Santa Clara University School of Law

Santa Clara Law Review

Volume 40 | Number 1 Article 7

1-1-1999

Thursday's Child: Litigation over Possession of Cryopreserved Embryos as a Call for Legislation

Jennifer Hodges

THURSDAY'S CHILD†: LITIGATION OVER POSSESSION OF CRYOPRESERVED EMBRYOS AS A CALL FOR LEGISLATION

Jennifer Hodges*

I. INTRODUCTION

Louise Joy Brown, the first child born through in vitro fertilization (IVF),[1] celebrated her twenty-first birthday on July 25, 1999.[2] Since her birth, IVF technology has been heralded as the answer to the prayers of many infertile couples, allowing them an alternative to either childlessness or adoption.[3] In the last twenty years, 300,000 other children besides Louise have been born worldwide from the same or similar procedure.[4] Currently, approximately 15,000 births result annually from IVF in the United States alone.[5] The assisted

---

† Monday's child is fair of face, Tuesday's child is full of grace, Wednesday's child is full of woe, Thursday's child has far to go, Friday's child is loving and giving, Saturday's child works hard for a living, but the child that is born on the Sabbath Day is bonny and blithe and good and gay.
THE REAL MOTHER GOOSE 87 (Rand McNally & Co. Chicago ed. 1985).

* Comments Editor, Santa Clara Law Review, Volume 40. J.D. candidate, Santa Clara University School of Law; B.A., University of California, Santa Cruz.

1. Literally, "fertilization in glass." In vitro fertilization is a procedure in which ova (eggs) are extracted from women and fertilized in a petri dish with sperm. Once the ova are fertilized, the resulting embryos are either placed into a woman's uterus, hopefully resulting in a pregnancy, or frozen for use in the future. *See, e.g.*, ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 89 (1995); MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY 4 (1985).

2. *See* Lori Andrews et al., *ART into Science: Regulation of Fertility Techniques; Assisted Reproductive Technology*, 281 SCI. 651, 651 (1998).

3. *See* Sherylynn Fiandaca, Comment, *In Vitro Fertilization and Embryos: The Need for International Guidelines*, 8 ALB. L.J. SCI. & TECH. 337, 339 (1998).

4. *See* Andrews, *supra* note 2, at 651.

5. *See id.*

reproductive technology (ART) industry, in seeking to provide a solution to couples desperate to have a child, has become big business, currently serving an estimated one in six infertile couples and taking in an annual revenue of approximately $2 billion.[6]

Along with the promise of this relatively new technology has come a host of moral, ethical, and legal problems. Cryopreservation, or the freezing of embryos[7] for later use, is one example of an area of ART that has opened the door to speculation, litigation, and concern.[8] For example, because cryopreservation allows embryos generated by IVF to exist outside the womb for an indefinite period of time,[9] its use has sparked a vigorous debate over whether such "frozen embryos" are best considered persons or property.[10] Differing viewpoints as to the appropriate characterization of frozen embryos have had a dramatic effect on the outcome of IVF litigation.[11] Further, concerns as to other implications of the procedure, such as the proper period of storage and the morality of destruction and experimentation on cryopreserved embryos, have also surfaced.[12]

Complicating the debate is the fact that the ART field is largely unregulated.[13] There are several reasons why the industry remains insulated from the regulations with which other fields of medicine must comply.[14] First, because of fallout from the abortion debate, embryo and fetal research is excluded from federal funding.[15] Therefore, unlike other institutions that do receive government funding, IVF clinics are not

6. *See id.*

7. Many terms are used to refer to cryopreserved embryos: embryos, frozen embryos, fertilized ova, fertilized zygotes, pre-embryos, and blastocysts. This comment uses these terms interchangeably; no implication is intended by the choice of any particular term at any given place in the text.

8. *See* Fiandaca, *supra* note 3, at 339.

9. *See* Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 134 (1993).

10. *See* Fiandaca, *supra* note 3, at 340. *See also* Nicole L. Cucci, Notes, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 St. JOHN'S L. REV. 417, 434-36 (1998).

11. *See* Cucci, *supra* note 10, at 434-36.

12. *See* Andrews, *supra* note 2, at 651.

13. *See id.* ART is among the least regulated medical specialties in the United States. Most notably, unlike Europe, the United States does not require that fertility clinics be licensed. *See* Michael D. Lemonick, *The New Revolution in Making Babies*, TIME, Dec. 1, 1997, at 40.

14. *See* Andrews, *supra* note 2, at 651.

15. *See id.*

required to form institutional review boards (IRBs).[16] Second, while some protections do generally exist for embryonic experimentation, many reproductive technologists are not subject to sanctions for misbehavior, unlike researchers in other fields, because they practice in private clinics.[17] Perhaps as a result of the lack of regulation, the ART industry has been accused of a multitude of transgressions, including "experimentation without appropriate review, use of embryos without consent, inadequate informed consent, conflicts regarding control over stored gametes[18] and embryos, and failure to routinely screen donors for disease."[19]

This comment focuses on just one problem raised by the implementation of IVF technology: determining the disposition of frozen embryos when the gamete donors undergo a change in circumstances, such as divorce. Part II examines the various legal theories regarding the status of frozen embryos. In reviewing a number of differing viewpoints, this comment addresses the impact of each perspective on the parties involved in the IVF process: the gamete donors, the clinics, and the embryos themselves. This comment does not focus on whether life begins at the point of fertilization, because that question carries with it a myriad of potentially unresolvable ethical, moral, and religious concerns.[20] Rather, this comment focuses on the legal implications of holding that this is so. Part II also provides a background of the technical aspects of the IVF procedure. Part III identifies the problem presented by the lack of uniform standards for resolving IVF disputes. Part IV analyzes the major viewpoints in more detail, discussing the potential impact of the implementation of each theory. Finally, Part V proposes a legislative solution that takes the decision-making power about the disposition of embryos out of the hands of the courts, and places it with the couples who undergo IVF.

16. *See id.*
17. *See id.*
18. "Gametes" refers to both sperm and eggs.
19. Andrews, *supra* note 2, at 652.
20. Generally, the question of whether an embryo constitutes life has been viewed as beyond the scope of the courts. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

II. BACKGROUND

A. *The Technology: The IVF Procedure and Cryopreservation of Resulting Embryos*

The IVF procedure is sought by couples who wish to have a child but cannot reproduce successfully by means of sexual intercourse.[21] The problem may stem from a number of sources, such as low sperm motility, failure to produce ova (eggs), or physical damage to the fallopian tubes or uterus.[22] In order to overcome these obstacles, it is necessary to fertilize the ova outside the woman's body and subsequently implant the resulting embryos in her uterus.[23]

The first step in IVF is the collection, or "harvesting," of healthy ova from the woman's ovaries.[24] First, egg production is stimulated through the use of fertility drugs, which cause the woman to produce a higher-than-normal number of eggs and also allow a certain amount of control over the timing of ovulation to facilitate the optimal scheduling of the retrieval procedure.[25] The production of multiple eggs is known as "superovulation,"[26] and may result in the harvesting of as many as fifteen to forty eggs per cycle.[27]

This bounty does not come without a price. Fertility drugs can cause mood swings, bloating, and pain, and can even frustrate subsequent implantation of embryos by irritating the uterine lining.[28] The harvest itself is traditionally

---

21. *See* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS, 956-59 (2d ed. 1991).

22. *See id.*

23. *See id.* For simplicity's sake, this overview of the IVF procedure assumes it takes place using the gametes (eggs and sperm) provided by a heterosexual married couple for the purpose of implanting the resulting embryos in the wife's uterus. However, this is not the only scenario in the real world of assisted reproductive technologies. Since any viable gametes and uterus can conceivably be used, a successful fertilization and implantation can encompass any number of different scenarios, including a recent California example in which a child was conceived using a donor egg, donor sperm, and a surrogate mother. *See* In Re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

24. Davidoff, *supra* note 9, at 134.

25. THE JOHNS HOPKINS HANDBOOK OF IN VITRO FERTILIZATION AND ASSISTED REPRODUCTIVE TECHNOLOGIES 153 (Marian D. Damewood, M.D. ed. 1996).

26. *Id.* at 153. *See also* Davidoff, *supra* note 9, at 134.

27. ROBYN ROWLAND, LIVING LABORATORIES: WOMEN AND REPRODUCTIVE TECHNOLOGIES 19, 22-23 (1992).

28. *See* Robert M.L. Winston & Alan H. Handyside, *New Challenges in Human In Vitro Fertilization; Scientific and Ethical Difficulties*, 260 SCI. 932, 932.

performed under general anesthesia via laparoscopy, an extraction of eggs from the woman's ovaries through incisions made in her abdominal wall.[29] More recently, the procedure has been performed under local anesthesia using ultrasound to guide a needle through the woman's bladder and into the ovary.[30] This process may require repeated penetration in order to collect all of the available eggs.[31] Ultrasound-assisted transvaginal extraction, which does not entail penetrating the abdomen, may also be used. However, this procedure is not favored because it is more difficult to perform than laparoscopic surgery and yields fewer eggs.[32]

The second step in IVF is the fertilization of the successfully retrieved eggs with the man's sperm in a petri dish.[33] In some cases, particularly those in which sperm motility is a factor, doctors may use a more invasive technique called "micro-injection,"[34] injecting the sperm directly into the eggs in order to facilitate fertilization.[35] After fertilization, the eggs are allowed to develop to the four- to eight-cell stage, at which point they may be transferred into the woman's uterus through a catheter.[36] Ideally, one or more embryos will then implant in the uterine lining and result in a pregnancy.

Due to the physically and emotionally taxing nature of this procedure,[37] many couples who undergo IVF choose to freeze, or cryopreserve, any extra, unimplanted embryos for future use in case the initial IVF procedure fails to produce a pregnancy.[38] Further, because of the low success rate of IVF[39] and the fact that almost no insurance carriers cover its costs,[40] freezing avoids the cost of repeated aspirations and

29. *See* ROWLAND, *supra* note 27, at 25.
30. *See id.* at 26.
31. *See id.* at 27.
32. *See id.* at 28.
33. *See id.* at 19.
34. *See* Andrews, *supra* note 2, at 652. "Only recently has it been observed that children born after this procedure are twice as likely to have major congenital abnormalities as children conceived naturally." *Id.*
35. *See id.*
36. *See* Cucci, *supra* note 10, at 421.
37. *See* Andrews, *supra* note 2, at 651.
38. For a complete discussion of cryopreservation of embryos, see Alan Trounson, *Preservation of Human Eggs and Embryos*, FERTILITY & STERILITY, July 1986, at 1.
39. In the United States, the overall birth rate per IVF treatment cycle is 14%. *See* Winston & Handyside, *supra* note 28, at 932.
40. *See* Annette Miller et al., *Baby Makers Inc.*, NEWSWEEK, June 29, 1992,

transfers.[41] Given that a single IVF procedure currently costs approximately $8000,[42] with no guarantees for success, cryopreservation may represent a substantial savings to a couple forced to undergo multiple implantations before succeeding in a pregnancy.

However, cryopreservation may present a host of legal problems, particularly since the individual circumstances of the gamete donors are likely to change over time.[43] Divorce, death, incapacitation, aging, birth of other children, or financial considerations may cause one or both parties to change their minds about continuing with implantation.[44] Even a successful implantation and birth through IVF may create "loose ends," leaving behind an unintended legacy of cryopreserved embryos that are no longer wanted or needed by the couple who chose to create them.[45] Also, given the flexibility of IVF to involve multiple parties such as egg donors, sperm donors, and surrogate mothers, as many as five individuals can potentially claim a valid legal interest in the disposition of any single embryo.[46]

B. *The Line of Litigation:* Davis v. Davis *as an Overview*

Relatively little litigation exists surrounding the IVF procedure and the disposition of cryogenically preserved embryos.[47] Speculations about the reasons for the seeming lack of controversy are numerous, ranging from the novelty of the technology[48] to lack of interest on the part of the patients and

---

at 38, 39.

41. *See* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to An Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 529 (1994). Because "the IVF process is costly . . . the fewer egg retrievals a woman undergoes the better." *Id.*

42. *See* Michael D. Lemonick, *The New Revolution in Making Babies*, TIME, Dec. 1, 1997, at 40. The actual cost to patients is increased due to the fact that most private insurers in the United States refuse to cover IVF. *See id.*

43. *See id.*

44. *See id.*

45. *Id.; see also* Rita Rubin, *100,000 Frozen Embryos*, USA TODAY, Dec. 8, 1998, at 1A.

46. *See* In Re Marriage of Buzzanca, 72. Cal. Rptr. 2d 280 (Ct. App. 1998).

47. "We have no case law to guide us . . . there are apparently very few other litigated cases involving . . . 'frozen embryos.'" Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).

48. *See* Tanya Feliciano, Davis v. Davis: *What About Future Disputes?*, 26 CONN. L. REV. 305, 312 (1993).

doctors involved,[49] especially with regard to the disposition of remaining embryos after a successful pregnancy.[50] With regard to medical malpractice suits, the high failure rate of IVF[51] may itself be a contributing factor to the lack of litigation since it may be difficult for patients to discern whether a failure is due to negligence or simply inherent risks of the procedure.[52] The situation is further complicated because United States Supreme Court cases dealing with the potential legal status of embryos, such as *Roe v. Wade*[53] and *Planned Parenthood v. Casey,*[54] are distinguishable in that they focus on women's rights to terminate pregnancies.[55] Because frozen IVF embryos have yet to be implanted, their existence does not necessarily constitute a "pregnancy." Thus, the discretion given to a woman's right to choose to have an abortion under *Roe* and *Casey* cannot be readily expanded to grant women analogous unilateral decision-making power in deciding the fate of unimplanted embryos.[56]

Nonetheless, the cases actually adjudicated offer at least some insight into the various viewpoints used by courts in determining how to resolve the disposition of frozen embryos. Foremost among these cases is *Davis v. Davis,*[57] which trial, appellate, and state supreme court decisions neatly encompass the three major views of IVF-produced embryos: frozen embryos as persons with associated legal rights,[58] as property,[59] and as neither persons nor property.[60] Because the *Davis* cases encompass all three of these views, they serve as a convenient backdrop for analyzing the moral, ethical, and

49. *See* Trounson, *supra* note 38, at 1.
50. *See id.*
51. *See* Winston & Handyside, *supra* note 28, at 932.
52. *See* Andrews, *supra* note 2, at 651.
53. Roe v. Wade, 410 U.S. 113 (1973).
54. Planned Parenthood v. Casey, 510 U.S. 1309 (1994).
55. At least one court has relied on this distinction in addressing the disposition of cryopreserved embryos: "The Court understands that . . . *Roe* . . . dealt with the constitutionality of abortion statutes and the Court's decisions in those cases have a profound effect on the states' compelling interest in the protection of human life, but only as it deals with the abortion issue." Davis v. Davis, No. E-14496, 1989 WL 140495, at *10 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).
56. *See id.*
57. *Davis*, *supra* note 55.
58. *See Davis*, 1989 WL 140495, at *11.
59. *See Davis*, 1990 WL 130807, at *3.
60. *See Davis*, 842 S.W.2d at 597.

legal problems currently posed by the cryopreservation of embryos.[61]

C. Davis v. Davis *at the Trial Court: The "Embryo as Person" View*

The *Davis* dispute marked the only point of contention in the Tennessee divorce proceedings between Mary Sue and Junior Davis: the disposition of seven cryogenically preserved embryos that were the result of an IVF attempt in December 1988.[62] Although the Davises were informed about the technical aspects of IVF and cryopreservation,[63] the clinic assisting the Davises in their IVF procedure neglected to seek their consent as to the future disposition of the embryos.[64] Although the clinic did ordinarily use consent forms that addressed the implications of storage and the possibility of donating embryos to an infertile couple,[65] the Davises never signed the forms, nor did they reach any definitive agreement prior to the procedure about either storage or donation.[66]

At the trial court level, Mary Sue wished to preserve the embryos in order to implant them in her uterus and continue her attempt to become pregnant. Junior wished to have the embryos destroyed.[67] In resolving the dispute, the trial court adopted the "embryo as person" view, awarding "custody" of the embryos to Mary Sue.[68]

In arriving at its decision, the trial court relied heavily on the expert testimony of French geneticist, Dr. Jerome Lejeune.[69] The court gave much consideration to the distinction between categorizing the Davises' embryos as "embryos" or "pre-embryos," and the resulting differences in legal analysis that the court saw as stemming from the application of those terms.[70]

---

61. *See* Feliciano, *supra* note 48, at 314.
62. *See Davis*, 842 S.W.2d at 589.
63. *See id.* at 592.
64. *See id.*
65. *See id.* at 592 n.9.
66. *See id.*
67. *See id.* at 589.
68. *See* Davis v. Davis, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).
69. *See id.* at *4.
70. *See* Davis, 842 S.W.2d at 593.

Despite contrary testimony by Dr. Irving Ray King, the gynecologist who performed the IVF procedures in the Davis case,[71] and a report by the American Fertility Society,[72] the court aligned itself with the reasoning of Dr. Lejeune, who insisted that there was no scientifically recognized distinction between the embryos and pre-embryos.[73] Dr. Lejeune instead referred to the four- to eight-cell structures as "early human beings," "tiny persons," and even as "kin."[74] The court, in accordance, held that from the moment of conception the embryos were "human beings,"[75] awarding custody to Mary Sue, whom the court determined should be "permitted the opportunity to bring these children to term through implantation."[76] In justifying its decision, the trial court cited the doctrine of *parens patrie*,[77] holding that it was "in the best interest of the children" to have the opportunity to be born instead of being destroyed.[78]

This line of reasoning, that an embryo is a human being from the moment of conception and deserves protection whether or not it is implanted in a woman's uterus, is supported not only by the Catholic church,[79] but also by Louisiana state law,[80] which declares outright that "[a]n in vitro fer-

71. *See id.* "[Dr. King] testified that the currently accepted term for the zygote immediately after division is 'preembryo' and that this term applies up until 14 days after fertilization. . . . [This] testimony was corroborated by the other experts who testified at trial, with the exception of Dr. Lejeune." *Id.*

72. American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY 6 (1990).

73. *See Davis*, 842 S.W.2d at 593.

74. *Id.* For a disparaging commentary on Lejeune's testimony, see George J. Annas, *A French Homunculus in a Tennessee Court*, 19 HASTINGS CTR. REP. 20 (1989).

75. *See Davis*, 842 S.W.2d at 589.

76. *Id.*

77. *Parens patriae* literally means "parent of the country." The doctrine refers to the principle that the state must take care of those who are unable to care for themselves. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

78. *Davis*, 842 S.W.2d at 594.

79. For a discussion of the Catholic Church's pro-life position, which has led to its opposition of IVF, see James Glieck, *The Vatican on Birth Science; Reproductive Help: Widespread and Unregulated*, N.Y. TIMES, Mar. 1, 1987, at A16. However, Father Richard McCormick, a noted Catholic bioethicist, has suggested that prior to implantation an embryo is not an individual and therefore not viewed as a person under Catholic theology. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 102, 109 (1994).

80. LA. REV. STAT. ANN. §§ 9:121-:133 (West 1999).

tilized human ovum is a biological human being . . . ."[81]

However, critics point out that the implications of this perspective are profound.[82] Categorizing embryos as human beings brings with it the necessity of allocating to them a panoply of legal rights, ranging from the right to be implanted, as addressed in *Davis,*[83] to the right to inherit property.[84] The granting of these legal rights to the embryo means that its rights may at times supersede the rights of others,[85] creating a ripple effect that in some cases may be in direct conflict with existing law. For example, the court determination in *Davis,* that an embryo has a right to be implanted, may mean that women like Mary Sue Davis who undergo IVF could be forced to implant all of the embryos resulting from the procedure.[86] This result is in direct conflict with a woman's right to privacy and bodily integrity under *Roe v. Wade,*[87] which explicitly concluded that "the unborn have never been recognized in the law as persons in the whole sense."[88]

D. Davis v. Davis *at the Appellate Court: The "Embryo as Property" View*

The "embryo as person" view espoused by the *Davis* trial court did not survive appeal. At the time of appeal, Mary Sue Davis had remarried and no longer wanted to implant the embryos in her own uterus.[89] Instead, she wanted to donate them to an infertile couple, while Junior still wanted them destroyed.[90]

Although not directly referring to it as such, the Tennessee Court of Appeals adopted an "embryo as property" approach in resolving the dispute.[91] The appellate court reversed the trial court's ruling on two grounds. First, the court

---

81. *Id.* § 9:126.
82. *See* Cucci, *supra* note 10, at 434.
83. *Davis*, 842 S.W.2d at 588.
84. *See* Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 807 (1992).
85. *See id.* at 813.
86. *See id.*
87. Roe v. Wade, 410 U.S. 113 (1973).
88. *Id.* at 162.
89. *See* Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).
90. *See id.*
91. *See* Trespalacios, *supra* note 84, at 813.

found that awarding the embryos to Mary Sue for implantation against Junior's will constituted "impermissible state action in violation of Junior's constitutionally protected right not to beget a child where no pregnancy has taken place."[92] Second, the court found no basis under Tennessee law for the trial court's determination that human life begins at conception,[93] nor did it find any state interest compelling enough to justify a court order of implantation against the will of either party.[94] Accordingly, the court held that Mary Sue and Junior held a joint interest in the pre-embryos, with equal control over their disposition.[95]

In reaching its decision, the appellate court cited the first IVF dispute brought to trial, *York v. Jones*.[96] In *York*, a couple who initiated an IVF procedure in Virginia sought to compel the transfer of their single remaining cryopreserved preembryo to an institute in California, where the couple had relocated.[97] The *York* court applied contract and property law principles in resolving the dispute, finding that a bailor-bailee relationship existed between the Yorks and the Virginia clinic.[98] In reaching its decision, the court relied on the fact that the consent form the Yorks signed referred to the stored embryos as "property" throughout.[99] The court held that since the prospect of implantation, the purpose of the bailment, had ceased to exist, the clinic was obligated to release the preembryo as the Yorks desired.[100]

By relying on *York*, the *Davis* appellate court arguably aligned itself with an "embryo as property" viewpoint,[101] and

92. Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).

93. *See id.*

94. *See id.* "[A]s embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for human life. But, even after viability, they are not given legal status equivalent to that of a person already born." *Id.*

95. *See id.* at *3.

96. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

97. *See id.* at 422.

98. *See id.* at 425.

99. *See id.* at 424. For example, one portion of the agreement stipulated that "in the event of a divorce, we understand legal ownership of any stored prezygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction." *Id.*

100. *See id.* at 425.

101. *See* Trespalacios, *supra* note 84, at 813.

shifted the focus from concentrating on the rights of pre-embryos to concentrating on the rights of the gamete donors.[102] This at least marked a strong departure from the status of personhood attributed to pre-embryos by the *Davis* trial court.[103] In considering, and then rejecting, the "embryo as person" view, the *Davis* appellate court recognized the conflict with constitutional law inherent in deciding that a cryogenically preserved embryo is a human being.[104]

However, the *Davis* appellate court decision has been the subject of criticism for several reasons. First, in relying on *York*, the appellate court failed to consider that the basis for the *York* holding rested not primarily on the categorization of the pre-embryos as property, but instead on the analysis of an existing contract between the parties.[105] Second, *York* is distinguishable in that it did not involve a divorce; the issue in *York* was not the resolution of ownership of the embryos as between the couple themselves, but between a couple and a clinic.[106] Third, the decision at the *Davis* appellate level has been criticized as inconsistent with property law, since in divorce cases joint property is usually divided equally between the parties, not subjected to joint ownership as were the embryos in *Davis*.[107] Finally, the appellate ruling arguably vested control of the embryos in Junior.[108] Since he was the party seeking to avoid procreation, the court of appeals essentially awarded Junior veto power over Mary Sue's desire to either implant or donate,[109] thereby granting him exclusive control over the disposition of the embryos.[110]

---

102. *See id.* at 813.

103. *See supra* text accompanying notes 71-81.

104. "[The U.S. Supreme Court] has clearly held that an individual has a right to prevent procreation." Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993) (citing Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1972); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

105. *See* Trespalacios, *supra* note 84, at 816.

106. *See Davis*, 842 S.W.2d at 596 (calling the appellate court's reliance on *York* "troublesome" for this reason).

107. *See* Trespalacios, *supra* note 84, at 816. Some commentators have interpreted the appellate court's holding as awarding joint custody. *See, e.g.*, Mark Curriden, *Joint Custody of the Frozen Seven*, ABA J., Dec. 1990, at 36.

108. *See* Trespalacios, *supra* note 84, at 817.

109. "In reality, such joint custody grants a veto power to one parent over the other's child-rearing decisions." *Id.* (citing Chamberlin, *Joint Custody: Its Legislative and Judicial Evolution*, TRIAL, Apr. 1989, at 23, 26).

110. *See id.*

E. Davis v. Davis *at the State Supreme Court: The "Neither Person nor Property" View*

The Supreme Court of Tennessee took a third route in interpreting how to resolve the disposition of the Davis' pre-embryos. First, the court rejected the trial court's finding that embryos are "people," referring to Dr. Lejeune's testimony as reflecting "a profound confusion between science and religion."[111] The court then adopted the American Fertility Society's term "pre-embryo" to describe the fertilized ova in the *Davis* case.[112]

Next, the supreme court noted that because the court of appeals cited *York v. Jones*[113] in reaching its decision, it "left the implication that [the Davises' interest in the pre-embryos] is in the nature of a property interest."[114] Instead of aligning itself with the "embryo as property" view,[115] however, the supreme court criticized the appellate court for implying that the pre-embryos were property[116] and expressed concern that the appellate decision did not "give adequate guidance to the trial court in the event that the parties did not agree."[117]

In seeking to define the nature of the Davises' interest in the pre-embryos, the supreme court aligned itself with the guidelines of the American Fertility Society,[118] which submitted an amicus curiae brief in the case.[119] The court declared that "pre-embryos are not, strictly speaking, either 'persons' or 'property' but occupy an interim category that entitles them to special respect because of their potential for human life."[120] The court concluded, therefore, that although Mary Sue and Junior did not have a "true property interest," the nature of their interest was one that vested in them a shared decision-making authority in determining the disposition of

111. *Davis*, 842 S.W.2d at 593.

112. *See id.* at 594. "Admittedly, this distinction is not dispositive in the case before us. It deserves emphasis only because inaccuracy can lead to misanalysis such as occurred at the trial level in this case." *Id.*

113. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

114. *Davis*, 842 S.W.2d at 596.

115. *See supra* text accompanying notes 101-10.

116. *See Davis*, 842 S.W.2d at 596.

117. *Id.* at 590. "[T]here is no formula in the court of appeals opinion for determining the outcome if the parties cannot reach an agreement in the future." *Id.* at 598.

118. *See id.* at 596.

119. *See id.* at 589.

120. *Id.* at 597.

the pre-embryos.[121] Although the Davises in this case did not have an agreement concerning the disposition of the pre-embryos,[122] the court nonetheless proposed that generally, such agreements should be presumed valid and strictly enforced.[123]

Because no such agreement existed in *Davis*, the supreme court was forced to decide the case on other grounds. The court first considered, and then rejected, arguments based on implied contract and reliance espoused by some scholarly articles.[124] The court then proposed a balancing test in order to resolve the dispute, weighing the state's interest in potential human life against Mary Sue and Junior's procreational autonomy.[125] The court described procreational autonomy as consisting of both the right to procreate and the right to avoid procreation, each of which deserved equal weight.[126] The court reasoned that since the state's interest in fetal life in abortion cases[127] does not become compelling until long after the stage of development attained by the pre-embryos in the *Davis* dispute,[128] the state's interest failed to outweigh the Davises' interest in procreational autonomy.[129]

The supreme court then balanced Junior's desire to avoid procreation against Mary Sue's desire to donate the pre-embryos to an infertile couple.[130] In considering the impact of unwanted parenthood on Junior, the court gave weight to Junior's testimony regarding the childhood trauma imposed upon him by his parents' divorce.[131] Having been raised with

121. *See id.*

122. *See Davis*, 842 S.W.2d at 598.

123. *See id.* at 597, 604.

124. The implied contract argument in *Davis* was that Mary Sue and Junior had an implied contract to reproduce via IVF and that since Mary Sue had relied on that contract, it should be enforced against Junior. *See id.* at 598. The court concluded that the reliance theory was inappropriate since Mary Sue no longer wanted to implant the embryos in her own uterus, but instead wished to donate them. *See id.* For an in-depth discussion in support of the implied contract argument, see Trespalacios, *supra* note 84.

125. *See Davis*, 842 S.W.2d at 603.

126. *See id.* at 601.

127. Specifically, the court considered *Roe v. Wade*, 410 U.S. 113 (1973), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). *See Davis*, 842 S.W.2d. at 601.

128. *See Davis*, 842 S.W.2d at 595.

129. *See id.* at 602.

130. *See id.* at 603.

131. *See id.* at 603-04.

largely absent parents,[132] Junior was "vehemently opposed to fathering a child that would not live with both parents."[133] The intensity of Junior's opposition was not diminished in considering donation of the pre-embryos to an infertile couple, since Junior feared the possibility that the recipient couple might subsequently divorce, leaving "his" child in a single-parent household.[134]

In light of this testimony, the supreme court held that Mary Sue's interest in donating the pre-embryos was not sufficient to overcome Junior's "lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."[135] The court gave some weight to the trauma Mary Sue experienced in undergoing IVF[136] and the burden she would suffer in knowing that the procedures were ultimately futile because the pre-embryos would never become children.[137] However, the court felt that even if Mary Sue sought to implant the pre-embryos in herself, the result would most likely be the same given that, in the court's opinion, Mary Sue had a reasonable opportunity either to repeat the IVF procedure or to adopt.[138]

The supreme court summarized its ruling in the *Davis* case by providing a step-by-step analysis for the adjudication of disputes over IVF-produced pre-embryos. Initially, courts should look to agreements reached between the parties.[139] If no such agreement exists, courts should balance the relative interests of the parties in using or destroying the pre-

132. Junior testified that when he was five years old, his parents divorced and his mother had a nervous breakdown. He and three of his brothers went to live at a home for boys run by the Lutheran Church. From then on he had monthly visits with his mother, but only saw his father three times before his father died in 1976. *See id* at 603.

133. *Id.* at 604.

134. *See Davis*, 842 S.W.2d at 604. Junior testified that he would "definitely" consider a child that was born to the recipient couple as his own. *Id.*

135. *Id.*

136. The proposition that since a woman makes a greater physical and emotional investment in the IVF procedure, and should therefore retain control over the resulting embryos, is referred to as the "sweat-equity" model. *See* John A. Robertson, *Resolving Disputes Over Frozen Embryos*, 19 HASTINGS CTR. REP. 7 (1989).

137. *See Davis*, 842 S.W.2d at 604.

138. *See id.* Mary Sue had remarried at this point in the litigation, and the court looked to the fact that she and Junior had at one time pursued adoption as indicative of her willingness to be satisfied by something less than genetic parenthood. *See id.*

139. *See id.*

embryos.[140] In cases where the party wishing to use the pre-embryos has a reasonable opportunity to have a child through alternate means, the balancing test should favor the party seeking to avoid procreation.[141] If no such reasonable alternatives exist, "the argument in favor of using the pre-embryos . . . should be considered."[142] Finally, in cases where the party seeking to control the disposition of the pre-embryos wishes merely to donate them, the party wishing to avoid procreation "obviously has the greater interest and should prevail."[143] The United States Supreme Court denied Mary Sue's writ of certiorari without comment,[144] effectively embracing the Tennessee Supreme Court decision.[145]

F. *Developments Since* Davis v. Davis

The latest case involving a preexisting contractual IVF agreement between the parties has, at its highest state court level, supported the *Davis* Supreme Court's presumption of validity.[146] *Kass v. Kass*,[147] like *Davis*, involved a dispute between a divorcing couple over the disposition of their cryopreserved pre-embryos.[148] However, in *Kass*, the New York couple signed an informed consent form prior to the IVF procedure that specified in the event of a divorce the pre-embryos should be donated to the IVF program for research.[149] Nevertheless, Maureen Kass brought an action seeking sole custody of the five pre-embryos so that she could undergo another implantation procedure.[150] Steven Kass counterclaimed for specific performance of the consent agreement, seeking to enforce the original decision to donate the pre-embryos to the

140. *See id.*
141. *See id.*
142. *Id.*
143. *Davis*, 842 S.W.2d at 604.
144. Stowe v. Davis, 507 U.S. 911 (1993).
145. *See* Feliciano, *supra* note 48, at 321.
146. Kass v. Kass, 91 N.Y.2d 554 (1998) (holding that an informed consent agreement signed by husband and wife before cryopreservation of their embryos should control).
147. *Id.*
148. *See id.*
149. *See id.* at 560. The *Kass* agreement read, in pertinent part: "In the event that we . . . are unable to make a decision regarding the disposition of our stored pre-zygotes . . . our frozen pre-zygotes may be examined by the IVF program for . . . approved research . . . as determined by the IVF program." *Id.*
150. *See id.*

clinic for research.[151]

The New York trial court reasoned that "a female participant in IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus,"[152] and granted custody of the embryos to Maureen.[153] However, the appellate division reversed, concluding that a woman's right to privacy and bodily integrity are not factors prior to implantation.[154] Instead, the court unanimously determined that when the parties to an IVF procedure have agreed to the disposition of resulting pre-embryos, their agreement should control.[155] The court of appeals affirmed this decision.[156]

The power given to the original agreement between the parties has found support in the existing statutory law of one state, Florida,[157] and pending legislation in New York[158] and New Jersey.[159] At the time of the *Kass* decision, only Florida's legislation required couples undergoing IVF to execute written agreements providing for the disposition of pre-embryos in the event of death, divorce, or other unforeseen circumstances.[160] Since *Kass*, New York and New Jersey have proposed similar legislation, also requiring couples to specify the disposition of their pre-embryos before undergoing IVF.[161]

However, emphasis on the contractual arrangement between the parties may carry with it additional problems in resolving disputes. One problem is that the agreement may itself be somehow lacking, and therefore open to debate and interpretation. The appellate division panel in *Kass*, while agreeing that the informed consent document should control, split over whether the particular agreement signed by the Kasses was too ambiguous to effectively determine the dispo-

151. *See id.*
152. *Kass*, 91 N.Y.2d at 561.
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.* The court of appeals is the highest state court in New York.
157. FLA. STAT. ANN. § 742.17 (West 1998) (stating couples must execute a written agreement specifying disposition of pre-embryos in event of death, divorce, or other unforeseen circumstances).
158. S.B. 1120, 222d Leg. (N.Y. 1999).
159. A.B. 2478, 208th Leg. (N.J. 1999).
160. FLA. STAT. ANN. § 742.17 (West 1998).
161. *See* S.B. 1120, 222d Leg. (N.Y. 1999); A.B. 2478, 208th Leg. (N.J. 1999).

sition of their pre-embryos.[162] Significantly, the opinions of the concurring and dissenting justices resolved the ambiguity problem by echoing the balancing test used in *Davis*.[163]

The scholarly commentary surrounding the debate over the disposition of pre-embryos has also proffered a variety of solutions, most of which fall within the contract/balancing test penumbra. Some commentators advocate automatically granting control over the pre-embryos to the party wishing to avoid procreation.[164] Others endorse automatically granting control to the woman when she desires to implant.[165] Still others view participation in an IVF program as an implied contract to procreate which should be enforceable despite events such as divorce.[166]

The debate rages in the context of a dearth of legislation. While research on human embryos is highly controlled,[167] IVF clinics themselves remain largely unregulated.[168] The only current federal legislation aimed at regulating IVF clinics requires only that the clinics report statistics such as success rate,[169] and even this regulation has been slow to take hold.[170] Essentially, by adopting a hands-off approach, the federal government has left discretion over IVF regulation to the states.[171] Thus far, the states have largely echoed the federal government's unwillingness to legislate. Only four states, Louisiana,[172] Florida,[173] New York,[174] and New Hampshire,[175]

---

162. *See* Kass v. Kass, 91 N.Y.2d 554, 561 (1998).

163. The concurring justice would have tipped the balance in favor of the objecting party considering "the emotional and financial burdens of compelled parenthood." *Id.* The dissenting justices would have remanded to the trial court for more fact-finding in order to facilitate a fair balancing of the parties' respective interests. *See id.*

164. *See, e.g.*, Robert Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67 (1990).

165. *See, e.g.*, Jeff L. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357 (1986).

166. *See, e.g.*, Feliciano, *supra* note 48; Trespalacios, *supra* note 84.

167. *See* Andrews, *supra* note 2, at 651.

168. *See id.*

169. The Fertility Clinic Success Rate and Certification Act of 1992 legislated that clinics performing IVF report the exact numbers of procedures performed and the resulting number of live births occurring. 42 U.S.C. §§ 263a-1 to -7 (1994).

170. Andrews, *supra* note 2, at 651. The first success rate report was not published until December, 1997. *See id.*

171. *See* Fiandaca, *supra* note 3, at 381.

172. LA. REV. STAT. ANN. §§ 9:121-:133 (West 1997) (stating that a pre-embryo is considered a "juridical person" that must be implanted).

have either proposed or passed legislation directed specifically at resolving the disposition of pre-embryos generated by IVF.

III. IDENTIFICATION OF THE PROBLEM

The range of decisions in *Davis v. Davis* is indicative of the difficulty courts have in categorizing the nature of IVF-produced embryos and resolving disputes as to their appropriate disposition.[176] Whether a court chooses to view these embryos as persons, as property, or as neither has a profound effect on the rights of IVF participants, on the outcome of future disputes, and on the ART industry as a whole. As IVF technology advances, more disputes will likely arise, forcing more courts to address the problem. Further, due to the lack of adjudicated cases in most states, courts may continually face IVF disputes as matters of first impression. This may lead to the type of confusion and reversal of decisions seen in *Davis*. States therefore may have an interest in adopting one of the views regarding the proper categorization of IVF-produced embryos, and legislating accordingly, to effectuate a more efficient and standardized approach to resolving future disputes. The question then becomes which approach best facilitates effective, fair, and standardized resolutions to the problem of frozen embryo disposition, and how to best implement that approach.

IV. ANALYSIS

A. *Embryos as Persons*

Deciding that an embryo is a human being from the moment of conception and deserves protection whether or not it is implanted in a woman's uterus, as the Louisiana legislature[177] and the *Davis* trial court[178] did, is appealing. Those who believe that life begins at fertilization may have few al-

173. FLA. STAT. ANN. § 742.17 (West 1999) (requiring couples to execute a written agreement specifying disposition of pre-embryos in event of death, divorce, or other unforeseen circumstances).

174. S.B. 1120, 222d Leg. (N.Y. 1999).

175. N.H. REV. STAT. ANN. §§ 168-B:13-:15, :18 (West 1999) (limiting ex utero maintenance of pre-embryos to 14 days).

176. Feliciano, *supra* note 48, at 314-15.

177. *See supra* text accompanying note 80.

178. *See supra* text accompanying notes 71-81.

ternatives for protecting embryos and allowing them the opportunity to be born. Frozen embryos essentially face only five prospective futures: implantation in the woman whose eggs gave rise to them, implantation in another woman through donation or surrogacy, use for research purposes, destruction, or storage, which, if continued too long, may become the equivalent of destruction.[179] Requiring implantation of all IVF embryos assures that they will at least have the opportunity to be brought to term, instead of being subjected to research, storage, or destruction.

However, the implications of this perspective are profound.[180] First, requiring the implantation of all IVF embryos necessarily requires IVF clinics to find a "home" for each embryo generated through the procedure. Every embryo must therefore be tracked and placed accordingly. If the gamete donors no longer wish to use the embryos themselves, the embryos must be donated to another couple for implantation. This leaves gamete donors with a potentially disturbing choice: either continue to implant their embryos despite their wishes to the contrary or have their genetic "children" born to other couples.[181]

Second, categorizing embryos as human beings brings with it the necessity of allocating to them not just the right to be implanted but a whole panoply of legal rights,[182] which may directly conflict with existing law.[183] For example, a court's determination that an embryo has a right to be implanted may mean that women who undergo IVF could be forced to implant all of the embryos that result from the procedure, regardless of their wishes.[184] This result directly conflicts with a woman's right to privacy and bodily integrity under *Roe v. Wade*.[185] Further, since *Roe* and *Casey* refused to recognize gestating embryos as human beings prior to viability,[186]

179. There is some disagreement about the maximum length of storage for pre-embryos. *See* Trespalacios, *supra* note 84, at 817 n.98.

180. *See* Cucci, *supra* note 10, at 434.

181. The moral difficulty with having one's genetic children raised by strangers was essentially the problem faced by Junior Davis when Mary Sue wished to donate their pre-embryos to an infertile couple. *See supra* text accompanying notes 135-38.

182. *See* Trespalacios, *supra* note 84, at 807.

183. *See id.*

184. *See id.*

185. Roe v. Wade, 410 U.S. 113 (1973).

186. Viability has been defined as the ability of a fetus to exist independently

granting rights to IVF embryos would essentially create two "classes" of embryos. Those which have been implanted or conceived naturally but are not yet viable would have no rights, whereas those which are arrested at the four- to eight-cell stage would be accorded all the rights that accompany legal recognition as a "person."[187]

Third, requiring implantation does not guarantee a birth will result. Given the low success rate of IVF,[188] at most fourteen percent of frozen embryos will come to term after implantation. This figure is potentially much lower for embryos that have been stored for some time.[189] The low success rate raises the question of whether creating the embryos in the first place should be allowed,[190] since by fertilizing eggs in vitro, clinics thereby sentence resulting embryos to a far less likely chance of being born than through normal coital reproduction.[191]

Finally, requiring implantation of all embryos may lead to an implementation nightmare. The *Davis* trial court decision[192] and the Louisiana statute[193] leave unresolved the question of who should bear the burden of ensuring that each embryo is implanted.[194] Placing this burden on IVF clinics requires imposing a regulatory scheme far beyond that which is required today, perhaps necessitating a review board whose function it is to track embryos and ensure that all are given an opportunity to gestate. While the imposition of a regulatory scheme may not in itself be unduly burdensome,[195] tasking clinics with finding recipient hosts for every IVF-produced

---

outside the womb. *Id.* at 159.

187. *See* Trespalacios, *supra* note 84, at 807.

188. *See* Winston & Handyside, *supra* note 28, at 932.

189. *See id.*

190. In fact, the Vatican has expressed an outright condemnation of IVF entirely. *See* Glieck, *supra* note 79, at A16.

191. *See* Winston & Handyside, *supra* note 28, at 932. At most, 60% of naturally conceived early pregnancies are lost, compared to the overall 86% failure rate of IVF pregnancies. *See id.*

192. *See supra* text accompanying notes 71-81.

193. *See supra* text accompanying notes 80, 172.

194. At least one commentator has suggested that the Louisiana statute is likely to face a constitutional challenge in the near future due to the vagueness of its interpretation. *See* Cucci, *supra* note 10, at 438.

195. Many commentators, especially in the scientific community, agree that some form of regulatory scheme is long overdue in the ART industry. *See, e.g.*, Andrews, *supra* note 2.

embryo may be unrealistic.[196] Placing the burden of implantation on the female gamete donor, as addressed above, is a direct violation of her constitutional rights to privacy and bodily integrity.[197] Placing the burden on the male gamete donor requires that if the female donor refuses to implant, he must find another female who is willing to act as a surrogate and carry all the embryos to term. Given all of the above complications, and conflicts with existing law, the "embryos as persons" view is probably the least compelling, and the most difficult to implement.

B. *Embryos as Property*

Viewing embryos as property similarly poses both legal and implementation problems. In theory, this viewpoint appears attractive since it holds the promise of a simple, bright line resolution founded on the principles of an already well-developed area of law. By designating embryos as property, courts can apply appropriate property law principles to decide a given case. This may be useful in cases such as *York,* in which the point of contention rests on a theory of conversion or of detinue.[198]

However, the "embryo as property" theory becomes more complex and difficult to implement in the context of divorce cases such as *Kass*[199] and *Davis*.[200] If embryos are property, then they are subject to a typical property division,[201] with each party entitled to a portion of the total number of embryos. However, vesting complete control over any of the embryos in either party logically leads to the same problems presented by requiring implantation, especially in cases in which one party desires to implant and the other does not. For example, if the embryos in the *Davis* case were divided in a traditional property settlement, Mary Sue would retain control

196. This may be especially true in light of the allegations against clinics of mishandling IVF procedures. *See id.*

197. *See supra* text accompanying notes 85-88.

198. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989). *See supra* text accompanying notes 96-100.

199. Kass v. Kass, 91 N.Y.2d 554 (1998). *See supra* text accompanying notes 149-60.

200. Davis v. Davis, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).

201. *See* Trespalacios, *supra* note 84, at 816.

over a certain number of the embryos. She would therefore have the authority to implant or donate the embryos in her possession despite the wishes of Junior. This result logically leads to the same debate over Junior's right not to procreate raised when the trial court granted Mary Sue control over all of the embryos.[202]

Some scholars criticize the appellate decision in *Davis* as inconsistent with property law,[203] since in divorce cases courts usually divide joint property equally between the parties, whereas the Davis appellate decision ostensibly subjected the embryos to joint ownership.[204] Instead of dividing the embryos between the parties, the appellate court granted joint control of the embryos to both Mary Sue and Junior, with "equal voice over their disposition."[205] This holding has been likened more closely to a joint custody arrangement than a traditional property division.[206]

The problem with a joint control arrangement over embryos is that it necessarily leads to an inequality between the parties in exercising control.[207] Since the embryos cannot be implanted unless both parties agree, the party resisting implantation necessarily holds a "veto power"[208] over the wishes of the party desiring implantation.[209] Further, since the embryos cannot be stored indefinitely without degrading,[210] the resisting party need only withhold consent long enough to have the final say in the matter.[211] Eventually, the embryos will have been stored so long that they will no longer be useful, and the resisting party will, in effect, have prevailed.[212] Therefore, in cases where one party desires implantation and the other does not, there is arguably no meaningful difference between joint control and an outright grant to the party seeking to prevent implantation.[213]

Finally, the sole precedent categorizing pre-embryos as

202. *See supra* text accompanying notes 135-45.
203. *See* Trespalacios, *supra* note 84, at 816.
204. *See id.*
205. *See Davis*, 1990 WL 130807, at *2.
206. *See* Trespalacios, *supra* note 84, at 816.
207. *See id.*
208. *Id.*
209. *See id.*
210. *See supra* note 182.
211. *See* Trespalacios, *supra* note 84, at 816.
212. *See id.*
213. *See id.*

property is itself subject to question.[214] The *Davis* appellate court, in relying on *York* as precedent, failed to recognize that the *York* decision was based primarily on an analysis of an existing contract between the parties.[215] Therefore, no case on record has determined the disposition of pre-embryos solely on a property law basis. Thus, the "embryo as property" view, like the "embryo as person" view, is not the most compelling argument for the appropriate resolution of IVF embryo disposition.

C. *Embryos as Neither Persons nor Property*

The viewpoint that embryos are neither persons nor property, as embraced by the *Davis* supreme court decision,[216] is perhaps the most workable solution to the problem of characterizing IVF-produced embryos.[217] The U.S. Supreme Court's denial of certiorari without comment in the *Davis* case suggests support for the Tennessee Supreme Court's interpretation of the nature of IVF embryos.[218]

In analyzing the implications of the *Davis* state supreme court decision, two separate holdings emerge. First, where an agreement between the parties undergoing IVF exists, that agreement should control.[219] Second, absent such an agreement, the court should apply a balancing test to determine which party has a superior interest.[220]

Placing emphasis on the contractual agreement entered into by the gamete donors is compelling for a number of reasons. First, the original contract arguably best exemplifies the expectations and wishes of each party at the time he or she decided to undergo the IVF procedure. Second, such a contract is readily included within the context of informed consent.[221] Since clinics stand to reap a financial benefit from IVF patients,[222] it is arguably a minimal burden on such clin-

214. *See supra* text accompanying notes 105-10.

215. *See* Trespalacios, *supra* note 84, at 816.

216. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993).

217. *See id.*

218. Stowe v. Davis, 507 U.S. 911 (1993).

219. *See supra* text accompanying notes 139-45.

220. *See id.*

221. For example, the agreement in the *Kass* dispute was included as part of the informed consent signed by the Kasses when they originally decided to undergo IVF. *See supra* text accompanying notes 149-60.

222. *See supra* text accompanying note 6.

ics to require a stipulation of disposition as part of their general informed consent procedure. Third, the process of forming the contract forces each party to clearly articulate his or her desires for the disposition of embryos; a contract that is included as part of informed consent may force the parties to recognize and allow for contingencies that they had not previously considered. Fourth, looking to the original agreement allows for a bright-line rule in determining the outcome of cases in which the disposition of embryos is at issue.[223]

However, because IVF clinics are largely unregulated,[224] emphasis on the contractual arrangement between the parties carries with it some problems in resolving disputes. Clinics may have no incentive, aside from self-protection, to encourage the parties to sign a contract.[225] Accordingly, the contracts may vary in effectiveness or comprehensiveness from clinic to clinic. There may be no contract at all, as in *Davis,*[226] or if there is a contract, it may be found somehow lacking, and therefore open to debate and interpretation.[227] The vulnerability of the contract to dispute is evidenced by the judicial rift in *Kass*.[228] The appellate division panel in *Kass*, while unanimously agreeing that the informed consent document should control,[229] split over whether the particular agreement signed by the Kasses was too ambiguous to effectively determine the disposition of the pre-embryos.[230]

Precisely because of either missing or vulnerable IVF contracts, the court in *Davis* and concurring judges in *Kass* turned to balancing tests.[231] The use of a balancing test can therefore be seen as a secondary choice, where there has been some problem with the IVF contract that renders the disposition of the embryos unclear.

Arguably, if all couples were required to sign contracts specifying the future disposition of their embryos as under

223. *See supra* text accompanying notes 122-23.

224. *See supra* text accompanying notes 13-19.

225. Or, as in the *Davis* dispute, a clinic may simply neglect to follow procedure and the parties may never be presented with a contract to sign. *See supra* text accompanying note 66.

226. *See id.*

227. Kass v. Kass, 91 N.Y.2d 554 (1998).

228. *See id.*

229. *See id.*

230. *See id.; see also supra* note 162.

231. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993); *see also Kass*, 91 N.Y.2d at 561.

Florida state law,[232] and those contracts were well-drafted, there would be no need to turn to a balancing test to resolve disputes. Since each couple entering into an IVF agreement would have already stipulated to the disposition of their pre-embryos in advance, there would be no need for courts to look outside of the original contract for an equitable resolution to a disagreement between the parties.

Further, an enforceable IVF contract has the added advantage of flexibility, taking into consideration the unique views and beliefs of any given couple. Therefore, this approach is not necessarily in conflict with either the person or property view of embryos since contracts would allow couples to specify their wishes themselves. For example, if a couple believes strongly that pre-embryos constitute life,[233] they may accordingly decide either not to undergo the procedure, not to freeze additional embryos, or to donate their extra embryos to an infertile couple. If a couple believes the embryos are property,[234] they may decide in advance how that property is to be handled in the event of death, divorce, or other unforeseen circumstances. Perhaps most importantly, requiring a contract means that unless couples are able to agree about the disposition of their embryos, they will not be able to participate in IVF at all. This effectively places the burden of resolving disputes in the hands of the couple, in advance of the procedure, instead of at the feet of a court after embryos have already been created and stored.

V. PROPOSAL

As long as couples continue to turn to IVF as a means of overcoming infertility, and as long as clinics continue to offer cryopreservation of pre-embryos as an alternative to repeated aspirations and transfers,[235] courts will repeatedly address the problem of how to resolve ownership disputes over those pre-embryos. Further, with technological advancements in the ART industry, the use of IVF will only increase. States therefore have an interest in adopting legislation in order to ensure fair and efficient resolution of disputes over cryopreserved embryos.

---

232. FLA. STAT. ANN. § 742.17 (West 1997).
233. *See supra* text accompanying notes 82-84.
234. *See supra* text accompanying notes 203-07.
235. *See supra* text accompanying notes 37-42.

The decision as to how pre-embryos should be treated or divided should a divorce, death, or other unforeseen circumstance occur rests more appropriately with the parties who seek to undergo the IVF procedure than with the courts. Therefore, the best resolution to the problem of the disposition of pre-embryos is through legislation similar to that adopted in Florida:[236] requiring a contract before the IVF procedure is performed. Every couple undergoing IVF should be required, as part of the informed consent agreement signed with their clinic, to comprehensively stipulate to the disposition of any embryos resulting from the procedure.[237] IVF clinics should, in turn, be barred from performing in vitro fertilization unless both gamete donors sign such an agreement in advance of the procedure.[238]

Further, the contracts used by IVF clinics should be standardized so that the language is clear and not open to debate. Clear and consistent language would prevent problems of interpretation that would otherwise arise due to variations in contracts from clinic to clinic,[239] and obviate the need for complex and potentially subjective secondary measures such as judicial balancing tests.[240]

VI. CONCLUSION

The ability to create and store human embryos through in vitro fertilization and cryopreservation has brought with it not only a promise of hope to infertile couples, but also a host of moral, ethical, and legal problems. In cases tried in the United States to date,[241] courts settle disputes over the disposition of frozen embryos when couples disagree about the future of the embryos.[242] Whether courts view cryopreserved embryos as persons, property, or neither has a profound effect on the outcome of cases where the disposition of frozen embryos is in dispute.[243]

---

236. FLA. STAT. ANN. § 742.17 (West 1997).

237. *See id.*

238. This proposition is not included in the Florida statute. *See id.*

239. *See supra* text accompanying notes 231-34.

240. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911 (1993); *see also* Kass v. Kass, 91 N.Y.2d 554, 561 (1998).

241. *See supra* Part II.B-E.

242. *See supra* Part II.B.

243. *See id.*

Part IV of this comment analyzes the implications of adopting each of these views of frozen embryos, and their potential impact on gamete donors, IVF clinics, and the embryos themselves.[244] This comment contends that the "neither persons nor property" view of embryos leads to the most equitable resolution of disputes. Under this theory, courts defer to contractual agreements entered into by the parties seeking to undergo IVF.[245] Part V suggests that states adopt legislation requiring couples to stipulate to the disposition of their embryos in the event of a divorce or disagreement before they are allowed to participate in IVF.[246] Part V additionally proposes that under the suggested legislation clinics be barred from performing the IVF procedure on couples who have not signed such agreements. Further, the agreements should be standardized in order to most effectively resolve disputes.[247] In the pursuit of equitable and efficient resolutions to problems of embryo disposition, unless well-drafted IVF contracts are uniformly required and enforced, states, like Thursday's child,[248] have far to go.

244. *See supra* Part IV.
245. *See supra* Part IV.C.
246. *See supra* Part V.
247. *See id.*
248. *See supra* note †.