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## "To Be or Not to Be a Parent?" the Search for a Solution to Custody Disputes over Frozen Embryos

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**"TO BE OR NOT TO BE A PARENT?"<sup>1</sup>****THE SEARCH FOR A SOLUTION TO CUSTODY  
DISPUTES OVER FROZEN EMBRYOS**

"Be fruitful and multiply, and replenish the earth."<sup>2</sup> Scripture's first commandment is to produce children. It should not be surprising, therefore, that those who cannot have children have received sympathetic treatment in Jewish literature as far back as the Old Testament. Genesis tells the story of Sarah, Abraham's barren wife, who was so distraught over her inability to have children that she urged Abraham to take on a concubine for purposes of producing a child.<sup>3</sup> God subsequently took pity on Sarah, blessing her with a child of her own.<sup>4</sup>

Contemporary research confirms the claims of the infertile on the sympathy of those more fortunate.<sup>5</sup> Infertility often erodes one's self-esteem, causes feelings of guilt and isolation, and leads to marital strife.<sup>6</sup> Traditionally, infertile couples were faced with a choice: either remain childless or adopt.<sup>7</sup> Recent advances, however, in reproductive science and technology have profoundly

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<sup>1</sup> Kass v. Kass, 235 A.D.2d 150, 168, 663 N.Y.S.2d 581, 593 (2d Dep't 1997) (Miller, J., dissenting), *aff'd*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998).

<sup>2</sup> Genesis 1:28.

<sup>3</sup> Genesis 16:1-4. Sarah said to Abraham "Behold now, the Lord hath restrained me from bearing; go in, I pray thee, unto my handmaid; it may be that I shall be builded up through her." Genesis 16:2. The commentaries explain that this passage teaches us that one who is childless is not "built up" but is "broken down." *Id.*

<sup>4</sup> Genesis 21:2. Sarah gave birth to a child at the age of ninety. *Id.*

<sup>5</sup> Keith Alan Byers, *Infertility and In Vitro Fertilization*, 18 J. LEGAL MED. 265, 270 (1997). Infertility has been described to exist "when a couple have not achieved a pregnancy after one year of regular unprotected sexual intercourse." *Id.* at 266 (citations omitted). "[I]t has been estimated that as many as 28 million couples in the United States experienced reproduction problems in the late 1980's." *Id.*

<sup>6</sup> *Id.* at 270 (discussing the profound effects of infertility including isolation and self-doubt). See also Marcia Joy Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1079 n.1 (1986) (citing Menning, *The Emotional Needs of Infertile Couples*, 34 FERTILITY AND STERILITY 313, 314-17 (1980)).

<sup>7</sup> However, adoption can be very costly and the waiting period for adopting a healthy child can be many years.

altered the ability of infertile couples to produce a child of their own.<sup>8</sup> With these new developments, many couples have been given hope where none had existed for years.<sup>9</sup>

As a result of these new technologies, our society is witnessing a reproductive revolution. In the past two decades, a grandmother gave birth to her grandchildren;<sup>10</sup> a 59 year-old woman gave birth to a child;<sup>11</sup> and an embryologist in Scotland cloned the first mammal, a sheep named Dolly.<sup>12</sup> Cryopreservation has made possible much of this reproductive technology. This process involves freezing embryos created through in vitro fertilization,<sup>13</sup> the fertilization of eggs by sperm outside the body in an unnatural environment.<sup>14</sup> The embryos so created are later implanted in a womb.<sup>15</sup> The first successful birth from a cryopreserved embryo

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<sup>8</sup> See John Robertson, *Assisted Reproductive Technology and The Family*, 47 HASTINGS L.J. 911 (1996) (discussing the growing use of assisted reproductive techniques to help childless couples form families, including "intrauterine insemination, ovulation induction, in vitro fertilization, intracytoplasmic sperm injection, sperm donation, egg donation, embryo donation, and gestational surrogacy.").

<sup>9</sup> "Although adoption and foster parenting can provide parenting experiences, only [assisted reproductive technologies] enable one or both partners to have some biologic tie, either genetic or gestational, to their children." See Robertson, *supra* note 8, at 912.

<sup>10</sup> See John D. Battersby, *South African Woman Gives Birth to 3 Grandchildren*, N.Y. TIMES, Oct 2, 1987, at A9.

<sup>11</sup> See, *A 50 Year old Woman Becomes a Mother*, USA TODAY, Jan. 7, 1994, at 11A.

<sup>12</sup> See Sharon Begley, *Little Lamb, Who Made Thee?* NEWSWEEK, Mar. 10, 1997, at 53-54.

<sup>13</sup> See Byers, *supra* note 5, at 272-73. See also Peter J. Neumann, *Should Health Insurance Cover IVF? Issue & Options*, 22 J. HEALTH POL'Y & L. 1215 (1997). In vitro fertilization has advanced "from the realm of science fiction to become a regularly performed treatment for couples experiencing persistent fertility problems. In Vitro fertilization is performed 50,000 times a year in some three hundred facilities in the United States." Byers, *supra* note 5, at 1215.

<sup>14</sup> WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1983). The term "in vitro" is defined as "outside the living body and in an artificial environment." *Id.*

<sup>15</sup> See Robertson, *supra* note 8, at 1083. The embryos are frozen in liquid nitrogen at a "two-, four-, or eight-cell stage of development, since earlier stage

was reported in 1984 in Melbourne, Australia.<sup>16</sup> Much progress has been recorded since.

For decades, the issue of reproductive rights has been at the forefront not only in science, but also in politics.<sup>17</sup> Abortion and contraception issues have challenged ethical and moral beliefs.<sup>18</sup> For many, the United States Supreme Court decisions in abortion and contraception cases “marked a victorious end to one phase” of a long struggle for reproductive freedom.<sup>19</sup> The successful development of in vitro fertilization in the 1980’s, however, ushered in a new era of unique legal and ethical issues, such as the legal status of pre-embryos, inheritance rights, and posthumous use of the reproductive material.<sup>20</sup> One very new issue relates to the

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embryos are more difficult to freeze, and later stage embryos are too advanced to develop normally after thawing.” Robertson, *supra* note 8, at 1083-84.

<sup>16</sup> See Byers, *supra* note 5, at 273. The embryo was frozen and stored for two months prior to implantation in the mother’s womb. N.Y. TIMES, Apr. 11, 1984, at A16, col. 4.

<sup>17</sup> See Christine Feiler, *Human Embryo Experimentation: Regulation and Relative Rights*, 66 FORDHAM L. REV. 2345 (1998). See also Gina Kolata, *Scientists Report First Cloning Ever of Adult Mammal: Feat Is Shock to Experts*, N.Y. TIMES, Feb. 23, 1997, at A6.

<sup>18</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1977); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>19</sup> John Robertson, *Procreative Liberty and The Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 405 (1983) (noting that “[w]omen in the United States began their long struggle for reproductive freedom with the birth control movement of the mid-nineteenth century.”).

<sup>20</sup> See, e.g., *Moore v. Regents of the University of California*, 793 P.2d 479 (1990) (refusing to grant Moore property rights in his own genetic materials); *Del Zio v. Columbia Presbyterian Medical Center*, No. 74-3558, slip op. (S.D.N.Y. Nov. 14, 1978). In *Del Zio*, the court held that a preimplantation embryo was not the property of the couple who provided the sperm and egg. *Id.* Nevertheless, the couple was awarded \$500,00 for intentional infliction of emotional distress. *Id.* See also Wurmbrand, *supra* note 6, at 1079 n.18. In her article, Wurmbrand discussed the first case to address the issue of the legal status of an embryo. *Id.* Unable to conceive, the Rios’ traveled to Australia in order to attempt in vitro fertilization. *Id.* Two of the eggs were frozen. Subsequently, the Rios’ died in a plane crash. *Id.* The fate of the embryos was decided by the government in favor of adoption. *Id.* See Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997) (analyzing the consequences of inheritance to children born from the use of reproductive technologies).

disposition of frozen embryos.<sup>21</sup> Courts have been asked to determine the ownership disposition of cryopreserved embryos where no specific provision has been made for them in case of divorce.<sup>22</sup> This note examines the custody battles over the frozen embryos. Part I briefly describes in vitro fertilization and embryo cryopreservation. Part II examines the relevant case law. Part III discusses the constitutional right to privacy generally. Finally, Part IV applies the right to privacy to these disputes and suggests that a resolution requires the balancing of competing interests of the parties. This note will argue that the party wishing to avoid reproduction should generally prevail if the other party has other reasonable alternatives to reproduce.

## I. REPRODUCTION WITH THE ASSISTANCE OF TECHNOLOGY

“More than one in eight married couples in the United States suffers from infertility.”<sup>23</sup> Although adoption is an alternative, many couples now seek help from reproductive technologies. In vitro fertilization is in especially wide use and has been called “one of the most important advances in reproductive medicine in this century.”<sup>24</sup> Although scientists have used in vitro fertilization for many years in animals, the first human birth resulting from in vitro

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<sup>21</sup> See *infra* notes 50-115 and accompanying text.

<sup>22</sup> Other debates have included determination of the legal status of the frozen embryo, determination of disposition of the frozen embryos after both of the gamete providers died and whether joint directives for disposition are legally binding. See Christine A. Djalleta, *A Twinkle in A Decedent's Eye: Proposed Amendments To The Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335 (1994) (discussing the “ownership” of frozen embryos after the death of one or both of the gamete providers).

<sup>23</sup> See Robertson, *supra* note 8, at 911 (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 3 (1988) (defining infertility as “a lack of pregnancy after a year of unprotected intercourse.”). See also Byers, *supra* note 5, at 266 (estimating that in the late 1980's, as many as twenty-eight million couples in the United States experienced problems in reproduction).

<sup>24</sup> See Byers, *supra* note 5, at 272 (quoting CHEN, OOCYTE FREEZING, IN CLINICAL IN VITRO FERTILIZATION 113 (C. Wood & A. Trounson eds. 2d ed. 1989)).

fertilization was in 1978 in England.<sup>25</sup> Louise Brown, a normal healthy baby, was conceived in a petri dish making her the world's first "test tube" baby.<sup>26</sup>

The in vitro fertilization procedure is particularly useful when a woman is unable to conceive in utero due to a blockage in her fallopian tubes.<sup>27</sup> The procedure, which takes about two weeks, involves retrieving mature eggs from a woman and fertilizing the eggs with sperm in vitro.<sup>28</sup> During the protocol, the woman is treated with hormones in order to induce ovulation and produce an increased number of eggs.<sup>29</sup> When suitable eggs are retrieved, they are combined with the man's sperm.<sup>30</sup> This fertilization takes place in a culture dish for a particular incubation period. The resulting embryos are transferred back to the uterus for implantation.<sup>31</sup> During the treatment, a doctor may fertilize more embryos than will actually be implanted. In about twelve weeks, the doctor can determine if the procedure worked and the woman is pregnant.<sup>32</sup>

In the twenty years of in vitro fertilization availability, over 35,000 babies in the United States have been born through this technique.<sup>33</sup> The development has been especially popular since

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<sup>25</sup> *The First Test Tube Baby*, TIME, July 31, 1978 at 58.

<sup>26</sup> *Id.* at 62. See also Byers *supra* note 5, at 272. In 1981, Elizabeth Jane Carr, America's first "test tube" baby, was born in Norfolk, Virginia. *Id.*

<sup>27</sup> See Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463 (1992). For more information about in vitro fertilization, see generally Byers, *supra* note 5, at 277-78. Infertility can result from various factors, including age, medication that a partner may be taking, a chronic disease, or a physical condition. Moreover, infrequent ovulation or low male sperm count are often blamed for causing infertility. *Id.* at 266.

<sup>28</sup> See Perry, *supra* note 27, at 467.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* During the procedure, the woman is placed under general anesthesia and several incisions are made in her abdomen. *Id.* A laparscope and a needle are inserted into the abdomen to retrieve the eggs. *Id.* An alternative to laparoscopy is ultrasound-directed needle aspiration. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See ARTHUR KAPLAN, *DUE CONSIDERATION: CONTROVERSY IN THE AGE OF MEDICAL MIRACLES* (1998).

1981 when doctors in London announced the development of a procedure by which embryos created through in vitro fertilization can be frozen in a cryogenic state for later implantation.<sup>34</sup> There are several advantages to cryopreservation.<sup>35</sup> First, physicians can postpone the implantation of the embryo.<sup>36</sup> Second, in vitro fertilization is costly,<sup>37</sup> time consuming, and physically demanding.<sup>38</sup> After all the tests, injections and preparation, in vitro fertilization may result in eight to twelve eggs.<sup>39</sup> Electing to fertilize and freeze the surplus eggs avoids repeating the painful

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<sup>34</sup> See Perry, *supra* note 27, at 463.

<sup>35</sup> See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY :MEDICAL AND SOCIAL CHOICES 3 (1988). See Perry, *supra* note 27, at 468. During Cryopreservation, the embryos are frozen in liquid nitrogen at a temperature of minus 195 degrees centigrade because "at this temperature, the fertilized ova can safely be preserved in a suspended biological state." *Id.* (citations omitted).

<sup>36</sup> See Wurmbrand, *supra* note 6, at 1083.

<sup>37</sup> See Byers, *supra* note 5, at 285. "On average, the cost incurred per successful delivery with in vitro fertilization increases from \$66,667 for the first cycle of in vitro fertilization to \$114,286 by the sixth cycle." *Id.* Due to the probability that the initial in vitro fertilization cycle fails, couples chose to undergo more than just the first cycle and " 'couples return for the \$8,000 to \$10,000 procedure again and again.'" *Id.* at 286 (quoting Librach, *Struggle To Conceive Has Emotional Price: Despite Setbacks, Infertile Couples Continue Pursuit of Parenthood*, ST. LOUIS DISPATCH, Jan. 29, 1995, at 1D.)

<sup>38</sup> See *id.* at 277. In his article, Professor John Robertson refers to the process of in vitro fertilization as "a test of human endurance." *Id.* The process begins with two weeks of daily drug injections. *Id.* The injections are painful and have side effects. *Id.* Each day, the woman undergoes ultrasound examinations and blood tests in order to monitor the ovaries so that the eggs can be removed at the right time. *Id.*

<sup>39</sup> *Id.* at 277. "Although the goal is to retrieve as many eggs as possible, this goal must be weighed against the threat of endangering the woman's health. Hyperstimulation of the ovaries can result in 'increasing patient discomfort and morbidity.'" *Id.* (quoting WOOD, THE CURRENT STATUS AND FUTURE OF ASSISTED REPRODUCTIVE TECHNOLOGY IN THE FEMALE, IN IMPLANTATION IN MAMMALS 277, 278 (1993)). Nevertheless, it is advantageous to retrieve many eggs because of the "correlation between the number of fertilized eggs ultimately transferred to a woman's uterus and the pregnancy rate." *Id.* at 278. Moreover, "[r]etrieving a larger number of eggs increases the likelihood that more fertilized embryo might exist for transfer to the woman's body." *Id.*

procedure, discomfort, time and cost involved in extracting eggs from a woman each time in vitro fertilization is attempted.<sup>40</sup>

For some, electing to freeze an embryo may be a necessity.<sup>41</sup> The physician may wish to postpone implantation when a woman is unable to undergo a second laparoscopy, or foresees possible radiation or other treatment that may damage her ovaries or cause a genetic defect in her eggs.<sup>42</sup> Cryopreservation is now available around the world.<sup>43</sup>

Although it provides a solution to the infertility problem faced by many couples, cryopreservation also provides a myriad of moral, legal and ethical dilemmas.<sup>44</sup> One such dilemma involves the disposition of frozen embryos.<sup>45</sup> Several cases illustrate the difficulties the judicial system faces in attempting to resolve these disputes.

## II. THE DEBATES

The few cases that have dealt with in vitro fertilization have provoked much public interest and legal commentary. They deal in large part with the issue of who should determine the disposition of frozen embryos when the gamete providers have not agreed as to their disposition. Due to the lack of comprehensive legislation in this area, courts have much discretion when deciding these cases.<sup>46</sup> Some courts have focused on whether a frozen embryo is

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<sup>40</sup> See *id.* at 1084. See also John Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of The New Reproduction*, 59 S. CAL. L. REV. 939, 949 (1986).

<sup>41</sup> Wurmbrand, *supra* note 6, at 1084.

<sup>42</sup> See *id.*

<sup>43</sup> See Byers, *supra* note 5, at 265.

<sup>44</sup> See Wurmbrand, *supra* note 6, at 1081 (exploring some of the controversies surrounding frozen embryos). See also Christine A. Djalleta, *A Twinkle in A Decedent's Eye: Proposed Amendments To The Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335 (1994) (discussing the "ownership" of preembryos after the death of the gamete providers).

<sup>45</sup> The cryogenically-preserved product of an in vitro fertilization is alternatively referred to as "pre-embryos," "pre-zygotes," and "frozen embryos."

<sup>46</sup> See *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998). Chief Justice Kaye noted:



considered a person, property,<sup>47</sup> or entitled to special respect.<sup>48</sup> Others, in an effort to avoid this question, have been looking to contract principles.<sup>49</sup> Still other courts have weighed the interests of both gamete providers. The following cases are representative of the issues facing the courts.

*a. York v. Jones*

One of the first cases to deal directly with a dispute between a couple and an in vitro fertilization clinic over custody of frozen embryos was *York v. Jones*.<sup>50</sup> When the Yorks entered a Virginia clinic to undergo in vitro fertilization they signed a consent form

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Proliferating cases regarding the disposition of embryos, as well as other assisted reproduction issues, will unquestionably spark further progression of the law. What is plain, however, is the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated.

*Id.* at 564, 696 N.E.2d at 179, 673 N.Y.S.2d at 355. *See also* Kass v. Kass, 235 A.D.2d 150, 673 N.Y.S.2d 581 (2d Dep't 1997). In his dissent, Justice Miller noted that the "legal, emotional, and ethical nightmare" resulting from these frozen embryo disputes proves the need for legislation mandating in vitro fertilization clinics to require signed agreements stating the parties' intentions in the event there is a change in circumstance. *Id.* at 168, 673 N.Y.S.2d at 594 (Miller, J., dissenting).

<sup>47</sup> *York v. Jones*, 717 F. Supp. 421 (E.D.Va. 1989) (discussing the confused state of jurisprudence regarding defining an embryo). *Compare* *York*, 717 F. Supp. at 421 (acknowledging that embryos were considered "'property' for purposes of a 'cryopreservation agreement'") with *Davis v. Davis*, 842 S.W.2d 588, 590 (Tenn. 1992) (concluding that the status of the frozen embryos was between that of person and property). *See also* Stephanie J. Owens, *Establishing Guidelines for Resolving Disputes Over Frozen Embryos*, 10 J. CONTEMP. HEALTH L. & POL'Y 493, 507 (1993) (discussing the person v. property debate over frozen embryos).

<sup>48</sup> *See* Ethics Committee of the American Fertility Society, *Ethical Considerations of Assisted Reproductive Technologies*, Vol 62, No.5, (Nov. 1994), at Ch. 10, p. 33S.

<sup>49</sup> *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998) (relying on contract principles to resolve the dispute).

<sup>50</sup> 717 F. Supp. 421 (E.D. Va. 1989).

agreement which detailed their rights to the frozen embryos.<sup>51</sup> Several months later, one embryo was cryogenically preserved.<sup>52</sup> Ultimately, the Yorks moved to California and sought the release and transfer of the last cryopreserved embryo from the clinic in Virginia to another in vitro fertilization clinic in California.<sup>53</sup> The Virginia clinic refused to transfer the remaining embryo.<sup>54</sup> The Yorks filed suit in federal court in Virginia and the defendants moved to dismiss.<sup>55</sup> The court found that the agreement created a valid bailor-bailee relationship between the Yorks and the clinic.<sup>56</sup> The court stated that embryos were considered property for purposes of such contracts.<sup>57</sup> The court denied defendants' motion, reasoning that the Yorks had in fact stated a cause of action.<sup>58</sup>

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<sup>51</sup> *Id.* The consent form provided in pertinent part:

We may withdraw our consent and discontinue participation at any time without prejudice . . . . We have the principle responsibility to decide the disposition of our pre-zygotes . . . . Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development.

*Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* The defendants argued that the Yorks agreed to have the procedure done only in Virginia and their proprietary rights to the frozen embryos were limited to the three "fates" set forth in the Cryopreservation Agreement. *Id.* at 427.

<sup>55</sup> *Id.* at 423. Plaintiffs' complaint alleged "breach of contract, quasi-contract; detinue and 42 U.S.C. § 1983." *Id.* at 423. The defendants moved to dismiss the complaint "for failure to state a claim upon which relief can be granted." *Id.*

<sup>56</sup> *Id.* at 425. Although the parties did not expressly create a bailment, under Virginia law, all that is required "is the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment." *Id.* (citing *Crandall v. Woodward*, 206 Va. 321, 143 S.E.2d 923 (1965)).

<sup>57</sup> *Id.* "The essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor." *Id.* (citing 8 AM. JUR.2D *Bailments* § 178 (1980)).

<sup>58</sup> *Id.* at 427.

Shortly thereafter, the case settled and the Yorks were permitted to transfer their remaining frozen embryo to the California clinic.<sup>59</sup> This, of course, is the easy case.

*b. Davis v. Davis*

*Davis v. Davis*,<sup>60</sup> decided by the Supreme Court of Tennessee, is the first case to “attempt to lay out an analytical framework for disputes between a divorcing couple regarding the disposition of frozen embryos.”<sup>61</sup> In *Davis*, Junior Lewis Davis filed for divorce against Mary Sue Davis. The couple agreed to the terms of marriage dissolution except for “who was to have ‘custody’ of the seven ‘frozen embryos’ stored in a Knoxville fertility clinic that had attempted to assist the Davises in achieving a much-wanted pregnancy.”<sup>62</sup> Initially, Mrs. Davis requested custody of the embryos for the purpose of having them implanted in her uterus, while Mr. Davis opposed any implantation until he determined “whether or not he wanted to become a parent outside the bounds of marriage.”<sup>63</sup> Eventually, the parties’ positions changed; Mrs. Davis wanted to donate the embryos to a childless couple and Mr. Davis wanted the embryos to be discarded.<sup>64</sup> *Davis* proceeded through three levels of the Tennessee judicial system, with each court arriving at an entirely different conclusion.

The trial court awarded custody to Mrs. Davis, concluding that the embryos were “human beings.”<sup>65</sup> The appellate court reversed

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<sup>59</sup> See John Robertson, *In The Beginning: The Legal Status Of Early Embryos*, 76 VA. L. REV. 437, 463 (1990).

<sup>60</sup> 842 S.W.2d 588 (Tenn. 1992).

<sup>61</sup> *Kass v. Kass*, 91 N.Y.2d 554, 563, 696 N.E.2d 174, 178, 673 N.Y.S.2d 350, 354 (1998).

<sup>62</sup> *Davis*, 842 S.W.2d at 589.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 590.

<sup>65</sup> *Id.* at 589. See also *Davis v. Davis*, No. E-14496, 1989 WL 140495, (Tenn. Cir. Ct. Sept. 21, 1989) *rev’d*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff’d*, 842 S.W.2d 588 (Tenn. 1992). The trial court judge instructed “it is the manifest Best Interest of the Children, *in vitro*, that they be made available for implantation to assure their opportunity for live birth; implantation is their sole and only hope for survival.” *Id.* at \*11.

and awarded “joint control . . . and equal voice over their disposition” to both Mr. Davis and Mrs. Davis.<sup>66</sup> The appellate court reasoned that Mr. Davis had a “constitutionally protected right not to beget a child where no pregnancy has taken place.”<sup>67</sup> Furthermore, the court found “no compelling state interest to justify ordering implantation against the will of either party.”<sup>68</sup>

The Supreme Court of Tennessee began its analysis by attempting to clarify the legal status of the pre-embryo.<sup>69</sup> The court concluded that the pre-embryos were not persons or property, but in a special category that deserved “special respect because of their potential for human life.”<sup>70</sup> Therefore, according to the court, the parties had equal decision-making authority over the disposition of the pre-embryos.<sup>71</sup> Next, the court discussed “whether the parties will become parents.”<sup>72</sup> The court examined the right to privacy and concluded that “the right of procreational autonomy is composed of two rights of equal significance -- the right to procreate and the right to avoid procreation.”<sup>73</sup> After balancing these two conflicting constitutional interests, the court concluded that Mr. Davis’ interest in avoiding genetic parenthood outweighed Mrs. Davis’ right to procreate by donating the embryos to another couple.<sup>74</sup> The court, however, noted that “the case

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<sup>66</sup> *Davis*, 842 S.W.2d at 589.

<sup>67</sup> See *Davis v. Davis*, 1990 WL 130807 at \*2 (Tenn. Ct. App. Sept. 13, 1990), *aff’d*, 842 S.W.2d 588 (Tenn. 1992).

<sup>68</sup> *Id.* at \*2-\*3.

<sup>69</sup> *Davis*, 842 S.W.2d at 594. “One of the fundamental issues the inquiry poses is whether the pre-embryos in this case should be considered ‘persons’ or ‘property’ in the contemplation of the law.” *Id.*

<sup>70</sup> *Id.* at 597.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 598.

<sup>73</sup> *Id.* at 601.

<sup>74</sup> *Id.* at 604.

Refusal to permit donation of the pre-embryos would impose on [Mary Sue Davis] the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children. While this is not an insubstantial emotional burden, we can only conclude that Mary Sue Davis’ interest in donation is not as significant as the interest Junior

would be closer if Mary Sue Davis was seeking to use the embryos herself, but only if she could not achieve parenthood by any other reasonable means.”<sup>75</sup> The court commented that any proposed state interest in preserving the life of the embryo “is at best slight,” reasoning that:

when weighed against the interests of the individuals and the burdens inherent in parenthood, the state’s interest in the potential life of these pre-embryos is not sufficient to justify any infringement upon the freedom of these individuals to make their own decisions as to whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents.<sup>76</sup>

Thus, according to *Davis*, the right to avoid genetic parenthood is a “fundamental” right.<sup>77</sup> One commentator noted “by finding that the right to avoid genetic procreation is fundamental, the *Davis* court established a barrier to state regulation in this area.”<sup>78</sup> Under this analysis, any attempt at regulation would be subject to a strict scrutiny analysis, “requiring that the means be necessary, or narrowly tailored, to meet a compelling state interest.”<sup>79</sup> However, the United States Supreme Court has not recognized the right to avoid procreation as “fundamental,” therefore for now, any law bearing on such a right will be subject to a rational basis test.<sup>80</sup>

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*Davis* has in avoiding parenthood. If she were allowed to donate these preembryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.

*Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 602.

<sup>77</sup> Robert Muller, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763, 784-85 (1993).

<sup>78</sup> *Id.* at 785.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 786. See also John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 500 (1990) (arguing that the United States

c. *Kass v. Kass*

*Kass v. Kass*,<sup>81</sup> another divorce case, dealt with the disposition of five frozen embryos.<sup>82</sup> The couple had sought the assistance of an in vitro fertilization clinic,<sup>83</sup> which required the parties to sign consent forms.<sup>84</sup> Several attempts at in vitro fertilization failed, but not all of the embryos had been used. The remaining embryos were frozen for future use.<sup>85</sup> Shortly thereafter, the parties filed for divorce.<sup>86</sup> The divorce decree provided that the frozen embryos would be disposed of in the manner specified in the consent form and neither party could claim custody over the embryos.<sup>87</sup> A court action ensued after Mrs. Kass notified the hospital that she wanted possession of the embryos.<sup>88</sup> The trial court awarded custody of the embryos to Mrs. Kass reasoning that a husband's rights in in

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Supreme Court is not likely to recognize the right to avoid procreation as a fundamental right).

<sup>81</sup> 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998).

<sup>82</sup> *Id.* at 557, 696 N.E.2d at 175, 673 N.Y.S.2d at 351.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 558-60, 696 N.E.2d at 176-77, 673 N.Y.S.2d at 352-53. The consent part provided in pertinent part: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction." *Id.* at 559, 696 N.E.2d at 176, 673 N.Y.S.2d at 352. A second part of the consent form provided in pertinent part:

In the event that we . . . 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: . . . (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 559-69, 696 N.E.2d at 176-77, 673 N.Y.S.2d at 353-54.

<sup>85</sup> *Id.* at 560, 696 N.E.2d at 177, 673 N.Y.S.2d at 353.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Kass v. Kass*, 1995 WL 110368, at \*4 (Sup. Ct. Nassau County Jan 18, 1995), *rev'd*, 235 A.D.2d 150, 663 N.Y.S.2d 581 (2d Dep't 1997), *aff'd*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998). Mrs. Kass wished to have the embryos implanted into her uterus. *Kass*, 1995 WL 110368, at \*2.

vitro fertilization are no greater than his rights in in vivo fertilization.<sup>89</sup>

The appellate court reversed the trial court's decision and held that the consent agreement signed by the parties unequivocally set forth the parties' intent and governed the disposition of the frozen embryos.<sup>90</sup> Moreover, the court concluded, a woman's right to bodily integrity is not implicated "in the IVF scenario until such time as implantation actually occurs."<sup>91</sup>

According to the concurring opinion, the consent agreement should not have been relied upon to resolve the dispute because it did not provide "real insight" into the true intentions of the parties and was "susceptible of multiple and conflicting interpretations."<sup>92</sup> The concurrence opined that where there is no agreement declaring the party's intention, "the objecting party, except in the most exceptional circumstances, should be able to veto a former spouse's proposed implantation."<sup>93</sup>

The dissenting opinion agreed with the concurrence that the informed consent agreements failed to provide a clear statement of the parties' intent.<sup>94</sup> Rejecting any presumption in favor of either party, the dissent instead held that the competing rights, equities, and circumstances of both parties should be balanced:<sup>95</sup> "The immediate question before us is whether the burdens of unwanted paternity of the 'would-not-be father' exceed the deprivation to the 'would-be-mother' in this case."<sup>96</sup> Since the record did not contain

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<sup>89</sup> *Id.* at \*4.

<sup>90</sup> *Kass v. Kass*, 235 A.D.2d 150, 158, 663 N.Y.S.2d 581, 588 (2d Dep't 1997), *aff'd*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998). "Accordingly, their prior statements as to disposition, as set forth at page six of the informed consent document, should be given effect according to its clear and unambiguous terms." *Id.*

<sup>91</sup> *Id.* at 155, 663 N.Y.S.2d at 586.

<sup>92</sup> *Id.* at 163, 663 N.Y.S.2d at 591 (Friedmann, J., concurring).

<sup>93</sup> *Id.* at 165, 663 N.Y.S.2d at 592 (Friedmann, J., concurring) (relying on the constitutional principles involving the right to procreate and the right to avoid procreation).

<sup>94</sup> *Id.* at 180, 663 N.Y.S.2d at 601 (Miller, J. dissenting).

<sup>95</sup> *Id.* at 168, 663 N.Y.S.2d at 594 (Miller, J. dissenting).

<sup>96</sup> *Id.* at 178, 663 N.Y.S.2d at 600 (Miller, J. dissenting) (discussing "diverse factors" that the court should consider when making this assessment).

sufficient information to balance adequately the competing interests of the parties, the dissent would have remitted the case back to the lower court for further proceedings.<sup>97</sup>

The New York Court of Appeals unanimously held that the parties had clearly intended that in case of divorce and disagreements, the pre-zygotes would be donated to the clinic for research.<sup>98</sup> Relying on *Davis*, the Court held that “agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.”<sup>99</sup> The court reasoned that such advance directives minimize any misunderstandings and maximize each party’s procreative liberty by reserving to them the authority to make such personal and private decisions.<sup>100</sup> Because the Court relied upon the agreement, it found no need to determine whether the pre-zygotes are entitled to “special respect.”<sup>101</sup> However, the court did conclude that the pre-zygotes are not “persons” for constitutional purposes.<sup>102</sup>

*d. J.B. v. M.B.*

Most recently, in *J.B. v. M.B.*,<sup>103</sup> the Superior Court of New Jersey was asked to decide the fate of seven frozen embryos. The couple’s attempts to conceive naturally were unsuccessful, so they

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<sup>97</sup> *Id.* at 169, 663 N.Y.S.2d at 594 (Miller, J. dissenting).

<sup>98</sup> 91 N.Y.2d 554, 565, 696 N.E.2d 174, 180, 673 N.Y.S.2d 350, 355 (1998).

<sup>99</sup> *Id.* at 565, 696 N.E.2d at 180, 673 N.Y.S.2d at 356 (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)).

<sup>100</sup> *Id.* The appellant argued that the consent forms were ambiguous. *Id.* at 566, 696 N.E.2d at 180, 673 N.Y.S.2d at 356. Applying general contract principles, the court rejected this argument and concluded that “the informed consents signed by both parties unequivocally manifested their mutual intention that in the present circumstances the pre-zygotes be donated for research.” *Id.* at 567, 696 N.E.2d at 181, 673 N.Y.S.2d at 357.

<sup>101</sup> *Id.* at 564-65, 696 N.E.2d at 179, 673 N.Y.S.2d at 355.

<sup>102</sup> *Id.*

<sup>103</sup> *J.B. v. M.B.*, 04-95-97 (N.J.Super. Ct., Sept. 28, 1998).



opted for in vitro fertilization.<sup>104</sup> A consent form with the clinic was executed.<sup>105</sup> After the procedure had begun, the wife discovered that she was pregnant naturally.<sup>106</sup> The couple decided to preserve the embryos by cryopreservation.<sup>107</sup> When, several months after the birth of their baby girl, the couple separated,<sup>108</sup> the wife sought to have the embryos discarded. The husband disagreed, arguing that his religious conviction prevented such an act.<sup>109</sup>

The court employed a balancing test similar to that suggested in *Davis*. Utilizing what it referred to as a "*Raison d'être*"<sup>110</sup> analysis, the court examined the reasons why the parties undertook the in vitro fertilization procedure.<sup>111</sup> Judge Laskin concluded that the parties did not go through the process "with the idea in mind to begin an enterprise of selling or donating embryos to other couples."<sup>112</sup> Accordingly, the court granted the wife's motion for

<sup>104</sup> *Id.* at 3. The couple's infertility problems were due to the blockage of the wife's fallopian tubes. *Id.* at 2. There were no infertility problems attributed to the husband. *Id.*

<sup>105</sup> *Id.* The consent form provided in pertinent part: "The control and disposition of the frozen embryos belongs to the patient and her partner. . . . The I.V.F. team will not be obligated to proceed with the transfer of any cryopreserved embryos if experience indicated the risks outweigh the benefits." *Id.* Attached to the consent form was a legal statement executed by the parties which provided in pertinent part that they "agree that all control, direction and ownership of our tissues will be relinquished to the I.V.F. Program under the following circumstances: a dissolution of our marriage by Court order, unless the Court order specified who takes control and direction of the tissues." *Id.*

<sup>106</sup> *Id.* at 3.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 4.

<sup>109</sup> *Id.* The husband wanted to use the embryos himself or donate them to another couple. *Id.* According to the husband, the frozen embryos were "living entities" which should have been preserved. *Id.*

<sup>110</sup> *Raison d'être* is a French expression which means "reason to be" or "reason for being." *Id.* The court asked the following questions: "Why did the parties in this case, undertake the IVF procedure? What was the reason for the undertaking of the IVF procedure?" *Id.* at 6.

<sup>111</sup> *Id.* The court found that the couple had been happily married, the wife was infertile, the husband was not infertile and in vitro fertilization was the answer to their problems. *Id.*

<sup>112</sup> *Id.* According to Judge Laskin "this was not the *Raison d'être*." *Id.*

summary judgment, basing its decision on several factors. First, the couple had a child naturally; second, the parties were divorced; and, last, the husband, the party who wished to preserve the embryos, had the ability to have more children with another woman.<sup>113</sup> Though the judge stated he would not rule on the issue of when life begins, he did say that he had no hesitation ruling that the cryopreserved embryos “are *not* living entities.”<sup>114</sup>

In *J.B.*, in sum, it was the party who had no infertility problem who wanted to keep the frozen embryos.<sup>115</sup> In such a case, it seems clear that the interests of the one who wishes to avoid procreation outweigh the interests of the one who wishes to procreate.

### III. THE CONSTITUTIONAL RIGHT TO PRIVACY: CRYOPRESERVATION AND PROCREATIVE LIBERTY

Under the Due Process clause of the Fourteenth Amendment, no person shall be “deprived of life, liberty or property without due process of law.”<sup>116</sup> Over the years, the Supreme Court has expanded the meaning of “liberty”<sup>117</sup> to include the right to privacy.<sup>118</sup> In *Meyer v. Nebraska*,<sup>119</sup> the United States Supreme Court declared that the liberty guaranteed by the Fourteenth Amendment includes “the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CONST. amend. XIV.

<sup>117</sup> See *infra* notes 116-135 and accompanying text.

<sup>118</sup> The right to privacy was originally enunciated by Samuel Warren and Louis D. Brandeis at the turn of the last century. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 95 (1890). Fifty years later, the Supreme Court began to recognize such a right. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that an Oklahoma law, which authorized sterilization, violated equal protection); *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) (arguing that a statute violated due process because it imposed upon the “privacy” of marriage).

<sup>119</sup> 262 U.S. 390 (1923).

those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>120</sup>

In *Griswold v. Connecticut*,<sup>121</sup> the United States Supreme Court explicitly recognized the existence of the right to privacy. Justice Douglas, writing for the Court, held that “specific guarantees in the Bill of Rights have penumbras” and it was these specific guarantees, the majority believed, that created a “zone of privacy.”<sup>122</sup> *Griswold* struck down a state prohibition on the use of contraception as unconstitutionally intruding “upon the right of marital privacy.”<sup>123</sup> Following *Griswold*, the United States Supreme Court extended the right to privacy to a number of substantive areas.<sup>124</sup> While *Griswold* shielded the privacy of married couples, *Eisenstadt v. Baird*<sup>125</sup> extended the right of privacy to unmarried individuals.<sup>126</sup> In *Eisenstadt*, the Court stated that 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 to bear or beget a child.”<sup>127</sup>

In *Roe v. Wade*,<sup>128</sup> the Supreme Court relied on the right to privacy to invalidate a statute criminalizing abortion. The Court concluded that the right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>129</sup> *Roe* established that no individual should be denied the right to procreate or compelled to procreate by State action. The *Roe* Court declined to recognize an unborn fetus as a “person” under

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<sup>120</sup> *Id.* at 399.

<sup>121</sup> 381 U.S. 479 (1965) (holding that a Connecticut statute banning the use of contraceptive devices was unconstitutional).

<sup>122</sup> *Id.* at 484.

<sup>123</sup> *Id.* at 486 (Goldberg, J., concurring).

<sup>124</sup> See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Services, Int’l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>125</sup> 405 U.S. 438 (1972) (invalidating a Massachusetts statute limiting the sale of contraceptive devices to married individuals).

<sup>126</sup> *Id.* at 453.

<sup>127</sup> *Id.*

<sup>128</sup> 410 U.S. 113 (1973).

<sup>129</sup> *Id.* at 153.

the federal and state constitutions.<sup>130</sup> From the *Roe* decision we learn that since a “woman alone controls her bodily integrity; her choice dictates the fate of a non-viable fetus.”<sup>131</sup> Nearly twenty years later, the United States Supreme Court in *Planned Parenthood v. Casey*,<sup>132</sup> held that a pregnant woman had a protected liberty interest in deciding whether to continue her pregnancy.<sup>133</sup> The Supreme Court recognized that abortion rights are rooted in the right to privacy<sup>134</sup> and equal protection.<sup>135</sup>

The question yet to be resolved is whether these interests are present when the court is asked to determine the fate of an embryo not yet implanted, specifically, is this right to bodily integrity implicated prior to implantation?<sup>136</sup>

According to the *Davis* court, as we have seen, concerns about a woman’s bodily integrity are not applicable in the in vitro

<sup>130</sup> *Id.* at 158. “The unborn have never been recognized in the law as persons in the whole sense.” *Id.* at 162.

<sup>131</sup> *Kass v. Kass*, 235 A.D.2d 150, 176, 663 N.Y.S.2d 581, 599 (2d Dep’t 1997) (Miller, J., dissenting), *aff’d*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998).

<sup>132</sup> 505 U.S. 833 (1992).

<sup>133</sup> *Id.* at 851-52.

<sup>134</sup> *Id.* at 851.

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education . . . These matters, involving the most intimate and personal choices a person may make in his lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

*Id.*

<sup>135</sup> *Id.* at 852. The court found that “the mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.” *Id.* See also Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 U.C.L.A. L. REV. 1077, 1110 (1998). According to Professor Rao, the right to privacy is misunderstood because it is not attached to individuals but “nurtures social institutions.” Therefore, when there is discord between the parties, the state is permitted to intervene in order to protect both parties’ interests. *Id.* at 1123. The State must balance the conflicting interests based upon policy rather than constitutional principles. *Id.*

<sup>136</sup> *Kass*, 235 A.D.2d at 176, 663 N.Y.S.2d at 599 (Miller, J., dissenting).

fertilization context.<sup>137</sup> *Davis* recognized the right to procreate as an integral part of one's right to privacy<sup>138</sup> and held that "procreational autonomy is a right enjoyed by both females and males and including the right to procreate or not to procreate."<sup>139</sup> Accordingly, the court drew no distinction between female and male gamete providers and viewed their rights as equal. Similarly, in *Kass*, the court concluded that a "disposition of these prezygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice."<sup>140</sup>

#### IV. CONCLUSION

*Davis* attempted to create a framework for cryopreservation cases. As a starting point, *Davis* held that a court should first look to the wishes of the progenitors as spelled out in a contract.<sup>141</sup> According to the *Davis* court, albeit in dictum, any agreement signed by the parties regarding disposition of the frozen embryos, should be presumed valid and binding.<sup>142</sup> If, however, no such agreement exists, as was the case in *Davis*, then the court must resolve the dispute by weighing the interests of both parties. In such a case, 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 in question."<sup>143</sup> Since Mary Davis did not seek to use the frozen embryos for herself she was unable to prevail under the balancing

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<sup>137</sup> *Id.* at 601. Nevertheless, the court conceded that a woman contributes more to the in vitro procedure than a man and the trauma to which a woman is subjected is more severe than that of the man. *Id.*

<sup>138</sup> *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992). See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing the right to procreate as an individual's basic civil right).

<sup>139</sup> *Davis*, 842 S.W.2d at 601.

<sup>140</sup> *Kass v. Kass*, 91 N.Y.2d 554, 564, 696 N.E.2d 174, 179, 673 N.Y.S.2d 350, 355 (1998).

<sup>141</sup> *Davis*, 842 S.W.2d at 604.

<sup>142</sup> *Id.* at 597. "This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition." *Id.*

<sup>143</sup> *Id.* at 604.

approach. The court acknowledged that the case would be “closer” had she wished to use them herself.<sup>144</sup>

*Kass* is significant because it clearly established what *Davis* had set out to do; prior directives are the key to resolving these disputes. However, this author believes that this resolution is the easy way out. In essence, according to *Kass* principles, “it’s too bad - you signed it, now you are bound.” Therefore, the question arises as to what happens when the consent forms are not indicative of the parties’ current intentions, that is, where the interests of one of the parties changes.<sup>145</sup>

In such cases, this author suggests that the courts should attempt to reconcile the parties’ conflicting interests by adopting a balancing approach. If either party can show no other means to procreate, the courts must consider the rights of both parties. Although the *Davis* court adopted a presumption that the party wishing to avoid procreation should normally prevail, the court left open the possibility that the party who wishes to procreate may have a more significant interest in certain circumstances.<sup>146</sup>

The very fundamental nature of procreation leads to the conclusion that contract principles should not govern. A contract that precludes the possibility of having children should not be enforceable. Rather, the court should consider the interests of both parties. Therefore, where both parties signed consent forms but their positions change to their detriment, the court should not look to contract principles, but should weigh the parties’ interests and burdens. In *Kass*, Mrs. Kass did not provide the court with any

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<sup>144</sup> *Id.*

<sup>145</sup> For example, a woman may have reached an age where she can no longer carry a child or has developed a physical condition whereby she is unable to undergo another in vitro fertilization procedure. See John Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990) (discussing the enforceability of the parties’ prior agreement in order to regulate the disposition of the parties’ frozen embryos). In his article, Professor John Robertson states that objection to enforcement of prior agreements arise because the providers are asked to sign these directions for disposition of the embryos at a time when those possibilities are highly abstract. *Id.* at 418. The specific need of the parties may change so dramatically that it may seem “unfair” to hold them to these decisions. *Id.*

<sup>146</sup> For example, if this is the party’s last chance at becoming a parent.

proof that this was her last chance of parenthood.<sup>147</sup> Perhaps if she had done so, the court would have balanced her interest in procreation against Mr. Kass's interest in avoiding procreation. As she failed to do so, we will never know.

*Esther M. Schonfeld\**

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<sup>147</sup> See, e.g., *Kass v. Kass*, 91 N.Y.2d 554, 564, 696 N.E.2d 174, 179, 673 N.Y.S.2d 350, 355 (1998). The *Kass* court rejected Mrs. Kass' argument that the consent forms were ambiguous. *Id.* at 566, 696 N.E.2d at 180, 673 N.Y.S.2d at 356. Applying common-law contract principles the court held that the consent forms unequivocally manifested the intentions of both parties. that the pre-zygotes be donated to the clinic for research. *Id.*

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