THE FATE OF FROZEN EMBRYOS AFTER DIVORCE: A CALL FOR COURTS TO PROPERLY BALANCE PROCREATIVE FREEDOM

I. INTRODUCTION

Assisted Reproductive Technologies (ART) allows for couples around the world to achieve biological parenthood in the face of infertility. The most commonly used form of ART is *in vitro* fertilization (IVF), which has provided a successful alternative

from the "non-traditional" way to build a family since 1978.[1] Yet, the development of reproductive medicine has placed challenges on the legal system. Such challenges typically arise when a couple decides to end their relationship and disagrees over what should be done with their frozen genetic material. In turn, this disagreement implicates competing constitutional interests between the couple.

Approximately 12% of women in the United States have difficulty becoming pregnant or carrying a pregnancy to term.[2] Further, men contribute to infertility in many cases—in about 35% of couples with infertility, a male factor is identified.[3] IVF involves the surgical removal of eggs from female ovaries for fertilization with a man's sperm outside of the body.[4] The fertilization of the egg and sperm creates an embryo, which is typically frozen cryogenically in liquid nitrogen for future implantation into the woman's uterus.[5] Freezing the embryos provides a backup in the event that IVF is unsuccessful or the participants want to try for a sibling.[6] Also, freezing embryos prevents multiple egg retrieval procedures, thus reducing the physiological manipulation of the woman's reproductive system.[7]

While the practice of freezing embryos is beneficial to the participants of IVF, the legal dilemma over the control of the frozen genetic material is ongoing. In response to this, the Ethics Committee for the American Society for Reproductive Medicine recommends that that all assisted reproductive programs "create and enforce written policies on the designation, retention, and disposal of abandoned embryos."[8] Despite this recommendation,

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1. *See* Meena Lal, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 519, 520 (1997) (Louise Brown, born July 25, 1978 in Great Britain, was first successful birth resulting from *in vitro* fertilization).

2. *Infertility*, CDC, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last visited Jan. 28, 2019).

3. *Id.*

4. *Id.*

5. Peter E. Malo, *Deciding Custody of Frozen Embryos: Many Eggs Are Frozen but Who Is Chosen?*, 3 DEPAUL J. HEALTH CARE. L. 307, 309 (2000). For the purposes of this Comment, the term "embryo" will refer to the four-to-eight-cell entities cryogenically frozen and awaiting implantation. Further, the use of the term "embryo" in this Comment is synonymous with other references such as "pre-embryo" and "pre-zygote" used in other works.

6. *Id.*

7. *Id.* at 309-10.

8. Ethics Comm. Of the Am. Soc'y for Reprod. Med., *Disposition of Abandoned*

policies and practices differ amongst fertility clinics. States have attempted to regulate the disposition of frozen embryos, but there is little to no consistency amongst state legislatures.[9] Further, many courts have dealt with this issue over the past forty years in different ways creating three different approaches to frozen embryo disputes utilized in various jurisdictions.[10]

This Comment first details the relevant constitutionally protected right to procreative freedom implicated when a divorcing couple disagrees over the disposition of their cryogenically frozen embryos. Second, this Comment will address the recent advancements made by different legislatures in the frozen embryo realm, highlighting the inconsistent regulatory schemes across the country. Next, this Comment analyzes courts' current approaches used in deciding the disposition of frozen embryos, and how these approaches differ when a valid disposition agreement is available as opposed to when a disposition agreement does not govern the fate of the frozen embryos. Finally, this Comment critiques the approaches utilized by the courts and argues that in order to ensure that the liberty interests of the gamete-providers are properly protected, courts should, in the absence of state regulation, uphold prior agreements that memorialize the couple's wishes in the event of a divorce. When a valid disposition agreement is unavailable, courts then must carefully balance the interests of the party seeking to procreate against the party seeking to avoid procreation by using a narrow factor-based analysis.

II. COMPETING CONSTITUTIONAL PROTECTIONS

The United States Constitution affords "protection to personal decisions relating to marriage, procreation, contraception, family relationship, child rearing, and education."[11] Typically, disputes involving personal decisions arise when the *government* unlawfully intrudes into the matters fundamentally affecting a person.[12] In contrast, disputes over the disposition of frozen embryos involve

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Embryos: A committee Opinion, 99 FERTILITY &STERILITY 1848, 1848-49 (2013).

9. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L. R. 179, 182-85 (2014).

10. *See* Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. R. 417, 438 (1998) (explaining the judicial inconsistency from the district, appellate, and supreme courts of Tennessee in *Davis v. Davis* over a dispute involved cryogenically preserved embryos of a divorced couple).

11. Planned Parenthood of Sw. Penn. v. Casey, 505 U.S. 833, 851 (1992).

12. *See* Eisenstadt v. Baird, 404 U.S. 438, 453 (1972) (emphasis added).

competing liberty interests between *individuals*. These competing liberty interests stem from the right to privacy and are comprised of the coextensive rights to procreate and to avoid procreation.[13]

Although the Constitution's text does not explicitly guarantee a right to privacy, the judiciary has recognized the right to privacy as belonging within the specific guarantees of the Bill of Rights.[14] Further, marriage and procreation are "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."[15] These two rights have attained large recognition by the Supreme Court, which highlights the significant "procreative autonomy" liberty interests at stake when disputes over frozen embryos arise.[16]

A. THE RIGHT TO PRIVACY

In 1965, the Supreme Court afforded the right to privacy constitutional protection for the first time in its seminal decision in *Griswold v. Connecticut*.[17] The Court found a Connecticut law forbidding the use of contraceptives unconstitutional because the law intruded upon the right of marital privacy.[18] The majority found that specific guarantees in the Bill of Rights create a "penumbra[al] zone of privacy," which protects individuals from government intrusion.[19] A "penumbral approach" involves drawing upon numerous protections outlined in the Bill of Rights to infer a constitutional protection that is not specifically outlined in the Constitution's text.[20] The Court concluded that the relationship of marriage is "intimate to the degree of being sacred," and that decisions made between husband and wife fall within a zone of privacy guaranteed in the penumbras of the Bill of Rights.[21]

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13. Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523 (1994); Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

14. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

15. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

16. *See e.g.,* Meyer v. Nebraska, 262 U.S. 390 (1923); Olmstead v. United States, 277 U.S. 438 (1928).

17. *Griswold*, 381 U.S. at 479.

18. *Id.* at 485-86.

19. *Id.* at 483-84. The Court noted that the First, Third, Fourth, Fifth, and Ninth Amendments all create various zones, also known as "penumbras," of privacy through the Bill of Rights. *Id.*

20. R. H. Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833, 833-34 (1974).

21. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

The Supreme Court expanded the right to privacy in *Eisenstadt v. Baird*[22], in which the Court struck down a Massachusetts law prohibiting the sale of contraceptives to unmarried people.[23] The *Eisenstadt* Court held that the right to privacy is the same for both married and unmarried individuals.[24] The Court noted, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[25] The Supreme Court later relied on that famous quote in deciding both *Roe v. Wade*[26] and *Lawrence v. Texas*[27]—two landmark decisions that reinforced the *Griswold* holding that the Constitution provides a realm of private conduct that the government may not enter.

B. THE RIGHT TO PROCREATIVE FREEDOM

In *Meyer v. Nebraska*[28], the Supreme Court recognized that the liberty protections of the Fourteenth Amendment protect "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[29] Subsequently, the Court in *Skinner v. Oklahoma*[30] held compulsory sterilization of certain habitual criminals unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[31] The *Skinner* Court found marriage and procreation to be "fundamental to the very existence and survival of race," and that they involve "the basic civil rights of man."[32] Although *Skinner* was ultimately decided on the liberty interests afforded in the Equal Protection Clause, courts typically rely upon

22. Eisenstadt v. Baird, 405 U.S. 438 (1972).

23. *Id.*

24. *Id.* at 453.

25. *Id.* (emphasis added).

26. *See* Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman's right to privacy encompasses the decision whether or not to terminate her pregnancy).

27. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that consenting adults have a right under the Due Process Clause to engage in homosexual activity without government intervention).

28. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

29. *Id.*; *see also* U.S. CONST. amend. XIV, § 1.

30. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

31. *Id.*; U.S. CONST. amend. XIV, § 1.

32. *Skinner*, 316 U.S. at 541.

this decision as "evidence of a judicially-recognized right to procreate."[33]

Relying on the aforementioned constitutional precedent, the Supreme Court of Tennessee decided the first case involving custody of IVF embryos in 1992. The *Davis v. Davis*[34] decision affirmed that the right of procreative freedom exists in the right to privacy in the context of disputes over of cryopreserved embryos.[35] Most importantly, the *Davis* decision set out a workable framework that respects the wishes of both parties when the fate of their frozen embryos is contested.[36]

The Supreme Court of Tennessee decided the dispute in favor of Mr. Davis and honored his wish to have the embryos destroyed, over the objections of his former wife.[37] Initially, Mrs. Davis wished to use the frozen embryos for implantation, but later decided she wanted them donated to a childless couple.[38] The Davises never signed a disposition agreement when they began their IVF program at the fertility clinic, nor were there any Tennessee laws governing the disposition of the couple's leftover cryogenically frozen embryos at the time they underwent IVF.[39] The court determined that the answer to the couple's disagreement existed in their constitutional right of privacy.[40] Although the right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution, the court relied on the liberty interests of the right to privacy as reflected in the Fourteenth Amendment.[41] The issue before the court was not whether to keep or discard the frozen embryos, but whether or not Mr. and Mrs. Davis became parents after the court awarded custody of the embryos to one of the parties.[42] With this is mind, the Tennessee Supreme Court concluded that the individual liberty in dispute between the Davis couple was the right to procreate, which is "a

33. Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. R. 417, 426 (1998).

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

35. *Id.* at 598-600.

36. *Id.* at 604; Stephanie J. Owen, *Davis v. Davis: Establishing Guidelines for Resolving Disputes over Frozen Embryos*, 10 J. CONTEMP. HEALTH L. & POL'Y 493, 510 (1994).

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

38. *Id.* at 590.

39. *Id.*

40. *Id.* at 598.

41. *Id.* at 599 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

42. Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

vital part of an individual's right to privacy" under both Tennessee law and federal law.[43]

The court determined that an inherent right to procreative autonomy is composed of two equally significant rights: the right to procreate and the right to avoid procreation.[44] Further, the tension between these two competing interests is most prevalent in the context of *in vitro* fertilization.[45] The court noted that the decision-making power rests solely on the gamete-providers alone because no other person or entity bears the consequences the way gamete providers do.[46] The court concluded that disputes involving the disposition of IVF embryos should be resolved first by honoring the preferences of the gamete providers because the interest "in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood."[47]

In the event that gamete providers disagree over the disposition of the frozen embryos, the court further reasoned that it should weigh both the liberty interests in using—or not using—the embryos, and the relative burdens of the court's decision.[48] The court determined that the burdens on the party seeking to avoid procreation are obvious: unwanted parenthood and all the financial and psychological consequences that go along with becoming a gestational parent.[49] In the event that the embryos were donated to a childless couple, Mr. Davis would face a lifetime of "either wondering about his parental status or knowing about his parental status but having no control over it."[50]

In deciding in favor of Mr. Davis, the court emphasized the fact that Mrs. Davis did not want to use the embryos herself.[51] The

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43. Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992). The *Davis* court found that the right to privacy is reflected in Sections 3, 7, 19, and 27 of the Tennessee Declaration of Rights. The court determined that the drafters of the Tennessee Constitution of 1796 "foresaw the need to protect individual from unwarranted governmental intrusion into matters . . . involving intimate questions of personal and family concern."

44. *Id.* at 601. The court relied on the concepts of liberty found in the right to privacy cases such as *Griswold* and *Roe*.

45. *Id.*

46. *Id.* at 602.

47. *Id.* at 603. The court explained having biologically related children born to an unknown person could have profound impact on both the genetic parent and the child; thus, the right to make decisions on whether or not to gestate the embryos should remain solely with the gamete providers.

48. Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

49. *Id.*

50. *Id.* at 604.

51. *Id.* Specifically, the court opined that Mrs. Davis's "interest in donation is not

court also recognized the trauma Mrs. Davis endured through her IVF attempts but concluded that could always try again to achieve parenthood—either genetically or through adoption.[52] However, the court stated that had Mrs. Davis wished to use the embryos to conceive more children because "she could not achieve parenthood by any other *reasonable* means" her interest in procreation would have been greater.[53]

Thus, despite the lack of legislative and judicial guidance, the Tennessee Supreme Court held that disposition disputes over frozen embryos following IVF "should be resolved, first, by looking to the preferences of the progenitors."[54] Then, if their wishes cannot be met, or if the parties cannot agree, courts should look to prior disposition agreements between the parties.[55] In the absence of a prior disposition agreement, the court held that the "relative interests of the parties in using or not using the pre-embryos must be weighed."[56] The *Davis* court concluded with the following holding that is most prevalent in utilizing this balancing of the interests approach:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[57]

The *Davis* opinion reaffirmed that the right of privacy encompasses the right of procreative autonomy, and the court also set out a workable framework in order to properly balance these rights.[58] Still, this framework only provided guidance for other

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as significant as the interest [Mr.] Davis has in avoiding parenthood."

52. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). The Davis couple had previously attempted to adopt a child, which the court found "indicate[d] that, at least at one time, she was willing to forego genetic parenthood and would have been satisfied by the child-rearing aspects of parenthood alone."

53. *Id.* (emphasis added).

54. *Id.*

55. *Id.*

56. *Id.*

57. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).; *see also* J.B. v. M.B. 783 A.2d 707 (N.J. 2001).

58. Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise*

states and jurisdictions as they began to resolve disputes involving cryogenically preserved embryos. Thus, an undeniable continuum of inconsistent state statutes and court decisions ensued.

III. A MELTING POT OF STATUTORY SCHEMES

As more and more embryos are being cryogenically stored, various state legislatures are increasingly being forced to address the issue of frozen embryo custody when a couple divorces and disagrees over the embryos' future. This section highlights the varying statutory schemes currently in place across the country. Louisiana has the most favorable laws regarding the rights of unborn children, while other state statutes emphasize a variety of statutory goals.[59] These statutes provide very little direction to state judiciaries, and thus "prohibit universal and consecutive outcomes between states."[60] For example, in 2018 the Arizona Senate passed a bill that is the first of its kind to award custody of the contested embryos to the party who wishes to help them "develop to birth."[61] This legislation adds to the numerous legal questions about the practice of fertility medicine and the constitutional rights of the participants of IVF.

A. LOUISIANA'S DETAILED REGULATION

Louisiana's Revised Statutes outline comprehensive regulations regarding human embryos, which are considerably more restrictive than similar laws in other states. For example, in Louisiana, a viable embryo resulting from *in vitro* fertilization is a juridical person until it is implanted in the womb.[62] Accordingly, the frozen embryo is not the property of the IVF clinic, the physician, or the gamete donors, and the embryo can sue or be sued.[63] Whereas other states typically treat frozen embryos as property, Louisiana gives frozen embryos a juridical personality allowing them to act as plaintiff in Louisiana lawsuits.[64]

Sound Wule Advancing Procreational Freedom and Reproductive Technology, 43 DEPAUL L. REV. 523 (1994).

59. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L. R. 179, 182-85 (2014).

60. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 126 (2002-03).

61. S.B. 1393, 53 Leg., 2d Reg. Sess. (Ariz. 2018).

62. LA. STAT. ANN. § 9:123 (2020). Under Louisiana law, a juridical person is an entity to which the law attributes personality. LA. CIV. CODE. ANN. art. 24 (2019).

63. LA. STAT. ANN. § 9:124 (2020); LA. STAT. ANN. § 9:126 (2020).

64. *See generally* York v. Jones, 717 F. Supp. 421, 425 (E.D.Va. 1989); LA. STAT. ANN. § 9:123–124 (2020).

Further, frozen embryos may only be used "for the support and contribution of the complete development of human in utero implantation."[65] This means that the embryos may not be intentionally destroyed.[66] However, in the event IVF participants no longer wish to use their embryos, they "shall be available for adoptive implantation."[67]

Notably, Louisiana provides a judicial standard should the IVF participants disagree over the fate of the frozen embryos. Disputes shall be resolved "in the best interest of the *in vitro* fertilized ovum."[68] These statutes provide divorcing couples the option to choose between implantation or adoption, and further provide a judicial standard should a dispute arise between them.[69]

B. OTHER STATE STATUTES PROMPT MORE INCONSISTENCY

Florida's regulation of frozen embryos encourages parties to enter into valid disposition agreements. The Domestic Relations laws in Florida state that a "couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm and pre-embryos in the event of a divorce, the death of a spouse, or any unforeseen circumstance."[70] Thus, valid disposition agreements should be upheld and enforced by a court in the event a couple chooses to divorce, despite any change in circumstances by a party from the time the agreement was made.[71] Absent a valid disposition agreement, "any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm . . . [and] decision making authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple."[72]

In Contrast, Virginia laws state that cryopreservation agreements between gamete donors and the medical clinic create a bailor-bailee relationship and no formal contract between the

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65. LA. STAT. ANN. § 9:122 (2020).

66. LA. STAT. ANN. § 9:129 (2020).

67. LA. STAT. ANN. § 9:130 (2020).

68. LA. STAT. ANN. § 9:131 (2020).

69. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L. R. 179, 182-85 (2014).

70. FLA. STAT. ANN. § 742.17 (2020).

71. Maria C. Gonzales, *Frozen Embryos, Divorce, and Needed Legislation: On the Horizon or Has it Arrived?*, 83. FLA. BAR J. (2009), https://www.floridabar.org/the-florida-bar-journal/frozen-embryos-divorce-and-needed-legislationon-the-horizon-or-has-it-arrived/.

72. FLA. STAT. ANN. § 742.17 (2020).

parties is necessary.[73] Further, Virginia considers frozen embryos the property of the gamete donors and affords IVF clinics only limited rights as bailee to exercise dominion and control over the embryos.[74]

The North Dakota Century Code prompts significant confusion on the issue of whether one party can use the frozen embryos without the other party's consent after divorce.[75] The provision states that "[i]f a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child."[76] Should a participant change their mind to assisted reproduction, consent "may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child."[77] This statute seems to suggest that a former spouse may use the embryos to secure a pregnancy whether or not the other spouse wishes to become a parent or not.[78] In other words, the spouse wishing to conceive will always be successful, thus leaving the other spouse with the option to decide whether or not to assume legal responsibility for their biological child.[79]

C. UNPRECEDENTED LEGISLATION: ARIZONA'S ATTEMPT TO BALANCE THE INTERESTS

On April 3, 2018, the Arizona Governor approved a bill requiring courts in a divorce proceeding to award *in vitro* embryos to the spouse who wishes to use them to have children.[80] In a divorce proceeding, this bill protects a parent's right to his or her fertilized embryos, and prevents the loss of these embryos to a third party simply because their spouse does not want to be a parent.[81]

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73. *See* York v. Jones, 717 F. Supp. 421, 425 (E.D.Va. 1989).

74. *Id.* at 426-27.

75. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 93 (2011).

76. N.D. CENT. CODE. ANN. § 14-20-64(1) (2020).

77. N.D. CENT. CODE. ANN. § 14-20-64(2) (2020).

78. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 184 (2014).

79. *Id.*

80. S.B. 1393, 53 Leg., 2d Reg. Sess. (Ariz. 2020).

81. Alexa Lardieri, *Arizona Law Awards Custody of Embryos to Partner Who Wants*

Specifically, the bill awards custody of the embryos to the spouse "who intends to allow the *in vitro* human embryos to develop to birth."[82] Where both spouses provided their gametes for the *in vitro* human embryos and they both want the embryos in order to have children, custody of the embryos will be awarded to the party who "provides the best chance for the in vitro human embryos to develop to birth."[83] However, if only one spouse provided gametes in order to create the embryos, then the court must award custody of the embryos to that spouse.[84]

The uniqueness of this bill is exemplified in Arizona's attempt to protect the interests of the spouse that chooses not to use the embryos to have more children.[85] The bill expressly provides that the spouse not awarded custody of the frozen embryos has "no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed in vitro human embryos."[86] In other words, that spouse is not liable for child support for any child born of the frozen embryos.[87]

The goal of this bill is to properly balance the interests of both spouses, and also to provide much needed direction for Arizona courts, which will create more consistent rulings for frozen embryo custody disputes in the state. Still, this law forces biological parenthood upon an unwilling participant and ignites a serious constitutional debate between the right to procreate and the right to avoid procreation.[88]

IV. THE COURTS' CURRENT APPROACHES

Where states lack legislative guidance, courts across the

Child After Divorce, U.S. NEWS (July 19, 2018), https://www.usnews.com/news/politics/articles/2018-07-19/arizona-law-awards-custody-of-embryos-to-partner-who-wants-child-after-divorce.

82. S.B. 1393, 53 Leg., 2d Reg. Sess. (Ariz. 2020).

83. *Id.*

84. *Id.*

85. *See* Ariana Eunjung Cha, *Who Gets the Embryos? Whoever Wants to Make Them into Babies, New Law Says*, THE WASHINGTON POST (July 17, 2018), https://www.washingtonpost.com/national/health-science/who-gets-the-embryos-whoever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html?utm_term=.13f1292dae06.

86. S.B. 1393, 53 Leg., 2d Reg. Sess. (Ariz. 2020).

87. *See* Christina Cauterucci, *Why Anti-Abortion Groups Love Arizona's New Frozen Embryo Law*, SLATE (July 19, 2018), https://slate.com/news-and-politics/2018/07/arizonas-new-frozen-embryo-law-is-terrible-news-for-couples-thinking-about-in-vitro-fertilization.html.

88. *See infra* Section V.A.3.

country have attempted to tackle the disposition of frozen embryos during a divorce using three very distinct frameworks. When the parties enter into a valid agreement that outlines the terms of disposition for their frozen embryos, the typical standards of contract law apply. However, if the parties do not sign a disposition agreement or the agreement is unenforceable, then the court will either wait until the mutual consent of the parties is reached or balance the parties' opposing interests. Each framework possesses both positive and negative aspects and, further, each approach creates different standards across multiple jurisdictions.[89]

A. VALID DISPOSITION AGREEMENTS

Courts generally agree that when the gamete providers express their intent by signing unambiguous disposition agreements, such agreements will be dispositive.[90] Typically, these contracts should govern in the event of death, divorce, or if a party changes their mind—although, this is not always the case.[91]

When fertility clinics require the gamete donors to fill out a disposition agreement, the terms of the agreement place a condition on the IVF clinic's performance of assisted reproductive treatment should the donors ever disagree over the use of the frozen embryos.[92] The couple accepts the terms by signing the disposition agreement, and this satisfies the requirements of offer and acceptance under contract law.[93] Therefore, the terms of a disposition agreement regarding frozen embryos will be upheld if the parties are in dispute so long as it is legally valid under the rules of contract law.[94] However, even if a contract between an IVF couple meets all the necessary requirements of an enforceable contract, such contracts may not be enforceable against certain defenses such as a change in the circumstances.[95]

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89. The pros and cons of the three approaches utilized by the courts will be analyzed in Section V.A of this Comment.

90. Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 238 (2013); *see also* In re Marriage of Dahl, 194 P.3d 834 (Or. Ct. App. 2008); In re Litowitz, 48 P.3d 261 (Wash. 2002).

91. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 128 (2002-03).

92. *Id.* at 128-29.

93. *Id.*

94. *Id.*

95. *Id.* at 129.

In *Kass v. Kass*,[96] a New York court utilized the contractual approach to a couple's signed agreement.[97] Mr. and Mrs. Kass married in 1988 and unsuccessfully tried to conceive a child.[98] The couple underwent IVF treatment in March 1990, where Mrs. Kass participated in five separate egg retrievals and had fertilized embryos implanted into her uterus on nine separate occasions.[99] The couple decided to attempt implantation once more, but for the first time used one of their surplus embryos from cryopreservation.[100] Before the final procedure, the couple signed four consent forms provided by John Mather Memorial Hospital.[101] The consent forms stated that in the event of disagreement, the pre-zygotes would be donated for research to the IVF program.[102]

After the tenth round of IVF, the doctors retrieved sixteen eggs from Mrs. Kass, and two days later four embryos were implanted into Mrs. Kass's sister who agreed to be their surrogate mother.[103] Unfortunately, the surrogacy transfer was unsuccessful, and the couple subsequently decided to dissolve their marriage.[104] Three weeks after signing the consent form at the hospital, the couple executed an uncontested divorce agreement which stated: "[t]he disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form."[105] However, Mrs. Kass later requested "sole custody of the pre-zygotes so that she could undergo another implantation procedure."[106]

The Court of Appeals of New York determined that "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygote should generally be presumed valid and binding, and enforced in any dispute between them."[107] The court found that Mr. and Mrs. Kass intended the disposition of their frozen genetic material to be a joint decision, and that the consent forms they signed amounted to a clear manifestation of

96. Kass v. Kass, 696 N.E. 2d 174 (N.Y. 1998).
97. *Id.*
98. *Id.* at 175.
99. *Id.* at 175-76.
100. *Id.* at 176.
101. Kass v. Kass, 696 N.E. 2d 174, 176 (N.Y. 1998).
102. *Id.* at 176-77.
103. *Id.* at 177.
104. *Id.*
105. *Id.*
106. Kass v. Kass, 696 N.E. 2d 174, 177 (N.Y. 1998).
107. *Id.* at 180.

that intention that the law must honor.[108] Thus, the court honored the couple's mutual consent and resolved their custody dispute by donating the embryos to the IVF program for research as they intended in their disposition agreement.[109] The contractual approach is considered the most administratively effective method used to resolve embryo custody disputes, but certain circumstances may arise where the contractual approach is inapplicable or refutable.[110]

B. NO ENFORCEABLE CONTRACT, NOW WHAT?

In the absence of a valid agreement—either because the parents did not sign one or the agreement does not contain a contingency plan dealing with divorce—courts have sought contemporaneous mutual consent from the parties or balanced the parties' coequal rights of procreative autonomy.[111]

1. THE CONTEMPORANEOUS MUTUAL CONSENT APPROACH

The contemporaneous mutual consent approach does not hold previous disposition agreements as binding on the parties if one party subsequently changes their mind regarding the disposition of the frozen embryos.[112] Instead, the gamete providers must express contemporaneous mutual consent in writing, and "no embryo should be used by either partner, donated to another patient, used in research, or destroyed" without it.[113]

For example, in *A.Z. v. B.Z.*, the husband and wife signed a consent form at the IVF clinic that stated that upon separation—*not divorce*—of the couple, the parties consented to allow the embryos to be implanted in the wife.[114] The form also allowed the couple to change their minds regarding the disposition of the frozen embryos, provided that both parents conveyed that fact in writing to the IVF clinic.[115] The couple eventually dissolved their marriage, and the wife wished to uphold the terms of the

108. Kass v. Kass, 696 N.E. 2d 174, 181 (N.Y. 1998).

109. *Id.*

110. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 129 (2002-03).

111. *See generally* In re Marriage of Witten, 672 N.W.2d 768, 773-74 (Iowa 2003).

112. *See generally id.*

113. *See generally id.* at 778.

114. A.Z. v. B.Z., 725 N.E.2d 1051, 1053-54 (Mass. 2000) (emphasis added).

115. *Id.* at 1054.

consent form and use the embryos to become pregnant, while the husband wished for the embryos to be destroyed.[116]

However, the court refused to honor the parties' consent agreement for the following reasons. First, the purpose of the consent form was to define the couples' relationship as a unit with the fertility clinic and to explain the benefits and risks of freezing the embryos.[117] The consent form was not intended to be a binding agreement between the husband and wife should they later disagree over the embryo's disposition.[118] Second, the consent form did not contain a duration provision concerning a time period when the form was to govern their conduct.[119] Because the couple signed the form four years earlier, the court could not assume that the donors intended for the consent form to govern disposition of the embryos after a fundamental change in their relationship (i.e., divorce).[120] Lastly, the consent form only dealt with the couple becoming "separated," which has a distinct legal meaning from divorce.[121] Thus, the court held that it could not conclude that the couple's consent form was intended to govern the disposition of the embryos upon divorce.[122] The court concluded that "[n]o agreement should be enforced in equity when intervening events have changed the circumstances" such that the original agreement signed by the parties does not "contemplate the actual situation now facing the parties."[123]

Similarly, in *In Re Marriage of Witten*,[124] an Iowa couple signed informed consent documents before undergoing IVF treatment.[125] After unsuccessful embryo transfers, the couple eventually divorced and disagreed over what to do with their remaining frozen embryos.[126] The Supreme Court of Iowa applied the contemporaneous mutual consent approach and concluded that it would violate public policy to enforce a prior disposition agreement when a party has changed his or her mind.[127] Thus, the

116. A.Z. v. B.Z., 725 N.E.2d 1051, 1054-55 (Mass. 2000).
117. *Id.* at 1056.
118. *Id.*
119. *Id.* at 1057.
120. *Id.*
121. A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000).
122. *Id.*
123. *Id.* at 1055.
124. In re Marriage of Witten, 672 N.W.2d 778 (Iowa 2003).
125. *Id.*
126. *Id.*
127. *Id.* at 782.

contemporaneous mutual consent approach allows the parties to change their intent previously expressed in an original agreement, leaving the decision-making authority to those who bear the consequences of that decision.[128]

2. THE BALANCING OF THE INTEREST APPROACH

As previously discussed in this Comment, courts may balance one party's right to procreate versus the objecting party's right to not procreate.[129] This is typically done when the preferences of both gamete-providers cannot be met, the disposition agreement they entered into cannot be honored, or no disposition agreement exists.[130] The *Davis* decision laid the foundation for the balancing of the interest approach by recognizing that "the party wishing to avoid procreation should prevail" so long as the opposing party can "reasonably achieve" procreation by other means.[131] The difference between the contemporaneous mutual consent approach and the balancing test is that when courts seek contemporaneous mutual consent, they allow public policy to supersede the parties' interests in procreating or not procreating.[132] Likewise, by utilizing a balancing test, the parties' interests deemed worthy of protection by the Supreme Court are paramount in the award of custody of the embryos.

In October 2018, the Colorado Supreme Court in *Rooks v Rooks* was tasked with balancing one's constitutional right to procreate against another's countervailing constitutional right to not procreate.[133] The court declined to rule on the competing constitutional rights and issued an opinion consistent with the embryotic custody framework set forth in *Davis*.[134] However, the *Rooks* decision provides much needed clarity for disposition cases by outlining a list factors that courts should consider, as well as

128. A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (stating that "judicial decisions that prior agreements to enter into familial relationships [like marriage and parenthood] should not be enforced against individuals who subsequently reconsider their decisions").

129. *See infra* Section II.

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

131. *Id.*

132. Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 238 (2013).

133. In re Marriage of Rooks, 429 P.3d 579 (2018).

134. *Id.* at 602 (finding that "where the decision is ultimately a private one between two people, the court need not get involved" in determining whose constitutional rights should prevail).

certain factors that should be excluded, when courts are faced with frozen embryo custody.[135]

In *Rooks*, the couple used IVF both in 2011 and 2013, and had three children born during their marriage in Colorado.[136] The Rookses signed a "Disposition Plan" for both IVF treatments in 2011 and 2013 that outlined the disposition of the couple's frozen embryos in the event either or both spouses were to die.[137] The disposition agreement further stated that if the couple divorced, "the disposition of [the] embryos [would] be part of the divorce/dissolution decree paperwork."[138] Ultimately, the couple separated in August 2014, and Mr. Rooks then filed for divorce that September.[139]

At the trial in 2015, the couple disagreed over their frozen embryos.[140] Mrs. Rooks wished to preserve the embryos in order to implant them at a later date because, to her knowledge, she was unable to get pregnant "naturally" again.[141] Mr. Rooks, however, did not want to have more children and wished to thaw and discard the frozen embryos.[142] Although the trial court discussed the three different recognized approaches, it eventually applied the balancing of interests approach to the 2011 and 2013 disposition agreements.[143] After applying the balancing test, the trial court concluded that the disposition plans did not allow either spouse unilateral control to implant the embryos without the other spouse's consent.[144] Further, the trial court found that the couple only intended for the embryos to be thawed and discarded in the event that they could not achieve "mutual resolution."[145]

The trial court also balanced Mr. Rooks's inherent right to avoid procreation against Mrs. Rooks's right to procreate.[146] The court further concluded that Mr. Rooks had the right to avoid the burdens of having more children, such as financial obligations, and

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135. In re Marriage of Rooks, 429 P.3d 579, 593-94 (2018).
136. *Id.* at 581.
137. *Id.* at 582.
138. *Id.* at 582-83.
139. *Id.* at 581.
140. In re Marriage of Rooks, 429 P.3d 579, 583 (2018).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. In re Marriage of Rooks, 429 P.3d 579, 583 (2018).
146. *Id.*

the moral and psychological implications of having another biological child.[147] The court also found that an additional sibling could have adverse effects on the existing Rooks children.[148] Lastly, the trial court concluded that discarding the frozen embryos would not be a deprivation to Mrs. Rooks because she already had three children, and it expressed concern regarding Mrs. Rooks's ability to financially support a fourth child.[149] Ultimately, the trial court awarded the frozen embryos to Mr. Rooks by finding that Mr. Rooks's right to avoid procreation outweighed Mrs. Rooks's desire to preserve the frozen embryos.[150]

After the trial court's decision was affirmed on appeal, the Supreme Court of Colorado granted a writ of certiorari. Upon review, the court decided to utilize the balancing of the interests approach because the couple lacked an enforceable agreement regarding disposition of the frozen embryos.[151] Further, by applying the balancing approach, the court emphasized that in granting an award of frozen embryos, courts should strive to protect each party's right to procreative autonomy.[152] The Colorado Supreme Court outlined a non-exhaustive list of factors that a reviewing court should weigh in disposing the frozen embryos.[153] These factors include: (1) the intended use of the genetic material by the spouse who wishes to preserve them; (2) the physical ability (or inability) demonstrated by the party seeking to use the frozen embryos for implantation; (3) the couple's original intent for undergoing IVF; (4) the burden of the parent seeking to avoid parenthood, including emotional, financial or logistical reasons; (5) whether a spouse demonstrated bad faith or attempted to use the frozen embryos as unfair leverage in the dissolution proceedings; and (6) any other considerations relevant to the specific parties' situation.[154] The court further noted improper considerations in allocating frozen embryos in a dissolution proceeding, and listed three factors that courts should not consider.[155] Specifically, a dissolution court should not assess whether the party seeking to parent more children by using the

147. In re Marriage of Rooks, 429 P.3d 579, 583-84 (2018).
148. *Id.* at 584.
149. *Id.*
150. *Id.*
151. *Id.* at 592.
152. In re Marriage of Rooks, 429 P.3d 579, 586 (2018).
153. *Id.* at 593.
154. *Id.* at 593-94.
155. *Id.* at 594.

frozen embryos can afford another child, nor should the court consider the number of the party's existing children.[156] Finally, the court concluded that the availability of adoption as an alternative to biological parenthood is not relevant to the "interest in achieving or avoiding genetic parenthood."[157]

Notably, the court recognized in the second and third factors that certain extenuating circumstances may come into play when a party has no other *reasonable* means to secure biological parenthood—their reason for undergoing IVF in the first place.[158] The clearest example of these two factors weighing heavily in favor of one party is when an ex-wife is unable to procreate biologically after chemotherapy treatments.[159] This is consistent with the *Davis* court's holding that "[i]f no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered."[160]

By adopting this approach, the Colorado Supreme Court recognized the equally valid constitutional based interests in procreative autonomy that both spouses possess.[161] Further, this approach encourages couples to enter into disposition agreements to protect their mutual consent regarding the fate of their genetic material in the event that the marriage leads to divorce.[162] In the event that an enforceable contract is not available to settle the dispute, the *Rooks* court clearly detailed what considerations are proper and improper when weighing the parties' procreative freedom against one other.[163]

156. In re Marriage of Rooks, 429 P.3d 579, 594 (2018).

157. *Id.*

158. *Id.* at 593-94 (stating that courts should consider the physical ability demonstrated by the party seeking to use the frozen embryos for implantation, and couple's original intent for undergoing IVF).

159. *See* Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012). In *Reber*, the court awarded the embryos to the wife after the parties' divorce because she was unable to have children biologically after having undergone chemotherapy. The embryos were created so that she could conceive after her cancer treatment was completed and, based on these circumstances, the court found that the wife's interest in procreating outweighed her ex-husband's in avoiding procreation.

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

161. In re Marriage of Rooks, 429 P.3d 579, 594 (2018).

162. *Id.*

163. *Id.*

V. PROPOSAL

With the multitude of approaches used in various legislatures and courts, it is clear that a national standard is necessary for determining disposition disputes in order to protect procreative autonomy. This section will analyze and critique the current approaches used amongst jurisdictions, as well as highlight state legislatures' advancements and shortfalls in the frozen embryo realm. This section also proposes a new standard by synthesizing the framework laid out in the *Davis* decision with the factor-based analysis provided by the court in *Rooks*, and argues for its implementation in jurisdictions across the country where state regulation is unavailable. This synthesized approach properly protects the countervailing liberty interests in procreative freedom by honoring valid disposition agreements when they are available, and, in the absence of a disposition agreement, also honors these interests by utilizing a fact-specific analysis when the fate of the frozen embryos is left to the courts.

A. CRITIQUING THE COURTS' CURRENT APPROACHES: WHAT WORKS AND WHAT DOESN'T

1. THE CONTRACTUAL APPROACH

Theoretically, the contractual approach is the most desirable way to solve disposition disputes because the parties' consent is presumed to be within the four corners of the document. However, having couples sign standardized clinic consent forms and treating them as binding contracts is impractical when a change in the circumstances, such as a divorce, occurs.[164] In response to this, courts have recognized that the doctrine of changed circumstances is one possible defense for disposition disputes.[165] This defense is appropriate because it would be inequitable to bind the parties to a decision regarding future parenthood made at a time when their needs, and the status of their relationship, were completely different.

Under the principles of contract law, nonperformance of a

164. Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 130 (2002-03) (explaining how the contractual approach is deemed "the most administratively effective method," but that the doctrine of changed circumstances is one possible defense to the approach).

165. *Id.*; *see also,* Kass v. Kass, 696 N.E. 2d 174, 179-80, n.4. (N.Y. 1998).

contract may be excused for changed circumstances. However, the party seeking to be released from the contract must show that "both parties assumed at the time of contracting that the changed circumstances would not occur and the changed circumstances made performance as agreed impracticable."[166] Therefore, if both impracticability and lack of foreseeability are present, then a change of the circumstances has occurred and the duty to perform is discharged.[167] The remedies provided by the doctrine of changed circumstances include "compensation for work done and restitution only to the extent that he has conferred a benefit on the other party by way of part performance, or reliance."[168]

Opponents to the changed circumstances defense in the IVF setting argue that one should not be relieved of their contractual agreement, despite a change in circumstances, unless he or she did not knowingly or freely consent to the agreement.[169] However, the doctrine of changed circumstances is proper when a divorcing couple argues over the enforceability of their previous disposition agreement because, while a couple may be able to foresee the possibility of certain subsequent events, the couple could not foresee the feelings associated with those events leading to the changed circumstances.[170]

The contractual approach and its defense of changed circumstances are exemplified in Florida's domestic relations law previously discussed in this Comment.[171] Florida's statute requires IVF participants to enter into disposition agreements that "provide for the disposition of the commissioning couple's eggs, sperm and pre-embryos in the event of a divorce, the death of a spouse, *or any unforeseen circumstance*."[172] In sum, this approach and its defense maximizes the gamete provider's procreative liberty by leaving them the control over the future disposition of their embryos. If courts did not honor a valid disposition agreement or recognize this defense, then the decision regarding the frozen embryo's future would be left to the judiciary. Although

166. Richard E. Speidel, Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case, 2001 WIS. L. REV. 795, 800 (2001).

167. Id.

168. Id. at 801.

169. Shelly R. Petralia, Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law, 17 J.L. & HEALTH 103, 131 (2002-03).

170. Id. at 130.

171. See supra Section III.B.

172. FLA. STAT. ANN. § 742.17 (2020) (emphasis added).

one party is likely to prefer a different disposition, this risk of unfairness is outweighed by the couple's ability to control the fate of their frozen embryos.[173] Freedom to contract (i.e., to make directives binding in future situations) protects the integrity of disposition disputes. Further, making these contracts defendable by a change in circumstances promotes fairness and protects the procreative liberty interests at risk. Thus, the contractual approach is useful when a valid disposition agreement exists between the parties, and it can be defended by the doctrine of changed circumstances.

2. THE CONTEMPORANEOUS MUTUAL CONSENT APPROACH

In stark contrast, the contemporaneous mutual consent approach should be excluded in all jurisdictions because it is impractical and counterproductive. Although this approach sought to rectify the shortcomings of the contractual approach, it gives no weight to the constitutional rights of the party seeking to become a parent because their wishes are dependent upon the opposing party's consent.[174] Further, this approach requires the party seeking to procreate the embryos to pay the continued storage costs of the cryogenically frozen embryos.[175] Thus, by exercising this constitutional right, the party who does not want the embryos destroyed is financially punished for exercising that right.[176] Leaving the embryos frozen until the parties can reach an agreement also means that the party who wishes to avoid parenthood prevails by default because the court will keep the embryos in that state until mutual consent between the parties is given.[177] Additionally, there is no guarantee that the embryos will be viable until mutual consent is agreed upon; therefore, the contemporaneous mutual consent approach should be excluded in future cases.[178]

The Colorado Supreme Court in *Rooks* rejected the contemporaneous mutual consent approach by agreeing with other

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

174. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 197 (2014).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

critics that the method is "totally unrealistic."[179] If the parties could achieve mutual consent, then they would not have ended up in court.[180] It is also implausible to believe that consent can be achieved during an emotionally charged divorce.[181] The approach also incentivizes the party who does not want the embryos implanted to refrain from consenting over dispositions and prompts an unfair advantage in divorce proceedings, which essentially requires courts to "abdicate [their] judicial responsibilities by ignoring the legislature's directive to distribute equitably the parties' marital property in a dissolution proceeding."[182] Thus, the contemporaneous mutual consent approach should be excluded in disposition disputes when there is no enforceable contract between the parties.

3. THE BALANCING OF THE INTEREST APPROACH

Unlike the previous approaches, the balancing test weighs the benefits and burdens of the parties' requests in a disposition dispute, while simultaneously respecting the coextensive rights to procreate and to avoid procreation.[183] This approach, which resulted from the first IVF dispute in *Davis*, affords a workable standard to the courts when there is no enforceable contract between the parties.[184] Critics of the balancing approach find that it requires burdensome litigation, and also leads to inconsistency and unpredictability.[185] Moreover, some find that the *Davis* court created an exception to the balancing test when it stated in dicta that "the case would be closer if [Mrs. Davis] were seeking to use the pre-embryos herself, but only if she could not achieve parenthood by any other reasonable means"[186] Yet, this "exception" was cured by the *Rooks* opinion in 2018 when it

179. In re Marriage of Rooks, 429 P.3d 579, 589 (2018) (citing Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

184. *Id.*

185. Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce,* 29 J. CONTEMP. HEALTH L. & POL'Y 233, 238 (2013).

186. Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Wule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 567 (1994) (of the view that the *Davis* court undermined the balancing test "by allowing one factor, such as whether or not the pre-embryos will be used by the gamete-donor, to weigh so heavily in the balance" itself); *Davis*, 842 S.W.2d at 604.

provided a list of factors that should be considered when utilizing the balancing of the interest approach and a list of factors that should not be considered.[187] Thus, the balancing of the interest approach provides for a fair disposition of frozen embryos upon disagreement by the parties. This approach is founded on the constitutional protection of procreative autonomy, and effectively protects those liberty interests when a disposition agreement is not available.

With this in mind, it is important to recognize that Arizona's new legislation completely undermines the constitutional considerations at play in embryo-custody disputes. By mandating that disputed embryos go to the party most likely to help them "develop to birth," Arizona has completely overridden the constitutionally protected liberty interests of the party who wishes to avoid procreation.[188] Further, if both parties intend to gestate the embryos, Arizona's new law requires courts to resolve the dispute "in a manner that provides the best chance for the *in vitro* human embryos to develop to birth."[189] Again, this undermines the gamete-providers' interests and forces biological parenthood on an unwilling participant. Arizona's law is similar to Louisiana's "best interest of the *in vitro* fertilized ovum" standard, in which disposition disputes are resolved in the best interest of the frozen embryos, not in the gamete-providers' interests.[190] While the "best interest of the child" standard is paramount in both Arizona and Louisiana child custody cases, the policy reasoning behind this standard should not be utilized in embryotic custody disputes because no child exists yet.[191] While the legal status and "personhood" of the embryo is beyond the scope of this Comment, the United States Supreme Court in *Roe v. Wade* decided that the word "person" used throughout the Constitution does not include the unborn.[192]

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187. In re Marriage of Rooks, 429 P.3d 579, 593-94 (2018).

188. *See* S.B. 1393, 53 Leg., 2d Reg. Sess. (Ariz. 2020) (requiring courts to "[a]ward the in vitro human embryos to the spouse who intended to allow the in vitro human embryos to develop to birth").

189. *See id.*

190. *See supra* Section III.A; LA. STAT. ANN. § 9:131 (2020).

191. *See* ARIZ. REV. STAT. ANN. § 25-403 (2012) ("The court shall determine legal decision-making and parenting time, either originally or on petition for modification, in accordance with the best interests of the child"); LA. CIV. CODE. ANN. art. 131 (2020) ("In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child").

192. Roe v. Wade, 410 U.S. 113, 158 (1973); Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom*

Thus, state legislation that does not properly take into account the interest in procreative freedom recognized as important by the Supreme Court should be struck down. Arizona's law, and similar legislation that does not protect the gamete-providers' interests above all other interests, could scare couples away from participating in IVF in the state, which goes against the entire purpose of assisted reproductive technology's existence: so that couples battling infertility have the chance to become biological parents.[193] For now, Arizona couples who are in dispute over their frozen embryos risk having the embryos born to a disgruntled ex-spouse and becoming biological parents against their will.[194] Is it really in the "best interest" of the frozen embryo to be born into such a family dynamic?

B. THE SOLUTION: SYNTHESIZING *DAVIS* AND *ROOKS*

Until state legislators can properly protect the procreative liberty interests of both participants in IVF, courts should resolve disposition disputes by synthesizing the *Davis* framework and the *Rooks* factors. This synthesized approach is preferred because it acknowledges the fundamental liberty of procreative freedom that falls under the right to privacy, and narrowly weighs each party's right to procreative freedom. Further, by utilizing the factor-based test outlined in *Rooks*, this synthesized approach prevents the party seeking to avoid procreation from having the scale tipped automatically in their favor.[195] Finally, twenty-six years later, the *Davis* framework has evolved from a set of embryo-custody

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and Reproductive Technology, 43 DEPAUL L. REV. 523 (1994) (explaining the legal status of the embryo in four distinct views: "the 'Right-to-Life' stance, the current constitutional view held by the Supreme Court, the Special Respect approach, and the private property notion").

193. Christina Cauterucci, *Why Anti-Abortion Groups Love Arizona's New Frozen Embryo Law*, SLATE (July 19, 2018), https://slate.com/news-and-politics/2018/07/arizonas-new-frozen-embryo-law-is-terrible-news-for-couples-thinking-about-in-vitro-fertilization.html.

194. *Id.*

195. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that typically "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos"); Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L. R. 179, 198 (2014) (explaining that critics of the balancing approach find that it is "'predictable' . . . since the party wishing to avoid parenthood always prevails, save the exception one party is infertile") (quoting Kimberly Berg*, Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 514 (2006)).

guidelines to a functional factor-based test that should be utilized on a case-by-case basis in all jurisdictions.[196]

This synthesized approach proceeds as follows. First, disposition should be resolved by looking to the preferences of parties; if the parties' preferences cannot be ascertained, or if there is a dispute over the disposition of the frozen embryos, then courts should honor an existing agreement between the parties that outlines disposition upon divorce.[197] These agreements are defendable by the doctrine of changed circumstances, provided the party can show a lack of foreseeability and that performance of the disposition agreement would be impracticable. Honoring binding agreements maximizes procreative liberty by respecting the gamete-providers' original intent behind a personal, private decision.

In the absence of a valid disposition agreement, the court should then balance the right to procreate and to avoid procreation and the relevant wishes of the parties to decide how to award the frozen embryos.[198] Thus, now that the parties have turned to the courts to resolve their dispute, the balancing test honors the right to privacy and the right to procreative freedom deemed worthy of protection by the Supreme Court.[199] Ordinarily, the party wishing to avoid procreating should prevail, so long as the other party can achieve parenthood in another reasonable way.

In order to account for any extenuating circumstances (i.e., certain health circumstances) and to protect the integrity of this fact-specific analysis, courts should weigh the following factors: (1) the intended use of the genetic material by the spouse who wishes to preserve them; (2) the physical ability (or inability) demonstrated by the party seeking to use the frozen embryos for implantation; (3) the couple's original intent for undergoing IVF; (4) the burden of the parent seeking to avoid parenthood, including emotional, financial, or logistical reasons; (5) whether a spouse demonstrated bad faith or attempted to use the frozen embryos as unfair leverage in the dissolution proceedings; and (6) any other considerations relevant to the specific parties' situation.[200] These factors reinforce the equally valid constitutionally based interest

196. Rooks v. Rooks, 429 P.3d 579, 594 (Colo. 2018).
197. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
198. *Id.*
199. *See supra* Section II.B.
200. *Rooks*, 429 P.3d at 593-944.

in procreation autonomy, and also simultaneously respect the deeply personal liberty and privacy interests at stake.[201] These factors should be utilized in every disposition dispute where the parties lack an enforceable agreement because, without their guidance, courts will decide embryotic custody under a standard that is too broad.[202]

Finally, the following factors should not be considered in any disposition dispute. First, a court should not assess any financial or economic distinctions between the parties, including whether the party seeking to gestate the embryos can afford a child or another child.[203] Nor shall a court consider the number of existing children the party currently has in determining the use of the embryos.[204] Lastly, adoption should not be considered as a "reasonable alternative" in disposition disputes because the relevant question at issue involves *genetic* parenthood.[205]

This synthesized framework encourages couples to record their mutual consent in valid disposition agreements in the event of a divorce. Where the parties' consent is not memorialized in an enforceable agreement, or the agreement does not account for disposition upon divorce, this framework further weighs the interest at stake in an appropriate manner. Therefore, both spouses' equally valid constitutionally based interests are protected.

VI. CONCLUSION

As new assisted reproductive technologies develop, state legislatures will attempt to regulate reproductive science and, in turn, more controversies will appear before our judicial system. The resolution of those controversies must depend on the liberties previously protected by the Supreme Court. The significance of those liberties underscores the need for a factor-based test that courts can rely on in the absence of state statutes. Until then, the synthesized framework outlined in this Comment must be used in

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201. Rooks v. Rooks, 429 P.3d 579, 581 (Colo. 2018).

202. *See* Hayley Sanchez, *Colorado Supreme Court Sets New Embryo Custody Guidelines in Divorced Couple's Case*, COLORADO PUBLIC RADIO (Oct. 29, 2018) http://www.cpr.org/news/story/colorado-supreme-court-sets-new-embryo-custody-guidelines-in-divorced-couples-case (stating that the court addressed the "umbrella issue" of disposition disputes for the first time, and provided district courts specific factors of what to base their ruling on).

203. *Rooks*, 429 P.3d at 594.

204. *Id.*

205. *Id.* (emphasis added).

embryotic-custody disputes in order to safeguard procreative freedom.

Caroline Strohe