impose this duty to do so with complete disregard for a legislatively and professionally established standard of care. Relying instead on unpersuasive and unsuitable theories, courts are effectively denying pharmacists their rightful professional status when upholding the no duty to warn rule. Moreover, due to growing prescription use, increasing drug errors, and mounting health care costs, public policy dictates that pharmacists use their expanded roles and knowledge to full potential. This requires pharmacists to be held accountable for failing to warn patients about potential adverse drug events.

Theoretically, the expansion of pharmacists' liability is a step in the right direction, recognizing the professional status of pharmacists and leading to better patient care and drug therapy outcomes. Unfortunately, however, current working conditions have forced pharmacists to take a step back from quality patient care activities, negating any positive effects expanding liability might bring. As pharmacists struggle under high dispensing volumes and exhausting work conditions, little time is left to meet even the bare minimum in patient care requirements. As a result, pharmacists have resorted to utilizing unsafe and inadequate methods in order to meet workplace demands and simultaneously avoid any liability to fulfill their duties. Thus, although the no duty to warn rule is no longer compatible with the contemporary pharmacy profession, any increase in liability without a corresponding decrease in other workplace demands can have dangerous consequences. It remains to be seen whether the pharmacy profession will be able to find the proper means to successfully remove itself from such a precarious position.

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416 See Omnibus Budget Reconciliation Act of 1990, 42 U.S.C. § 1396r-8 (mandating that the minimum standard of care for pharmacists requires that pharmacists perform drug utilization reviews and patient counseling).

417 See generally THE PHARMACIST WORKFORCE, supra note 1, at 33 (discussing the increased importance and expanded role of pharmacists as medicine becomes more complex, the risk for errors increases, and cost constraints intensify).

418 See Gonzalez, supra note 49, at 53, 76 (noting that the complexity of current drug therapy, combined with the OBRA mandates and various state statutes, creates an environment in which pharmacists must warn patients about the potential risks of drug therapy).

419 See Uken, New York, supra note 290, at 39 (suggesting that pharmacists' workloads requiring that they perform only their basic duties, often resulting in handling non-drug-related activities such as patient counseling).

420 See Smith, supra note 327, at 67.

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ERECTING WOMEN:

CONTRACTING PARENTHOOD FROM MARRIAGE TO DIVORCE

Rachel Polinger-Hyman

The sex impulse was dangerous to the Party, and the Party had turned it to account. They had played a similar trick with the instinct of procreation. The family could not actually be abolished, and, indeed, people wanted it. The children on the other hand, were systematically turned against the family had become in effect an extension of the Thought Police. It was a fact that every member of which everyone could be surrounded right and day by

INTRODUCTION

The disposition of frozen embryos in divorce proceedings presents an opportunity to explore how our judicial system accommodates advances in assisted reproductive technologies with constitutional law and advancements in reproductive technology give rise to ethical and moral dilemmas.
forcing a redefinition of family values, structure, and legal responsibilities.3

Traditionally, the political arena has served as a major contributor in shaping and reflecting societal notions of family.4 Political suggestions have ranged from condemning homosexuality to approving of working mothers outside the home; each of these suggestions has encompassed an ideological view of a society that either supported or criticized an alternative notion of family.5

The traditional nuclear, biological family is now a vision that is constantly morphing.6 Divorce, same-sex relationships, and out-of-wedlock births are examples of recent social phenomena that have challenged the traditional family structure.7 These social changes, in combination with rapid advancements in reproductive technology, are also transforming the fundamental meaning of parenthood.8

Recent developments in the high-tech field of fertility medicine, particularly the ability to cryopreserve embryos and store them indefinitely, have triggered perplexing questions regarding post-divorce rights of ownership.9 Current practices within the fertility field reflect the needs and desires of those actively participating...

3 Lori B. Andrews & Norvete Elster, Regulating Reproductive Technologies, 21 J. LEGAL MED. 35, 46 (2000); see also Mark Hand, Note, Divergence and the Disposition of Frozen Embryos, 28 Hofstra L. Rev. 403, 403-94 (1996) (advancing that New York courts should give joint dispositional custody to divorcing parties when they do not have a prior contractual agreement).

4 See Andrews & Elster, supra note 3, at 46.

5 See id. at 46-47 (noting that each political formulation of "family" will necessarily imply different family values); see also Ruth Macdonald, What Is Wrong with Conventional?, in NEW WAYS OF MAKING BARREN: THE CASE OF EGG DONATION 106 (Cynthia B. Cohen ed., 1996) (noting that politics also plays a part in deciding how women are compensated for reproductive services such as egg donation, embryo donation, or surrogacy).

6 Andrews & Elster, supra note 3, at 47 (noting that the traditional nuclear, biological family consisted of a mother, father, and their children); see also Thomas H. Murray, New Reproductive Technologies and the Family, in NEW WAYS OF MAKING BARREN: THE CASE OF EGG DONATION 52, 54-60 (Cynthia B. Cohen ed., 1996).

7 Andrews & Elster, supra note 3, at 48; see also Lisa Swire Caball, Moral Concerns About Institutionalized Gamete Donation, in New Ways of Making Barren: The Case of Egg Donation 74, 76 (Cynthia B. Cohen ed., 1996) (commenting that even though family structures are changing due to social factors, the parent-child relationship remains constant).

8 Andrews & Elster, supra note 3, at 47-48 (noting that parenthood may be defined by "procreation, genetics, intention, renting, or some combination of those factors.")

9 See J.B. v. M.R., 751 A.2d 613, 616 (N.J. Super. Ct. App. Dist. 2000) (holding that a former husband and wife's in vitro fertilization contract was unenforceable, stipulating that control and ownership of embryos would be relinquished to an IVF (in vitro fertilization) program should their marriage dissolve).

10 Murray, supra note 6, at 52-55 (demonstrating how market analogies are utilized in discussions regarding reproductive technology and its effect on families).

11 See J.B., 751 A.2d at 615 (citing a frozen embryo disposition contract, which stated that, [who] will be asked to execute the attached legal statement regarding control and disposition of cryopreserved embryo(s)."

12 Id. at 615-16 (noting that, as a matter of public policy, individuals should not be forced into parenthood).

13 842 S.W.2d 388 (Tenn. 1992) (granting Junior Davis custody of his and his ex-wife's frozen embryos because she was intent on implanting the embryos outside of wedlock).

14 765 N.E.2d 174 (N.Y. 1990) (upholding the Kass' contractual agreement which provided 753 A.2d at 615 (rejecting an in vitro contract which would donate the frozen eggs to a third party for a fee).”

15 725 N.E.2d 1015 (Mass. 2000) (rejecting a contract which would enable an ex-wife to impregnate her and her ex-husband's frozen embryos even when the ex-husband did not wish to fertilization clause and the ex-husband divorced).

16 See O'Dowd, supra note 1, at 10 (remarking that writing a diary, the narrator notes: “How would I have to resist the present, in which case I would not listen to him, or it would be directed the current realm of reproductive technology, where the law consistently attempts to address new problems. In this new world of reproduction, the future will never resemble the present — it will be as if the marriage dissolved since it will not be able to accurately guide the changing times. Id.)
tically of enforcing written agreements between couples involved in artificial reproductive technologies. Part VI tests the validity of dispositional agreements by constructing an informed consent IVF contract. In sum, this comment criticizes how courts have severely departed from their historically protective stance towards procreative freedom by refusing to enforce IVF reproductive contracts.18

I. BACKGROUND

A. The IVF Process

Before analyzing the legal and political ramifications of contracting for parenthood, it is important to understand the purpose of IVF and the procedures involved.19 IVF provides infertile couples an opportunity to conceive their own children.20 Infertility, however, should not be confused with sterility.21 The medically accepted definition of infertility is the inability to conceive after one year of intercourse without contraception.22 Usually, infertility, unlike sterility, is merely a result of impatience rather than inability to conceive.23

The IVF procedure requires the stimulation of the ovaries to produce multiple eggs, which are then fertilized outside of the woman's body in a petri dish.24 While ninety percent of removed eggs placed in the uterus,25 embryos that are not transferred right away may be stored for later use through cryopreservation.26

B. Cryopreservation

Cryopreservation consists of freezing embryos in liquid nitrogen at subzero temperatures.27 The process of freezing allows storage for later use of the extra embryos retrieved from the female.28 By putting the embryos on ice for later use, cryopreservation relieves

18 Specifically, the Supreme Court has repeatedly established a woman's qualified right to terminate a pregnancy. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); see also Roe v. Wade, 410 U.S. 113 (1973). Moreover, more than half a century ago, the Supreme Court also protected the right to procreate, invalidating a state's provision for involuntary sterilization of habitual criminals. See Skinner v. Oklahoma, 316 U.S. 535 (1942).


21 See JANCE RAYMO ND, PROCREATIVE FREEDOM BY REFUSING TO ENFORCE IVF REPRODUCTIVE CONTRACTS, 588, 593 (1997).

22 The Frustacis sued the Tyler Medical Clinic, the资料显示 hae the high degree of Pregnan, as well as the doctors' alleged negligence in the use of six million dollars. Id.

23 See also RAYMOND, supra note 21, at ch. 1.

24 Enter Spotlight, L.A. Times, Apr. 29, 1990, at A5 (discussing how Pergonal and HCG ing an egg follicle). The birth of the Fruzkis' son in 1989 was a result of over stimulated, publicized case which illustrated various problems associated with fertility drugs. All those who women take fertility drugs. In this case, four sheep died and within four days, problems, including heart failure. The Fruzkis sued the Tyler Medical Clinic, the资料显示 hae the high degree of Pregnan, as well as the doctors' alleged negligence in the use of six million dollars. Id.

25 See supra note 22, at 1377; see also Nancy Hill-Holzman, Frustacis Preparing to Re-Birth an Embryo: Genesis of a New Case Law (discussing how Pergonal and HCG ing an egg follicle). The birth of the Fruzkis' son in 1989 was a result of over stimulated, publicized case which illustrated various problems associated with fertility drugs. All those who women take fertility drugs. In this case, four sheep died and within four days, problems, including heart failure. The Fruzkis sued the Tyler Medical Clinic, the资料显示 hae the high degree of Pregnan, as well as the doctors' alleged negligence in the use of six million dollars. Id.

26 See Jennifer L. Canow, Note, Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Standard of Care Adjudicating Procreative Freedom and Reproductive Technology, 43 DePaul L. Rev. 523 (1993) (discussing how, in the absence of cryopreservation, the extra eggs extracted from the woman that are not implanted will expire).

27 Marcia J. Yerxa, supra note 25, at 1083 (explaining that the best stages at which to freeze the embryos are at the three, four, or eight cell development stage).

28 See id., at 1100-05; see also Lisa A. Atkins, Preservation of Human Egg and Embryos Through Procreation: The First Human Pregnancy Resulting from Cryopreservation Occurred in
the woman from undergoing further egg retrievals that may be painful, risky, and dangerous.29

Cryopreservation is appealing for several reasons. First, the cost efficiency of cryopreservation should not be overlooked.30 Each IVF cycle, which includes ovum retrieval and implantation, can cost between $10,000 and $20,000.31 Extracting more than one egg during the IVF procedure reduces the need to repeat the process when a subsequent pregnancy is desired.32

Second, hormonal induction of egg production causes numerous deleterious side effects for successful embryo implantation.33 Women who are at a high risk of developing ovarian disease following IVF ovarian stimulation are advised to freeze their embryos for subsequent transfer.34 Cryopreservation also maximizes the potential of future pregnancy by giving doctors and parents the opportunity to choose the times when there is a reasonable possibility of success.35 In addition, allowing the woman's cycle an opportunity to acclimate to a more natural balance after the IVF procedure benefits the woman by increasing the success rate for pregnancy.36

30 See Rayward, supra note 21 (describing difficulties associated with the IVF treatment such as pregnancies occurring outside the uterus, ectopic pregnancies, and miscarriages).
31 See [IVF Costs], at http://www.advancedfertility.com/ivfprice.htm (last visited Sept. 28, 2003) (reporting that embryo freezing and storing may entail further costs in addition to the IVF cycle procedures).
32 See Carow, supra note 26, at 529; see also Helen Bequrest Holmes, To Freeze or Not to Freeze: Is That an Option? in ISSUES IN REPRODUCTIVE TECHNOLOGY 193, 196 (Helen Bequester Holmes ed., 1994) (commenting that the "medical reasons" to utilize cryopreservation are numerous).
33 Robyn Rowland, LIVING LABORATIRES: WOMEN AND REPRODUCTIVE TECHNOLOGY 80 (Indiana University Press 1992) (finding that clomiphene, a current fertility hormone used to stimulate egg production, has a similar chemical structure to the drug diethylstilbestrol (DES)). Between the 1940s and 1970s, DES was administered to pregnant women as a prophylactic measure to avoid miscarriage. This drug was eventually removed from the market, as it was found to cause cancer of the vagina, cervix, and breast, increased rates of infertility, spontaneous abortions, and certain miscarriages in daughters of these women. Id.
34 Id. at 35 (finding that pre-menopausal women should also consider freezing their eggs for future use).
35 Richard P. Dickey, The Medical Status of the Embryo, 32 Loy. L. Rev. 317, 333 (indicating that high fever, bleeding, accidental injury to the mother, or a natural disaster can compromise implantation success).
36 See Carow, supra note 26, at 529-530 (noting that a woman is more likely to get pregnant through IVF when her body is free from fertility drugs).

Third, cryopreservation provides optimum family planning by enabling a couple to delay having children for years without the worry of future infertility problems.37 Because fertility capabilities decrease with age, technological reproduction affords older couples hope.38 IVF is not just a treatment for the forever infertile, it is also an option for couples who have already had children, but who cannot conceive again due to either male or female physiological factors.39

Fourth, cryopreservation offers couples a choice in deciding the disposition of the embryos produced in the IVF process.40 For fertile couples as a result of successful cryopreservation programs,41 couples may choose to use embryos donated by another couple, or embryos donated by another couple for use by that couple, or embryos donated by another couple for use by that couple's physician.

In fact, the Centers for Disease Control has discovered that the live

37 See John A. Robertson, Ethical and Legal Issues in Cryopreservation of Human Embryos, 47 FERTILITY & STERILITY 597 (1987) (comparing cryopreservation with insuranc e coverage because the former is not just a treatment for the forever infertile, it is also an option for couples who have already had children, but who cannot conceive again due to either male or female physiological factors).
38 Leon Speroff et al., CLINICAL GYNECOLOGIC ENDOSCOPY AND INFERTILITY 932 (5th ed. 1994) ("In successful IVF programs, where take-home baby rates can be in the 35% range, fertility drugs cause couples to safeguard against future infertility by freezing their eggs now for later use.
39 See supra note 24.
40 See John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the Disposition of the Embryos Produced in the Reproductive Process Related to an Assisted Reproductive Technology Procedure, 85 U. PA. L. REV 307 (1987) (comparing cryopreservation with insuranc e coverage because the latter is not just a treatment for the forever infertile, it is also an option for couples who have already had children, but who cannot conceive again due to either male or female physiological factors).
41 See supra note 24.
42 See supra note 24; see also Virginia Groark, Divorce Settlement Keeps Frozen Embryos In Limbo, Chi. Trib., Mar. 25, 2000, at NS (reporting that a divorcing couple in Illinois agreed to custody agreement).
43 See supra note 24; see also Virginia Groark, Divorce Settlement Keeps Frozen Embryos In Limbo, Chi. Trib., Mar. 25, 2000, at NS (reporting that a divorcing couple in Illinois agreed to custody agreement).
birth per thaw rate for frozen embryos is usually lower than the live birth per transfer rate for fresh embryos that were never frozen.\(^{46}\)

Another problem associated with cryopreservation involves the time limit imposed on storing the embryos.\(^{46}\) To illustrate, a "prenatal massacre" ensued in Great Britain in 1996 when frozen embryos, essentially abandoned by their parents, were removed from liquid nitrogen freezers and immersed in a warm solution where they were allowed to disintegrate.\(^{46}\) This event occurred pursuant to a United Kingdom law which insisted that frozen embryos must be thawed and allowed to die after five years.\(^{46}\)

One of the greatest disadvantages of cryopreservation, which is the focus of this comment, lies in the ability to contract for the future disposition of the frozen embryos.\(^{46}\) Many programs require couples to sign cryopreservation contracts delineating the terms under which the clinic can preserve the embryos commercially.\(^{46}\) Clinics outline the time limits in which frozen embryos are considered abandoned and highlight the actions of the clinic in such circumstances.

\(^{46}\) Id.

\(^{47}\) See Robertson, Legal Structure, supra note 39, at 375 (discussing the problems that can arise when gamete providers do not fully consider the ramifications of storage time limits on cryopreserved embryos).

\(^{48}\) Id. (noting that parental consent is required for cryopreservation beyond five years).

\(^{49}\) Howard J. Jones, Jr., Cryopreservation and its Problems, 53 FERTILITY & STERILITY 780, 780 (1990). The following instances are unexpected circumstances which should be included in a reproductive contract:

- Death or disability of the prospective parents; death or disability of one of the prospective parents; legal separation of the prospective parents; divorce of the prospective parents; if the cryopreserved material remains in storage beyond the prospective mother's reproductive limit or beyond some other agreed upon time limit; loss of contact with the prospective parents, including their failure to pay current or delinquent cryopreservation fees and charges, if any; loss of interest by the prospective parents in attempting a pregnancy; a wish of one [or both] prospective parent's to remove the cryopreserved pre-zygote/pre-embryo from the original program; [and] voluntary or involuntary discontinuation of a cryopreservation program by an IVF program.

\(^{50}\) John Dwight Ingram, In Vitro Fertilization: Problems and Solutions, 98 DICK. L. REV. 67, 78 (1993) (stating that medical facilities should clearly elucidate terms such as "transfer or withdrawal of embryos, sale or adoption, use for research, or destruction, and . . . time limits.").

\(^{51}\) Id. at 74 (commenting that medical facilities and gamete providers may disagree about the removal and transfer of embryos to another facility, and that gamete providers may argue Allie B. Patrick, Note, The Davis Dilemma: How to Prevent Battles Over Frozen Preembryos, 41 CASE W. RES. L. REV. 543 (1991) ("IVF has generated legal problems stemming from disputes between IVF participants and their clinic, and disputes between the IVF participants themselves.").

\(^{52}\) See Ingreman, supra note 49, at 75 (finding that parties will not typically enter into an IVF contract unless they are certain that the contract's provisions will be honored).

\(^{53}\) Id. at 76 (asserting that couples will have strong emotions regarding issues such as disposal, implantation, death, and divorce).

\(^{54}\) See Samuel A. Gunzburg, Note, Frontr Life's Dominions: Extending Reproductive Autonomy Through Life-Changing Decisions and Interrogating the Power of Surrogacy Contracts, 65 HASTINGS L. J. 2205, 2211-12 (1997) (commenting that Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (demonstrating Junior and Mary Sue Davis’ disagreement about the disposition of their embryos after their marriage and ultimately litigate, the courts’ position leaves much to be de-
II. THE EARLY DAYS

A. Maidenhead Revisited: The First Time

The first IVF procedure in the United States occurred in 1973. Doris and John Del Zio were the first couple in the United States participating in the radical new fertility procedure. After three failed attempts to repair Mrs. Del Zio’s fallopian tubes, New York fertility specialists, Dr. William Sweeney and Dr. Landrum Shettles, performed this procedure by surgically removing an egg from Mrs. Del Zio’s ovary and placing it in a sterile package. The egg was then fertilized with Mr. Del Zio’s sperm and placed in an incubator to develop for three days at Columbia Presbyterian Hospital.

Dr. Raymond Vande Wiele, Chairman of Obstetrics and Gynecology at Columbia, became enraged when he discovered that Dr. Shettle had not sought the institution’s permission before performing the experiment. Dr. Vande Wiele objected to the procedure on ethical and moral grounds. Punctuating his argument, Dr. Vande Wiele removed the container from the incubator and opened it, destroying the Del Zios’ chances of ever giving birth to a child.

B. Bipolar Nation: Redefining Family Values

Married couples have a fundamental right to determine whether and when they can bear a child. Does this right extend to couples choosing the means by which they bear a child? Every culture and religion in the world has recognized procreation as a natural right, although Dr. Vande Wiele was ethically opposed to the IVF procedure, he evidently was not opposed to destroying an embryo having a ten to twenty percent chance of becoming a child.

As reproductive technology procedures progressed throughout the 1970s and 1980s, it became clear that the Del Zios were not an exception to IVF embryo management; rather, they were the resolved ethical and moral issues regarding embryo disposition. Around the world, IVF clinics were coming under attack, predominantly from right-to-life organizations. For example, priests in and patients had to walk past a human barrier whenever they wanted to get in.

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57 See Shapiro, supra note 55, at 13 (advancing that courts tend to disregard contracts concerning embryo disposition).
58 See Andrews, supra note 58, at 16.
60 Id. (identifying Dr. Landrum Shettles as a fertility specialist based at Manhattan’s Columbia Presbyterian Medical Center).
61 Id. (stating that the zygote was incubated in a culture medium for this period of time to maximize the probability of a successful implantation in Mrs. Del Zio’s uterus).
62 See Andrews, supra note 58, at 16-17 (revealing that Mrs. Del Zio’s reproductive organs were damaged beyond repair after the surgical procedure, making another egg retrieval impossible); see generally Del Zio v. Presbyterian Hosp. of N.Y., No. 74 Civ. 3588 (S.D.N.Y. 1978) (recognizing a cause of action for emotional distress for the mishandling or destruction of embryos). For unilaterally destroying the embryo of his own initiative and without notice or consultation with the couple involved, the couple sued Dr. Vande Wiele for intentional infliction of emotional distress. The jury awarded the couple $500,000 in damages. Id. at 2, 11. This case triggers important legal issues. The potential liability resulting from control and ownership of embryos hinges on the legal status of the embryo. If property law governs, then the embryo is classified as a person, then perhaps a common law theory of damages for mishandling the body of a close relative may arise. Id. at 5-13.
63 Andrews, supra note 58, at 7 (explaining that many clinics do not want to destroy embryos, even in cases of abandonment, where the genetic parents cannot be contacted after demise of the donated frozen embryo, calling it a "prenatal wrong". As an alternative, married women volunteer to bring embryos to terms, similar to taking in an orphan or a human barrier whenever they wanted to get in.
64 See id. at 18 (reporting that more than 1,300 doctors and scientists were working on assisted reproductive technology research by 1985).
65 See generally Ingram, supra note 49, at 69-72 (explaining that questions such as "what do we mean by 'life'?" and "when does life begin?" abound in IVF discussions).
66 Andrews, supra note 58, at 23-24 (highlighting religious and legal protests in Australia, the United States, and England).
67 See id. (noting that one young woman seeking abortion services looked a protesting priest in the eye and asked, "Why don't you want me to have this baby?").
68 Id. at 25; see also, Risenstahl v. Baird, 405 U.S. 438, 453 (1972), "If the right of privacy means governmental intrusion into matters so fundamentally affecting a person as the decision..."
r al right of marriage.\textsuperscript{71} The United States Constitution also protects this right.\textsuperscript{72} But how are morality and ethics reconciled with the desire to procreate for non-married couples?

Charles Baudelaire, a French poet, advanced an apt discussion about the function of morality in society.\textsuperscript{73} He wrote, in My Heart Laid Bare, the following:

All the imbeciles of the Bourgeoisie who indiscriminately use the words: "immoral," "immorality," "morality in art" and other such stupid expressions remind me of Louise Villedieu, a five-franc whore who once went with me to the Louvre. She had never been there before, and began to blush and cover her face with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statues and pictures, how such indecencies could be flaunted in public.\textsuperscript{74}

Baudelaire illustrates, through the subjective lens of high and low art, how morality is a bipolar disease, capable of two extremes.\textsuperscript{75} In the name of ethics, one doctor would destroy an embryo, and conversely, in the name of ethics, another doctor would strive to protect the embryo from destruction.\textsuperscript{76}

\textsuperscript{71} ANDREWS, supra note 58, at 25 (further opining that, "For many married couples [having children] is the essence of family.").

\textsuperscript{72} See Roe v. Wade, 410 U.S. 113 (1973) (dealing with the fundamental right to make reproductive decisions when the means chosen by the state involved forcing a woman to remain pregnant against her wishes). Although this right of procreation is not an enumerated right, the Supreme Court has interpreted the Constitution to protect this right. Id.; see also Monique Vinet Imbert, Note, The Golden Egg: In Vitro Fertilization Produces Adjudication, 17 B.U. Int’l. & Comp. L. Rev. 495, 525-06 (1991) (discussing the long-established United States Supreme Court precedent that "an individual may, without unjustified government interference, make decisions relating to marriage, procreation, contraception, abortion, family relationships, and child rearing."); Skinner v. Oklahoma, 516 U.S. 525, 541 (1992) (holding that marriage and procreation are among the basic civil rights of man); see also Mario J. Trespalacios, Comment, Frozen Embryos: Towards an Equitable Solution, 46 U. Miami L. Rev. 803, 823-24 (1992) (discussing the conflict that arises when the enforcement of one person’s rights denies the rights of the other party). The argument advanced is that the parties exercised their rights to procreate when they decided to undergo the IVF procedure. Thus, they should not be allowed to change that decision if that decision would deny the other party the right to the preembryos. Id.

\textsuperscript{73} CHARLES BAUDELAIRE, My Heart Laid Bare 203-04 (Peter Quennell ed. & Norman Cameron trans., 1951).

\textsuperscript{74} Id. at 203-04.

\textsuperscript{75} Id.

\textsuperscript{76} See ANDREWS, supra note 58, at 71-72 (discussing the controversy in Britain regarding laws which required the destruction of abandoned embryos that had been in storage for more than five years as of August 1, 1986). Then Prime Minister John Major denied a last-minute appeal by anti-abortion groups to delay the disposal of the embryos. After the embryos had been destroyed, the clinics received requests from the genetic parents to preserve the embryos. Doctors, understandably distressed, never imagined they would be destroying embryos of women that were desperate to conserve them. Id.

Societal morals are currently in flux due to the interplay between assisted reproductive technology and traditional conceptions of family structure.\textsuperscript{77} Therefore, before answering whether marriage is or should be a condition precedent to undergoing IVF procedures, or especially embryo disposition during divorce proceedings, it is first important to define and understand modern conceptions of parenthood.\textsuperscript{78}

Currently, one of the ways in which men and women are distinguishable is by a woman’s ability to bear and beget children.\textsuperscript{79} Yet, in the evolving world of the new millennium, even this idea is being challenged.\textsuperscript{80} In 1997, Japanese researchers announced that the ability to circumvent the need for human gestation was an artificial womb with an artificial embryo.\textsuperscript{81} The advent of artificial wombs would compel the parenthood model to evolve and challenge a history of Supreme Court cases based on traditional notions of family.\textsuperscript{82} A man could become a single parent by purchasing an embryo, and utilizing the machine to nurture and support the fetus.\textsuperscript{83} A woman could utilize an artificial womb to circumvent pregnancy.\textsuperscript{84} In an epoch of environmentally engineered embryos

\textsuperscript{77} Janet L. Delgitt, The "Intersex" of Reproduction: Reproductive Technologies and the Parent-Child Bond, 26 Conn. L. Rev. 1261, 1261-62 (1994) (commenting that the "complex system of principles" endemic to our society are challenged by scientific innovation).

\textsuperscript{78} ANDREWS & EBERLE, supra note 3, at 47 (supporting that reproductive technology encourages a reconsideration of the meaning of "parent").

\textsuperscript{79} ANDREWS, supra note 58, at 73-74.

\textsuperscript{80} Id.

\textsuperscript{81} Id. (describing the artificial womb as a clear plastic box of warm amniotic fluid in which a Currently, the Japanese researchers have only attempted to utilize the device with goats, removing the fetuses from their mothers three weeks before their due date and placing them in the artificial womb. Id.

\textsuperscript{82} The Connecticut Supreme Court has recognized that the traditional notions of nuclear family have been replaced and extended family now play a larger role. The court refuses a law which fits a very narrow definition of "family." Doe v. Doe, 710 A.2d 1297, 1317 (Conn. 1998).

\textsuperscript{83} ANDREWS, supra note 58, at 74 (theorizing the social and familial implications of the Japanese artificial womb technology).

\textsuperscript{84} Id. Highlighting that women can also benefit from the Japanese womb machine, despite the fact that they are biologically equipped to support a fetus on their own).
and artificial wombs, society truly personifies a bipolar nation: the best and worst of times.\(^\text{85}\)

Disputes regarding the disposition of reproductive biological material can arise in a rich variety of circumstances and contexts.\(^\text{86}\) Two fundamental rights of constitutional protection are the right to procreate and the right to avoid procreation.\(^\text{87}\) Recently, courts have considered whether, through contract, these procreative rights can be waived.\(^\text{88}\) Although case law indicates that waiving reproductive rights is contrary to public policy, courts should recognize a couple's procreative liberty by binding the gamete providers to their reproductive agreements.

III. ARGUMENTS FOR THE FROZEN EMBRYO AS LIFE, PROPERTY, OR DESERVING SPECIAL RESPECT

A. Embryo as Life

The pro-life movement is the impetus behind viewing the embryo as a life.\(^\text{89}\) Under this view, destruction of a preembryo is equivalent to the destruction of a living human being.\(^\text{90}\) Applying the Right-to-Life analysis, the husband's right to avoid procreation ceases to exist after participation in the IVF program.\(^\text{91}\)

I. Davis v. Davis

In 1980, Mary Sue and Junior Davis married and Mary Sue became pregnant six months later.\(^\text{92}\) Unfortunately, a tubal pregnancy forced her to undergo surgery, resulting in a loss of her right fallopian tube.\(^\text{93}\) After her fifth tubal pregnancy, Mary Sue decided to have her remaining fallopian tube ligated, leaving her unable to naturally conceive.\(^\text{94}\) The Davises then decided to pursue IVF in order to have a child.\(^\text{95}\)

The Davis' unsuccessfully attempted IVF six times, incurring a total expense of $35,000.\(^\text{96}\) Each pregnancy attempt required Mary Sue to endure hormone injections, invasive surgery, and psychological toll as she wondered each time if the procedure would work.\(^\text{97}\) On December 8, 1988, their last attempt at IVF, nine eggs were retrieved from Mary Sue, fertilized, and allowed to develop in the lab-


\(^\text{87}\) See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); see also Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that a statute outlawing the use of contraceptive devices was an unlawful invasion of the privacy of marital relationships); see also Stanford v. Kramer, 455 U.S. 745, 750 (1982) (noting the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); see also Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1983) (recognizing that "the choice to terminate a pregnancy or bear a child" is "one of the most intimate decisions in human experience.")

\(^\text{88}\) A.Z., 725 N.E.2d at 1056-59.

\(^\text{89}\) See Dehnel, supra note 20, at 1382 (stating that "the Right-to-Life approach would accord a preembryo the full rights and protections of persons under the law because they believe life begins at the 'moment of conception'.")

\(^\text{90}\) Polinger-Hyman, supra note 23, pp. 103-104.

\(^\text{91}\) Id.

\(^\text{92}\) Id. (explaining that the couple attempted adoption but for various reasons decided on IVF because, fertilization of these ova in a petri dish using the sperm provided by a man, and the ova were taken. Id.

\(^\text{93}\) Id. at 961-92 (noting Mary's failed attempts at pregnancy even though she subjected herself to both subcutaneous injections, which were necessary to shut down her pituitary gland, and intramuscular injections, to produce ova).

\(^\text{94}\) See Davis, 842 S.W.2d at 592; see also Davis v. Davis, No. E-14496, 1998 WL 140495, at *2 (Tenn. Cir. Ct. 1998) (outlining the difficulties Mary Sue underwent in her attempt to
The couple understood the scientific process of cryopreservation, but were still unaware of possible ethical issues and how cryopreservation changed the IVF process. Furthermore, the couple did not consider the ramifications of storing the embryos beyond the time needed to transfer them if pregnancy did not initially result. No written agreement existed between the clinic and the couple, or between Mary Sue and her husband.

No pregnancy resulted from the last IVF attempt, and in February of 1989, before another embryo transfer could be considered, Junior Davis filed for divorce. Thereafter, a dispute arose regarding the disposition of the seven remaining cryopreserved embryos.

Mary Sue requested custody of the embryos in order to later implant them and have additional opportunities at motherhood. Junior opposed Mary’s request, desiring to keep the embryos frozen until he decided “whether or not he wanted to become a parent outside the bounds of marriage.”

### a. The Trial Court’s Decision

The trial court concluded that embryos are humans, and as such, they should be afforded the same protections as people born alive. The trial court made an astounding assertion, stating that “human life begins at the moment of conception, . . . [and] Mr. and Mrs. Davis have accomplished their original intent to produce a human being to be known as their child.” The court further determined that its role was to establish public policy determining the status of embryos in a divorce proceeding. Employing the above reasoning, the court found that awarding the frozen embryos to Mary Sue recognized the “best interests of [the] children.”

In this b. The Court of Appeals Decision

The Court of Appeals of Tennessee placed significant emphasis on the fact that the frozen embryos were a result of mechanical manipulation. Unlike the trial court, the appellate court considered and concluded that his constitutional rights were violated in a situation where pregnancy had not yet occurred. After reviewing pertinent

98 Davis, 842 S.W.2d at 592.
99 Id.
100 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
101 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
102 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
103 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
104 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
105 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
106 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
107 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
108 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
109 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
110 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
111 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
112 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
113 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
114 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
115 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
116 Davis v. Davis, No. E-14496, 1989 WL 140495, at *3-4; see also Teopralicious, supra note 72, at 98-103.
nent legislative acts and case law in Tennessee, the court concluded that there was no compelling state interest to justify embryo implantation against the will of either party.114

Evaluating the disposition of the frozen embryos from a joint interest standpoint, the court held that justice would not be served by ordering Junior to be a father; this concept would be abhorrent as ordering Mary Sue to implant an embryo against her will.115 The final holding of the Court of Appeals granted both Mary Sue and Junior joint control over the disposition of the embryos.116 This ruling thus required the consent of both parties before Mary Sue could implant the remaining seven cryopreserved embryos.

c. The Tennessee Supreme Court Decision

The Tennessee Supreme Court believed that the appellate decision did not adequately address the disposition of frozen embryos in situations where couples disagree.117 By the time the case reached the Supreme Court, Mary Sue and Junior's positions as to the disposition of the embryos had shifted; both parties had remarried and Mary Sue desired to donate the embryos to a childless couple while Junior sought to have the embryos discarded.118 The court disagreed with the trial court's finding that the embryos were persons, and discarded the appellate decision which afforded the embryos a property status.119 Instead, the court determined that the preembryos fall into an "interim category" between property and persons,

114 Id. at *3 & n.7 (comparing the ovum of unrestricted state action to the notion of controlling reproduction in Nazi Germany).

115 Id. at *3; see also Casor, supra note 26, at 538-43 (describing the rights of a preembryo from various positions, including the Right-To-Life position, the special respect position, and the personal property approach). Unlike the trial court application of the Right-To-Life view, the appellate court adopts the property view. Under the property approach, neither party is allowed to implant the embryos against the will of the other unless bodily interests are introduced, and the preembryos are not entitled to state protection. The Right-To-Life position and the property approach are in sharp contrast with each other because the Right-To-Life approach suggests that implantation must take place, regardless of whether the woman desires implantation, while the property approach allows each "gamester-donor" to have the right to determine whether implantation should take place. Id. The problem inherent in the property approach is that it classifies embryos as property, which recalls the antiquated notion of slavery in which persons were considered property.

116 Davis, 1960 WL 138097, at *3 (holding that, to be consistent with existing law, both parties should share an interest in the two fertilized ova).

117 Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

118 Id.

119 Id. at 597.

120 Id. at 598 (alizing the preembryos for their potential to become babies rather than for their value as right cell organisms).

121 Davis, 842 S.W.2d at 598 (referring to individuals' Constitutional right to privacy when deciding whether to become parents).

122 Id. at 600.

123 Id. at 601. The United States Supreme Court has addressed the issue of procreation as falling under the right of privacy. "The right of privacy may not be vested in the doctor or the patient. 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 not to bear a child."

124 Davis, 842 S.W.2d at 604.

125 Id. at 604; see also Daniall I. Steinberg, Note, Divergent Conceptions: Procreative Rights and Disputes Over the Fate of Freason Embryos, 74 B. U. L. Rev. 313, 320-21 (1997) (discussing the right to life approach and the special respect view, which strikes a balance between the property approach).

126 See Davis, 842 S.W.2d at 604; see also Roe v. Wade, 410 U.S. 113, 139 (1973) (articulating the concept that a pregnant woman cannot be isolated in her privacy because of the child she specializes from various areas unable to agree on the point in time when life begins, with many courts holding that it was also unable to make that determination. Id. This fundamental liberty procreation, contraception, family relationships and child rearing. See Planned Parenthood

127 and should therefore receive "special respect" because of their potential for human life.

128 Interestingly, the Supreme Court did not focus its inquiry on the preembryo.129 Rather, the court framed the issue on whether the parties would become parents.130 Applying the Tennessee state constitutional law, the court concluded that the "right of procreation is a vital part of an individual's right to privacy." This right includes "the right to procreate and the right to avoid procreation." The court held that in situations where there is no other reasonable alternative for parties wishing to become parents than to consideration. However, in cases where there is a reasonable alternative, "the party wishing to avoid procreation should prevail."

2. The Davis Court Framework

The holding of the Davis court ultimately dismissed Mary Sue's right to procreate. It reasoned that without implantation of the frozen embryos, the fundamental privacy rights normally associated with pregnancy were not triggered. This argument overlooks the
emotional, psychological, familial, and religious ramifications surrounding the decision to bear a child. By promoting pregnancy as the "gatekeeper of reproductive rights," the court fails to account for the physical risks the female experiences as a consequence of the IVF procedure and the notion that the pregnancy process begins before an embryo implants itself in the lining of a woman's uterus.

From a public policy standpoint, determining an embryo to be a human being and then regulating from that position probably does not serve the best interests of the participating couple or society at large. If embryos are indeed humans, then the procedures used on them for research purposes must be limited. Also, treating embryos as persons may require all embryos extracted during each cycle to be implanted because the cryopreservation process runs a risk of harming them.

Furthermore, ovarian stimulation is an inexact science, yielding an unpredictable amount of eggs with each cycle. Implanting all these "viable" embryos would produce a tremendous amount of high order multiple pregnancies. Such multiple pregnancies are dangerous for both the mother and the babies. Therefore, promoting multiple pregnancies through the restrictive regulation of reproductive technologies serves no one's best interests.

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182 Citry, 505 U.S. 833, 852-53 (noting the physical constraints of a pregnant woman and identifying this as a key factor in justifying restriction of the state's role in limiting abortion rights).

183 Dear, supra note 2, at 457-62 (asserting the idea of pregnancy as a gatekeeper for reproductive rights and arguing that parties to an IVF conception should be afforded reproductive rights just as those parties to an in vitro conception).


185 Id.; see also Robertson, Legal Structure, supra note 39, at 981-82.

186 Daar, Paper Tiger, supra note 130, at 635-36; see also Robertson, Legal Structure, supra note 39, at 971.

187 Daar, Paper Tiger, supra note 130, at 635-36; see also Shirley J. Paine et al., Ethical Dilemmas in Reproductive Medicine, 18 WYETH L. Rev. 51, 54 (1996) (recounting the process for IVF and discussing the number of eggs that can be retrieved from a woman at any one time as being from one to fifty-six, with an average being around twelve).

188 Daar, Paper Tiger, supra note 130, at 636.

189 See Judith Daar, Selective Reduction of Multiple Pregnancy: Lifesaving Ethics in the Womb, 25 U.C. Davis L. Rev. 773, 778-79 (1992) (explaining that maternal complications increase with the number of fetuses as well as a dramatic increase in the rate of neonatal and infant deaths).

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B. Embryos as Property

Another possible classification for embryos is that they are property. The property approach can require the mutual consent of the parties involved before allowing implantation of the cryopreserved embryos. Unlike the Right-to-Life approach, the property theory can be viewed as not requiring state protection of the


Maureen and Steven Kass were married in 1988 and quickly began trying to conceive a child. Upon discovery that her exposure to diethylstilbestrol (DES) earlier in Maureen's life greatly reduced her chances of becoming pregnant, the couple then sought fertility assistance.

In 1990 the couple underwent five different egg retrieval procedures and doctors attempted nine different times to implant the embryos into Maureen's uterus. Unfortunately, she never carried any of them to term.

Three years later, in 1993, the couple signed four different consent forms provided by the hospital which outlined the procedures to be performed, the disposition of the fertilized eggs, and the disposition of the frozen embryos. These forms included instructions regarding the disposition of the embryos in the event of divorce.
In late 1993, the Kass’ decided to divorce, at which time five embryos remained frozen and stored at the hospital.\textsuperscript{10} The disposition of the frozen embryos triggered a bitter custody dispute, with Maureen wanting custody of the frozen embryos in order to attempt another implantation, and with Steven opposing the removal of the embryos from storage to again attempt pregnancy.\textsuperscript{14}\textsuperscript{6}

a. The Supreme Court of Nassau County Decision

In 1995, the Supreme Court of Nassau County in New York awarded custody of the embryos to Maureen and directed her to “exercise her right” to have the embryos implanted.\textsuperscript{14}\textsuperscript{7} Additionally, the court found that Maureen did not waive these rights although she signed the clinic consent forms and filed an “uncontested divorce” agreement.\textsuperscript{14}\textsuperscript{8} Upon addressing Steven’s rights, the court succinctly ruled that they ended with ejaculation.\textsuperscript{14}\textsuperscript{9} In accordance with the trial court in Davis, the Kass court ruled that until the fetus reaches the stage of development when the State’s interest in protecting life is triggered, the mother possesses exclusive control over the nonviable fetus’ fate.\textsuperscript{14}\textsuperscript{10}b. The Appellate Division

The Appellate Division reversed the New York Supreme Court’s decision, and determined that a woman’s right to privacy and bodily integrity do not arise until after implantation of the embryo in the uterus occurs.\textsuperscript{14}\textsuperscript{11} The court further held that the contract signed by the couple involving the disposition of any unused frozen embryos should control.\textsuperscript{14}\textsuperscript{12} The court’s decision suggested that embryos were not recognized as persons for constitutional purposes and Maureen’s rights to privacy or bodily integrity were not yet implicated.\textsuperscript{14}\textsuperscript{13}

c. The Court of Appeals Decision

The New York Court of Appeals affirmed the appellate decision, finding that Maureen and Steven adequately expressed their agreement.\textsuperscript{14}\textsuperscript{14} By enforcing the contract, the court felt it was encouraging an important public policy: integrity of the contract.\textsuperscript{14}\textsuperscript{15} After reading the consent agreement, the court determined that if the parties’ intent is ascertainable from the signed agreement, then courts

\textsuperscript{10} Id. at 177 (detailing the “uncontested divorce agreement” the couple signed just prior to their divorce, which indicated that the embryos should be disposed of so that neither Maureen nor Steven Kass could obtain custody).

\textsuperscript{11} Id. (detailing that Steven wanted specific performance of the contract that he and Maureen signed with the clinic so that the clinic would retain the embryos for research purposes).

\textsuperscript{12} Id. at 177 (reasoning that a woman undergoing IVF treatment should have decision-making authority over a fertilized egg produced through the treatment, just as a pregnant woman has the authority to determine the fate of a nonviable fetus).

\textsuperscript{13} Id. It is interesting to note that the court did not enforce the contract and instead reasoned that Maureen could not sign away her constitutional right of decisional authority over the disposition of her embryos. This statement is inapposite with the idea that cryopreservation affords couples choices in deciding the disposition of their frozen embryos. A more precise interpretation of decisional authority in the context of cryopreservation contracts is that it affords the woman a choice. If this is so, then the whole idea behind creating a cryopreservation contract between the couple and the clinic, and between the couple themselves, is meaningless, because even after the contract has been entered into, the woman still maintains complete control. The court here implies that even if the couple decides on a method for the disposition of their embryos, the woman’s right to revoke her approval is not subject to any limitations or contract boundaries.

\textsuperscript{14} Kass v. Kass, 996 N.E.2d at 177.

\textsuperscript{15} Id.

\textsuperscript{16} See id. The court did, however disagree over whether the disposition agreement was sufficiently clear.

\textsuperscript{17} Id. at 178. A plurality of the Appellate Division Justices believed that the consent form clearly indicated that the progestogen should go to research purposes if the couple could ambiguous as to be worthless. A final two Justices believed that a balancing of the parties’ preemergent, id.

\textsuperscript{18} Id. at 180-81 (reasoning that because the Kasses were both involved in the signing of the agreement and both parties concurred that the agreement was an expression of their intent, would not be upheld in a court of law, then the integrity and seriousness of the consent before making their decisions. The individuals making these deeply personal decisions ensure that the interested parties are the ones making the decisions and the court has the at 177-79.}
should give effect to the plain intent of the agreement. Because the parties’ intent was clear, the court honored the agreement.

2. The Kass Approach: Identifying Shared Preferences through Contracts

A property approach asks courts to look at the preferences of the progenitors. This view is unrealistic without the existence of a contract because it assumes a shared preference between the progenitors. The contract framework is compatible with the property approach because it holds that addressing the rights of the parties is what courts would prefer to do, as opposed to focusing on the rights of the preembryo.

One of the benefits of the property view is that property owners are entitled to complete control, within legal bounds, over their property. Classifying embryos as property enables the respective egg and sperm donor to maintain complete decision-making authority over the disposition of their embryos. By injecting contracts into the property approach, the owners would be able to transfer their ownership rights of the embryos.

The Kass court accepted the couple’s agreement regarding the future disposition of their embryos as binding. Although seemingly establishing a precedent for the enforcement of IVF agreements, later courts have declined to enforce reproductive contracts. "Contract law is primarily an instrument of commercial

transfer," and because IVF contracts involve life choices, courts are unwilling to later force procreation through IVF agreements.

C. The Special Respect View

The special respect view strikes a compromise between the Right-to-Life view and the property approach. The belief is that preembryos deserve special respect that is greater than that afforded to property or even human tissue. By recognizing the special significance of preembryos and their potential to become full-fledged individuals, courts are urged to take into account the preembryo’s significance without ignoring the gamete provider’s interests.

1. The A.Z. v. B.Z. Decision

Provided that contracts do not contravene public policy, adults are free to enter into any bargains they choose. Recently, the Massachusetts Supreme Court diminished the role of contracts between genetic progenitors. The case of A.Z. v. B.Z. involved a controversy about a document executed by a fertility clinic and signed by a married couple desiring IVF treatment. The wife marked through pre-printed language on the clinic’s prepared form, substituting in her own handwriting and detailing the disposition of the

Ungency occurs and . . . the possibility of unfairness that could arise when a party's circum-
cumstances have changed.")

130 Kass, 696 N.E.2d at 181.
131 Id. at 182 (stating that “[t]hese parties having clearly manifested their intention, the law will honor it.”).
132 Sex v. Trespalacios, supra note 72, at 814 (referring to a balancing of the parties’ interests and the attendant negative implications that arise when treating a preembryo as property).
133 See id. at 826-28.
134 See id. at 826 (explaining that this assumption is consistent with the notion that preem-
bryos may have some legal rights).
135 See, e.g., Breas v. Wheeler, 61 P. 782 (Cal. 1900); Directors of Fallbrook Irrigation Dist. v. Abila, 39 P. 794, 796 (Cal. 1895) (stating that property ownership confers upon the owner the right to the property’s use however he wishes, assuming his use is within the bounds of the law).
136 See, e.g., Yock v. Jones, 717 F. Supp. 421, 426-27 (E.D. Va. 1989) (recognizing a property interest in embryos, the court held that gamete providers possess a proprietary interest in their embryos and may determine how to use or dispose of them).
137 Kass, 696 N.E.2d at 180-81.
138 See Robertson, Private Agreements, supra note 25, at 419 (explaining the contract defense of changed circumstances as the “inability to foresee how one will feel when the stated circum-
cumstances have changed.”).
140 Carone, supra note 26, at 555-56 (supporting the special respect position as being the correct perspective from which to view preembryos).
141 Steinberg, supra note 126, at 320.
143 A.Z. v. B.Z., 725 N.E.2d at 1051, 1057-58 (Mass. 2000) (rendering unenforceable a contract, signed by a husband and wife as one party and a clinic as another party, that provided for Ronald Chester & Scott E. Alumbaugh, Functioning First-Year Legal Education: Toward a New Pedagogical Jurisprudence, 25 U.C. Davis L. Rev. 21, 29-30 (1991) (sketching the history some things should not be contracted for, regardless of what agreements individuals reach).
144 A.Z. v. B.Z., 725 N.E.2d at 1055-56, 1059 (rejecting decisions to permit contract law to govern disputes between genetic progenitors).
145 Id. at 1053-54 (stating that the document was a preprinted consent form inserting cryo-
preservation of the embryos).
embryos in the event the couple separated.172 The language change indicated that the preembryos contained in frozen vials stored at the clinic were to be returned to the wife for implantation.173 Thus, the consent forms, although always signed by the husband, had been altered and completed by the wife.174

After enduring two failed ectopic pregnancies, the removal of both fallopian tubes, and finally the birth of twin daughters, the couple separated and then divorced.175 The wife wanted the right to implant the remaining frozen preembryos should she choose, but the ex-husband objected and sought an injunction to prevent the implantation.176 The court ruled that even if the reproductive agreement was unambiguous, the result of enforcing the agreement would compel one donor, the ex-husband, to become a parent against his will.177 The court determined that the consent form was not binding because its purpose was to guide the clinic in following decisions made by the couple and not to create a binding contract between the husband and wife.178 Holding that forced procreation is against public policy, the court refused to hold valid the 1991 frozen preembryos.179

The A.Z. court established a troubling precedent. Following the A.Z. ruling, other courts affirmed that contracts to procreate are to maintain the integrity of their opinion by immediately disclaiming the case was decided on constitutional grounds.180 For exegeses the following convoluted thought process: the case is not yet "constitutional principles are a source of public policy."

Another fundamental problem with the A.Z. decision is that it enervates the role of contracts, positioning written agreements between parties as mere formalities.182 In a suit for breach of contract, the plaintiff normally pleads the existence of an agreement, consideration, performance, breach, and resultant damages.183 In determining the nature of the agreement, identifying the intent of the parties

172 See id. at 1056-57 (noting that because the husband signed the blank form before the wife changed the language regarding disposition of the preembryos, he never viewed the final form of the contract language).

173 Id. at 1054 (revealing that when completing the first cryopreservation consent forms in fall of 1988, both husband and wife were present and signed the forms at the same time). The husband observed the wife make changes on the contract regarding the disposition of the embryos in the event of separation. After discussing with his wife the ramifications of her changes, he signed the contract. Six cryopreservation forms were signed over the next three years. These later forms the husband signed while they were still blank. Subsequently, the wife filled in the forms with the dispositional language previously discussed, and signed the forms in her husband’s absence. Id.

174 Id. (Objecting to the piecemeal method by which the consent forms were signed, the court noted that the forms at issue were “intended only to define the donors’ relationship as a unit with the clinic.”). Because the consent form was literally “signed in blank by the husband,” the court held that the consent form did not reflect the husband’s true intentions regarding the disposition of the embryos. Id. at 1057.

175 A.Z., 725 N.E.2d at 1052-53 (explaining that prior to the divorce, the couple had undergone IVF from 1988 through 1991, which resulted in the disputed frozen embryos).

176 Id. at 1053-55. The court’s focus is centered on the implantation stage of the embryo. If the embryo has not been implanted in the woman, the consensus of the court is to allow the man revocation rights. The counter-argument to this position is that a man participating in a naturally occurring pregnancy does not have those revocation rights. Perhaps courts should not focus on implantation as the trigger phase, but rather establish a medically reasonable period of time to implant the disputed embryos.

177 Id. at 1057-58 (rejecting the enforceability of the contract, the court stated that forced procreation, which would occur if the contract were enforced, is very much against public policy).

178 See J.E. v. M.B., 751 A.2d 613, 619-20 (N.J. 2000) (explaining that this decision is “not inconsistent with” Katz, 808 N.E.2d 174, or Davis, 842 S.W.2d 588, because neither decision enforces agreements between the parties."). At issue in the case at bar is the post-divorce disposition, while the wife wanted the embryos destroyed. Id. at 614. The husband wanted to preserve the embryos for future use, weighing the husband’s right to procreate, against the wife’s right to avoid the outcome of the contract to create a child would impair the wife’s constitutional right to procreate.

179 See J.E. v. M.B., 751 A.2d 613, 619-20 (N.J. 2000) (explaining that this decision is “not inconsistent with” Katz, 808 N.E.2d 174, or Davis, 842 S.W.2d 588, because neither decision enforces agreements between the parties."). At issue in the case at bar is the post-divorce disposition, while the wife wanted the embryos destroyed. Id. at 614. The husband wanted to preserve the embryos for future use, weighing the husband’s right to procreate, against the wife’s right to avoid the outcome of the contract to create a child would impair the wife’s constitutional right to procreate.

180 See id. at 1059.

181 See id. at 1058.

182 Id. at 1056-58 (relying on Massachusetts law which indicated that “agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions.”). Id. at 1059.

183 Id. at 1056-58 (indicating that the parties did not argue that the preconception agreements contained any ambiguity or that they were signed under duress). The court states that the court would have ignored the contract, regardless of its validity, if this decision were reversed in any way that would prejudice the notifying party’s interests. Id. at 1059. The consequences of the decision are net adverse effects, far from encouraging fertility clinics and their clients to parties to disperse with contracting in general, since the courts will not enforce the
is necessary. In A.Z. v. B.Z., the reproductive agreement between the couple clearly established by words and actions the intention for parenthood, as well as the anticipation of changed circumstances.

In A.Z. the court overlooks the fundamental idea that Artificial Reproductive Technology (ART) regulation should focus on the rights and obligations of patients and other parties availing themselves of ART services. Of course, if the IVF participant consents to an ART cycle, and the patient is coerced into treatment that she does not desire, then courts should intervene because the patient's rights are violated. However, in a situation where the parties are fully informed of the nature of the procedure and the possible future contingencies and they contractually waive their reproductive rights, then courts have a duty to enforce the contract.

2. The J.B. v. M.B. Decision

A dyslexic version of the A.Z. v. B.Z. fact pattern is evidenced in the New Jersey case of J.B. v. M.B. In J.B. v. M.B., the couple married in 1992 and, unfortunately, their efforts to have children were unsuccessful. After discovering the medical basis in the wife's inability to become pregnant, the couple contacted an IVF clinic in an attempt to conceive children.

The wife became pregnant during the IVF process and gave birth to a baby girl in March 1996. The extra embryos created during the IVF process were frozen for future use in the event the initial implantation was unsuccessful. In September of 1996 the couple incorporated in the divorce settlement was a property agreement, which reserved a "decision concerning the parties' cryopreserved preembryos/embryos." In the post-divorce proceeding regarding the disposition of the frozen embryos, the wife sought their destruction, claiming she had agreed to the IVF procedure to establish a family in the context of bryos implanted, donated, or given to her ex-husband, the ex-husband argued that his ex-wife agreed to donate the unused embryos to infertile couples.

The trial court, granting summary judgment in favor of the wife, determined that the parties' understanding in favor of IVF to procreate as a married couple. Because the marriage dissolved, the rationale for

You will be asked to execute the attached legal statement regarding control and disposition of cryopreserved embryos.

An attached statement noted "all control, direction and ownership of our tissue will be marriage by court order, unless the court specifies who takes control and direction of the tissues..." Id. at 616.

J.B., 751 A.2d 615 (expressing that it was undetermined whether the wife became pregnant as a result of IVF or through natural intercourse).

Id. (explaining the embryos that were not implanted in the woman and were frozen when only eight cells large).

Id. (noting the couple's child was born seven months before they were separated).

Id. at 615-16. The wife argued that:

Defendant (ex-husband) and I made the decision to attempt conception through in vitro fertilization treatment. These decisions were made during a time when planned to raise a family together as a married couple. I ensured the in vitro intact family.

J.B., 751 A.2d at 616 (evidencing that the notion to donate the embryos was the wife's idea). The husband certified that she wanted to donate the embryos because she knew of rated that the wife had ever offered the embryos to her husband's sister, who was childless. Id. (noting the couple had achieved their goal of conceiving a child).
cryopreservation of the embryos no longer existed. In reaching his conclusion that the embryos should be destroyed, the judge also emphasized that the ex-husband was capable of fathering children in another relationship.

Citing the decisions in *Kass*, *Davis*, and *A.Z. v. B.Z.*, the appellate court concluded that regardless of the existence of an embryo disposition agreement, it would not enforce an agreement which would compel one donor to become a parent against his or her will. In upholding the trial court’s ruling favoring the wife’s position that the embryos should be destroyed, the appellate court noted that destruction of the embryos would not impair the husband’s reproductive rights. In balancing the husband’s and wife’s interests in procreation, the court reasoned that even if all of the wife’s financial and custodial responsibilities for her child disappeared, she would still be left with the fact that her biological child would exist in an environment controlled by strangers.

The appellate court focused its holding on a contract basis, and thus avoided addressing the complex constitutional right to procreate without undue government influence. The only way legislatures can override constitutional rules is by amending the Constitution, in part because rules of constitutional law are generally about far more fundamental matters than any given rule of tort by formulating its ruling on contractual, rather than constitutional, grounds.

IV. LEGAL ASPECTS OF ART

A. In the Beginning: Constitutional Bearings

Within the robust content of the Constitution and its many layers, there exist several potential arguments supporting the enforcement of reproductive contracts directing the disposition of pre-embryos. A fundamental right granted to all citizens of the United States under the Constitution is the right to procreate.

The Supreme Court has never probed intensely into a fundamental liberty interest; it was simply wholly stated in *Skinner* from using the term “fundamental rights” to refer to non-enumerated rights.

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199 Id. (agreeing with the wife’s argument that the preembryos were intended only to be used in the context of their marriage).

200 Id. at 616. Seemingly ill at this additional analysis employed by the court would be more apt if the husband wanted the embryos. However, in this case the husband’s stated purpose for requesting that the embryos be preserved was that they may be donated, not because he wanted to become a father. Id.

201 *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998) (holding that where parties clearly manifest their intention to donate pre-embryos to an IVF research program, then the law will give effect to that intention).

202 *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that, “ordinarily, the party wishing to avoid procurement shall prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question”). If the issue is donation of the preembryos, then the objecting party shall prevail in order to prevent forced parenthood. Id.

203 *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (holding that “even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will”).

204 *J.B. v. M.B.*, 751 A.2d at 618-19 (stating the court will not enforce contracts to procreate because they are against public policy).

205 Id. at 618-19 (reasoning that the husband retains the ability to father children even if the embryos are destroyed).

206 Id. at 618-19 (reasoning that enforcement of the alleged contract to create a child would impair the wife’s constitutional right not to procreate, whereas permitting destruction of the embryos would not effectively impair the husband’s reproductive right). Unfortunately, the court does not address that the wife entered into the agreement with the understanding that divorce was a possibility. Therefore, this psychological aspect to the donation that the court discussed should have already been accounted for during the consent process.

207 Id. at 619-20 (holding that a contract forcing one person to be a parent against his or her will is against public policy); see also *Roe v. Wade*, 410 U.S. 113, 164 (1972) (maintaining a state interest in the early stages, and no state statute can intrude on that fundamental right).


209 *J.B. v. M.B.*, 751 A.2d 615, 619-20 (2000) (stating the court’s decision was not based on public policy reasons that are related to constitutional issues).


211 Id. at 536, 541-42 (explaining the position Justice Douglas took in arguing why the right to reproduction was a fundamental liberty interest). Justice Douglas referred to the right of reproductory as a “basic right” and asserted that the human race would end if the right were not exercised. Id.

212 Id. at 541-42 (holding that reproduction was a “basic liberty” requiring strict scrutiny analysis). *Roe v. Wade*, 410 U.S. 113, 133 (1972).
ated rights strongly protected by the Constitution. With procreation through reproductive technologies, defining the right to procreate becomes more difficult as a result of the shift from in vivo conceptions to IVF.  

B. Tradition: A Fundamental Interest

Beginning with the proposition that procreative autonomy is a fundamental liberty interest, we must delineate the territory of this liberty interest. In order to do this, we must first identify a reproductive case to be a paradigm and assume that some form of heightened judicial scrutiny constitutionally protects this paradigm. For example, in Roe v. Wade, the Supreme Court held the constitutional right of privacy is "broad enough to generally encompass a woman's decision whether or not to terminate her pregnancy." The Court specifically articulated that an individual's right to control his or her reproductive function is a "fundamental" right. The Supreme Court also held unconstitutional a statute requiring the consent of a spouse for a woman to obtain an abortion. These decisions suggest that whether an individual's body shall produce another life is a decision left solely to that individual.


217 Shapiro, Cloning Lives, supra note 213, at 250 (identifying the difficulties in identifying a paradigm in this area when the parameters are virtually impossible to define).

218 410 U.S. 113, 164 (1972) (holding that a statute criminalizing abortion without regard to the stage of the pregnancy violates the Due Process Clause of the Fourteenth Amendment; therefore, the woman's interest in her pregnancy at certain stages outweighs the state's interest in regulating abortion).

219 Id. at 152-53 (stating the right to privacy includes a woman's right to determine if she wants to abort her pregnancy).

220 Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (noting that a state is not permitted to allow a spouse the power to prevent pregnancy termination when even the government itself cannot interfere during the first three months of a pregnancy).

221 LAURENCE H. TURE, AMERICAN CONSTITUTIONAL LAW § 15-10 (2d ed. 1988) (noting the conflict between this privacy right to terminate or carry to term a pregnancy and situations where an innocent life must be taken in order to save another in certain abortion situations).

222 Id. at 249 (noting that some of these laws or cases seriously challenge the tradition of procreative autonomy. For persons whose mental functioning is in any way in reproductive choices. Id.

223 See Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (noting "the right to procreate and the right to avoid procreation . . . are both subject to protections and limitations").

224 Id. at 606 (stating "that the parties wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.

Later, the Casey Court spoke of the physical burdens of pregnancy, and of the role that pregnancy plays in a woman's life: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." Pregnancy is therefore more than simply the process of implanting the embryo. The psychological and emotional elements involved in pregnancy often awaken within the woman before she is actually pregnant. If the right to an abortion is extended to a period of time before an embryo implants itself in the lining of a woman's uterus, there is little historical precedent for broad government regulation of activity within the woman's body. Justice's decision, however, is a rocky tradition of prohibiting procreation by persons of extremely low intelligence and, to a certain degree, by other incompetent persons.

There exists a body of law regulating procreation to avoid injuries to the fetus, but this is intended to promote private procreation goals. The court...

C. Equal Protection: Developing an Equality Model for Reproductive Rights

Courts consistently hold that the right to avoid procreation usurps the right to procreate. Courts use a balancing test in each party's future potential for reproduction. While inquiring into the sternness of the female's reproductive capability, the court...
does not adequately address the physical and emotional aspects of the IVF procedure itself. Ultimately, courts are state actors that deny equal protection to women who can only use IVF to become pregnant.

To date, only one court has recognized the need for equal treatment of fertility and non-fertility patients in the context of constitutional liberties. The trial court in Kass v. Kass, later reversed, advocated an equal treatment approach, reflecting “from a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process.” To give a naturally conceiving woman the right to control her embryo and to deny this right to a fertility patient is to “favor situs over substance.”

The trial court’s argument in Kass effectively rebuts the contention that reproductive agreements are contrary to public policy. IVF requires the male partner to surrender his semen with the understanding that his actions may result in procreation. Therefore, a man is more acutely aware of the possibility that a child will be born in the in vitro situation because he is providing sperm in a non-coital manner for the express purpose of procreation.

Courts have not focused on the intent of the parties, despite their attempts to implicate this contractual world, rather, the courts focus on whether the embryo has been implanted or is being stored. In doing so, courts have created an inequality for infertile women. Women undergoing ART should have the same right to control the disposition of their embryos as afforded to naturally conceiving women.

Casey and Roe recognize that states’ interests in protecting the potential life of the unborn fetus increase as a pregnancy continues. Following this reasoning, courts should also require a reasonable time frame in association with a fertility patient’s right to control her frozen embryos. For example, the trial court in Kass understood that giving Maureen Kass the exclusive and unlimited right to determine the fate of her disputed embryos meant that she could potentially delay implantation for many years, leaving her ex-husband in reproductive limbo. A man engaging in sexual intercourse typically knows whether he is to become a father within nine months, but a man participating in ART will not have this same ability if a woman is given unlimited access to their cryopreserved embryos. For this reason, the Kass trial court directed that Maureen Kass exercise her right to implant the embryos “within a medically reasonable time.”

The controversy in establishing the meaning of a “medically reasonable time” can be resolved by utilizing the normal forty-week

234 Daar, supra note 2, at 465 (noting courts have favored the party wishing to avoid procreation in every frozen embryo case to date).
236 Id. (stating that “biological life exists from that moment forward”).
237 Id.
238 See id. at *2-3 (arguing that the man’s right in natural conception, should be the same as when procreation is in vitro). His procreation decision ends after ejaculation. Id.
239 Id. at *5 (reasoning that the male knows of the eventuality of a possible child at some point in the future after participating in IVF).
240 See Kass, 1995 WL 110368 at *2-3. (stating that “he knows, or should have known, that technology is such that the possibility and probability of a delayed implantation are very real.”).
gestation period during which time the embryos could be used.\textsuperscript{240} Using the natural gestation period to define a "medically reasonable time" cures the problem of notice and certainty and affords fertile and infertile women the same rights.\textsuperscript{241} This framework dictates that if a woman became pregnant using fresh embryos from an IVF cycle and carried the child to term, her male partner could prevent her from using any remaining frozen embryos after forty weeks had elapsed from the time of embryo formation.\textsuperscript{242}

D. Contracting Parenthood: The Enforceability of Contracts

1. Intent of the Parties

In A.Z. v. B.Z., the court set a dangerous precedent regarding the role and enforceability of reproductive contracts.\textsuperscript{246} The court eased its way into a finding that favors public policy over forced parenthood by narrowing the issue into a discussion of forced procreation.\textsuperscript{247} The court analyzed the terms of the contract and determined that it was unenforceable.\textsuperscript{248}

The legally relevant inquiry in determining intent and the nature of the contract language is to consider whether a meeting of the minds between the parties exists.\textsuperscript{249} In A.Z. v. B.Z., the creation of the frozen preembryos required a meeting of the minds and the

\textsuperscript{240} Daar, supra note 2, at 468.

\textsuperscript{241} Id. (explaining that this approach follows the natural pregnancy term, which makes it easier to know the consequences of one's actions because the period of time is defined).

\textsuperscript{242} Id. (explaining further that if the woman did not become pregnant from implantation or if she miscarried, she would still have the gestational forty week period to implant the other embryos).

\textsuperscript{243} See A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that even though both parties signed consent forms, the consent forms are unenforceable because they would force one parent to become a parent against his wishes).

\textsuperscript{244} Id. (referring to a state policy that prevents individuals from being force into parenthood, and refusing to use law to override this public policy).

\textsuperscript{245} See id. at 1056-57 (commenting that the purpose of the consent form is not to become a binding agreement regarding disposition of the embryos at a later date). The court finds that a contract does not exist for the following reasons: the parties' intent cannot be discerned; there is no duration provision, the agreement fails to define what "become separated" means; the agreement is lacking elements of a traditional separation agreement; and the donor's conduct at the time of signing the agreement does not show his intent. Id.

\textsuperscript{246} Hunt, supra note 3, at 511 (discussing the implied contract model which assumes that the reason the parties underwent the IVF procedure is for the creation and implementation of the pre-embryo); see also Trepalacis, supra note 72, at 829 (stating that "through the bilateral exchange of promises to complete the IVF process by the exchange of gametes for the engineering of a pre-embryo, the parties create[d] a contract whether or not they have signed a written agreement").

\textsuperscript{247} See A.Z., 725 N.E.2d at 1053 (describing that before the IVF procedure was performed by extracting the egg from the woman and fertilizing it with the donor's sperm, the parties had to both sign a consent form concerning embryo disposition).

\textsuperscript{248} See Trepalacis, supra note 72, at 829 (stating that consent is established at the creation of the embryo).

\textsuperscript{249} A.Z., 725 N.E.2d at 1054 (explaining the IVF consent form provided options for disposition of the frozen embryos and had a space under the options for a husband and wife to fill in in this case did provide for returning the eggs to the wife for implantation if there was calling the clinic to inquire about the terms of the consent form several times). Id. at n.8.

\textsuperscript{250} See id. at 1053 (stating the wife underwent three years of IVF treatment after multiple ectopic pregnancies).

\textsuperscript{251} See id. (describing the IVF process as one that involves injecting fertility drugs into the woman and surgically removing the woman's eggs).

\textsuperscript{252} See id. at 1052-53; see also Davis v. Davis, 842 S.W.2d 598, 604 (ruling that 'if no other reasonable alternatives exist, then the argument in favor of using the preembryos to that a woman should be entitled to implant the embryos if there is no reasonable likelihood that a significant number of the embryos will be viable and normal' in the case). Id. at 849, supra note 49, at 82 (stating that she would conceive with another partner).

\textsuperscript{253} See, e.g., John A. Robertson, Ordinal Authority Over Embryos and Control of IVF Technology to Address the Negligent Storage of Embryos, Determining the Loss of Value that Occurred at the Airlines, 35 Wash. & Lee L. Rev. 807 (1988) (stating that while tort and property law may need to change and the state no different than insuring against accident or life insurance).

\textsuperscript{254} Chandna Lantz, Note, Triggering Coverage of Progressive Property Loss: Preserving The Distinctions Between First- and Third-Party Insurance Policies, 35 Wash. & Lee L. Rev. 1801, 1810

\textsuperscript{255} This indicates that the contract element went uncontested by both parties. Next, the agreement was negotiated by both parties and relied upon by the wife. The wife also underprocreated. Arguably, she tolerated these painful reproductive procedures at great risk to her own health, which outweighed the contributions of the husband who did not undergo these additional invasive procedures. Therefore, the wife provided extra consideration for the ability to keep the embryos in case of subsequent separation or divorce in two ways: she risked her own health in order to procreate, and she allowed the extraction of more than one egg to increase the chances of reproducing.
arising from this insurance formula is that coverage is limited to the insured's property or person. Therefore, in order for the donor to take out insurance on the preembryo, the preembryo must be classified as either a property or a person.

A preembryo is a zygote, or fertilized egg, that has not been implanted in the uterus. Recent case law supports that courts are unwilling to support the contention that preembryos are persons or property. Underlying the court's hesitancy in condoning a property approach in evaluating preembryos is likely a recognition of the inherent inequality within the property inquiry. Associating preembryos as property conjures up antiquated notions of slavery, which predicated itself upon the idea that people may be equated with property.

E. Assuming the Position: Forseeability and Risk

The issue of foreseeability and assumption of risk, in the context of anticipating changed circumstances, is not adequately addressed by the court. Couples should be aware and account for any foreseeable risks when undergoing an IVF procedure. Although couples may not like thinking about the consequences of divorce,

(194) noting that first-party insurance covers the insured's interest and is meant to indemnify the insured against loss sustained. Third-party insurance, on the other hand, is meant to protect the insured against liability to a third party and not personal loss.Id. at 1812.

268 See id. at 1810.

269 Office of Technology Assessment, Infertility: Medical and Social Choices, 358, 384 (1988) (defining embryo as the "term used to describe the stages of growth from the second to the ninth week following conception."). The term zygote means "a fertilized ovum because of the assumption in slavery that people were property.") Id. at 388.

270 Davis, 842 S.W.2d at 597 (involving the disposition of frozen embryos in the context of divorce). The Tennessee Supreme Court ruled that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an intermediate category that entitles them to special respect because of their potential for human life." Id.


272 Id. at 433, n.432 (noting that many commentators compare surrogacy contracts to slavery because of the assumption in slavery that people were property).

273 Robertson, Prior Agreements, supra note 25, at 411 (stating that trial courts are inexperienced when enforcing contracts for IVF and that many objections to enforcement are due to the time that lapses between contract formation and attempted enforcement).

274 Id. at 418-19 (discussing changed circumstances and foreseeability in IVF contracts and suggesting that there would be fewer disputes over disposition if agreements were legally binding).

the parties' rights should be negotiated in order to guide them if such event were to occur. However, the court in Baby M refused to acknowledge an individual's right to contract for parenthood. The court in the Littowitz case took the same approach, although a default rule was employed so that by the contract neither party would receive use of disputed embryos without the other's consent.

Opponents of enforcing IVF contracts argue that it is extremely difficult for the parties to contemplate hypothetical circumstances and plan for the future based upon conjecture. Arguably, such an argument lacks conviction and is merely suggested as an escape route enabling parties to avoid procreation. In the normal course of marriage and pregnancy it is not uncommon to plan for the future of a child that may result from the union; likewise, it is not strange that a couple plan for situations that may arise during or as a result of IVF. By refusing to enforce the IVF contract, the A.Z. court considerably weakened the role of contracts in reproductive contract, the court reasoned that the ex-wife, who was forty years-old and desired implantation, would not be irreversibly harmed if implantation was denied because she could still produce offspring.

275 See id. at 409-10 (discussing how several IVF facilities have a provision in their contracts providing for the disposition of embryos in the event of divorce).

276 See Matter of Baby M., 537 A.2d 1227, 1250 (N.J. 1988) (holding that a maternal surrogacy contract was unenforceable as contrary to public policy). The court indicated that no primarily by money, was "contrary to the objections of our laws." Id.

277 Littowitz v. Littowitz, 10 P.3d 1086, 1089 (Wash. Ct. App. 2000). The contract signed by the parties stated in relevant part:

[B]ecause both the husband and wife are participants in the cryopreservation program, any decision regarding the disposition of [their preembryos] will be sion regarding the disposition of [their preembryos] they must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of [their preembryos]. Id.

278 Robertson, Prior Agreements, supra note 25, at 419 (suggesting that prior agreements are inadequate because of their "indulgence to foresee how one will feel when the stated contingencies have changed").

279 Id. at 432 (stating that IVF contracts are not different from conventional contracts with regard to foreseeing future events and providing for them).

280 See A.Z v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that the law should not enforce contracts that interfere with intimate family relationships).

281 Id. at 1053 (stating that at the time of divorce, the wife was still capable of conceiving); see also Jennifer M. Stuber, Disputing Frozen Embryos: Using International Perspectives to Formu-
In fact, the only fertile presence in the courtroom was the imaginations of the presiding justices.\textsuperscript{272}

Courts should encourage the negotiation and execution of a reproductive contract prior to undergoing IVF. The facts in A.Z. v. B.Z. evidenced that a primary reason the couple entered into a prior agreement concerning the disposition of the embryos was to ensure that in case of divorce, the authority to make decisions regarding the future disposition of the frozen preembryos would reside in the mother.\textsuperscript{273} The ex-husband defeated this argument by asserting that the doctrine of changed circumstances should excuse him from performance of the contract.\textsuperscript{274} The reasoning employed by the court is questionable because the changed circumstances argument loses its vitality when the event that was actually bargained for is the occurrence the proponent later claims was unforeseeable.\textsuperscript{275}

The knowledge that reproductive contractual agreements will be legally enforced emphasizes the importance and seriousness of the consent process.\textsuperscript{276} Furthermore, a contractual agreement provides certainty to the parties that their intentions will be followed.\textsuperscript{277} The A.Z. v. B.Z. case managed to dismantle everything that the Kass court attempted to construct with its statement that, "parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through the possible contingencies and carefully specify their wishes in writing."\textsuperscript{278}

F. Vetoing Paternity:Implanting the Egg

Courts initially allowed for the proposition that the IVF agreement could be enforced in actions between a joint father/mother-pairing and the clinic.\textsuperscript{279} Presumably, in A.Z. v. B.Z. the court did not find the reproductive document objectionable based on any procedural defects in its execution or in its ability to govern the disposition of the frozen preembryos.\textsuperscript{280} Rather, the court overruled the wife's claim to the preembryos on the grounds that it waived the father's right to veto paternity.\textsuperscript{281}

Ultimately, in determining the outcome in many procreation cases, significant weight is placed on the issue of implantation.\textsuperscript{282} After implantation, the male progenitor has no right to insist on the embryo being destroyed, even if doing so occasions only a moderate physical invasion of the woman.\textsuperscript{283} Under these circumstances, it is quite possible that the male will become a father against his wishes.

Allowing the female's wish to outweigh the male's after implantation contradicts the policy argument the court advances regarding the unwillfulness to enforce reproductive agreements that result in forced parenthood.\textsuperscript{284} The court would likely willingly compel parenthood in situations where implantation of the embryo already occurred.\textsuperscript{285}

\textsuperscript{272} See e.g. A.Z., 725 N.E.2d at 1054 (noting the contract states that normal menstrual age is forty-five); Stoler, supra note 271, at 460-66 (stating the wife was forty-four years old). If the wife was forty-four years old and the normal menstrual age is forty-five, the court must have found the wife fertile for up to twelve months at the least.

\textsuperscript{273} A.Z., 725 N.E.2d at 1054; see also Robertson, Prior Agreements, supra note 25, at 415 (arguing that the gamete providers' reproductive rights are secured when they enter into binding contracts regarding the disposition of their frozen embryos). To exercise this control, therefore, it is necessary for the "gamete providers [to] have the power to make binding agreements for [the future disposition of embryos]." These agreements are impotent if their enforceability hinges on the parties continued to agree. Id.

\textsuperscript{274} See A.Z., 725 N.E.2d at 1057 (stating even though the couple provided for separation, divorce is a much different circumstance).

\textsuperscript{275} See id. (repeating the mantra of changed circumstances, the court claimed the reproductive contract was unenforceable). The court noted that the couple already had twins, and used other facts to explain why the agreement should not be enforced due to changed circumstances. In determining whether the circumstances warranted the contract unenforceable, the court looked to foreseeability. Id. Because the situation that occurred was practically spelled out in the contract, arguably, the only changed circumstance here is a change of mind.


\textsuperscript{277} Id.
changes, depending on the phase of the new life and who is arguing against forced parenthood.\(^\text{286}\)

G. Role Reversal: The Husband Speaks

In a dissolution action, the trial court in \textit{Litowitz v. Litowitz}\(^\text{287}\) awarded the parties’ preembryos to the husband.\(^\text{288}\) The \textit{Litowitz} case is noteworthy because it represents the protection of a male’s fundamental right to reproductive autonomy just as past cases have protected a female’s right.\(^\text{289}\) In this case, the husband wanted to place the pre-embryos into adoption rather than grant them to his wife, who wanted the preembryos awarded to her for implantation in a surrogate.\(^\text{280}\) On appeal the wife relied on the argument that she should be the primary residential parent for any resulting child because the trial court should have enforced the egg donor contract.\(^\text{290}\)

The appellate court affirmed the lower court and held that the husband was not bound by contract to become a parent.\(^\text{291}\) Accordingly the husband could exercise his right not to procreate in a limited way, such as adoption, which would allow the preembryos to develop but would avoid placing him in the unwanted parenting role.\(^\text{292}\)

V. Deconstructing Contracts

The tension between preserving the status of contract law and the increasing success of assisted reproductive technology necessitates a broader interpretation of the familial structure.\(^\text{293}\) An examination of the term infertility exemplifies the changing configuration of the traditional, nuclear family.\(^\text{294}\) With the advent of assisted reproductive technologies, infertility no longer completely reproductive technologies have cured many types of infertility and now impregnate the nomenclature with its own antithesis: the expectation of fertility.\(^\text{295}\)

The courts have failed to accurately delineate the parameters and implications of a party’s intent pertaining to IVF contracts.\(^\text{296}\) Because the concept of intent connotes a contractual relationship, it is necessary to examine the elements contained within a reproductive contract.\(^\text{297}\) This characterization of intent would allow courts to better resolve disputes involving reproductive technology through the world of contracts.\(^\text{298}\) Following are excerpts from a copy of an informed consent IVF contract.\(^\text{299}\) Accompanying the contract are comments and criticism regarding the strengths and weaknesses of the language employed. The purpose of deconstructing the contract is to help refine the terms of the agreement and therefore encourage future enforcement of reproductive informed consent contracts.

\(^{286}\) Compare A.Z., 725 N.E.2d, at 1057 (holding that courts will not enforce agreements regarding the disposition of preembryos with Intent of S.P.B., 631 P.2d at 1216 (holding that a man has no right to terminate pregnancy after conception).

\(^{287}\) See Litowitz, 10 P.3d at 1086, 1088 (Wash. App. 2000) (explaining the court chose not to enforce the egg donor contract because the husband was the sole progenitor before the court and was not completely bound by the agreement which would force him to become a parent).

\(^{288}\) See id. at 1092 (illustrating the court’s holding that a husband has a constitutional right not to be forced to procreate).

\(^{289}\) See id. at 1089.

\(^{290}\) See id. at 1090 (explaining that the wife also argued that both she and the egg donor relied upon the agreement that only the Litowitzes would use the preembryos).

\(^{291}\) See id. 1092.

\(^{292}\) Litowitz, 10 P.3d at 1092 (noting that if a preembryo becomes a child then the husband might be unwillingly thrust into a lifetime parenting role and he should have control over whether this will happen).

\(^{293}\) Janet L. Dolgin, Symposium: \textit{Seneca’s Dilemma}: Exploring Parental Rights: The “Intent” of Reproduction: Reproductive Technologies and the Parent Child Bond, 26 Conn. L. Rev. 1261, 1262 (1994) (explaining that the increase in technology has upset during a time of shifting views as to family definitions and social structures).

\(^{294}\) Id. at 1262 (because of the emergence of reproductive technologies, the term infertility has produced a profound change in the definition of family).

\(^{295}\) See id. at 1261-62 (explaining that society’s view of infertility has changed due to the new reproductive technology that enhances the possibilities of pregnancy).

\(^{296}\) Id. at 1261 (explaining that the revolutionary changes in reproductive technology instills confidence in fertility when in the past it was thought to be impossible).

\(^{297}\) Id. at 1262, 1273 (explaining that courts have not rendered uniform decisions, basing the holdings on the intent of the parties leads to confusion because courts interpret intent differently).

\(^{298}\) Dolgin, supra note 293, at 1274.

\(^{299}\) See id. at 1273 (suggesting because intent is a fundamental principle controlling contract law, studying contract law might be helpful; however, courts typically that the part- evidence of intent).

\(^{300}\) Informed Consent for In Vitro Fertilization and Embryos Transfer (Dec. 2000) (unpublished Contract)
A. Informed Consent for IVF, Embryo Transfer and Cryopreservation

1. The Contract Language

"We __ and the undersigned, are willing participants in and give our consent for ovarian stimulation, egg retrieval, in vitro fertilization and embryo transfer by Dr. ________ and his/her designees." 301

2. Deconstructing the Contract: Concerning Dual Consent

It has become accepted for an ART facility to require both donors to agree to disposition instructions for the embryos in the event of divorce or death. 302 Unfortunately, the enforceability of these dual consent disposition instructions has been somewhat weakened by the A.Z. v. B.Z. decision. 303 In considering the binding value of this dual consent in the contract, a practical, and perhaps more appropriate means of limiting potential liability would be to draft the consent form to inform the donors that their first choice disposition instructions may not be available. 304 Furthermore, the facility should reserve the right to allow the embryos to be discarded or used for research purposes if the donors’ disposition instructions cannot be carried out within a reasonable period of time or because of conflicting interests from the donors. 305

While considering the implications of having both donors consent to the procedure, recall the intent-based approach used in Davis. 306 The Davis court reasoned that the fundamental right of choice on procreation could only be protected if the court follows the mani-

301 Id.


303 See A.Z. v. B.Z., 725 N.E.2d 1081, 1056-57 (explaining that the court still found the contract to be unenforceable although the parties had specifically contemplated separation).

304 See id. at 1056 (explaining that one of the reasons the court held the contract unenforceable was the absence of any indication that the couple intended the form to act as a binding agreement in the event of a disagreement).

305 ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, Ethical Consideration of Assisted Reproductive Technologies, 67 Fertility & Sterility 15, 15 (1997) (explaining that degeneration of the embryos is a default disposition circumstance in cases where consent by the donors exists or where the couple has apparently abandoned the embryos after passage of a certain amount of time.)

306 Davis v. Davis, 842 S.W.2d 388, 394 (Tenn. 1992) (suggesting that an interest in reproductive cells is a limited property right that is subject to the decision-making authority of the owner).

B. The Informed Consent Standard

1. The Actual Contract Language

We understand that: (1) the purpose of this procedure is for us to obtain a pregnancy and have a child; (2) our physician will govern the situation; and (3) if eggs are obtained, fertilized, and develop normally, I the female, will allow transfer of the embryo(s) to my cryopreservation.

We understand that the woman’s ovaries will be stimulated by medication. Growth of the follicles, which contain the eggs will be monitored by sampling blood for hormone analysis and by ultra-

307 Id. at 604; see also Gasl A. Katz, Peripatus c. CECCS: Protecting Intent in Reproductive Technology, 11 Emory J.L. & Tech. 680, 693 (1998) (explaining that the court’s holding in Davis was based on intent, rather than the consent standard, which would have required fulfillment of the contract).

308 Davis, 842 S.W.2d at 397; see also Katz, supra note 307, at 693 (explaining that the court recognized the impossibility of satisfying the intent of two donors, thus choosing the term consent instead of intent).

309 See Katz, supra note 307, at 693.

310 See id. at 693 (explaining that consent is a standard that applies the ex ante intent of the parties).

311 See id. at 693.
sound examination of the ovaries. There is the chance of cycle cancellation due to abnormalities in response to stimulation. There is also the possibility of formation of an ovarian cyst or of ovarian hyperstimulation as a result of the medication. This stimulation and monitoring protocol is frequently used in non-IVF infertility patients. I (the woman) will undergo needle aspiration of my ovaries for recovery of the eggs. The eggs will be transferred to the Assisted Reproductive Technology Laboratory for inspection. I (the man) will obtain a semen sample for the purpose of fertilization of the eggs. (Should semen from a donor be utilized, a separate consent form will be used.) If the eggs appear normal, they will be incubated with the sperm. If fertilization is successful, the resulting embryos will be cultured in the laboratory. All laboratory procedures will be for the sole purpose of enhancing the success of fertilization and growth and the prevention of infection. The laboratory techniques will be those considered the state of the art and may be varied at the discretion of the Assisted Reproductive Technology Laboratory personnel. There will be no manipulation of the embryos other than to aid in the achievement of a pregnancy.321 (emphasis added).

2. Limiting Liability through Informed Consent

Explaining to the patient the nature of the IVF procedure in contract terms helps to minimize liability.324 One of the most important sentences in this portion of the contract establishes the intent of the parties and requires their consent: “the purpose of this procedure is for us to obtain a pregnancy and have a child.”325 This sentence clarifies the donors’ intent and suggests that fertilization of embryos has only one purpose: procreation.326

Contrast this argument with the wife’s claim in J.B. v. M.B. where the wife contended that upon divorce, the contract pertaining to preembryos is not binding because it was made in the context of a current marriage.327 The trial judge affirmed this argument holding the contract unenforceable.328 Affirming the trial court, the appellate court noted that even had the contract wording been perfectly clear, the court still would not have enforced an agreement that would compel one donor to become a parent against his or her will.329

Another crucial function of the informed consent language employed in this contract is to establish a defense against a cause of action for battery.330 Explaining the invasive nature of the in vitro process protects the fertilization clinic in case the woman asserts a battery or other claim.321 The contract at issue details the invasive nature of IVF by informing the woman that she will undergo “needle aspiration” of her ovaries.322 If the courts remain unwilling to enforce these reproductive agreements, this could leave infertility claimant without potentially high liability to an informed consent.

C. The Transfer Stage

1. The Future Disposition Clause

“All embryos with normal appearance will either be transferred to the woman’s uterus, cryopreserved or donated. The normal appearing embryo(s) will be transferred to the woman’s uterus by means of a tube inserted through the cervix.”324

a. Validity Does Not Guarantee Clarity

This clause contains three possible directives for the use of the embryos: implantation, cryopreservation, or donation.325 Although presumptively this is a valid clause, even the most carefully drafted

321 Id. at 619 (illustrating that although fertilization’s purpose is to procreate, the balancing of each donor’s rights must be analyzed).
322 See Vukadinovich, supra note 314, at 74 (explaining that ART facilities have potential liability when the informed consent contract fails; then this failure exposes the facility to possible liability for battery claims because the entire informed consent including defense clauses are void).
323 Id. at 74 (by strengthening the informed consent document, an ART facility may be able to reduce the likelihood of incurring liability not only with embryo disposition, but also the possible peripheral issues such as battery claims).
324 Informed Consent Contract, supra note 300 (illustrating the contractual clause giving notice that the IVF procedure is invasive).
325 See Vukadinovich, supra note 314, at 77.
326 Informed Consent Contract, supra note 300.
327 Id. The single clause, which contains three separate possible uses of the embryos, may be a source of ambiguity.
agreements may receive judicial scrutiny.326 A judge may be confronted with dual interpretations of the plain meaning of a document.327 Thus, even if one judge purportedly applies the plain meaning rule to the instrument, another judge may find the meaning ambiguous.328

b. Case Law Interpreting This Clause

Initially, in Kass v. Kass, the court adopted the presumed validity standard.329 Recall that Maureen and Steven Kass executed a single, seven-page consent agreement which had two informed consent sections: cryopreservation consent and statement of disposition.330 The contract provided the Kasses with the opportunity to direct the disposition of any frozen embryos should they disagree about the future of their gamete material.331 While Maureen Kass argued that the consent forms she signed were ambiguous, Steven Kass argued that the prior agreement plainly mandated transfer to the IVF program.332 The court unanimously declared that the consent forms unequivocally manifested the parties' mutual intention that the embryos be donated for re-

326 See John D. Calamari & Joseph M. Perillo, The Law of Contracts 148-49 (4th ed. 1998) (explaining that "[t]he Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous in its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind."). The court determines whether there is ambiguity, not the drafters of the contract.

327 Id. at 148, 149 (explaining that the meaning of the words varies with the "verbal context surrounding circumstances and purpose in view of the linguistic education of their users" and, therefore, separate interpretations are possible).

328 See id. at 149.

329 See Kass v. Kass, 663 N.Y.S.2d 581, 587 N.Y. App. Div. 1997 (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), and explaining the court's reliance on the presumed validity of an agreement regarding disposition in the event of contingencies, because the progenitors have provided the gamete materials and thus should retain control as to their disposition).

330 Id. at 583.

331 Id. at 584. The couple signed their names to the following instructions:

In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desires for the disposition of our pre-zygotes and direct the IVF program to [choose one]: (b) Our frozen pre-zygotes 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.

332 See id. at 585, 586.

search.333 The court reasoned that the consent forms read as a whole indicated a shared intent that any disposition be made as a joint decision of the parties, and no party alone could lay claim to the embryos.334

Now contrast this detailed contract agreement to a broader, general statement such as: "we are unable to make a decision regarding the disposition of our embryos." Could such general language usurp a contract clause detailing specific circumstances in the event they transpire? Kass and subsequent cases have indicated that it does not matter how general or specific the contract language is; courts will take tremendous freedom in interpreting contracts that designate embryo dispositions.335

2. The Contract: Detailing the Risks Involved

a. Technology Invades the Woman

Although both donors may agree to a particular option at the time of the IVF procedure, changes in their relationship often influence consideration to the possible implications of their disposition instructions (or lack thereof).336 In many cases, the male donor does not consider the fact that if the disposition instructions are not carried out, he may become the biological and legal father of a child born after the couple divorces or even remarries.

333 See id. at 590 (explaining the court's reasoning that where a manifestation of mutual intent embryo disposition is controlling because the couple mutually agreed to the terms).

334 See Kass, 663 N.Y.S.2d at 590 (explaining that the "disposition of pre-zygotes form" expressed preference of the progenitors cannot be ascertained). Because they could not come to a be used by the IVF facility for scientific purposes) controlled, in accordance with the parties' wishes.

335 Davis v. Davis, 842 S.W.2d 588, 591, 597-99 (explaining that courts have the discretion to interpret contract clauses that affect the outcome, irrespective of what extent the parties may truly have been).

336 See A.Z. v. B.Z., 725 N.E.2d 1051, 1053, 1056-57 (Mass. 2000) (noting that this case exemplifies the problem of what to do with fertilized embryos in the event of contingencies such as separations or death).

337 See id. at 1056-57 (noting that neither the form nor the record indicated that the couple intended the consent form to act as a binding agreement between them in the event of disagreement over disposition).
b. The Contract: Avoiding Liability by Ensuring Understanding of the Risks

We understand and accept that the procedure may involve the following sources of discomfort:
1. Ovarian stimulation: injections, blood sampling, and ultrasound examinations
2. Oocyte recovery: see surgical consent
3. Embryo transfer: uterine cramping
We understand and accept that the procedure may involve the following risks:
1. Ovarian stimulation: poor response resulting in cycle cancellation or hyper-stimulation resulting in ovarian cyst formation and cycle cancellation.
2. Oocyte recovery: see surgical consent
3. Embryo transfer: bleeding, pain, and infection
We understand that the chances of obtaining a pregnancy by this procedure are, at best, approximately 30 percent. If pregnancy is established, we understand and accept that multiple pregnancy, miscarriage, ectopic pregnancy, or stillbirth may occur. We understand that in vitro fertilization may lead to a higher incidence of multiple pregnancy. We know that, to date, the incidence of abnormalities has been approximately the same as the population in general.

(1) (the man) consent to accept paternity of any child we may have as a result of this procedure.

(c) Contracting Away the Right to Privacy

It is clear that the Constitution guarantees a right to be free from unwarranted significant invasions of the body. The woman may encounter significant risks and a great amount of bodily invasion in the IVF process. The informed consent process allows the woman to consider risks she will undertake and then consent to the bodily invasion. Although it is not possible to anticipate every problem that might occur with regard to gamete donors, adopting a comprehensive patient informed consent process may limit many potential liabilities facing an ART facility.

343 Informed Consent Contract, supra note 300 (emphasis added).
344 See Rochin v. California, 342 U.S. 165, 172 (1952) (illuminating the Court’s shock at an illegal violation of the petitioner’s privacy by the use of force to open his mouth in order to extract evidentiary capsules that the accused swallowed).
345 Informed Consent Contract, supra note 300, at 2522-23 (reflecting the clause giving notice that the IVF procedure is invasive by informing the woman that she will undergo needle aspiration).
346 Informed Consent Contract, supra note 300 (contemplating potential actions the facility can take to gain more protection from possible patient claims). The contract lists several reasons why pregnancy may not occur, thus further limiting the liability as much as it can. See Informed Consent Contract, supra note 300.

347 See Alan Meisel & Mark Kuczenski, Legal and Ethical Myths about Informed Consent, 156 ARCHIVES INTERNATIONAL MED. 2921, 2922 (1996) (explaining that the purpose of informed consent is to allow the patient to understand the various possibilities for the treatment of a particular patient’s condition, and to allow the patient to consider this information in his or her own context of values and then choose a course of treatment).
348 See A.Z. V. B.Z., 725 N.E.2d 1051, 1056 (Mass. 2000) (indicating that the couple had informed consent effectively limiting their right to the preembryo; the ART facility would have to obtain the preembryo).
have already enacted laws regulating insurance coverage for IVF and other forms of infertility treatments.348

4. The Options

a. Contractually Carrying Out Disposition Instructions

If extra eggs are obtained, we have the following options:
1. We do ___ do not ___ wish to have all of the eggs inseminated. If there are more than the optimal number of embryos for the establishment of a pregnancy, we want the extra embryos frozen and saved for later transfer. (An additional fee and separate consent form will be necessary) We understand that, if we do not elect to have embryo cryopreservation, only a limited number of eggs will be inseminated and all resulting embryos will be transferred to the uterus.
2. We do ___ do not ___ wish to donate extra eggs which we do not utilize to another couple who cannot obtain normal eggs of their own.349

b. The Implications for the Donors

It has become accepted for an ART facility to require both donors to agree to disposition instructions for the embryos in the event of the couples’ divorce, death, or other unforeseen circumstances.350 However, these disposition instructions will probably not be binding upon the parties if the AZ v. B.Z. case is an indication of how courts will treat these agreements.351

It is interesting to note that the informed consent provisions and the disposition instructions are contained in the same contract.352 Some critics of this layered consent claim that including disposition instructions in the informed consent agreement triggers an unconscionability defense because of the strictures contained in the agreement.353 However, in the contract above, there is no fine print

349 See Cons. Consent Contract, supra note 300 (illustrating the exact contract language and terms).
350 See Kaas v. Kass, 663 N.Y.S.2d 581, 584 (N.Y. App. Div. 1997) (disputing the custody of frozen embryos after divorce); see also Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (indicating that these agreements should be presumed valid and thus enforced).
351 AZ v. B.Z., N.E.2d 1051, 1057 (Mass. 2000) (holding that although disposition was contemplated in an agreement, the contract was still unenforceable).
352 See id. at 1056-57.
353 Ellen A. Waldman, Disposing Over Embryos: Of Contracts and Consents, 32 Amuz. St.J. 926 (2000) (arguing that informed consent documents containing dispositional agreements are indicative that unconscionability is present).

attempting to hide the nature of the agreement.354 Rather, there is room in which the parties are invited to add to the contract any additional terms, conditions, or directions they would like.355

In drafting this portion of the contract, the fertility clinic has limited the options regarding the disposition of the embryos. Implied in this options clause, ironically, is a lack of choice: a woman can either discard the embryos or donate them. Being limited to selecting one of these preferences may not accurately reflect the true nature of her desires. Limiting the post-divorce embryo possibilities to donation or destruction, without room for negotiation or modification, creates a persuasive public policy argument for enforcing reproductive agreements.356

There is nothing in this disposition clause which directly asserts that the primary purpose of seeking fertility treatment is to create a child within the bounds of marriage.357 Without this explicit language, the agreement reflects the primary purpose of the consent form, which is to enable the gamete providers to create a child regardless of their personal relationships.358 In fact, the appellants in Davis, Kass, and A.Z. went to enormous lengths in a futile attempt to enforce post-divorce parenthood, but to no avail.359

c. The Implications for the Fertility Clinic

ART facilities may soon face an interesting dilemma and potential liability when instructions left by donors are not carried out, either from negligence or impossibility.360 This impossibility in carrying out a donor’s wishes is common when the wishes relate to donating of embryos for research or to childless couples, because the facility often has a hard time carrying the instructions out.361

One such situation occurs when the facility cannot locate a couple who desires the embryos for implantation and instead allows them

354 See Informed Consent Contract, supra note 300 (illustrating the straightforward language of the contract).
355 See id.
356 See Kaas v. Kass, 663 N.Y.S.2d at 584-85 (noting that the lack of choice in an addendum, which was a contractual term in the consent agreement, severely restricts post divorce possibilities).
357 See Informed Consent Contract, supra note 300.
358 See id.
360 See Yuskavitch, supra note 314, at 77.
to deteriorate to the point they are no longer viable. This presents a case for potential liability if the donors happen to be strongly pro-life.

The facility might be able to avoid such potential liability by informing donors on the consent form that their first choice for embryo disposition might not be available. As a default position, the facility also could reserve the right to allow the embryos to degenerate if the donor’s wishes cannot be carried out in a given amount of time.

CONCLUSION

Disputes over the disposition of frozen embryos offer fertile grounds for debate. Although the judicial approach to existing reproductive disputes suggests a rejection of the contract model, this comment suggests that IVF agreements delineating the disposition of post divorce embryos should be honored. By upholding the integrity of the contract, courts can minimize the costs and frequency of suits surrounding disagreements over the disposition of frozen embryos. More importantly, by binding couples to a prior agreement, courts recognize gamete providers’ procreative liberty: the right to choose.

The court should not limit the couple’s legally valid dispositional choices. In refusing to enforce post-divorce disposition arrangements, courts confine IVF participants into a situation that may not yield the results they desired and intended. If the only options presented to the IVF participant are either destruction or donation of the embryo upon divorce, the selection of one of these does not necessarily reflect the true preferences of the participants.

—to the future or to the past, to a time when thought is free, when men are different from one another and do not live alone—to a time when truth exists and what is done cannot be undone: From the age of solitude, from the age of uniformity, let think—greetings!

—George Orwell, 1984

302 Id.
303 Id.
304 See Robertson, Prior Agreements, supra note 25, at 408-09 (noting that the growing practice of embryo freezing will inevitably lead to perplexing legal questions that must be resolved).
305 See id. 424 (emphasizing that enforcement of disposition agreements will maximize procreative freedom, give certainty to ART programs, and minimize disputes).
306 See id. at 424 (noting how respect for the freedom of a couple in making choices should be recognized if the goal is to give maximum reproduction control to the actual gamete providers).
307 See id. (recognizing that if the goal is to give couples control over disposition, then the couples should have a range of legally viable options).
308 See id. (arguing that agreements between gamete providers should be legally binding within general principles of contract law).
309 See Robertson, Prior Agreements, supra note 25, at 423 (noting that the options have great consequences if not fully understood or analyzed; thus, ART restrictive programs should make clear to the gamete providers all of their other options).