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COMMENTS

IN VITRO FERTILIZATION AND CONSENT AGREEMENTS: WHERE DOES CALIFORNIA STAND?

Matthew Ellis*

I. INTRODUCTION

For many, bearing children is one of life’s greatest pleasures. Unfortunately, infertility\(^1\) prevents approximately one-fifth of couples in the United States from enjoying the childbearing experience.\(^2\) Fortunately, assisted reproduction techniques provide infertile couples a chance to bear children. In vitro fertilization ("IVF") is one such assisted reproduction technique giving hope to infertile couples.\(^3\)

In July 1978, Louise Brown of England proved to the world that an IVF birth was possible.\(^4\) Since then, the popularity of the IVF procedure has increased, and in 1995 it ac-

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1. Infertility is defined as the "inability of a couple to conceive after 12 months of intercourse without contraception." OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY, MEDICAL AND SOCIAL CHOICES 3 (1988).


3. "In vitro" describes conception which occurs outside the mother's body, and thus "in an artificial environment." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 851 (27th ed. 1988).

counted for 70 percent of all assisted reproduction procedures performed.\textsuperscript{5} Unlike other forms of assisted reproduction, couples favor IVF because it allows them to create a child of their own genetic makeup.\textsuperscript{6} While the procedure is quite popular, it can be extremely painful.

The procedure begins with the hormonal stimulation of a woman's ovaries in order to invoke the release of multiple eggs.\textsuperscript{7} Doctors then remove the eggs by either laparoscopy\textsuperscript{8} or ultrasound directed needle aspiration.\textsuperscript{9} Upon removal, doctors fertilize the eggs with sperm in a petri dish.\textsuperscript{10} The creation of a preembryo occurs after approximately two divisions, or when the organism reaches the eight-cell stage.\textsuperscript{11} At this stage, one to three preembryos are implanted in a woman's uterus and any fertilized eggs not transferred are typically cryopreserved.\textsuperscript{12}

Cryopreservation involves the freezing of any unused preembryos.\textsuperscript{13} Widely accepted by the IVF community, cryopreservation lessens the cost of the IVF treatment by decreasing the number of times a woman must submit herself to the painful egg extraction process.\textsuperscript{14} Although heralded as a great advancement for IVF, the legal issues surrounding cryopreservation now challenge legislatures and courts.\textsuperscript{15} These issues arise from the delay cryopreservation causes between fertilization and implantation.\textsuperscript{16} For instance, courts today

\textsuperscript{5} See Peter E. Malo, Deciding Custody of Frozen Embryos: Many Eggs are Frozen but Who is Chosen?, 3 DEPAUL J. HEALTH CARE L. 307, 308 (2000).


\textsuperscript{7} See Dehmel, supra note 4, at 1380.

\textsuperscript{8} Laparoscopy is a procedure performed under anesthesia, in which the physician places two tubes in the woman's abdomen near the navel; the doctor then observes the ovary through a scope attached to one of the tubes. A hollow needle is passed through the other tube and the eggs are gently vacuumed out of the body cavity. See Meena Lal, The Role of the Federal Government in Assisted Reproductive Technologies, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 520-22 (1997).

\textsuperscript{9} See Dehmel, supra note 4, at 1381.

\textsuperscript{10} See id.

\textsuperscript{11} See id.

\textsuperscript{12} See id.

\textsuperscript{13} See Sheinbach, supra note 6, at 990.

\textsuperscript{14} See id. at 991.

\textsuperscript{15} See id. at 991 nn.11-19.

\textsuperscript{16} See Dehmel, supra note 4, at 1378 (noting that “freezing embryos adds to IVF the element of delay between donation and implantation, thus creating
are forced to make determinations regarding the ownership rights of preembryos when the gamete providers no longer agree as to their disposition.\footnote{See John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 464 (1990) (noting that before the preembryos are removed or frozen many IVF clinics ask gamete providers to sign agreements outlining dispositional alternatives).} Given the potential for such disputes, many IVF clinics require patients to sign consent agreements outlining ownership rights before undergoing treatment.\footnote{See id.}

Although one might think that consent agreements outlining ownership rights in cases of divorce or separation would solve any disagreements, such is not the case. Recent state court decisions demonstrate the opposing views among courts regarding the effectiveness of consent agreements.\footnote{See infra Part II.A.} State courts with little, if any, guidance from legal precedent or their legislatures face the daunting task of determining the validity of these agreements. State courts confronting such decisions might have to examine property, constitutional and contract law before reaching a conclusion.\footnote{See Sheinbach, supra note 6, at 991-93.}

Like most states, California has no statutes governing the effectiveness of IVF consent forms.\footnote{See id. at 1002 n.80 (noting that only Florida, Kansas, Kentucky, Louisiana, New Hampshire, and Pennsylvania have specific legislation attempting to ameliorate the problems associated with IVF).} Thus, California courts deciding such cases do so without direction from the legislature. Fortunately, California state court decisions in similar areas can be used to guide the court. These cases can also be used to predict how California courts will rule on the effectiveness of consent agreements. Such a prediction is not only helpful to IVF practitioners, but also to progenitors participating in the programs.\footnote{See Bill E. Davidoff, Frozen Embryos: A Need For Thawing in the Legislative Process, 47 SMU L. REV. 131, 133 (1993).} A prediction of this nature also provides both practitioners and patients the ability to judge for themselves whether to rely on such agreements or seek other means to determine their dispositional intent.\footnote{See Robertson, supra note 18, at 463.}

Part II of this comment summarizes state court decisions time for a party to change his or her mind about completing the process through implantation.".
from Tennessee, New York and Massachusetts that deal with the effectiveness of consent agreements between married couples used in the IVF process. Part II also focuses specifically on those California court cases that address similar legal issues confronted by the Tennessee, New York and Massachusetts courts. Part III then asks why a prediction needs to be made regarding consent agreements between married couples and proposes the best path to do so. Using the cases summarized in Part II, Part IV explores the various approaches to defining a preembryo and how such definitions shape the legal arguments surrounding consent forms. Furthermore, Part IV discusses how a "tie" is created between gamete providers and the considerations the courts used to determine how to break the "tie." Part IV then predicts how California would rule on consent agreements using the California cases summarized in Part II and discusses the controversy surrounding the methodology used to make the prediction. Finally, Part V makes a plea to the California Legislature to uphold the validity of consent agreements so as to eliminate the confusion in this area.

II. BACKGROUND

A. Consent Agreements and Current Case Decisions

At present, three state court cases represent the various positions regarding the effectiveness of consent agreements between married couples. Below, in chronological order, are summaries of each of the cases and the courts' findings regarding the enforcement of such agreements.

1. Davis v. Davis

In the Tennessee Supreme Court case of Davis v. Davis, Junior and Mary Sue Davis sought the court's assistance in

24. See infra Part II.A.
25. See infra Part II.B.
26. See infra Part III.
27. See infra Part IV.A.
28. See infra Part IV.B.
29. See infra Part IV.C.
30. See infra Part V.
31. 842 S.W.2d 588 (Tenn. 1992).
helping them decide the fate of seven frozen embryos. The couple was faced with this dilemma due to their decision to divorce before Mary could complete her IVF treatment. Having no contract between them, the couple disputed the preembryos' disposition. Originally, the dispute arose when Mary wanted to implant them against Junior's wishes. Junior wanted the preembryos destroyed. Later, after remarrying, Mary changed her mind and wanted the preembryos donated. Junior opposed the idea because he felt uncomfortable fathering an unwanted child.

Before determining the disposition of the preembryos, the supreme court in Davis first reflected on how different preembryo classifications influence dispositional outcomes. In doing so, the supreme court noted that the trial court considered the preembryos as "children in vitro." By drawing this conclusion, the trial court was able to disregard the preferences of the gamete providers. At the other extreme, the intermediate court impliedly classified the embryos as "property" and concluded that each spouse shared equivalent but competing interests in the preembryos. This conclusion left the couple in a stalemate; neither partner could overcome the other's property interest and the intermediate court never proposed a solution to the problem.

32. See id. at 589.
33. See id.
34. See id. at 590.
35. See id. at 589.
36. See id. at 590.
37. See id.
38. See id. at 604.
39. See id. at 592.
40. See id. at 594.
41. See id. at 595 (noting the trial court's ruling vested the preembryos with "legally cognizable interests separate from those of their progenitors").
42. See id. (finding that the intermediate court found the preembryos as "property" without explicitly holding as such).
43. See id. at 598. See also Robert J. Muller, Davis v. Davis: The Applicability of Privacy Rights and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes, 24 U. TOL. L. REV. 763, 802 (1993). In his discussion, Muller noted:

[I]t may be possible, one could argue, to ground the progenitors' interest in basic property rights that create a sphere of privacy... where the preembryo is a product of both gamete providers, and where no issue of bodily integrity is directly implicated, the progenitor's private spheres overlap. The progenitors are similarly situated with respect to the same object, the preembryo. The result is that a property rights analy-
To determine the classification of the preembryos, the supreme court in *Davis* looked to state statutes, federal case law and medical literature.\(^4^4\) The court noted that Tennessee's criminal and assault statutes provided an exception for abortions, indicating that embryos and fetuses were not afforded the same protections as "persons."\(^4^6\) In addition, the court recognized that federal law did not give embryos the same rights as "persons" under *Roe v. Wade*.\(^4^6\) While state statutes and federal case law provided some guidance, the *Davis* court found medical literature most helpful, particularly the opinion by the Ethics Committee of The American Fertility Society.\(^4^7\) In summarizing the Committee's belief, the court noted that the preembryo deserved "respect greater than that accorded to the human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become human tissue and because of its symbolic meaning to people."\(^4^8\) Using these references, the court concluded that preembryos were neither "property" nor "persons."\(^4^9\) By drawing this conclusion, the court was able to avoid the outcomes the lower courts encountered; however, before devising a solution, the court had to determine the rights of each gamete provider.\(^5^0\)

The *Davis* court acknowledged an individual's right to

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\(^{44}\) *See Davis*, 842 S.W.2d at 594-97.

\(^{45}\) *See id.* at 594-95 (determining that the abortion statutory scheme indicates that as "embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born.").


\(^{47}\) *See Davis*, 842 S.W.2d at 596 (citing Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY 1S (Supp. 2 1990)). The American Fertility Society is now known as the American Society for Reproductive Medicine. For additional information on this society, visit http://www.asrm.org/index.html.

\(^{48}\) *Davis*, 842 S.W.2d at 596.

\(^{49}\) *See id.* at 597.

\(^{50}\) *See id.* at 598.
procreational choice granted by the federal constitution. \(^{51}\) In addition, the court recognized Tennessee’s state constitution afforded the same rights. \(^{52}\) In so finding, the court stated “the specific individual freedom in dispute is the right to procreate. In terms of the Tennessee state constitution, we hold that the right to procreate is a vital part of an individual’s right to privacy. Federal law is to the same effect.” \(^{53}\) Furthermore, the \textit{Davis} court recognized that both Tennessee’s constitutional right to privacy as well as current public policy protected “the gamete providers’ decisional authority over the preembryos to which they have contributed.” \(^{54}\) Essentially, the court reasoned that Tennessee had, at best, a miniscule interest in the preembryos’ disposition. \(^{55}\) Once eliminating the possibility of any state or federal interest in the decision making process, \(^{56}\) the court concluded “the gamete providers have primary decision making authority regarding the preembryos in absence of specific legislation on the subject.” \(^{57}\)

After acknowledging that the decision lay squarely in the hands of the gamete providers, the court stated that both parties held equal rights to the preembryos. \(^{58}\) As a result, the court essentially created a “tie” in terms of the rights held by the gamete providers. \(^{59}\) In order to break this tie and assign a prevailing party, the court devised a balancing test. \(^{60}\) The first step of the balancing test provides that courts should determine the preferences of the progenitors. \(^{61}\) The second step requires courts to look at a prior agreement if a dispute arises between the parties or the court cannot determine their preferences. \(^{62}\) If no agreement exists, the third step requires the

\begin{footnotesize}
\begin{enumerate}
\item See id. at 598-601.
\item See id.
\item Id. at 600.
\item Id. at 602.
\item See id.
\item See id. at 602 (determining that since the state’s interest did not become sufficiently compelling until viability, then the state’s interest was not sufficient enough to overcome the gamete provider’s interests).
\item See id. at 597.
\item See id. at 601.
\item See id. (noting that “the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.”).
\item See id. at 603.
\item See id. at 604.
\item See id.
\end{enumerate}
\end{footnotesize}
court to weigh the interests of the parties to determine whether the preembryos should be destroyed. The factors used in the balancing include the burden of a child on each party and the chance each party might have to achieve parenthood without the preembryos. The court noted that "ordinarily, the party wishing to avoid procreation should prevail," unless the other party has no reasonable alternatives for achieving pregnancy.

Although a consent agreement never existed between Junior and Mary, the court nevertheless felt compelled to discuss the validity of such an agreement. In dicta, the court noted, "an agreement regarding the disposition of any untransferred preembryos in the event of contingencies (such as death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." The court also determined that such agreements should be amendable by agreement because couples going through IVF are unlikely to predict any future events. The court mentioned that this would "protect the parties against some of the risks they face in this regard."

Since no contract existed, the court applied a balancing test to determine the disposition of the preembryos. Following its own advice, the court concluded that Junior’s interests outweighed those of Mary because he opposed parenthood; however, the court noted that the balancing would have been much closer had Mary not been remarried and had she wanted to use the preembryos herself.


Similar to Davis, the couple in Kass v. Kass, Steve and

63. See id.
64. See id. at 603-04.
65. See id. at 604.
66. See id. at 597.
67. Id.
68. See id.
69. Id.
70. See id. at 603.
71. Id. at 604.
72. See id.
Maureen, disputed the custody of five cryopreserved preembryos after divorcing. Like the couple in Davis, however, the Kass couple signed a consent agreement before performing the IVF procedure. In part, the agreement required a court of law to determine the disposition of the preembryos if the couple divorced. The agreement further had a general indecisiveness clause that provided that the preembryos would be donated to research if the progenitors could not make a decision as to their distribution.

Like the Davis court, the Kass trial court began its analysis by determining the status of the preembryos. In making its decision, the trial court relied heavily on the Davis decision in determining that preembryos deserved "special respect." While both appellate courts overruled the trial court's ruling on the disposition of the preembryos, neither appellate court overruled the trial court's decision to grant the preembryos "special respect." The New York Supreme Court in Kass also agreed with the Davis court on the need to identify the intent of the progenitors. Its approval of the Davis court position was revealed when the New York Supreme Court stated: "where a manifestation of mutual intent exists between the parties, that intent must be given effect by the court." Unlike Davis, however, the New York Supreme Court refused to go so far as to hold that consent agreements must be enforced. Rather

74. See Kass, 663 N.Y.S.2d at 585.
75. See id.
76. See id. at 583-84.
77. See id.
78. See id. at 584.
80. See Kass, 1995 WL 110368 at *2.
82. See Kass, 663 N.Y.S.2d at 587.
83. Id.
84. See id. at 587-90. This becomes evident when the court limited the holding in Davis "to the extent it requires that where a manifestation of mutual intent exists between parties, that intent must be given effect by the court." Id. at 587. Further support is also provided by the fact that the court noted consent agreements need not be binding in order to manifest intent for such an agreement to be used. See id. at 589.
than uphold the agreement per se, the court, noting that such agreements were not against public policy, relied on the agreement only to assist in the determination of each party's intent.\textsuperscript{85} In this regard, the court noted that, if unambiguously stated, "the manifestation of their intent in the informed consent document should be viewed as controlling."\textsuperscript{86} This view of the contract is much different than determining the validity of the contract and then automatically enforcing it. Thus, in determining how the preembryos should be disposed, the New York Supreme Court began by looking at the consent agreement to determine whether the intentions of the parties could be derived from it.\textsuperscript{87}

In an attempt to dissuade the court from relying on the consent agreement's indecisiveness clause to determine their intent, Maureen argued that the clause could not be used.\textsuperscript{88} To support this assertion, she first argued that the clause relating to indecisiveness only applied to situations where neither she nor Steve was around to make a decision, such as in concurrent death scenarios, not cases of general disagreement.\textsuperscript{89} Next, she claimed that the divorce clause supplanted the indecisiveness clause because a divorce forced the court to determine the disposition without referring to the consent agreement.\textsuperscript{90} In essence, Maureen was hoping to force the court to use its equitable remedies, like the balancing test used in \textit{Davis}, to determine the preembryo's disposition.\textsuperscript{91}

Not convinced, the court found the agreement to be unambiguous.\textsuperscript{92} The court noted that throughout the agreement

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\textsuperscript{85} See \textit{Kass}, 663 N.Y.S.2d at 590. The fact the court did not uphold the agreement per se, only the intentions manifested in it, demonstrates that the court relied only on its intentions. See \textit{id}.

\textsuperscript{86} \textit{Id.} at 589.

\textsuperscript{87} \textit{See id.} at 587.

\textsuperscript{88} \textit{See id.} at 588.

\textsuperscript{89} \textit{See id}.

\textsuperscript{90} \textit{Id.} at 589-90.

\textsuperscript{91} \textit{See id.} at 589. The New York Court of Appeals also found the agreement unambiguous. See \textit{Kass}, 696 N.E.2d at 181 ("[W]e agree that the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the
“we” and “us” were constantly used, showing that the parties intended that neither spouse could control the disposition of the preembryos without the other’s consent. And, unlike Maureen, the court viewed the indecisiveness clause as extending to situations where she and Steve disagreed about the disposition of the preembryos. In addition, the court found further support of their intentions in an uncontested divorce instrument expressing their mutual desire that neither person should gain possession of the preembryos.

While the court never enforced the agreement per se, it did find the intentions expressed in it unambiguous and thus ordered that the preembryos be donated to research as expressed in the agreement. The court’s intent-based approach to resolve the dispute, as opposed to a purely contractual view, allowed the court to enforce the intentions manifested in the contract, but also left open the possibility that other factors, while not controlling, could influence the court’s opinion. Thus, the court prevented contract law from becoming the sole factor in determining the outcome of disputes involving reproductive technology.

3. A.Z. v. B.Z.

Like the cases previously discussed, the dispute in A.Z. v. B.Z. concerned the disposition of preembryos after a couple had divorced. Like the couple in Kass, the A.Z. couple signed a consent form before the wife underwent an egg extraction. The signed contract included general information about the process and the desired disposition of the preem-
bryos under certain contingencies. Specifically, the agreement provided that the wife was to receive the preembryos in the event of divorce. Unlike Kass, however, the A.Z. trial court did not believe the consent form represented the couple's unambiguous intent. In addition, the A.Z. court never broached the topic of the preembryo's status. Although the court did not explain why the topic did not necessitate discussion, it appears to have been neglected to be discussed because the court transferred the case on its own motion in order to specifically address the topic of consent agreements. Thus, it apparently was not compelled to address the issue of preembryo classification.

In making its finding, the court elicited five reasons why the contract did not represent the couple's unambiguous intent. The court first found that the agreement was only between the clinic and the parents; the agreement did not mention that the husband and wife intended it to be an agreement between them. Second, the court found that the agreement did not contain a duration provision. The court did not believe the husband intended the agreement, written four years prior to the dispute, to control indefinitely. Third, the court noted that the agreement only dealt with the separation of the couple, not specifically with divorce. The court noted that the law defines both differently. Fourth, the actions of the parties in regards to the agreement showed ambiguity. The court noted one instance where the wife needed clarity from the clinic regarding the disposition clause. Finally, the court noted that the consent agreement did not represent a binding separation agreement because it did not meet the "minimum level of completeness needed to denominate it as an enforceable contract in a dispute between

101. See id. at 1054.
102. See id.
103. See id. at 1057.
104. See id. at 1052-59.
105. See id. at 1052.
106. See id. at 1056.
107. See id.
108. See id. at 1056.
109. See id.
110. See id.
111. See id.
112. See id.
husband and wife."\textsuperscript{113}

Even after finding the agreement ambiguous and unenforceable, the court continued its discussion of the validity of consent agreements in general. In dicta, the court noted:

Even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, \textit{we would not enforce an agreement that would compel one donor to become a parent against his or her will.} As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.\textsuperscript{114}

In determining that such consent is against public policy, the court analogized the consent in this case with other familial contracts found void as against public policy.\textsuperscript{115} For example, the court cited a case where it found a contract requiring an individual to abandon a marriage to be void as against public policy.\textsuperscript{116} The court reemphasized that "the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy, grounded in the notion that respect for liberty and privacy, requires that individuals be accorded the freedom to decide whether to enter into a family relationship."\textsuperscript{117}

By finding consent agreements forcing family relationships void as against public policy, the court essentially disallowed the use of such agreements to determine the intention of the parties, even if such agreements were unambiguous.\textsuperscript{118} In addition, the court's ruling established the position that contract law will have little or no bearing in cases involving disputes engendered by reproductive technologies.\textsuperscript{119} Following its own advice, the court refused to make the husband a

\textsuperscript{113} Id.  \\
\textsuperscript{114} See id. at 1057-58 (emphasis added).  \\
\textsuperscript{115} See id. at 1058.  \\
\textsuperscript{116} See id. at 1059 (citing Capazzoli v. Holwasser, 490 N.E.2d 420 (Mass. 1986)).  \\
\textsuperscript{117} Id. at 1059.  \\
\textsuperscript{118} While this conclusion is not explicitly stated in the case, it is the only logical conclusion to be drawn from the holding. If the intentions expressed in the consent agreement could still be used, these intentions would undoubtedly be against the desires of the person not wishing to become a parent.  \\
\textsuperscript{119} See A.Z., 725 N.E.2d at 1052, 1059. This conclusion is evident from the fact the court refused to enforce the disposition clause in the contract and instead relied on one party's desire not to become a parent. See id.
parent against his wishes.\textsuperscript{120}


Like most state legislatures, the California Legislature has passed no laws in the area of assisted reproduction.\textsuperscript{121} In addition, very little case law exists in this general area, and no case law exists specifically regarding the validity of contracts in IVF procedures. Thus, courts in California must make analogies to existing state cases and analyze other state court decisions. Fortunately, some California cases do discuss the same legal issues the courts addressed in Davis, Kass and A.Z.

1. Hecht v. Superior Court

The California case of \textit{Hecht v. Superior Court} provides IVF practitioners and gamete providers some insight on whether California courts would classify preembryos as property and how they might determine a preembryo's disposition.\textsuperscript{122} In short, the case involved a dispute over fifteen vials of sperm a deceased husband left to his second wife.\textsuperscript{123} The deceased made it clear in his will that his second wife could use the sperm to impregnate herself.\textsuperscript{124} Appalled, the deceased's children from his first marriage vehemently opposed the idea of a half sibling.\textsuperscript{125} Although the husband and wife had signed a settlement agreement, the agreement was un-

\begin{itemize}
\item \textsuperscript{120} See id.
\item \textsuperscript{121} See Sheinbach, \textit{supra} note 6, at 1002 n.80 (noting that only Florida, Kansas, Kentucky, Louisiana, New Hampshire, and Pennsylvania have specific legislation attempting to ameliorate the problems associated with IVF as of 1999).
\item \textsuperscript{122} See \textit{Hecht v. Superior Court}, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
\item \textsuperscript{123} See \textit{id.} at 276-80.
\item \textsuperscript{124} See \textit{id.} at 276-77. The will stated in part:

\begin{quote}
It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "diplomas and framed mementoes,"] to the extent that she wishes to preserve any or all of my mementoes and diplomas and the like for our future child or children.
\end{quote}

\textit{Id.}
\item \textsuperscript{125} See \textit{id.} at 279.
\end{itemize}
clear regarding the distribution of the sperm. Thus, the administrator of the estate asked the court for guidance on how to dispose of the sperm. The probate court ruled that all sperm vials be destroyed.

The second wife appealed the decision of the probate court. One of the many issues resolved on appeal was whether the sperm constituted "property" over which the probate court had jurisdiction. To determine classification of the sperm, the court relied heavily on an opinion of the American Fertility Society. That opinion recommended that gamete donors maintain an interest in determining the disposition of their reproduction cells. In addition, the Hecht court summarized the Davis analysis, noting that the Davis court considered the American Fertility Society's opinion and determined that preembryos should be accorded greater respect than mere "property" due to their reproductive capabilities. Finally, the court noted that sperm, like preembryos, are unlike other human cells because of their life producing characteristics. The opinions and conclusion led the court to find that sperm is a "unique type of property" and that the "decedent had an interest . . . to the extent that he had decision making authority as to the use of his sperm for reproduction."

After concluding that the deceased held an interest in the disposition of the sperm, the court then held that the probate court had jurisdiction over the disposition of the vials. On remand, the probate court, pursuant to the settlement agreement, allocated three vials to the second wife and the remainder to the deceased's children.

After the judgment, the second wife impregnated herself

126. See id. at 278.
127. See id.
128. See id. at 279.
129. See id. at 276.
130. See id. at 281.
131. See id.
132. See id. at 282.
133. See id. at 282-83 (discussing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).
134. See id. at 283.
135. Id. at 283.
136. See id.
with the three vials of sperm, but to no avail. Desiring to become pregnant with her deceased husband's sperm, the second wife returned to court to obtain possession of the remaining twelve vials. In the unpublished opinion of *Hecht v. Superior Court*, the court determined whether an "asset" under the terms of the property settlement agreement included sperm.

In settling the dispute, the court first acknowledged its prior ruling which found that decedents possessed an interest in sperm due to its unique life producing characteristics. The court then reaffirmed its agreement with commentators who characterized sperm "as the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive." In addition, the court agreed that this "fundamental right must be jealously protected, and it is *not to be subjected to the rules of contracts*. Rather the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent.

In order to determine the deceased's intent, the *Hecht* court looked to the decedent's will, a note written to his wife and children, and instructions he left to the cryobank. The level of detail shocked the court and it stated that "[s]eldom has this court reviewed a probate case where the decedent evidenced his or her intent so clearly." The court found that the decedent's will unambiguously stated that "he had created and stored this sperm for the sole purpose of having a child with [his wife] . . . ." The statement to his wife and children supported the will which informed them that the decedent "had created the sperm vials with the specific intent [that his second wife] use them [to create a child]." Not

138. See *Hecht*, 59 Cal. Rptr. 2d at 224.
139. See id. at 225.
141. See *Hecht*, 59 Cal. Rptr. 2d at 225.
143. *Id.* (emphasis added).
144. See *id.* at 227.
145. *Id.*
146. *Id.*
147. *Id.*
wanting to encroach on the deceased's "fundamental right," the court ordered the remaining vials of sperm be distributed to the second wife.148

2. Steven S. v. Kay S.

Steven S. v. Kay S. provides guidance on whether preembryos would be classified as "persons" by California courts.149 In this case the court confronted the issue of whether an unborn child was a minor who came within the descriptions of section 300(a) of California's Welfare Code.150 Since this specific code section did not explicitly define whether an unborn child came within the parameters of the subdivision, the court had to look elsewhere for guidance.151 In doing so, the court turned to the oft-quoted case of Justus v. Atchison.152

In Justus, the Supreme Court of California determined whether the word "person" within section 377 of the California Civil Procedure Code included a stillborn fetus.153 To support its conclusion that fetuses were not to be equated with persons under the statute, the court stated:

In People v. Belous, we observed "there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child." Indeed, such equivalence is the exception rather than the rule. As the United States Supreme Court explained in Roe v. Wade, "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before

148. See id. at 228.
150. See id. at 526. The provision under review by the court provided that "[a]ny person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such a person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control. No parent shall be found to be incapable of exercising proper and effective parental care or control solely because of a physical disability, including, but not limited to, a defect in the visual or auditory functions of his or her body, unless the court finds that the disability prevents the parent from exercising such care or control."

Id. at 526 n.3 (quoting section 300, in part, from the California Welfare and Institutions Code then in force).
151. See id. at 527-28.
152. See id. at 527 (referring to Justus v. Atchison, 565 P.2d 122 (Cal. 1977)).
live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. . . . In short, the unborn have never been recognized in the law as persons in the whole sense.”

In addition, the Justus court recognized specific instances when the California Legislature specifically extended the definition of a “person” to include unborn children. One example noted by the court was the legislature’s revision of Penal Code section 270, which the legislature amended to read: “A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.” In conclusion, the Justus court stated that when the “Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a ‘person,’ as in section 377, it impliedly but plainly excludes such fetuses.”

Adopting the conclusion found in Justus, the Steven S. court found that subdivision (a) of Welfare and Institutions Code section 300 did not include fetuses. The court noted that if it were to hold otherwise, it would be making law as opposed to interpreting them. Thus, the court strictly construed the statute in accordance with precedent and its view of the role of the court.

3. Johnson v. Calvert

Johnson v. Calvert provides some guidance on whether consent agreements would be effective in California and how any contract disputes involving consent agreements would be resolved. Johnson involved a surrogacy contract dispute involving a married couple and a surrogate mother. The contract provided that the surrogate mother would relinquish all rights to the child in return for payments compensating her

155. See Steven S., 178 Cal. Rptr. at 527; Justus, 565 P.2d at 132.
157. Id.
158. See Steven S., 178 Cal. Rptr. at 528.
159. See id.
160. See id.
162. See id. at 778.
for carrying the child to birth.\textsuperscript{163} During the course of the pregnancy the surrogate mother, however, feeling abandoned by the married couple, decided to keep the child.\textsuperscript{164} As a result, the married couple filed suit and the court had to determine who would receive custody.\textsuperscript{165}

The court found that the mother providing the ovum and surrogate mother held equal maternity rights under the Uniform Parentage Act.\textsuperscript{166} The Act provides that maternity can be determined by either giving birth or through genetic testing.\textsuperscript{167} Since the married woman provided the ovum and the surrogate delivered the baby, the result under the Act was a "tie."\textsuperscript{168} Because California only allowed a child to have one mother,\textsuperscript{169} the court had to find a way to break the "tie."\textsuperscript{170}

The court believed the case could not be determined "without inquiring into the parties' intentions as manifested in the surrogacy agreement."\textsuperscript{171} When looking at the contract, the court noted that the aim of the contract was "to bring [the couple's] child into the world, not for the [married couple] to donate a zygote to [the surrogate mother]."\textsuperscript{172} By using the intentions set forth in the contract, the court concluded that when a "tie" results under the Act "she who intended to procreate the child, that is, she who intended to bring about the birth of a child that she intended to raise as her own- is the natural birth mother under California law."\textsuperscript{173} Ironically, the court did not enforce the surrogacy contract, but merely the intentions manifested in it.\textsuperscript{174}

\begin{thebibliography}{99}
\bibitem{163} See id.
\bibitem{164} See id.
\bibitem{165} See id.
\bibitem{166} See id. at 781 (noting that both the genetic and surrogate mother proved maternity under the Uniform Parentage Act).
\bibitem{167} See id. at 778-82.
\bibitem{168} See id. at 782.
\bibitem{169} See id. at 781 (finding that "California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible").
\bibitem{170} See id. at 782.
\bibitem{171} Id.
\bibitem{172} Id.
\bibitem{173} Id. at 782.
\bibitem{174} See id.; see also DOLGIN, supra note 97, at 186 (noting that the court explicitly approved but did not enforce the surrogacy contract on which it relied to discern the parties' intentions).
\end{thebibliography}
III. IDENTIFICATION OF THE PROBLEM

Unlike most areas of medicine, IVF remains under the radar map for most state legislatures. Since IVF procedures have existed for over two decades and legislators have done little in this area, it is unlikely that laws providing courts guidance will surface anytime soon. Thus, in states such as California where no laws exist regarding IVF procedures, IVF practitioners and gamete providers desiring to understand whether California courts will uphold IVF consent agreements should have a thorough knowledge of California case law. Understanding relevant case law can help IVF practitioners and participants predict, as this comment attempts to do, where California stands on the effectiveness of consent agreements between married couples.

IV. ANALYSIS

California's classification of preembryos must first be determined before beginning any legal analysis surrounding consent agreements. Then, as in Davis, the court will need to determine whether a "tie" results, and, if so, how to break that "tie."

A. Persons or Property

Before making any determination about the legality of a consent agreement, courts first need to confront the issue of whether preembryos are considered persons or property. Surprisingly, courts and state legislatures classify preembryos differently. For instance, a Louisiana state statute describes a preembryo as a "judicial person which shall not be intentionally destroyed." Thus, in Louisiana the preembryo is not the property of the physician, IVF clinic, or the gamete

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175. See Lal, supra note 8, at 533-34.
176. See DOLGIN, supra note 97, at 164 (noting that in each of the Davis decisions the status of the preembryos established the terms of the debate).
178. See LA. REV. STAT. ANN. § 129 (West 2000).
In contrast, the courts in *Davis* and *Kass* determined that the preembryos were not "persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."\(^{180}\)

In the *Davis* supreme court decision, the adoption of the "special respect" status allowed the court to avoid the pitfalls confronted by the lower courts.\(^{181}\) This categorization not only allowed the court to give the progenitors an opportunity to determine the disposition of the preembryos,\(^{182}\) but also allowed the court to devise a solution that would prevent a stalemate.\(^{183}\) Such a balance would not have occurred if the preembryos were treated as mere "property" or as a "person."\(^{184}\) As one commentator suggests, if the preembryos were looked upon as "property," the case would have been "handled by reference to the parties' comparative claims to 'control' the property stake."\(^{185}\) And as stated above, if the preembryos were treated like "persons," the judge would have determined the case in the preembryos' best interests.\(^{186}\) Thus, the "special respect" determination allowed the court to take into consideration each party's specific desire regarding parenthood.

Due to the fact that California lacks any statute or case specifically classifying preembryos, one way to determine their classification is to ask whether they would qualify as either a "person" or "property" under California law. If neither of these questions can be answered in the affirmative, then preembryos must reside somewhere in the middle as in *Davis*.

1. **Preembryos: Property Under California Law?**

The fact that the analysis in *Hecht* resembles that of *Davis* provides good support that California courts would not equate preembryos with something like a chair.\(^{187}\) *Hecht's* re-

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179. *See id.* § 126 (deeming an IVF embryo "a biological human being" which is not property of the physician who acts as the agent of fertilization, or the facility which employs him, or the donors of the sperm and ovum).

180. *Davis*, 842 S.W.2d at 597; *see also Kass*, 1995 WL 110368 at *1.

181. *See Davis*, 842 S.W.2d at 597.

182. *Id.* at 597 (determining that the progenitors have an interest in the preembryos to the extent that they have decision making authority concerning their disposition).

183. *See id.* at 598.

184. *See id.* at 595.

185. DOLGIN, supra note 97, at 164.

186. *See Davis*, 842 S.W.2d at 594.

liance on the American Fertility Society’s opinion and the *Davis* court ruling shows that the court believes these opinions to be the best source in resolving the classification of gamete material. Further strengthening this prediction is the fact that sperm, unlike preembryos, in and of itself, is incapable of forming life. Since *Hecht* gave sperm “special respect,” or a “unique form of property” classification, it is unlikely that another California court would relegate to a lesser classification something more capable of life than sperm. Although *Hecht* provides good support for the proposition that preembryos are not “property,” it provides no guidance as to whether they are “persons.”

2. Preembryos: Persons Under California Law?

Determining whether California would consider a preembryo a “person” is a little more difficult than determining whether it is “property.” The greater difficulty arises from the fact that the definition of “persons” and “fetuses” varies under California statutes. For example, criminal statutes, such as section 187 of the California Penal Code, have extended the meaning of homicide to include fetuses, while civil statutes, like section 300 of the Welfare Code, have been interpreted as giving unborn fetuses no status as a “person.”

*Steven S. v. Kay S.* provides some good guidance for resolving this issue. As mentioned above, the court in *Steven S.* tackled this dilemma by determining that unless the Legislature has spoken, the court will not consider fetuses to be “persons.” A preembryo, usually characterized as an earlier stage of embryonic development than that associated with the term fetus, is not likely to be given the status of a “person”

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189. *See id.* at 283.
190. *See id.* (noting that *Davis’* discussion of whether preembryos are persons was not pertinent in this case).
191. The California Penal Code defines murder as “the unlawful killing of a human being, or a fetus, with malice afore-thought.” CAL. PENAL CODE § 187(a) (Deering 2000). The statute makes an exception for legal abortions. *See id.* § 187(b).
193. *See id.* at 528.
where a fetus has not been so defined. Thus, there is a strong likelihood that a preembryo would not be classified as a person.

3. Somewhere In Between

The cases of Hecht and Steven S. indicate that preembryos would be classified somewhere between “persons” and “property.” Thus, like Davis and Kass, California courts would likely give them “special respect.” Unlike Hecht, Steven S. and the cases supporting its proposition involved the interpretation of statutes. One could argue that such cases should be narrowly construed as applying only to cases interpreting statutes; however, due to the lack of any California common law cases specifically on point, courts will likely turn to the statutes and their interpretations for guidance. In doing so, courts will find that the trend is not to classify preembryos, similar to fetuses, as “persons” unless the legislature has specifically desired to do so.

B. Competing Interests and the Formation of a “Tie”

As pointed out in Davis, when parties dispute over preembryos there are essentially two equal but competing interests. These interests arise from each party’s constitutional right to choose whether to procreate. Thus, as will be discussed later, the main question for the court to decide is how to break the “tie.” It is important to understand the derivation of these competing interests and to ensure that no other party, such as a state, has authority to determine the disposition of the preembryos.

Neither the federal nor any state constitution explicitly grants an individual the right to procreate or not procreate. Instead, these rights arise from the liberty interest in the Due Process Clause and the privacy interest in the penumbras of the Bill of Rights. For instance, the right to procreate was

194. See id.; see also Hecht, 20 Cal. Rptr. at 282.
196. See id. at 528.
197. See Davis v. Davis, 842 S.W.2d 588, 602 (Tenn. 1992) (noting that the two equal but competing interests consist of the right to procreate and the right to avoid procreation).
198. See id.
199. See Muller, supra note 43, at 785-86.
200. See Dehmel, supra note 4, at 1378 (linking reproductive freedom to the
first recognized by the Supreme Court in *Skinner v. Oklahoma*. In *Skinner*, the Supreme Court struck down a statute mandating the sterilization of habitual criminals and established the right to procreate as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race." Likewise, the court in *Griswold v. Connecticut* established the right not to procreate by holding that a married couple's use of contraception was within a "zone of privacy" established by the Constitution. The Supreme Court's opinion in *Eisenstadt v. Baird* reinforced the *Griswold* decision by holding that even unmarried couples were within the "zone of privacy."

Like the Tennessee Supreme Court in *Davis*, it is important for California courts to determine whether the government retains an interest in deciding the fate of preembryos. If the court finds that the government does have an interest, then a "tie" no longer exists. Instead, there would be a three-way interest in the disposition of the preembryos, and in such cases courts might find it difficult to enforce consent agreements. As noted in *Davis*, a state's interest can arise either through its interest in the preembryo's potential for human life or the public policy surrounding the disposition of the preembryo.

Much like the protections accorded by the U.S. Constitution have been interpreted, article 1, section 1, of the California Constitution has been interpreted to make the choice to procreate a fundamental right. Thus, the state must have a compelling interest in preserving the potential life of preembryos in order to overcome the gamete providers' rights to

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privacy interest in the penumbra of the Bill or Rights and the liberty interest of the Due Process Clause).
202. *Id.*
205. *See Robertson*, supra note 18, at 483 (recognizing that a state may impose limitations on the gamete providers decisional authority).
206. *But see Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) ("[A]t least with respect to Tennessee's public policy and its constitutional right to privacy, the state's interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy.").
207. *See id.*
privacy, or more specifically, the right to beget or not beget a child. 209 Judging from the nonexistence of statutes regarding preembryos and their potential for life, it appears that California has no interest in overriding an individual's authority over preembryos. Thus, it appears that California's interest in protecting the potential life of the preembryo is remote at best.

Once the Davis court determined that only the progenitors had an interest in determining the disposition of the preembryos, it was easy for the court to declare a "tie." 210 Given the fact that there are no California statutes governing the disposition of preembryos, it appears that courts would also find that only the gamete providers have sole authority to determine the disposition of their preembryos. Such a ruling only makes sense, because, as the Davis court acknowledged, "no other person or entity has an interest sufficient to permit interference with the gamete providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way the gamete providers do." 211

C. How To Break The "Tie"

Although not explicitly stated in any of the cases discussing consent agreements, the main question being answered in Davis, Kass, and A.Z. is how to resolve an apparent "tie" between two equal but competing interests. 212 While Davis proposes that unambiguous consent agreements, when involved, should control the outcome, 213 Kass suggests that the intent of the progenitors are appropriate "tie breakers," and that unambiguous consent agreements provide a good manifestation of their intent. 214 Unlike either Davis or Kass, the A.Z. deci-

209. See id.
210. See Davis, 842 S.W.2d at 602-03 (explaining that the state's interest is not sufficient enough to justify infringement on the gamete-providers decision making authority). After making this conclusion, the court then balanced the interests of the two parties to determine who should prevail. See id.
211. Id. at 602.
213. See Davis, 842 S.W.2d at 597.
214. See Kass, 663 N.Y.S.2d at 589.
sion, while never discussing how the "tie" should be broken, implicitly suggests that consent agreements that force one to become a parent against his or her wishes were not appropriate "tie-breakers." In determining the best "tie-breaking" method, each court had to decide the depths to which contract law would influence the outcome of problems involving family structure.

In _Davis_, the Tennessee Supreme Court bemoaned the intermediate court's decision that each progenitor share equal custody in the preembryos, because it allowed one party veto power over the other even though they supposedly had equal footing. The Tennessee Supreme Court noted that such a decision essentially conferred on Junior Davis the "inherent power to veto any transfer of the preembryos and thus insure their eventual discard or self destruction." This fear of unilateral veto power most likely influenced the court's proposal that consent agreements, if available, should be binding and enforceable. By upholding the enforceability of consent agreements, however, the court essentially allowed contract law to become the governing factor in determining whether a family was or was not to be created.

While the New York Supreme Court in _Kass_ upheld _Davis_' general proposition that the parties' mutual intent should be carried out, it did not believe that consent agreements should be binding and enforceable. This qualification of the _Davis_ holding was noted in the _Kass_ court's statement: "We are in full agreement with the decision in _Davis_ to the

215. A.Z., 725 N.E.2d at 1057. By voiding consent agreements as against public policy, the A.Z. court essentially determined that IVF consent agreements signed in Massachusetts would play no role in determining the disposition of preembryos. See id.

216. _See generally_ DOLGIN, _supra_ note 97. Dolgin notes that unlike contracts between adults, courts are hesitant to allow contract law become the governing principle in resolving disputes engendered by reproductive technologies for fear of commodifying the parent-child bond. See id.

217. _See Davis_, 842 S.W.2d at 598.

218. _Id._

219. _See_ DOLGIN, _supra_ note 97. Dolgin notes that _Davis_' recognition "as definitive the preferences and contractual agreements entered into by the progenitors, the court defined the Davises as associates in the business of human reproduction." _Id._

extent it requires that where a manifestation of mutual intent exists, that intent must be given effect by the court. The Kass court's broadening of Davis' proposition was demonstrated when it noted that such agreements do not need to be binding in order to use the intent they manifested to help resolve the dispute. Thus, unlike Davis, the New York Supreme Court decision in Kass reflects an intent-based approach that focuses on intent rather than contract law to determine the outcome of disputes engendered by reproductive technologies.

Unlike Davis and Kass, the A.Z. court ruled that consent agreements that force one to become a parent against his or her wishes will in no way play a role in the "tie-breaking" process. As noted above, the court found even unambiguous agreements to be void against public policy. This decision stemmed from the court's belief that by enforcing such agreements it would be entering an area into which the court typically did not intrude, that of forced familial relationships. Instead, the court believed that public policy would not allow courts to force individuals into "intimate family relationships." In coming to this conclusion, the court, without stating as much, indicated that such agreements, and even the intentions they manifest, cannot be used to discern the parties' intentions. Thus standing at the opposite end of the spectrum from Davis, the Massachusetts decision in A.Z represents the view that contract law has no place in resolving disputes involving forced familial relationships.

The Davis, Kass, and A.Z. cases suggest three philosophies for breaking the "tie" between gamete providers. One involves granting consent agreements absolute authority,
without regard to the dispositional terms. The second method of analysis treats the intent of the parties as controlling. Under this methodology, consent agreements, while not determinative of the outcome, may be used in determining intent. The third methodology treats consent agreements that force one party to become a parent against the other’s wishes as void against public policy and thus those agreements have no role in directing the dispositional outcome.

The first solution brings contracts to the fore of the resolution process, whereas the third tends to exclude the consent agreements from the decision making process altogether. Assuming California courts find that preembryos lie somewhere between “persons” and “property,” and that the state claims no interest in the disposition of the preembryos, then they must determine which philosophy to follow.

1. California, Consent Agreements and the “Tie-Breaker”

When considering which philosophy California courts will adopt, surrogacy contracts provide a good indication of how California courts will rule. Like consent agreements, persons or couples desiring a child secure their parental rights by entering into surrogacy contracts with the woman carrying the child or providing the ovum. Typically signed before the procedure occurs, the agreements usually provide that the surrogate mother will surrender all custody rights of the child to the person or couple desiring the child. Occasionally, the surrogate mother later decides that she wants to keep the child. While California courts have ruled both for and against the enforcement of such contracts, courts have not used public policy arguments as a basis for denying the enforcement of

230. See Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
232. See A.Z., 725 N.E.2d at 1057.
233. See In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994). The court notes that two types of surrogacy contracts exist, gestational and traditional. Id. Gestational surrogacy contracts are used when the sperm of a man are united with the egg of his wife and implanted in another woman’s womb with the understanding that the resulting child will be the child of the married couple. Id. The traditional surrogacy contract is used when the sperm of a man is used to impregnate a woman other than his wife with the understanding that the resulting child is to be the child of the married couple. Id.
234. Id.
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such contracts.\textsuperscript{235}

Although consent agreements deal with ownership rights and surrogate contracts focus on custody rights, their similarities derive from the fact that they are both used in assisted reproduction processes.\textsuperscript{236} In surrogacy cases, surrogacy contracts are used to delineate the rights of the intended mother and the gestational and/or ovum donor. The process of in vitro fertilization, on the other hand, utilizes consent agreements to delineate the rights of the IVF clinic in regard to the husband and wife as well as the separate rights of the husband and wife. Given this relationship, an examination of the philosophy used to determine the enforcement of surrogacy contracts provides a framework applicable to IVF consent agreements. The \textit{Johnson} case assists in providing this framework.

In \textit{Johnson}, the court was forced to break a “tie” between two women who had equal maternity rights under existing law.\textsuperscript{237} Ironically, the analysis performed in \textit{Johnson} mirrored that of \textit{Kass}.\textsuperscript{238} Once the court acknowledged both parties had proven equal maternity rights under existing law, the court found it necessary to inquire into the intent of the parties.\textsuperscript{239} To determine each party’s intent, the court looked not only to the surrogacy contract, but also analyzed whether the couple involved, Mark and Crispina, intended to be the parents.\textsuperscript{240}

This court noted:

Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.\textsuperscript{241}

While the surrogacy contract was not directly enforced or

\begin{itemize}
\item \textsuperscript{235} See id. at 894 (declining to enforce a traditional surrogacy contract because it was incompatible with the parentage and adoption statutes, not on grounds of public policy); \textit{Johnson} v. \textit{Calvert}, 851 P.2d 776, 778 (Cal. 1993) (finding that gestational contract valid, and declining to void such contracts on grounds that they violate public policy).
\item \textsuperscript{236} See supra Part II.A.2-3.
\item \textsuperscript{237} See supra Part II.A.2-3.
\item \textsuperscript{238} See supra Part II.A.2-3.
\item \textsuperscript{239} See \textit{Johnson}, 851 P.2d at 782.
\item \textsuperscript{240} See id.
\item \textsuperscript{241} See id.
\end{itemize}
deemed void as against public policy, it was used "only incidentally in actualizing the intent that the contract revealed."\(^{242}\) By upholding the intent of the contract but refusing to enforce it explicitly, the *Johnson* court, like the *Kass* court, attempted to resolve the issue without relying solely on principles of contract law.\(^{243}\)

When the *Johnson* court philosophy is applied to consent agreements, there appears to be a strong indication that such agreements will not be upheld per se\(^ {244}\) or deemed void as against public policy.\(^ {245}\) Instead, the consent agreements will be only one factor used to determine each party's intent before undergoing the IVF process. Conveniently, this philosophy allows California courts to avoid ruling on the enforceability of the consent agreements because that issue is not at stake.\(^ {246}\) However, the court will have to make sure that, at a minimum, the consent agreements are not held void as against public policy.\(^ {247}\) This must be done, as in *Johnson* and *Kass*, to ensure that the intent of the agreement may be used as a factor in determining the intent of the parties.\(^ {248}\) This minor hurdle, however, will most likely not be too difficult to overcome if California courts follow *Johnson*. The *Johnson* court was reluctant to find the surrogacy contract void as against public policy without guidance from the state legisla-

\(^{242}\) Dolgin, *supra* note 97, at 191.

\(^{243}\) See id. at 193-94. Dolgin notes that had the court simply relied on principles of contract, the "court would have avoided the need to presume intent." *Id.* at 193. However, if it did so, then it would have "definitely defined the family in market terms, as a collection of free, essentially unconnected, uncommitted individuals." *Id.* at 193-94.

\(^{244}\) See id. at 194 (noting that *Johnson* "neither enforced nor dismissed the gestational surrogacy contract").

\(^{245}\) This conclusion is drawn from the fact that the court in *Johnson* seemed reluctant to void as against public policy a surrogacy contract without guidance from the California Legislature. See *Johnson*, 851 P.2d at 782-84. Specifically, the court noted: "It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy." *Id.* at 787.

\(^{246}\) See Dolgin, *supra* note 97, at 194 (noting that the court in *Johnson* "neither enforced nor dismissed the gestational surrogacy contract" when making its determination).

\(^{247}\) See *Johnson*, 851 P.2d at 783.

\(^{248}\) See id. (noting that the court felt free to inquire into the parties' intentions manifested in the consent agreement because the court did not find it as "inconsistent with public policy").
Since the California Legislature has yet to provide guidance on the effectiveness of consent agreements, the courts will likely avoid the pitfall of A.Z. and enforce the intent of the parties as manifested in the agreement.

The Hecht case provides further support for the proposition that California courts will apply an intent-based methodology to problems engendered by reproductive technologies. Although the situation is unlike Kass or Davis in that the court did not need to break a "tie," the case did involve gamete material and the use of reproductive technologies, i.e., posthumous insemination. Similar to the Johnson court, the Hecht court specifically avoided ruling on the validity of any will or contract and instead focused primarily on the deceased's intent. The court found the will of the deceased as well as the contract between the sperm bank and the deceased helpful in determining the deceased's intent. Thus, by applying the intent-based methodology, the court was able to avoid interjecting contract law principles into an area where it may not belong.

2. The Mire Regarding the Use of Intent

The Johnson and Hecht cases suggest that in situations where ownership rights between gamete donors conflict, California courts may not necessarily uphold or enforce consent agreements but will enforce the intentions they represent.

There is much disagreement as to whether this is the proper path to follow. Generally speaking, many people fear that upholding contracts, or the intentions they manifest, used in the artificial reproduction process will lead to a depersonalization of the reproduction process and a breakdown of the

249. See id.


252. See Hecht, 59 Cal. Rptr. 2d at 227 (noting that the decedent's will and contract with the cryobank provided ample evidence to discern his intent).

253. See supra Part IV.C.1.


255. See Shultz, supra note 254, at 333. Professor Shultz describes the depersonalization of the reproduction process as comprising two subcategories: 1) the severance of a process that should not be separated, and 2) the commodification of the people and resultant children of the process. See id. at 333-37.
More specifically, Professor Dolgin notes that the use of intent by the courts has created results that are irreconcilable. That is, courts using intent to uphold the traditional notions of family have failed precisely because they recognize that parents or gamete providers have a choice, whereas the traditional notions of family only recognize biological truths—truths that find choice irrelevant. Furthermore, Professor Dolgin notes that intent is difficult to discern because people's intentions are often "multidimensional, complicated, and confused." Thus, courts will have difficulty determining the true intent of each party.

While courts relying on intent have failed to explain why intent, as opposed to the enforcement of a contract, is used, Professor Dolgin suggests that intent is used to "allow courts to mediate between images of the marketplace and those of the traditional home." The use of intent not only gives the courts guidance on how to rule but also the flexibility to rule in a way they feel is appropriate in order to maintain some...
semblance of the traditional notions of family.\textsuperscript{262} Such flexibility would not be possible if the court relied solely on contract law.\textsuperscript{263}

V. PROPOSAL

Determining the effectiveness of consent agreements signed in California is not easily solved. As previously mentioned, preliminary issues must be resolved before the effectiveness of a consent agreement can be evaluated.\textsuperscript{264} Apparently, however, California courts will defer to consent agreements where the parties' intentions are unambiguously conveyed.\textsuperscript{265}

Whether it is proper to use intent to determine the dispositional outcome of preembryos when a consent agreement exists is questionable. However, in a world where certainty is preferred over the uncertain, it would seem that the enforcement of consent agreements would be preferable to the ad hoc decisions that could result from an intent-based approach. While the enforcement of consent agreements between couples will intrude on the traditional notions of family, there are benefits in doing so.\textsuperscript{266} As noted by Professor Robertson, one benefit accruing from enforcing consent agreements is that it “maximizes the gamete providers’ procreative liberty by giving them control over future disposition of embryos produced in the course of the IVF treatment of infertility.”\textsuperscript{267} Another benefit is “that it gives the certainty needed for efficient operation of embryo freezing programs.”\textsuperscript{268} A third benefit of enforcing consent agreements is that “legal recognition will minimize disputes and the cost of resolving disputes which do arise.”\textsuperscript{269}

The downsides of enforcing consent agreements between parties undergoing IVF appears relatively small. While the

\textsuperscript{262} See id. at 181-82.
\textsuperscript{263} See id. at 182.
\textsuperscript{264} See supra Part IV.
\textsuperscript{265} See supra Part IV.
\textsuperscript{266} See, e.g., John A. Robertson, Prior Agreements for Disposition of Frozen Embryos, 51 OHIO ST. L.J. 407, 419-23 (1990) (explaining why the advantages of enforcing voluntary agreements for disposition of stored embryos are not outweighed by objections to enforcement).
\textsuperscript{267} Id. at 415.
\textsuperscript{268} Id. at 416.
\textsuperscript{269} Id. at 418.
enforcement of such agreements recognizes the autonomy of the individuals, counter to the traditional notions of family, it does no more than a prenuptial agreement. Arguably a prenuptial agreement intrudes more on the traditional notions of family because it recognizes that individuals will in a sense remain autonomous throughout a marriage. While an argument could be made that prenuptials only concern property and not objects with the potential for life, this argument is weakened by the fact that progenitors probably have greater dispositional authority over their gamete material than typical property. As for the depersonalization of the reproduction process in the context of IVF, it would seem that such a concern should be more geared to the IVF process in general, because simply undergoing the process of IVF depersonalizes the reproduction process. Even concerns about the commodification of women and children are unwarranted because the process does not involve a third party surrogate of a child. Lastly, some argue that binding consent agreements cannot take into consideration changed circumstances that might occur after a party has signed such a contract. Even this concern is unwarranted, however, because as Professor Robertson notes, consent agreements "raise few problems of foreseeability or changed circumstances different from those that arise in a vast array of other transactions which are held binding, despite a changed situation that makes the original agreement now undesirable to one of the parties."

Given the apparent imbalance between the benefits and burdens of enforcing consent agreements, the California Legislature should clarify whether such agreements are valid. Doing so will help increase the certainty of an already uncertain process. Furthermore, it will prevent judges from applying an ad hoc intent-based rationale that allows them to inject their view of what the traditional notions of family ought to be. The law proposing that such contracts be held valid should ensure that IVF clinics press upon individuals the importance of the decision they are making so as to ensure that they do not regret the decision they have made.

270. See Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (noting that the preembryo is due 'special respect' because of its potential for life).  
271. See Robertson, supra note 266, at 419-20 and sources cited therein.  
272. Id. at 420.  
273. See id. at 423.
VI. Conclusion

Although IVF brings happiness to many people, as noted in *Kass, Davis* and A.Z., it also brings many difficult legal issues for the courts to sift through- one of which being the ownership rights of preembryos when disputes arise regarding their disposition. Unlike other forms of "property," preembryos differ because they have the potential for life. As such, many courts afford these eight-celled organisms "special respect" and pay close attention to the desires of the gamete providers. While consent agreements provide courts insight into the intentions of the parties, as was demonstrated in *Davis, Kass,* and A.Z., courts have adopted different views on whether those intentions may be relied upon and, if so, what effect they will have on the final decision. As noted by one commentator, the various positions reflected in *Davis, Kass,* and A.Z. reflect the struggle courts have with injecting contract law principles into areas involving family matters.

Which position California courts will adopt is anyone's guess. The cases of *Hecht* and *Johnson* suggest that California courts prefer the intent-based philosophy. That philosophy dictates that decisions regarding cells that have the potential for human life are best left to the providers. Thus, it appears California will embrace consent agreements, if unambiguous, and rely on the intents they manifest to determine the disposition of preembryos.

Instead of allowing courts to apply a methodology that allows them to define family structure, the California Legislature should pass a law that validates consent agreements. Like every decision, there are drawbacks to doing so; however, in the context of the IVF process, the benefits of enforcing agreements between couples appear to outweigh any drawbacks. Requiring the enforcement of consent agreements will bring consistency and certainty to an already uncertain process.

274. See supra Part I.
275. See supra Part IV.
276. See DOLGIN, supra note 97, at 249-51.
277. See supra Part IV.
278. See supra Part IV.
279. See supra Part V.