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WHAT'S MINE IS MINE, BUT WHAT'S YOURS SHOULD ALSO BE MINE: AN ANALYSIS OF STATE STATUTES THAT MANDATE THE IMPLANTATION OF FROZEN PREEMBRYOS

*Diane K. Yang**

INTRODUCTION

In recent years, the advancements in reproductive technology have led to a surge in the number of couples seeking fertility treatments such as in vitro fertilization (“IVF”).¹ IVF is one of many artificially assisted conception procedures available to infertile couples.² In a country where one in every five couples is

* Brooklyn Law School Class of 2003; B.A., Barnard College of Columbia University, 2000. The author would like to thank the following individuals: Professor Jennifer Rosato for her invaluable insight, comments and guidance; David Keusch for his helpful suggestions; her friends, Andrea Anderson, Annie Lam, Debbie Lee, and Belinda Leung, who offered their encouragement and support; the entire staff of the *Journal of Law and Policy*, especially her editors, Caroline Nadal and Sonia Robertson; and her mother for her unconditional love and extraordinary patience.

¹ The IVF procedure accounted for approximately 74% of the Assisted Reproductive Technologies (“ARTs”) used in 1999. Center for Disease Control and Prevention, 1999 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports, fig.2, available at <http://www.cdc.gov/nccdphp/drh/ART99/index99.htm> (last visited Apr. 28, 2002).

² Although a vast majority of the cases involve disputes between couples who later separate, there have been instances where unmarried individuals have also sought the use of IVF to conceive children. See discussion *infra* note 211 (discussing a criminal case where a bachelor hired a surrogate to undergo

infertile, the United States has emerged as a leader in disputes involving the custody of frozen preembryos³ created by artificial conception procedures.⁴ Currently, however, there are no federal statutes that provide a uniform consensus on resolving the disputes over the ownership of preembryos. In an effort to create predictability and eliminate confusion over future disposition of preembryos, several states⁵ have enacted legislation requiring specific treatment of preembryos in the event of death, separation, divorce of the commissioning couple, or any other unforeseen circumstances.⁶

The different views regarding the status of preembryos have caused debate and unpredictability. The lack of direction from a

IVF with his sperm).

³ Courts and commentators addressing this topic identify the fertilized egg at the developmental stage when cryopreservation takes place in different ways. Some courts, for example, use the term “pre-zygote,” while others use the term “preembryo.” See, e.g., *J.B. v. M.B.*, 783 A.2d 707, 708 (N.J. 2001) (noting that the term “preembryo” rather than “embryo” should be used when the ova are frozen); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (using the term “pre-zygote”). Furthermore, the New Jersey court found that because “[a] preembryo is a fertilized ovum up to approximately fourteen days old (the point when it implants in the uterus),” it uses that term in place of “embryo” because “preembryo is technically descriptive of the cells’ stage of development when they are cryopreserved (frozen).” *J.B.*, 783 A.2d at 708 n.1 (internal citation omitted). Since these terms are legally indistinguishable, the terms “pre-zygote,” “preembryo” and “fertilized egg” will be used interchangeably throughout this note.

⁴ See Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L.J. 315, 317 (1997). Other leaders in custody disputes include Israel and the United Kingdom. See, e.g., Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One’s Mind*, 12 DUKE J. COMP. & INT’L L. 75, 76-7 (2002) (finding that ART procedures are commonplace in these countries and briefly discussing the significant custody cases that arose in each locale).

⁵ These states include Florida, Illinois, Kansas, Kentucky, Louisiana, Missouri, New Hampshire, New Mexico, and Pennsylvania. See *infra* note 158 (describing the restrictions in each state).

⁶ David H. Fiestal, Note, *A Solomonic Decision: What Will Be the Fate of Frozen Preembryos?*, 6 CARDOZO WOMEN’S L.J. 103, 107-08 (1999) (noting that a few states have passed statutes to address the disposition of frozen preembryos).

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majority of state legislatures forces socially vital issues such as one's procreative freedom and the status of a preembryo to be decided and determined by judges who represent the opinions and morals of a select few rather than society at large.⁷ Although it is common in family law for judges to decide the legal direction and standards of particular problems,⁸ it is best for legislators, who represent the public, to decide the issues and impose uniformity in the law. Furthermore, judges have been forced to sift through an array of complicated factors pertaining to consent agreements, contracts, and other legal matters with little statutory guidance, creating a confusing and contradictory body of caselaw. With more than 100,000 frozen preembryos stored in IVF clinics throughout the country, a number growing at a rate of 18.8% annually,⁹ legislative guidance is needed. Couples attempting IVF are entitled to direction from the legislature prior to undergoing the procedure. The legislatures should enact statutes that thoroughly address the disposition of these preembryos in a way that ensures maximum procreative freedom.

Although a few states have enacted specific statutes to deal with the issue of frozen preembryos, each differs widely as to the legal status of and rights attributed to these cells.¹⁰ Part I of this note provides an introduction to the IVF procedure and describes how frozen preembryos are created. Part II focuses on present caselaw and how the state courts have dealt with the issue of custody disputes. Part III describes and analyzes state legislative

⁷ See Barbara L. Shapiro, "Non-Traditional" Families in the Courts: The New Extended Family, 11 J. AM. ACAD. MATRIM. LAW. 117, 118 (1993) (noting that judges often voice their moral objections and fears of state intrusions in familial decisions).

⁸ *Id.*

⁹ See Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 59 (2000); see also Jackie Jadnack, *Legal Chill Surrounds Frozen Embryos*, ALBUQUERQUE J., Apr. 1, 2001, available at 2001 WL 17938689 (stating that there are an estimated 100,000 to 200,000 frozen preembryos being stored in fertility clinics throughout the country).

¹⁰ See discussion *infra* Part III (discussing and comparing the Florida, Louisiana, and New Mexico statutes).

responses regarding the disposition of frozen preembryos and analyzes the scope of protection state laws provide and more importantly, the priorities of each law. It also argues that the Florida statute, which requires couples to determine the disposition of their preembryos in a signed agreement prior to IVF,¹¹ is the best approach to this sensitive issue because it encourages participants to make conscious and thoughtful decisions. Although some may argue that such agreements defining familial relationships violate public policy, these agreements should nevertheless be encouraged because they ensure that parties will not be forced to accept outcomes they did not anticipate.¹² Finally, this note concludes that state statutes are essential in providing guidance for the future of IVF programs, and it proposes a revised version of Florida's statute mandating disposition agreements. Ultimately, this note predicts that as use of IVF and other assisted reproductive procedures increase in popularity, the potential for debate and controversy will also intensify. Thus, the state legislatures should take a pro-active position to determine the future of IVF programs, maximize individual procreative rights, and establish predictability for future IVF participants.

I. IN VITRO FERTILIZATION AND THE CREATION OF EXCESS PREEMBRYOS

In the United States, approximately 6.1 million people,¹³ or about 10% of the population that is of reproductive age, are

¹¹ FLA. STAT. ANN. § 742.17 (West 2001) (requiring the commissioning couple and the treating physician to enter into a written agreement that provides for the disposition of the cells).

¹² See *supra* note 7 (noting that since judges voice their objections to state intrusions, this creates ambiguity as to what the court might do if a custody case over preembryos should come before the court).

¹³ American Society for Reproductive Medicine, ASRM: *Frequently Asked Questions About Infertility*, available at <http://www.asrm.org/Patients/faqs.html> (last visited Apr. 28, 2002) [hereinafter ASRM: *Frequently Asked Questions*].

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affected by infertility.¹⁴ Since 1978, when the first child conceived by IVF was born,¹⁵ the use of artificial reproductive technologies (“ARTs”) has grown into a largely unregulated, billion-dollar industry.¹⁶ More than 45,000 American babies have been conceived through IVF since its introduction in the United States.¹⁷

IVF begins with administering fertility drugs to the woman to stimulate egg production.¹⁸ The eggs are extracted from her ovaries and placed in a petri dish to be combined with sperm to fertilize the egg.¹⁹ Once fertilization has taken place, the cell begins to divide.²⁰ After the preembryo reaches the four-to-eight cell stage, it is transferred into the woman’s uterus.²¹ Following the development of cryopreservation²² in 1981,²³ physicians have been able to obtain more eggs with one extraction procedure and can now create and store extra preembryos.²⁴ Because only about one in every four preembryos implanted results in a successful pregnancy,²⁵ the unavoidable result of IVF is the creation of extra

¹⁴ Infertility is defined as “the failure of a couple to conceive after one year of intercourse without using contraception.” *Id.*

¹⁵ Thomas D. Arado, Note, *Frozen Embryos and Divorce: Technological Marvel Meets the Human Condition*, 21 N. ILL. U. L. REV. 241, 241 (2001).

¹⁶ LORI B. ANDREWS, *THE CLONE AGE* 48 (1999).

¹⁷ ASRM: *Frequently Asked Questions*, *supra* note 13.

¹⁸ See Mabelle M. Seibel, *A New Era in Reproductive Technology In Vitro Fertilization, Gamete Intrafallopian Transfer and Donated Gametes and Embryos*, 318 NEW ENG. J. MED. 828, 829 (1988).

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² Cryopreservation is the freezing of preembryos in liquid nitrogen at either the two-, four- or eight-cell stage of development. Arado, *supra* note 15, at 244 (citing Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1083 (1986)).

²³ Andrea M. Siegel, Comment, *Legal Resolution to the Frozen Embryo Dilemma*, 4 J. PHARMACY & L. 43, 46 (1995).

²⁴ *Id.*

²⁵ Center for Disease Control and Prevention, 1999 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports, *Introduction to the 1999 National Report*, available at

preembryos. These surpluses are cryopreserved to ensure that there are enough preembryos for use in future implantation.²⁶ Since human eggs cannot be frozen independently and still remain viable,²⁷ many cryopreserved cells exist as either frozen preembryos or as sperm. While eggs can only be frozen for a short time,²⁸ preembryos and sperm can be stored indefinitely.²⁹

There are primarily three different views attributed to preembryos and these various beliefs fuel the controversies over frozen cells. One group believes that preembryos constitute life; others believe that preembryos are the property of the people who supplied the gametes; and another group would give them a special interim status. Some argue that the party who wishes to use the preembryos should be given sole control of the cells,³⁰ and others think that the party who wishes to avoid procreation should prevail.³¹

<http://apps.nccd.cdc.gov/ART99/nation99.asp> (last visited Apr. 28, 2002).

²⁶ The average number of embryos transferred into a uterus before pregnancy is 3.1 embryos per procedure with only about 21.7% of such pregnancies resulting in live births. *See id.*

²⁷ *See* Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 219 (1997). Scientists currently believe that oocyte freezing and thawing, the process where the cells are cryopreserved and later defrosted in preparation for an IVF procedure, are the most difficult feats of reproductive technology to complete successfully because of the delicacy of the egg's chromosomes. Unlike sperm, the egg's chromosomes are less resilient and unlikely to replace the procedure of embryo freezing. *Id.* at 219 n.93.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See, e.g.,* Jill Melchoir, Comment, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921, 924 (2000) (arguing that the intentional creation of embryos strongly implies a contract to procreate); Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 545 (1991) (arguing that the law should respect the special status of preembryos and that the appropriate outcome should always be in favor of the spouse who decides to implant).

³¹ *See, e.g.,* *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (finding that "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means

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A. The “Preembryo as Person” Viewpoint

Those who view preembryos as persons argue that “a person’s unique genetic makeup is complete as soon as that person is conceived”; and, therefore, they object to the intentional destruction of fertilized eggs.³² They adopt a “*parens patriae*” viewpoint using the “best interest of the child” inquiry.³³ Louisiana and New Mexico, adopting this view, have enacted perhaps the most restrictive and controversial statutes. Both states mandate the implantation of excess preembryos by either the gamete providers or by a surrogate couple.³⁴ Louisiana’s statute

other than use of the preembryos in question”); Michelle F. Sublett, Note, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585, 616 (1990) (arguing that should a dispute between the gamete providers occur, there should be a presumption in favor of letting the preembryo expire over a gamete provider’s wish to bring the embryo to life since no human life has developed).

³² Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 66 (1999). See, e.g., *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *9 (Tenn. Ct. App. Sept. 21, 1989) (holding that human life begins at conception rather than at implantation).

³³ *Parens patriae* is “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp[ecially] on behalf of someone who is under a legal disability to prosecute the suit.” BLACK’S LAW DICTIONARY 1137 (7th ed. 1999).

³⁴ See, e.g., LA. REV. STAT. ANN. § 9:129 (West 2001) (finding that a human preembryo is a juridical person and shall not be intentionally destroyed by anyone including its gamete providers and fertility clinic that generated its existence); N.M. STAT. ANN. § 24-9A-[1][g] (Michie 2001) (defining a “fetus” as the product of conception until birth), [3][a] (stating that a fetus cannot be subject to any activity that places it at risk unless the activity is for the health needs of that particular fetus and the fetus is minimally placed at such risk).

Although the New Mexico statute is similar to that of Louisiana because it also requires the implantation of preembryos, New Mexico has not gone as far as to define them as persons with separate individual rights. The problem with both states’ implantation requirement is that they deprive the procreative rights of IVF participants without a sufficient state interest. See *Kramer v. Union Free Dist.*, 395 U.S. 621, 627 (1969) (holding that limiting fundamental rights can only be justified by a compelling state interest).

regarding IVF and the status of preembryos is the most comprehensive, but it is also the most questionable as to whether it will pass constitutional scrutiny.³⁵ Currently, Louisiana is the only state that defines a preembryo as a “juridical person,”³⁶ and as a separate legal entity³⁷ that can “sue or be sued.”³⁸ Under this statute, the preembryo is not the property of its progenitors, IVF physicians, or clinical facilities that generates or maintains its existence.³⁹ Instead, if the donors of the sperm and egg renounce their parental rights to the preembryo for in-utero implantation, the preembryo must be made available for adoption.⁴⁰

There is academic support for the view that a preembryo should be given the rights of a person because, under this view, the preembryo is a human life.⁴¹ Supporters of this belief would give a preembryo all the rights and privileges of a human being from the moment of conception.⁴² They believe that a preembryo should be considered a life because it is a grouping of living

Second, the requirement of implantation prioritizes legislative intent over medical concerns as to the best interest of the patients since the statutes do not provide for medical exceptions when a physician would ordinarily refrain from implanting more embryos than necessary because of the patient’s own physical condition. *See generally* N.M. STAT. ANN. § 24-9A-[1]-[7] (Michie 2001). *See also* KY. REV. STAT. ANN. § 311.715 (Banks-Baldwin 2001) (stating that publicly funded IVF programs cannot conduct procedures that would intentionally destroy the embryo).

³⁵ *See generally* LA. REV. STAT. ANN. §§ 9:124–130.

³⁶ *See, e.g.*, § 9:123.

³⁷ *See, e.g.*, § 9:125.

³⁸ *See, e.g.*, § 9:124.

³⁹ *See, e.g.*, § 9:126.

⁴⁰ *See id.*

⁴¹ Symposium, *Pushing the Boundaries: An Interdisciplinary Examination of the New Reproductive Technology*, 45 LOY. L. REV. 239, 240-41 (1999) (noting that the fertilized cell is a “germinated genetic embodiment of a novel human life. The newly united cell, or zygote, is a fertilized human ovum and has the potential to develop into a human person.”).

⁴² John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 971 (1986).

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cells, forming the basic units of human life.⁴³ They further argue that a preembryo has the same rights of a living being because its conception resulted from an intentional act to reproduce.⁴⁴ In addition, they claim that scientific evidence supports this view,⁴⁵ that if allowed to develop, a preembryo may become a human life.⁴⁶

This argument, however, is extreme. Preembryos and embryos are lost naturally each day.⁴⁷ Such occurrences are not contemplated as a loss of life, but rather a loss of genetic cells.⁴⁸ Many opponents argue further that the loss of cells “should not change merely because the loss occurs through the IVF process.”⁴⁹ They contend that certain legalized birth control methods, such as “morning after” pills⁵⁰ and intrauterine devices (“IUDs”),⁵¹ essentially cause the same loss of embryos by

⁴³ David G. Dickman, Comment, *Social Values in a Brave New World: Toward a Public Policy Regarding Embryo Status and In-Vitro Fertilization*, 29 ST. LOUIS U. L.J. 817, 830 (1985).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Kim Schaefer, Comment, *In Vitro Fertilization, Frozen Embryos and the Right to Privacy—Are Mandatory Donation Laws Constitutional?*, 22 PAC. L.J. 87, 95 (1990). Seven days after fertilization, the preembryo is implanted in the uterus; this is the stage where many preembryos are lost. See R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 6 STAN. L. & POL’Y REV. 11, 15 (1995) (“A successful pregnancy depends on establishing a strong interaction between the [pre]embryos and the tissues of the womb.”).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ These pills, which require a prescription, prevent pregnancies by stopping ovulation, fertilization, or implantation of a fertilized egg in the uterus. See Jim Ritter, *Having Pill Around Could Reduce Pregnancies Morning-After Drug Should Be Prescribed in Advance, Group Says*, CHIC. SUN-TIMES, May 1, 2001, available at 2001 WL 7229028.

⁵¹ Scientists are still unclear as to how IUDs work to prevent pregnancy, but some believe that they produce macrophages, white blood cells that destroy sperm. See *Contraception: Medical School to Test New IUD Contraceptive*, DRUG WEEK, Jan. 19, 2001, available at 2001 WL 17573310.

preventing its attachment to the uterine wall.⁵² While there are other legalized methods to destroy preembryos, it follows that preembryos created through IVF are no different and thus, are not and should not be afforded similar legal protections as a human life.

B. Frozen Preembryos Invoke a "Special Interim Status"

Many people agree that preembryos exist in an uncertain legal status. They are cells that do not enjoy protection as "persons" under federal law,⁵³ but cannot be considered property because of their potential to become life. As a result of this potential, many scholars view preembryos as deserving a special status.⁵⁴ To these scholars any other legal treatment or categorization—such as deeming them as "property"—would offend morals and ethics.⁵⁵ Some courts have also accepted this viewpoint. In *Davis v. Davis*,⁵⁶ for example, the Tennessee Supreme Court held that preembryos were neither property nor life, but rather occupied a "special interim status."⁵⁷

⁵² Schaefer, *supra* note 47, at 95.

⁵³ See also Jennifer M. Dehmel, Note, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1383 (1995) ("In *Roe v. Wade*, the United States Supreme Court interpreted the word 'person' as used in the Fourteenth Amendment to exclude the unborn. Although 'person' is not defined in the Constitution, the Court held that 'use of the word is such that it has application only postnatally.'").

⁵⁴ See *Davis v. Davis*, 842 S.W.2d 588, 588 (Tenn. 1992) (acknowledging that even the American Fertility Society, an organization of over 10,000 physicians and specialists working with problems of infertility, has categorized embryos as occupying an interim status group). See also Jennifer L. Carlow, Note, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 526 (1994).

⁵⁵ See John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 447 (1990).

⁵⁶ 842 S.W.2d at 594-98; see also *infra* Part II.A (discussing the specific facts and holding of the case).

⁵⁷ 842 S.W.2d at 597 ("We conclude that preembryos are not, strictly

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Professor John Robertson supports the view of providing special status for preembryos and advocates the use of contract theory to resolve custody disputes.⁵⁸ As a leading defender of the use of contracts, he argues that they provide the only way to adequately protect a couple's interest in procreative autonomy.⁵⁹ He claims that enforceable contracts will minimize potential disputes and create more efficient IVF programs because of their ability to establish certainty and predictability as to the disposition of preembryos.⁶⁰ Professor Robertson recognizes that these agreements give both parties the opportunity to decide and determine their reproductive future.⁶¹ By equating advance agreements with living wills⁶² and donor cards,⁶³ he concludes that such directives are permissible.⁶⁴ Moreover, he argues that they protect "one's current interests and autonomy . . . [by]

speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.").

⁵⁸ Professor of Law, University of Texas at Austin. Faculty Profiles, University of Texas, School of Law, *available at* <http://www.utexas.edu/law/faculty/jrobertson> (last visited Apr. 28, 2002). Professor Robertson has written numerous articles and books on bioethical issues and is currently Chair of the Ethics Committee of the American Society for Reproductive Medicine. *Id.*

⁵⁹ John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 414 (1990). Furthermore, Robertson states that "[c]lear rules for disposition of embryos is [sic] necessary to meet the needs of infertile couples, to minimize disputes, and to facilitate efficient IVF program operation." *Id.* at 409.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 415 n.29. A living will is defined as follows:

An instrument, signed with the formalities necessary for a will, by which a person states the intention to refuse medical treatment and to release healthcare providers from all liability if the person becomes both terminally ill and unable to communicate such a refusal.

BLACK'S LAW DICTIONARY 945-46 (7th ed. 1999).

⁶³ Robertson, *supra* note 59, at 415 n.28. He also argues that the use of prior agreements for preembryos is similar to the use of living wills and donor cards in that one's current interests and autonomy may be served by the ability to direct future events when the person is no longer able to decide. *Id.*

⁶⁴ *Id.* at 415.

direct[ing] future events when the person is unable or unavailable to decide.”⁶⁵

The recognition and enforcement of these contracts maximizes procreative liberty because the outcome is based on the mutual consent and control of both parents.⁶⁶ Without such authority, procreative rights are infringed because the “decisions about [the pre]embryos will be made by others in ways that might insufficiently value the reproductive concerns of the persons involved.”⁶⁷ If the prior agreement is not binding, the IVF program, the court, or the legislature will determine the disposition of the frozen preembryos.⁶⁸ This may result in a disposition contrary to the parents’ intent and thus, interfere with procreative interests.⁶⁹ In his view, couples will only be able to rely on such agreements for the future disposition of their preembryos with universal acceptance of such agreements.

Professor Carl Coleman is perhaps one of the strongest opponents to the idea of creating contractual obligations to determine the disposition of frozen preembryos.⁷⁰ He expressly rejects the constitutionality of such agreements,⁷¹ arguing that contracts violate inalienable rights inherent to all individuals, such as the right to procreate freely.⁷² He claims that an agreement restricts a couple’s choice because the terms of the contract, although once agreed upon, may no longer reflect the

⁶⁵ *Id.* at n.28.

⁶⁶ *Id.*

⁶⁷ *Id.* at 415.

⁶⁸ *Id.* at n.28.

⁶⁹ *Id.* at 415.

⁷⁰ Professor Coleman was formerly the Executive Director of the New York State Task Force on Life and the Law, a nationally recognized interdisciplinary commission. He has served on numerous governmental and bar association committees. He currently chairs the Special Committee on Treatment Decisions of the New York State Bar Association’s Health Law Section and is an Associate Director of the Health Law and Policy Program at Seton Hall. Biography, Seton Hall Law On-Line, *available at* http://law.shu.edu/faculty/fulltime_faculty/colemaca/coleman.htm (last visited Apr. 28, 2002).

⁷¹ Coleman, *supra* note 32, at 56, 88-90.

⁷² *Id.* at 57.

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couple's present intent or desire.⁷³ He further argues that the decision to procreate or avoid procreation is such a significant fundamental right that only upon the mutual consent of both parties should a preembryo be either carried to term or destroyed.⁷⁴

C. Frozen Preembryos as Property Viewpoint

Those who consider preembryos as matrimonial assets or "property," equate preembryos as the personal property of their gamete providers.⁷⁵ Under this reasoning, preembryos can be treated just as any other asset and thereby can be owned, destroyed, gifted, or donated.⁷⁶ Supporters of this viewpoint place the desires and interests of the gamete providers above that of the preembryo.⁷⁷ Although this idea has existed for quite some time, many jurisdictions have been hesitant to define preembryos as property.⁷⁸

One of the most popular theories that supports the view of preembryos as property is the "sweat equity" rule.⁷⁹ The idea is

⁷³ *Id.* at 126.

⁷⁴ *Id.* at 82.

⁷⁵ Guzman, *supra* note 27, at 207.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See, e.g.,* Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (refusing to define the status of preembryos as anything more than interim); *but see* York v. Jones, 717 F. Supp. 421 (E.D.Va. 1989) (holding that preembryos are the property of their gamete providers for purposes of a cryopreservation agreement).

⁷⁹ Paula Walter, *His, Hers, or Theirs—Custody, Control and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 962 (1999). This approach favors women by resting on the assumption that procreative rights, by their very biological nature, cannot be equal between both genders. *See generally* Lori B. Andrews, *The Legal Status of Embryos*, 32 LOY. L. REV. 357, 406 (1986); Judith Daar, *Panel on Disputes Concerning Frozen Embryos*, 8 TEX. J. WOMEN & L. 285, 293 (1999); John A. Robertson, *Resolving Disputes over Frozen Embryos*, 19 HASTINGS CTR. REP. 7 (1989); Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 348 (1993).

that a woman should have sole decision-making authority with respect to the fate of her preembryos.⁸⁰ In numerous articles and publications, scholars have recognized the argument that a woman retains this decision-making right.⁸¹ By extending the holding of *Roe v. Wade*,⁸² these scholars argue that since a woman has the right to choose if and when to abort a pregnancy, she should have the same freedom to control her frozen preembryos.⁸³ Applying this reasoning, a frozen preembryo artificially sustained in liquid nitrogen is no different from a fetus in the womb; therefore, the woman should retain the right to determine its fate.⁸⁴ Regardless of whether the father wishes to procreate or avoid procreation, the woman retains ultimate decision-making authority.⁸⁵ Although this theory has supporters,⁸⁶ the reasoning is questionable and is subject to criticism.

There are several flaws with the “sweat equity” argument. First, although *Roe v. Wade* recognized the negative impact upon a woman if she were forced to choose between carrying an

⁸⁰ See Andrews, *supra* note 79, at 406. Those who favor this idea claim that during IVF, women endure a physically and emotionally invasive procedure, while men merely surrender sperm, a relatively simple and easy task. *Id.* Since women undergo a more painful and difficult procedure, they should be granted with the decision-making rights. *Id.*

⁸¹ See generally *supra* note 79 (noting the various scholars who have written about a woman’s right to make the decision regarding the disposition of her preembryos). See also Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1095-96 (1986) (noting that there are scholars who believe that a woman’s interest in privacy, bodily autonomy, and limiting lineal descendants would entitle her to dispose of her preembryos as she deems fit).

⁸² *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the expansion of privacy rights would cover the right of a woman to have an abortion).

⁸³ Andrews, *supra* note 79, at 406.

⁸⁴ Proponents of the “sweat equity” rule support a woman’s right to decide the fate of preembryos because it is through her that preembryos are formed. Thus, it is assumed that supporters would also view frozen preembryos as no different from fetuses. See *id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

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unwanted pregnancy or entering into motherhood,⁸⁷ its holding legalizing abortion was based on the fundamental right of privacy.⁸⁸ Frozen preembryos, stored in a clinic are significantly different from a fetus sustained within the womb; thus, the principles behind *Roe* are not triggered.⁸⁹ Unlike in *Roe*, there is no privacy interest because there is no burden or interference with the woman's body or personal autonomy.⁹⁰ Moreover, the legal status of a preembryo differs greatly depending on whether it is in the womb or in a frozen state.⁹¹ While there are criminal statutes to protect fetuses in the womb from intentional abortions by a third party,⁹² it is not a criminal offense to accidentally or intentionally destroy a preembryo outside of the uterus.⁹³ A

⁸⁷ *Roe*, 410 U.S. at 153.

⁸⁸ *Id.* at 154 (stating that “the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation”).

⁸⁹ *Id.* at 153. In *Roe*, the Court recognized various psychological, mental, and physical burdens on a woman if the state forced her into unwanted motherhood. *Id.* All of these factors pertain to a woman's bodily autonomy. Thus, frozen preembryos would not violate the privacy principles defined in *Roe* since these cells are removed from the woman's body.

⁹⁰ See Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1479 (1995).

⁹¹ Melchoir, *supra* note 30, at 950 (noting that a frozen preembryo exists outside of the womb and since the bodily integrity of the woman is not violated, state laws can prohibit its destruction where it otherwise could not if the preembryo was attached to a uterine wall).

⁹² See, e.g., FLA. STAT. ANN. § 782.09 (West 2001) (stating that “[t]he willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother”); ILL. COMP. STAT. 720 ILCS 5/9-1.2(3)(b) (West 2001) (providing that it is a crime to kill any individual of the human species from fertilization until birth other than by a lawful abortion); LA. REV. STAT. ANN. § 14:32.5 (West 2001) (providing that feticide is the killing of an unborn child); N.M. STAT. ANN. § 30-5-3 (Michie 2001) (providing that a criminal abortion is any act, not justified as a medical termination, that ends a woman's pregnancy); N.Y. PENAL LAW § 125.00 (Consol. 2001) (defining homicide as any conduct that causes the death of a person or an unborn child who is more than twenty-four weeks from the moment of conception).

⁹³ Currently, there are no statutes that impose criminal sanctions on a

couple, therefore, can sue for monetary damages for the destruction of their preembryos,⁹⁴ but a physician who destroys a preembryo could not be charged with murder.

Another flaw in the “sweat equity” theory is that under it men and women are not afforded equal rights. Even though *Roe* gives women the right to control the procreative process with respect to traditional pregnancies, the decision does not vest greater rights to women than men.⁹⁵ Instead, “*Roe* and its progeny are cited for the principle that the right to procreate and the right not to procreate are independent rights, each equally protected in the interest of either gender.”⁹⁶ Because the statuses of fetuses and preembryos are not equivalent under the law, the interest in the fate of the preembryo is the same among both gamete providers, man and woman. Neither party, therefore, should gain sole control over the preembryos on the basis of sex alone, as supporters of the “sweat equity” theory would argue. Just from these few viewpoints, it is evident that the status of the preembryo remains unclear.

II. BACKGROUND OF CASELAW

Cases with unforeseen circumstances, where the interested

person who destroys an embryo. Although there are criminal sanctions for intentional feticide, many of these jurisdictions define a fetus, for the purposes of imposing criminal charges, as those beings that have reached a specific point of development. *See supra* note 92.

⁹⁴ *See, e.g.,* Del Zio v. Presbyterian Hosp., 1978 U.S. Dist. LEXIS 14450, at **3-6 (S.D.N.Y. Nov. 14, 1978). In this case, the couple’s physician, believing that Mrs. Del Zio could not reproduce naturally, suggested that the couple attempt conception by IVF, a relatively new and experimental treatment at the time. *Id.* at **2-3. The chairman of obstetrics and gynecology, however, learned of the experimental procedure within his department and ordered the culture destroyed. *Id.* at *3. The plaintiffs filed suit for both conversion and intentional infliction of emotional distress. *Id.* at *4. The jury awarded the plaintiffs \$50,000 in damages for the second claim only. *Id.* at *11.

⁹⁵ Walter, *supra* note 79, at 962; *see also* Andrews, *supra* note 79, at 407.

⁹⁶ Walter, *supra* note 79, at 962.

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parties have not made any agreements as to the disposition of their preembryos, such as when death or divorce occurs, have become increasingly problematic. Although there have been precedent-setting cases involving disputes over the disposition of these preembryos in states such as Tennessee,⁹⁷ New York⁹⁸ and New Jersey,⁹⁹ state legislatures should provide the courts with greater guidance in this area.¹⁰⁰ Today judges rather than the gamete providers are deciding matters pertaining to procreational rights.

A. *Davis v. Davis: Supreme Court of Tennessee, 1992*

Davis v. Davis was the first major case decided by a state's highest court with regard to the custody of preembryos.¹⁰¹ In *Davis*, the Tennessee Supreme Court agreed with the appellate court that there is a constitutional right to avoid procreation when no pregnancy has taken place.¹⁰² The Davises could not procreate naturally and attempted six IVF procedures, none of which led to

⁹⁷ See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (holding that there is an equal right to both procreate and avoid procreation and that the interests of each party must be weighed).

⁹⁸ See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (upholding the validity of predisposition agreements upon the divorce of the progenitors).

⁹⁹ See, e.g., *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (holding that even if the husband and wife in this case had entered into an unambiguous agreement regarding the disposition of their frozen preembryos, because it is against public policy, the court will not enforce an agreement that would compel one donor to become a parent against his or her will).

¹⁰⁰ See *infra* Part III (discussing the different legislation regulating IVF).

¹⁰¹ *Davis*, 842 S.W.2d at 589.

¹⁰² *Id.* at 589, 590, 601. The Tennessee Supreme Court stated that it granted review of the case not because it disagreed with the basic legal analysis utilized by the intermediate court, but because the issue was of great importance. *Id.* at 590. The court went on to hold that there is a fundamental right to privacy so that "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do." *Id.* at 602.

a pregnancy.¹⁰³ As a result, seven extra frozen preembryos were created.¹⁰⁴ When the Davis marriage dissolved, the couple could not agree on the disposition of the preembryos.¹⁰⁵ The parties had not executed a prior written agreement to govern the disposition of the preembryos in the event of divorce.¹⁰⁶ While Mary Sue Davis wanted to either retain the preembryos for her own use or donate them to a childless couple, Junior Davis vehemently opposed fathering a child and having it raised by others.¹⁰⁷ Concluding that the preembryos were “human beings,”¹⁰⁸ the trial court gave custody to Mary Sue for the purpose of carrying them to term through implantation.¹⁰⁹ The appellate court reversed the decision, finding that the husband’s interest in avoiding procreation was constitutionally protected and that there was no compelling state interest to justify the transfer against the will of Junior Davis.¹¹⁰ Although the Tennessee Supreme Court agreed with the intermediate court’s decision of avoiding forced procreation, it disagreed with its legal analysis and created a new legal framework to provide guidance in this area.¹¹¹

The Tennessee Supreme Court refused to define a preembryo

¹⁰³ *Id.* at 591.

¹⁰⁴ *Id.* at 589.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 590.

¹⁰⁷ Initially, Mary Sue Davis wanted the preembryos for another IVF procedure to become pregnant. *Id.* at 589-90. However, at the time the case was before the Tennessee Supreme Court, she had remarried and wanted the authority to donate the preembryos to a childless couple. *Id.*

¹⁰⁸ *Id.* at 589 (stating that the trial court defined the preembryos as human beings “from the moment of fertilization”).

¹⁰⁹ *Id.*

¹¹⁰ *Davis v. Davis*, No. E-14496, 1990 WL 130807, at *3 (Tenn. Ct. App. Sept. 13, 1990) (stating that “[i]t would be . . . repugnant to order [the husband] to bear the psychological, if not the legal, consequences of paternity against his will”).

¹¹¹ *Davis*, 842 S.W.2d at 590 (stating that review was granted because of the importance of the case in developing new law regarding reproductive technologies, and because the decision of the intermediate court “[did] not give adequate guidance to the trial court in the event the parties cannot agree”).

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as either property under the sole control and disposition of its progenitors,¹¹² or as a person who is afforded separate legal interests.¹¹³ Instead, the court decided that a preembryo occupied an interim level status in which it is entitled to special respect due to its potential for life.¹¹⁴ Holding that preembryos lacked the same legal protections afforded to fetuses,¹¹⁵ the court found that, as a matter of law, progenitors should have primary decision-making authority regarding their preembryos.¹¹⁶ The court determined that the right of procreational autonomy is composed of two equal rights: the right to procreate and the right to avoid procreation.¹¹⁷ The court further held that “[a]n interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood.”¹¹⁸ The court concluded that because Mary Sue ultimately did not want to use the preembryos herself, Junior’s right to avoid procreation outweighed her wish to have the cells donated.¹¹⁹ If Mary Sue had desired to use the preembryos herself, however,

¹¹² *Id.* at 596 (holding that a preembryo is not “property” since it has the “potential for developing into independent human life, even if it is not yet legally recognizable as human life itself”).

¹¹³ *Id.* at 595 (pointing out that the legality of abortion indicates that while preembryos “are accorded more respect than mere human cells because of their burgeoning potential for life . . . they are not given legal status equivalent to that of a person already born [even though they may have reached viability]”).

¹¹⁴ *Id.* at 597 (stating that “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life”).

¹¹⁵ *Id.* at 596-97. To further emphasize the difference between preembryos and fetuses, the court pointed out that while “[l]eft undisturbed, a viable fetus has an excellent chance of being brought to term and born live . . . a preembryo in a petri dish, [even if] later transferred, has only a 13-21 percent chance of achieving implantation.” *Id.* at 595 n.19.

¹¹⁶ *Id.* at 597.

¹¹⁷ *Id.* at 601.

¹¹⁸ *Id.* at 603 (citing that the courts have previously addressed abortion cases, which deal with the question of gestational parenthood, as well as questions pertaining to child-bearing and child-rearing aspects of parenthood).

¹¹⁹ *Id.* at 604.

the court would then have considered whether she could have biological children through alternate means.¹²⁰

Although the couple did not execute a prior written agreement as to the disposition of the preembryos upon divorce, the court nevertheless presumed such agreements to be valid and enforceable.¹²¹ The court found that if the initial contract could be later modified by mutual accord,¹²² these agreements would protect parties against unconscionable risks.¹²³ Furthermore, enforcement of such agreements would ensure that the progenitors retain authority over the disposition of their preembryos.¹²⁴ The *Davis* decision was remarkable not only because it was the first case to address this issue,¹²⁵ but also because the court in *Davis* thoughtfully set forth an analytical framework for determining the status and fate of frozen preembryos.

¹²⁰ *Id.* (holding that such other means can include attempts at IVF or adoption).

¹²¹ *Id.* at 597 (stating that the conclusion that agreements should be enforced is premised on “the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition”).

¹²² *Id.*

¹²³ *Id.* The court recognized that infertile couples are highly emotional: [T]he parties’ initial “informed consent” to IVF procedures will often not be truly informed because of near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds. Providing that the initial agreement may later be modified *by agreement* will . . . protect the parties against . . . the risks they face in this regard.

Id.

¹²⁴ *Id.*

¹²⁵ *Davis* was the first major case to reach a state’s highest court and to address the problems that arise with frozen preembryo disposition. Although the couple in the case did not execute a prior written agreement as to the disposition upon divorce, the court suggested that an agreement could be sustained so long as it could be modified by mutual accord in the future. *Id.* at 597, 604.

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B. Kass v. Kass: Court of Appeals of New York, 1998

Six years after the *Davis* decision, the New York Court of Appeals supported the validity of predisposition contracts in *Kass v. Kass*.¹²⁶ Like *Davis*, *Kass* involved a dispute between a divorcing couple over their frozen preembryos. The wife wanted to use the preembryos after the divorce to become pregnant.¹²⁷ The husband, citing to a consent form the parties signed before the IVF procedure,¹²⁸ claimed that the couple had agreed to donate the preembryos for scientific research.¹²⁹

The court unanimously held that the consent form signed by both parties demonstrated the couple's intent to donate the excess preembryos to scientific research, and therefore, the agreement should be enforced.¹³⁰ Furthermore, it held that agreements in

¹²⁶ 696 N.E.2d 174 (N.Y. 1998) (holding that predisposition agreements upon the divorce of the progenitors are valid).

¹²⁷ *Id.* at 177.

¹²⁸ *Id.* at 176. The couple underwent numerous IVF attempts and signed the consent agreement right before the final procedure. *Id.* The second part, entitled "INFORMED CONSENT FORM NO. 2 ADDENDUM NO. 2-1: CRYOPRESERVATION-STATEMENT OF DISPOSITION," stated the following:

We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. *We are to indicate our choices by signing our initials where noted below.*

1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use by us in a future IVF cycle.

2. 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 the IVF program to (choose one):

(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.

Id. at 176-77 (emphasis in original).

¹²⁹ *Id.* at 175, 176-77.

¹³⁰ *Id.* at 180. Similarly, other prior written directives, such as living

general must be enforced to promote important policy goals.¹³¹ First, the court found that advance directives encourage parties to think through possible consequences of their actions and to carefully detail their wishes in writing.¹³² Second, such expressions minimize ambiguity and “maximize procreative liberty by reserving to the progenitors the authority to make, what is in the first instance a quintessentially personal [and] private decision.”¹³³ Third, having enforceable written agreements ensures the predictability and certainty necessary for the continuance of IVF programs.¹³⁴ Lastly, the court recognized that if the public realizes and understands that courts will enforce such agreements, it underscores the “seriousness and integrity of the consent process.”¹³⁵

Although the Court of Appeals of New York strongly favors the use of written agreements,¹³⁶ it suggested in a footnote that

wills and health care proxies, have been enforced. *See, e.g.*, *Cohen v. Bolduc*, 760 N.E.2d 714, 717-18 (Mass. 2002) (noting that “every State has enacted legislation permitting individuals to give advance directives for health care decisions should they become incapable of communicating their own wishes”); Jill Hollander, Note, *Health Care Proxies: New York’s Attempt to Resolve the Right to Die Dilemma*, 57 BROOK. L. REV. 145, 160 (1991) (finding that forty-two states and the District of Columbia have enacted statutes recognizing the validity of living wills, which are “[w]ritten directives to the family, physicians and hospital that life-prolonging treatment should not be administered in the event the person becomes incompetent”).

¹³¹ *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* The court recognized that all contracts dealing with some future event are difficult to deal with because they contemplate the unknown. *Id.* However, events such as death, divorce, and incapacity make it even more necessary for the court to uphold advance predisposition agreements since they reflect the parties’ intent before disputes erupt. “To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.” *Id.* at 180-81.

¹³⁶ *Id.* at 180 (agreeing with the Tennessee Supreme Court in *Davis* that agreements between progenitors should be enforced and that “[e]xplicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice,

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had the appellant raised the claim that the agreement was invalid because of a significant change in circumstances, or that procreation was no longer desired, it would have been unenforceable as a violation of public policy.¹³⁷ Although it is understandable for any court to refrain from making a per se rule, this court-created exception renders New York's approach as to the enforceability of such contracts undeterminable.¹³⁸ This footnote weakens what could have been a powerful position for the validity of advanced directives. Consequently, couples who have such covenants are still unable to predict whether their agreements are enforceable or binding.

C. J.B. v. M.B.: Supreme Court of New Jersey, 2001

In a recent New Jersey Supreme Court decision, the court reaffirmed the general consensus that agreements are valid in custody disputes over frozen preembryos despite finding the specific contract in the case to be invalid because of ambiguity.¹³⁹ In *J.B. v. M.B.*, the wife, J.B., wanted to destroy the

where the intangible costs of any litigation are simply incalculable.”).

¹³⁷ *Id.* at 179 n.4 (stating that the “[p]arties’ agreement may, of course, be unenforceable as violative of public policy Significantly changed circumstances also may preclude contract enforcement.”). The court noted however, that since these particular arguments and issues were not argued by Maureen Kass, it would not resolve these outstanding issues in the current case. *Id.*

¹³⁸ This differs from the dictum in *Davis*, which allowed for modification of the contract by mutual accord. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). In *Davis*, the court presumably would enforce a pre-existing agreement between the parties despite changed circumstances in the absence of modification. *Id.* In contrast, the *Kass* court reserved the ability to declare a contract invalid if finding a change of circumstances or intentions. *Kass*, 696 N.E.2d at 179 n.4. Thus, the *Kass* court was less deferential to the agreement between the parties. Arguably it was more deferential to the parties’ present intent, taking account of changed circumstances. The disposition of preembryos, however, is best left to the parties’ intentions manifested in an agreement that they can later modify, rather than the post facto judgment of a court.

¹³⁹ See *J.B. v. M.B.*, 783 A.2d 707, 708 (N.J. 2001).

preembryos while the husband, M.B., urged the court to enforce the contract they made prior to IVF.¹⁴⁰ The contract stated that if the couple divorced, all unused preembryos would be relinquished to the custody of the clinic unless there was a separate determination by the courts as to “who takes control and direction of the tissues.”¹⁴¹ In arguing for the validity of the agreement, M.B. insisted that it was the couple’s mutual desire to give the preembryos to the clinic so that they could be donated to an infertile couple.¹⁴²

While the intermediate appellate court held that any agreement between the parties to use or donate the preembryos would be unenforceable as a matter of public policy,¹⁴³ the New Jersey Supreme Court found no clear agreement between the parties and the clinic as to the intended disposition of the preembryos.¹⁴⁴ Since there was no clear demonstration as to the meaning of the agreement, the court concluded that the wife’s right to avoid procreation was stronger than the husband’s wish to donate¹⁴⁵ and ordered the preembryos destroyed.¹⁴⁶ The court

¹⁴⁰ *Id.* at 710.

¹⁴¹ *Id.*

¹⁴² *Id.* Furthermore, in his cross-motion, M.B. claimed that, as Catholics, he and his wife had many long and serious conversations regarding the entire process, and it was their mutual intention to donate any unused preembryos to infertile couples. *Id.*

¹⁴³ *J.B. v. M.B.*, 751 A.2d 613, 618 (N.J. Super. Ct. App. Div. 2000) (holding that even if the agreement was unambiguous, the court would not compel one gamete donor to become a parent against his or her will and that “[a]s a matter of public policy . . . forced procreation is not an area amenable to judicial enforcement”).

¹⁴⁴ The court stated that “the thrust of the document signed by J.B. and M.B. is that the . . . Center obtains control over the preembryos unless the parties choose otherwise in a writing, or unless a court specifically directs otherwise in an order of divorce,” and that the agreement contained conditional language and thus, was ambiguous. *J.B.*, 783 A.2d at 713.

¹⁴⁵ *Id.* at 717 (holding that because the husband retains the capacity to father children, “M.B.’s right to procreate is not lost if he is denied an opportunity to use or donate the preembryos We will not force J.B. to become a biological parent against her will.”); *see also Davis*, 842 S.W.2d at 589 (holding that a husband’s right to avoid procreation outweighed a wife’s desire to donate the preembryos to an infertile couple).

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further held that formal, unambiguous contracts adequately indicating the parties' intentions are enforceable if each party maintains the right to change his or her mind about the terms of disposition in the future.¹⁴⁷ The court, however, did not describe the elements of a disposition agreement that would adequately indicate the parties' intention, nor did it specify sufficiently some of the public policy concerns that would invalidate such agreements.

Although these three cases demonstrate that the highest state courts of Tennessee, New York, and New Jersey would likely enforce clear, unambiguous agreements regarding custody of frozen preembryos, many other states have yet to address this issue. This unpredictability as to the courts' reaction to such agreements is exacerbated by the fact that other jurisdictions explicitly reject such contracts.¹⁴⁸ As with many issues dealing with the intricacies of family law, courts may invalidate

¹⁴⁶ *J.B.*, 783 A.2d at 720. The court indicated that if M.B. chose to pay the cost of cryopreservation, it would allow the preembryos to be frozen indefinitely. *Id.*

¹⁴⁷ *Id.* Furthermore, although the court did not express an opinion as to situations in which a party who is no longer fertile seeks the use of the stored preembryos against the wishes of his or her partner, the court noted that adoption might be a consideration in future judicial determinations over the custody of frozen preembryos as an alternative to infertile individuals attempting to have children. *Id.* Not only is this concept fatally flawed but it also restricts one's freedom to procreate. Although the law recognizes adopted children as having the same legal status as if they were biological, in this context, the possibility of having one's own biological children by gaining custody of his or her frozen preembryos should not be equated with the possibility of adoption for various reasons. *See, e.g.*, David L. Theysen, Note, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711, 724-29 (1999) (noting that adoption for many prospective parents can be difficult and can cost as much as IVF; hence, courts should not assume that a party may just adopt to achieve parenthood without sufficient evidence verifying the likelihood of this possibility).

¹⁴⁸ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1051 (Mass. 2000) (holding that even if disposition agreements were clear and unambiguous, the court will not compel one to become a parent against his or her will as a matter of public policy).

agreements because of public policy.¹⁴⁹ This should not, however, be taken to mean that the legislatures cannot design statutes that provide clear and informative model consent agreements. With such legislative actions, even if the courts invalidate agreements because of specific public policy conflicts, the agreement, at least, would not be void because of ambiguous terms.

In fact, it would be more beneficial to the IVF industry if agreements were invalidated for public policy reasons rather than for ambiguous terms. Invalidating agreements because of public policy concerns gives clinics, attorneys, and IVF participants an understanding that contracts should not be used because the courts will not accept such arrangements. Voiding disposition agreements because of ambiguous terms or circumstances, however, as many courts have done, does little to provide guidance to future parties and still leaves open the question as to what constitutes an agreement that will be upheld by the courts.¹⁵⁰ Without direction from state laws as to the validity of such agreements or guidance as to an appropriate, enforceable contract, courts will continue to provide a non-uniform body of law. This lack of uniform guidance will continue until legislatures enact comprehensive statutes that will sufficiently maximize procreative rights and define the status of a preembryo.

III. LEGISLATION

Currently, the federal government minimally regulates the IVF industry.¹⁵¹ The existing regulations were drafted in response to public outcry for correct statistical data in Assisted

¹⁴⁹ Shapiro, *supra* note 7, at 118.

¹⁵⁰ See, e.g., *J.B.*, 783 A.2d at 714 (stating that “a formal, unambiguous memorialization of the parties’ intentions would be required to confirm their joint determination”).

¹⁵¹ Meena Lal, Comment, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 533 (1997) (indicating that the Assisted Reproductive Technology Programs Act is the only federal act regulating the industry).

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Reproductive Technology (“ART”) procedures,¹⁵² rather than as a result of congressional action. In the late 1980s, the general public expressed concern that some IVF clinics exaggerated their success rates.¹⁵³ These allegations by IVF participants and critics eventually led Congress to pass the Fertility Clinic Success Rate and Certification Act of 1992.¹⁵⁴ The act, among other things, requires clinics to report annually its pregnancy rates and authorizes the Center for Disease Control to develop and oversee certification procedures of IVF facilities.¹⁵⁵ Despite the federal government’s attempt to protect IVF participants,¹⁵⁶ the federal statute fails both to keep up with the growing advances in ART procedures and to address core ethical issues.¹⁵⁷ In fact, the lack

¹⁵² *Id.* (noting that the federal act was enacted to require the reporting of success rates and for the development of a state-run certification program of embryo laboratories); *see also* Note, *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092, 2106 (1996) (noting that “[t]he number of clinical pregnancies achieved also matters to consumers because, by comparing that number to the number of live births, a woman can estimate her risk of experiencing the physical and emotional traumas of miscarriage”).

¹⁵³ Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 124 (2001) (noting that the enacted laws merely provide for medical screening guidelines, clinical reports and insurance coverage guidelines).

¹⁵⁴ 42 U.S.C. § 263 (2001). The act was proposed on November 26, 1991 and passed on October 8, 1992. *See* H.R. REP. NO. 102-1096, at 26 (1992). The House report states that the purpose of the act is to “provide the public with comparable information on the effectiveness of infertility services and to assure the quality of these services by providing for the certification of embryo laboratories.” *Id.*

¹⁵⁵ *See* 42 U.S.C. § 263[a-1]–[a-7] (2001).

¹⁵⁶ By requiring the reporting of success rates, the enactment of the Assisted Reproductive Technology Programs Act protects the public from potentially misleading information from fertility laboratories and clinics about their statistics and ability to help infertile couples conceive.

¹⁵⁷ ART advances that have yet to be fully addressed by federal regulation include the following: (1) Gamete Intrafallopian Transfer (“GIFT”), where fertilization occurs in the body rather than in a laboratory as in IVF; (2) Zygote Intrafallopian Transfer (“ZIFT”), where the preembryos are placed directly into the fallopian tube; and (3) cryopreservation, the freezing and storage of bodily cells. *See, e.g.*, Jean M. Eggen, *The “Orwellian Nightmare”*

of federal legislation regarding the legal status of frozen preembryos and the validity of predisposition contracts suggests a conscious decision by the federal government to avoid the issue. This failure has caused a great deal of discrepancy and inconsistency among the states.¹⁵⁸

The ART and IVF industries are subject to many different standards of compliance created by different statutory laws.¹⁵⁹ Statutes, such as those enacted in Louisiana¹⁶⁰ and New Mexico,¹⁶¹ that protects preembryos create problems for the

Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies, 25 GA. L. REV. 625, 628-32, 635-37 (1991).

¹⁵⁸ Currently, nine states have enacted statutes that attempt to resolve some of the problems associated with IVF. FLA. STAT. ANN. § 742.17 (West 2001) (requiring the commissioning couple and the treating physician to enter into a written agreement that provides for the disposition of the cells in the event of death, divorce, or other unforeseen circumstances); 720 ILL. COMP. STAT. 510/6(7) (2001) (providing that no person shall sell or experiment on a human ovum unless it is therapeutic to the fetus produced thereby); KAN STAT. ANN. § 65-6702 (2000) (allowing the use of any drug or device that prevents implantation of an embryo); KY. REV. STAT. ANN. § 311.715 (Banks-Baldwin 2001) (prohibiting the use of public funds for IVF treatment if such procedures result in the intentional destruction of a human embryo); LA. REV. STAT. ANN. § 9:129 (West 2001) (providing that an in vitro fertilized human ovum exists as a juridical person and shall not be intentionally destroyed); MO. ANN. STAT. § 1.205(1) (West 2001) (providing that life begins at the moment of conception); N.H. REV. STAT. ANN. § 168-B:1, B:13-16 (2001) (defining terms of eligibility for IVF treatment, limiting the usage of preembryos, and requiring the judicial pre-authorization of all written consent agreements); N.M. STAT. ANN. § 24-9A-[1]-[7] (Michie 2001) (stating that all preembryos created must be implanted); PA. STAT. ANN. tit. 18, § 3213 (2001) (providing for IVF reporting requirements).

¹⁵⁹ Andrews, *supra* note 79, at 406. Without clear, uniform laws among the states, physicians are reluctant to perform such procedures since it is uncertain whether they may be prosecuted for any subsequent loss of preembryos. *See also* Jadrnack, *supra* note 9 (noting that in New Mexico with “the absence of clear law, fertility clinics find themselves wondering exactly where their liability lies”).

¹⁶⁰ LA. REV. STAT. ANN. §§ 9:126, 129 (West 2001) (finding that an in vitro fertilized human ovum exists as a juridical person and cannot be destroyed intentionally).

¹⁶¹ N.M. STAT. ANN. § 24-9A-[1]-[7] (stating that all preembryos created

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continued use of IVF.¹⁶² When left to create their own laws, states may create “vague duties for physicians or establish extremely high standards of care . . . [which] may make it unlikely that physicians will offer the techniques.”¹⁶³ Louisiana’s statute making preembryos “juridical person[s],”¹⁶⁴ for example, may deter specialists from even offering the most basic IVF procedure for fear of future prosecution by the state.

On the otherhand, Florida’s statute is the antithesis of Louisiana and New Mexico’s implantation requirement. Florida allows for the destruction of preembryos and encourages parties to sign predisposition agreements prior to IVF in cases of divorce, death, or any other unforeseeable circumstances.¹⁶⁵ If a written agreement is absent, the custody of the gametes will

must be implanted and thus cannot be intentionally destroyed).

¹⁶² For example, the state of Illinois enacted a law providing that physicians who fertilized a woman’s egg outside her body “shall, [for purposes of an 1877 child abuse act] with regard to the human being thereby produced, be deemed to have the care and custody of a child.” Andrews, *supra* note 79, at 398. As one can imagine, this statute created great hindrances for IVF doctors in the state. *Id.* The main concern was that physicians were uncertain as to how the courts would interpret the extent of their care over the preembryos. *Id.* In an industry where simple procedures could potentially destroy an embryo, physicians were concerned that routine processes, such as the freezing and thawing of extra preembryos, would be considered a prosecutable offense. *Id.*

¹⁶³ *Id.* at 399-400.

¹⁶⁴ See *supra* note 34. “As a juridical person, the . . . ovum shall be given an identification by the medical facility . . . which entitles such ovum to sue or be sued.” LA. REV. STAT. ANN. § 9:124. One author defines Louisiana’s “juridical person” status to preembryos as that which grants such cells the right to subsist; therefore, they cannot be intentionally destroyed. Kevin U. Stephens, *Reproductive Capacity: What Does the Embryo Get?* 24 S.U. L. REV. 263, 269 (1997).

¹⁶⁵ See FLA. STAT. ANN. § 742.17 (providing that “[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, death of a spouse, or any other unforeseen circumstance”). See also KAN. STAT. ANN. § 65-6702 (complimenting the Florida statute in considering the disposal of preembryos lawful when the donors jointly decide it).

remain with the individual who provided them.¹⁶⁶ In cases dealing with preembryos, decision-making authority regarding disposition must be based on the mutual consent of both parties.¹⁶⁷ In addition to mandating predisposition agreements, Florida is the only state that has enacted legislation that explicitly recognizes the validity of these contracts.¹⁶⁸

Intervention by state legislatures to create some consistency and uniformity among the states is inevitable.¹⁶⁹ Although some states have enacted their own statutes as a result of the absence of federal guidelines, many of these statutes differ greatly as to the definition of life, the rights and status of a preembryo, and the ability of IVF participants to choose the fate and disposition of their gametes.

IV. ANALYSIS

With only a vague line of U.S. Supreme Court cases addressing issues of abortion and the right to procreate (some dating back well over twenty years), and with virtually no guidance from the federal government, it is no surprise that the current state of the law over frozen preembryos is unsettled. Although some states have made a valiant attempt to address this issue by enacting their own legislation,¹⁷⁰ statutes that mandate implantation, such as those in Louisiana and New Mexico, are problematic.¹⁷¹ The right to procreate is significant, and this dilemma can only be alleviated with contractual enforcement.

Since contracts can be invalidated if they violate public policy

¹⁶⁶ See FLA. STAT. ANN. § 742.17(1).

¹⁶⁷ See *id.* § 742.17(2).

¹⁶⁸ Coleman, *supra* note 32, at 74.

¹⁶⁹ Ellen Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 940 (2000) (arguing that the legislation be enacted to oversee the contracting process in order to achieve its assumed goal of enhancing procreative liberty).

¹⁷⁰ See discussion *infra* Part III (discussing and comparing the Florida, Louisiana, and New Mexico statutes).

¹⁷¹ See discussion *infra* Part III (discussing why certain state statutes are problematic).

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or constitutional principles, legislators should provide guidelines for appropriate disposition agreements. Advance disposition agreements provide individuals with the opportunity to set forth and establish their own personal interests, viewpoints, and ethics for either procreation or the avoidance of procreation. If statutes similar to Florida's are enacted, the participants' interests, as reflected by their agreement, would be the courts' primary concern if litigation occurs. Advance directives, therefore, sidestep the need to classify preembryos as either persons or property. The court need only determine the circumstances and intent of the parties prior to signing the agreement.¹⁷² Furthermore, only a statute such as Florida's can withstand constitutional scrutiny because it does not force one to procreate against his or her will and ensures that prior agreements respecting the participants' wishes are enforced.

A. Mandatory Implantation Requirements Infringe on Procreative Rights

Those states that mandate the implantation of preembryos generally perceive the cells as "persons."¹⁷³ Once the legal status of a preembryo is upgraded by statute to that of a "person," a legitimate interest is created requiring the state's protection.¹⁷⁴ Furthermore, mandatory preembryo donation may have considerable impact on IVF and may deter couples from participating in treatment altogether. This may rob them of their chance to ever reproduce.¹⁷⁵ Louisiana's statute mandating implantation or donation severely limits the choices available to the gamete providers.¹⁷⁶ Furthermore, all options that are valid under Louisiana law have grave detrimental consequences for the

¹⁷² See Robertson, *supra* note 59, at 414.

¹⁷³ See, e.g., LA. REV. STAT. ANN. § 9:129 (providing that an in vitro fertilized human ovum exists as a juridical person and shall not be intentionally destroyed); N.M. STAT. ANN. § 24-9A-[1]-[7] (stating that all preembryos created cannot be harmed and, thus, cannot be destroyed).

¹⁷⁴ Arado, *supra* note 15, at 252.

¹⁷⁵ See Andrews, *supra* note 79, at 400.

¹⁷⁶ LA. REV. STAT. ANN. § 9:129.

participants. In Louisiana, the couple can either give up their preembryos for adoption and suffer the psychological burden of knowing that their biological children exist somewhere,¹⁷⁷ or they can use all of their preembryos to avoid donation and incur a dangerous risk to the woman's health if multiple pregnancies occur.¹⁷⁸

Although Louisiana's statute holds that a preembryo exists as a "juridical person,"¹⁷⁹ to bestow this legal status upon these cells is problematic under current caselaw. One concern is that even fetuses, which are more advanced and developed than preembryos,¹⁸⁰ are not held to be persons under the United States Supreme Court decisions¹⁸¹ interpreting the Constitution¹⁸² or

¹⁷⁷ Robertson, *supra* note 59, at 405.

¹⁷⁸ *Id.* See discussion *infra* note 224.

¹⁷⁹ See LA. REV. STAT. ANN. § 9:129 (West 2001).

¹⁸⁰ Once the zygote, a fertilized egg, is formed, it begins to divide and attaches itself to the uterine wall while it continues to divide for a period of eight weeks. See Stephens, *supra* note 164, at 266-67. Only after the main organs are developed has the preembryo become a fetus. See *id.* at 267. See also Joel N. Ephross, Note, *In Vitro Fertilization: Perspectives on Current Issues*, 32 JURIMETRICS J. 447, 459 (1992) (stating that "[a]n embryo may have a unique genetic identity, but lack the 'cluster of features' associated with a person; or, lack sufficient potential for development to be cognizant of independent protection").

¹⁸¹ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (holding that personal autonomy recognizes limits on governmental power to mandate medical treatment); *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 438 n.27 (1983) (holding that the state is free to require certain types of abortions to be performed only in hospitals); *Roe v. Wade*, 410 U.S. 113, 156-59 (1973) (noting that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment"); *Roe*, 410 U.S. at 162 (stating that "the unborn have never been recognized in the law as persons in the whole sense"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

¹⁸² U.S. CONST. AMEND. XIV, § 1. The Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

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among the scientific community.¹⁸³ In *Roe v. Wade*, the Supreme Court specifically held that the state's interest in potential life should only be considered from the point of viability.¹⁸⁴ Furthermore, scientific data supports the notion that pregnancy does not occur at the moment of conception but rather at the point when the preembryo attaches to the uterine wall.¹⁸⁵ Under the *Roe* precedent, therefore, it is troubling that Louisiana's statute deeming frozen preembryos as separate legal entities would withstand constitutional scrutiny since the preembryos are neither attached to a uterine wall nor within in a woman's womb.

Despite this troubling concept, however, statutes defining preembryos as "juridical persons" may be held constitutional since such laws are distinct from "right to abortion" cases.¹⁸⁶ Under current caselaw, states can define preembryos and fetuses as persons with protective rights so long as their interpretation does not interfere with a woman's bodily integrity.¹⁸⁷ Louisiana's definition of a preembryo, therefore, may withstand constitutional scrutiny since frozen preembryos are not sustained in a woman's body and will not trigger the privacy interests enunciated in *Roe*.¹⁸⁸

Statutes that define preembryos as persons and require mandatory implantation of cells interfere with a person's procreative rights and thus, may offend the Fourteenth Amendment.¹⁸⁹ The Supreme Court has held that procreation is

¹⁸³ *Roe*, 410 U.S. at 153.

¹⁸⁴ *Id.* at 160. Viability is usually held to be the time when the fetus reaches twenty-eight weeks or about seven months. *Id.*

¹⁸⁵ Guzman, *supra* note 27, at 207. Since fetuses are not recognized as persons under the law, one must ask if a frozen preembryo within a glass tube, sustained only with the use of liquid nitrogen, can be recognized as an independent entity by any state or court.

¹⁸⁶ Rao, *supra* note 90, at 1479.

¹⁸⁷ *Id.*

¹⁸⁸ Melchoir, *supra* note 30, at 950 (noting that since frozen preembryos exist in petri dishes, "[t]he bodily integrity of the woman would not be breached if she were not allowed to destroy her frozen embryos as it would be if she were not allowed to have an abortion").

¹⁸⁹ U.S. CONST. AMEND. XIV, § 1. *See also* *Roe v. Wade*, 410 U.S. 113

“fundamental”¹⁹⁰ and “one of the basic civil rights of [persons].”¹⁹¹ To interfere with this right, therefore, requires a compelling state interest.¹⁹² Although disputes over frozen preembryos differ from the previous cases addressed by the Supreme Court, absent language or decisions to the contrary, there is no reason to suspect that the right to procreate or avoid procreation with respect to IVF violates the fundamental freedoms established by the Court. Directives that force couples to either use their preembryos or forfeit them for adoptive implantation restricts one’s freedom to procreate or avoid procreation.¹⁹³

Another problem with mandatory implantation statutes is that they “infringe on procreative rights of IVF participants without identifying an interest that the state seeks to protect.”¹⁹⁴ To justify this interference with procreative liberties, the burden of proof is on the government to demonstrate that there is both the compelling need for the law and that the restriction is not overly broad.¹⁹⁵ Although the state can argue that it has an interest in protecting life, this purported interest is not compelling under current caselaw or scientific opinions. It is not practical, moreover, since preembryos have not reached the minimum

(1973).

¹⁹⁰ *Id.* at 156.

¹⁹¹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that an Oklahoma statute that provided for the sterilization of criminals who were convicted more than two times for certain felonies was unconstitutional on the grounds of equal protection since convicted felons were not treated equally).

¹⁹² *See Roe*, 410 U.S. at 155. The Court, citing *Kramer v. Union Free Dist.*, 395 U.S. 621, 627 (1969), held that where fundamental rights are concerned, limiting these rights can only be justified by a “compelling state interest.” *Id.*

¹⁹³ *See Clifton Perry & L. Kristen Schneider, Cryopreserved Embryos: Who Shall Decide Their Fate?* 13 J. LEGAL MED. 463, 469-74 (1992) (providing a constitutional analysis of landmark cases that have established an individual’s right to procreate and avoid procreation).

¹⁹⁴ Cynthia Reilly, *Constitutional Limits on New Mexico’s In Vitro Fertilization Law*, 24 N.M. L. REV. 125, 128 (1994).

¹⁹⁵ *See Andrews*, *supra* note 79, at 400.

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developmental stage necessary to constitute "life."¹⁹⁶

Furthermore, statutes that require gamete providers to donate their preembryos to other couples for implantation serve as a dual infringement on procreative rights. If couples choose not to use their preembryos, not only must they relinquish their rights in determining the disposition of their own biological DNA, but also by mandating implantation, they face having a biological child carried and reared by a complete stranger. Mandated implantation requirements "place upon gamete providers the burden of knowing that they may have a living genetically related child."¹⁹⁷ This strikes at the very notion of individual rights and procreative freedom. This also may lead to great judicial inefficiencies when courts are constantly called upon to make ad hoc determinations regarding the best interest of the child in each and every case.¹⁹⁸

As the Tennessee Supreme Court noted, unlike a viable fetus in its mother's womb who has an excellent chance of being brought to term and born alive, a preembryo that is transferred by IVF has only a 13% to 21% chance of achieving implantation.¹⁹⁹ Even if implanted successfully, only 56% to 75% of these pregnancies result in live births.²⁰⁰ Moreover, despite the presumed statutory goal of maternal and fetal protection,²⁰¹ mandatory implantation may actually work to the detriment of

¹⁹⁶ See Elizabeth G. Patterson, *Human Rights and Human Life: An Uneven Fit*, 68 TUL. L. REV. 1527, 1529, 1550 (1994) ("[A] human who has not yet been born, reached viability, or satisfied some other criterion for the beginning of life, is not considered a person in whom human rights inhere Traditionally, the law has not treated the fetus as a person.").

¹⁹⁷ Elisa K. Poole, Comment, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67, 75 (1990).

¹⁹⁸ Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 140 (1993).

¹⁹⁹ *Davis v. Davis*, 842 S.W.2d 588, 595 n.19 (Tenn. 1992).

²⁰⁰ *Id.*

²⁰¹ Bruce Nolan, *LA Rejects OK on Embryo Tests*, NEW ORLEANS TIMES-PICAYUNE, Oct. 2, 1994, available at 1994 WL 3864404 (stating that "Louisiana law prohibits the production of embryos for any other purpose but creating a child").

both beings.²⁰² By substituting a physician's individualized decision-making judgment as to the best interest of the woman with a legislative mandate, these statutes may harm the recipient by forcing the implantation of less suitable preembryos.²⁰³ In addition, the Supreme Court has recognized that the "full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'"²⁰⁴ Without devising a mechanism for medical conventions, these statutes invite burdensome medical predicaments and may frustrate the established "medical protocol[s] designed to ensure the health of the mother or fetus that might discourage a physician from implanting every [pre]embryo."²⁰⁵ Even though the state may require implantation, the possible risk of multiple gestations may "require a mother and her physician to abort some or all of the fetuses after the preembryos are implanted."²⁰⁶ There is no doubt that such an occurrence would defeat the purpose of having a statute in the first place.

Although Louisiana's law seems to protect these "persons," it does not provide clear guidelines for preembryos after they are donated.²⁰⁷ While adoption laws exist to guard the interests of children already born,²⁰⁸ states that mandate preembryo donation

²⁰² Reilly, *supra* note 194, at 128.

²⁰³ Stephens, *supra* note 164, at 269 (claiming that if Louisiana does not modify its position of treating preembryos as juridical persons, "modifications in the law need to be made to allow for . . . defective preembryos and other tort problems such as medical liability").

²⁰⁴ *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416, 427 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ LA. REV. STAT. ANN. § 9:129.

²⁰⁸ While there are agencies to protect adopted or foster children, it is unclear whether such precautions are taken to ensure that adoptive parents of frozen preembryos are providing safe and healthy environments for the resulting children. *See, e.g.*, The New York State Department of Health, *Adoption and Medical Information Registry*, available at <http://www.health.state.ny.us/nysdoh/vr/reginfo.htm> (last visited Apr. 28, 2002) (stating that the web site provides three services that do the following: (1) help adoptees obtain

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do not have similar protections to secure the interests of children conceived from anonymously donated preembryos.²⁰⁹ This lack of state legislation can have a severe impact on everyone involved. Issues such as unknown medical histories,²¹⁰ possible abuse and

information about their birth parents; (2) facilitate the exchange of information between adoptees and their birth parents; and (3) enable adoptees to obtain medical information). While many states have agencies that oversee the process of adoption and provide services for adoptees to obtain crucial information about their medical history and past, there does not seem to be similar authorities for children born from donated preembryos. To adopt a child in New York State, adoptive parents must meet certain conditions, obtain consent from appropriate authorities, and comply with general provisions relating to adoptions. See New York State Bar Association, *Adoption in New York*, available at <http://www.nysba.org/public/pamphlets/adoption.html> (last visited Apr. 28, 2002). There are no similar precautions and monitoring authorities established for donated preembryos.

²⁰⁹ See, e.g., N.M. STAT. ANN. § 32A-5-[2] & [3] (2001) (establishing a framework for child protection, economic security and legal equivalency for adoptive children but defining an “adoptee” as “a person who is the subject of an adoption petition”). Frozen preembryos given to surrogate parents are not within the definition of “adoptee” under the act, and, thus, they do not seem to be protected under New Mexico adoption laws.

²¹⁰ In addition to the possibility of intermarriage, most preembryos will be adopted and carried to term anonymously. See 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 States*, 76 WASH. U. L.Q. 759, 760 (1998) (noting that one option for fertility clinics is to give the preembryos anonymously to other couples who carry them to gestation). Thus, adoptive parents would most likely not have knowledge of the child’s biological lineage or medical history. This may pose serious medical concerns for the child in the future. Dennis J. Doherty, *Frozen Embryos: The Birth of a Legal Controversy*, 65 WIS. LAW. 15, 17 (1992) (noting that states could apply their adoption framework to cases of frozen preembryos so that such precautions and genetic relations could be recorded to resolve potential problems). Without knowledge of the child’s propensity for inheritable disorders, physicians and the child’s surrogate parents are not in the best position to make medical decisions on their behalf. *Id.* Although this lack of knowledge is true even in traditional adoptions, with the issue of mandatory adoption of frozen preembryos, the state can rectify this potential problem by making allowances for the disclosure of medical background information of the gamete providers prior to them giving up their preembryos for adoption. Unfortunately, it appears that these statutes do not

neglect by unfit surrogate parents,²¹¹ the increased number of dispersed biological siblings,²¹² and the possibility of intermarriage²¹³ or incest²¹⁴ are all questions that the statutes of Louisiana and New Mexico are ill-prepared to address.

The possibility for abuse and neglect, moreover, may be magnified in states where couples are required to donate their preembryos to surrogate parents who have not been effectively screened.²¹⁵ For example, in one tragic occurrence in Pennsylvania, a bachelor, James Austin, hired a surrogate mother to carry his child.²¹⁶ The Infertility Center of America (“ICA”) matched Austin with a surrogate who was impregnated with his

make such authorizations or considerations before forcing these couples to donate.

²¹¹ See, e.g., *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453 (Pa. Super. Ct. 1997) (holding that the surrogate mother did have standing to sue for the wrongful death of her newborn even though she was paid by the baby’s father, a bachelor, to carry his child to term).

²¹² Unlike sperm banks that have enacted policies to reduce the possibility of multiple children from one donor by setting limits to the number of children a donor can father or mandating that his sperm not be released to a woman within the same area, there are no visible safeguards for adopted preembryos. See, e.g., Rainbow Flag Health Service, *Known Donor Insemination*, available at <http://www.gayspermbank.com> (last visited Apr. 28, 2002) (claiming that its sperm bank limits the use of donor sperm to impregnate only four women). See also The Sperm Bank of NY, Inc., *Become a BioGenetics Exclusive Donor*, available at <http://www.sperm1.com> (last visited Apr. 28, 2002) (limiting the number of pregnancies from a specific sperm donor to two per state in non-anonymous donations). As such, it may be possible for women in the same county or even town to implant and gestate biological siblings without knowledge or consideration of the possible future ramifications. Furthermore, it seems none of the states keep records tracking how many “sibling” preembryos are implanted and result in births. This lack of clear precautions and data keeping opens the door to the possibility of incest and familial strains upon all persons involved.

²¹³ Andrews, *supra* note 16, at 80-83.

²¹⁴ *Id.*

²¹⁵ See, e.g., *supra* note 208.

²¹⁶ *Huddleston v. Infertility Ctr. of Am.*, 700 A.2d 453 (Pa. Super. Ct. 1997).

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sperm.²¹⁷ An ICA representative even accompanied Austin when he went to the delivery room to claim his newborn son.²¹⁸ Austin, in addition, received counseling and assistance from the clinic that matched him with the surrogate. Despite these efforts, Austin killed the newborn shortly after its birth.²¹⁹

States with mandatory implantation statutes value preembryos as “persons” and believe that such restrictions would result in born life.²²⁰ Given the current state of abortion laws in this country²²¹ and the lack of demand for donated preembryos,²²² Louisiana’s goal to promote life by mandating implantation seems futile.²²³ If a couple in Louisiana or New Mexico wishes to destroy the preembryos rather than donate them, they can exercise their right to implant the preembryos and subsequently terminate the pregnancy by a legal abortion.²²⁴ Moreover, couples

²¹⁷ *Id.*

²¹⁸ *Id.* at 456.

²¹⁹ *Id.* at 455.

²²⁰ Nolan, *supra* note 201.

²²¹ As with the right to procreate, there is an equally large number of cases supporting the notion of the right to avoid procreation. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut statute prohibiting the use of contraceptives was unconstitutional because it invaded the privacy rights of married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the holding of *Griswold* to establish the right to privacy for unmarried couples); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977) (holding that “[r]ead in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusions by the State”).

In *Roe*, the Court found that this right extended to include abortion decisions. *Roe v. Wade*, 410 U.S. 113 (1973). In expanding privacy rights to include the right of abortion, the Court considered the negative consequences that would result should the right to terminate an unwanted pregnancy be infringed by the government. *Id.* at 153. This reasoning supports the notion that the right not to procreate should be respected by the government and that the state’s interest in the potential life of preembryos is insufficient to justify forced adoptive implantation. *See supra* Part IV.A.

²²² Coleman, *supra* note 32, at 64.

²²³ Nolan, *supra* note 201.

²²⁴ Although this situation is highly impractical and unlikely to occur, this scheme is perfectly permissible and legal under Louisiana and New Mexico

can simply go to a different jurisdiction where the restrictions and regulations are better suited to their own principles to undergo IVF. Whatever minimal interest the state has in potential life is further undermined by the low probability that the birth of a child would result by the prohibition on abandonment.²²⁵ Thus, it is not clear that retaining these preembryos for donation will accomplish the state's goal in yielding more births. Given all these deterrents, it seems that the goal of encouraging new life is futile.²²⁶

B. Benefits of Advance Disposition Agreements

As an alternative to the harsh statutes of Louisiana and New Mexico, the Florida statute mandating the validity and use of disposition agreements provides the best means for resolving some of the most difficult disputes over frozen preembryos. Enforcing such agreements provides maximum procreative liberty and ensures that IVF participants fully consider the ramifications of their actions. As long as couples have the ability to modify the agreement whenever they change their minds, the contract should be valid and enforced.

There are some courts²²⁷ as well as scholars²²⁸ who believe that advance disposition agreements should not be enforced

state laws and would allow couples to circumvent inane mandatory implantation requirements.

²²⁵ See Guzman, *supra* note 27, at 219.

²²⁶ See Coleman, *supra* note 32, at 64.

²²⁷ See, e.g., J.B. v. M.B., 783 A.2d 707, 708 (N.J. 2001) (holding that even if the husband and wife had entered into an unambiguous agreement regarding their frozen preembryos, because it is against public policy, the agreement would not be enforced); A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that the court would not enforce an agreement that would compel one donor to become a parent against his or her will as a matter of public policy).

²²⁸ See Coleman, *supra* note 32, at 57; see also Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 136, 1941 (1986) (noting that “[b]ecause the law permits different methods of disposal for different rights, courts cannot rely on some imagined internal structure or logic in a system of rights to deduce inalienability”).

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because they violate public policy or infringe upon one's freedom to procreate.²²⁹ Many argue that because advance agreements are decided prior to IVF, they should not be binding upon individuals who subsequently change their minds as to the disposition method originally selected.²³⁰ Although the individual's circumstances and state of mind prior to and after IVF may drastically change, human indecisiveness and uncertainty are variables in any contract.²³¹ While individuals may be indecisive about the disposition of their frozen preembryos, this issue requires prudent decision-making and predictability. As with every contract, individuals should understand the terms of the agreement and anticipate possible circumstances.²³² Divorce, death of the participants, and the possibility of future infertility are all conceivable situations, and the effect of these events can be provided for in a written agreement. Contracting encourages potential parents to consider these possibilities and decide disposition issues prior to creating preembryos or dissolving the relationship.

Furthermore, courts have enforced agreements within the familial setting.²³³ Like antenuptial agreements²³⁴ or divorce stipulations, disposition agreements provide individuals with

²²⁹ See Coleman, *supra* note 32, at 66 (arguing that such disposition agreements are unenforceable because they attempt to restrict rights that are inalienable).

²³⁰ See *id.*

²³¹ Susan B. Apel, *Disposition of Frozen Embryos: Are Contracts the Solution?*, 27 VER. B.J. & L. DIG. 29, 32 (2001).

²³² *Id.* at 31-32.

²³³ *Id.* at 32.

²³⁴ *Id.* An antenuptial agreement is defined as follows:

A written contract between two people who are about to marry, setting out the terms of possession of assets, treatment of future earnings, control of the property of each, and potential division if the marriage is later dissolved. These are fairly common if either or both parties have substantial assets, children from a previous marriage, potential large inheritances, high incomes, or have been "taken" by a prior spouse.

Law.Com Dictionary, available at <http://dictionary.law.com> (last visited Apr. 28, 2002).

predictability and assurance that prior consensus will be honored. Although antenuptial agreements and divorce stipulations focus on establishing economic stability and certainty while disposition agreements address more personal issues, both types of agreements carry similar psychological, emotional, and financial burdens. Much like any other binding agreement pertaining to one's personal life, an advance disposition contract will always be emotional and difficult.

Despite the possible stress of executing such agreements on couples, contracts determining the disposition of the preembryos provide them with relief from the current state of legal limbo. The benefits of contractual agreements in relation to frozen preembryos are multifold. First, contractual agreements set out a coherent legal framework for participants in which they can address the possibilities and circumstances that may occur as a result of creating preembryos. Florida's statute recognizing the validity of such agreements allows people to conform their conduct to the rules set out by the legislature beforehand and, if the rules are not to their liking, to forgo IVF altogether.²³⁵

Second, agreements permit couples to decide the fate of their gametes in a way that conforms to their personal feelings and beliefs. Florida's statute, which requires couples to decide the fate of their preembryos before they are created,²³⁶ ensures that the parties discuss issues that are of personal significance to them and guarantees that the contract best reflects their concerns. Agreements ensure that the individual progenitor's values and beliefs are incorporated into the agreement from the beginning. By enforcing agreements, advance directives also reduce the possibility that the parties will be forced to accept a never-anticipated result since both parties provided consent. This mutual agreement should be respected and enforced by the state and the courts rather than be taken apart and scrutinized by third parties unrelated to the dispute or concerns of the parties involved.

Third, advance disposition agreements promote practicality

²³⁵ Apel, *supra* note 231, at 32.

²³⁶ *Id.*

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and efficiency. By encouraging IVF participants to sign enforceable agreements, courts would no longer be called upon each time a dispute arises. When a dispute occurs without an agreement in place, not only will one party lose custody of the preembryos, but everyone involved will be forced to pay legal fees and await judicial appeals.²³⁷ While the caselaw on such disputes is inadequate to address these issues, statutes are the best means to resolve potential conflicts and promote judicial efficiency. In order to maximize the benefits of the agreements, IVF participants must have assurances from the legislature and the courts that the agreements will be valid and enforceable. If statutes explicitly mandate advance contracts and provide for their enforceability, there will be fewer disputes over frozen preembryos.²³⁸ Because frozen preembryos are unique and can have great impact on the lives of the parties involved, the need for greater legislative guidance and enforcement is compelling.

V. PROPOSAL

The federal legislature's lack of guidance regarding frozen preembryo disposition has forced the states to address this issue, creating uncertain and inconsistent results nationwide.²³⁹ This lapse in the interpretation of state law is the greatest threat to the IVF industry, forcing physicians and participants to wonder about the legality of their actions and the disposition of their genes.²⁴⁰ Having familial disputes resolved before gestation to ensure a consistent and stable environment for future growth and development benefits preembryos. Laws mandating their disposition, therefore, are important to provide individuals with proper notice as to the potential liabilities that may arise from their actions and to establish a stable home environment for a child conceived by IVF.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *See id.*

²⁴⁰ *See* discussion *supra* note 162 (discussing instances where physicians are unclear as to the legal implications of IVF and its processes).

The primary reason for the need to clarify legal parentage before birth is to ensure that there is a secure home for the child. The current law regarding legal parentage of preembryos created by ARTs poses danger to a child because it leaves the question of who his or her parents are unanswered. The confusion over who has the decision-making authority and responsibility for the child is the most significant risk. Establishing clear legal parentage is important in defining the relationship between the child, donors, surrogate mothers, and the intended rearing parents. Despite the desperate situation with regard to frozen preembryos in the law, the federal government has still refused to tackle these issues. Although states have enacted their own statutes, many of these laws are constitutionally questionable.²⁴¹

Florida's approach to this debate is the best solution because it encourages prudent decision-making and would give the gamete providers predictability.²⁴² This approach ensures that neither party will be forced to sustain a highly unanticipated or greatly compromised outcome. By allowing couples to choose whether to carry the preembryo to term or to destroy it, the Florida statute maximizes procreative freedom by giving decision-making authority to the individuals who provided the gametes.²⁴³ Florida's statute appropriately gives IVF participants this authority, as they are directly affected by any resulting disposition of the preembryos.²⁴⁴

Although Florida's statute is the best statute currently available, some amendments could be incorporated. First, to

²⁴¹ See *supra* Part III (discussing certain state statutes that may be constitutionally questionable because they overly restrict one's right to procreate).

²⁴² See *supra* note 7 (noting that such agreements would enable the couple to determine the disposition of their cells).

²⁴³ FLA. STAT. ANN. § 742.17 (West 2001). This mutual agreement, solidified in a written agreement, ensures that the preembryos will be disposed of in a manner consistent with both progenitors' wishes.

²⁴⁴ See Eggen, *supra* note 157, at 700 (noting that the intervention of third parties "causes the donor couple to relinquish at least a portion of their interest in reproductive privacy, as their preembryos no longer will be used for their own procreation").

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prevent possible incest or intermarriage, statutes attempting to provide legislative guidance should also provide for confidential record keeping in preembryo adoption. Gamete providers should provide their names and any other relevant medical history to the state for recordation. Second, proper monitoring agencies should be established to ensure that adoptive parents are mentally, physically, and financially fit to carry preembryos to term and beyond. This would include updating or amending any existing adoption laws currently in place to include and protect the children born from adopted preembryos. In addition, the donative parents should be relieved of all the parental and financial responsibilities for the resulting child. Third, the legislation should mandate the signing of disposition agreements to determine the control of these preembryos upon divorce, death, and other possibilities. This would also require the legislation to provide model consent agreements with clear, unambiguous terms for clinics and IVF participants to follow.

Another concern is the possibility that one spouse becomes infertile and may need the preembryos to procreate. In *Davis*, although the Tennessee Supreme Court was opposed to forced procreation, it carved out an exception for those who could not have biological children without the use of the frozen preembryos.²⁴⁵ Although advance directives allow couples to plan for future infertility, courts may still be uneasy about invalidating such agreements knowing that the individual can only have biological children through IVF. As a revision to Florida's statute, this note proposes an amendment requiring clinics to divide sperm so that some of these gametes are frozen in their independent state while the rest are used to create preembryos. Because sperm can be stored safely in the frozen state while eggs cannot,²⁴⁶ an infertile man would have the opportunity to have

²⁴⁵ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). The Tennessee Supreme Court held that if an agreement was available, it should be adhered to. *Id.* If no agreement exists however, the courts should weigh the interests of the parties regarding the use of the preembryos. *Id.* Unless the party does not have a reasonable opportunity to become a parent without using the preembryos, generally, the party wishing to avoid procreation will prevail. *Id.*

²⁴⁶ See Guzman, *supra* note 27, at 219.

biological children without using the frozen preembryos and without infringing on the woman's right to avoid procreation. Although this is only effective if the man is rendered infertile, this simple procedure would at the very least ensure that disposition agreements would be upheld in these particular situations. If the man has agreed to destroy the preembryos upon divorce and later becomes infertile, the contract could still be honored since the man can always access his frozen sperm to procreate with a willing participant.

States should also require informed consent and counseling for all potential IVF participants. This would ensure that the participants know both the benefits and risks of ARTs so that they are able to make appropriate treatment decisions. Counseling would educate individuals about the serious implications of these procedures, such as the psychological stress of infertility treatment,²⁴⁷ its success rates,²⁴⁸ any religious or ethical concerns,²⁴⁹ the possibility of multiple pregnancies,²⁵⁰ and the possible need for selective reduction.²⁵¹ Informed consent and counseling ensure that participants are educated about the psychological commitments and ramifications of the treatment they are considering. Both encourage thought and reflection by the couple and may potentially indicate to the individuals whether they are good candidates, emotionally and psychologically, for ARTs. On a similar note, a brief waiting period prior to IVF

²⁴⁷ Lori B. Andrews & Lisa Douglass, *Symposium on Biomedical Technology and Health Care: Social and Conceptual Transformations*, 65 S. CAL. L. REV. 623, 630 (1991) (stating that some clinicians have even recommended that couples undergo psychological counseling as part of infertility treatment).

²⁴⁸ *Id.*

²⁴⁹ Ephross, *supra* note 180, at 450 (noting that counseling helps couples to cope with the stress that may arise from their ethical and cultural backgrounds).

²⁵⁰ Mary V. Rorty & Joann V. Pinkerton, *Elective Fetal Reduction: The Ultimate Elective Surgery*, 13 J. CONTEMP. HEALTH L. & POL'Y 53, 64 (1996) (noting that with infertility treatments, there is a great chance that multiple pregnancies may occur, forcing couples to contemplate the possibility of selective reduction).

²⁵¹ *Id.*

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should also be encouraged by the states so that the parties can ponder and reflect on their agreement and still have the opportunity to modify or reconsider aspects of their contract before IVF.²⁵² As one author notes, “it is the function of adequate counseling and some common sense, to assist people to make the best decisions possible, even under what some may view as less than ideal circumstances.”²⁵³

CONCLUSION

Although courts and scholars have been unable to agree on the future of frozen preembryos, there is uniform consensus that legislation needs to be enacted to alleviate the current state of confusion. While the federal government has failed to keep up with the growing advances in reproductive technologies, states have acted to provide direction. With little caselaw and guidance from the legislatures, however, these statutes do little to address the underlying concerns and issues brought forth by frozen preembryos.²⁵⁴ Disposition agreements should be recognized because they encourage thoughtful decision-making and preserve the intent of the IVF participants.²⁵⁵ Moreover, a model consent agreement should be provided to the participants.

Although courts are free to invalidate an agreement if it

²⁵² The success of waiting periods in other controversial areas has been well documented. For example, state imposed waiting periods have resulted in a greater number of gun permit rejections, since local authorities have more time to conduct thorough background checks on applicants. William Recktenwald & Jan Crawford, *Brady Bill Not As Tough As 25-Year-Old Illinois Gun Law*, CHI. TRIB., Nov. 23, 1993, at A1, A8. A waiting period of two-years before marriage has been recommended for covenant marriages. A study found that out of 700 Louisiana couples who were married in 1999, half of them in covenant marriages, only 25% of those who had waiting periods divorced. Marilyn Serafini, *Get Hitched, Stay Hitched*, NAT'L J., Mar. 9, 2002, available at 2002 WL 7094794.

²⁵³ Apel, *supra* note 231, at 32.

²⁵⁴ Hopefully, with more states enacting statutes to deal with this issue, the varying laws will compel the federal government to finally address this matter and provide some clarity.

²⁵⁵ Robertson, *supra* note 59, at 414.

violates public policy, a model agreement will prevent unenforceability because of ambiguous terms. If invalidation of an agreement should occur, it is more beneficial that the agreement be held unenforceable because it violates a specific public policy concern as opposed to being held invalid for ambiguity. Violation of public policy informs participants that such agreements would not be upheld. If a court decides that the terms of the agreement are ambiguous, however, it is unclear as to what would make an agreement valid or unambiguous and whether the courts would accept such agreements. Presenting a model consent agreement would reduce the burden on the courts to determine the legality of the contract terms. Courts could just look to the agreement and determine its implication on public policy.

Mandatory implantation, moreover, should be avoided because it is constitutionally questionable and invokes a slew of problems and concerns. Other states should recognize the superiority of Florida's statute and adopt a similar framework with some revisions for the regulation of ART and IVF procedures. The advances made in ARTs and IVF cannot be expected to keep pace with the federal government's sluggishness in enacting regulations to provide guidance in this area. Hence, it is time for the state legislature to provide the public and the courts with clear direction as to the future of this scientific field. Only with responsible action by legislatures can this ambiguous array of caselaw and statutes ever be amended and rectified.