

2013

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Recommended Citation

Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. Contemp. Health L. & Pol'y 233 (2013).

Available at: <https://scholarship.law.edu/jchlp/vol29/iss2/6>

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“RETHINKING” EMBRYO DISPOSITION UPON DIVORCE

*Michael T. Flannery**

INTRODUCTION

Because reproductive technology affords married couples the ability to preserve potential human life for future existence, courts are often forced to confront the disposition of frozen embryos upon divorce. This problem arises either because couples fail to expressly state their intent for disposition upon divorce through contract, or public policy renders such contracts unenforceable. Consequently, courts are forced to construct alternative resolutions.

Since 1992, when the Tennessee Supreme Court first confronted the issue in *Davis v. Davis*,¹ courts have applied three different methods of analysis in disposing of frozen embryos upon divorce: a contractual approach;² a contemporaneous mutual consent approach,³ and a balancing approach.⁴ Complicating the various approaches is the additional debate over the status of the embryos,⁵ but this is largely a question of legislative policy, the constitutionality of which is beyond the scope of this Article. Within the common law framework, all courts, beginning with *Davis*, have adopted the standard that embryos are neither property nor persons, but rather “occupy an interim category that entitles them to special respect because of their

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¹ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

² See *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997); *In re Litowitz*, 48 P.3d 261 (Wash. 2002); *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006); *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008).

³ See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁴ See *Davis*, 842 S.W.2d at 604; *J.B. v. M.B. & C.C.*, 783 A.2d 707 (N.J. 2001); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

⁵ The question of status entails the view of the embryo as either property, “person,” or of an interim category warranting special respect. See *Davis*, 842 S.W.2d at 596.

potential for human life.”⁶ The main question, however, has been: by what framework of analysis should courts apply this standard?

Many view the approaches taken by the courts as seemingly conflicted and inconsistent, viewing the variety of analytical frameworks to be almost mutually exclusive as a matter of policy.⁷ But in fact, with very slight exception regarding the right of a progenitor to change his or her mind as to disposition, all of the cases are actually quite consistent in their analysis for disposing of embryos upon divorce.

The most obvious consistency among the courts addressing this issue is the universal call for legislative input on the policies affecting the status of the embryo, and the specific policies that affect the disposition of embryos upon divorce.⁸ Ultimately, these policies involve the consideration of conflicted constitutional rights of individual parties, which may be premised upon individual state policies that are beyond the scope of this Article.

⁶ *Id.* at 597.

⁷ See, e.g., Helen S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 103 (2002) (describing American cases as “seemingly unanimous in outcome [but], in fact, contradictory” and in disagreement about the enforceability of consent forms, “whether to impose a fixed rule that a person will not be forced to become a parent after he or she changes his or her mind about implanting frozen pre-embryos, or whether to balance the rights of each of the divorced persons, taking into account their individual circumstances.”); Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 400 (2005-2006) (asserting that “the adversarial model is a particularly ineffective form of dispute resolution for embryo disputes,” noting specifically the “divergent interpretations of the legal status of the embryo and the progenitors’ interests,” concluding that the adversarial model “removes the decision making authority from the progenitors” and, instead, recommending an alternative dispute resolution model). But see Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is An Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 493 (2008-2009) (recognizing disputes over cryopreserved embryos arising during divorce proceedings as “not consistently resolved among U.S. courts” but sufficient, helpful, and predictive in resolving such disputes); Charla M. Burill, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals An Indefinite Solution*, 54 WAYNE L. REV. 1365 (2008) (not necessarily critiquing the legal framework itself, but limiting, by default, dispositions from which parties would choose within the existing framework).

⁸ See, e.g., *Davis*, 842 S.W.2d at 595; *A.Z. v. B.Z.*, 725 N.E.2d at 1058.

These are relevant, however, as any policies implemented by the state may ultimately affect disposition.⁹

Whatever the policies of an individual state may be, the legal framework within which these policies are implemented is sufficient to protect the interests at stake, provided that the parameters of each framework are more clearly defined, specifically with respect to the right of a progenitor to change his or her mind regarding disposition. This is not to say that legislative input on any number of aspects of the disposition of frozen embryos is not warranted. Indeed, this Article proposes that state legislatures should mandate that any couples participating in fertility procedures involving frozen embryos must expressly provide for their intent for disposition upon divorce. Such mandates will maximize the opportunity for individuals to exercise informed, autonomous decision-making authority regarding disposition. Where parties fail to exercise that authority, courts will balance the parties' interests to determine disposition. With respect to a party's right to change his or her mind, within more narrowly defined parameters, the existing legal frameworks are suited to accommodate that right, and a legislative mandate requiring expressed intent upon divorce does not interfere with that right.

In Part I, I discuss the appropriate scope of the three legal frameworks and how courts should employ them in resolving the disposition of frozen embryos upon divorce. Courts should not view the common law development on this issue as a collection of mutually exclusive frameworks from which to choose, thereby pigeonholing all future analysis of the rights of progenitors into one analytical framework. Rather, courts should view all three approaches as a continuum—the application of which is highly fact sensitive, the most important fact being the unambiguously expressed intent of the parties for disposition upon divorce. A statutory provision that requires parties to state their intent supports the policy that such personal decisions should be left to the individual, and it does not interfere with the right to change one's mind.

I discuss in Part II the availability of such a mandate and other limitations upon disposition that state legislatures have implemented. Although much

⁹ For example, if a state legislature adopts a policy that affords personhood status to frozen embryos, *see, e.g.*, LA. REV. STAT. ANN. § 9:126 (2012), such status naturally limits the dispositional options and the enforceability of contracts that require the destruction of the embryos. However, when conflict arises in such cases, courts must still determine the appropriate disposition upon divorce, and the frameworks that have been used by the courts discussed in this Article are sufficient to make this determination consistently and without contradiction.

of the legislative posturing on these issues is beyond the scope of this Article, certain legislative policies on disposition may affect the enforceability of contracts providing for disposition upon divorce. Therefore, such policies are relevant to the legal framework that determines disposition in those cases.

In Part III, I recommend that each state legislature statutorily provide for its policies on the determinative issues affecting the disposition of embryos upon divorce. But where they do not, individual courts should more narrowly define the scope of the analytical framework within which courts determine the disposition of frozen embryos upon divorce, specifically with respect to the ability to change one's mind. By doing so, courts will be able to reconcile individual cases within a reasoned and consistent framework that affords predictability, eases administrative burden, and reconciles constitutional interests in a fair and responsible manner.

I. THE DISPOSITION OF GENETIC MATERIAL UPON DIVORCE

In 1992, the first case to address the issue of the disposition of frozen embryos upon divorce was *Davis v. Davis*.¹⁰ *Davis* presented a complex set of facts that established the comprehensive parameters of the legal framework within which all subsequent cases would be resolved. I discuss the factual context of the *Davis* case in sub-Part C.1 (the "balancing" approach), *infra*. In *Davis*, there was no enforceable agreement for disposition of the embryos. In determining the appropriate disposition of the embryos, the court balanced the parties' respective interests based on the specific facts of the case. In doing so, the court provided a continuum of reasoning that, when appropriately defined, offers a consistent and workable common law framework within which to resolve disputes over the disposition of embryos upon divorce. Specifically, the *Davis* court held that:

disputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the [e]mbryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by

¹⁰ *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) (holding that, in the case of divorcing parties who each want ownership of pre-embryos, a balancing of each party's interests should apply).

means other than use of the []embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the []embryos to achieve pregnancy should be considered. However, if the party seeking control of the []embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.¹¹

Based on this holding in *Davis*, courts have employed three analytical approaches in addressing the issue: (1) the contractual approach;¹² (2) the contemporaneous mutual consent approach;¹³ and (3) the balancing

¹¹ *Id.* at 604.

¹² Under the pure contract approach, courts are inclined to enforce original agreements in which the progenitors express their intent for disposition upon divorce. *See, e.g.*, *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997); *In re Litowitz*, 48 P.3d 261 (Wash. 2002); *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006); *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008). When parties contract but do not express their intent upon the contingency of divorce, courts could still enforce the agreement to which the parties consented, but this begs the question of whether two persons who consented to participate in the In Vitro Fertilization (IVF) process to become pregnant as a married couple consent to become parents upon their divorce through the subsequent use of their genetic material, against their will. Under such circumstances, courts could imply the parties' intent upon divorce or could balance the parties' interests. For comments favoring the contractual approach, *see, e.g.*, Yehezkel Margalit, *To Be Or Not To Be (A Parent)?—Not Precisely the Question: The Frozen Embryo Dispute*, 18 CARDOZO J. L. & GENDER 355 (2012) (favoring contracts); Marisa G. Zizzi, *The Pre-embryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L. J. 391 (2012) (proposing requiring agreements and mandating enforcement). *But see* Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57 (2011) (disfavoring contract agreements).

¹³ Under the contemporaneous mutual consent approach, agreements between the parties generally are still enforced, but any such agreement must be contemporaneously agreed upon; if a party changes his or her mind after executing an initial agreement for a specific disposition, the court will not enforce the original agreement but will only enforce a subsequent agreement that is mutually agreed upon. *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *In re Marriage of Witten*, 672 N.W.2d 768, 780-81 (Iowa 2003); *see also Davis*, 842 S.W.2d at 604 (holding that but for the factual distinctions in the case, the *Davis* court favored the perspective that the enforceability of the initial agreement is subject to one party's right to change his or her mind). Absent subsequent mutual agreement, a court might maintain the status quo until the parties reach such mutual agreement, or until the term for storage has expired, in which case, the terms of the contract with the storage facility may dictate disposition, or the court may determine disposition upon balancing the interests of the parties.

approach.¹⁴ Within these approaches, courts generally agree that when the parties state their unambiguous intent with respect to the disposition of frozen embryos, such agreements will be dispositive. When such stated intent is not contested by either party, it matters not that the parties' intent is to destroy, implant, preserve, or donate the embryos.¹⁵ When there is no agreement, or when the contingency of divorce renders the parties' intent for disposition ambiguous, courts have balanced the respective rights and interests of the parties.¹⁶ As provided in *Davis*, in balancing the parties' interests, ordinarily the party wishing to avoid procreation will prevail, assuming the objecting party has a reasonable opportunity to otherwise become a parent.¹⁷ If no alternative to achieve parenthood exists, then the

¹⁴ Under the balancing approach, courts also will enforce agreements in which the parties express their intent upon divorce. Thus, all courts generally agree that when the parties state their unambiguous intent with respect to the disposition of frozen embryos upon divorce, such agreements will be dispositive. But if there is no agreement, if the parties do not clearly express their intent for disposition, or if there is disagreement, the court may imply the parties' intent by their participation in the IVF process, or the court may balance the respective interests. See *Davis*, 842 S.W.2d at 590-91; *J.B. v. M.B. & C.C.*, 783 A.2d 707 (N.J. 2001); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012). There were other approaches, such as an implied consent model, and various equity models, that the *Davis* court considered but rejected based on the facts of the case. See *Davis*, 842 S.W.2d at 590-91. However, any of these considerations may be appropriate within a specific state's policy scheme regarding the disposition of frozen embryos or the enforceability of contracts involving them.

¹⁵ Notwithstanding the party's agreement, the disposition of frozen embryos may be limited in jurisdictions that hold embryos as having "personhood" status and, therefore, prohibit destruction of the embryos. See, e.g., 720 ILL. COMP. STAT. ANN. § 5/9-1.2 (West 2002) (prohibiting killing any unborn child, defined as an "individual of the human species from fertilization until birth"); LA. REV. STAT. ANN. § 9:126 (2012); MINN. STAT. ANN. §§ 609.266-2691 (West 2003) (providing for various offenses against unborn children, defined to be "the unborn offspring of a human conceived, but not yet born"); N.M. STAT. ANN. §§ 24-9A-1 to -7 (Michie 2003) (requiring that embryos be transferred to a woman to avoid clinical experimentation restrictions); WIS. STAT. ANN. § 940.04 (West 1996 & Supp. 2004) (prohibiting destruction of an unborn child, defined as a human being from conception until live birth).

¹⁶ See *J.B. v. M.B. & C.C.*, 783 A.2d 707 (N.J. 2001); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

¹⁷ *Davis*, 842 S.W.2d at 604.

court may favor the use of the embryos.¹⁸ Under any of these circumstances, courts have resolved the issue using the *Davis* framework. Although outcomes may vary depending upon the facts of the respective cases and the policies favored by respective states, courts have consistently applied the analytical frameworks, which have generally proven workable.

The only issue that courts have not resolved consistently using the *Davis* framework has been whether a participating progenitor has a right to change his or her mind about embryo disposition. This inconsistency, however, is not necessarily the result of any limitations in the frameworks set out by *Davis, per se*. Rather, within the continuum of these frameworks, courts must more narrowly define the ability of a progenitor to change his or her mind by identifying and incorporating the intent of the parties *specifically regarding disposition upon divorce*. When parties have unambiguously stated their intent for disposition upon divorce, such agreement should be enforced. It is only when parties have no original agreement, or they have an original agreement but have not specifically agreed to disposition upon divorce, that a party should be able to change his or her mind as a result of that contingency having occurred. The courts that have applied the contemporaneous mutual consent approach have blurred the limits of the *Davis* holding by allowing parties to alter an original agreement that included the unambiguously expressed intent for disposition upon divorce. A more narrowly-drawn distinction that affords a party the right to alter an original agreement only when the original agreement did not contemplate the contingency of divorce accords more with the analysis in *Davis*. Such an approach provides a fair and consistent legal framework within which to resolve these cases.

Furthermore, a statutory mandate that requires parties to state their intent for embryo disposition in the event of divorce provides predictability for parties and clinics, encourages and promotes informed autonomous decision-making by the parties—which is favored by courts—and avoids the burden and expense of unnecessary litigation.

A. *The Contractual Approach*

Contrary to cases in which parties have no agreement regarding the disposition of the pre-embryos upon divorce and, consequently, courts are

¹⁸ See *Reber*, 42 A.3d at 1133; see also Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, GREENBELT PATCH (Jan. 7, 2013), <http://greenbelt.patch.com/articles/judge-awards-maryland-woman-custody-of-frozen-embryos?national=patch&ncid=edlinkuspatc00000006> (describing case in which court gave nine frozen embryos to ex-wife over ex-husband's objection).

left to resolve the conflict by balancing respective interests, some courts are faced with the issue of whether to enforce an existing agreement between the parties and thereby avoid any consideration of individual interests.¹⁹ The first case in which a court employed a strict contractual approach to the disposition of frozen embryos was *Kass v. Kass*, decided five years after *Davis* in 1997.²⁰

1. *Kass v. Kass*

In *Kass*, Maureen and Steven Kass participated in an IVF process and produced five remaining frozen embryos.²¹ Prior to the procedure, the parties executed an informed consent document, which provided, in part:

In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.²²

Regarding the disposition of the embryos, the informed consent agreement provided:

In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct [that] . . . [o]ur frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.²³

¹⁹ See, e.g., *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008); *Roman v. Roman*, 193 S.W.3d 40 (Tex. 2006) (enforcing contract); *In re Litowitz*, 48 P.3d 261 (Wash. 2002) (enforcing agreement of parties regarding disposition of cryopreserved embryos after five years); *Cahill v. Cahill*, 757 So. 2d 465 (Ala. Civ. App. 2000) (enforcing parties' agreement by making no determination as to disposition); *Kass v. Kass*, 235 A.D.2d 150, 162-63 (N.Y. App. Div. 1997) (enforcing terms of consent forms, signed by husband and wife to donate embryos in event of divorce).

²⁰ *Kass*, 235 A.D.2d at 150.

²¹ *Id.* at 153.

²² *Id.* at 152.

²³ *Id.*

Upon the parties' divorce claim, they executed a divorce agreement which provided, "[t]he disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay a custody claim to these pre-zygotes."²⁴ Subsequently, however, the wife changed her mind and asserted a claim to custody of the frozen embryos.²⁵

In light of the *Davis* analysis, the court in *Kass* reasoned that "the first . . . inquiry should be directed at whether the parties have made an expression of mutual intent which governs the disposition of the pre-zygotes *under the circumstances in which the parties find themselves*," thus, limiting the context of the parties' intent to divorce.²⁶ Noting the *Davis* court's "bemoaning" of the lack of expressed intent in *Davis*, the *Kass* court held that the *Davis* balancing analysis may be appropriate when parties are in conflict, but when there is an agreement such balancing is not necessary.²⁷ In considering the wife's argument in *Kass*, the court found it significant that the agreement "[did] not mandate any particular disposition of the pre-zygotes—it merely provide[d] that they will not be released from storage absent a court order directing same."²⁸ But the court held that "[t]his provision relative to divorce did not confer on the court the right to ignore the unambiguous agreement of the parties as to the disposition of the pre-zygotes and to de novo create its own disposition based on what it believed was a more equitable determination. . . ."²⁹ In *Kass*, the only express agreement between the parties that spoke to "the circumstances in which the parties [found] themselves" was the agreement to allow the clinic to use the embryos for research if they could not otherwise agree. Because the parties

²⁴ *Id.* at 153.

²⁵ *Id.*

²⁶ *Id.* at 155 (emphasis added).

²⁷ *Id.* at 156-58. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (ruling "as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies . . . should be presumed valid and should be enforced as between the progenitors Providing that the initial agreements may later be modified *by agreement* will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.").

²⁸ *Davis*, 842 S.W.2d at 589 (emphasis in original).

²⁹ *Id.*

could not agree, the court simply enforced that agreement.³⁰ The court held that:

the decision to attempt to have children through IVF procedures and the determination of the fate of cryopreserved pre-zygotes resulting therefrom are intensely personal and essentially private matters which are appropriately resolved by the prospective parents rather than the courts. Accordingly, where the parties have indicated their mutual intent regarding the disposition of the pre-zygotes *in the event of the occurrence of a contingency*, that decision must be scrupulously honored, and the courts must refrain from any interference with the parties' expressed wishes. . . . [T]he parties in this case made such a clear and unequivocal choice, and the plaintiff's subsequent change of heart cannot be permitted to unilaterally alter their mutual decision.³¹

Concurring Justice Friedman was concerned that the informed consent document signed by the parties was insufficient to unambiguously state the parties' intent.³² Justice Friedman suggested some ambiguity in the parties' agreement in that, arguably, the agreement to contribute the embryos to research was reserved simply for the extra pre-zygotes left over from the IVF procedure, but that the divorce contingency provided for resolution by the court upon the parties' disagreement.³³ But even if this were the case, the court would be left to balance the interests of the parties, as in *Davis*. Under this approach, Justice Friedman did not favor the strict balancing test but, rather, favored the presumption that the interests of the party objecting to use of the embryos outweighs the interests of the party wishing to procreate. Therefore, despite this viewpoint, Justice Friedman concurred with the majority holding.³⁴

³⁰ *Kass*, 235 A.D.2d at 155.

³¹ *Id.* at 162-63 (emphasis added).

³² *Id.* at 163 (Friedman, J., concurring). For a discussion regarding the insufficiency of consent agreements between progenitor parties and fertility clinics, see Forman, *supra* note 12, at 57 (urging courts and legislatures not to enforce embryo disposition divorce provisions found in clinic consent forms).

³³ *Kass*, 235 A.D.2d at 163-65.

³⁴ *Id.* at 163. Justice Friedman refers to the dicta in *Davis*—providing for the court to favor use of the embryos for a party wishing to implant the embryos if this were her only means of parenting—and suggests that such a holding conflicts with the holding in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S. Ct. 2831 (1976), which

Dissenting Justice Miller agreed with concurring Justice Friedman that the informed consent document signed by the parties did not reflect an unambiguous agreement to destroy the embryos.³⁵ Justice Friedman expressed that agreements between parties should be encouraged, if not mandated:

The legal, emotional, and ethical nightmare resulting demonstrates the clear need for legislation mandating that in vitro fertilization clinics require the execution of a standardized, binding agreement setting forth the parties' specific intentions in the event of foreseeable changes in circumstances, and possibly for legislation altering the parent status of the party objecting to parenthood to that of a sperm donor, thereby avoiding potential child support obligations.³⁶

Absent such agreement, the dissent argued that the court should balance the respective interests of the parties, as the court did in *Davis*.³⁷

Nevertheless, the majority in *Kass* adopted the bright line rule that the parties' original agreement was enforceable and determinative of the disposition of their frozen embryos because the parties had already contemplated in the agreement the circumstances in which they found themselves. The specific language in the majority opinion supports the view that courts will employ a strict contractual approach only when the parties have considered the contingency of divorce and have expressly provided for their unambiguous intent upon the occurrence of that contingency.³⁸

2. *Cahill v. Cahill*³⁹

In *Cahill v. Cahill*, a husband and wife had three zygotes, formed via IVF procedures performed during the marriage, that were frozen at the Medical

provided that "no person or entity should be allowed to interfere with another person's decision not to have offspring before the point of viability." *Kass*, 235 A.D.2d at 165 (citing *Danforth*, and Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 523 (1990)).

³⁵ *Kass*, 235 A.D.2d at 168.

³⁶ *Id.* (Miller, J., dissenting).

³⁷ *Id.*

³⁸ *Id.* at 162-63.

³⁹ *Cahill v. Cahill*, 757 So. 2d 465 (Ala. Civ. App. 2000).

School of the University of Michigan (“the University”).⁴⁰ Upon obtaining a divorce, the divorce judgment did not include an award of the three zygotes.⁴¹ The husband asserted that the parties’ contract with the University prohibited either party from unilaterally obtaining the zygotes from the University.⁴² The pertinent provision of the parties’ “Contract Concerning Control and Disposition of Zygotes” provided:

[The wife] and [the husband] agree that all control and direction of our [zygotes] will be relinquished to the Physicians of the Department of Obstetrics and Gynecology under the following circumstances:

- ‘1. A dissolution of our marriage by court order
- ‘4. At any time by our/my election.
- ‘5. If we/I have not remained in contact with the IVF program for a period of time exceeding three (3) years.⁴³

The trial court ordered that “the zygotes shall not be the property of either party [and that] [a]ccording to the only evidence presented, the University of Michigan *appears* to be the current owner of the zygotes.”⁴⁴ Therefore, based on the contract accepted by the court, the trial court essentially made no determination as to the disposition of the zygotes and left the issue of disposition to be litigated by the parties and the University in future proceedings.⁴⁵ The Court of Appeals affirmed that determination.⁴⁶ Therefore, as in *Kass*, notwithstanding any policy considerations by the State or equitable arguments by the parties regarding their respective rights and interests, the court enforced the agreement that the parties had executed

⁴⁰ *Id.* at 465.

⁴¹ *Id.*

⁴² *Id.* at 466. The wife was ordered to submit the parties’ original contract to the court, which she failed to do. Absent the original contract, the husband submitted to the court a standard, unsigned form normally used by the University in its IVF procedures. The husband claimed that the parties signed and agreed to the terms of a similar form. The wife did not contest this claim, and the court accepted the form as the basis of the parties’ contract with the University. *Id.* at 467.

⁴³ *Id.* at 466.

⁴⁴ *Id.* at 467 (emphasis added by Court of Appeals).

⁴⁵ *Id.*

⁴⁶ *Id.* at 468.

prior to their participation in the procedure since it contemplated divorce and stated the parties' intent for disposition with respect to it.

3. *In re Litowitz*⁴⁷

In *In re Litowitz*, the court also enforced the parties' agreement regarding disposition, even when one of the parties—the wife—was not a progenitor of the eggs that were used and, therefore, was not genetically connected to the embryos that were the subject of the dispute.⁴⁸

In *Litowitz*, Becky and David Litowitz had two cryopreserved embryos, which were the subject of a parenting plan upon their divorce.⁴⁹ The husband had already adopted two of the wife's children from a previous marriage, and they had a biological child together prior to their marriage.⁵⁰ Shortly thereafter, the wife underwent a hysterectomy, leaving her unable to produce eggs or to naturally give birth to a child.⁵¹ The couple decided to undergo *in vitro* fertilization to have another child, and they created five embryos using eggs obtained from an egg donor, fertilized by the husband's sperm.⁵² A female child was born from use of three of the embryos implanted in a surrogate mother. The two remaining embryos were cryopreserved.⁵³ The parties, as the intended parents, signed a contract with the egg donor, providing that “[i]n no event may the Intended Parents allow any other party the use of said eggs without express *written* permission of the Egg Donor.”⁵⁴ The parties entered into two contracts with the clinic, one for authorizing embryo cryopreservation (freezing) following *in vitro* fertilization, and the other for cryogenic preservation (short term), which the

⁴⁷ *In re Litowitz*, 48 P.3d 261 (Wash. 2002).

⁴⁸ *Id.* at 267.

⁴⁹ *Id.* at 262.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 262-63.

⁵⁴ *Id.* at 263 (emphasis in original).

court deemed not relevant to the matter.⁵⁵ Under the cryopreservation agreement with the clinic, the parties agreed to the following:

By this document, we wish to provide the Center with our mutual direction regarding disposition of our []embryos upon the occurrence of any one of the following four (4) events or dates: . .

C. Our []embryos have been maintained in cryopreservation for five (5) years after the initial date of cryopreservation unless the Center agrees, at our request, to extend our participation for an additional period of time. . . .

At the earliest of the above-mentioned events or dates, we authorize and request that one of the following options be utilized for the disposition of our []embryos remaining in cryopreservation:

. . .

(3) That our []embryos be thawed but not allowed to undergo further development;⁵⁶

Unlike the agreements in *Kass* and *Cahill*, the agreement made no mention of specific disposition upon divorce. Rather, the agreement provided:

We agree that because both the husband and wife are participants in the cryopreservation program, that any decision regarding the disposition of our []embryos will be made by mutual consent. In the event we are unable to reach a mutual decision regarding the disposition of our []embryos, we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our []embryos.⁵⁷

Thus, the parties agreed that, upon disagreement, they would seek a court determination regarding disposition. Because disagreement could have occurred at any time, this provision was broad enough to cover disagreement within the marriage or upon the contingency of divorce.

Upon their divorce, the husband wanted to donate the remaining embryos for adoption. Conversely, the wife wanted to use a surrogate to bring the embryos to term.⁵⁸ The lower court awarded the embryos to the husband

⁵⁵ *Id.* The court noted that the latter agreement was not relevant to the issue before it. *Id.* at 263, n.20.

⁵⁶ *Id.* at 263-64 (emphasis in original).

⁵⁷ *Id.* at 263.

⁵⁸ *Id.* at 264.

under the “best interest of the child” standard.⁵⁹ The appellate court affirmed, finding that the husband’s right not to procreate compelled the court to award him the embryos, and the wife appealed.⁶⁰ The Supreme Court of Washington reversed and enforced the parties’ agreement to petition the court for instructions when they could not reach a mutual agreement regarding disposition of the embryos.⁶¹

Thus, as in *Kass* and *Cahill*, even though the contract did not expressly mention divorce, the scope of the parties’ intent expressed in the agreement included that contingency. Therefore, the court in *Litowitz* simply enforced the original intent of the parties, which was that the court would determine the appropriate disposition upon disagreement. However, the court still had to make that determination. In doing so, rather than balancing the parties’ constitutional interests, as in *Davis*, the court again focused on the parties’ intent, providing:

Intent may be discovered not only from actual language in an agreement, but also from “viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”⁶²

In light of these considerations, the court simply enforced the disposition to which the parties had originally agreed, which was that the remaining embryos be “‘thawed out but not allowed to undergo further development’ and disposed of when the embryos ‘have been maintained in cryopreservation for five (5) years after the initial date of cryopreservation . . .”⁶³

Note the difficulty presented by the fact that the parties never expressed their intent for disposition upon divorce. For the court to have relied upon the provision authorizing thawing, but no further development of the

⁵⁹ *Id.* at 264, n.28. (“The characterization of frozen preembryos as “children” is of dubious legal or scientific correctness. However, it is of no consequence to our determination in this case.”); *see also id.* at 269.

⁶⁰ *Id.* at 265.

⁶¹ *Id.* at 268.

⁶² *Id.*

⁶³ *Id.* at 271.

embryos after a prescribed period of cryopreservation, begs the question whether the parties did, in fact, mutually intend for the same disposition upon divorce. Justice Chambers, concurring with the majority opinion, observed that all of these considerations must be made in the context of a dissolution proceeding, and principles of equity and public policy must be factored into the equation.⁶⁴ Justice Sanders, who dissented in the opinion, asserted that the only intent expressed by the parties upon disagreement was to let the court determine the appropriate disposition, and the trial court did just that, having made a determination based on the “best interest of the potential child.”⁶⁵

But the majority’s disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the []embryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination. Thus the majority denies these parties that option left by Solomon in lieu of chopping the baby in half. The wisdom of Solomon is nowhere to be found here.⁶⁶

Accordingly, based on the factors and policies that, arguably, the court should consider, the dissenting Justice would have disposed of the embryos by ordering the husband to donate the embryos to a suitable couple.⁶⁷ However, the majority determined that the parties’ intent was for the embryos to be destroyed after a specific time. This case illustrates the importance of the parties’ intent and the factors a court should consider when the parties do not unambiguously express their intent for disposition upon divorce.⁶⁸ In Part III, I offer recommendations for addressing and

⁶⁴ *Id.*

⁶⁵ *Id.* at 274 (Sanders, J., dissenting). “I cannot fault a trial court that recognized the fundamental purpose and objective of the contract and dealt with the prospect a child would be born, the future of which was of paramount concern and profound responsibility.” *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 271. Here, the provision to let the court decide upon disagreement could have included disposition upon divorce (unless the parties divorced but still agreed as to disposition). As it happens, the parties divorced and disagreed, so the court determined disposition. If legislation were in place that implemented a default presumption or policy regarding disposition, the decision to let the court decide would have been more informed. Nevertheless, the court enforced the parties’ agreement to allow the court to decide upon their disagreement.

resolving these questions. However, notwithstanding the actual disposition of the embryos and the basis for it, like the court in *Kass*, with respect to the framework within which the court must determine disposition, the *Litowitz* court simply enforced the original agreement of the parties, which was to authorize the court to make the appropriate disposition of the embryos.

4. *Roman v. Roman*⁶⁹

In *Roman v. Roman*, the parties had three frozen embryos, which the lower court awarded to the wife, Augusta N. Roman, over the objection of the husband, Randy M. Roman, in the couple's final decree of divorce.⁷⁰ Upon the husband's appeal, the appellate court reversed, holding that the parties may voluntarily decide the disposition of a frozen embryo in advance of cryopreservation, and that the embryo agreement between the husband and wife, which provided for embryos to be discarded in the event of divorce, was valid and enforceable.⁷¹

The parties participated in *in vitro* fertilization and cryopreservation.⁷² They signed a consent agreement in which they agreed to discard the embryos in the case of divorce.⁷³ The agreement also allowed them to withdraw their consent to the disposition of the embryos and to discontinue their participation in the program.⁷⁴ On the night before implantation, the husband expressed feelings that led him to withdraw his consent. A month later, the parties signed an agreement to unfreeze and implant the embryos, contingent on receiving counseling, in which they never participated.⁷⁵ Subsequently, the parties filed for divorce and reached a property settlement agreement, except for the disposition of the frozen embryos.

⁶⁹ *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).

⁷⁰ *Id.* at 41-42.

⁷¹ *Id.* at 54-55.

⁷² *Id.* at 42.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 42-43.

The *Roman* court purposefully drew its holding narrowly, “in anticipation that the issue would ultimately be resolved by the Texas legislature.”⁷⁶ The court acknowledged the parties’ agreement classifying the frozen embryos as their “joint property” and, in doing so, the court commented on the developing nature of legislation on that issue.⁷⁷ Absent any such legislative resolution or policy directive, however, the court was confronted with determining the appropriate disposition of the embryos and the enforceability of the parties’ prior written agreement. In making these determinations, the court provided:

We are mindful of the cases that have addressed this issue and particularly what we see as an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable so long as the parties have the opportunity to withdraw their consent to the terms of the agreement. Because we are not bound by state law from other jurisdictions, however, we will also review our own statutes to determine the public policy of this State in the context of embryo agreements.⁷⁸

In assessing the state’s policy, the court looked to the Uniform Parentage Act for its policy regarding ART and gestational agreements.⁷⁹ In reviewing these bodies of law, the court concluded that “the public policy of [the] State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo’s disposition in the

⁷⁶ *Id.* at 44. See also *id.* at 44, n.6 (“At least three states have enacted legislation addressing frozen embryos. See, e.g., Fla. Stat. Ann. § 742.17 (couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances); N.H. REV. STAT. ANN. §§ 168-B:13–168-B:15, 168-B:18 (couples must undergo medical examinations and counseling; 14-day limit for maintenance of ex utero pre-zygotes); LA. REV. STAT. ANN. §§ 9:121–9:133 (pre-zygote considered “juridical person” that must be implanted); see also TEX. FAM. CODE ANN. §§ 160.102(2) (defining assisted reproduction), 160.706 (entitled “Effect of Dissolution of Marriage”) (Vernon 2002), & 160.754(e) (Vernon Supp.2005) (stating that parties to gestational agreement must enter into agreement before the 14th day preceding the transfer of embryos).

⁷⁷ *Roman*, 193 S.W.3d at 44-45, n.7.

⁷⁸ *Id.* at 48.

⁷⁹ *Id.* at 48-49, n.11 (referring to Uniform Parentage Act & Tex. Fam. Code Ann. §§ 160.001-.763).

event of a contingency, such as divorce, death, or changed circumstances”⁸⁰ and that such agreements between parties should be “presumed valid and should be enforced as between the progenitors.”⁸¹

With respect to the specific agreement in *Roman*, the court relied on the parties’ “Informed Consent for Cryopreservation of Embryo,” which provided, in part: “If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be . . . Discarded.”⁸² The parties’ agreement, itself, recognized the lack of legislative policy on the matter, wherein the agreement provided:

We understand that legal principles and requirements regarding IVF and embryo freezing have not been firmly established. There is presently no state legislation dealing specifically with these issues. We have been advised that each embryo resulting from the fertilization of the wife’s oocytes by the husband’s sperm shall be the joint property of both partners based on currently accepted principles regarding legal ownership of human sperm and oocytes. We are aware that these regulations may change at any time.⁸³

Nevertheless, the court held that the parties’ intent for disposition upon divorce could not be more clearly stated⁸⁴ and held that the trial court abused

⁸⁰ *Id.* at 49-50.

⁸¹ *Id.* at 50 (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)).

⁸² *Id.* at 51-52. The court noted that the agreement also gave the parties the option of releasing the frozen embryos to either party, but that the parties declined this option. *See id.* at 51, n.17.

⁸³ *Id.* at 51.

⁸⁴ *Id.* at 52. The dispute between the parties stemmed from the wife’s claim that the agreement was ambiguous as to the application of the provision regarding destruction of the embryos. The wife claimed that she intended that aspect of the agreement to apply only to embryos that remained after implantation had occurred, and that she never agreed to destroy embryos without an opportunity to get pregnant. However, the court did not interpret the agreement as supportive of this claim. One of the husband’s contentions of dispute was that the trial court erred in awarding the embryos to the wife after he withdrew his consent to implantation. *Id.* at 54. However, the court distinguished the husband’s desire to withdraw consent to a specific implantation from a repudiation of the embryo agreement and withdrawal from the program. *Id.* at 54, n.18.

its discretion by not enforcing the parties' agreement that the embryos be discarded.⁸⁵

5. *In re Dahl and Angle*⁸⁶

In *In re Dahl and Angle*, the husband and wife produced six cryopreserved embryos through an IVF procedure, after which the parties dissolved their marriage.⁸⁷ At the time of the IVF procedure, the parties had signed an embryo storage agreement which provided that if the parties disagreed as to the transfer and disposition of the embryos, the wife was solely authorized to transfer and dispose of them, unless a court awarded either of the parties the exclusive rights to the embryos.⁸⁸ If the parties failed to comply with the agreement, they could have authorized the clinic to donate the embryos to another woman, and the parties would consent to waive any claims to the embryos. Alternatively, they could authorize the clinic to donate the embryos to a research facility. The couple selected the agreement option that allowed them to donate the embryos to a research facility if they failed to comply with the agreement.⁸⁹

Upon the parties' divorce, the wife claimed exclusive rights to the embryos under their agreement.⁹⁰ The husband denied having read or initialed the agreement and objected to the destruction of the embryos or their donation to research; he preferred that the embryos be donated to

⁸⁵ *Id.* at 54-55. For focused discussion on the *Roman* case, see Theresa M. Erickson & Megan T. Erickson, *What Happens to Embryos When A Marriage Dissolves? Embryo Disposition and Divorce*, 35 WM MITCHELL L. REV. 469, 483-87 (2009) (favoring contractual approach; predicting that United States Supreme Court would favor contractual approach in such cases).

⁸⁶ *In re Marriage of Dahl*, 194 P.3d 834 (Or. Ct. App. 2008).

⁸⁷ *Id.* at 836.

⁸⁸ *Id.* Like the provision in *Litowitz*, this provision could have covered the contingency of divorce, but only if the parties divorced and disagreed, which, in fact, is what occurred.

⁸⁹ *Id.*

⁹⁰ *Id.* at 837.

another couple.⁹¹ The trial court enforced the parties' agreement, allowing the wife to destroy the embryos, and the husband appealed.⁹²

On appeal, the husband argued that his desire for "'his offspring to develop their full potential as human beings' should outweigh the wife's interest in avoiding genetic parenthood."⁹³ The court rejected the opportunity to balance those interests because the parties had already reached a contrary agreement.⁹⁴ In defaulting to the parties' original contract, the court noted that:

[h]usband fails to advance, and we cannot identify, any affirmative countervailing state policy that would impose a genetic parental relationship on someone as a default principle. Nor does he identify any affirmative state policy favoring his preferred disposition of the embryos. . . . Given that, we have no basis on which to disturb the trial court's conclusion.⁹⁵

The court suggested that an expressed state policy with default presumptions or favoring in the balance of progenitor choices may be a sufficient basis to overturn a decision enforcing the parties' original

⁹¹ *Id.*

⁹² *Id.* at 837. The Court of Appeals was not clear if the trial court's decision to destroy the embryos was based on the trial court's balancing of the constitutional interests of each party and a determination that wife's constitutional interests outweighed the husband's, or if it was based on the terms of the agreement signed by the parties. *Id.* at 837, n.2.

⁹³ *Id.* at 841.

⁹⁴ *Id.* at 842.

⁹⁵ *Id.* at 841-42, n.6. The court noted that other states did provide for specific policies regarding decision-making authority over preembryos. *Id.* (citing CAL. HEALTH & SAFETY CODE § 125315 (West 2006) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); *see also* FLA. STAT. ANN. § 742.17 (West 2005) (requiring IVF agreement and prescribing decision-making authority absent such an agreement); LA. REV. STAT. ANN. §§ 9:121-133 (2008) (defining a human embryo as a "juridical person" that must be implanted); MASS. GEN. LAWS ANN. CH. 111L, § 4 (West Supp. 2008) (requiring IVF providers to obtain informed and voluntary choice regarding disposition of unused embryos); N.J. STAT. ANN. § 26:2Z-2 (West 2007) (permitting embryonic research, requiring informed and voluntary choice by parties regarding disposition)"). For further discussion of State policies regarding the disposition of embryos, see Part II, *infra*.

agreement. Absent a countervailing policy expressed by the legislature, however, the court gave effect to the parties' original intent.⁹⁶

Thus, in all five of the "contractual approach" cases, notwithstanding the parties' subsequent disagreement, the courts enforced all of the parties' original agreements, all of which included provisions sufficient for expressing the parties' intent for disposition of the embryos upon divorce. This begs the question, however, of whether the courts would have enforced the agreements similarly had the agreements not included provisions expressing the parties' intent upon divorce, or if, for example, like the provision in *Litowitz*, regarding disposition upon disagreement, the agreements were not interpreted to include divorce.

A perspective of mutual exclusion among the three frameworks might suggest that courts would have enforced such agreements. However, the language of the court in *Kass* suggests that they would not, and that a strict contractual approach would only apply when the parties have contemplated, and stated their unambiguous intent upon, divorce. It stands to reason that if a state adopts the premise described in *Kass*—that the decision to dispose of embryos resulting from participation in IVF procedures is "intensely personal" and a "private matter" that is "appropriately resolved by the prospective parents rather than the courts"⁹⁷—and the parties' divorce is viewed as a contingency that affects that decision, then the court would only enforce an agreement in which the parties had considered the contingency and consented to disposition upon it. Had they not considered the contingency and consented to disposition upon it, enforcing such a contract would defy the policy that favors the parties making a mutual decision based on that contingency. Thus, a *strict* contractual approach could preempt the mutual intent of the parties when they have not considered and agreed upon the contingency of divorce. As recognized by the courts that have confronted this issue, legislative guidance would clarify the state's policy for the respective courts in this circumstance.

B. *The Contemporaneous Mutual Consent Approach*

At least two courts have adopted a less strict approach to the enforcement of contracts regarding the disposition of frozen embryos by allowing parties to change their minds from their original agreement upon changed

⁹⁶ *Dahl*, 194 P.3d at 842.

⁹⁷ *Kass*, 663 N.Y.S.2d at 590.

circumstances, such as divorce.⁹⁸ In accordance with the perspective that a *strict* contractual approach might be over-inclusive if the parameters were not narrowly defined to limit the enforceability of agreements to those in which the parties contemplated divorce, reason suggests that courts that adopt a contemporaneous mutual consent approach also would determine that the parties may only change their minds if they had not already expressed their intent for disposition upon divorce.

1. *A.Z. v. B.Z.*

In *A.Z. v. B.Z.*, the parties had four frozen embryos in storage after having undergone successful IVF procedures that resulted in the birth of twin daughters.⁹⁹ During each procedure, the husband had signed a blank consent form, which the wife subsequently filled-in, providing that, upon *separation*—not divorce—the parties consented to allow the embryos to be implanted in the wife.¹⁰⁰ The consent form also allowed the parties to change their minds, provided they both notified the clinic in writing.¹⁰¹ Upon the parties' subsequent divorce, the wife wished to use the embryos to become pregnant, and the husband wished for the embryos to be destroyed.¹⁰²

Acknowledging the history of IVF procedures¹⁰³ and the law surrounding their use,¹⁰⁴ the court considered the reasons supporting the enforcement of

⁹⁸ See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (finding that a consent form providing for embryos to be given to wife for implantation upon marriage "separation" was unenforceable because, inter alia, "separation" is distinguishable from "divorce," so consent form was ambiguous; see also *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁹⁹ *Id.* at 1053.

¹⁰⁰ *Id.* at 1053-54.

¹⁰¹ *Id.* at 1054.

¹⁰² *Id.* at 1054-55.

¹⁰³ *Id.* at 1055, n.13 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55 (1999) [hereinafter Coleman]; Jennifer Marigliano Dehmen, Note, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377 (1995); Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United*

contracts between progenitors: minimizing misunderstanding, maximizing procreative liberty, and providing needed certainty to IVF programs.¹⁰⁵ However, the court refused to enforce the parties' consent agreement for three reasons. First, the court held that, under the circumstances of the consent form and the parties' lives, the consent form did not represent the intent of the parties regarding disposition of the preembryos in the case of a dispute between them.¹⁰⁶ Rather, the court viewed the consent form as a guide to the clinic if the couple (as a unit) did not wish to continue with the IVF procedure.¹⁰⁷ Second, the consent form did not contain a duration provision. Instead, the form was signed four years earlier, before the occurrence of changed circumstances that the parties did not necessarily consider, and to which the husband now objected.¹⁰⁸ In this light, the court held:

In the absence of any evidence that the donors agreed on the time period during which the consent form was to govern their conduct, we cannot assume that the donors intended the consent form to

States, 76 WASH. U. L. Q. 759 (1998); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L. J. 407 (1990); 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 (1999); Daniel I. Steinberg, *Divergent Conceptions: Procreational Rights and Disputes Over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L. J. 315 (1998); Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority Over Frozen Embryos*, 29 SETON HALL L. REV. 937 (1999).

¹⁰⁴ The court referenced the three states that, at the time, had legislation regarding frozen embryos: Florida, New Hampshire, and Louisiana. *A.Z.*, 725 N.E.2d at 1055; see FLA. STAT. ANN. § 742.17 (West 1997) (requiring couples to “enter into a written agreement that provides for the disposition . . . in event of a divorce, the death of a spouse, divorce or other unforeseen circumstance”) (effective June 30, 1993); N.H. REV. STAT. ANN. §§ 168-B:15 (2010) (requiring couples to undergo medical examinations and counseling and imposing a fourteen-day limit for maintenance of ex utero prezygotes) (effective Jan. 1, 1991); LA. REV. STAT. ANN. §§ 9:121- 9:133 (providing “prezygote considered ‘juridical person’ that must be implanted”) (enacted 1986).

¹⁰⁵ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056 (Mass. 2000).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1056-57.

govern the disposition of the frozen [e]mbryos four years after it was executed, especially in light of the fundamental change in their relationship (i.e., divorce).¹⁰⁹

Third, the consent form contemplated becoming “separated,” which it did not define.¹¹⁰ Unlike the court in *Litowitz*, which interpreted the scope of the parties’ agreement broadly, the court held that it could not conclude that this consent form was intended to govern the disposition of embryos upon divorce.¹¹¹

Thus, unlike all of the courts that applied the “strict contractual approach” for agreements that expressly provided for disposition upon divorce, the court held that “[n]o agreement should be enforced in equity when intervening events have changed the circumstances such that the agreement which was originally signed *did not contemplate the actual situation now facing the parties.*”¹¹² Because the court determined that the parties had not contemplated divorce, it allowed the husband’s subsequent intent to alter the alleged mutual intent expressed in the parties’ original agreement.¹¹³ The converse implication would be that where the parties’ agreement *did* contemplate the divorce that they now faced, the court would not allow either party to change his or her mind and unilaterally alter the original agreement. However, in the absence of a binding agreement, as in *Davis*, the court in *A.Z.* determined that the “best solution” was to balance the wife’s interest in procreation against the husband’s interest in avoiding procreation.¹¹⁴ In considering this balance, the court noted that the

¹⁰⁹ *Id.* at 1057.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1055 (emphasis added).

¹¹³ The court noted the questionable circumstances under which the husband signed the original agreement, wherein the husband simply signed a blank form, on which the wife later filled in the alleged agreed-upon disposition. Because the court offered several factors on which it based its decision that the form did not accurately reflect the parties’ mutual agreement, it is not clear how much weight the court placed on these facts in its determination. *See id.* at 1056-59.

¹¹⁴ *Id.* at 1055. The balancing approach of *Davis* is the applicable framework when parties have not contemplated the contingency of divorce, thus, it follows that the courts would likewise balance the parties’ interests when one party changes his or her mind such that disagreement about disposition is the result.

legislature already favored a policy of not enforcing contracts that compel family relationships:¹¹⁵

[T]his court has expressed its hesitancy to become involved in intimate questions inherent in the marriage relationship. . . . ‘Except in cases involving divorce or separation, our law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship. We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy.’¹¹⁶

Thus, the court would not enforce an agreement that compelled one party to become a parent against his or her will.¹¹⁷ It follows, then, that even if the parties’ original agreement included a provision in which the parties contemplated divorce and expressly stated their intent for disposition upon divorce—such as the parties in *A.Z.* did by consenting to one of the parties using the embryos to become a parent after divorce—then, if one of the parties subsequently changed his or her mind and objected to such disposition, the court would not enforce the original contract because it could compel a family relationship against the will of one of the parties.¹¹⁸ The court further noted that allowing one party to change his or her mind “enhances the ‘freedom of personal choice in matters of marriage and family life.’”¹¹⁹ However, it is not at all clear if such freedom of personal choice may supersede a previous, but variant, agreement to which the party already consented. The court in *A.Z.* held:

¹¹⁵ *Id.* at 1058. The court noted that the legislature had already abolished the cause of action for breach of promise to marry, and allowed a mother four days to change her mind for adoption, and noted the court’s laissez-faire attitude about marriage issues and reluctance to enforce agreements that bind parties to future family relationships. *Id.* at 1058-59.

¹¹⁶ *Id.* at 1058 (quoting *Doe v. Doe*, 314 N.E.2d 128, 131 (Mass.1974)).

¹¹⁷ *Id.* at 1057.

¹¹⁸ Enforcing a contract in which one of the parties uses the embryo to become a parent raises numerous questions about the resulting parental status of the objecting progenitor. While such possible outcomes are relevant to the need for state legislatures to statutorily provide for policies addressing issues involving the disposition of embryos in such circumstances, the specific outcomes regarding parental status and the resulting rights and obligations of the parent-child relationship are beyond the scope of this Article.

¹¹⁹ *Id.* at 1059 (citing *Moore v. East Cleveland*, 97 S. Ct. 1932, 1935 (1977)).

We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship. . . . “There are ‘personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should never be attempted.’”¹²⁰

Thus, the court ruled that the alleged contract with the fertility clinic would not control, and if one of the parties wished to avoid procreation after the divorce, that person’s choice would control by presumptive default.¹²¹

The court did not enforce the specific agreement in *A.Z.* because it held that the agreement did not accurately reflect the intent of the parties and because it violated a public policy favoring autonomous decision-making. However, the court did not hold whether it would necessarily enforce the agreement if the parties had expressed their intent for disposition upon divorce.¹²² Nor did the court hold that it would not enforce a mutual agreement that provided for donation of the embryos to a surrogate, for research, or to be destroyed, i.e., where one party is not becoming a parent against his or her will.¹²³ Thus, even when the court relies on general policies relevant to issues involving family relationships—specifically, policies respecting the right of contracting parties to change their minds in issues involving procreation.¹²⁴ Courts confronting the disposition of frozen

¹²⁰ *Id.* (citing *Doe v. Doe*, 314 N.E.2d 128, 130 (Mass. 1974)).

¹²¹ *Id.*

¹²² The court specifically noted, however, that, although it relies on the reasoning of *Davis* and *Kass*, it does not necessarily subscribe to the views expressed by those courts, thereby suggesting that, even with an express provision for disposition upon divorce, the agreement may still be subject to one party changing his or her mind. *Id.* at 1056, n.19.

¹²³ *Id.* at 1057-58, n.22. The court also recognizes that “agreements among donors and IVF clinics are essential to clinic operations. There is no impediment to the enforcement of such contracts by the clinics or by the donors against the clinics, consistent with the principles of [its] opinion.” *Id.* at 1058, n.22.

¹²⁴ *See infra*, note 211 and accompanying text (discussing policies for changing one’s mind in other reproductive areas).

embryos upon divorce may require express legislative clarity on the issue. Absent such legislative clarity, the most reasonable application of contemporaneous mutual consent that comports with the reasonable parameters of a strict contractual approach is to enforce original agreements in which parties express their intent for disposition upon divorce, and to limit the opportunity of one party to unilaterally alter original agreements to circumstances under which the original agreement did not contemplate the contingency of divorce.

2. *In re Marriage of Witten*¹²⁵

As in *A.Z.*, the court in *In re Marriage of Witten* held that it is against public policy to enforce a prior agreement regarding the use or disposition of frozen embryos when one party changes his or her mind.¹²⁶ In *Witten*, the parties employed several unsuccessful IVF procedures during their marriage, which resulted in seventeen fertilized eggs remaining in storage.¹²⁷ For each procedure, the parties had signed informed consent documents that provided that the embryos would only be transferred, released, or disposed of upon the signed approval of both parties.¹²⁸ There was no specific provision addressing disposition upon divorce.¹²⁹

¹²⁵ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

¹²⁶ *Id.* at 781.

¹²⁷ *Id.* at 772.

¹²⁸ *Id.*

¹²⁹ The court's perspective on the scope of the parties' original agreement outside the context of the contingency of divorce presents a notable distinction between this court and the other courts discussed in this Article. Many other courts conclude that a court cannot enforce an agreement between the parties regarding disposition of embryos—whether it be an agreement for destruction, implantation, or donation—when the agreement does not expressly contemplate and provide for the parties' intent upon divorce. See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *J.B. v. M.B. & C.C.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012). Following the logic of these courts, the agreement in *Witten*, providing that both parties must mutually consent to the disposition of the embryos, would be equally unenforceable within the context of the contingency of divorce. Nevertheless, despite the fact that the agreement between the parties in *Witten* contained no such provision regarding divorce, the *Witten* court enforced the agreement requiring that both parties must mutually agree to disposition, concluding that the scope of the parties' agreement regarding "release of embryos" was "broad enough to

At trial, the wife sought “custody” of the embryos so that she could implant them in herself or donate them to a surrogate, through which she would become a genetic parent; she objected to destruction of the embryos or donation to another couple.¹³⁰ The husband did not oppose donation to another couple, but he opposed destruction or implantation in the wife.¹³¹

Under the terms of the parties’ agreement, the district court enjoined the parties from using or disposing of the embryos absent written approval by the other party. The wife appealed.¹³² She claimed that because the consent agreement did not provide for the parties’ intent upon divorce, the court should apply a “best interest” analysis and award custody of the embryos to her on that basis. Alternatively, she argued that the court should balance her interests in procreating over the husband’s interest in not procreating, and that it would violate public policy for the court not to enforce an agreement to which her husband impliedly consented by his participation in the IVF process.¹³³

In addressing each of the wife’s arguments, the court recognized the legal framework provided by the courts that previously addressed this issue, which are discussed herein.¹³⁴ Regarding the contract approach adopted by *Kass*, *Litowitz* and, to a limited extent, *Davis*, the court relied on commentators that find problems with enforcing original contracts.¹³⁵ The court concluded that “[t]he contractual approach and the contemporaneous mutual consent model share an underlying premise: ‘decisions about the disposition of frozen embryos belong to the couple that created the embryo,

encompass the decision-making protocol when the parties are unmarried as well as when they are married.” *Witten*, 672 N.W.2d at 773.

¹³⁰ *Witten*, 672 N.W.2d at 772-73.

¹³¹ *Id.* at 773.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 773-74.

¹³⁵ *Id.* at 776-77 (citing Coleman, *supra* note 103, at 55; Christina C. Lawrence, Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Embryos, 52 CASE W. RES. L. REV. 721, 729 (2002)); accord *J.B. v. M.B. & C.C.*, 783 A.2d 707, 718-19 (2001).

with each partner entitled to an equal say in how the embryos should be disposed.”¹³⁶

In favoring a mutual decision by the couple,¹³⁷ proponents of the mutual-consent approach suggest that, with respect to “decisions about intensely emotional matters, where people act more on the basis of feeling and instinct than rational deliberation,” it may “be impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised.”¹³⁸ The court mitigated this concern, recognizing that, under a mutual contemporaneous consent approach,

advance instructions would not be treated as binding contracts. If either partner has a change of mind about disposition decisions made in advance, that person’s current objection would take precedence over the prior consent. If one of the partners rescinds an advance disposition decision and the other does not, the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out

When the couple is unable to agree to any disposition decision, the most appropriate solution is to keep the embryos where they are—in frozen storage. Unlike the other possible disposition decisions—use by one partner, donation to another patient, donation to research, or destruction—keeping the embryos frozen is not final and irrevocable. By preserving the status quo, it makes it possible for the partners to reach an agreement at a later time.”¹³⁹

¹³⁶ *Witten*, 672 N.W.2d at 777 (citing Coleman, *supra* note 103, at 81).

¹³⁷ *Id.* at 780-81.

¹³⁸ *Id.* at 777 (quoting Coleman, *supra* note 103, at 98); *see also* Sara D. Petersen, *Dealing With Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1090 & n.156 (2003) (stating “surveys of couples that have stored frozen embryos suggest that they may be prone to changing their minds while their embryos remain frozen” and citing a study that found “[o]f the 41 couples that had recorded both a pre-treatment and post-treatment decision about embryo disposition, only 12 (29%) kept the same disposition choice.” (citation omitted)).

¹³⁹ *Id.* at 778 (quoting Coleman, *supra* note 103, at 110-12); *see also* Coleman, *supra* note 103, at 89 (suggesting “the embryo would remain in frozen storage until the parties reach a new agreement, the embryo is no longer viable, or storage facilities are no longer available”); *accord* Lawrence, *supra* note 135, at 742.

Thus, under the contemporaneous mutual consent approach adopted in *Witten*, the court provided a broad opportunity for both parties to exercise decision-making autonomy, while, by default, favoring the interest in not procreating over the use of the embryos.¹⁴⁰ Like the court in *A.Z.*, the *Witten* court supported its mutual decision-making policy by considering the policies inherent in other areas involving marital and family relationships, the effect of which was to treat the parties' divorce as essentially rescinding the parties' prior agreement by operation of law.¹⁴¹ Accordingly, by

¹⁴⁰ See Charla M. Burill, Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals An Indefinite Solution, 54 WAYNE L. REV. 1365, 1366-67 (2008) (arguing for default rule application that provides progenitors with only three options: (1) donate to other potential parents; (2) donate to research; or (3) thaw and dispose; such limitation of options arguably "honors both progenitors' procreative autonomy, is in line with public policy, and provides certainty in a situation where certainty has never before existed."). The court suggests that whether parties have a right to change their mind or the interests of the respective parties are considered, the outcomes are generally the same when the state's public policy favors the interests of the party wishing to avoid procreation over the interests of the party wishing to use the embryos. *Witten*, 672 N.W.2d at 778 (citing *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) ("As a matter of public policy, ... forced procreation is not an area amenable to judicial enforcement."); *J.B.*, 783 A.2d at 717 (evaluating relative interests of parties in disposition of embryos, concluding husband should not be able to use embryos over wife's objection); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) ("Ordinarily, the party wishing to avoid procreation should prevail."); *Susan B. Apel, Disposition of Frozen Embryos: Are Contracts the Solution?*, 27 VT. B. J., 29, 31 (2001) ("Some argue that the party seeking to avoid procreation should prevail, and indeed, this appears to be the one harmonizing rationale of the four reported cases.")).

¹⁴¹ *Witten*, 672 N.W.2d at 781, 782 (considering state law requiring seventy-two hour waiting period after child's birth before parent may relinquish parental rights, limitation of damages for breach of promise to marry, and prohibition on contracts encouraging dissolution of marriage). The court notes that contracts between donors and fertility clinics should still be enforced (as stated in *AZ v. BZ*) because they serve the purpose of "defining and governing the relationship between the couple and the medical facility, enduring that all parties understand their respective rights and obligations." *Id.* at 782 (citing Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L. J. 897, 918 (2000) (noting "courts and most scholarly authorities would transform documents designed to record the transmission of medical information from clinic to couple, and the couple's acceptance of medical treatment, into a binding agreement between the couple itself")). The court acknowledges that "[w]ithin this context, the medical facility and the donors should be able to rely on the terms of the parties' contract." *Id.* (citing *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 n.22 (Mass. 2000) (noting court's decision not to enforce agreement between partners is not an "impediment

rejecting the contractual approach and the balancing approach, when one party changes his or her mind and the parties are not able to reach a mutual decision regarding the disposition of the embryos, the court held that public policy required that the status quo be maintained. The practical effect of this was that the embryos would be stored indefinitely unless both parties subsequently mutually agreed to disposition.¹⁴² As it happens, the parties' original agreement accorded with this public policy. Even if the parties' original agreement in *Witten* were otherwise, however, the *Witten* court held that public policy favored a party's right to change his or her mind and disfavored the court's ability to balance the interests of the parties upon any such disagreement. This begs the question of whether the court would hold otherwise on the issue of changing one's mind if the parties had expressed a different intent upon the contingency of divorce, or if the court were not to interpret the scope of the language of the contingency provision so broadly to include the contingency of divorce.

Thus, as in *A.Z.*, the framework adopted in *Witten* was largely dependent on the state's inconsistent public policy. The difference, however, is that the holding in *Witten* highlights the one shortcoming that the framework provided by *Davis* affords, which is the lack of defined parameters with respect to the right to change one's mind. That parameter should be defined by the parties' unambiguously expressed intent upon the specific contingency of divorce. Absent specific legislative policy on the disposition of embryos upon divorce, the application of related policies not intended for the disposition of frozen embryos upon divorce may undermine the mutual intent of the parties or result in inconsistent applications. When such policies are not statutorily clarified, courts should apply the contemporaneous mutual consent approach within parameters that accord

to the enforcement of such contracts by the clinics or by the donors against the clinics"); see also *J.B. v. M.B. & C.C.*, 783 A.2d 707, 719 (2001). Thus, the court enforces the provision of the parties' original contract that provides that the University's obligation to store the embryos would not extend beyond ten years. *Witten*, 672 N.W.2d at 783, n.4. This aspect of the court's holding may be attributed to its view that the contract with the University may still be enforceable as between it and the parties, but the scope of the distinction is left unclear. The scope of this distinction will present difficulty for other courts that adopt this approach.

¹⁴² The court holds that "any expense associated with maintaining the status quo should logically be borne by the person opposing destruction." *Witten*, 672 N.W.2d at 783 (citing *Coleman*, *supra* note 103, at 112 ("The right to insist on the continued storage of the embryos should be dependent on a willingness to pay the associated costs.")).

with the parameters of the strict contract approach—that is, by allowing parties to change the intent expressed in their original agreement only when the original agreement did not contemplate the contingency of divorce.¹⁴³

C. *The Balancing Approach*

When parties do not have an enforceable agreement regarding the disposition of frozen embryos upon divorce, courts may opt to balance one party's right to procreate versus the objecting party's right not to procreate.¹⁴⁴ As with many other aspects of the disposition of frozen embryos, the policies surrounding the rights and interests of the respective parties and the constitutional parameters of those rights and interests may be clarified or reconciled legislatively. It is sufficient to observe that in cases in which parties have not expressly stated their intent for disposition upon divorce—or in cases in which the parties *have* stated their intent upon divorce but courts or legislatures apply a broad interpretation or policy that allows

¹⁴³ The court's consideration that it may be "impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised," see *Witten*, 672 N.W.2d at 777, and that, therefore, even when parties mutually consent to disposition upon divorce in an original agreement, they should be able to unilaterally change their minds, is strictly a matter of public policy. Many states allow for surrogate mothers and mothers considering adoption to change their minds after original consent. This—like other conclusions about individual public policies on related issues—is beyond the scope of this article. However, in the case of agreements regarding disposition of embryos upon divorce, particularly when legislatures mandate that parties state their intent so as to facilitate the fair and reasonable application of a strict contractual approach, such as I propose here, it is particularly incongruous and illogical to mandate agreements regarding specific contingencies, but to hold such agreements unenforceable upon a subsequent unilateral change of heart. For discussion of issues involving the emotional or "regrettable" aspects of reproductive decisions, see generally Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255 (2011) (discussing treatment of reproductive regret through developing several models on variety of disputes, such as abortion, surrogacy, frozen embryos, and unplanned pregnancy).

¹⁴⁴ Susan L. Crockin, Commentary, "*What Is an Embryo?*": *A Legal Perspective*, 36 CONN. L. REV. 1177, 1181-82 (2004) (suggesting an approach that recognizes the normative property foundations as preferable to the right to be a parent); Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369 (2007); Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 215-19 (2005); see also *Roe v. Wade*, 410 U.S. 113 (1973) (embryos are not people).

for one party to change his or her mind despite a prior agreement contemplating divorce—the balancing approach affords a workable standard that allows the court to consider the individual interests of the parties while safeguarding the autonomous decision-making authority of both parties. As reasoned by the court in *Davis*, the balancing approach avoids the limitations of the application of a bright line rule,¹⁴⁵ but it is more susceptible to inconsistent and unpredictable application. However, a legislative policy that mandates that parties express their intent for disposition upon divorce would limit the need for courts to balance the interests of the parties, thereby promoting autonomous decision-making by the parties. It would also assure the predictability and fairness that is universally called for by courts forced to determine disposition upon divorce when legislative guidance on the policies relevant to that disposition is lacking.

1. *Davis v. Davis*¹⁴⁶

The landmark case that established the foundational analysis for the status and disposition of frozen embryos was *Davis v. Davis*.¹⁴⁷ In *Davis*, Junior Lewis Davis and Mary Sue Davis were the progenitors of seven frozen embryos.¹⁴⁸ Upon dissolution of the marriage, Mary Sue Davis first sought to acquire the frozen embryos to implant in her own uterus, to give birth to a child post-divorce.¹⁴⁹ Junior Davis wished for the frozen embryos to be preserved until he could decide whether he wanted to become a parent outside of marriage.¹⁵⁰ Holding that the embryos were “human beings” from the moment of fertilization, the trial court awarded custody of the embryos to Mary Sue Davis.¹⁵¹ The appellate court reversed, holding that Junior Davis had a “constitutionally protected right not to beget a child where no

¹⁴⁵ *Davis*, 842 S.W.2d at 591.

¹⁴⁶ *Id.* at 588.

¹⁴⁷ *Id.* With respect to status, the *Davis* court held that embryos were neither “persons” nor property under federal or Tennessee law, but rather occupied an interim category that entitled them to special respect because of their potential for human life. *Id.* at 594-97.

¹⁴⁸ *Id.* at 589.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

pregnancy has taken place,” and that there was “no compelling state interest to justify . . . ordering implantation against the will of either party.”¹⁵² The court vested the parties with “joint control . . . and equal voice over [the] disposition [of the embryos].”¹⁵³

During the course of litigation, both parties remarried and changed their respective positions on the disposition of the embryos. Mary Sue no longer wished to use the embryos to become pregnant; rather, she wanted to donate the embryos to another couple.¹⁵⁴ Junior wanted the embryos to be destroyed.¹⁵⁵ Considering their respective positions and the fact that there was no original agreement as to disposition of the embryos upon divorce, the court balanced the interests of the parties, finding that Junior’s interest in not procreating outweighed Mary Sue’s interests, and the court affirmed the Court of Appeal’s judgment favoring Junior’s position.¹⁵⁶ Junior subsequently collected the preserved embryos from the Knoxville clinic where they were preserved and destroyed them.

Under the balancing framework in *Davis*, the court first acknowledged that there were two possibilities through which it could resolve the conflict without balancing the parties’ interests: a Tennessee statute governing the disposition of the embryos, or an agreement between the parties.¹⁵⁷ Either would have been dispositive. However, Tennessee provided no such statutory or common law guidance on its policy in such matters,¹⁵⁸ and the

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 590.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 604.

¹⁵⁷ *Id.* at 590. “[A]s a starting point . . . an agreement regarding disposition of any untransferred embryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between progenitors.” *Id.* at 597.

¹⁵⁸ At the time of *Davis*, the only existing statute was in Louisiana (1986 LA. ACTS R.S. 9:121 et seq.), which forbade the intentional destruction of a cryopreserved IVF embryo and applied a “best interest of the embryo” standard to party disputes. The statute provided that unwanted embryos must be made available for “adoptive implantation.” *Davis*, 842 S.W.2d at 590, n.1.

Davises had no written agreement specifying their intent as to disposition of any unused embryos.¹⁵⁹ Thus, the court was forced to construct a workable framework for resolving the issue.

The court considered several bright line tests offered by commentators on the subject,¹⁶⁰ including two versions of an implied contract model.¹⁶¹ The court also noted the “equity models,” one of which suggested dividing the embryos equally between the parties for them to do with as they wished,¹⁶² and the other that afforded “veto power” to the party desiring to avoid parenthood.¹⁶³ However, without an express statutory policy adopted by the legislature, the court reasoned that there were too many factors that come to bear on the issue for it to adopt a bright line litmus test. Instead, the court concluded that it must “weigh the interests of each party . . . in order to resolve [the] dispute in a fair and responsible manner.”¹⁶⁴ Thus, without an express agreement between the parties, or a statute directing the court toward any state policy on the issue, the court balanced the parties’ respective rights of procreational autonomy, i.e., Mary Sue Davis’s interest

¹⁵⁹ *Davis*, 842 S.W.2d at 590. The court noted that the Davises never even discussed, let alone agreed to, contingencies upon divorce. *Id.* at 592.

¹⁶⁰ The court noted comments suggesting options ranging from mandating use or destruction, *id.* at 590 (citing Brian J. Hynes, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. LEGIS. 97 (1990)), to restricting control to female gamete providers because of greater contribution to the process (the so-called “sweat-equity” model), *id.* (citing Robertson, *Resolving Disputes Over Frozen Embryos*, Hastings Center Report 7, Nov./Dec. 1989). Another suggested option would limit such restricted control only to instances in which the female donor would use the embryos for herself. See Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOYOLA L. REV. 357 (1986).

¹⁶¹ *Davis*, 842 S.W.2d at 590. One model provides for the court to draw an inference from enrollment in an IVF program that the IVF clinic had authority to determine the outcome when the parties could not reach agreement, and the other provides for the court to infer from the parties’ creation of the embryos that they irrevocably committed themselves to reproduction and would require transfer to either the female provider or to another donee. *Id.* at 590-91.

¹⁶² *Id.* at 591. The court noted the futility of this alternative in that it would contradict both of the parties’ wishes. See *id.* at 591, n.6.

¹⁶³ *Id.* at 591 (citing Elisa K. Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67 (1990)).

¹⁶⁴ *Id.*

in using the embryos versus Junior Davis's interest in not using the embryos.¹⁶⁵ In balancing the parties' interests, the court held:

Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternative exists, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.¹⁶⁶

Thus, in *Davis*, the court held that an original agreement by the parties would be enforceable.¹⁶⁷ Compared to the contemporaneous mutual consent approach, although the outcomes may differ depending on the facts of the case and the applicability of state policies, i.e., whether the original agreement contemplated divorce and whether such agreements are enforceable, the frameworks are consistent. The difference between *Davis* and *Witten* is that upon disagreement, the *Davis* court found it appropriate to balance the interests of the parties and did so in favor of the interest in not procreating, thereby allowing the embryos to be destroyed.¹⁶⁸ Whereas in *Witten*, public policy superseded the court's balancing of the parties' interests.¹⁶⁹ To this extent, the balancing approach in *Davis* may be favored over the contemporaneous mutual consent approach in *Witten* because the balancing approach allows for the consideration of the independent interests of both parties when a state's public policy on this issue is not expressed or is otherwise contrary on the issue of the enforceability of such contracts.¹⁷⁰

¹⁶⁵ *Id.* at 604.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 597.

¹⁶⁸ *Id.* at 603-04.

¹⁶⁹ *Witten*, 672 N.W.2d at 779-80.

¹⁷⁰ For comment on the application of default rules with specific critique of *Witten*, see Charla M. Burill, Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals An Indefinite Solution, 54 WAYNE L. REV. 1365, 1373-74, 1386-88 (2008) (concluding that by mandating an outcome, the holding in *Witten* fails to maintain the procreational freedom of both parents).

Nevertheless, with respect to the right to change one's mind within these frameworks, neither court expressly defined the appropriate parameter of that right by limiting it to agreements in which the parties have not already contemplated the contingency of divorce.

2. *J.B. v. M.B & C.C.*¹⁷¹

Almost ten years after *Davis*, the Supreme Court of New Jersey applied a similar balancing test and reached a similar result in *J.B. v. M.B & C.C.*¹⁷² In *J.B.*, the husband and wife initiated IVF procedures, which resulted in seven embryos remaining in storage.¹⁷³ The clinic's consent form addressed the control and disposition of remaining embryos and included an agreement signed by both parties which provided that upon dissolution of the marriage, unless the court orders otherwise, all control, direction, and ownership of the embryos would be relinquished to the IVF Program.¹⁷⁴ Within their claim for divorce, the husband stated his desire for the embryos to be donated, and the wife objected. However, the court determined that the basis for the agreement between the parties to engage in the IVF process—to create a family as a married couple—no longer existed. With the agreement ambiguous as to which party would control the use of the embryos upon the contingency of divorce, as in *Davis*, the court held that there was no clear indication of the parties' intent.¹⁷⁵ The court held that “[w]ithout guidance from the Legislature, we must consider a means by which courts can engage in a principled review of the issues presented in such cases in order to achieve a just result.”¹⁷⁶ For the court in *J.B.*, the means by which to achieve a just result was to balance the interests of the parties. As in *Davis*, the court held that the right not to become a parent outweighed the right to

¹⁷¹ *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

¹⁷² *Id.* In *J.B.*, however, it was the wife (J.B.) who wanted to destroy the frozen embryos and the husband (M.B.) who wanted to preserve them, to be used by donating them to another couple.

¹⁷³ *Id.* at 708.

¹⁷⁴ *Id.* at 709-10.

¹⁷⁵ *Id.* at 713.

¹⁷⁶ *Id.* at 715.

use the embryos to become a parent, and, therefore, the embryos were not implanted.¹⁷⁷

In reaching its conclusion, the court in *J.B.* acknowledged that there are benefits to enforcing contracts, as expressed in *Kass* and *Davis*, and recognized that “*in vitro* fertilization is in widespread use, and that there is a need for agreements between the participants and the clinics that perform the procedures.”¹⁷⁸ The court noted:

Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities now available. . . . Yet, at the point when a husband and wife decide to begin the *in vitro* fertilization process, they are unlikely to anticipate divorce or to be concerned about the disposition of pre-embryos on divorce.¹⁷⁹

In light of these dynamics, the court held:

We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time *in vitro* fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored [embryos].¹⁸⁰

As in *A.Z. v. B.Z.*, the parameters of this holding should be limited to agreements in which the parties did not contemplate divorce in their original agreement. If they had, the original agreement should be enforced.¹⁸¹ Upon a party’s change of mind, the interests of both parties must be evaluated and, under the analysis in *J.B.*, the party choosing not to become a biological parent will ordinarily prevail.¹⁸² In considering the respective interests of the parties, specifically the fact that the husband, M.B., was already a father

¹⁷⁷ *J.B.*, 783 A.2d at 716-17.

¹⁷⁸ *Id.* at 719.

¹⁷⁹ *Id.* at 715.

¹⁸⁰ *Id.* at 719.

¹⁸¹ “[D]espite the conditional nature of the disposition provisions, in the large majority of cases the agreements will control, permitting fertility clinics and other like facilities to rely on their terms.” *Id.*

¹⁸² *Id.*

and was capable of fathering other children, the court affirmed the right of the wife, J.B., to prevent implantation of the embryos.¹⁸³

The court concluded by adding that “[w]e express no opinion in respect of a case in which a party who has become infertile seeks use of stored preembryos against the wishes of his or her partner, noting only that the possibility of adoption also may be a consideration, among others, in the court’s assessment.”¹⁸⁴ This caveat would come to bear in 2012, in *Reber v. Reiss*, which was the first case to address the issue of the disposition of frozen preembryos upon divorce in such a context and, thereby, complete the framework of possibilities first presented in *Davis* two decades before.

3. *Reber v. Reiss*¹⁸⁵

In 2012, the Superior Court of Pennsylvania confronted the scenario in which the party seeking to preserve the embryos was a wife who was unable to procreate biologically after having undergone chemotherapy for breast cancer, and the parties had no agreement regarding the disposition of the frozen embryos.¹⁸⁶ The trial court awarded thirteen frozen embryos to the wife in the parties’ divorce decree.¹⁸⁷

A Special Master first recommended that the embryos be awarded to the husband, who would direct that the embryos be destroyed.¹⁸⁸ After trial, the court concluded that ordinarily, in balancing the parties’ interests, the party

¹⁸³ *J.B.*, 783 A.2d at 719-20.

¹⁸⁴ *Id.* at 720. The court noted that, in balancing these interests, adoption may be a relevant issue as to availability to become a parent. *Id.* (Verniero, concurring). Concurring Judge Zazzali, discussing adoption, infertile couples, and advancing technology, noted: “[D]eveloping technologies will give rise to many more such controversies in the future. The resolution of those controversies depends on the amount of caution, compassion and common sense we summon up as we balance the competing interests. The significance of those interests underscores the need for continued careful and deliberate decision-making, infused with equity, in this developing jurisprudence.” *Id.*

¹⁸⁵ *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

¹⁸⁶ *Id.* at 1132-33.

¹⁸⁷ *Id.* at 1134.

¹⁸⁸ *Id.* at 1133.

wishing to avoid procreation should prevail.¹⁸⁹ However, the court concluded that the wife's inability to achieve biological parenthood without the use of the embryos was a unique factor that outweighed the husband's desire to avoid procreation.¹⁹⁰ The trial court awarded the embryos to the wife as part of the equitable distribution of property, and the husband appealed.¹⁹¹

The court held that, under these circumstances, the balancing approach was the most suitable test.¹⁹² Unlike the court in *Witten*, the *Reber* court disagreed with the husband's argument that the "court should have enforced a provision in the consent form that the [e]mbryos would be destroyed after three years," finding that such a provision related to the parameters of storage rather than an agreement about disposition.¹⁹³ Thus, in the absence of the parties—or the legislature—offering a formula regarding disposition, the court opted to balance the parties' interests.¹⁹⁴ In considering the wife's interest in procreating, the court determined that this was the 44-year-old wife's last chance to have a genetically related child. The embryos were created so that she could conceive after her cancer treatment was completed. Most notably, the court concluded that, "unless and until our legislature decides to tackle this issue, our courts must consider the individual circumstances of each case."¹⁹⁵ Based on the unique circumstances presented in *Reber*, the court affirmed the decision of the trial court and awarded the embryos to the wife.¹⁹⁶ Thus, the full range of factual

¹⁸⁹ *Id.* at 1134.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1134.

¹⁹² *Id.*

¹⁹³ *Id.* at 1136.

¹⁹⁴ *Id.* at 1134.

¹⁹⁵ *Id.* at 1142, n.11 (citing Fla. Stat. Ann. § 742.17(2) (West 2012)) ("Absent a written agreement, decision making authority regarding the disposition of pre [-]embryos shall reside jointly with the commissioning couple."); Tex. Fam. Code Ann. § 160.706(b) (Vernon 2011) ("The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos.").

¹⁹⁶ *Reber*, 42 A.3d at 1142.

possibilities within the *Davis* balancing framework was now presented within *Reber*. However, because the parties in *Reber* had no original agreement providing for their intent for disposition upon the contingency of divorce, the parameters for the right of a party to change his or her mind remained unresolved.

Likewise, in a case similar to *Reber* reported in January 2013, the Maryland Circuit Court considered the disposition of nine frozen embryos claimed by Honorine Anong, despite the objection of her former husband, Godlove Mbah.¹⁹⁷ The parties began IVF procedures in 2008, through which they gave birth to a daughter. However, following their divorce in May 2012, they continued to dispute the disposition of the remaining embryos.¹⁹⁸ Originally, the parties had an agreement providing that the embryos would be given to the wife in the case of a separation.¹⁹⁹ Upon their divorce, however, the husband wished for the embryos to be destroyed.²⁰⁰ Similar to the case in *Reber*, the wife contended that because her fallopian tubes were removed in the previous IVF procedure to help her conceive, she could not have children without using those embryos.²⁰¹ On this basis, the court awarded sole custody of the embryos to the wife. Similar to *Reber*, therefore, the outcome begs the unresolved question of whether the court would have held similarly—allowing the husband to change his mind—if the parties had formed an original agreement that contemplated the contingency of divorce²⁰² and if this were not the wife's

¹⁹⁷ See Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, GREENBELT PATCH (Jan. 7, 2013), <http://greenbelt.patch.com/articles/judge-awards-maryland-woman-custody-of-frozen-embryos?national=patch&ncid=edlinkuspatc00000006> (last visited Apr. 5, 2013) (describing case in which court gave nine frozen embryos to ex-wife over ex-husband's objection).

¹⁹⁸ The husband was awarded sole custody of the existing daughter after it was determined that the mother was unfit to have custody of the child. *Id.* This raises a variety of questions as to the application of any relevant custody or fitness standards to the existing embryos, which would be dependent upon the status prescribed to the embryos.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² This also assumes that, with respect to the language providing for disposition upon the contingency of separation, the court would interpret such language narrowly, as the

only means of becoming a genetic parent. Nevertheless, the limitation for resolution is not in the failure of the legal frameworks originally prescribed by *Davis*. Rather, it is the result of imprecise legislative policies on the issue of embryo disposition upon divorce. The *Davis* framework merely provides a workable continuum for resolution in its stead.

D. A Workable Continuum

Since 1992, in determining the disposition of frozen embryos upon divorce, courts have opted for one of the three approaches discussed in this Article.²⁰³ Each approach has its inherent benefits and shortcomings. A strict contract approach is narrow, as there is less opportunity for parties to make autonomous decisions upon contingencies not provided for in the agreement, e.g., divorce. However, when parties do express their intent for disposition upon divorce, a strict contract approach is advantageous in that it provides predictability and assures autonomous decision-making. A legislative policy mandating such agreements may guarantee that decisions regarding disposition upon divorce would rest with the progenitors.

The contemporaneous mutual consent approach, while flexible in providing individual parties the opportunity to change his or her mind upon the contingency of divorce, may lack the predictability and enforceability of the contractual approach if parameters for changing one's mind are not clearly defined. For example, a couple may agree that the embryos will be destroyed upon divorce. Thus, either party may have based his or her decision to participate in the IVF process on the understanding that, should the couple face divorce, the embryos would not be used. The objecting party may not have consented to participate otherwise. However, if a party

court did in *A.Z. v. B.Z.*, see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (interpreting consent form providing for disposition upon *separation* as not inclusive of contingency of *divorce*), rather than broadly, as the court did in *Witten*, see *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (interpreting the disposition provision regarding death during marriage broadly enough to encompass decision-making protocol upon divorce), and *Litowitz*, see *In re Litowitz*, 48 P.3d 261, 270-71 (Wash. 2002) (interpreting broadly provision of contract addressing disagreement between parties to include disagreement even upon divorce).

²⁰³ Commentators have offered other frameworks for resolution outside of the scope of judicial determination. See, e.g., Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 411-16 (2005) (arguing for alternative dispute resolution to resolve frozen embryo disputes).

may change his or her mind after the parties have already contemplated and agreed to disposition upon divorce, it may defeat the reliance that the other party placed on the original agreement.

Although the balancing approach is effective in implementing public policy considerations regarding parenthood and individual party interests, it also requires burdensome litigation. Additionally, it is most susceptible to inconsistency and unpredictability. Perhaps most importantly, it is the least conducive to autonomous decision-making by the parties. However, mandating that parties unambiguously express their intent upon divorce under a narrowly defined contractual approach would avoid the need for courts to balance the interests of the parties.

As evidenced by the court opinions discussed herein, state legislatures can reconcile the inherent drawbacks of each framework by first mandating that all agreements between parties and IVF providers include provisions that expressly provide for disposition upon divorce.²⁰⁴ In addition, state legislatures should statutorily provide for public policy presumptions upon the failure of parties to unambiguously provide for disposition upon divorce, or upon subsequent disagreement. By doing so, states will maximize the informed autonomous decision-making by parties that, when lacking, typically prompts litigation. When litigation does result, however, the legal frameworks set out in *Davis* provide a workable continuum by which courts may fairly dispose of frozen embryos upon divorce. Courts may enforce the original agreements of parties when such agreements expressly provide for the unambiguous intent of the parties for disposition upon divorce, and may allow for parties to express a new intent by contemporaneously and mutually consenting to disposition upon the occurrence of a contingency not previously contemplated.²⁰⁵ Upon disagreement, courts may balance the

²⁰⁴ See, e.g., *Kass v. Kass*, 663 N.Y.S.2d 581, 594 (N.Y. App. Div. 1997) (Miller, J., dissenting) (expressing the need for legislatures to mandate binding agreements expressing the parties' specific intentions upon foreseeable changes in circumstances); *Litowitz*, 48 P.3d at 271 (Chambers, concurring) (recognizing that public policy principles must factor into dissolution proceedings involving frozen embryos); *Roman*, 193 S.W.3d at 44 (anticipating legislative resolution of the issue); *In re Marriage of Dahl*, 194 P.3d 834, 841 (Or. Ct. App. 2008) (attempting to identify state policy providing for default rule); *A.Z.*, 725 N.E.2d at 1059 (recognizing public policy favoring autonomous decision-making); *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992) (recognizing legislative directive as dispositive on issue of disposition); *J.B. v. M.B. & C.C.*, 783 A.2d 707, 715 (N.J. 2001) (urging legislative guidance to achieve just result).

²⁰⁵ *J.B.*, 783 A.2d at 718-19 (citing *Kass*, 696 N.E.2d at 180 (noting "need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes.")). *Kass* supported the enforcement of contracts because they "avoid costly

interests of the parties, and may do so more effectively and predictably when guided by the public policy determinations of the state rather than individual courts. Thus, with a workable continuum in place, and the opportunity to more narrowly define the parameters within which a party may change his or her mind yet to present itself, courts simply await legislative guidance for a more efficient, affordable, and predictable resolution.

II. LEGISLATIVE POSTURING

It is evident that many law-making bodies are poised to address various issues and policies involving frozen embryos. Some state legislatures may designate or limit specific uses of embryos through state statutes,²⁰⁶ many of which involve regulations of abortion or embryonic research.²⁰⁷ Some states

litigation,” and “both minimize misunderstandings and maximizes procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal private decision.” *Kass*, 696 N.E.2d at 180; *see also Davis*, 842 S.W.2d at 597; John A. Robertson, *Prior Agreements For Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409-18 (1990) (arguing that enforcement of advance directives maximizes reproductive freedom, minimizes disputes, and provides certainty to couples and in vitro fertilization programs).

²⁰⁶ *See, e.g.*, CAL. PENAL CODE § 367g (West 2012) (prohibiting use for any purpose other than that indicated by provider’s written consent form).

²⁰⁷ *See, e.g.*, ME. REV. STAT. ANN. TIT. 22, § 1593 (West 2004) (prohibiting use, transfer, or distribution of in utero and ex utero fetuses for experimentation); MASS ANN. LAWS CH. 112, § 12J (I)-(III) (West 2004) (prohibiting research on fetus, defined to include embryos); MICH. COMP. LAWS ANN. § 333.2685 (West 2004) (prohibiting non-therapeutic research on embryos); MINN. STAT. ANN. §§ 609.266-.2691 (West 2003) (providing for various offenses against unborn children, defined to be “the unborn offspring of a human conceived, but not yet born”); MINN. STAT. ANN. §§ 145.421, 422 (West 1998 & Supp. 2004) (prohibiting research on living human conceptus, defined to include human organism from fertilization through first 265 days thereafter); N.M. STAT. ANN. §§ 24-9A-1, -3, -5 (Michie 2003) (prohibiting research on fetus, defined as product of conception); N.D. CENT CODE 14-02.2-01 (2004) (prohibiting research on fetus “before or after expulsion from its mother’s womb”); 18 PA. CONS. STAT. ANN. §§ 3203, 3216 (West 2000) (prohibiting non-therapeutic research on unborn child, defined as human from fertilization until live birth); R.I. GEN. LAWS § 11-54-1 (2002) (prohibiting research on live fetus, defined to include embryo); S.D. CODIFIED LAWS §§ 34-14-16 to -20 (Mich. 2004) (prohibiting research on embryo, defined to include in vitro embryos from single-celled stage); UTAH CODE ANN. § 76-7-310 (2012) (prohibiting research on live unborn children); WIS. STAT. ANN. § 940.04 (West 1996 & Supp. 2004) (prohibiting destruction of unborn child, defined as human being from conception until live birth).

specifically prohibit the destruction of embryos,²⁰⁸ while others might specifically require parties to donate their embryos.²⁰⁹ In some cases, states do not require specific dispositions but, instead, simply limit the amount of time that embryos may remain unfrozen or stored.²¹⁰

Only a few states have addressed specific aspects involving divorce, and of these, most address the issue of parentage rather than disposition.²¹¹

²⁰⁸ See, e.g., 720 ILL. COMP. STAT. § 5/9-1.2 (West 2002) (prohibiting killing any unborn child, defined as an “individual of the human species from fertilization until birth”); MINN. STAT. ANN. §§ 609.266 et seq (2012) (providing for various offenses against unborn children, defined to be “the unborn offspring of a human conceived, but not yet born”); N.M. STAT. ANN. §§ 24-9A-1 to -7 (2011) (requiring that embryos be transferred to woman to avoid clinical experimentation restrictions); WIS. STAT. ANN. § 940.04 (2011) (prohibiting destruction of unborn child, defined as human being from conception until live birth). *But see* KAN. STAT. § 65-6702 (2012) (permitting destruction of product of in vitro fertilization prior to implantation).

²⁰⁹ See LA. REV. STAT. ANN. § 9:130 (2012) (requiring adoptive implantation upon renunciation by parents, in accordance with written procedures of facility where embryos are stored).

²¹⁰ See, e.g., N.H. STAT. 168-B:15 (2013) (limiting *ex utero* noncryopreserved state to 14 days post-fertilization).

²¹¹ See Unif. Parent. Act, § 706, providing: “(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child. (b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.” Unif. Parentage Act § 706. Several states adopt the parentage rules of § 706. See, e.g., COLO. REV. STAT. § 19-4-106(7)(b) (2012); DEL. CODE ANN. TIT. 13, §§ 8-101 to 102, 8-701 to 8-707 (2012); N.D. CENT. CODE § 14-20-64 (2012); TEX. FAM. CODE ANN. § 160.706 (Vernon 2011); WASH. REV. CODE ANN. § 26.26.725 (West 2011); WYO. STAT. ANN §§ 14-2-401 et seq. (2012); *see also* OHIO REV. CODE ANN. § 3111.97 (2011) (defining parental rights for embryo donation); OKLA. STAT. TIT. 10, § 551 - 556 (2012); VA. CODE ANN. § 20-158(3)(C) (2012) (addressing parentage upon divorce). The Model Act Governing Assisted Reproductive Technology provides similar language. See ABA Model Act Governing Assisted Reproductive Technology § 606 (Effect of Dissolution of Marriage or Withdrawal of Consent). For discussion of the distinction between the Uniform Parentage Act and the Uniform Probate Code with respect to assisted reproduction, see Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J. L. REFORM 899 (2012).

Although some states statutorily require that physicians provide forms discussing possible dispositions of embryos to promote informed consent,²¹² only Florida requires a written agreement providing for disposition upon divorce.²¹³

Despite states' efforts to provide statutorily for policy issues involving frozen embryos, courts dealing with the issue of divorce have clearly and unanimously urged legislatures to provide guidance on policies affecting disposition under such circumstances. Although individual policies may vary, courts clearly prefer that parties exercise informed decision-making rather than courts applying a balancing approach. To the extent that state legislatures can promote this decision-making policy, they should do so.

III. RECOMMENDATION

State legislatures should mandate that parties participating in assisted reproductive technologies expressly provide for the disposition of genetic material upon divorce. While scholars may disagree as to the effectiveness of any particular mechanism by which parties indicate their intent,²¹⁴ the practical necessity of such a mandate is undeniable. Still, many scholars question the practicality of requiring couples in the throes of infertility to make decisions about the disposition of embryos upon divorce.²¹⁵ Within

²¹² See, e.g., CAL. HEALTH & SAFETY CODE § 125315 (West 2012); CONN. GEN. STAT. §§ 19a-32d through 32g (2010); MASS. GEN. LAWS ch. 111L, § 4 (West 2012); N.J. STAT. ANN. § 26:2Z-2 (West 2012).

²¹³ See FLA. STAT. ANN. § 742.17, providing: "A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance. (1) Absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm. (2) Absent a written agreement, decision making authority regarding the disposition of preembryos shall reside jointly with the commissioning couple." See also Brenda L. Henderson, *Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution Under Florida Law*, 17 NOVA L. REV. 549 (1992).

²¹⁴ See Forman, *supra* note 12, at 57 (urging courts and legislatures not to enforce embryo disposition divorce provisions found in clinic consent forms).

²¹⁵ See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003). See also Brandon J. Bankowski, *The Social Implications of Embryo Cryopreservation*, 84 FERTILITY & STERILITY 4, 823, 828 (Oct. 2005).

other areas involving reproduction and parenthood, such as those involving adoption and surrogacy agreements, policy demands that a party be afforded the opportunity to change his or her mind.²¹⁶ Although the difficulty of such personal and emotional decisions should not be minimized, the right to change one's mind should not be absolute or unqualified, particularly when other parties have relied on the original agreement of the party now changing his or her mind. Furthermore, the decision to participate in IVF procedures is an equally emotional decision. It is incongruous, at the least, to hold that a party is capable of making the autonomous decision to undergo IVF procedures, with all of the risks and consequences inherent in such procedures, and to decide on the disposition of embryos upon a variety of circumstances and contingencies, but to be unable to determine one's intent for disposition upon divorce. More so, to rest such incongruous reasoning on the argument that such decisions ought not to be dependent on the foresight of creative lawyering or the drafting of precise contractual language that expresses the unambiguous intent of the parties is contrary to accepted policies that validate and enforce nuptial agreements, in which divorcing parties routinely express their intent on issues of child custody and property distribution.

Indeed, every court addressing the issue, regardless of the legal framework for which that court has opted, has universally acknowledged that the parties' agreed-upon intent—however formed—may be determinative of disposition.²¹⁷ Thus, a narrowly drawn contractual framework may be sufficient under such circumstances. It is only when divorcing parties fail to expressly provide for disposition upon divorce that a balancing of interests may be the more appropriate—but less preferred—framework, and other policies regarding the status of the embryos may come to bear. Whatever the default policy may be, it necessarily provides predictability for the progenitors and the fertility clinics, and, therefore, promotes decision-making autonomy to parties who agree to participate in the assisted reproductive process.

²¹⁶ See Falker, *supra* note 7, at 523 (viewing reproductive contracts under the adoption paradigm as inapplicable to disposition cases). See also *In re Baby*, No. M2012-01040-COA-R3-JV, 2013 WL 245039 at *1 (Tenn. App. Jan. 22, 2013) (denying surrogate mother's request to invalidate order ratifying surrogacy agreement).

²¹⁷ See, e.g., *Kass v. Kass*, 235 A.D.2d 150, 156-58 (N.Y. App. Div. 1997) (enforcing parties' original contract); *Witten*, 672 N.W.2d at 782 (recognizing enforceability of in vitro fertilization contracts, subject to the right of either party to change his or her mind) *Davis*, 842 S.W.2d at 597 (holding embryo disposition agreements between progenitors to be presumptively valid and enforceable).

Where states do not implement such a requirement, courts confronting the disposition of frozen embryos upon divorce should more narrowly define the frameworks for legal analysis derived from *Davis*. Specifically, courts should adhere to the strict contract model in cases in which the parties have expressly and unambiguously stated in an original consent agreement their intent with respect to disposition upon divorce. One party should not be allowed to unilaterally alter that agreement, reached by mutual reliance, by simply changing his or her mind upon a contingency that the parties already contemplated. In cases in which couples have no such original agreement, or in cases in which they have an agreement for disposition but it does not unambiguously express their intent for disposition upon divorce, the court should allow a party to determine his or her intent upon the contingency of divorce and provide for contemporaneous mutual consent to resolve disposition. Only upon the absence of an original agreement, or conflict between the parties as a result of the contingency of a divorce that was not contemplated in the original agreement, should the court balance the parties' interests to determine disposition.

CONCLUSION

The legal frameworks for determining the disposition of frozen embryos upon divorce, first established in 1992 in *Davis v. Davis*, have provided a continuum of reasoning that has allowed courts addressing the issue to consider the unique circumstances of individual cases.²¹⁸ Within any individual case, the *Davis* court recognized two controlling factors to govern disposition: the written agreement of the parties and the legislative policies of the state.²¹⁹

Universally, in making such determinations, courts favor the contractual intent of the progenitors over the balancing of individual interests by the court.

Many states have statutorily provided policies that govern specific issues relevant to the court's consideration of the respective interests of the parties—parentage provisions, limitations on use, personhood status, and inheritance restrictions all dictate the interests that courts may favor in a variety of circumstances. But there are very few statutory provisions that promote or encourage the policies governing dispositional decision-making authority specific to the contingency of divorce. The *Davis* case—and each case

²¹⁸ See *supra* text accompanying notes 20-202.

²¹⁹ *Davis*, 842 S.W.2d at 590.

discussed in this Article relevant to divorce—is merely the product of this lack of legislative direction.

The analysis provided in *Davis* accommodates two legal objectives—the enforceability of contracts and the balancing of individual interests.²²⁰ The applicability of each depends on the scope of the parties' intent with respect to the disposition of their embryos. When intent is unambiguous, courts enforce contracts. When intent is lacking or conflicted, courts balance interests. When courts balance interests, legislative policy dictates preferences. Analytically, this presents a consistent and seamless framework for resolution. But when the contingency of divorce is introduced to the equation, with no specific policies to guide determinations of decision-making authority or disposition, parties tend to change their minds, and resolution becomes more difficult.

Absent legislative policy on the specific issue of the disposition of frozen embryos upon divorce, the *Davis* framework provides for parties to change their minds upon the contingency of divorce by recognizing a contemporaneous mutual consent approach to resolving dispositions. However, as applied in practice, a broad interpretation of the *Davis* framework may blur the parameters of this approach by allowing parties to change their minds subsequent to an original agreement. Where parties have already contemplated divorce as a contingency and have agreed upon disposition, such agreements should be enforced. Thus, contemporaneous mutual consent should only apply in cases in which parties have not yet contemplated and agreed to disposition upon divorce. If parties do not contemporaneously mutually agree upon such contingency, then courts should balance the respective interests. By narrowly drawing the parameters for when parties may change their minds, and by limiting unambiguous intent to the circumstances in which the parties find themselves, the *Davis* framework may continue to provide a consistent, predictable, and responsible method for resolving embryo disposition upon divorce. By adopting a legislative policy mandating that parties express their unambiguous intent for disposition upon divorce, such that courts may enforce contracts and avoid the balancing of constitutional interests, states may maximize autonomous decision-making, minimize litigation, and afford courts and infertile couples the consistent and predictable resolution for disposition that each deserves.

²²⁰ See *id.* at 596-97, 603-04.