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Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce

*Meagan R. Marold**

The difficulty of IVF or of any fertility issues is the hope and the shattered hope, the dream that it might happen this time and then it doesn't happen.¹

I. INTRODUCTION

For someone who desperately wants a child, the thought of infertility can be daunting, depressing, and disheartening. With more and more women marrying later or delaying pregnancies in order to make educational and career advances,² the possibility of not being able to conceive a child grows with each passing year. “A woman’s fertility drops off beginning in her late twenties, continues to fall even more dramatically after the age of thirty-five, and plummets when she reaches forty.”³ Fortunately, with over ten percent of American women suffering from some sort of fertility problem,⁴ there are

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1. See Heidi Brockmyre, *5 Steps to Overcome Feeling Isolated While Trying to Get Pregnant*, ZEN FERTILITY CENTER (June 20, 2012), <http://www.zenfertility.com/fertility-education-and-treatment/5-steps-to-overcome-feeling-isolated-while-trying-to-get-pregnant/> (quoting Brooke Shields).

2. See T.J. Mathews & Brady E. Hamilton, *Delayed Childbearing: More Women Are Having Their First Child Later In Life*, NATIONAL CENTER FOR HEALTHCARE SERVICES, 1 (2009). “The average age of first-time mothers increased by 3.6 years, from 21.4 years in 1970 to 25.0 years in 2006.” *Id.*

3. NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 1 (2009). “Once a woman turns thirty, her chances of getting pregnant decrease about 3–5 percent each year. By the age of thirty, 7 percent of couples are infertile, and by the time they reach the age of forty, 33 percent of couples are infertile.” *Id.* See Elizabeth Gregory, *Tighter Belts, Later Bumps*, L.A. TIMES (Jan. 9, 2011), <http://articles.latimes.com/2011/jan/09/opinion/la-oe-gregory-birthrate-20110109> (citing a survey indicating “7% of women will be infertile by age 29, 11% by age 34, 33% by 39, 50% by 41, 87% by 44, and almost all women thereafter”).

4. See *Fast Stats: Infertility*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/fertile.htm> (last updated Feb. 12, 2013) (noting that 10.9% of American women, ages 15-44, suffer from an “impaired ability to have children”). See

viable medical options that allow a woman to experience a pregnancy and give birth to a child.

These options, known as Assisted Reproductive Technologies or ART, involve “surgically removing eggs from a woman’s ovaries, combining them with the sperm in the laboratory, and returning them to the woman’s body.”⁵ The most common forms of ART include in vitro fertilization,⁶ zygote intrafallopian transfer or tubal embryo transfer,⁷ gamete intrafallopian transfer,⁸ and intracytoplasmic sperm injection.⁹

While these advances in medicine have created exciting new ways for couples to achieve their familial goals, ART has virtually dumbfounded the legal community regarding the disposition of frozen embryos at the time of divorce. Who gets to keep the embryos? Can that person use the embryos to have a baby? This article seeks to address the ways in which state legislatures and courts have dealt with the issue of what happens to the frozen embryos when a couple divorces. Part Two provides a broad overview of the history of ART and the more recent development of cryopreservation. Part Three delves deep into the approaches jurisdictions have taken in determining which party is to be awarded frozen embryos at the time of divorce: state statutes, the contractual approach, the contemporaneous

also Reproductive Health, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/> (last updated Feb. 12, 2013) (indicating that “[a]bout one-third of infertility cases are caused by women’s problems. Another one-third of fertility problems are due to the man. The other cases are caused by a mixture of male and female problems or by unknown problems.”).

5. *Assisted Reproductive Technology*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ART/index.htm> (last updated Apr. 4, 2013). ART does not include procedures such as intrauterine or artificial insemination, where only sperm is involved. *Id.* Moreover, ART does not include “procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.” *Id.*

6. *See Reproductive Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/> (last updated Feb. 12, 2013) (noting that in vitro fertilization or IVF “means fertilization outside the body”).

[IVF] is often used when a woman’s fallopian tubes are blocked or when a man produces too few sperm. Doctors treat the woman with a drug that causes the ovaries to produce multiple eggs. Once mature, the eggs are removed from the woman. They are put in a dish in the lab along with the man’s sperm for fertilization. After 3 to 5 days, healthy embryos are implanted in the woman’s uterus.

Id.

7. *Id.* (explaining that zygote intrafallopian transfer or tubal embryo transfer involves fertilization of the embryo in the laboratory similar to the procedure used in IVF, but instead of being transferred to the uterus, the “embryo is transferred to the fallopian tube instead...”).

8. *Id.* (indicating that a gamete intrafallopian transfer or GIFT “involves transferring eggs and sperm into the woman’s fallopian tube,” allowing for the eggs and sperm to fertilize inside of the woman’s body).

9. *Id.* (indicating that intracytoplasmic sperm injection or ICSI involves the injection of a single sperm into a mature egg, followed by the transfer of the embryo into the fallopian tube or uterus). This procedure “is often used for couples in which there are serious problems with the sperm. Sometimes it is also used for older couples or for those with failed IVF attempts.”

Id.

mutual consent approach, and the balancing approach. Part Four analyzes the pros and cons of each approach, while Part Five proposes a new way to undertake the division of frozen embryos at divorce with the parties' fertility at the forefront of the analysis.

II. ASSISTED REPRODUCTIVE TECHNOLOGY

The first test tube baby, Louise Brown, was born in England in July 1978.¹⁰ This medical phenomenon instilled a sense of hope in infertile couples around the globe that their baby too could be conceived in a petri dish. Accordingly, "163,038 ART cycles were performed at 451 reporting clinics in the United States during 2011, resulting in 47,849 live births (deliveries of one or more living infants) and 61,610 live born infants."¹¹ ART "includes all fertility treatments in which both eggs and sperm are handled."¹² ART procedures, such as IVF "involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body."¹³

More recently, the process of cryopreservation has been used to preserve embryos for a future IVF cycle.¹⁴ Following fertilization of the egg with the sperm "the embryo is dehydrated, suspended in an aqueous medium, and treated with a cryopreservant to substitute for the water after dehydration."¹⁵ The embryo is then cooled, transferred to liquid nitrogen, and stored.¹⁶ When a woman decides she is ready to have a child, the embryo is taken out of storage, "rehydrated and rinsed of the cryopreservant" and implanted into the uterus of the woman.¹⁷

10. *This Day in History: World's First Test Tube Baby Born*, <http://www.history.com/this-day-in-history/worlds-first-test-tube-baby-born> (last visited Feb. 19, 2014). Louise was born via "caesarean section and weighed in at five pounds, [twelve] ounces." *Id.* After years of infertility caused by Mrs. Brown's blocked fallopian tubes, Mr. and Mrs. Brown were finally able to conceive after undergoing IVF with the help of IVF pioneers "British gynecologist Patrick Steptoe and scientist Robert Edwards." *Id.* See Nicholas Wade, *Pioneer of In Vitro Fertilization Wins Nobel Prize*, N.Y. TIMES (Oct. 4, 2010), http://www.nytimes.com/2010/10/05/health/research/05nobel.html?pagewanted=all&_r=0 (indicating that in 2010, Robert Edwards won the Nobel prize in physiology or medicine); Deborah Hastings, *Where is World's First 'Test Tube' Baby Now?* AOL NEWS (Oct 4, 2010, 1:16 PM), <http://www.aolnews.com/2010/10/04/where-is-louise-brown-worlds-first-test-tube-baby/> (noting that Louise Brown, now 34, lives a quiet life with her husband and son who was conceived and born naturally).

11. *Assisted Reproductive Technology*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ART/index.htm> (last updated Apr. 4, 2013).

12. *Id.*

13. *Id.* ART does 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.*

14. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY* 101 (2011).

15. *Id.*

16. *Id.*

17. *Id.*

The cryopreservation process allows the woman more opportunities to get pregnant than implanting all of the freshly fertilized eggs at once inside of the uterus.¹⁸ Cryopreservation also reduces the possibility of multiple births and allows doctors to examine the embryos for the possibility of diseases.¹⁹

Despite all of the reproductive possibilities that come from freezing embryos, these potentials for life come with a plethora of questions that have flabbergasted the legal community. One such question being, what happens to them when a couple decides to get a divorce?

III. THE DISPOSITION OF FROZEN EMBRYOS AT THE TIME OF DIVORCE

With little regulation from the federal government and no United States Supreme Court cases addressing procreation within the context of IVF, state courts and state legislatures have attempted to tackle this difficult question. A few states have enacted statutes, while the remaining states allow judges to rule on the matter, using three very distinct frameworks.

A. STATE STATUTES

While few states have enacted statutes regarding the disposition of frozen embryos at the time of divorce, the legislation that has been passed offers insight and guidance for states considering similar regulations. Furthermore, these statutes provide couples, doctors, and lawyers with some direction, albeit foggy at best, for making informed decisions regarding what happens to frozen embryos when a couple divorces.

1. California

The California Health and Safety Code § 125315 mandates that a physician provide fertility treatment patients with information “to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.”²⁰ These information forms must, at a minimum, “indicate the time limit on storage of embryos at the clinic or storage facility” and provide the couple with disposition options in the event one of the partners passes away, both of the partners pass away, the partners separate or divorce, and the partners abandon the embryos.²¹

The couple may choose from the following options in the event the couple separates or divorces: make the embryos available to the female

18. KINDREGAN & MCBRIEN, *supra* note 14, at 101. “Cryopreservation has the advantage of preserving the frozen embryos so that they can be used in different cycles, thereby increasing the potential for producing a pregnancy. Successful implantation is less likely during the drug-induced cycle necessary to harvest multiple eggs.” *Id.*

19. KINDREGAN & MCBRIEN, *supra* note 14, at 101–02.

20. CALIFORNIA HEALTH AND SAFETY CODE § 125315(a).

21. CALIFORNIA HEALTH AND SAFETY CODE § 125315(b)(1)–(4).

partner, make the embryos available to the male partner, donate the embryos for research, donate the embryos to another individual or couple, or thaw the embryos and take no further action.²² The couple also has the opportunity to write in their own option as long as it is “clearly stated.”²³ Moreover, a physician’s failure to provide a couple or individual undergoing fertility treatment with these documents “constitutes unprofessional conduct.”²⁴ However, a couple’s decision to actually fill out the form is completely voluntary.²⁵

2. Florida

Florida’s Domestic Relations § 742.17 indicates a “couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple’s eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any unforeseen circumstance.”²⁶ This language recognizes the use of disposition agreements as binding, thus “allow[ing] people to conform their conduct to the rules set out by the legislature.”²⁷

However, unlike California’s statute, no options are listed for the couple to choose from, nor is the physician’s failure to provide this information of any consequence to him or her. Furthermore, the statute provides “absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm . . . [and] decision making authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.”²⁸ Unfortunately, this language provides little guidance for divorcing couples.

3. Massachusetts

Massachusetts General Laws chapter 111L § 4 indicates a physician “shall present the patient with the options of storing, donating to another person, donating for research purposes or otherwise disposing of or destroying any unused pre-implantation embryos, as appropriate.”²⁹ Like Florida, there are no repercussions for Massachusetts doctors who fail to provide this information to their patients. While this statute provides patients with some options, it does not suggest specific options for various disposition scenarios such as divorce.

22. CALIFORNIA HEALTH AND SAFETY CODE § 125315(b)(3).

23. *Id.*

24. CALIFORNIA HEALTH AND SAFETY CODE § 125315(a).

25. *Id.*

26. Florida’s Domestic Relations § 742.17.

27. 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 Embryos*, 10 J.L. & POL’Y 587, 628 (2002).

28. Florida’s Domestic Relations § 742.17.

29. MASS. GENERAL LAWS ch. 111L § 4(a).

4. North Dakota

The North Dakota statute proves to be the most confusing and complicated of the lot. It provides “[i]f 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 divorce, the former spouse would be a parent of the child.”³⁰ The statute goes on to say “[t]he consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.”³¹

The reading of the statute is troubling because the statute mentions consent to assisted reproduction, but makes no mention of consent to parenthood.³² This discrepancy begs the question of whether a former spouse may use the embryos to further a pregnancy against the other spouse's wishes. If this interpretation proves true, the spouse wanting to conceive will always prevail.³³ This statute seems to force individuals to become parents against their wishes.

5. Louisiana

This statute is different from all of the others in that Louisiana finds frozen embryos to be people under the law.³⁴ Accordingly, frozen embryos may only be used “for the support and contribution of the complete development of human in utero implantation”³⁵ and may not be destroyed.³⁶ In the event a couple no longer wishes to use their frozen embryos, they

30. N.D. CENT. CODE. ANN. § 14-20-64(1).

31. *Id.*

32. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 94 (2011).

33. *Id.*

34. L.A. STAT. ANN. 9:123. “An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.” *Id.*

35. L.A. STAT. ANN. 9:122.

The use of a human ovum fertilized in vitro is solely for the support and contribution of the complete development of human in utero implantation. No in vitro fertilized human ovum will be farmed or cultured solely for research purposes or any other purposes. The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.

Id.

36. L.A. STAT. ANN. 9:129.

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.

“shall be available for adoptive implantation.”³⁷ If a couple has a dispute regarding the frozen embryos, Louisiana has indicated the “best interest of the in vitro fertilized ovum” standard should apply.³⁸ While this statute is the most restrictive in terms of a couple’s options at the time of divorce, it is the most clear and unambiguous of the statutes. It gives a couple their options, implantation or adoption, and provides the judicial standard to be used to solve disputes.

B. THE CONTRACTUAL APPROACH

While the various pieces of legislation mentioned above have their pitfalls, it is clear that states that acknowledge disposition agreements will ensure a properly filled out agreement will be held valid and legally binding under the rules of contract law. In order for a contract to be deemed valid and enforceable “(1) one party must make an ‘offer’ to the other, (2) which must then be ‘accepted’ by the other party, and (3) that offer and acceptance must be supported by an exchange of ‘consideration.’”³⁹ In the realm of disposition agreements, an IVF clinic offers to perform the procedure, but places a condition on that offer if the couple disagrees to the use of the frozen embryos.⁴⁰ The couple accepts the terms by signing the agreement, and a fee is paid to the IVF clinic as valid consideration for their services.⁴¹ The contractual approach holds a disposition agreement to be legally binding as long as the contract was formed in accordance with contract laws and no valid defenses come into play.

Courts have had several opportunities to apply contract principles to couples’ signed agreements. In *Kass v. Kass*,⁴² a New York case, Husband and Wife signed an informed consent form prior to undergoing IVF and indicated that in the event they did not want to use their frozen embryos to pursue a pregnancy, they wished the IVF program to use their frozen embryos for research and biological studies.⁴³ The procedure resulted in nine embryos, four of which were transferred to Wife’s sister, and the remaining five were cryopreserved.⁴⁴ Wife’s sister was unable to become pregnant and shortly thereafter, Wife filed for divorce and “request[ed] sole custody of the

37. L.A. STAT. ANN. 9:130.

38. L.A. STAT. ANN. 9:131.

39. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 128–29 (2002-03).

40. *Id.* at 129.

41. *Id.*

42. 696 N.E. 2d 174 (N.Y. 1998).

43. *Id.* at 177–78.

44. *Id.* at 178. See Linda Carroll, *Doubly Blessed: Two Siblings Act as Surrogates for Sibling*, TODAY.COM (Feb. 10, 2012, 8:59 AM), <http://www.today.com/health/doubly-blessed-two-sisters-act-surrogates-sibling-1C9381823> (offering a story of two sisters who agreed to serve as surrogates for their other sister who was unable to carry a child).

pre-zygotes so she could undergo another implantation procedure.⁴⁵ Husband opposed Wife's request and sought specific performance of the agreement, which stated any additional frozen embryos would be donated for research.⁴⁶

The Court of Appeals of New York, wishing to develop a clear and consistent rule, determined, "agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."⁴⁷ While both parties agreed to the legal nature of the forms and "they were freely and knowingly made," Wife argued the consent forms were "fraught with ambiguity" in regards to the intent of the parties.⁴⁸

Applying basic contract law, the court determined ambiguity by looking within the four corners of the consent form document.⁴⁹ The court paid particular attention to the inclusive language of the agreement, such as "[w]e have the principal responsibility . . . [o]ur frozen pre-zygotes . . . [and] written consent of both us," in determining that the parties intended the disposition of their frozen embryos to be a joint decision.⁵⁰ Accordingly, the court concluded the "parties unequivocally manifest[ed] their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program."⁵¹ In other words, the court honored the wishes the couple set forth in their informed consent forms.⁵²

In *Roman v. Roman*,⁵³ a Texas case, Husband and Wife signed a clinic consent form indicating if they divorced, their frozen embryos were to be discarded.⁵⁴ Following the harvesting of Wife's eggs, but before the implantation procedure, Husband withdrew his consent to the use of the frozen embryos.⁵⁵ Shortly thereafter, Husband filed for divorce, asking the

45. *Kass*, 696 N.E. at 178. Wife's difficulty getting pregnant was believed to be caused by "prenatal exposure to diethylstilbestrol." *Id.*

46. *Id.* at 178. The Kasses' disposition agreement form indicated that in the event they no longer wished to pursue a pregnancy their "frozen embryos may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program." *Id.* at 175.

47. *Id.* at 180. The Court indicated that parties to IVF should "think through possible contingencies and carefully specify their wishes in writing." *Id.* Moreover, the Court noted that "[e]xplicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable." *Id.*

48. *Id.* at 180.

49. *Id.*

50. *Id.* at 181.

51. *Id.*

52. *Id.* at 182.

53. 193 S.W.3d 40 (Tex. App. 1st 2006).

54. *Id.* at 42, 44. The agreement stated: "If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: the frozen embryo(s) shall be . . . Discarded." *Id.* at 44.

55. *Id.* at 42.

court to uphold the couple's written agreement.⁵⁶ Conversely, Wife argued that she wanted to use the frozen embryos in hopes of giving birth to a biological child.⁵⁷

The trial court awarded the embryos to Wife as part of a "just and right" division of community property.⁵⁸ Husband appealed, arguing that the trial court's award was in violation of the couple's agreement, while Wife disputed "the agreement's validity and the interpretation of the agreement."⁵⁹ The Texas Court of Appeals conducted a thorough examination of state law from other jurisdictions, as well as a review of Texas assisted reproduction and gestational agreement statutes.⁶⁰ It determined that an embryo agreement, which allows the parties to "voluntarily decide the disposition of frozen embryos" but is "subject to mutual change of mind," does not violate the public policy of the State of Texas.⁶¹

Next, the court determined whether the consent form was ambiguous.⁶² Wife argued that "she understood the embryo agreement to apply to remaining embryos only after implantation had occurred"⁶³ and that "she never agreed to destroy all of the embryos without an opportunity to get pregnant."⁶⁴ The court examined the document in its entirety and established "the parties' embryo agreement was not ambiguous so as to preclude a meeting of the minds."⁶⁵ Of importance to the court was the provision that disposed of the remaining frozen embryos in the event one spouse died.⁶⁶

56. *Roman*, 193 S.W.3d at 43. In addition, Wife "filed a counterclaim for divorce that included claims for fraud and intentional infliction of emotional distress." *Id.*

57. *Id.*

58. *Id.* See TEX. FAM. CODE § 7.001 (West 2014) ("In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.").

59. *Roman*, 193 S.W. 3d at 44–45. Husband argued that the "agreement clearly provided for disposal of the frozen embryos in the case of divorce." *Id.* at 44.

60. *Id.* at 49.

61. *Id.* The Court examined the following cases and statutes: *Davis v. Davis*, 842 S.W.2d 588 (1993) (using a balancing approach to ultimately determine that Husband's interest to avoid procreation outweighed Wife's interest to donate the frozen embryos); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (deciding that the consent agreement should control); *J.B. v. M.B.*, 751 A.2d 613 (N.J. 2000) (balancing the interests of the parties); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1053–54 (Mass. 2000) (noting that the consent form did not express the intentions of Husband and holding the consent form is invalid); *Litowitz v. Litowitz*, 48 P.3d 261, 263 (Wash. 2002) (holding the consent agreement as valid); *In Re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (using the contemporaneous mutual consent approach); TEX. FAM. CODE ANN. § 160.701–702 (West 2001) (failing to determine the disposition of frozen embryos in the event of divorce or death); TEX. FAM. CODE ANN. § 160.756(b)(4) (noting that for a gestational agreement to be deemed valid both parties must understand the agreement and enter into the agreement voluntarily).

62. *Roman*, 193 S.W.3d at 50.

63. *Id.* at 52.

64. *Id.*

65. *Id.* at 53. The court noted that "[i]n an unambiguous contract, [it] will not imply language, add to language, or interpret it other than pursuant to its plain meaning." *Id.* at 52.

66. *Id.* at 53.

For this section, the couple chose to give the remaining embryos to the surviving spouse.⁶⁷ The court viewed this election as showing the couple was aware of their varying options to dispose of their embryos and had made their choices.⁶⁸

In *Kass v. Kass* and *Roman v. Roman*, the courts determined the contracts entered into were legally binding agreements and ruled accordingly. However, not every signed clinic consent form will pass the courts' muster.

Specifically, in *A.Z. v. B.Z.*,⁶⁹ a Massachusetts couple signed a form each time the wife underwent egg retrieval.⁷⁰ Each form was the same and outlined the process, cost, benefits, and risks of the IVF procedure.⁷¹ The forms also allowed the couple to determine the disposition of their frozen embryos should a variety of circumstances arise by opting to donate, destroy, or write in their own option for each listed incident.⁷²

At the time the first form was filled out and completed, both Husband and Wife were present.⁷³ The form indicated in the event of separation, the embryos would be conferred upon the wife for future implantation.⁷⁴ However, subsequent forms signed by Husband were blank at the time of his signing and Wife filled in the information regarding the disposition of the eggs after Husband signed.⁷⁵ Each form had the same disposition in regards to separation as the first one did, returning the frozen embryos to Wife for implantation.⁷⁶

At the time of divorce, Wife sought the use of the final vial of frozen embryos which coincided with one of the blank consent forms Husband signed.⁷⁷ The Supreme Judicial Court of Massachusetts determined the form did not represent the intent of the parties and accordingly, did not enforce the form against them.⁷⁸ The court deemed the form invalid based on both the primary purpose of the form and the circumstances surrounding the execution of the form.⁷⁹

In reaching its decision invalidating the form, the court asserted three reasons. First, it determined the form was "intended only to define the

67. *Roman*, 193 S.W.3d at 53.

68. *Id.*

69. 725 N.E.2d 1051, 1053 (2000).

70. *Id.*

71. *Id.*

72. *Id.* The listed contingencies included: "wife or donor' reaching normal menopause or age forty-five years; preembryos no longer being healthy; 'one of us dying;' '[s]hould we become separated;' '[s]hould we both die.'"

73. *Id.*

74. *Id.*

75. *Id.* at 1054. "Sometimes a consent form was signed by the husband while he and his wife were traveling to the IVF clinic; other forms were signed before the two went to the IVF clinic." *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1056.

79. *Id.* at 1057.

donors' relationship as a unit with the clinic" and not to act as a legally binding contract.⁸⁰ Second, the court stressed the form did not "contain a duration provision" and refused to "assume that the donors intended the consent form to govern the disposition of the frozen preembryos four years after it was executed."⁸¹ And third, the form did not define the term "should we become separated."⁸² Moreover, the court found that since the husband signed blank forms, the forms did not represent his true intention.⁸³

C. CONTEMPORANEOUS MUTUAL CONSENT APPROACH

While the courts in the aforementioned cases analyzed the parties' contracts, other courts have adopted a different approach based on contemporaneous mutual consent.⁸⁴ This approach proposes that "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the contemporaneous mutual consent of the couple that created the embryo."⁸⁵ This approach does not view prior agreements as binding contracts if one of the partners subsequently changes his or her mind regarding the disposition of the embryos.⁸⁶ In order to proceed forward, the couple must make a mutual decision or the embryos will be kept frozen in storage until an agreement can be reached.⁸⁷

*In re Marriage of Witten*⁸⁸ exemplifies the contemporaneous mutual consent model. In this case, a couple from Iowa signed informed consent documents prior to undergoing IVF.⁸⁹ The subsequent embryo transfers proved unsuccessful and the couple later filed for divorce.⁹⁰ The wife adamantly opposed the destruction of, or the donation of, the frozen embryos, wishing only to have the embryos implanted in herself or a

80. *B.Z.*, 725 N.E.2d at 1056–57. The Court found that the primary purpose of the consent form was to "explain to the donors the benefits and risks of freezing, and to record the donors' desires for disposition of the frozen embryos at the time the form is executed in order to provide the clinic with guidance if the donors (as a unit) no longer wish to use the frozen embryos." *Id.*

81. *Id.* Given the donors' change in circumstances among other factors, the court refused to enforce this four-year-old agreement. *Id.*

82. *Id.* at 1057. The court did not want to assume that separated and divorce meant the same thing. *Id.*

83. *Id.* The court went on to say that had the couple entered into an unambiguous agreement it "would not enforce an agreement that would compel one donor to become a parent against his or her will." *Id.*

84. *See In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003) (comparing the contractual and the contemporaneous mutual consent approaches, the court noted that the two models "share an underlying premise: 'decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed'").

85. *Id.* at 778.

86. *Id.*

87. *Id.* The court indicated that by "[p]reserving the status quo, it makes it possible for the partners to reach an agreement at a later time." *Id.*

88. 672 N.W.2d at 778.

89. *Id.* at 771.

90. *Id.*

surrogate mother.⁹¹ The husband wanted the frozen embryos to be donated to another couple.⁹² The Supreme Court of Iowa applied the contemporaneous mutual consent approach and held that “agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties ‘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 embryo.’”⁹³

D. THE BALANCING OR BEST INTEREST APPROACH

While the contractual and contemporaneous mutual consent approaches discussed above both look to the contract, the balancing or best interest approach looks exclusively at the desires of the parties. This method takes into consideration the wishes of both parties and the burdens that will be imposed upon the individuals given the court’s decision and weighs them against one another. This approach allows the courts to take into account the constitutional rights of the couple to procreate or avoid procreation. One’s right to procreate stems from *Skinner v. Oklahoma*,⁹⁴ where the United States Supreme Court indicated one’s right to procreation is “one of the basic civil rights of man” and “procreation [is] fundamental to the very existence and survival of the race.”⁹⁵ On the other hand, in *Eisenstadt v. Baird*,⁹⁶ the Court stated one’s right to privacy included one’s right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁹⁷

Focused on the Constitutional issues raised by *Skinner* and *Eisenstadt*, the Supreme Court of Tennessee adopted the balancing approach in *Davis v. Davis*.⁹⁸ In that case, the couple underwent IVF and had their remaining embryos cryogenically preserved.⁹⁹ However, neither party signed an informed consent form.¹⁰⁰ Unfortunately, the procedures did not result in a

91. *In re Marriage of Witten*, 672 N.W.2d at 772–73. At trial, Wife testified that if implantation of the embryos resulted in a successful pregnancy, “she would afford [Husband] the opportunity to exercise parental rights or to have his rights terminated.” *Id.* at 772.

92. *Id.* at 773.

93. *Id.* at 782. In deciding to follow the contemporaneous mutual consent model, the court found 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.” *Id.*

94. 316 U.S. 535 (1942).

95. *Id.* at 541.

96. 405 U.S. 438 (1972).

97. *Id.* at 453.

98. 842 S.W.2d 588 (Tenn. 1992).

99. *Id.* at 592. Early in their attempts to have a baby, Mrs. Davis suffered from five tubal pregnancies. *Id.* at 591. Following the fifth tubal pregnancy, Mrs. Davis “chose to have her left fallopian tube ligated, thus leaving her without functional fallopian tubes by which to conceive naturally.” *Id.* The couple then attempted adoption, but “at the last minute, the child’s birth mother changed her mind about putting the child up for adoption.” *Id.*

100. *Id.* at 592. There is no indication that the couple “ever considered the implications of storage beyond the few months it would take to transfer the remaining ‘frozen embryos’ if

pregnancy and Husband filed for divorce.¹⁰¹ The Wife wished to donate the frozen embryos and Husband was “adamantly opposed to such donation” and preferred to discard the frozen embryos.¹⁰²

Applying the balancing approach, the court weighed the parties’ competing interests against one another.¹⁰³ On the one hand, the court determined that if the embryos were donated, Husband would be forced to become a parent, thrusting tremendous psychological and financial consequences upon him.¹⁰⁴ The court took into account Husband’s traumatic childhood and how his parents’ divorce caused his mother to have a meltdown, resulting with Husband living in a boys’ home and having little relationship with either of his parents.¹⁰⁵ Moreover, Husband opposed donation of the frozen embryos because the receiving couple could possibly get a divorce.¹⁰⁶ Conversely, the court examined the efforts Wife put forth in undergoing IVF treatment and how disposing of the embryos would render her endeavors futile.¹⁰⁷

After carefully weighing the impact the decision could have on both parties, the court concluded that Wife’s interest was not as significant as Husband’s.¹⁰⁸ However, the court did note “the case would be closer if [Wife] were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means.”¹⁰⁹ The court concluded “the party wishing to avoid procreation should prevail” as long as the

necessary. There was no discussion, let alone an agreement, concerning disposition in the event of a contingency such as divorce.” *Id.*

101. *Id.*

102. *Id.* at 590. At the trial court level, Wife requested that the frozen embryos be awarded to her “with the intent to have them transferred to her own uterus, in a post divorce effort to become pregnant.” *Id.* at 589. Husband wished that they stayed frozen until he made a decision as to whether or not he wanted to become a father. *Id.* By the time the Supreme Court of Tennessee heard the case, both Husband and Wife had changed their minds to reflect their above-mentioned positions. *Id.* at 590.

103. *Id.* at 603.

104. *Id.* at 603.

105. *Id.* at 603–04. Husband only saw his father three times following his parent’s divorce and “had monthly visits with his mother.” *Id.* at 603. Husband indicated that “it was especially hard to leave his mother after each monthly visit. He clearly feels that he has suffered because of his lack of opportunity to establish a relationship with his parents and particularly because of the absence of his father.” *Id.* at 604.

106. *Id.* at 604.

107. *Id.* Wife endured six unsuccessful IVF attempts. *Id.* at 591. Prior to each procedure, Wife endured “the month of subcutaneous injections necessary to stimulate her ovaries to produce ova. She was anesthetized five times for the aspiration procedure to be performed. Forty-eight to seventy-two hours after each aspiration, she returned for transfer back to her uterus, only to receive a negative pregnancy test result each time.” *Id.* at 591–92. Moreover, the couple spent \$35,000 in IVF procedures. *Id.* at 591.

108. *Id.* at 604. The court noted that if Wife were permitted to donate the embryos Husband “would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.” *Id.*

109. *Id.* “If no other reasonable alternatives exist, than the argument in favor of using the preembryos to achieve pregnancy should be considered.” *Id.*

opposing party has a "reasonable possibility of achieving parenthood" by other means.¹¹⁰

Nine years following the *Davis* decision, the Supreme Court of New Jersey applied the balancing approach to once again weigh the competing interests of donating against discarding the embryos. In *J.B. v. M.B.*,¹¹¹ the couple underwent IVF because Wife had a medical condition that prohibited her from becoming pregnant.¹¹² The IVF resulted in eleven pre-embryos, four of which were "transferred to [Wife] and the remaining seven were cryopreserved."¹¹³ This procedure resulted in a pregnancy, and Wife gave birth to the couple's daughter.¹¹⁴ However, later that year Wife filed for divorce and sought a court order regarding the remaining frozen embryos.¹¹⁵

In this case, Wife wanted to discard the remaining frozen embryos, while Husband wished to donate them to an infertile couple.¹¹⁶ The trial court weighed the couple's arguments and determined, since Husband was not infertile, he would be able to have children in the future and only wanted to donate the frozen embryos, while the wife's desire not to have children was "the greater interest and should prevail."¹¹⁷

On appeal, Husband "argued that his constitutional right to procreate had been violated" by the trial court's decision.¹¹⁸ The Court of Appeal weighed Wife's right not to procreate against Husband's right to procreate and found that discarding the frozen embryos would not affect Husband's right to procreate because he was perfectly capable of fathering a child in the future.¹¹⁹ Furthermore, allowing the donation of the embryos against Wife's wishes would violate her right not to procreate because she would be "forced to allow strangers to raise that child."¹²⁰

Ultimately, the Supreme Court of New Jersey adopted the rule gleaned from *Davis v. Davis* and found that Wife, "the party wishing to avoid procreation," should not be forced to become a parent against her wishes.¹²¹

110. *Davis*, 842 S.W.2d at 604. However, the court did note that "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Id.* at 597.

111. 783 A.2d 707 (N.J. 2001).

112. *Id.* at 709.

113. *Id.* at 710.

114. *Id.*

115. *Id.*

116. *Id.* Wife indicated that she "agreed to preserve the preembryos for our use in the context of an intact family," and that she and Husband never discussed what would happen to the frozen embryos should they divorce. *Id.* Conversely, Husband responds that the couple discussed the issue and decided that "any unused preembryos would not be destroyed, but would be used by his wife or donated to infertile couples." *Id.*

117. *Id.* at 711.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Moreover, the court “express[ed] no opinion in respect of a case in which a party who has become infertile seeks use of stored embryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court’s assessment.”¹²²

While *Davis v. Davis* and *A.B. v. M.B.* both found in favor of the party seeking to avoid procreation, they did leave the door open for the possibility of an infertile party to prevail over the party not wishing to be a parent. However, a court did not seize this opportunity until *Reber v. Reiss*¹²³ in 2012. In this case, Wife was diagnosed with breast cancer and “[a]s a result of the diagnosis and proposed recommended cancer treatments, the parties were advised to undergo IVF to preserve Wife’s ability to conceive a child.”¹²⁴ The couple underwent IVF, resulting in thirteen preembryos utilizing Wife’s eggs and Husband’s sperm.¹²⁵ Following the IVF process, Wife endured “extensive breast cancer treatments.”¹²⁶ Nearly two years following the IVF procedure, Husband filed for divorce, and wife sought “all thirteen embryos for implantation.”¹²⁷

The trial court determined that while the party wishing to avoid procreation ordinarily prevails, “Wife’s inability to achieve biological parenthood without the use of the preembryos is an interest which outweighs Husband’s desire to avoid procreation.”¹²⁸ Accordingly, the trial court awarded the pre-embryos to Wife.¹²⁹ Husband appealed, arguing that the “trial court erred in finding that Wife’s interests in procreating outweighed Husband’s interests to avoid unwanted procreation.”¹³⁰

On review, the Superior Court of Pennsylvania engaged in a very fact specific balancing approach to determine the disposition of the couple’s frozen embryos.¹³¹ For the Wife, the court reviewed trial testimony regarding her belief that she could no longer have children and the fact that the only reason she underwent IVF was because she was diagnosed with breast cancer.¹³² In regards to Husband’s arguments that Wife could adopt or become a foster parent, the court indicated “simply because adoption or foster parenting may be available to Wife, it does not mean that such options

122. *M.B.*, 783 A.2d at 720.

123. 42 A.3d 1131 (Pa. 2012).

124. *Id.* at 1132. “To accommodate the IVF process, Wife deferred the commencement of her cancer treatment for several months.” *Id.* at 1132–33.

125. *Id.* at 1133.

126. *Id.* Wife’s cancer treatment included “two surgeries, eight rounds of chemo therapy and 37 rounds of radiation.” *Id.*

127. *Id.* Following the couple’s separation, Husband entered into a relationship with another woman and eighteen months later “Husband’s biological son was born.” *Id.*

128. *Id.* at 1134.

129. *Id.*

130. *Id.*

131. *Id.* at 1136.

132. *Id.* at 1137. “Wife has undergone testing with regard to her ability to have children since her recovery from cancer and testified that she ‘was lead [sic] to believe that [she] cannot have children.’” *Id.* 1133.

should be given equal weight in a balancing test.”¹³³ Moreover, the court discussed the difficulties a single, older woman with health complications could face when trying to adopt.¹³⁴ The court concluded “Wife’s compelling interest in using the preembryos include the fact that these preembryos are the option that provides her with what is likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all.”¹³⁵

For the Husband, the court considered “that he opposes Wife’s use of these preembryos for procreation because he, himself, was adopted and he would not want any of his children not to know his or her biological father.”¹³⁶ However, Wife indicated Husband can be involved in the child’s life if he wishes, thus “alleviating his concerns about the child not being able to find out about his or her biological father.”¹³⁷ Another argument Husband asserted was that a potential child would be a financial burden to him. Countering that argument, the appellate court pointed to Wife’s testimony at the trial that she would “do her best to assure that Husband never has to pay to support the child or children.”¹³⁸

Accordingly, the court determined since the couple “never made an agreement prior to undergoing IVF, and these preembryos are likely wife’s only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all, [it] agree[d] with the trial court that the balancing of the interests tips in Wife’s favor.”¹³⁹

IV. THE PROS AND CONS OF EACH FRAMEWORK

Following the above discussion of the state statutes and the cases decided under the contractual, contemporaneous mutual consent, and balancing approaches, we now turn our attention to the pros and cons of each of the aforementioned frameworks.

133. *Reiss*, 42 A.3d at 1138.

134. *Id.* at 1139; *See Can a Single Person Adopt?* <http://www.parents.com/parenting/adoption/facts/can-a-single-person-adopt/> (last visited May 8, 2013) (expressing the potential difficulties a single adoptive parent may face).

Agencies have varying policies in dealing with single applicants. Some don’t accept them at all. Others may put your application and request for a home study (a family assessment) on the back burner while waiting to find a couple who wants to adopt. The children offered to you may have disabilities that you cannot handle, or be 12 years old when you requested a toddler. If you pursue independent adoption (a path to adoption with no agency involvement), birth mothers may balk when they learn you are single.

Id.

135. *Reber*, 42 A.3d at 1140. Wife testified that “I always wanted to have children. I wouldn’t have gone through . . . the whole IVF thing if I hadn’t wanted children And I wanted that experience of being pregnant and that closeness, that bond.” *Id.* at 1138.

136. *Id.*

137. *Id.*

138. *Id.* at 1141.

139. *Id.*

A. STATE STATUTES

While few states have implemented legislation particularly on point to the disposition of frozen embryos at the time of divorce, those that have provide little if any direction to the court, thus “act[ing] to prohibit universal and consecutive outcomes between states.”¹⁴⁰ From Louisiana finding frozen embryos are people,¹⁴¹ to North Dakota’s problematic reading of potentially forcing individuals to become parents,¹⁴² the statutes vary considerably from state to state and do not afford clear-cut and concise rules.

However, the statutes do offer some positives that are worth noting. The California statute seems to provide the most incentive for IVF clinic doctors to provide their clients with disposition agreements, since it is the only statute that has any consequence for the doctors.¹⁴³ Moreover, it lists specific possibilities for the various contingencies, offering clients ideas of how they would like to dispose of their embryos.¹⁴⁴ Nonetheless, none of the statutes make filling out a disposition agreement mandatory, so couples who may be running short on time or who are overwhelmed by the volume of the forms may simply chose not to do so.

B. CONTRACTUAL APPROACH

For those individuals who fill out a disposition agreement, the contractual method, which holds agreements regarding the disposition of frozen embryos valid and binding, is alluring “because it validates the purpose and binding nature of contracts.”¹⁴⁵ If couples know their agreements will be enforced by the courts, they may be more inclined to take the time and make a thoughtful and informed decision regarding the disposition of their frozen embryos in the event of death, divorce, or some other extenuating circumstance.¹⁴⁶ Proponents of the contractual approach believe enforcing contracts is an efficient way to resolve legal disputes.¹⁴⁷

However, opponents of the contractual approach find holding clinic consent forms as valid, legally binding agreements proves to be problematic for a number of reasons. First, the disposition agreement is often hidden amongst a myriad of forms, including information regarding storage, costs, risks, and benefits of the procedure.¹⁴⁸ These forms often convey “their

140. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 126 (2002-03).

141. L.A. STAT. ANN. 9.123 (West 1986).

142. N.D. CENT. CODE. ANN. § 14-20-64(1) (West 2005).

143. CAL. HEALTH AND SAFETY CODE § 125315(a) (West 2004).

144. CAL. HEALTH AND SAFETY CODE § 125315(b)(3) (West 2004).

145. Kimberly Berg, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 514 (2006).

146. *Id.*

147. *Id.* at 515.

148. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 67 (2011). See *Kass v. Kass*, 696 N.E.2d 174, 176 (N.Y. 1998) (noting that the Kasses “signed four consent forms”).

information using highly technical language in densely packed, single spaced documents that may not even clearly delineate the different topics.”¹⁴⁹ Even if a couple is given a separate form regarding the disposition of their frozen embryos, it is still one of many forms the couple has to sign, consequently diluting their perceived power of the pen.¹⁵⁰ The presentation of the countless forms coupled with the contemplation of death and divorce in a time of supposed happiness for the parents-to-be, makes it nearly impossible to form a thoughtful and informed decision about where, or to whom, your embryos will go to in the event one of the contingencies should occur.¹⁵¹

Moreover, if the couple is able to rationally dictate the parties' desires, it does not eliminate the fact that making such a decision is quite difficult. The party is asked, sans frills or sugar coating, what they would like to do with their potentially unborn child, and are then presented with a series of options or a fill in the blank option. Research conducted in 2010 by the Department of Social Medicine at the University of North Carolina at Chapel Hill indicates “patients feel ‘anguished’ and ‘agonized’ over the decision about what to do with frozen embryos.”¹⁵² Accordingly, those parties who had successful IVF procedures resulting in a child, no longer in need of their frozen embryos “could not identify a preferred disposition option for their excess embryos.”¹⁵³ The research concluded that the informed consent forms should be occasionally reviewed, “with serious discussions about disposition after childbearing is complete.”¹⁵⁴ By advising couples to revisit their forms and assess disposition following changes in circumstances, in addition to the emotional turmoil said forms create, this research suggests the clinic consent forms should not yield a legally binding contractual agreement.

C. CONTEMPORANEOUS MUTUAL CONSENT APPROACH

The contemporaneous mutual consent approach, like the contractual approach, upholds disposition agreements made by the couple. However, this approach allows for the parties to change their minds after the agreement has been made. Thus, only allowing the frozen embryos to be disposed of in a manner agreed exclusively upon by both individuals.

Proponents of the approach find enforcing contracts “respects the decision-making authority of the persons the partners were at the time the agreement was made,” but fails to take into account “the individual’s

149. *Kass*, 696 N.E.2d at 176 (indicating that two of the forms signed by the Kassess “consist[ed] of 12 single spaced type written pages”).

150. *See* Forman, *supra* note 148 (noting that the cryopreservation disposition agreement is just “one of many the patients must wade through prior to treatment”).

151. Forman, *supra* note 148.

152. A.D. Lyerly et al., *Decisional Conflict and the Disposition of Frozen Embryos: Implications of Informed Consent*, 26 HUM. REPROD. 646, 646 (2011).

153. *Id.*

154. *Id.*

evolving personality.”¹⁵⁵ Accordingly, the contemporaneous mutual consent approach honors the views and wishes of the “new person” who exists today.¹⁵⁶ Moreover, supporters of this approach view the concept of changing one’s mind regarding the disposition of his or her frozen embryos as an inalienable right, making the relinquishment of the right unenforceable if the individual changes his or her mind.¹⁵⁷ Proponents also analogize disposition agreements to promises to marry or never divorce, both of which have been struck down as unenforceable in most states.¹⁵⁸ Lastly, the contemporaneous mutual consent model does not force an individual to become a biological parent against his or her wishes.¹⁵⁹ This approach recognizes the emotional turmoil some may experience through becoming a parent or donating the embryos and emphasizes the opposing party’s Constitutional right of privacy.

Nonetheless, critics of this approach find that leaving the embryos in a state of limbo until the parties can reach an agreement has its downsides as well. Unlike the balancing approach, this approach ignores the constitutional rights of both of the parties to procreate or avoid procreation, consequently discounting their individual preferences. In addition, the party who does not want to destroy the embryos is forced to pay the storage costs, “effectively punish[ing] that party for pursuing those rights.”¹⁶⁰ Moreover, this approach undercuts the contractual nature of disposition agreements and offers no incentive for parties to take these forms seriously if they know they are allowed to change their minds down the road.¹⁶¹ Lastly, “the viability of the preembryos cannot be guaranteed indefinitely,”¹⁶² hence the party wishing to destroy the embryos will eventually get his or her way if the parties are unable to reach an agreement before the frozen embryos cease to be viable.

D. THE BALANCING APPROACH

Unlike the contractual and contemporaneous mutual consent methods, the balancing approach weighs the benefits and burdens of the parties’

155. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 91–92 (1999). *But see* 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 Embryos*, 10 J.L. & POL’Y 587, 627 (2002) (arguing for a contractual approach). “Although the individual’s circumstances and state of mind prior to and after IVF may drastically change, human indecisiveness and uncertainty are variables in any contract.” *Id.*

156. Coleman, *supra* note 155, at 91–92.

157. Coleman, *supra* note 155, at 91–92.

158. Coleman, *supra* note 155, at 91–92.

159. Coleman, *supra* note 155, at 91–92.

160. Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison of Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 563 (2008).

161. Sara D. Peterson, *Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1080 (2003).

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

requests against one another in determining who should be awarded custody of the frozen embryos. Proponents of this method believe it “acknowledges that a divorce is a dissolution of the marital unit and involves the divergent interests of the parties.”¹⁶³ Additionally, this approach emphasizes the great efforts courts have undertaken to consider one’s Constitutional right to either procreate or avoid procreation.

Critics of the balancing approach find it provides little guidance to the courts, forcing them to decide each dispute on a case by case basis.¹⁶⁴ Others believe this method “does not sufficiently protect procreative liberty because it undermines freedom of contract.”¹⁶⁵ Moreover, some find this approach has become a “predictable and arguably pretextual practice,” since the party wishing to avoid parenthood always prevails, save the exception one party is infertile.¹⁶⁶ However, following *Reiber v. Reiss*, the pretextual argument will undoubtedly carry less weight if more and more individuals are able to take advantage of the infertility exception.

V. CONCLUSION: THE BEST APPROACH – ONE WHERE [IN]FERTILITY MATTERS

Upon reviewing the alarming fertility statistics presented in the introduction of this article, it only seems fitting that fertility, often times the main reason a couple undergoes IVF, should guide decisions regarding the disposition of frozen embryos at the time of divorce. This proposed method, a hybrid of the three approaches used by the courts, combines the aforesaid methods by holding a disposition agreement valid and binding, unless one member of the party, wishing to use the frozen embryos for procreation, is able to prove that his or her infertility would make it impossible for him or her to have a child.

Accordingly, this approach harmonizes the three judicial approaches. It honors the contractual nature of disposition agreements by treating them as binding contracts. It appreciates the changes in circumstances stressed by the contemporaneous mutual consent approach by taking into account whether an individual can achieve parenthood with the changes that divorce will bring. And lastly, it respects the constitutional rights the balancing approach seeks to uphold by awarding those individuals who are unable to have children a greater interest in their frozen embryos.

While some may consider that this approach benefits only women, this method is actually completely gender neutral. Fertility statistics provide “among couples who are infertile, about forty percent of cases are exclusively due to female infertility, forty percent exclusively to male

163. Lambert, *supra* note 160, at 564.

164. Tracy Frazier, *Of Property and Procreation: Oregon's Place in the National Debate Over Frozen Embryo Disputes*, 88 OR. L. REV. 931, 946–47 (2009).

165. Berg, *supra* note 145, at 517.

166. Berg, *supra* note 145, at 517.

infertility, and ten percent involve problems with both partners. In the remaining ten percent, the cause is unknown.”¹⁶⁷ Accordingly, infertility affects men and woman equally. While men are obviously unable to carry a child, many women affected by infertility are also unable to achieve a successful pregnancy by carrying a child. Fortunately for both sexes, the option of using a gestational carrier is a successful way to bring a child into this world using the frozen embryos.¹⁶⁸

The main pitfall to this approach arises when both parties can prove their infertility and both wish to be awarded the frozen embryos. Two possible solutions exist, each with pros and cons. The first solution is to “gestate the child and then hold a custody hearing after the child’s birth.”¹⁶⁹ This post gestation approach will undoubtedly move the couple into the world of family law and the best interest of the child standard used in child custody proceedings.¹⁷⁰ When dealing with frozen embryos, courts have declined to use this standard because it does not consider the frozen embryo to be a child in need of the protections the best interest standard takes into account.¹⁷¹

The second solution is to divide the embryos between the couple.¹⁷² This option will give each party the opportunity to have his or her own child, as opposed to potentially just one with the added bonus of a custody dispute, as proposed by the first resolution. However, if only a few embryos remain, dividing them will diminish each individual’s opportunity of being able to have a child because each person will have fewer chances to try and achieve a successful implantation. An additional issue ensues when there are an odd number of frozen embryos. What happens to the odd numbered embryo? Application of the balancing approach? Destruction? Moreover, the

167. Shae-Lee McArthur, *Fact File: Infertility*, ABC HEALTH AND WELLBEING (May 30, 2007) <http://www.abc.net.au/health/library/stories/2007/05/30/1919840.htm#.UW3E53fPZOQ>.

168. *Reproductive Health*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/> (last updated Feb. 12, 2013). “In this case, a woman uses her own egg. It is fertilized by the man’s sperm and the embryo is placed inside the carrier’s uterus. The carrier will not be related to the baby and gives him or her to the parents at birth.” *Id.* Gestational carriers are different from surrogates in that a surrogate “is a woman who agrees to become pregnant using the man’s sperm and her own egg. The child will be genetically related to the surrogate and the male partner. After birth, the surrogate will give up the baby for adoption by the parents.” *Id.*

169. Donna Katz, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Embryos*, 5 VA. J. SOC. POL’Y & L. 623, 671 (1998).

170. *Id.*

171. *See In Re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003) (determining that the best interest of the child standard was inapplicable to frozen embryos). The *Whitten* court found that the “best interest standard” is to “assure the child the maximum continuing physical and emotional contact with both parents and to encourage parents to share the rights and responsibilities of raising the child.” *Id.* Accordingly, the court indicated that frozen embryo disputes “do not involve maximizing physical and emotional contact between both parents and the child; they involve the more fundamental decision of whether the parties will be will be parents at all.” *Id.*

172. Katz, *supra* note 169, at 672.

division of the embryos, like other tangible assets in a marriage, raises the issue of whether frozen embryos are in fact personal property, a hotly debated topic outside the scope of this article.

While a fertility conscious analysis, as evidenced above, has its pitfalls, unlike other approaches, it seeks to simultaneously honor one's contractual and Constitutional rights. With the recent decision of *Reiber v. Reiss*, it appears courts are interested in fertility issues and have essentially placed one's inability to procreate above one's wishes to avoid procreation. In light of that focus, courts and legislatures should consider a fertility conscious analysis when determining the disposition of frozen embryos at the time of divorce.