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## Arizona Gamete Donor Law: A Call for Recognizing Women's Asymmetrical Property Interest in Pre-Embryo Disposition Disputes

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**Arizona Gamete Donor Law:  
A Call for Recognizing Women’s  
Asymmetrical Property Interest in Pre-Embryo  
Disposition Disputes**

*By Melissa B. Herrera\**

*Sperm may be cheap and plentiful, eggs are not.*  
—Ruth Colker<sup>1</sup>

*It is a disturbing consequence of modern biological technology that the fate  
of nascent human life, which the Embryos in this case represent, must be  
determined in a court by reference to cold legal principles.*  
—Hon. Judge Anne-Christine Massullo<sup>2</sup>

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1. Ruth Colker, *Pregnant Men Revisited or Sperm is Cheap, Eggs are Not*, 47 HASTINGS L.J. 1063, 1063 (1996).

2. In re the Marriage of Stephen Findley v. Mimi C. Lee, No. FDI-13-780539, 2016 WL 270083, at \*2 (Cal. Super. Jan. 11, 2016) [hereinafter referred to as Findley].

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## INTRODUCTION

Arizona residents, Ruby Torres and John Joseph Terrell first met in 2003 and began dating on and off in 2009.<sup>3</sup> In June of 2014, at the age of thirty-three years old, Ruby was diagnosed with triple negative bilateral breast cancer, which is one of the most aggressive forms of cancer.<sup>4</sup> Her treatment plan included chemotherapy, radiation, and a bilateral mastectomy.<sup>5</sup> Ruby was advised that her treatment plan would place her body in menopause, rendering her virtually unable to have biological children.<sup>6</sup>

With only a month to start treatment, Ruby decided to undergo the process of in vitro fertilization (“IVF”) in an effort to preserve her ability to have future children.<sup>7</sup> The couple hastily began the IVF treatment process and wed in July of 2014.<sup>8</sup> The treatment resulted in the extraction of fourteen eggs, which were then fertilized with John’s sperm.<sup>9</sup> Seven pre-embryos were produced and cryogenically<sup>10</sup> preserved for future use.<sup>11</sup> The couple stated that they intended to have children down the line—presumably when Ruby’s health was stabilized.<sup>12</sup>

3. Appellants Opening Brief, In re the Matter of John Joseph Terrell v. Ruby Torres, No. CA-CV 17-0617, 2017 WL 6663727, at \*3 (Ariz. App. Div. 1) [hereinafter referred to as Terrell v. Torres].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 5.

8. *Id.* at 3-5.

9. *Id.* at 7.

10. See *Cryopreservation and Storage*, AMER. SOC’Y REPROD. MED., (last visited Apr. 12, 2018), <http://www.asrm.org/topics/topics-index/cryopreservation-and-storage/> [https://per ma.cc/F8G4-6K97] (defines Cryopreservation as the freezing of embryos, eggs, or sperm at very low temperature to preserve viability).

11. Terrell v. Torres, *supra* note 3, at \*7; see generally *Davis v. Davis*, 842 S.W. 2d 588, 593 (Tenn. 1992) (explaining the term “pre-embryo” as referring to the initial phase of human development, beginning with the first cell division, continuing up to fourteen days after conception). For the sake of consistency, the term “pre-embryo” will be used to refer to this stage of development. The terms “embryo” and “pre-embryo” have been used interchangeably throughout this note.

12. Ken Alltucker, *Woman Battling Cancer, Ex-husband Ordered to Donate Fertilized Embryos*, THE REPUBLIC, (Aug. 31, 2017, 4:00 PM), <https://www.azcentral.com/story/news/nation-now/2017/08/31/woman-battling-cancer-ex-husband-ordered-donate-fertilized-embryo>

Ruby's aggressive cancer treatment plan was successful, and her cancer is in remission.<sup>13</sup> Sadly, Ruby and John's marriage did not survive. John initiated dissolution proceedings in August of 2016.<sup>14</sup> Like many other women in her position, Ruby is now facing an uphill legal battle to be awarded the right to the embryos, which may be her only opportunity to have biological children.<sup>15</sup>

The disposition of Ruby and John's pre-embryo's presented Arizona courts with a case of first impression. At the time of the trial court hearing, Arizona did not have a statute to address this burgeoning predicament.<sup>16</sup> On August 21, 2017, Honorable Judge Ronee F. Korbin Steiner determined that the frozen embryos were jointly owned and per their previous agreement, were to be donated to a third party or couple for the purpose of impregnation.<sup>17</sup> Ruby has appealed this decision and the case is currently pending in the Court of Appeals of Arizona, Division 1.<sup>18</sup>

Without a uniform federal regulation regarding the disposition of pre-embryos in dissolution proceedings, some state legislatures have enacted legislation to mitigate potential issues for parties; each state varying in their approaches.<sup>19</sup> Inspired by Ruby's harrowing story, Arizona is the latest state to enact a statute regarding the disposition of embryos in a dissolution proceeding—Senate Bill SB 1393.<sup>20</sup> This bill was first presented to the Arizona Senate by Republican members in late January of 2018 and was

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os/623100001/ [https://perma.cc/84MU-4BQR].

13. Ken Alltucker, *Cancer Survivor Battling Ex-husband Ordered to Donate Fertilized Embryos*, THE REPUBLIC, (Sept. 1, 2017, 6:31 PM), <https://www.azcentral.com/story/news/local/arizona-health/2017/08/31/cancer-battling-arizona-woman-ex-husband-ordered-donate-fertilized-embryos/617118001/> [https://perma.cc/6B5Z-W9UD].

14. Ken Alltucker, *Phoenix Cancer Survivor to Appeal Judge's Order to Donate her Embryos*, THE REPUBLIC (Sept. 19, 2017, 5:45 PM), <https://www.azcentral.com/story/news/local/phoenix/2017/09/19/phoenix-cancer-survivor-appeal-judges-order-donate-her-embryo-os/682738001/> [https://perma.cc/XL6D-H2AD].

15. *Id.*

16. Alltucker, *supra* note 12; Terrell v. Torres, *supra* note 3, at \*4.

17. Terrell v. Torres, *supra* note 3, at \*1.

18. Court Docket at 1, Terrell v. Torres, No. 1 CA-CV 17-0617 FC, 2018 Ct. of App., Div. 1\* (2017), (last visited Nov. 12, 2018), <https://apps.supremecourt.az.gov/aacc/appella/1CA/CV/CV170617.pdf> [https://perma.cc/REW6-VLCJ] (This case is still pending, the current case status per the docket states that this case has been under advisement since June 13, 2018).

19. Andy Newman, *California Judge Orders Frozen Embryos Destroyed*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/19/us/california-judge-orders-frozen-embryos-destroyed.html> [https://perma.cc/68XY-NA44]; LA. REV. STAT. ANN. §§ 9:121-133 (West 2018); FLA. STAT. ANN. § 742.17 (West 2018); N.M. STAT. ANN. §24-9A-1(D) (West 2018); MASS. GEN. LAWS ANN. ch 111L, § 4 (West 2018); N.D. CENT. CODE ANN. § 14-20-64 (West 2017); COLO. REV. STAT. ANN. § 19-4-106 (West 2018); TEX. FAM. CODE ANN. § 160.706 (West 2017); 2018 Wash. Legis. Serv. Ch. 6 (S.S.B. 6037) (West 2018).

20. SB 1393: *Parental Right to Embryo*, CTR. ARIZ. POL'Y (last visited Apr. 12, 2018), <https://www.azpolicy.org/bill/sb-1393-parental-right-to-embryo/> [https://perma.cc/X722-72C4].

adopted into law on April 3, 2018.<sup>21</sup> It was introduced as an effort to protect a prospective parent's right to his or her embryos. Commenters have noted that this bill seeks to "balance the interests of the spouses by removing any right, obligation, or interest between the spouse that no longer wants to be a parent and any resulting child."<sup>22</sup> Pursuant to this new law, the person who wants the embryos for the purpose of bringing them to life will be awarded the embryos.<sup>23</sup> This law makes it so that someone in Ruby's situation will not suffer her same fate. But is this the correct solution? This Note argues that in many ways, the newly enacted Arizona statute will generally yield the "right" outcome, but it is not the best means to achieve it.

Section I of this note describes both the process of IVF as well as the legal background. I begin to advance the assertion that the current legal framework is flawed, and propose that states adopt a woman-centered approach to embryo disputes<sup>24</sup> in which women presumptively win. One of the controlling factors in this analysis is the gamete provider's inability to produce additional gametes. In the seminal case regarding embryo disputes, *Davis v. Davis*, the court stated, "as they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers."<sup>25</sup> In doing so, the court set up a framework—that was followed thereafter—where the contributions to the IVF process by both sexes are presumed to be the same. The reality is that the biological differences between men and women make it so that women's contributions are not only physically greater, as the egg is the largest cell in the body,<sup>26</sup> but the process itself is much more invasive and physically taxing on women. Women should have a greater claim to pre-embryos because they have greater "sweat equity"<sup>27</sup> invested in the embryo itself. Though it is true that the potential for human life exists because of

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21. *Bill History for SB1393*, ARIZ. STAT. LEG., (last visited Apr. 12, 2018), <https://apps.azleg.gov/BillStatus/BillOverview/70559?SessionId=119> [<https://perma.cc/28AG-S6PE>].

22. CTR. ARIZ. POL'Y, *supra* note 20.

23. *Id.*

24. The phrase "embryo disputes" refers to disputes that may arise in dissolution or separation.

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

26. *Egg Freezing FAQ*, USC FERTILITY, (last visited Apr. 12, 2018), <http://uscfertility.org/egg-freezing-faqs/> [<https://perma.cc/LN2N-UJYK>].

27. The term "sweat equity" refers to "the effort and toil a company's owners and employees contribute to a project or enterprise ..." Will Kenton, *Sweat Equity*, INVESTOPEDIA, (June 25, 2018), <https://www.investopedia.com/terms/s/sweatequity.asp> [<https://perma.cc/9Q29-SKAB>]. This term is used in business to describe a compensation structure seen in start-up companies. *Id.* It is also used in reference to real estate, property. *Id.* Here, sweat equity refers to the additional ways in which women contribute to IVF that men do not. For example, during the IVF process, women must endure hormonal treatment and undergo an invasive procedure for doctor's to extract their eggs for later implantation—men do not.

both gamete providers, this should not be taken to mean that both contributions are equivalent.

Moreover, *Davis* set the stage to view a prior written agreement on the disposition of the embryos as evidence of the parties' intent.<sup>28</sup> However, given the nature of the matter—two married people coming together and deciding to expand their family—there is no incentive or wherewithal to bargain over equitable terms if the relationship ends. Thus, the contract approach followed by many states whereby courts uphold and presume written agreements to be valid is also flawed and inequitable at the outset.

Shifting focus, section II examines Arizona's newly adopted Arizona Revised Statute section 25-318.03. Next, I contrast the case that was the impetus for the Arizona bill, *In re the Matter of John Joseph Terrell v. Ruby Torres*, to the factually similar case adjudicated in California, *Findley v. Lee*. I conclude this section by proposing that courts can arrive at the same outcome as Revised Statute section 25-318.03—awarding the embryo to the party who is most likely to bring it to life<sup>29</sup>—by rightfully weighing a woman's<sup>30</sup> greater contribution in the creation of the embryo more heavily than that of her husband's.<sup>31</sup>

Section III explores the constitutionality of Arizona Revised Statute section 25-318.03 and discusses the possibility of a right to IVF located within the right to procreate. This step is necessary in order to determine if states can create statutes regulating IVF. Moreover, analyzing the right to procreate is also important to establishing whether a woman-centered approach is viable. I then discuss how courts should position embryos within the legal framework of property or in the alternative, in the form of special property or *sui generis*—but not as people. Embryos are a special form of property because of their potential for human life, but they are property nonetheless. Imputing personhood on a collection of cells that may never be a person is problematic to women and reproductive rights. I conclude my analysis by proposing a modest federal regulation where the federal government enacts a statute declaring frozen embryos as a special

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28. *Davis*, 842 S.W. 2d at 597.

29. For the purposes of this argument, the author assumes that more often than not, women will be awarded any and all pre-embryos in dissolution proceedings under this new statute. This assumption is rooted in both biological realities and conventional gender norms. As such, a woman's centered approach that guides the adjudication of embryo disputes would yield the same outcome. Given that Arizona Revised Statute section 25-318.03 is newly enacted, there is no data available at this time that either proves or disproves this assumption. The author acknowledges that the statute creates the opportunity for a husband to be awarded any and all embryos against the wishes of his wife. Moreover, the statute is also applicable in non-heteronormative couplings.

30. References to women in this essay refer to cis-gendered women. The author acknowledges that the analysis would be different for trans and gender nonconforming individuals.

31. The argument presented does not undertake the different, albeit related, legal issues that arise as a result of divorce or separation in non-heteronormative relationships.

type of property. This could bring uniformity to embryo disposition disputes and assist in ensuring that reproductive rights do not vary by jurisdiction.

Women have a disproportionate property investment in the embryo due to biology, sweat equity, and the overall invasive nature of the IVF process on women's bodies. This disproportionate property interest should not be discounted by equating it to men's contribution—doing so is not only a miscarriage of justice, but also a reaffirmation of patriarchal norms.

## I. IN VITRO FERTILIZATION: THE MEDICAL PROCEDURE AND THE LEGAL LANDSCAPE

### A. THE PROCESS OF IN VITRO FERTILIZATION

“In vitro fertilization (“IVF”) is a complex series of procedures used to treat fertility or genetic problems and assist with the conception of a child.”<sup>32</sup> It is the most common and effective form of assisted reproductive technology (“ART”).<sup>33</sup> IVF technology has been used by medical professionals since the late 1970s.<sup>34</sup> In 1978, in Britain, Louise Brown became the first person born through IVF.<sup>35</sup> It is estimated that over 5 million babies have been born through IVF worldwide.<sup>36</sup> The U.S. Department of Health & Human Services estimates that there may be as many as 620,000 cryo-preserved embryos in the United States.<sup>37</sup> The average cost of one IVF cycle is between \$10,000 and \$15,000.<sup>38</sup>

The steps involved in IVF are as follows: ovulation induction, egg retrieval, sperm retrieval, fertilization and embryo transfer.<sup>39</sup> During a typical IVF procedure, mature eggs are retrieved from the woman's ovaries and fertilized by sperm in a laboratory.<sup>40</sup> The fertilized egg, also known as

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32. *In vitro Fertilization (IVF)*, MAYO CLINIC, (last visited Apr. 12, 2018), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [https://perma.cc/H4UN-CGDA].

33. *Assisted Reproductive Technology*, MEDLINE PLUS, (last visited Apr. 12, 2018) <https://medlineplus.gov/assistedreproductivetechology.html> [https://perma.cc/AK8N-T8VC].

34. MAYO CLINIC, *supra* note 32.

35. Maggie Fox, *A Million Babies Have Been Born in the U.S. With Fertility Help*, NBC NEWS, (Apr. 28, 2017 9:08 AM), <https://www.nbcnews.com/health/health-news/million-babies-have-been-born-u-s-fertility-help-n752506> [https://perma.cc/YB7V-7EWF].

36. Bonnie Rochman, *5 Million Babies Born Through IVF in the Last 35 Years*, NBC NEWS, (Oct. 14, 2013, 4:54 PM), <https://www.nbcnews.com/healthmain/5-million-babies-born-through-ivf-past-35-years-researchers-8C11390532> [https://perma.cc/8SWN-WPH9].

37. *Embryo Adoption*, U.S. DEP'T. HEALTH & HUM. SERVICES, (last visited Apr. 12, 2018), <https://www.hhs.gov/opa/about-opa/embryo-adoption/index.html> [https://perma.cc/9CQS-6274].

38. *Frequently Asked Questions*, SOC'Y FOR ASSISTED REPROD. TECH., (last visited Apr. 12, 2018), <http://www.sart.org/patients/frequently-asked-questions/> [https://perma.cc/49UT-2S7D].

39. MAYO CLINIC, *supra* note 32.

40. *Id.*

an embryo, is then implanted in the patient's uterus or cryogenically preserved.<sup>41</sup> Cryopreservation refers to the freezing of embryos, eggs, or sperm at a very low temperature to preserve viability.<sup>42</sup> Liquid nitrogen is typically used to achieve the necessary temperature.<sup>43</sup>

Although eggs and sperm may be frozen separately, embryos have a higher success rate for eventual live birth.<sup>44</sup> "The egg is the largest cell in the human body and contains a large amount of water."<sup>45</sup> Because of these properties, when eggs are frozen, ice crystals form that can destroy the cell.<sup>46</sup> However, crystal formation can be prevented through a technique that involves dehydrating the egg and replacing the water with an "anti-freeze" prior to cryopreservation.<sup>47</sup> This is important to preserve the integrity of the frozen egg or embryo.<sup>48</sup> Additionally, researchers can fertilize an egg with a hardened shell by injecting the sperm into the egg with a needle by using a technique known as intracytoplasmic sperm injection ("ICSI").<sup>49</sup> These procedures assist in protecting the viability and stability of the pre-embryo.

#### B. LEGAL LANDSCAPE OF PRE-EMBRYO DISPUTES—PERSON, PROPERTY, OR *SUI GENERIS*?

Currently, there is no federal statute or regulation that governs the disposition of frozen embryos.<sup>50</sup> Some state legislatures have enacted statutes regarding this subject matter, but the type of statute varies geographically. For example, Louisiana has statutorily imputed personhood to in vitro fertilized human cells and human genetic material by bestowing these embryos with rights, such as the right to sue or be sued.<sup>51</sup> Louisiana's revised statute title 9 section 126 states that "the in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which

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41. USC FERTILITY, *supra* note 26.

42. *Cryopreservation and Storage*, AMER. SOC'Y FOR REPROD. MED., (last visited Apr. 12, 2018), <http://www.asrm.org/topics/topics-index/cryopreservation-and-storage/> [<https://perma.cc/7LFG-FMJP>].

43. AMER. SOC'Y FOR REPROD. MED., *supra* note 42.

44. Robin Marantz Henig, *Freezing Eggs May Reduce a Woman's Odds of Success with IVF*, HEALTH NEWS FROM NAT'L PUB. RADIO, (Aug. 28, 2015, 12:06 PM), <https://www.npr.org/sections/health-shots/2015/08/28/435251307/freezing-eggs-may-reduce-a-womans-odds-of-success-with-ivf> [<https://perma.cc/Z6P6-698E>].

45. USC FERTILITY, *supra* note 26.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Findley, *supra* note 2, at 1.

51. LA. REV. STAT. ANN. § 9:121 (West 2018); LA. REV. STAT. ANN. § 9:124 (West 2018).



employs him or the donors of the sperm and ovum.”<sup>52</sup> In Louisiana, viable in vitro fertilized human embryos are juridical people and, as such, they may not be destroyed.<sup>53</sup> In the event of a dispute over the disposition of the embryo, “the judicial standard for resolving such disputes is . . . the best interest” of the pre-embryo, which is the standard used in child custody disputes.<sup>54</sup> If parties choose not to implant the embryo, then that embryo is to be made available for adoptive implantation.<sup>55</sup>

In California, Health & Safety Code section 125315 regulates the nature of information that physicians are required to give patients undergoing fertility treatments.<sup>56</sup> The statute also proscribes a required set of options that the patient must decide upon and set forth in an advance directive prior to treatment.<sup>57</sup> For example, patients must decide on the disposition of the embryos in the event of death or marriage.<sup>58</sup> Unlike Louisiana, California takes a hybrid property and contractual approach to the disposition of an embryo. Other states have enacted models similar to the one in California. In New Jersey and Massachusetts, for example, physicians are also required to obtain informed and voluntary consent from the gamete donors with regard to the disposition of the embryos.<sup>59</sup>

States typically adjudicate embryo disputes by using one of three analytical frameworks: “1) the contractual approach; 2) the balancing approach; and 3) the contemporaneous mutual consent approach.”<sup>60</sup> Courts have been reluctant to grant “one party an embryo to initiate pregnancy over the objection of the other gamete” provider.<sup>61</sup> Absent agreement, the default is a balancing of interests’ test.<sup>62</sup>

The first case where a court provided guidance on the disposition of embryos in a dissolution proceeding, absent an agreement, is the seminal case from the Supreme Court of Tennessee, *Davis v. Davis*.<sup>63</sup> Junior Lewis Davis and Mary Sue Davis met in spring of 1979 while in the Army and stationed in Germany.<sup>64</sup> The couple married soon after on April 26, 1980.<sup>65</sup>

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52. LA. REV. STAT. ANN. § 9:126 (West 2018).

53. LA. REV. STAT. ANN. § 9:129 (West 2018).

54. LA. REV. STAT. ANN. § 9:131 (West 2018).

55. LA. REV. STAT. ANN. § 9:130 (West 2018).

56. CA. HEALTH & SAFETY CODE §125315 (West 2018).

57. *Id.* § 125315(b).

58. *Id.*

59. *See* MASS. GEN. LAWS ANN. ch 111L, § 4 (West 2018); N.J. STAT. ANN. §26:2Z-2 (amended 2018).

60. Findley, *supra* note 2, at 15.

61. *Id.*

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

63. *Id.* at 604.

64. *Id.* at 591.

65. *Id.*

Mary Sue became pregnant shortly after.<sup>66</sup> Unfortunately, she was unable to carry this pregnancy to term due to a tubal pregnancy, which not only caused a miscarriage but ultimately resulted in the removal of her right fallopian tube.<sup>67</sup> Sadly, this was the beginning of their issues with conception. Mary Sue went on to have four more tubal pregnancies that ultimately left her without functioning fallopian tubes.<sup>68</sup> As such, IVF became their only option to have biological children.<sup>69</sup>

Beginning in 1985, the couple went through a total of six attempts at IVF.<sup>70</sup> None of the treatments resulted in a pregnancy.<sup>71</sup> Believing that their marriage would stand the test of time, the couple did not have a prior agreement on the disposition of the embryos. However, Junior Lewis Davis filed for divorce in February 1989 after a transfer procedure did not result in pregnancy.<sup>72</sup> Junior Lewis and Mary Sue agreed on all other aspects of their divorce except the disposition of the frozen embryos.<sup>73</sup> Initially, Mary Sue wanted the trial court to award her ownership so that she could use them in another pregnancy attempt after the divorce.<sup>74</sup> However, as the litigation progressed, and she remarried, Mary Sue changed her position and wanted ownership over the embryos so that she could donate them to an infertile couple—an action that she believed would provide meaning to the years of invasive procedures that she underwent in her arduous attempts to conceive.<sup>75</sup>

The *Davis* court, outlined several approaches for courts to use in similar cases.<sup>76</sup> The Tennessee Supreme Court held that disputes involving the disposition of pre-embryos should be resolved by first looking to the preferences of the progenitors.<sup>77</sup> If this is not feasible, then the court should look to any prior agreement concerning the disposition.<sup>78</sup> If no prior agreement exists, then the court should balance the interests of the parties in using or not using the pre-embryo.<sup>79</sup> The court took the position that the embryos belonged in an interim category between property and people.<sup>80</sup> In doing so, the court established that embryos are *sui generis*—a category “of

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66. Davis, 842 S.W. 2d at 591.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 592.

73. *Id.* at 589.

74. *Id.*

75. *Id.* at 604.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 597.

its own kind.” They reasoned that the embryos were not property because they had the potential for human life, but this potential for human life did not automatically confer personhood.<sup>81</sup> The court also held that since Mary Sue no longer wanted to use the embryos for her own use, Lewis’ “right” not to procreate outweighed Mary Sue’s interest in wanting the embryos to be donated to an infertile couple to give her fertility efforts meaning.<sup>82</sup>

A major issue with the current framework is inconsistency, which in turn propagates a piecemeal system where reproductive rights vary from state to state. For example, in Louisiana, as previously mentioned, an embryo has personhood and it cannot be disposed of—ever. Thus, in Louisiana, the option of freezing embryos will lead to the forfeiture of your cells, your genetic material, and potentially your only chance at future pregnancy if you choose not to or are unable to use your embryos yourself. In contrast, in California, there is arguably more reproductive freedom for women because there are more choices available to them. Embryos are not forcibly donated unless a prior agreement contains an advanced written directive requiring forcible donation. California’s approach reflects the holding and rationale from *Davis* in which embryos are treated as a form of special property whose fate can be decided similarly to other forms of high-stakes property. Inconsistency among jurisdictions regarding the disposition of embryos has the potential to be discriminatory against women and should be eradicated.

## II. COMPARING MODELS ON EMBRYO DISPUTES: ARIZONA AND CALIFORNIA

### A. THE HARROWING CASE OF *JOHN J. TERRELL V. RUBY TORRES*

Ruby Torres’ life was going according to plan. Prioritizing education, Ruby first graduated from Arizona State University with a Bachelor of Science in 2002.<sup>83</sup> After her undergraduate degree, Ruby earned both a Masters of Education and a Juris Doctorate.<sup>84</sup> Ruby has worked as an attorney in the areas of wrongful death, litigation, and personal injury.<sup>85</sup>

Ruby met John Joseph Terrell, her now ex-husband, in 2003 and began an on-again-off-again relationship in 2009.<sup>86</sup> Ruby’s life and the couple’s relationship was forever altered after Ruby discovered a lump on her breast during a self-examination.<sup>87</sup> In July of 2014, thirty-three-year-old Ruby

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81. *Davis*, 842 S.W. 2d at 597.

82. *Id.* at 604.

83. Ruby Torres, LINKEDIN (last visited Apr. 2018), <https://www.linkedin.com/in/ruby-torres-6804475b> [http://perma.cc/2YW7-A4TY].

84. *Id.*

85. Ruby Torres, AVVO (last visited Apr. 12, 2018), <https://www.avvo.com/attorneys/850-05-az-ruby-torres-4514406.html> [http://perma.cc/B548-5F29].

86. *Terrell v. Torres*, *supra* note 3, at \*3.

87. *Alltucker*, *supra* note 12.

Torres, attorney at law, was diagnosed with one of the most aggressive and difficult types of cancer to treat,<sup>88</sup> bilateral triple negative breast cancer.<sup>89</sup> After delivering the prognosis, Ruby's oncologist referred her to a fertility treatment center to preserve her ability to have children in the future.<sup>90</sup> After treatment, this form of cancer would leave Ruby with no other opportunity to have biological children.<sup>91</sup> Acting on the advice of her oncologist, Ruby took "steps to preserve her ability to have children in the future."<sup>92</sup> Ruby consulted with reproductive endocrinologist, Dr. Millie Behera, M.D. at the Bloom Institute.<sup>93</sup> "After her consultation, Ruby decided to preserve her fertility in light of the upcoming chemotherapy and cancer treatment by way of in vitro fertilization."<sup>94</sup>

Initially, Ruby's then boyfriend, John, was reluctant to participate in the IVF procedure but had a change of heart when he learned Ruby had another possible sperm donor.<sup>95</sup> With only a month before having to begin aggressive cancer treatment, Ruby and John entered into a contract for the IVF procedure on July 11, 2014.<sup>96</sup> The contract had a provision for the disposition of the embryos in the event of a divorce or dissolution of relationship.<sup>97</sup> Their agreement provides in pertinent part that:

In the event the patient and her spouse are divorced . . . we agree that the embryos should be disposed of in the following manner (check one box only): A court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose.<sup>98</sup>

The couple was presented with a second option, to destroy any unused embryos in the event of a dissolution.<sup>99</sup> This option was rejected by the couple.<sup>100</sup>

After executing the contract, the record shows that Ruby underwent the

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88. *Triple Negative Breast Cancer*, NAT'L BREAST CANCER FOUND., INC., (last visited Apr. 12, 2018), <http://www.nationalbreastcancer.org/triple-negative-breast-cancer> [<http://perma.cc/SCZ2-C8H5>].

89. Alltucker, *supra* note 13.

90. Terrell v. Torres, *supra* note 3, at \*3-4.

91. Alltucker, *supra* note 13.

92. *Id.*

93. Terrell v. Torres, *supra* note 3, at \*4.

94. *Id.*

95. *Id.*

96. *Id.* at \*4-5.

97. *Id.* at \*5.

98. *Id.* at \*5-6.

99. *Id.* at \*6.

100. *Id.*

process of in vitro fertilization (IVF) to create embryos that could be implanted after her cancer treatment.<sup>101</sup> Ruby endured a “three-week treatment course that resulted in fourteen eggs.”<sup>102</sup> The treatment successfully produced seven pre-embryos.<sup>103</sup> “The intent of creating these embryos was to have the right to have children down the road.”<sup>104</sup>

Ruby had the option of having her eggs frozen for future fertilization but was advised against this option because the success rate for frozen embryos to develop into children is higher than that of frozen eggs that are later fertilized.<sup>105</sup> “At the time of the execution of the contract, the couple had been together since 2009 and were not thinking that their relationship would come to an end.”<sup>106</sup> It is evident that this fact played a crucial role in Ruby’s decision to have her eggs fertilized with John. The record demonstrates that had John not offered to donate his sperm, she would have acted on the advice of her care providers to best preserve her ability to have children in the future and would have opted to use another donor. This fact should be given substantial consideration when weighing Ruby’s interest in the embryos over John’s interest because if not for his willingness to donate his sperm, she would have exclusive possession of the embryos created with her eggs.

After the IVF treatment, Ruby underwent both chemotherapy and radiation treatment to eradicate her cancer and save her life.<sup>107</sup> The treatments were successful, and Ruby is currently in remission.<sup>108</sup> Unfortunately, as many marriages do, Ruby and John’s marriage came to an end.<sup>109</sup> John initiated divorce proceedings in 2016.<sup>110</sup> As is the case with many divorce proceedings, the court was left with dividing all the couple’s assets. However, this Arizona court also had the Solomon-like task of deciding the disposition of the couple’s seven frozen embryos that are stored at a fertility bank.<sup>111</sup> Who gets the embryos? Without any state precedent or statute to follow as a guide, the Maricopa County trial court judge ruled that neither party would get the embryos.<sup>112</sup> Instead, the judge

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101. Jason Berry, *Bitter Divorce Highlighted by Fight over Embryo*, AZ FAMILY (Sept. 1, 2017, 5:45 PM), <http://www.azfamily.com/story/36275322/bitter-divorce-highlighted-by-fight-over-frozen-embryos> [<http://perma.cc/3BWL-BM7S>].

102. Terrell v. Torres, *supra* note 3, at \*7.

103. Alltucker, *supra* note 13.

104. Alltucker, *supra* note 12 (quoting an interview with the *Arizona Republic* newspaper).

105. Terrell v. Torres, *supra* note 3, at \*7.

106. Berry, *supra* note 99.

107. Alltucker, *supra* note 13.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

ordered the embryos be donated to a third party because Ruby and John were unable to reach an agreement.<sup>113</sup> The presiding judge stated that John’s “right not to be compelled to be a parent outweighs [his] wife’s rights to procreate and desire to have a biologically related child.”<sup>114</sup>

Ruby no longer produces eggs following the chemotherapy and any efforts to produce viable eggs are unlikely to be successful.<sup>115</sup> Now, her only opportunity to conceive a biological child may be lost forever. Ruby has appealed the ruling on the grounds that “the contract provided that the embryos are joint property of both parties, and based upon a balancing of interests’ test, the embryos should be awarded to her.”<sup>116</sup> This case is currently pending and under advisement in the Arizona Court of Appeals, Division 1 since the Honorable Samuel A. Thurma heard oral arguments on June 13, 2018.<sup>117</sup> If the order is upheld, Ruby may never know the fate of her potential progeny. However, no matter what Honorable Thurma’s decision, this may not be the end of the line for this issue or this case.

**B. ENACTED ARIZONA SENATE BILL 1393—ARIZONA REVISED STATUTE  
SECTION 25-318.03**

Arizona Senate Bill SB 1393 was signed into law by Republican Governor Doug Ducey on April 8, 2018.<sup>118</sup> This bill adds section 25-318.03 to the state’s Marital and Domestic Relations statutes. Arizona Revised Statute section 25-318.03 concerns the disposition of embryos in a divorce proceeding.<sup>119</sup> It also outlines the responsibilities of the parties.<sup>120</sup> At the outset, the statute makes clear that Arizona’s general rule is to grant the embryo to the party who will develop it to birth.<sup>121</sup> The bill reads in pertinent part:

If an action described in section 25-318, subsection A involves the disposition of in vitro human embryos, the court shall:

1. Award the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth.

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113. S.E. Smith, *Proposed Arizona Law Could Promote Embryonic Personhood*, CARE2 (Feb 21, 2018), <https://www.care2.com/causes/proposed-arizona-law-could-promote-embryonic-personhood.html> [<http://perma.cc/CF85-ZD7A>].

114. Alltucker, *supra* note 13.

115. *Id.*

116. Appellate Terrell v. Torres *supra* note 18.

117. *Id.*

118. Christine Snavely, *Breaking News: Gov. Ducey Signs CAP-Supported Bill SB 1393*, CENR. ARIZ. POL’Y (Apr. 3, 2018), <http://www.azpolicy.org/2018/04/03/breaking-news-gov-ducey-signs-cap-supported-bill-sb-1393/> [<http://perma.cc/Q4DQ-QCRG>].

119. S.1393, 53rd Leg., 2nd Reg. Sess. (AZ, 2018).

120. *Id.*

121. *Id.*

2. If both spouses intend to allow the in vitro human embryos to develop to birth and both spouses provided their gametes for the in vitro human embryos, resolve any dispute on disposition of the in vitro human embryos in a manner that provides the best chance for the in vitro human embryos to develop to birth.

3. If both spouses intend to allow the in vitro human embryos to develop to birth but only one spouse provided gametes for the in vitro human embryos, award the in vitro human embryos to the spouse that provided gametes for the in vitro human embryos.<sup>122</sup>

Moreover, section 25-318.03(B) goes as far as to declare that even in situations where parties have a prior agreement, the court should still award the embryo to the spouse who will bring the embryo to life.<sup>123</sup> The subsections (C) and (D) of the statute make it clear that the spouse who is not awarded the embryo does not have responsibilities, rights, or obligations with respect to any child that may result, unless said party consents to such responsibilities.<sup>124</sup> Subsections (E) orders the spouse who is not awarded the embryos to provide the spouse who was ordered the embryos with “detailed written nonidentifying information that includes the health and genetic history of the spouse and spouse’s family.”<sup>125</sup> And finally, the last subsection of the statute provides definitions for relevant terms in the statute, specifically for “gamete,” “human embryo,” and “in vitro.”<sup>126</sup>

#### C. CALIFORNIA: HEALTH & SAFETY CODE SECTION 125315 AND *FINDLEY V. LEE*

California’s statute for the disposition of frozen embryos is not located in its Family Law Code, but rather in section 125315 of the Health and Safety Code.<sup>127</sup> Health and Safety Code section 125315 has been in effect since 2004.<sup>128</sup> It sets out detailed guidelines for the information that health care providers delivering the fertility treatment must provide their patients in order to satisfy the requirement of informed consent; and the options patients may choose from when deciding the disposition of embryos in

122. S.1393, 53rd Leg., 2nd Reg. Sess. (AZ. 2018).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. CAL. HEALTH & SAFETY CODE § 125315 (West 2018).

128. *Id.*

various situations.<sup>129</sup>

Pursuant to California's statute, individuals undergoing IVF must be provided with information regarding their options for unused embryos.<sup>130</sup> Moreover, patients must indicate "advanced written directives regarding the disposition of embryos."<sup>131</sup> The statute states that at a minimum, patients must decide the disposition of their embryos in the following circumstances: 1) death of either partner, 2) death of both partners or death of a patient without a partner, 3) separation or divorce of the partners, 4) the partners' decision or patient's decision who is without a partner, to abandon the embryos by request or a failure to pay storage fees.<sup>132</sup> The statute enumerates different options the patient can choose from depending on the circumstance.<sup>133</sup>

With regard to divorce or separation of partners, patients can choose to dispose of the embryos in one of six ways. The statute reads in pertinent part:

In the event of separation or divorce of the partners, the embryos shall be disposed of by one of the following actions:

- (A) Made available to the female partner.
- (B) Made available to the male partner.
- (C) Donation for research purposes.
- (D) Thawed with no further action taken.
- (E) Donation to another couple or individual.
- (F) Other disposition that is clearly stated.<sup>134</sup>

California's statutory scheme calls on the courts to take a contract approach to embryo disputes.

In a case factually similar to that of Ruby Torres, *Findley v. Lee*, California courts upheld the parties' prior agreement to thaw and discard unused embryos if the parties divorced or separated.<sup>135</sup> Steven Findley and Mimi C. Lee first met during their undergraduate studies at Harvard College in 1988.<sup>136</sup> Mimi later obtained a joint M.D./Ph.D. in neuroscience from the Albert Einstein College of Medicine in New York.<sup>137</sup> Mimi went on to move to the West Coast and practice anesthesiology in the Bay Area.<sup>138</sup> Steven "went on to work in finance and became a Senior Vice

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129. CAL. HEALTH & SAFETY CODE § 125315 (West 2018).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Findley, *supra* note 2, at 2.

136. *Id.* at 3.

137. *Id.*

138. *Id.* at 4.



President and Senior Research Analyst at Alliance Bernstein, a global wealth management firm in New York.”<sup>139</sup> The pair remained close friends for nearly two decades before their relationship took a romantic turn.<sup>140</sup>

Steven and Mimi's began a bi-coastal long-distance relationship in January 2010.<sup>141</sup> In April 2010, Steven proposed to Mimi and set their wedding for September 4, 2010.<sup>142</sup> Shortly after their engagement, at Steven's behest, Mimi reluctantly saw her physician regarding a lump on her breast—a biopsy was later performed for further testing.<sup>143</sup> Soon after her examination, Mimi received the devastating call from her physician that the sample “tested positive for an estrogen receptor-positive malignant tumor.”<sup>144</sup>

Mimi underwent a lumpectomy on August 27, 2010, and married Steven a week later.<sup>145</sup> Shortly after their honeymoon, the couple began “exploring IVF as a way to preserve their option of having a family given [Mimi's] cancer diagnosis.”<sup>146</sup> After several consults, the couple decided to go through with the IVF process.<sup>147</sup> They signed two consent forms prior to the IVF procedure pursuant to California Health and Safety Code section 125315.<sup>148</sup> The couple indicated in their consent agreement that they choose to thaw and discard any unused embryos in the event the couple divorced.<sup>149</sup>

On October 16, 2010, Mimi's egg retrieval and Steven's sperm sample transpired.<sup>150</sup> Their doctor was able to retrieve eighteen eggs.<sup>151</sup> “Of the [eighteen] eggs, only [twelve] were inseminated . . . and after three days, five embryos resulted.”<sup>152</sup> The couple decided to wait a year to discuss the use of the embryos due to Mimi's cancer treatment.<sup>153</sup> The couple separated on August 5, 2013, and Steven filed for divorce on December 6, 2013.<sup>154</sup>

Judge Anne-Christine Massullo ordered the embryos be thawed and destroyed pursuant to their agreement.<sup>155</sup> The court found the agreement

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139. Findley, *supra* note 2, at 3.

140. *Id.*

141. *Id.* at 4.

142. *Id.*

143. *Id.*

144. *Id.*, at 4.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 7.

150. *Id.* at 9.

151. *Id.*

152. *Id.*

153. *Id.* at 10.

154. *Id.*

155. *Id.* at 45.

was valid and enforceable.<sup>156</sup> Judge Massullo declined to categorize the embryos as either “life” or “property,” stating that “they [the embryos] are, in the construct of the law, *sui generis* and will be deemed as such in this Statement of Decision.”<sup>157</sup> Judge Massullo’s ruling is consistent with the California statutory scheme and the rationale in the seminal case, *Davis v. Davis*.<sup>158</sup> Whether this statutory scheme benefits women is questionable.

### III. ANALYSIS

#### A. CONSTITUTIONALITY OF ARIZONA REVISED STATUTE SECTION 25-318.03 AND THE RIGHT TO PROCREATE

Arizona Revised Statute section 25-318.03 was enacted to regulate the disposition of pre-embryos in divorce proceedings but in doing so, it is also a regulation on IVF. The statute presumes that we have a right to IVF and the product of the procedure. Does such a right exist?

To analyze the constitutionality of the statute and the state’s power to enact such legislation we must begin by situating it within our current jurisprudence. It is unclear whether there is a fundamental right to use IVF. If such a right exists, many scholars suggest that it flows from a fundamental right to procreate.<sup>159</sup> The right to procreate was first articulated in *Skinner v. Oklahoma*.<sup>160</sup> The right to procreate was then placed within the privacy interest of the individual in *Eisenstadt v. Baird*.<sup>161</sup> In *Eisenstadt* the Court stated, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>162</sup> Meaning, the government may regulate the right to procreate, including IVF so long as there is a compelling state interest.

Arizona Revised Statute section 25-318.03 should be held as unconstitutional as a matter of public policy because it indirectly imputes personhood and a right to life to a pre-embryo. The statute contains charged language that establishes a statutory scheme where the default disposition favors the party that will bring the embryo *to life*.<sup>163</sup> This is an explicitly pro-life stance and the opposite of what most jurisdictions without a statute do. Courts tend to side with the party who will not bring the embryo to life

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156. Findley, *supra* note 2.

157. *Id.* at 44.

158. Davis, 842 S.W. 2d at 597.

159. See Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1459 (2008).

160. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

161. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

162. *Eisenstadt*, 405 U.S. at 453.

163. ARIZ. REV. STAT. ANN. § 25-318.03 (A) (1) (2018).

because doing so forces parenthood on the objecting party.<sup>164</sup> However, this approach may be incorrect because of a misinterpretation of abortion jurisprudence.<sup>165</sup>

In the landmark decision, *Roe v. Wade*, the Supreme Court held that states have a compelling interest in embryos at viability or, in other words, the moment that the fetus is capable of a meaningful life outside the mother's womb.<sup>166</sup> For pre-embryos, this would technically be the moment of fertilization. However, this analysis is not applicable here because *Roe* hinged on bodily integrity, and pre-embryos do not intrude on women's bodily integrity in the same way as pregnancy because they are still outside of the body and gestation has not occurred.<sup>167</sup> In a situation in which the woman does not want to take actions to bring the embryo to life and her former spouse will, then under Arizona's statutory scheme, he would be awarded the embryo and her bodily integrity allegedly will not be infringed on because she will not gestate the embryo. However, it is important to note that in order to create the pre-embryo, the female gamete provider's bodily integrity is compromised at each stage of the IVF procedure. This statute also absolves the party who is not awarded the embryo of legal responsibility to parent and provide support. Thus, it is likely that this statute would be found constitutional under current jurisprudence because it does not force implantation or gestation on the woman.

Harvard Law Professor I. Glen Cohen argues that the Constitution does not provide a right not to procreate.<sup>168</sup> Through an analysis of Supreme Court precedent, Cohen describes the right to procreate as "containing three possible sticks: the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent (because at present only women can carry a fetus, this last right is limited to women)."<sup>169</sup> Cohen argues that Supreme Court jurisprudence protecting your right not to be a gestational parent does not "compel a fundamental right to be a genetic parent."<sup>170</sup> The right not to be a genetic parent can be waived in advance by consent to engage in sexual activity or contract.<sup>171</sup>

Cohen recognizes that your right not to be a gestational parent and your right not to be a genetic parent may be in conflict with each other.<sup>172</sup> To that end, Cohen suggests that a rule for resolving conflict between rights would establish the following: "1) protect the interests of potential life after

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164. See Davis, 842 S.W. 2d at 604; Findley, at 15.

165. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1154 (2008).

166. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

167. See Colker, *supra* note 1 (for further analysis on *Roe v. Wade*).

168. Cohen, *supra* note 163, at 1135.

169. *Id.*, at 1138.

170. *Id.*

171. *Id.* at 1162.

172. *Id.*

viability; 2) protect the right to be or not to be a gestational parent, because of its close tie to bodily integrity;[and] 3) protect the right not to be a genetic parent.”<sup>173</sup> Under Cohen’s framework, a statute like Arizona’s is constitutional and preferred because it resolves the tension between the right not to be a gestational parent and the right to not be a genetic parent. A woman is not compelled to be a gestational parent if she does not want and her bodily integrity is preserved. Her consent in the procedure waives her right not to be a genetic parent.

I take issue with this position because it places men and women as equal donors with the same interest in the embryo.<sup>174</sup> In doing so, this position minimizes the bodily intrusion on women’s bodies during the different stages of the IFV procedure by calling it a waiver of the right to be a genetic parent. In other words, consent for the procedure allows the other party to lay claim to the embryo.

#### B. RECOGNIZING WOMEN’S VALUE AND GREATER PROPERTY INTEREST IN FROZEN EMBRYOS

I argue that courts should shift to a woman-centered approach when adjudicating embryo disputes, even if there is a contract. What I mean by a woman-centered approach is that women should presumptively be awarded any embryos in most, if not all, divorce or separation proceeding for two main reasons: 1) under a property framework, women have greater ownership rights to a fertilized embryo than do men because of their biology, or put differently, their reproductive capacity and 2) there is no legal right *not* to procreate.<sup>175</sup>

To hold that both spouses who provide their gametes are equal donors ignores biological realities and is simply a falsity. From a biological standpoint, men and women are different. Women are born with all of the eggs that they will have for the rest of their lives.<sup>176</sup> In fact, once women reach sexual maturity, they lose at least one egg every month during menstruation.<sup>177</sup> When women reach menopause, which is generally around

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173. Cohen, *supra* note 163.

174. See discussion *infra* Section II-B.

175. See *supra* section II-A (for discussion on the absence of a legal right not to procreate); see also Cohen, *supra* note 163, at 1135. At this time, my argument does not go as far as to say that all contracts regarding the disposition of pre-embryos should be void as a matter of public policy. However, the emotionally charged nature of the subject matter presents a situation where bargaining power is practically non-existent. See Helene S. Shapo, *Frozen Pre-embryos And The Right to Change One’s Mind*, 12 DUKE J. COMPARATIVE & INT’L L. 75 (2002) (for an examination on the issue of contractual enforcement and changing one’s mind in the context of agreements made prior to fertility treatments).

176. *Ovarian Follicles*, PUBMED HEALTH, (last visited Apr. 12, 2018), <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0024714/> [<https://perma.cc/W2RM-6D DA>].

177. *How Does the Menstrual Cycle Work?* PUBMED HEALTH, (last visited Apr. 12, 2018), <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0072454/> [<https://perma.cc/7KRA-UC5 D>].

the age of fifty-one, their eggs are no longer viable, and their reproductive potential has come to an end.<sup>178</sup> In contrast, a fertile man may reproduce well past the age of any woman. Some studies suggest that a man's biological clock might be more similar to women's than previously thought and that with increasing age men too risk infertility.<sup>179</sup> While this may be true, this does not change my analysis because sperm are created constantly, and it is possible for men to obtain a new donor egg. For women, each egg released during menstruation or extracted for IVF is an egg that the woman can never recover—it is gone forever.

Furthermore, biological difference is reflected in the marketplace for donors. In the U.S. an egg donation can cost an average of \$25,000, depending on the number of eggs purchased.<sup>180</sup> However, vials of donor sperm cost anywhere from \$400 to \$650 depending on location, type of insemination and anonymity of donor.<sup>181</sup> Moreover, the number of eggs that are produced during one round of IVF is vastly smaller than that of sperm. The average male ejaculate contains twenty million sperm.<sup>182</sup> One round of IVF can yield fifteen to twenty eggs depending on the health and age of the woman.<sup>183</sup>

Biological difference is also represented in the IVF procedure itself—it is far more physically taxing on a women's body than it is on a man's body. Women's bodies are repeatedly invaded throughout the IVF process. For example, the IVF process begins with women taking fertility medications, causing hormonal and physical changes to the body.<sup>184</sup> The woman must then undergo ultrasounds to examine the ovaries, and blood tests to check hormone levels.<sup>185</sup> Further bodily intrusion occurs during the extraction and implantation phases. Conversely, men merely supply their sperm sample by engaging in a routine act, self-stimulation. While the process is emotionally taxing on both parties, from a biological standpoint, the IVF process is different for men and women. Thus, the law should

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178. PUBMED HEALTH, *supra* note 177.

179. Elizabeth Heubeck, *Age Raises Infertility Risk in Men, Too?* WEB MD, (last visited Apr. 12, 2018), <https://www.webmd.com/infertility-and-reproduction/features/age-raises-infertility-risk-in-men-too#3> [<https://perma.cc/NPC7-EE3>].

180. Hanan Kamal, *The Cost of Sperm Donor, Egg Donor, IVF, ICI, IUI*, DAILY WORTH (Aug. 19, 2014), <https://www.dailyworth.com/posts/2880-the-cost-of-sperm-donor-egg-donor-ivf-ici-iui> [<https://perma.cc/385N-U8ST>].

181. Kamal, *supra* note 180.

182. *Sperm: 15 Crazy Things you Should Know*, CBS NEWS, (last visited Apr. 12, 2018), <https://www.cbsnews.com/pictures/sperm-15-crazy-things-you-should-know/7/> [<https://perma.cc/RS4E-BMWK>].

183. *Is 15 the Magic Number in Egg Retrieval*, FERTILITY AUTHORITY, (last visited Apr. 12 2018), <https://www.fertilityauthority.com/articles/15-magic-number-egg-retrieval> [[http://perma.cc/2C6U-9Z66](https://perma.cc/2C6U-9Z66)].

184. *Invitro Fertilization: IVF*, AMER. PREGNANCY ASS'N, (last visited Apr. 12, 2018), <http://americanpregnancy.org/infertility/in-vitro-fertilization/> [<https://perma.cc/2ZRC-P4MT>].

185. *Id.*

recognize, women's greater ownership rights to the embryo than men due to women's unique reproductive capacity.

Legal scholar Ruth Colker has argued that courts have a tendency to favor men's interest in not having children in embryo dispute cases by equating their reproductive experiences in the IVF process.<sup>186</sup> She uses *Davis v. Davis* to describe how Mary Sue Davis' trauma and pain of having suffered five tubal pregnancies before turning to IVF and the six IVF attempts were only given cursory consideration.<sup>187</sup> Colker argues that the court "imposed a notion of formal equality on a situation in which the parties were not in a formally equal position."<sup>188</sup> This argument still holds today and can be extended to both Ruby Torres' pending case and *Findley v. Lee*.

In Ruby's case, at the trial level, the judge gave preference to her ex-husband's "right" not to have a child over Ruby's physical investment in creating the embryos. She underwent the difficult IVF procedure one month before starting aggressive cancer treatment. Furthermore, these embryos are Ruby's only opportunity at having biological children. These factors should have weighed heavily in her favor. The same analysis applies for cancer survivor Mimi Lee. Moving forward, the Arizona Revised Statute section 25-318.03 provides spouses in Ruby's situation a better chance at being awarded the embryos. But that does little for women outside of Arizona. While I agree with the outcome, the pro-life policy and quasi-personhood status is troubling and problematic in other areas of reproductive rights, such as abortion. This is especially pertinent today given current American politics.

Colker is not arguing that "the physical differences in reproductive capacity automatically mean that women's claims trump men's claims."<sup>189</sup> She takes the position that the court should prefer life and "when a man does not want to sustain life, the woman has undergone painful and repeated IVF procedures, and has a lesser possibility of pregnancy in the future through IVF, there is even more reason to credit her desire to sustain life."<sup>190</sup> I do not completely agree with this position. If a woman does not want to bring the embryo to life and the husband does, her opinion should be weighed more heavily than his because of her greater property interest in the embryo and her reproductive capabilities. Women are born with only so many eggs, they should have more of a say of whether or not their gametes are used to bring life to a biological child absent an extreme circumstance. Meaning, in the event that the shoe is on the other foot, and the husband is the one who can no longer produce gametes and the

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186. Colker, *supra* note 1, at 1071.

187. *Id.* at 1072.

188. *Id.* at 1073.

189. *Id.*

190. *Id.*

embryos are his only chance at progeny, this should be taken into consideration and perhaps weighed against the wife's interest if her reproductive abilities allow for future progeny without the embryos. To be clear, I do not propose a pro-life approach, but instead advocate for an approach that considers an expansive view on reproductive freedom and choice.

The most compelling counterargument to my proposal is that adopting a woman-centered approach is sex discrimination and punishes men for their biology, a status which is beyond their control. A woman-centered approach does not punish men for their biology but instead recognizes and attempts to mitigate the discrimination that women have historically encountered. Moreover, a woman-centered approach in the domain of new technology inches us toward sexual equality rather than perpetuating patriarchal notions of choice. Under the current legal landscape, it is women who are "out of luck" if they did not bargain for their embryo, which is simply not realistic in this context. This discriminatory effect may be exacerbated depending on the statutory scheme within her particular jurisdiction—if there is one at all. A woman's centered approach to adjudicating pre-embryo disputes gives women a greater ownership stake in the embryo due to their proportional investment in its creation.

Giving women more property rights to embryos does not perpetuate the sexist notion that women possess more responsibility for the care of children, it simply preserves a woman's choice to have children. This decision rests not on a duty to be mother or a disproportionate responsibility for the care of children, but is instead contingent on her greater ownership stake in the property, the embryo, due to their large investment in its creation.

### C. PROPOSED FEDERAL RESOLUTION

My proposed federal resolution is modest. At a minimum, a federal statute declaring frozen embryos as a special type of property should be enacted. This small change would bring about uniformity across states with regards to how courts proceed in the disposition of the case. Furthermore, it would strengthen other reproductive rights, such as abortion, because it would preempt states from enacting contrary legislation. Currently, outcomes concerning this reproductive rights issue hinge on the geographic location of the parties involved, and that should never be the case for such an important matter.

While I recognize that frozen embryos have the potential for human life and it may feel repugnant to equate life with property, it may be a necessary evil to conceptualize embryos in this manner for a just and uniform outcome. To impute personhood on a frozen embryo is both incorrect and problematic.

## V. CONCLUSION

IVF is a practice that allows many people who otherwise would not be able to conceive an opportunity to beget their own progeny. Whether or not we have a constitutional right to this technology is ambiguous. Further complicating matters is the legal status of pre-embryos—person, property, or something in-between? Currently, the key factor in determining the legal status of a pre-embryo largely depends on geographical location. In legal practice, the status of pre-embryos is closer to property than a person. In contrast, the medical and scientific fields provide some semblance of clarity, pre-embryos are closer to personhood than property. To those who go through the IVF process or are considering doing so, the pre-embryos represent many things, such as hope, flexibility in family planning, and the possibility of a child. While there are compelling reasons to grant pre-embryos personhood, as cold as it may seem, granting this status could be dangerous to other reproductive rights, namely abortion.

In divorce proceedings where the disposition of pre-embryos is contested, women should presumptively win all embryo disputes because their unique reproductive capacity makes it so that they have greater ownership rights to a fertilized embryo than do men. Biological difference is relevant at every stage of the IVF process. Women literally lose a piece of their body they will never get back and they must undergo a surgical procedure to have it removed. I am not arguing that men's contributions are without value, but rather, that they are not equivalent. To equate men's contribution to women's in the context of IVF demeans the physical intrusions and pain women endure, disadvantages women, and is detrimental to women's reproductive rights issues.

Jurisdictions that apply a balancing test where they weigh women's contributions to the embryo the same as men's, as seen in the seminal case *Davis v. Davis*, strengthen the patriarchal hold (white) men have always had in society. This framework gives the husband an alleged right to not procreate over the wife's right to procreate and, in doing so, gives men more decision-making power in these disputes. Moreover, the newly promulgated Arizona Revised Statute section 25-318.03 yields a favorable result for women, assuming that women are the ones who disproportionately want to bring the pre-embryo to life. However, the phrasing of the bill and its pro-life origins are problematic because they impute personhood on a cluster of cells that may never become a person. This is a dangerous trend to set because it has far reaching potential in other areas of reproductive rights.

Using a hybrid property and contract approach, as is done in California, may seem equitable and impartial because parties negotiate the terms and know what to expect in the event of divorce. However, it is problematic because the emotional subject matter—*contracting the disposition of hypothetical children with a partner that one loves and believes they will be with them until death do them part*—stifles any inclination to negotiate



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equitable terms and choose directives that will prevent a worst-case scenario for both parties. Even highly educated people, like Mimi Lee and Ruby Torres, were not immune to making this mistake.

It is well-documented that women end up in a worse economic situation after divorce than men do.<sup>191</sup> Upholding contracts or incorrectly applying a balance of interest tests and constitutional misinterpretations leave women reproductively “poorer” after divorce. If we don’t change our standards in emerging fields, what hope do we have for other institutional change?

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191. Colker, *supra* note 1, at 1063 (arguing that women are “reproductively ‘poorer’ than men following divorce if the couple has attempted to use IVF during the marriage”).