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# SEEKING A BETTER SOLUTION FOR THE DISPOSITION OF FROZEN EMBRYOS: IS EMBRYO ADOPTION THE ANSWER?

Paul C. Redman II<sup>†</sup> and Lauren Fielder Redman<sup>††</sup>

## I. INTRODUCTION

Recent years have brought amazing advances in the area of assisted reproductive technology. In vitro fertilization has given many couples a chance to have a child of their own, but this miracle of science has another side which presents many legal and ethical dilemmas. At issue is the fact that not all of the eggs fertilized for the process are used.<sup>1</sup> These embryos are frozen in liquid nitrogen for potential later use. Amazingly enough, these embryos can probably survive frozen for thousands of years.<sup>2</sup> This population of frozen embryos<sup>3</sup> is increasing by 18% per year.<sup>4</sup>

Problems arise when couples move and do not leave the fertility clinic with a forwarding address or a directive to discard the embryos if the couple is later unavailable.<sup>5</sup> Some people think that disposal of all of these embryos is the proper solution to this problem. Others feel that this is wrong based on a reverence for the life that these embryos represent.<sup>6</sup>

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2. See Rita Rubin, *100,000 Frozen Embryos: One Couple's Surplus Can Fill the Void of Another*, USA TODAY, Dec. 8, 1998, at 1A.

3. There is no consensus on exactly what to call fertilized eggs. They may be called pre-embryos or embryos. Most infertility physicians and patients prefer the term embryo, so that is the term this paper will use. See Mario J. Trespalacios, *Frozen Embryos: Toward an Equitable Solution*, U. MIAMI L. REV. 803, 804 (1992).

4. See Robert A. Davis, *Growing Issue: 'Orphan Embryos'*, CHICAGO SUN TIMES, Mar. 7, 1999, at 1.

5. See Verena Dobnik *Embryo Imbroglia; Questions of Custody Over Frozen Embryos Trigger New Laws, Consent Agreements*, THE PATRIOT LEDGER, Apr. 14, 1998, at 7. See also Joshua S. Vinciguerra, *Showing Special Respect—Permitting the Gestation of Abandoned Embryos*, 9 ALB. L. J. SCI. & TECH. 399, 400 (1999).

Sometimes parents disappear, however, without leaving clear instructions or money to pay for storage. Clinic workers do their best to find the missing moms and dads, sometimes even enlisting police databases to try to track them down. When that is not possible, the clinics find themselves in an ethical quandary. They have no legal right to donate the embryos to childless couples or to release them for research. Yet without express parental interest, there is no legitimate reason to keep them on ice indefinitely. The embryos are thus left in a bizarre limbo hovering between life and death. Michael D. Lemonick, *Sorry, Your Time Is Up*, TIME, Aug. 12, 1996, at 41.

Problems also surface when the donor parents divorce or die.<sup>7</sup> In the case of separation or divorce, disposition of the embryos becomes a huge custody dispute. What is to be done when one donor wants the embryos implanted or preserved for future use, while the other wants them to be destroyed? Whose right in this traditionally constitutionally protected area of privacy should prevail?

In the United States there is no national public policy on abandoned embryos<sup>8</sup> or embryos caught in a dispute between the couples that created them. The authors of this paper assert that there should be a public policy in America that deals with the disposition of unneeded and abandoned embryos, and this policy should disfavor the embryos being destroyed. This paper will examine ethical and legal issues raised by unneeded or abandoned embryos and look at the how embryo adoption can be an important part of public policy in favor of preserving these embryos. This paper will also discuss how protocols are needed to give individuals undergoing infertility treatment the power in advance to specify what they want done with their excess embryos to avoid disputes and abandonment issues up front. In examining these issues, this paper will examine current case law, statutory law, and constitutional law.

## II. IVF OVERVIEW

On July 25, 1978, a normal healthy infant girl named Louise Brown was born, becoming the world's first test-tube baby. This successful in vitro fertilization (IVF) and embryo transfer (ET) was described by Dr. Robert Edwards and Dr. P. C. Steptoe in *Lancet* in 1978.<sup>9</sup> This technique would quickly become important in the treatment of infertility.<sup>10</sup>

In vitro fertilization is just one technique in the field of assisted reproductive technology (ART). ART defines all procedures that involve the direct retrieval of eggs, or oocytes, from the ovary. IVF, the first and most common procedure in ART, is the fertilization of the oocyte with sperm in the laboratory. Zygote intra-fallopian transfer (ZIFT), another technique sometimes utilized, transfers fertilized oocytes into the fallopian tube.<sup>11</sup>

Oocytes are retrieved from the ovary after the patient has undergone hormonal therapies that hyper-stimulate the ovaries to produce a greater number of oocytes than usual. Under ultrasound guidance, a fine needle is placed trans-vaginally to remove the oocyte containing follicles. This procedure is commonly performed

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6. See Davis, *supra* note 3, at 1.

7. See *id.*

8. See Vinciguerra, *supra* note 5, at 400. Contrast this with England, which statutorily provides for embryos stored for five years to be destroyed in most cases. See, e.g. Richard Yates, *The Fate of Babies in Waiting*, THE TIMES OF LONDON, Mar. 6, 1999.

9. See P.C. Steptoe and R.G. Edwards, *Birth After Reimplantation of a Human Embryo*, LANCET 336 (1978).

10. See ALAN TROUNSON AND DAVID K. GARDNER, HANDBOOK OF IN VITRO FERTILIZATION 2 and 288 (1993).

11. See LEON SPEROFF ET AL., CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 1133 (6<sup>th</sup> ed. 1999).

within a day-surgery setting under sedation.<sup>12</sup> The oocytes and sperm are separately prepared and then placed in various culture systems. It is in these culture media that the human oocytes are fertilized by the sperm, becoming human embryos. These remain in the culture media and continue developing through the preimplantation stages.<sup>13</sup> The embryos, after maturing in the media for approximately 48 hours and reaching the 4- to 6- cell stage, are then transferred into the uterus using a small catheter placed through the cervix.<sup>14</sup>

Approximately 2.5 million married couples currently suffer from infertility in the United States.<sup>15</sup> This number has not greatly increased over the past three decades, but the number of physician office visits for infertility problems has risen dramatically. Several factors have been proposed to explain this increase. These include a delayed age of childbearing due to social and career choices, the rapid progress in assisted reproductive technologies,<sup>16</sup> the removal of the social stigmata of having problems with infertility, fewer babies generally available for adoption,<sup>17</sup> the postponement of marriage, increased contraception availability and usage, liberalized abortion policies, poor socioeconomic conditions, and the aging of the post World War II population boom.<sup>18</sup>

The initial indication for in vitro fertilization was severe female mechanical factor infertility. This involves severe damage to the fallopian tube, which must be open in order for the oocyte to travel to the uterus once it has been fertilized.<sup>19</sup> Other indications have since been introduced,<sup>20</sup> including: male factor infertility,<sup>21</sup> immunological infertility,<sup>22</sup> endometriosis,<sup>23</sup> cervical factor infertility,<sup>24</sup> ovarian failure or absence of the ovaries,<sup>25</sup> and unexplained infertility.<sup>26</sup>

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12. See Trounson *supra* note 8, at 18.

13. See *id.* at 58.

14. See JAMES R. SCOTT ET AL., DANFORTH'S OBSTETRICS AND GYNECOLOGY 743 (7<sup>th</sup> ed. 1997) [hereinafter Danforth].

15. Infertility is traditionally defined as one year of unprotected intercourse without conception. See Speroff, *supra* note 10, at 1013.

16. This progress is a result of an increase in the number of clinics and physicians specializing in the field of infertility as well as the increasing success rates of the various methods.

17. See Danforth, *supra* note 13, at 725.

18. See Speroff, *supra* note 10, at 1014.

19. Tubal damage may result from severe pelvic infections, previous sexually transmitted diseases, or prior pelvic surgery. *Id.*

20. See Trounson, *supra* note 8, at 2.

21. Male infertility can be due to the complete lack of sperm, a decrease in the number or quality of the sperm, a previous vasectomy, or congenital or surgical absence of the testes.

22. Immunologic conditions leading to infertility include the presence of antibodies produced against sperm in either the male or female.

23. Endometriosis is the ectopic presence of endometrial tissue (the innermost lining of the uterus) in the pelvis, on the ovaries, in or around the fallopian tubes, on the uterus, or on the bowel. This may cause a mechanical obstruction or may release inflammatory substances which are hostile to the oocyte, preventing the fertilization or proper transfer of an oocyte.

24. Irregular cervical structure can impede the migration of sperm into the uterus and fallopian tubes. Cervical mucus that is too thick can also be impenetrable to sperm.

25. Ovarian failure may be due to increasing age of the patient, chemotherapy or irradiation therapy for cancer, surgical removal of the ovaries, and congenital absence of the ovaries. In these situations, donor oocytes are obtained from a volunteer, fertilized with the husband's sperm (in vitro), and then transferred to the wife's uterus.

26. Unexplained infertility is a diagnosis given to a couple after all likely reasons for infertility, including those listed above, have been excluded.

As a result of ovarian hyper-stimulation, large numbers of oocytes are harvested during a single retrieval procedure.<sup>27</sup> Due to the expense, emotional hardships, and the potential for medical or surgical complications involving the process of ovarian hyper-stimulation and oocyte retrieval, spare embryos are cryopreserved. Many times, multiple in vitro fertilization cycles are necessary to successfully become pregnant and carry a baby or babies to delivery. These spare embryos may also be used years later if a future pregnancy is desired by the couple. Embryos can also be stored in an embryo bank by a patient who has oocytes harvested and fertilized while she is young for use when she becomes older.<sup>28</sup> A patient may also wish to have embryos stored before undergoing either chemotherapy or irradiation of pelvic tumors. Once she is cured of her cancer, she may then have these embryos transferred to her still functioning uterus.<sup>29</sup> Embryos have also been used in surrogates after menopause or the death of the woman.<sup>30</sup>

It is standard practice for infertility clinics to transfer only a limited number of embryos, usually four to eight, into the woman's uterus. This reduces the rate of high-order multiple pregnancies, which can lead to an increase in maternal and fetal complications both during and after the pregnancy. This also serves to decrease the need for selective termination.<sup>31</sup> In fact, Great Britain recently mandated that no more than three embryos be transferred per IVF cycle.<sup>32</sup>

At the current level of technology, human embryos are stored by cryopreservation.<sup>33</sup> Unfertilized oocytes are very rarely frozen for storage, as the cryopreservation technique leads to inferior results.<sup>34</sup> Oocytes stored before fertilization have lower fertilization and survival rates when compared to similarly stored embryos. This is probably due to the more delicate nature of an unfertilized oocyte.<sup>35</sup>

At the end of a successful in vitro fertilization cycle that results in the delivery of a child, the disposition of the unused embryos must be decided upon. Generally, there are several options. The embryos may be preserved through cryopreservation. Some of the reasons for this are discussed above. The embryos may also be donated by the couple to another patient who is not able to produce usable oocytes. This is sometimes referred to as embryo adoption. Embryos can also be donated for use in research. Finally, the embryos may be destroyed. Each option has its

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27. DANIEL R. MISHELL, JR. AND PAUL F. BRENNER, MANAGEMENT OF COMMON PROBLEMS IN OBSTETRICS AND GYNECOLOGY 780 (3<sup>rd</sup> ed. 1994).

28. As a woman's pool of oocytes age, she has an increased incidence of genetic abnormalities, including Down's syndrome.

29. This process requires the use of hormones in order to sustain her pregnancy in the absence of functioning ovaries.

30. See Danforth, *supra* note 13, at 741-42.

31. Selective termination is the process by which one or more of the fetuses are terminated during an early stage of the pregnancy. This is sometimes performed when the pregnancy consists of more than three or more fetuses. The end result is most often a twin pregnancy. This procedure leads to many psychosocial and ethical dilemmas.

32. JONATHAN S. BEREK, NOVAK'S GYNECOLOGY 949 (12<sup>th</sup> ed. 1996).

33. "The cryopreservation of gametes and embryos involves an initial exposure to cryoprotectants, cooling to subzero temperatures, storage, thawing, and finally, dilution and removal of the cryoprotectants, with return to a physiologic environment which allows further development." Trounson, *supra* note 8, at 214.

34. See Trounson *supra* note 8, at 214.

35. See Mishell, *supra* note 26, at 781.

own unique legal, ethical, and informed consent issues.<sup>36</sup>

In light of the above discussion, it is important to realize that the scientific, technological, and clinical successes of assisted reproductive technologies has greatly outpaced the rate at which the legal, social, theological, and ethical implications have been analyzed and established. Interestingly, very little work in this regard was accomplished to identify and analyze these important issues until after Louise Brown's birth in 1978.<sup>37</sup> This has led to much public discussion in both the medical and legal communities.<sup>38</sup> Some of the legal and ethical issues and policies will be discussed later in this paper.

### III. EMBRYO ADOPTION AS AN ALTERNATIVE TO DISPOSAL

A promising method for dealing with unneeded frozen embryos is embryo donation or "adoption," where women trying to have a child can assume ownership or legal custody of someone else's frozen embryos.<sup>39</sup> The process of embryo adoption is not considered to be a legal adoption, since American law does not consider embryos "living beings."<sup>40</sup> However, donating couples must sign consent forms just as in traditional adoptions giving up all parental rights.<sup>41</sup> Recipient women or couples must sign legal documents accepting full responsibility for any children resulting from the embryo adoption.<sup>42</sup>

Embryo adoption is beneficial on many levels. First is cost. Embryo adoption is much cheaper than undergoing a normal course of IVF.<sup>43</sup> In fact, cost for treatment using a donor embryo is only a quarter to a third of the cost of traditional IVF.<sup>44</sup> A cycle of traditional IVF costs over \$10,000, while embryo adoption costs about \$3000.<sup>45</sup> Because of this cost difference, couples who cannot afford their own fertility treatment have a chance to become pregnant.<sup>46</sup> It is very important to point out that this fee is for the medical costs involved.<sup>47</sup> There is no charge for the embryos.<sup>48</sup>

Embryo adoption is a wonderful solution for couples who cannot produce useable egg or sperm. Embryo adoption also offers an opportunity for single

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36. 2000 COMPENDIUM OF SELECTED PUBLICATIONS, The American College of Obstetricians and Gynecologists, 181-84 (2000) (hereinafter COMPENDIUM).

37. See Trounson, *supra* note 8, at 288-89.

38. See *id.* at 299.

39. See Charles Bullard, *Legal Problems May Await Embryo Adoption, Donation*, THE DES MOINES REGISTER, Jan. 18, 1999, at 4.

40. See *id.*

41. See *id.*

42. See *id.*

43. See Cherry Norton, *Embryo Adoption Register Planned*, THE INDEPENDENT (LONDON), July 5, 1999, at 10.

44. See *id.*

45. See Bullard, *supra* note 38, at 4. Embryo adoption averages \$3150, which includes all medication, screening, tests, physicians charges, counseling, and surgical fees. *Id.*

46. See Norton, *supra* note 42.

47. See Mark McEwen, *Dr. Norbert Gleicher of the Center For Human Reproduction and Eva and Lee Muhr, Who are Adopting Embryos, Discuss the New Option of Embryo Adoption*, CBS NEWS TRANSCRIPTS, June 9, 1998.

48. See *id.*

women and lesbians to become pregnant.<sup>49</sup> Embryo adoption can also be easier and cheaper than traditional adoption. The adoption of a healthy infant can cost between \$10,000 and \$30,000, while international adoptions can cost twice as much.<sup>50</sup>

There is tremendous interest in embryo adoption among patients undergoing fertility treatment. In one pilot program, nearly one third of patients wanted information about the program's embryo adoption procedure.<sup>51</sup> A program in Iowa has a long waiting list, as demand for donated embryos far exceeds supply.<sup>52</sup>

Embryo adoption can be handled in several ways. It can be conducted much like traditional adoption. In fact, traditional adoption agencies are beginning to offer embryo adoption.<sup>53</sup> JoAnn Davidson of Christian Adoption and Family Services of California states, "[w]e're handling embryo adoption like we would traditional adoption of a newborn."<sup>54</sup> Embryo adoption can require a screening process much like ordinary adoptions.<sup>55</sup> The family wishing to adopt an embryo completes a home study program and is selected by the genetic family.<sup>56</sup> There are agencies that insist upon open adoptions, in which genetic parents are told about adoptive parents.<sup>57</sup> The reasoning behind this is to avoid genetic "siblings" from meeting and marrying.<sup>58</sup>

Stringent procedures and agencies used for traditional adoptions do not have to be utilized, however.<sup>59</sup> Many fertility clinics facilitate embryo adoption by the doctor selecting the family to receive the donated embryo.<sup>60</sup> Since embryo adoption is more like conception than traditional adoption, there need not necessarily be a fitness requirement.<sup>61</sup>

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49. See Norton, *supra* note 42.

50. See David L. Theyssen, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711, 725 (1999). Theyssen points out that healthy adoptive children are not easily obtained as postponed child bearing, increased participation of women in the labor force, and increased infertility have led to an increase in people wishing to adopt, while birth control, abortion, and societal acceptance of single motherhood have resulted in less babies available for adoption. *Id.* In addition, being single makes it much harder to qualify to be an adoptive parent. See *id.* at 726. "A single white woman's adoption of . . . an infant could be considerably more difficult than another attempt at IVF." *Id.* at 728.

51. See Norton, *supra* note 42. Two-thirds were interested because of financial hardship. One-third were single women, and one-sixth were lesbians. *Id.*

52. See Bullard, *supra* note 38, at 4..

53. See Embryo 'Adoption': Trend Raises Ethical Legal Questions, AMERICAN HEALTH LINE, Dec. 9, 1998 [hereinafter Embryo 'Adoption'].

54. *Id.* This agency charges \$4,500 to facilitate embryo adoption. See *id.* Christian Adoption and Family Services can be contacted at 714-529-2949 or <www.snowlakes.org>. See *id.*

55. See Marnie Ko, *It's Not Adoption, Just "Material": Ottawa Wrestles Once Again With Embryo Ownership and Experimentation*, ALBERTA REPORT, May 31, 1999, at 42.

56. See Embryo 'Adoption', *supra* note 52.

57. See Valerie Richardson, *Adoption Agency Seeks Parents for Frozen Embryos; 'Snowflake' Orphans Seen as Unique*, THE WASHINGTON TIMES, Sept. 8, 1999, at A2.

58. See *id.*

59. See Maria Joy Wurmbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1099 (1986) (citing Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. LAW. REV. 939, 1011 (1986)).

60. See *Adoption Agency Begins Embryo Adoption Program*, BUSINESS WIRE, Oct. 14, 1998.

61. See *id.* This makes it easier for single women and lesbians to be able to utilize reproductive technologies that may traditionally be available only to married couples.

Both types of embryo adoptions have stringent medical screening requirements, however, to protect both the adoptive mother and the embryo.<sup>62</sup> Screening also often involves taking a genetic history of the donors and their educational attainment.<sup>63</sup>

The rights of the embryo donors are terminated. This is not a new or novel concept. Sperm donor programs have long followed protocols that protect the donors from support obligations.<sup>64</sup> In fact, during the embryo adoption or donation process, both the donors and recipient(s) must sign detailed legal documents.<sup>65</sup>

Embryo adoption is a very good alternative to disposal. "Even if you believe that they're just cells but they have potential for human life, then this is still the best alternative provided you get proper counseling to avoid problems down the line."<sup>66</sup> According to one source, there is no known opposition to embryo adoption.<sup>67</sup>

#### IV. THE STATUS OF FROZEN EMBRYOS AND THE LAW

##### A. *Three Ways to Classify the Status of Embryos*

There are three recognized ways to view the frozen embryo's legal status: as property without protection; as a person entitled to protection, or some interim status; and as deserving of some protection, but not as much as afforded a person.

##### 1. Embryos as Property

This classification seems to be the most contentious. No special consideration is given to the fact that the embryos are living; in fact, under this framework, the embryos are viewed no differently than any other human tissue, such as an appendix.<sup>68</sup> This view "ignores the importance that society places on life and also on the fact that embryos are potential life."<sup>69</sup> One further complication of the view that embryos are property is the fact that the Supreme Court has widely recognized the right to procreate and raise one's children as being of fundamental importance worth protecting,<sup>70</sup> and in *May v. Anderson*, articulated these rights to be far more precious than property rights.<sup>71</sup>

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62. See McEwen, *supra* note 46.

63. See Kevin Drawbaugh Reuters, *Frozen Human Embryos Now Offered for Adoption*, THE COMMERCIAL APPEAL, May 30, 1998, at A8.

64. See Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1070 (1996).

65. See McEwen, *supra* note 46.

66. See Bullard, *supra* note 38.

67. See *id.*

68. See Kristine E. Luongo, *The Big Chill: Davis v. Davis and the Protective of "Potential Life"?*, 29 NEW ENG. L. REV. 1011, 1020 (1995).

69. See *id.* at 1021.

70. See Vincent F. Stempel, *Procreative Rights in Assisted Reproduction Technology: Why the Angst?*, 62 ALB. L. REV. 1187, 1194 (1999).

71. 345 U.S. 528, 533 (1953). See also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).



## 2. Embryos as People

This classification is also not without problems. Under this classification, embryos are viewed as children and subject to the same custody requirements. Children are protected in America by the best interests of the child doctrine, so under this classification, embryos would be subject to the same requirements.<sup>72</sup> Under the best interests of the child doctrine, if neither parent wants the embryos implanted, this necessitates the termination of parental rights.<sup>73</sup> The result would be forced parenthood, which is constitutionally unacceptable, or forced adoption of the embryos, which would entail donating the embryos to another woman for implantation.<sup>74</sup> A further problem with the personhood approach is that embryos have a low chance of implanting and resulting in a pregnancy.<sup>75</sup>

## 3. Embryos as Some Interim Classification

It seems that some middle ground is needed between the two extremes of embryos as property and embryos as persons. This is where an interim classification comes into play. It is important to first point out that embryos are living human entities that have the potential to develop into full persons, though they are less developed than fetuses.<sup>76</sup> Flowing from this comes the opinion held by many that an embryo, although not yet a person, still deserves some form of respect. The embryo's potential to become a person holds a special significance for many people, yet it may never realize its amazing potential.<sup>77</sup>

Under this interim classification, decision making power in regard to the frozen embryos belongs to the egg and sperm donors, as in the property model.<sup>78</sup> According to the Report of the Ethics Committee of the American Fertility Society, decision-making authority regarding embryos reside with the biological parents.<sup>79</sup> Unlike the property model, however, this decision making power is not absolute. This decision making power could be superseded, for example, if there was legislation to the contrary.<sup>80</sup>

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72. See Luongo, *supra* note 67, at 1018.

73. See *id.*

74. See *id.*

75. See *id.*

76. See John H. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 443 (1990).

77. See Luongo, *supra* note 67, at 1022. Under the interim classification, the embryo should not be treated with exactly the same rights as a person because "it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential. *Davis v. Davis*, 842 S.W. 2d 588, 596 (Tenn. 1992).

78. See Luongo, *supra* note 67, at 1023.

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

80. See *id.*; see also, e.g., discussion under State Legislation, *infra*, for a discussion about legislation in Louisiana that makes deliberate destroying of frozen embryos illegal.

*B. The Davis<sup>81</sup> Case as an Example of the Inadequacy of the Law*

With little legislation on these issues, the “courts are now writing the rules for the disposition of frozen embryos.”<sup>82</sup> The *Davis* case illustrates the uncertainty in this area.

Mary Sue and Junior Davis were a married couple undergoing in vitro fertilization treatment in hopes of conceiving a child. Mary Sue was left infertile after multiple tubal pregnancies necessitated a tubal ligation.<sup>83</sup> After a failed attempt to adopt a child, the Davis couple turned to IVF.<sup>84</sup> The couple underwent numerous cycles of IVF at a clinic offering cryogenic freezing of embryos.<sup>85</sup> Junior Davis filed for divorce several months after the freezing process. At that point a pregnancy had not been achieved.<sup>86</sup> The divorce was complicated by a dispute over what should be done with the seven frozen embryos, as Mary Sue wanted the embryos implanted in her at the beginning of the adjudication process.<sup>87</sup> Mary Sue later wanted to donate the embryos to a third party.<sup>88</sup> Junior wanted the embryos to be destroyed.<sup>89</sup> At the time of the egg retrieval and fertilization, the clinic that the Davis couple was using did not ask them to consider the implications of stored embryos and there was no agreement between Mary Sue and Junior as to their disposition.<sup>90</sup>

The trial court considered the embryos to be persons and awarded them to Mary Sue since she wanted to implant them.<sup>91</sup> The appellate court overturned the trial court’s decision, using the embryos as property analysis,<sup>92</sup> and recognizing

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

82. John A. Robertson, *Meaning What You Sign; Kass v. Kass regarding Disposition of Frozen Embryos*, THE HASTINGS CENTER REPORT, July 1, 1998, No. 4, Vol. 28, at 22.

83. *See id.* at 591.

84. *See id.* The birth mother of the child that the Davises planned to adopt backed out at the last minute. Other routes to adoption proved to be too expensive for the Davises. *See id.*

85. *See id.* at 591-92. Both Mary Sue and Junior Davis testified that before they started the IVF process of cryopreservation, no one explained how it would change the nature of the IVF treatment. They said they never considered the implications of storing the embryos longer than a few months. There was no discussion or agreement about the disposition of the embryos in the case of a contingency, nor were they ever asked to sign any consent forms. *See id.*

86. *See id.* at 592.

87. *See id.* at 589.

88. *See id.* Mary Sue wished to donate the embryos to a childless couple. *See id.*

89. At first, Junior wanted the embryos to be left frozen indefinitely, while he “decided whether or not he wanted to be a parent outside the bounds of marriage.” *Id.* at 589.

90. *See id.* at 592.

91. *See Davis v. Davis*, No. E-14496, 1989 WL 140495, at \*9 (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).

92. The intermediate court relied on *York v. Jones*, 717 F. Supp. 421 (E.E. Va. 1989), which involved a dispute between a married couple and a fertility clinic. The Yorks were seeking treatment for infertility at the clinic and had embryos cryogenically frozen. They had one embryo remaining in storage when they decided to move from Virginia (where the fertility clinic was located) to California. The Yorks requested that the clinic in Virginia transfer the remaining embryo to a clinic in California for later implantation, and the clinic refused. The York court held that the “cryopreservation agreement between the Yorks and the Institute created a bailment” which necessitated the clinic to return the subject of the bailment once the purpose of the bailment was terminated. *Davis*, 842 S.W. 2d at 595.

The Tennessee supreme court in *Davis* held that the Court of Appeals should not have cited *York* without precisely defining the interest that Mary Sue and Junior have in the embryos. *See id.* at 595-96.

Junior's right not to procreate.<sup>93</sup> The Tennessee Supreme Court agreed with the appellate court on the point that Junior had a right to not procreate, and framed the dispute as to whether the parties would become parents, and balanced the interests of both Junior and Mary Sue.<sup>94</sup> The Tennessee Supreme Court, on review, found that the facts of *Davis* led to a competing constitutional right both to procreate and to avoid procreation.<sup>95</sup> The court held that in balancing these rights, the party seeking to avoid procreation should normally prevail.<sup>96</sup>

The Tennessee Supreme Court's analysis used interim category when deciding how to classify embryos.<sup>97</sup> The fundamental problem with the court's decision, however, is that the award of joint control "inherently places the party who wants to implant at a disadvantage."<sup>98</sup> Because of this, one donor bears all of the burden for deciding what will happen to the embryos, instead of both parties deciding together.<sup>99</sup>

### C. *The Constitution and the Right to Privacy*

Reproductive technology embodies marriage, family, contraception, and abortion, all of which have been discussed in the context of the constitutional right to privacy.<sup>100</sup> The United States Supreme Court has never directly addressed whether the right to procreate should include the right to utilize technology, such as IVF, but it seems that any procreation, even artificial, would be included within the right to privacy.<sup>101</sup> Because of this, some people believe that extending embryos certain rights and respect is inconsistent with *Roe v. Wade*,<sup>102</sup> but this is clearly not the case. "*Roe* is not about the right of a woman to kill the fetus; *Roe* is about the right of a woman not to be pregnant. When a case does not involve a pregnant person, then the rights protected by *Roe* are not implicated."<sup>103</sup> In the case of frozen embryos, there is not pregnant woman involved. The embryos' existence is entirely separate from the woman. Once the woman's body is not involved, her interests are subservient to the state's interest in life.<sup>104</sup> This is clearly illustrated by *Commonwealth v. Edelin*, which established the duty of an abortion doctor to

93. *See id.* It is very interesting to note, however, that even though the court used the property analysis, they still awarded "joint custody" of the embryos to Mary Sue and Junior Davis. *Davis*, 842 S.W. 2d at 595.

94. *See Davis*, 842 S.W. 2d at 601-603. In balancing the equities, the court considered the positions of the parties, the significance of their interests and the relative burdens that would be opposed by differing resolutions. *See id.* at 603 citing *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495 (1988).

95. *See Davis*, 842 S.W. 2d at 600.

96. *See id.* at 603. The court held that the party seeking to avoid procreation should normally prevail if the other party could achieve parenthood in a reasonable way not including the use of the embryos in question. A reasonable way was further held to include another attempt at IVF and adoption. *See id.* *See also* *Theysen* at 711.

97. *See id.* at 603.

98. *Trespacios supra* note 3, at 816.

99. *See id.* at 817.

100. *See Luongo, supra* note 67, at 1024. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Loving v. Virginia*, 388 U.S. 1 (1967), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

101. *See Luongo, supra* note 67, at 1025.

102. 410 U.S. 113 (1973).

103. *Colker, supra* note 63, at 1068.

104. *See Wurmbrand, supra* note 58, at 1097.

rescue a viable fetus born alive, even though its survival might lead to the existence of a biological link that might cause the mother mental anguish.<sup>105</sup> In accord with *Roe*, "the state could treat the embryos as persons or give them as much protection as possible, as long as there were no infringement on a woman's bodily autonomy."<sup>106</sup> In fact, since *Roe*, the Court has "consistently held that the state may assert a legitimate interest in protecting potential life."<sup>107</sup> Thus, the question of embryo protection can and should be considered separately from abortion issues.<sup>108</sup>

#### D. State Legislation

There is very little statutory authority and common law precedent dealing with the disposition of frozen embryos.<sup>109</sup> What law there is varies greatly from state to state. An important factor in the widely varying state law is America's decentralized legislative system, in which family law is primarily left up to the states.<sup>110</sup> Currently, no federal law exists to clear up disputes over embryo ownership.<sup>111</sup> Only six states have directly addressed the issue.<sup>112</sup>

The state with the most comprehensive legislation in this area is Louisiana. Louisiana utilizes the personhood perspective and deems embryos to be legal people accorded with full legal rights of people.<sup>113</sup> Because of this, Louisiana statutory law holds that no embryo may be intentionally destroyed and if the IVF patients renounce their "parental rights . . . the embryo shall be available for adoptive implantation."<sup>114</sup> The statute mandates that disputes over the disposition of embryos should be resolved in "the bests interest of the embryo."<sup>115</sup>

Florida law prescribes disposal methods for embryos and establishes inheritance rights.<sup>116</sup> This law calls for a written agreement in advance concerning the donors' wishes as to the disposition of the embryos in the event of unforeseen

105. 359 N.E.2d 159 (1976). *See also* Wurmbrand, *supra* note 58, at 1097.

106. Luongo, *supra* note 67, at 1046.

107. Wurmbrand, *supra* note 58, at 1094. *See, e.g.,* *Maier v. Roe*, 432 U.S. 464 (1977) (holding); *Harris v. McRae*, 448 U.S. 297 (1980) (parenthetical).

108. *See* Wurmbrand, *supra* note 58, at 1092.

109. *See* Luongo, *supra* note 67, at 1011.

110. *See* Judy Peres, *Setting Limits on High-Tech Babymaking; The Law Has Not Kept Up With Reproductive Science; Partly Because the issues are Difficult to Discuss*, CHICAGO TRIBUNE, July 26, 1998, at 1 Zone C. Peres explains that more consistent regulation is needed but that it is doubtful that we (America) can come up with a single set of rules, since some states would be more protective of embryos, while others want a more liberal arrangement. This is further complicated by the politically sensitive nature of assisted reproduction. Peres further notes that the political divisions we are familiar with do not yield obvious policy positions.

111. *See* Donna M. Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U.L. REV. 989, 993 (1999).

112. They are: Louisiana, Florida, Kansas, Kentucky, New Hampshire, and Pennsylvania. *See* LA. REV. STAT. ANN §9:130, LA. REV. STAT. ANN §§9:129 and 9:131 (West 1991), FLA. STAT. Ch. 742.17 (1993), KAN. STAT. ANN. 65-6702 (1992), KY. REV. STAT. ANN. 311.715 (Michie 1995), N.H. REV. STAT. ANN. 168-B:13-15 (1994 & Supp. 1996), PA. STAT. ANN. 3213(e), 3216 (c) (West 1983 & Supp. 1998).

113. *See* LA. REV. STAT. ANN §9:130.

114. Luongo, *supra* note 67, at 1018-19, (quoting LA. REV. STAT. ANN §9:130 (West 1991)).

115. *See* LA. REV. STAT. ANN §§9:129 and 9:131 (West 1991).

116. *See* FLA. STAT. Ch. 742.17 (1993).

circumstances.<sup>117</sup> Kansas, on the other hand provides for the disposition of embryos without interference by the state.<sup>118</sup> Kansas law further states that disposal of embryos is lawful when agreed upon jointly by the parties.<sup>119</sup> Kentucky prohibits the use of state funds for IVF research or procedures.<sup>120</sup> In addition, it makes a public medical facility's intentional destruction of embryos illegal.<sup>121</sup> New Hampshire defines eligibility, limits donors, and restricts the use of embryos.<sup>122</sup> New Hampshire law also requires prior consent forms be signed and insisting on donors receiving counseling before beginning IVF procedures so that they are well informed.<sup>123</sup> Finally, Pennsylvania outlines IVF reporting requirements.<sup>124</sup>

#### *E. Ethical and Constitutional Considerations to Use When Balancing the Equities*

As evidenced by the *Davis* case, the current trend is to accord more weight to the party seeking to avoid parenthood.<sup>125</sup> However, the Assisted Reproductive Technologies Report concluded that "during marriage, both parents should have decision making authority over the embryos' disposition. After a divorce, the spouse who seeks to use the embryo should have control."<sup>126</sup> The American Fertility Society Guidelines<sup>127</sup> can be used to further public policy in this area. The guidelines endorse a special respect for embryos.<sup>128</sup> These guidelines state that this special respect should be the basis for legislation in this area and should prevent clinics from destroying or performing research on abandoned embryos.<sup>129</sup> Legislation following such guidelines would articulate preserving a social value in human life.<sup>130</sup>

Laws, such as the Louisiana statute, that prohibit embryo destruction by mandating embryo donation for adoption "could be written to protect embryos without imposing any duty on biological parents" thereby steering clear of right to privacy issues.<sup>131</sup> The donors' only burden is the knowledge that they may have biological offspring, though a major consideration, can be outweighed by the

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117. *See id.*

118. *See* KAN. STAT. ANN. 65-6702 (1992).

119. *See id.*

120. *See* KY. REV. STAT. ANN. 311.715 (Michie 1995).

121. *See id.*

122. *See* N.H. REV. STAT. ANN. 168-B:13-15 (1994 & Supp. 1996).

123. *See id.*

124. *See* PA. STAT. ANN. 3213(e), 3216 (c) (West 1983 & Supp. 1998).

125. *See* Joshua S. Rubenstein, *Advances in Medical Technology; Implications for Practitioners, Clients*, NEW YORK LAW JOURNAL, Sept. 7, 1999, at 9.

126. *Id.*

127. The group is now known as the American Society for Reproductive Medicine. Their website can be accessed at <<http://www.asrm.org>>. The society is comprised of over 10,000 doctors and scientists specializing on infertility of humans. *See* Vinciguerra, *supra* note 5.

128. *See* Vinciguerra, *supra* note 5.

129. *See id.* Some experts feel that legislation following these guidelines should allow clinics to release abandoned embryos for adoption by other couples or individuals. An important point to consider is that "forfeiture of the right to direct the fate of cryogenically preserved embryos due to abandonment of those embryos by the creating couple creates a strong incentive for couples not to abandon them." *Id.*

130. *See id.*

131. Luongo, *supra* note 67, at 1049.

state's legitimate interest in life, especially since this burden does not infringe upon the bodily integrity of the donors.<sup>132</sup>

When applied to judicial cases, such as *Davis*, equitable principles must be used.<sup>133</sup> A policy in favor of supporting life could and should be an important part of this equitable determination. Using this policy would tend to have the equities be balanced in favor of the donor who wishes to sustain the existence of the embryos. The American Academy of Medical Ethics argued as amicus in *Davis* that embryos should not be destroyed, instead given to the party wishing to implant the embryo or donated to another couple.<sup>134</sup>

Another important point is that in balancing the equities, we should not value the embryo because of some kind of attachment the donor has to the embryo, but instead because of the inherent value of the life itself.<sup>135</sup> A party in a dispute should not have his or her wishes to sustain the life of the embryo discounted because he or she wishes to donate the embryo to an adoptive person or couple, as happened in the *Davis* case.<sup>136</sup>

## V. SOLUTIONS

### A. *The Need for Protocols Establishing Prior Consent*

The above discussion highlights the need for contractual arrangements between couples undergoing fertility treatment. The court in *Davis* recognized that a prior directive might have eliminated the dispute between the *Davis* couple and made the court's interference unnecessary.<sup>137</sup> These protocols should be established on three levels: legislative, in the fertility clinics, and between individuals.<sup>138</sup>

#### 1. Legislative

Uniform legislation is needed in this area. In fact, the need for legislation in this area increases as the process of IVF daily becomes more common.<sup>139</sup> "It is the Legislature, and not individual litigants and judges, which has the primary responsibility and resources needed to conduct the studies and analysis necessary

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132. See Luongo, *supra* note 67, at 1050. Others feel, however, that if both parties do not want the embryos donated for implantation in another woman, there is a strong presumption that the parties right to not procreate should be protected. See Trespalacios, *supra* note 3, at 833-34.

133. See discussion about balancing of the equities in Part IV. D. and footnote 93, *supra*.

134. See Michael Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore With No Precedent, Court to Decide on Request To Destroy Fertilized Ova*, 151 N.J.L.J. 993 (Mar. 18, 1998).

135. See Colker, *supra* note 63, at 1077.

136. See *id.*

137. See *Davis*, 842 S.W. 2d at 590 (paran).

138. It is worth noting that there are potential problems with these prior directives. First, they indicate the donors' intent at the start of the process, which can change over time; and, second, there may be state or constitutional considerations that overturn these agreements. See Steinbach, *supra* note 109, at 1018. These potential problems should be considered when drafting prior consent agreements, so that they can be avoided.

139. See Wurmbrand, *supra* note 58, at 1081.

to make ethical and policy decisions affecting society as a whole."<sup>140</sup> Bills are needed that will require couples to decide ahead of time what should be done with unneeded embryos.<sup>141</sup> One proposed bill would require forms to be filled out before the IVF process is begun.<sup>142</sup> The forms would include the patients' names, the type and number of embryos to be provided, the name of the clinic and/or storage facility, and the name of the donee if applicable.<sup>143</sup> The forms would require the patients to specify what is to happen to the embryos in case of contingencies.<sup>144</sup>

It is important to note that creating a legislative framework in this area does not necessarily preclude modification by individuals in private contracts.<sup>145</sup> In fact, what is needed is a legislative framework that will guide private contracts and help those couples who are unable or unwilling to address the reality that their relationship may end in death or divorce.<sup>146</sup>

Some opponents of prior directives point out that the passage of time between making the prior directive and the contingency could give rise to a claim of unfairness due to a change of circumstances.<sup>147</sup> This would interject legal uncertainty into the situation.<sup>148</sup> Yet, "in making the agreement the parties had the opportunity jointly to determine their reproductive futures."<sup>149</sup> Holding the parties to their agreement recognizes and respects their procreative liberty and establishes more certainty into the situation.<sup>150</sup> This would allow these issues to be decided according to predetermined guidelines that all parties freely entered into instead of on a much more unpredictable ad hoc basis.<sup>151</sup>

Legislative frameworks could thus be used to embody the ethical position that embryos are deserving of a special respect and are more than mere property. One way this could be accomplished is by specifically providing that embryo adoption or donation is a valuable option in the event that an IVF patient for one reason or another finishes treatment with remaining frozen embryos.

## 2. Fertility Clinics

Fertility clinics should call on their patients in advance to create legal directives to deal with contingencies such as divorce, death, lost contact, inability

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140. *A Call For Legislative Action*, NEW JERSEY LAWYER, Apr. 6, 1998, at 6.

141. See Michael Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore With No Precedent, Court to Decide on Request to Destroy Fertilized Ova*, 151 N.J.L.J. 993 (Mar. 9, 1998).

142. See *id.*

143. See *id.*

144. See *id.* The particular bill lists the following contingencies: the death of either or both partners, the death of the patient if patient is not part of a couple, separation, divorce, abandonment by one or both partners, or unpaid storage fees.

145. See *A Call For Legislative Action*, *supra* note 138, at 6.

146. See *id.*

147. See Robertson, *supra* note 81, at 410.

148. *Id.*

149. *Id.*

150. *Id.*

151. See *id.* at 415-16.

to agree and failure to pay storage charges.<sup>152</sup> The IVF program should have policies that direct what is to become of the spare embryos, whether they are transferred to the same patient in the future, stored, adopted out to another couple, donated for research purposes, or discarded. This gives IVF programs the certainty they need to efficiently run their programs.<sup>153</sup> The clinic should remind patients that it is important to think carefully about their choices and to stress the significance of the directives. Clinics should also have policies that deal with situations which involve the absence of written directives.

Informed consent comes into play on the clinic level, as well. If clinics do not require prior directives, informed consent necessitates the clinic informing the patients of what the clinic will do with the frozen embryos when certain specified events occur, such as loss of contact with the patients, death, or divorce.<sup>154</sup> These agreements between the couple and the clinic are as much prior directives as agreements between the couple.<sup>155</sup>

Careful consent procedures are in the best interests of all involved in the IVF process.<sup>156</sup> Programs should "take great care to make sure that the couple is fully aware of the consequences of their choices and the alternatives forgone."<sup>157</sup> The program should be especially careful that the impact of the options available is explicitly explained.<sup>158</sup>

### 3. Individual

Until law becomes firmly established in this area, any couple planning to enter into IVF treatment should be advised to create a contract expressly stating what is to be done with excess embryos in the case of death, divorce, or unavailability of the couple.<sup>159</sup> Careful attention should be paid to existing state law in the area, so the contract is not held unenforceable as against public policy.<sup>160</sup> The possibility of death or divorce might seem like a remote possibility at the time fertility treatment is started, yet this issue must be confronted.<sup>161</sup> Most couples would prefer to have a prior directive control future disposition of the frozen embryos than

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152. See Robertson, *supra* note 81, at 410. These directives could be changed at any time in writing if both parties consent to the change. See generally Booth, *supra* note 139. At this juncture it is important to point out that the emotional hardship and significant strain on the relationship that is experienced by infertile couples is very great and can even be a significant factor in the death of the relationship. The strain infertile couples feel is often compared to that resulting from the grieving process that is encountered after the death of a child. *Id.*

153. See John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 415 (1990).

154. See John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 410 (1990).

155. See *id.* For example, the clinic might specify that in the case of divorce, the clinic has the right to award the embryos to the wife, discard them, use them for research, or donate them to another couple. See *id.*

156. See *id.* at 422.

157. *Id.* at 422.

158. See *id.* at 423.

159. See *A Call For Legislative Action*, *supra* note 138, at 6.

160. For example, couples living in Louisiana could not provide for the disposal of embryos, as this is against the law in that jurisdiction.

161. See *A Call For Legislative Action*, *supra* note 138, at 6.



having a court decide.<sup>162</sup> They also must personally give informed consent if the embryos are to be used for research purposes.

### *B. New Technology*

It seems almost paradoxical to assert that new technology may lift us from this ethical and legal quandary, since this technology is what created the problem in the first place.<sup>163</sup> However, if new techniques are discovered that allow the female's oocyte to be stored or frozen and later successfully fertilized, the issues discussed in this paper could be greatly alleviated. Disposing of an oocyte does not pose the same ethical dilemma that disposing of a fertilized egg does. In and of itself, an oocyte does not have the potential to become a human being. In addition, custody issues would be eliminated, as it is clear that the woman should have control of the frozen or otherwise preserved oocyte. Most significantly, the woman's use of the oocyte in no way infringes upon the man's desire to avoid procreation. She may elect to become pregnant using her oocytes in combination with donor sperm or the sperm of her new partner.

The issues arising from what to do with unneeded or abandoned embryos are many. They encompass several areas of the law as well as ethical and moral considerations. It is clear that protocols should be established to deal with the issues on a legislative as well as a clinic level. When developing these protocols, embryo adoption should be considered as a viable option for the disposition of unwanted or abandoned embryos.

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162. See Robertson, *supra* note 152.

163. Currently, research is being conducted that is attempting to use oocytes from previously frozen ovarian tissue. A woman's ovarian tissue may be surgically removed at any time in her reproductive years and frozen using cryopreservation techniques. When she is ready to attempt a pregnancy, the ovarian tissue can be thawed and the oocytes then retrieved. These oocytes may then be fertilized and then transferred to her uterus. This process would therefore bypass the ethical and legal questions raised above. However, with the current technology that is available, the freezing and thawing process has been shown to be too destructive to the ovarian tissue and the oocytes. Therefore, at this time, this process is not being used to create embryos that lead to successful pregnancies. In spite of its current limitations, this process or others similar in nature may one day alleviate the need to store embryos. See David B. Seifer, *The Aging Ovarian Follicle: Can We Turn Back the Clock?* CONTEMPORARY OB/GYN, Vol. 45, No. 3, at 92.