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**DISPOSITION OF FROZEN PREEMBRYOS IN THE CASE OF  
DIVORCE: NEW YORK SHOULD IMPLEMENT A MODIFIED  
MUTUAL CONTEMPORANEOUS CONSENT APPROACH**

*Kasey Bray\**

**I. INTRODUCTION**

When partners in New York divorce or separate with joint preembryos left in frozen storage, the New York courts, in some cases, may force one of the parties to have a child with his or her former partner under the contract approach of distribution. This approach leaves parties bound to a contract made years prior. The first New York case concerning the disposition of preembryos did not reach the New York Court of Appeals until more than twenty years after the initial use of in vitro fertilization.<sup>1</sup> Today, New York must adapt to modern reproductive technology and adopt a clear and effective solution for the disposition of frozen preembryos when former partners cannot reach an agreement on disposition of their shared genetic material.

According to the Centers for Disease Control and Prevention (“CDC”), “infertility is defined as not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.”<sup>2</sup> Around

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<sup>1</sup> *Kass v. Kass*, 91 N.Y.2d 554, 564 (N.Y. 1998).

<sup>2</sup> *Infertility FAQs*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 16, 2019), <https://www.cdc.gov/reproductivehealth/infertility/index.htm>. “To get pregnant [a] woman’s body must release an egg from one of her ovaries’ external icon (ovulation external icon).” *Id.* “A man’s sperm must join with the egg along the way (fertilize).” *Id.* “The fertilized egg must go through a fallopian tube external icon toward the uterus external icon (womb).” *Id.* “The fertilized egg must attach

six percent of married women ages fifteen to forty-four suffer from infertility.<sup>3</sup> Couples who want to have a child but suffer from infertility can use Assisted Reproductive Technology (“ART”).<sup>4</sup> ART is any reproductive technology that requires the management of eggs and embryos outside of the woman’s body.<sup>5</sup> This includes in vitro fertilization (“IVF”).<sup>6</sup> If the woman cannot produce eggs, or if either of the parties is infertile or has a severe genetic disease, the parties can use donor eggs, donor sperm, or frozen embryos to conceive.<sup>7</sup>

IVF is the most successful and therefore one of the most common methods of ART.<sup>8</sup> The United States has approximately 500 IVF centers and hundreds of thousands of frozen pre-embryos<sup>9</sup> preserved throughout the country.<sup>10</sup> IVF is a treatment in which an ovum is removed from a woman and placed in a container with sperm

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to the inside of the uterus (implantation).” *Id.* “Infertility may result from a problem with any or several of these steps.” *Id.*

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

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

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *In vitro fertilization (IVF)*, MAYO CLINIC (June 22, 2019), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

<sup>9</sup> “The eggs are retrieved from the woman’s body and examined by a physician who evaluates their quality for fertilization. Egg cells ready for insemination are then combined with the sperm sample and allowed to incubate for approximately twelve to eighteen hours. Successful fertilization results in a zygote that develops into a four- to eight-cell preembryo. At that stage, the preembryos are either returned to the woman’s uterus for implantation or cryopreserved at a temperature of –196C and stored for possible future use.” John E.B. Meyers, *FAMILY LAW IN A NUTSHELL*, 337 (6th ed. 2019) (quoting *J.B. v. M.B.* 783 A.2d 707, 701(N.J. 2001)). Dr. Irving King, a gynecologist who worked in the field of infertility and reproductive endocrinology for twelve years, testified that “the currently accepted term for the zygote immediately after division is “preembryo” and that this term applies up until 14 days after fertilization. . . . [and] that this 14-day period defines the accepted period for preembryo research . . . [and a]t about 14 days, . . . the group of cells begins to differentiate in a process that permits the eventual development of the different body parts which will become an individual.” *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992).

<sup>10</sup> Mary Pflum, *Nation’s fertility clinics struggle with a growing number of abandoned embryos*, NBC NEWS (Aug. 12 2019), <https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806>.

to be fertilized.<sup>11</sup> Once the egg is fertilized, it is put back in the woman's uterus.<sup>12</sup> Normally, IVF clinics will remove multiple eggs at a time so that more than one is fertilized and replaced in the uterus.<sup>13</sup> The embryos that are not replaced can be frozen and stored.<sup>14</sup> IVF treatments often result in multiple pregnancies.<sup>15</sup> Because of the potential health complications of multiple pregnancies, couples often decide against implanting some of the embryos and freeze them instead.<sup>16</sup> There are five different options for the remaining preembryos: storage, compassionate transfer, disposition, donation to research,<sup>17</sup> and embryo donation.<sup>18</sup>

The American Fertility Society has three main ethical views for deciding whether an embryo should be treated as property or human life.<sup>19</sup> On one end of the spectrum, preembryos are viewed as humans, and therefore have the same fundamental rights as living persons.<sup>20</sup> On the other end of the spectrum, preembryos are considered the same as normal human tissue.<sup>21</sup> The middle, and most common, position is to view preembryos with "respect greater than that accorded to human tissue but not the respect accorded to actual persons."<sup>22</sup> Under this view, although preembryos are not living and breathing persons, they have the potential to become persons, and are therefore afforded greater respect than regular human tissue.<sup>23</sup> In *Roe*

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<sup>11</sup> Barry R. Furrow, ET AL., HEALTH LAW HORNBOOK SERIES (3d ed. 2015).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Sara D. Petersen, Comment: *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 L. REV. 1065, 1069 (2003).

<sup>16</sup> *Id.*

<sup>17</sup> Fertility clinic doctor Craig Sweet explained that there are few research facilities accepting preembryos. *Id.* Approximately eighteen percent of his IVF patients opt to donate their preembryos to research, but when there are no facilities that are willing to take them, he has to "go back to those patients and find out what they want to do, but [he] often can't find these people." *Id.*

<sup>18</sup> Rachel Gurevich, *Options for What to Do with Extra Frozen Embryos After IVF*, VERYWELL FAMILY (Feb. 11, 2020), <https://www.verywellfamily.com/extra-embryos-after-ivf-what-are-your-options-1960215>.

<sup>19</sup> The Ethics Committee of the American Fertility Society, *The Moral and Legal Status of Humans*, 46 FERTILITY & STERILITY 3 29S (Supp. 1986).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

*v. Wade*,<sup>24</sup> the Supreme Court held that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>25</sup> The law only recognizes full rights after a live birth.<sup>26</sup> The Court also recognized that the State has an interest “in the potentiality of human life” after viability.<sup>27</sup> Expanding on the Supreme Court’s decision in *Roe*, the Supreme Court of Tennessee in *Davis v. Davis*<sup>28</sup> noted that preembryos are far from being viable.<sup>29</sup> Even after viability, embryos are “accorded more respect than mere human cells because of their burgeoning potential for life,” but are still not given the same rights or status as a living person.<sup>30</sup>

A significant problem with ART arises when a couple divorces after undergoing IVF and cryopreserving the remaining embryos. Unlike the division of property, the disposition of preembryos in a divorce is difficult because of their potential for life. There is an issue on how to decide disposition of the preembryos if the parties cannot agree. If the divorcing parties can agree on how they want to distribute the preembryos, whether by thawing, implanting, or donating the preembryos to a research facility or another infertile couple, then there is no problem.

This Note will focus on the three main approaches to the disposition of the remaining preembryos if the parties separate or divorce and cannot come to an agreement on disposition. First, the constitutional approach balances both parties’ rights granted by the

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<sup>24</sup> 410 U.S. 113 (1973).

<sup>25</sup> *Id.* at 162.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 164-65. A fetus is viable when it is “potentially able to live outside the mother’s womb” with artificial aid. *Id.* Viability is usually reached around 28 weeks, but a fetus may reach viability at as early as 24 weeks. *Id.*

<sup>28</sup> 842 S.W.2d 588 (Tenn. 1992).

<sup>29</sup> *Id.* at 595; *Id.* at 605 n.17 (citing Elisa K. Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 Am. J. Fam. L. 67 (1990)) (“Left undisturbed in the mother’s uterus, a viable fetus has an excellent chance of being brought to term and born live. In contrast, a preembryo in a petri dish, if later transferred, has only a 13-21 percent chance of achieving actual implantation.”).

<sup>30</sup> *Davis*, 824 S.W.2d at 595. The Supreme Court of Tennessee held in that “disputes involving the disposition of preembryos produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed.” *Id.* at 604; *see* discussion *infra* Part III.A.

Fourteenth Amendment, the right to procreate and the right not to procreate.<sup>31</sup> Second, the contract approach, adopted in New York, holds that consent forms executed prior to IVF treatment are “enforceable so long as they do not violate public policy.”<sup>32</sup> Third, under the mutual contemporaneous consent approach, the preembryos remain frozen and stored until, if ever, the parties can come to a mutual agreement on disposition of the preembryos.<sup>33</sup> Additionally, this Note will also discuss a fourth approach adopted in Massachusetts which promotes its public policy against forced parenthood.

This Note will explain why New York should abandon the contract approach and instead implement the mutual contemporaneous consent approach to prevent implantation of preembryos without the contemporaneous consent of both parties. However, to solve the issue of disposition, this Note will argue that New York should modify the mutual contemporaneous consent approach so that the preembryos are thawed if the parties do not agree to a disposition plan in a specified period of time.

Under the proposed change to the New York approach, the consent agreement that the parties executed before IVF would be enforceable as long as neither party contemporaneously objected at the time of divorce. The default rule should be that if only one party wants to use or donate the preembryos but the other does not consent, the parties are deemed to have abandoned the preembryos which would then be thawed. This approach differs from the normal mutual contemporaneous consent approach because the modified default rule in the case of the parties not agreeing on disposition of the preembryos is thawing them.

Part II of this Note will address the Supreme Court decisions that found the constitutional right to procreate and the conflicting right to not procreate. Parts III, IV, and V will analyze the three common approaches to preembryo distribution, respectively. Part VI will analyze Massachusetts’ public policy. Part VII of this Note will propose that New York abandon the contract approach and adopt the mutual contemporaneous consent approach rather than Massachusetts’ public policy approach or the constitutional approach.

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<sup>31</sup> *Id.* at 601.

<sup>32</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 776 (Iowa 2003).

<sup>33</sup> *Id.* at 783.

## II. BACKGROUND ON THE CONSTITUTIONAL RIGHT TO HAVE CHILDREN

Under the Fourteenth Amendment of the United States Constitution, the government cannot “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>34</sup> The Constitution further protects citizens in the Ninth Amendment which states, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>35</sup>

The Supreme Court in *Meyer v. Nebraska*<sup>36</sup> ruled that under the Due Process Clause of the Fourteenth Amendment, every individual has the right “to marry, establish a home, and bring up children.”<sup>37</sup> The Court found that even though “liberty” has not been “define[d] with exactness,” previous Supreme Court decisions have established that the right to “marry, establish a home, and bring up children” are included.<sup>38</sup> Building on the decision in *Meyer*, the Supreme Court held in *Skinner v. Oklahoma*,<sup>39</sup> that the Fourteenth Amendment protects procreation and marriage as basic rights “fundamental to the very existence and survival of the race.”<sup>40</sup> The right to have a child is a basic liberty.<sup>41</sup> The Court further stated that

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<sup>34</sup> U.S. CONST. amend. XIV § 1.

<sup>35</sup> U.S. CONST. amend. IX.

<sup>36</sup> 262 U.S. 390 (1923) (finding that Nebraska’s law prohibiting the teaching of foreign languages in the State unconstitutionally interfered with a parent’s fundamental right to raise their children as they please).

<sup>37</sup> *Id.* at 399; *In re Marriage of Rooks*, 429 P.3d 579, 587 (Colo. 2018) (“We note that the right to procreate or to avoid procreation does not depend on the means by which that right is exercised. An individual may exercise her right to procreate through conventional conception or IVF—or she may exercise her right to avoid procreation through abstinence, contraception, voluntary sterilization, or even abortion—but the nature of the right itself (to procreate or to avoid procreation) remains the same.”).

<sup>38</sup> *Meyer*, 262 U.S. at 399 (“Without a doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

<sup>39</sup> 316 U.S. 535 (1941).

<sup>40</sup> *Id.* at 541.

<sup>41</sup> *Id.*

Oklahoma's act allowing habitual criminals to be sterilized so long as it did not affect the criminal's general health was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>42</sup>

*Griswold v. Connecticut*<sup>43</sup> established the right to privacy in a marriage.<sup>44</sup> Here, two doctors were charged as accessories<sup>45</sup> after giving "information, instruction, and medical advice . . . as to the means of preventing conception" to a married couple.<sup>46</sup> The Court found that marriage lies "within the zone of privacy created by several fundamental constitutional guarantees."<sup>47</sup> The Court noted that it would be "repulsive to the notions of privacy" to allow police to search a married couple's bedroom for contraceptives.<sup>48</sup> Similarly, allowing a law to govern whether a married couple could use contraceptives would invade the privacy of a marriage.<sup>49</sup> The Court held in *Eisenstadt v. Baird*<sup>50</sup> that both married and single individuals have the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," given that the right to privacy is not a right of a married couple, but the rights of two individuals.<sup>51</sup> The Court noted in *Cleveland Board of Education v. LeFleur*,<sup>52</sup> that its decisions in previous cases<sup>53</sup> clearly establish that "freedom of personal choice in matters of marriage and family life is one of the

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<sup>42</sup> *Id.* at 538.

<sup>43</sup> 381 U.S. 479 (1965).

<sup>44</sup> *Id.* at 486.

<sup>45</sup> *Griswold*, 381 U.S. at 480. Any doctor who aided a married couple in violating this statute could be charged as an accessory to the crime of using contraceptives. *Id.* CONN. GEN. STAT. § 53-32 (1958 Rev.) provides, "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.*

<sup>46</sup> *Griswold*, 381 U.S. at 480.

<sup>47</sup> *Id.* at 485.

<sup>48</sup> *Id.* at 585-86.

<sup>49</sup> *Id.*

<sup>50</sup> 405 U.S. 438 (1972).

<sup>51</sup> *Id.* at 453.

<sup>52</sup> 414 U.S. 632 (1974) (holding that the Board of Education's rule requiring mandatory maternity leave without pay violates the Due Process Clause of the Fourteenth Amendment).

<sup>53</sup> The Court referenced its decisions in *Skinner*, *Meyer*, *Griswold*, *Roe*, and *Eisenstadt*. *Id.* at 640.



liberties protected by the Due Process Clause of the Fourteenth Amendment.”<sup>54</sup>

The constitutional rights to procreate and to not procreate are “negative right[s] to be free from interference” as opposed to “affirmative right[s] to assistance.”<sup>55</sup> Negative rights protect a person from unconstitutional interference by the State, but do not require that States affirmatively act to protect those rights.<sup>56</sup> States are not obligated to “take any positive action to secure fertility for infertile individuals.”<sup>57</sup> Consequently, the balancing test used under the constitutional approach consistently sides in favor of a party’s right to not procreate, with rare exceptions.<sup>58</sup>

### III. CONSTITUTIONAL APPROACH

The constitutional approach decides the disposition of preembryos under the Fourteenth Amendment by balancing the parties’ right to procreate and the right not to procreate.

#### A. Tennessee

The Supreme Court of Tennessee in *Davis v. Davis* followed the constitutional approach and decided in favor of the husband’s right to not procreate.<sup>59</sup> The court explained that the Supreme Court in *Griswold* established the right to procreational autonomy under the

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<sup>54</sup> *Id.*

<sup>55</sup> Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 (2008).

<sup>56</sup> Christina C. Lawrence, Note, *Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Preembryos*, 52 CASE W. RES. 721, 728-29 (2002).

<sup>57</sup> *Id.* at 738.

<sup>58</sup> *Id.*; *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (“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.”); *Reber v. Reiss*, 42 A.3d 1131, 1134 (Pa. Super. Ct. 2012) (holding that the wife’s compelling interest of using the preembryos because they were likely her only chance of having a biological child outweighed her former husband’s interest in avoiding unwanted parenthood).

<sup>59</sup> *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992).

Fourteenth Amendment.<sup>60</sup> In *Davis*, the court acknowledged both the right to procreate and the right not to procreate, saying “it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance -- the right to procreate and the right to avoid procreation.”<sup>61</sup> Here, the wife wanted to donate the frozen preembryos to an infertile couple while the husband wanted to destroy the embryos.<sup>62</sup> The couple did not complete a consent form or agreement to govern the disposition of the frozen embryos.<sup>63</sup> The court noted that, although there was no valid consent form, the parties should be entitled to change their minds and modify the contract as the circumstances change even if a valid agreement was made.<sup>64</sup>

To determine the disposition of the embryos, the court looked to the “positions of the parties, the significance of their interests, and the relative burdens that would be imposed by differing resolutions.”<sup>65</sup> The husband had childhood trauma from his parents’ own divorce and was opposed to raising a child whose biological parents were not together.<sup>66</sup> On the other hand, siding with the husband “would impose on [the wife] the burden of knowing that the lengthy IVF procedures she underwent were futile” because the preembryos would be destroyed.<sup>67</sup> The court explained that regardless of whether the preembryos were used by the wife or donated to another infertile couple, if the preembryos resulted in a child, it would “impose unwanted parenthood on [the husband], with all of its possible financial and psychological consequences.”<sup>68</sup> Because of these burdens, the court ruled in favor of the husband’s right to not procreate.<sup>69</sup> The court reasoned that courts should consider the argument of the party wishing to use the embryos if he

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 590.

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

<sup>64</sup> *Id.* at 597.

<sup>65</sup> *Id.* at 603.

<sup>66</sup> *Id.* at 604.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 603.

<sup>69</sup> *Id.* at 604.

or she has no “reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”<sup>70</sup>

### B. New Jersey

In *JB v. MB*,<sup>71</sup> the Supreme Court of New Jersey reached a similar result as the court in *Davis*, and held in favor of the wife’s right to not procreate.<sup>72</sup> In this case, the parties executed a consent form prior to the IVF treatment that included a provision for the disposition of embryos in the case of divorce.<sup>73</sup> The clause stated, in the event of divorce, the IVF center would determine disposition of the embryos, unless the court decided the disposition.<sup>74</sup> A year after the procedure, the couple successfully had a child together and left seven preembryos remaining in storage.<sup>75</sup> The parties soon divorced, and the husband wished to either implant the embryos or donate the preembryos to “other infertile couples,” while his former wife wanted the embryos destroyed because she claimed she only intended to use them in the marriage.<sup>76</sup>

The New Jersey Supreme Court agreed with the court in *Davis*, where the right to not procreate should outweigh the right to procreate.<sup>77</sup> The husband’s right to procreate was not violated by destruction of the embryos.<sup>78</sup> The parties already had a daughter and the husband would not be stopped from having more children in the future without the use of the preembryos.<sup>79</sup> Allowing the husband to use the preembryos, whether to implant or donate, would cause the wife to be forced into having a biological child that she did not want.<sup>80</sup> The circumstances surrounding her decision to begin IVF drastically changed between having a child and her marriage ending

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<sup>70</sup> *Id.*; Ashley Alenick, Note, *Pre-Embryo Custody Battles: How Predisposition Contracts Could Be the Winning Solution*, 38 *CARDOZO L. REV.* 1879, 1891 (2017) (“Reasonable possibility is broadly defined to include both a willingness to undergo further IVF procedures or to adopt.”).

<sup>71</sup> 783 A.2d 707 (N.J. 2001).

<sup>72</sup> *Id.* at 720.

<sup>73</sup> *Id.* at 710.

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

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

<sup>76</sup> *Id.* at 710.

<sup>77</sup> *Id.* at 716.

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

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

<sup>80</sup> *Id.* at 717.

in divorce.<sup>81</sup> Her constitutional right to not procreate was more at risk in this situation.<sup>82</sup>

The court noted that if the parties have a valid agreement in place, such agreement should be upheld.<sup>83</sup> However, either party should have the right “to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.”<sup>84</sup> This allows both parties to both determine disposition of the embryos and to guard their own interests while also allowing the parties to change their minds.<sup>85</sup>

### C. Colorado

In *In re Marriage of Rooks*,<sup>86</sup> the Supreme Court of Colorado held that when parties do not have an enforceable agreement to determine disposition, courts should balance the parties’ “equally valid, constitutionally based interests in procreational autonomy.”<sup>87</sup> Because the parties did not indicate their intention for disposition of the embryos in the case of divorce in their consent form, the agreement was not applicable and the court remanded the case with instructions to apply the constitutional analysis.<sup>88</sup> The court enumerated a list of factors that should be considered when balancing the parties’ interests: (1) the intended use of the preembryos, (2) whether the party wishing to use the embryos has other means of conceiving a child; (3) the original reasons for deciding to participate in IVF, (4) the burden placed on the unwilling party if a child were to be born, and (5) bad faith on the part of either party, among other “relevant case-by-case” factors.<sup>89</sup> The Court noted that when applying the intended use of the preembryos factor, courts should prioritize a party who wants to use the preembryos to become a genetic parent over a party who wishes to donate the preembryos to another couple.<sup>90</sup>

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<sup>81</sup> *Id.* at 710.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 719.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 429 P.3d 579 (Colo. 2018).

<sup>87</sup> *Id.* at 594.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 593-95.

<sup>90</sup> *Id.* at 593.

#### D. Pennsylvania

In *Reber v. Reiss*,<sup>91</sup> after the wife had been diagnosed with breast cancer, the parties decided to begin IVF “to preserve [w]ife’s ability to conceive a child.”<sup>92</sup> As a result of chemotherapy and the wife’s being forty-four years old, the embryos were most likely the only way for the wife to become a biological parent.<sup>93</sup> The husband opposed implantation of the embryos.<sup>94</sup> As an adopted child himself, the husband was concerned that his potential child would suffer from not having a relationship with his or her biological father.<sup>95</sup> He also claimed that he only participated in IVF as a safeguard for the wife to have a biological child and he did not want to provide financial support to a potential child born to his former wife from the preembryos.<sup>96</sup>

The Pennsylvania Superior Court ruled in favor of the wife, reasoning that the “pre-embryos are likely [w]ife’s only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all.”<sup>97</sup> According to the court, the husband implicitly agreed to IVF and could still be a part of the child’s life without obligation to pay child support.<sup>98</sup> The court rejected the husband’s argument that he only participated as a safeguard because his participation also allowed the wife to become a genetic parent, which was the purpose of the wife’s fighting for implantation.<sup>99</sup> The court indicated that it did not have to decide whether to implement the constitutional approach or the contract approach because neither party had signed the divorce portion of the consent form.<sup>100</sup>

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<sup>91</sup> 42 A.3d 1131 (Pa. Super. Ct. 2012).

<sup>92</sup> *Id.* at 1132.

<sup>93</sup> *Id.* at 1442.

<sup>94</sup> *Id.* at 1440.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1442.

<sup>98</sup> *Id.* at 1441 (“Husband also contends that the prospective child would be a financial burden for him, and the trial court erred in concluding it had full equity power to rely on Wife’s vow not to seek financial support from Husband if a child is born . . . Husband’s concerns must be considered in light of Wife’s agreement to do her best to assure that Husband never has to pay to support the child or children.”).

<sup>99</sup> *Id.* at 1440-41.

<sup>100</sup> *Id.* at 1136.

#### IV. MUTUAL CONTEMPORANEOUS CONSENT

Under the mutual contemporaneous consent model, the two parties have the power to decide what happens to the embryos, as opposed to the constitutional approach where the court analyzes the circumstances and makes its own decision about distribution.<sup>101</sup> Even though the power remains with the parties, as it does in the contract approach, the mutual contemporaneous consent approach allows the parties to change their minds as the situation changes.<sup>102</sup> The mutual contemporaneous consent model differs from the contract approach in that it requires that “no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors.”<sup>103</sup> If the donors cannot agree, the embryos continue to be cryopreserved<sup>104</sup> in storage.<sup>105</sup>

##### A. Iowa

In *In re Marriage of Witten*<sup>106</sup> the wife asked the court for custody of the embryos so that she could implant them to become a biological parent.<sup>107</sup> The husband opposed implantation of the embryos into his former wife, but stated he would agree to their donation.<sup>108</sup> The court decided that it would be against public policy to uphold the parties’ contract, forcing the husband to become a parent, when he clearly changed his mind since the contract was

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<sup>101</sup> *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

<sup>102</sup> *Id.* at 777.

<sup>103</sup> *Id.* at 783. Signed authorization is compulsory under the mutual contemporaneous consent model. *Id.*

<sup>104</sup> Petersen, *supra* note 15, at 1069 (“Cryopreservation entails maintaining the embryos in a solution of liquid nitrogen ‘to protect the fertilized eggs from damage. Frozen embryos are stored at . . . approximately -400 [degrees] F . . . .’ The ability to cryopreserve affords couples greater flexibility in their family planning, as it allows for the possibility of subsequent pregnancies without the woman having to undergo additional cycles of ‘ovarian stimulation and retrieval,’ which is an invasive and painful procedure. Moreover, if and when couples do decide to thaw and to implant their stored embryos, the transfer procedure is identical to that involving fresh embryos immediately following IVF.”).

<sup>105</sup> *Witten*, 672 N.W.2d at 783.

<sup>106</sup> *Id.* at 773.

<sup>107</sup> *Id.* at 772.

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

created.<sup>109</sup> Instead, because the contract no longer expressed the husband's desires, the court held that the embryos would remain in cryopreservation indefinitely, until an agreement was reached by the parties.<sup>110</sup>

### B. Criticisms of the Mutual Contemporaneous Consent Approach

In *Reber*, the disposition of preembryos was an issue of first impression.<sup>111</sup> The Pennsylvania Superior Court analyzed three different approaches used by other states to determine which approach the Pennsylvania courts should use.<sup>112</sup> It criticized the mutual contemporaneous consent approach as "totally unrealistic."<sup>113</sup> The court noted that if the "parties could reach an agreement, they would not be in court."<sup>114</sup>

Additionally, although the mutual contemporaneous consent approach emphasizes that "each partner [is] entitled to an equal say in how the embryos should be disposed," a stalemate puts all of the power in the hands of the party opposing implantation.<sup>115</sup> First, rather than the parties splitting the costs when an agreement cannot be reached, the party that opposes thawing the preembryos is responsible for the entire cost of keeping the preembryos cryopreserved.<sup>116</sup> Second, the party favoring destruction of the preembryos may emotionally manipulate the other party or hold the preembryos "hostage" by only agreeing to implantation in exchange for money or property.<sup>117</sup>

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<sup>109</sup> *Id.* at 781.

<sup>110</sup> *Id.* at 783.

<sup>111</sup> *Reber v. Reiss*, 42 A.3d 1131, 1134 (Pa. Super. Ct. 2012).

<sup>112</sup> *Id.* at 1134-35.

<sup>113</sup> *Id.* at 1142 n.5.

<sup>114</sup> *Id.* at 1142.

<sup>115</sup> *Szafranski v. Dunston*, 993 N.E.2d 502, 511 (Ill. App. Ct. 2013) (alteration in original) (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003)) (explaining that an individual can contractually relinquish his fundamental rights not to become a parent by signing a valid consent agreement); Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFFALO L. REV. 1159 (2009).

<sup>116</sup> Strasser, *supra* note 115, at 1210.

<sup>117</sup> *Id.*

**V.      CONTRACT APPROACH**

The contract approach enforces the consent form, filled out by the parties prior to IVF, as a binding and valid agreement regarding disposition of the preembryos.<sup>118</sup> Under the contract approach, “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>119</sup> The contract approach allows the parties to determine their own plan for disposition of the embryos in the case of divorce, as opposed to the court’s plan.<sup>120</sup> Courts that follow the contract approach enforce a valid agreement between the parties that specifies the disposition of the embryos in the case of divorce.<sup>121</sup> The courts using the contract approach do not analyze either party’s constitutional rights to have or to not have a child, instead carrying out the parties’ intention and purpose in forming the contract.<sup>122</sup>

**A.      New York**

New York follows the contractual approach to disposition of the preembryos as shown in the following cases. In *Kass v. Kass*, the former husband and wife had five frozen preembryos in storage.<sup>123</sup> The wife was fighting for sole custody of the preembryos so that she could conceive a child.<sup>124</sup> The consent form, filled out prior to the parties’ IVF attempts, stated that the preembryos were to be donated in a situation where the parties were unable to agree on disposition.<sup>125</sup> The husband counterclaimed and requested specific performance for embryo donation based on the consent agreement.<sup>126</sup>

The New York Court of Appeals held that the consent form filled out by the parties that expressed their intent for disposition of the preembryos is normally “valid and binding, and enforced in any

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<sup>118</sup> Alenick, *supra* note 70, at 1887.

<sup>119</sup> *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998).

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

<sup>121</sup> Sarah Holman Loy, *Responding to Reber: The Disposition of Pre-Embryos Following Divorce in Pennsylvania*, 122 PENN. STATE L. REV. 545, 552-53 (2018).

<sup>122</sup> *Kass*, 91 N.Y.2d at 567.

<sup>123</sup> *Id.* at 557.

<sup>124</sup> *Id.* at 560.

<sup>125</sup> *Id.* at 567.

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



dispute between them.”<sup>127</sup> The consent form that was signed by both husband and wife, “unequivocally manifest[ed] their mutual intention” to donate the embryos in the case of divorce.<sup>128</sup> The court noted that the consent form contained “words of shared understanding— ‘we,’ ‘us’ and ‘our,’” that showed that both parties were in agreement about the disposition that was explained in the consent form.<sup>129</sup> Both parties stipulated that they signed the IVF consent form of their own free will and according to their accurate intentions.<sup>130</sup> Therefore, the court upheld the consent form, which provided that the preembryos would be donated for research in the case of divorce.<sup>131</sup>

Following *Kass*, the court in *Finklestein v. Finklestein* upheld the consent form because it expressed the parties’ intention in the case of divorce.<sup>132</sup> The consent form stated that the preembryos were for the parties’ sole use, with the option of either party to “revoke such consent.”<sup>133</sup> The husband filled out a form from the IVF program on which he wrote, “revoking my consent to use of any of my genetic material, including the embryo created with Batel Yishay Finklestein” (his wife).<sup>134</sup> The court explained that, under the consent agreement, either party could change his or her mind and withdraw consent, whether it related to the storage of the embryos or the implantation of the embryos.<sup>135</sup> In *Finklestein*, a party had to revoke his or her consent to prevent the other party from using the preembryos.<sup>136</sup> In contrast, under the mutual contemporaneous consent approach both parties must contemporaneously sign an authorization for use of the preembryos. The court enforced the contract and refused to allow the wife to implant the preembryos because the husband revoked his consent as allowed under the agreement.<sup>137</sup> Instead, the court granted the husband custody of the preembryos to destroy them. If the consent form did not have a

<sup>127</sup> *Id.* at 565 (citing *Davis v. Davis*, 842 S.W.2d. 588, 597 (Tenn. 1992)).

<sup>128</sup> *Id.* at 567.

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

<sup>130</sup> *Id.* at 566.

<sup>131</sup> *Id.* at 569.

<sup>132</sup> *Finklestein v. Finklestein*, 162 A.D.3d 401 (N.Y. App. Div. 2018).

<sup>133</sup> *Id.* at 402-03.

<sup>134</sup> *Id.* at 402.

<sup>135</sup> *Id.* at 403.

<sup>136</sup> *Id.* at 401-02.

<sup>137</sup> *Id.* at 404.

provision for revoking consent, the husband would be unable to revoke his consent and the wife would be able to use the preembryos to implant without his contemporaneous consent.<sup>138</sup>

Following the precedent in *Kass*, the Supreme Court of New York County in *Heldt v. Watnik*<sup>139</sup> upheld a consent form that gave one party custody of the preembryos and allowed for implantation against the other party's wishes.<sup>140</sup> The parties executed three of the same consent agreements, prior to IVF, which stated that the embryos are "joint property" and therefore the IVF center "will not permit embryo(s) designated as joint property to be used without the consent of both [parties]."<sup>141</sup> However, the consent agreements also stated that, in the event of separation of the parties, the preembryos would go to the woman, who could then use them for implantation.<sup>142</sup> Although the court held that the contract was unambiguous, it can be argued that the contract's contradictory language created the ambiguity. Treating the preembryos as joint property or granting custody to the woman in the case of separation are inconsistent. However, the court decided that the consent form was unambiguous and could be upheld because it "expressly outlined three scenarios in which the parties are to choose a specific disposition plan," one scenario being the separation of the parties.<sup>143</sup> Following the terms of the consent form, the court granted custody of the preembryos to the woman.<sup>144</sup>

## B. Washington

Implementing the contract approach, the Supreme Court of Washington in *In re Litowitz*<sup>145</sup> chose to enforce the consent form signed by both parties.<sup>146</sup> The preembryos were created with an egg from a donor, which was fertilized with the husband's sperm.<sup>147</sup> Although the wife was not a biological parent, the husband and wife

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<sup>138</sup> *Id.* at 403-04.

<sup>139</sup> No. 651464/2018, 2019 WL 2371882, at \*7 (N.Y. Sup. Ct. June 5, 2019).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at \*1-2.

<sup>142</sup> *Id.* at \*2.

<sup>143</sup> *Id.* at \*4.

<sup>144</sup> *Id.* at \*5.

<sup>145</sup> 48 P.3d 261 (Wash. 2002).

<sup>146</sup> *Id.* at 270-71.

<sup>147</sup> *Id.* at 262.

were the “intended parents” and they were in charge of making decisions regarding disposition of the preembryos.<sup>148</sup> The egg donor contract executed by the wife, husband, and the egg donor gave the wife equal rights to the embryos, even though the embryos were not biologically hers.<sup>149</sup> After the divorce, the husband wanted to donate the embryos to another couple, while the wife intended to have the preembryos implanted in a surrogate.<sup>150</sup>

The parties indicated in the consent agreement that, after the preembryos had been frozen in storage for five years, they should be thawed and “not allowed to undergo further development,” unless the parties extended the length of the storage.<sup>151</sup> To change the consent agreement, both parties had to agree.<sup>152</sup> Under the contract, because five years passed from both the date of the contract and the date of the implantation of the other preembryos from their IVF procedure, and because neither party requested that the five-year period be extended, the embryos should have been thawed.<sup>153</sup> The court upheld the contract.<sup>154</sup>

## VI. PUBLIC POLICY REGARDING FORCED PARENTHOOD

### A. Massachusetts

Massachusetts prohibits the use of preembryos by either party if it would require one party to unwillingly become a parent which would be against public policy.<sup>155</sup> This public policy prevails over a contractual agreement made by the parties which would compel one of the parties to become a parent against his or her wishes.<sup>156</sup> In 2000, Massachusetts became the first and only state that applied this policy.<sup>157</sup>

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<sup>148</sup> *Id.* at 263.

<sup>149</sup> *Id.* at 267.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 263-64.

<sup>152</sup> *Id.* at 270-71.

<sup>153</sup> *Id.* at 269.

<sup>154</sup> *Id.* The court noted that it was unknown if the preembryos had already been thawed or if they were still in existence. *Id.*

<sup>155</sup> *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1058.

In *A.Z. v. B.Z.*,<sup>158</sup> the Supreme Court of Massachusetts invalidated a consent form filled out prior to the IVF process.<sup>159</sup> Prior to the first IVF treatment, the husband and wife filled out the consent form that stated that in the case of separation, the preembryos would be given to the wife for implantation.<sup>160</sup> The wife gave birth to twins after the couple participated in IVF treatment for three years.<sup>161</sup> Before every subsequent treatment, the husband signed a blank consent form and then the wife would fill in the information with the same provision in case of separation.<sup>162</sup> When the couple separated, there were four frozen preembryos in storage.<sup>163</sup> The husband filed a motion to prevent the wife from thawing and implanting them.<sup>164</sup>

The wife wanted the consent form upheld four years after the husband signed it.<sup>165</sup> During those four years, the parties' circumstances changed significantly because they divorced.<sup>166</sup> It was unclear if the husband intended the wife to receive the embryos in the case of "separation,"<sup>167</sup> because only the wife filled out the forms stating that she would receive the preembryos in the case of separation.<sup>168</sup> The consent form never outlined the terms of the parties' intent for raising the child, such as custody and child support, if in the case of separation, the wife did have a child.<sup>169</sup> The court ruled that the consent form could not be upheld.<sup>170</sup> Additionally, the court affirmed the judgement of the Suffolk County Probate and

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<sup>158</sup> 725 N.E.2d 1051 (Mass. 2000).

<sup>159</sup> *Id.* at 1058.

<sup>160</sup> *Id.* at 1054.

<sup>161</sup> *Id.* at 1053.

<sup>162</sup> *Id.* at 1057.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1056-57.

<sup>166</sup> *Id.* at 1057.

<sup>167</sup> *Id.* ("Separation and divorce have distinct legal meanings. Legal changes occur by operation of law when a couple divorces that do not occur when a couple separates. Because divorce legally ends a couple's marriage, we shall not assume, in the absence of any evidence to the contrary, that an agreement on this issue providing for separation was meant to govern in the event of a divorce."). However, the parties could argue that there is little distinction between divorce and separation pursuant to the order in this case.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

Family Court which granted a “permanent injunction in favor of the husband, prohibiting the wife ‘from utilizing’ the frozen preembryos held in cryopreservation at the clinic.”<sup>171</sup>

The court went even further than resolving the issues between the parties.<sup>172</sup> More broadly, the court refused to uphold any consent form that would compel an unwilling party into parenthood.<sup>173</sup> Even if a party entered into a valid agreement to participate in IVF treatments and allowed his partner to implant the preembryos in the case of divorce, “prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions.”<sup>174</sup> Agreements for distribution of preembryos in the case of divorce are not per se invalid.<sup>175</sup> As long as the distribution agreement does not violate public policy, the parties can mutually decide distribution.<sup>176</sup> The law should not be able to compel the husband to become a parent with his former spouse four years after they signed the consent form, during which time the parties divorced.<sup>177</sup>

The court noted that contracts will not be upheld if “the public interest in freedom of contract is . . . outweighed by other public policy considerations.”<sup>178</sup> It relied on a Massachusetts statute that prohibits contracts binding an individual into “familial relationships” that include marriage and parenthood.<sup>179</sup> In addition, the Massachusetts Supreme Court had previously refused to uphold contracts that “bind individuals to future family relationships.”<sup>180</sup>

## B. Arizona

On the other hand, in March 2018, Arizona passed a law stating that in deciding disposition of frozen preembryos, courts must “award the in vitro human embryos to the spouse who intends to

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<sup>171</sup> *Id.* at 1053.

<sup>172</sup> *Id.* at 1057.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1062.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1055.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1058.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

allow the in vitro human embryos to develop to birth.”<sup>181</sup> Even if the parties have a valid agreement providing for the disposition upon divorce, the court must award the preembryos to the party who intends to have a child, regardless of whether the contractual agreement provides otherwise.<sup>182</sup> Arizona’s public policy prevails over the terms of the contract.<sup>183</sup>

## **VII. ARGUMENT: NEW YORK SHOULD ADOPT THE MODIFIED MUTUAL CONTEMPORANEOUS APPROACH**

### **A. Implementing the Mutual Contemporaneous Consent Approach over the Massachusetts’ Public Policy and Constitutional Approach**

The Massachusetts’ public policy approach and the mutual contemporaneous consent approach prevent unwanted parenthood by preventing a person from being forced into a familial relationship. However, the mutual contemporaneous consent approach is preferable because it protects against unwanted parenthood and solves the issue of disposition of the preembryos. The public policy approach only mandates that parties cannot be forced into parenthood but does not direct disposition of the preembryos. In *A.Z.*, after establishing the public policy approach, the Supreme Court of Massachusetts affirmed the probate court’s decision to decide disposition under the constitutional approach, rather than establishing a standard method of disposition under the public policy approach.<sup>184</sup> If New York decided to implement the same public policy approach, it would require an additional approach to determine disposition. Therefore, this approach is not enough to completely solve the problem of disposition.

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<sup>181</sup> ARIZ. REV. STAT. §25-318.03 (LexisNexis 2018).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *A.Z.*, 725 N.E.2d at 1054-55.

### B. Modification of the Mutual Contemporaneous Consent Approach

As a solution to the valid criticisms<sup>185</sup> of the mutual contemporaneous approach, New York should implement a default rule that the preembryos are thawed if the parties do not come to a contemporaneous agreement. The default thawing rule provides an incentive for the parties to revisit distribution discussions upon divorce and prevents preembryos from remaining in storage permanently in the absence of an agreement. If the parties do not decide disposition within five years of divorce, the preembryos should be considered abandoned by both parties and thawed. If neither party contemporaneously objects to the consent agreement's disposition, the consent agreement then determines disposition.

Adding a default rule for thawing the preembryos if the parties cannot create a disposition plan after divorce also reduces the problem of abandoned preembryos.<sup>186</sup> Under the traditional mutual contemporaneous consent approach, preembryos are often stuck in "legal limbo" because they are frozen in storage indefinitely until disposition is decided by the parties or a court.<sup>187</sup> Although the exact number of abandoned preembryos across the United States has not been determined, fertility experts estimate that hundreds of thousands of preembryos have been abandoned<sup>188</sup> and left frozen in storage for years on end because there is no limit or rule that requires preembryos to be thawed after a period of time.<sup>189</sup>

Dr. Robert Nachtigall's study of fifty-eight couples with an average of 7.1 preembryos in storage per couple found "after an

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<sup>185</sup> See discussion *supra* Part IV.B.

<sup>186</sup> Mary Pflum, *Nation's fertility clinics struggle with a growing number of abandoned embryos*, NBC NEWS (Aug. 19, 2019, 4:34 AM), <https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806>.

<sup>187</sup> *Id.*

<sup>188</sup> Though the exact definition varies from clinic to clinic, "an abandoned embryo generally refers to a situation in which a patient has not paid storage fees related to a frozen embryo for five or more years and fails to respond to letters and calls from the clinic." *Id.*

<sup>189</sup> *Id.* Clinics are reluctant to discard frozen preembryos, even if the storage fees are no longer paid or whether there is a contract in place providing for the preembryos to be discarded after a period of time. *Id.* Clinics do not want to be liable or to receive bad press for thawing preembryos that would have been used. *Id.*

average of 4.2 years of cryopreservation, seventy-two percent of couples still had not made a decision on the disposition of their embryos.”<sup>190</sup> Although there may be no harm caused to the undecided parties by leaving preembryos in storage indefinitely, a time limit on the duration of preembryo storage is necessary to protect infertility doctors.<sup>191</sup> By leaving preembryos indefinitely in storage, the burden of deciding whether and when the preembryos should be destroyed does not disappear.<sup>192</sup> Instead, the burden to dispose of the preembryos shifts to doctors or the heirs of the parties long after the parties die.<sup>193</sup> Even if the preembryos are not abandoned and the parties die with preembryos remaining in storage, it would still be up to whoever inherits their estate to decide disposition, potentially shifting the burden to their living children or parents.<sup>194</sup> Although doctors can legally destroy the preembryos if they are abandoned, many doctors “will not destroy the embryos for fear that the couple will return and demand their embryos.”<sup>195</sup> In the event that the couple returns, the doctor who destroyed the preembryos could be sued, even for something “as serious as wrongful death.”<sup>196</sup> On the other hand, a doctor, who keeps the abandoned preembryos in storage, he or she would have to pay the cost of storage.<sup>197</sup>

A rule mandating that frozen preembryos must be thawed after five years of storage is not unprecedented. In 1990, England passed the Human Fertilization and Embryology Act of 1990 (“HFEA”).<sup>198</sup> HFEA established a five-year limit for storage of preembryos, after which the government destroys the preembryos.<sup>199</sup> Additionally, the American Society for Reproductive Medicine’s (“ASRM’s”) view is that there should be a specific time limit on

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<sup>190</sup> Molly O’Brien, Note and Comment, *An Intersection of Ethics and Law: The Frozen Embryo Dilemma and the Chilling Choice Between Life and Death*, 32 WHITTIER L. REV. 171 (2010).

<sup>191</sup> *Id.* at 184-85.

<sup>192</sup> *Id.* at 185.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 185.

<sup>195</sup> *Id.* at 173.

<sup>196</sup> *Id.* at 187.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 174.

<sup>199</sup> *Id.* at 174.



preembryos being cryopreserved.<sup>200</sup> The ASRM agrees with the HFEA time limit of five years for cryopreservation of preembryos.<sup>201</sup> The New York legislature should follow both the HFEA and ASRM and pass a five-year limit on frozen storage, with the government destroying the preembryos after five years. This would encourage parties to decide a disposition plan within five years and protect fertility doctors from any potential lawsuits.

An argument against the mutual contemporaneous consent approach is that parties who cannot have biological children on their own and wish to implant the preembryos are inhibited from exercising their fundamental right to become parents without the consent of the other party. However, there are procedures to store both eggs and sperm by themselves.<sup>202</sup> If a party is undergoing IVF to preserve the chance to have a child in the future because of age or medical reasons, he or she is not precluded from individually freezing either sperm or eggs. To avoid the issue of a party's last hope for having biological children being tied to his or her former spouse, New York can mandate that IVF clinics also store the couples' individual sperm and eggs. This would give each party a backup option for having biological children if the other party did not want to have a child from the preembryos.

### C. Why the Contract Approach is Not Effective in New York

Under contract law, a party's nonperformance can be excused if "changed circumstances make enforcement of the agreement unreasonable."<sup>203</sup> The court in *A.Z.* held that a married couple's divorce constituted changed circumstances that rendered the contract

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<sup>200</sup> Brandon J. Bankowski, M.D., Anne D. Lyerly, M.D., Ruth R. Faden, M.P.H., Ph.D., and Edward E. Wallach, M.D., *The social implications of embryo cryopreservation*, 84 FERTILITY AND STERILITY 823 (2005).

<sup>201</sup> *Id.*

<sup>202</sup> *Egg, Embryo, and Sperm Freezing*, RED ROCK FERTILITY, <https://redrockfertility.com/egg-sperm-embryo-freezing/> (last visited Mar. 14, 2021).

<sup>203</sup> Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 153 (1999) (quoting John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L. J. 407, 418 (1990)).

unenforceable.<sup>204</sup> The court reasoned that no contract shall be “enforced in equity when intervening events have changed the circumstances such that the agreement which was originally signed did not contemplate the actual situation now facing the parties.”<sup>205</sup> Critics of the contract approach correctly argue that couples undergoing IVF may not be able to “focus intelligently or meaningfully on future contingencies,” when their one focus is on conception.<sup>206</sup> Part of this criticism also includes the issue that parties may not know that they are filling out a legally binding consent form, instead thinking of it as a medical form to be used only by the IVF clinic.<sup>207</sup> The court in *A.Z.* stated that consent agreements are primarily used to inform the couple of the “benefits and risks of freezing” and for a written record of the couple’s plan for disposition “at the time of execution.”<sup>208</sup> Parties may not consider their options as thoroughly and carefully as they would if they were aware that the consent agreement may be legally binding.

Further, the court in *JB* pointed out that when a married couple begins IVF, “they are unlikely to anticipate divorce or to be concerned about the disposition of preembryos on divorce.”<sup>209</sup> A party would likely not agree to a costly medical procedure to have a child with her spouse if she anticipated that they would end up divorcing. There are many reasons that an unanticipated divorce could occur after the parties signed the consent form, an example being infidelity by one party that is discovered after IVF. The

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<sup>204</sup> *A.Z. v B.Z.*, 725 N.E.2d 1051, 1055 (Mass. 2000); see Haut *supra* note 203, at 521. Under traditional contract law, the party opposing implantation could claim that his or her purpose of signing the consent form to have a child with his or her spouse was frustrated by the unforeseen event of divorce. The doctrine of changed circumstances is often used to modify child custody or child support agreements. *Id.*; T. Ward Chapman, *Contracts-Frustration of Purpose*, 59 MICH. L. REV. 98 (1960). The Frustration of Purpose Doctrine provides an excuse for nonperformance if: (1) the contract is not fully performed; (2) the purpose of the frustrated party in entering the contract must be known to the other party; (3) an event not reasonably foreseeable at the time of the contract must have occurred and frustrated the party’s purpose; and (4) the risk was not assumed by the frustrated party. *See id.*

<sup>205</sup> *A.Z.*, 725 N.E.2d at 1055.

<sup>206</sup> John A. Robertson, *Precommitment Strategies For Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 994 (2002).

<sup>207</sup> *Id.*

<sup>208</sup> *A.Z.*, 725 N.E.2d at 1054-55.

<sup>209</sup> *J.B. v. M.B.*, 783 A.2d 707, 715 (N.J. 2001).

contract approach fails to consider the reality that couples beginning IVF are not focused on future legal battles against each other, so binding them to the consent agreement without any opportunity to change their minds is inequitable.

In a divorce, any provisions in a prenuptial agreement determining child support, custody, or visitation issues are void because the agreement “cannot definitively address child support issues or custody issues for unborn children.”<sup>210</sup> New York courts are obligated to determine the issues of child support, custody, and visitation “based on circumstances at the time of a separation or divorce” in the best interests of the divorcing parties’ children.<sup>211</sup> Although preembryos are not living children, they do have potential for life, and any child born from the preembryos would be an “unborn” child of the parties at the time the consent form agreement was signed.<sup>212</sup> Regardless, consent agreements do not “contain provisions for custody, child support, and maintenance.”<sup>213</sup> Even if the same provisions are not void in a IVF consent agreement, a party who unwillingly becomes a parent could spend years in court to determine his custody and support obligations for a child he did not consent to being born. This imposes an unfair burden on a party forced into parenthood that would be otherwise avoided if distribution was determined at the time of divorce and both parties had to consent to use of the preembryos.

Because New York follows the contract approach, the New York Supreme Court New York County, following the precedent set by *Kass*, restricted a party from exercising his fundamental right to not have a child. The decision in *Heldt* unfairly binds the man to a decision he made three years prior while he was in a relationship with the other party.<sup>214</sup> Becoming a parent is a life changing decision that should be contemporaneously made. A party should not be forced into becoming a parent based on a decision made when the circumstances were vastly different.<sup>215</sup>

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<sup>210</sup> *Prenuptial Agreements*, N.Y.C. BAR LEGAL REFERRAL SERV., <https://www.nycbar.org/get-legal-help/article/family-law/marital-agreements/prenuptial-agreements> (last visited Jan. 5, 2021).

<sup>211</sup> *Id.*

<sup>212</sup> 842 S.W.2d at 595.

<sup>213</sup> A.Z., 725 N.E.2d at 1054-55.

<sup>214</sup> *Heldt*, No. 651464/2018, 2019 WL 2371882, at \*7 (N.Y. Sup. Ct. June 5, 2019).

<sup>215</sup> Kathianne Boniello, *Man fighting ex over frozen embryos: I know the pain of growing up without a dad*, N.Y. POST (April 21, 2018, 2:34 PM),

The courts that bind parties to their original consent forms to allow the decision of disposition to remain with the couple are “flawed because it characterizes the right to privacy and procreative liberty as the right of the couple rather than the right of two separate individuals.”<sup>216</sup> The Supreme Court held in *Eisenstadt* that an *individual* has the right to decide to procreate or to not procreate.<sup>217</sup> This clearly establishes that the right of one individual to procreate is not tied to either his or her spouse or former spouse. The length of time between filling out a consent form and the former spouse attempting to implant the preembryos should not matter. There could be drastic changes in the relationship in a short amount of time. For example, if one of the parties agrees to go through IVF, executes a consent form, and then finds out his or her partner was cheating, the circumstances are vastly different from the time of the execution of the consent form. Either party should be able to change his or her mind up until the implantation of the preembryos.

This approach should also be favored over the constitutional approach, which rarely, but potentially, may side with the party who desires to become a parent but cannot biologically become a parent without use of the preembryos.<sup>218</sup> The constitutional approach is insufficient because in some extreme circumstances it binds a party to become a parent because his or her former spouse is incapable of having a child even though the parties’ individual rights should not be intertwined.

Further, outside of IVF, a person is not forced to become a parent solely because his or her former spouse wishes to become a biological parent. This same argument should translate to IVF as well. Similar to natural methods of conceiving a child, parties should

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<https://nypost.com/2018/04/21/man-fighting-ex-over-frozen-embryos-i-know-the-pain-of-growing-up-without-a-dad>. The man fighting for his right to not become a parent in *Heldt* expressed that he would feel “morally obligated” to help raise a child that was genetically his child because of his single parent upbringing. *Id.* He explained that the woman has other options to have exercised her right to become a parent without infringing on his right to not have a child, such as: a donor sperm, a donor sperm and egg, surrogacy, or adoption. *Id.*

<sup>216</sup> Lawrence, *supra* note 56, at 729.

<sup>217</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); In *Cleveland Board of Education*, the Supreme Court affirmed the decision in *Eisenstadt*, holding that it was the right of an *individual* to make *personal* decisions in both marriage and family life. *Cleveland Bd. of Educ. v. Fleur*, 414 U.S. 632, 639 (1974).

<sup>218</sup> See discussion *supra* III.D.

have the right to consent to potentially conceiving a child in their present state of mind, as opposed to a decision made years ago. In the natural reproductive process, parties make the decision to potentially conceive a child each time they engage in sexual intercourse.<sup>219</sup> They can avoid conceiving a child by choosing not to engage in sexual intercourse, by using birth control, or by having an abortion.<sup>220</sup> A disposition method that does not allow for contemporaneous decisions binds a party to decisions made before divorce or separation, a significant change in circumstances.<sup>221</sup> This separates IVF and other ART methods from the natural procreative process because “[t]he decision whether to bear or beget a child’ can no longer be conceived as an isolated decision.”<sup>222</sup>

### VIII. BURDENS OF PARENTHOOD AND POTENTIAL METHODS OF CONSENTING TO IMPLANTATION WITHOUT FORCED PARENTHOOD

#### A. Legal, Financial, and Emotional Burdens of Raising a Child

Parenthood comes in three forms: gestational parenthood, legal parenthood, and genetic parenthood.<sup>223</sup> In California, Texas, and Washington, statutes “specify that if a fertilized preembryo is implanted *after* the parties divorce, a former spouse (who contributed genetic material) is not deemed to be the legal parent of any resulting child if the former spouse does not contemporaneously consent to implantation.”<sup>224</sup> However, this policy does not protect parties who

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<sup>219</sup> Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, The Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH L.J. 257, 290 (1990) (“In sum, given the relationship between the state, the progenitors, and the preembryo, a deadlock between the progenitors should be resolved by allowing the preembryos to deteriorate and die. Preembryo loss is the price of the progenitors’ freedom and mutual dependence. The price may be high, but it seems necessary to preserve our most personal rights and the integrity of our most personal relationships.”).

<sup>220</sup> *Id.* at 291.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008). Only women can be gestational parents. *Id.* at 1135.

<sup>224</sup> *Id.* at 1146.

underwent IVF procedures from being forced into parenthood after they changed their minds about having a child from those embryos.<sup>225</sup> The party opposing use of the embryos should be protected regardless of whether the parties are married, separated or divorced. A party who is either a genetic, gestational, or legal parent is unwillingly tied to the child with legal, financial, or emotional burdens.

Under New York law, the legal relationship between a parent and child is based on the parent's obligation to financially care for the child, the right to custody, and the right to make decisions regarding the child's upbringing.<sup>226</sup> These legal obligations are the bare minimum expected from a parent. There are many financial expenses that come with raising a child. According to the United States Department of Agriculture, in 2015, in a middle-class two child family with married parents, the average cost of raising a child until the age of seventeen was \$233,216.<sup>227</sup> This is a substantial burden on a party who does not want to become a parent. The financial obligation is the only required burden on the parent, but it is not likely the only burden actually created by the birth of a biological child. Becoming a parent entails emotional burdens because "genetic ties may form a powerful bond between an individual and his or her progeny even if the progenitor is freed from the legal obligations of parenthood."<sup>228</sup>

In New York, when an unmarried woman has a child, the child has no legal father unless paternity is established by (1) signing a voluntary Acknowledgment of Paternity form or (2) petitioning a

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<sup>225</sup> *Id.*

<sup>226</sup> *Parental Rights*, NYCOURTS.GOV (Apr. 3, 2017) <https://nycourts.gov/Courthelp/Family/parentalRights.shtml>.

<sup>227</sup> Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T OF AGRIC., (Feb. 18, 2020), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child#:~:text=Families%20Projected%20to%20Spend%20an,on%20Children%20by%20Families%2C%202015>.

<sup>228</sup> Martin & Lagod, *supra* note 219, at 290; *see* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) ("[W]e can only conclude that Mary Sue Davis's interest in donation is not as significant as the interest Junior 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. He testified quite clearly that if these preembryos were brought to term he would fight for custody of his child or children. Donation, if a child came of it, would rob him twice -- his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.").

court to determine paternity.<sup>229</sup> The biological father of a child born to an unmarried woman has no rights or responsibilities to the child, unless paternity is established.<sup>230</sup> If the parties are still legally married, the biological father is automatically presumed to be the legal father.<sup>231</sup> Potentially, if the parties were divorced, and the party opposing the implantation was male, they could sign an agreement not to acknowledge the paternity of the child so that the father has no legal or financial obligations. However, this still does not solve the problem of an emotional burden on the party opposing parenthood. If the parties were still legally married however, the biological father would be the legal father.<sup>232</sup>

### B. Ex-Spouse as a Donor/Surrogate

New York State's Child-Parent Security Act ("CPSA"), effective as of February 15, 2021, changes legal parenthood in New York from being defined by "traditional principles of biology, marriage, and/or gestation" to "intent and consent" determining who is a legal parent.<sup>233</sup> If the donor intends to donate an egg or sperm, but does not intend to become a parent to a child born from the donated gametes, the CPSA protects the donor from obligations to the child.<sup>234</sup> The CPSA establishes legal protections for children born through ART by clarifying who the parents of a child born from ART are and then establishing the financial and legal responsibilities of the parents.<sup>235</sup> The protections apply to cases in which one party allows the other to use the IVF preembryos because New York's Family Court Act provides that "[d]onor also includes an individual

<sup>229</sup> *Paternity Establishment*, THE OFFICIAL WEBSITE OF N.Y. STATE, [https://www.childsupport.ny.gov/dcse/paternity\\_establishment.html#:~:text=Every%20child%20has%20a%20biological,establish%20paternity%20for%20the%20child](https://www.childsupport.ny.gov/dcse/paternity_establishment.html#:~:text=Every%20child%20has%20a%20biological,establish%20paternity%20for%20the%20child) (last visited Mar. 14, 2021).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Alexis L. Cirel, *February 2021 Marks the Implementation of New York State's Child-Parent Security Act*, SCHWARTZ SLADKUS REICH GREENBERG ATLAS LLP (Dec. 18, 2020), <https://ssrga.com/blog/february-2021-marks-the-implementation-of-new-york-states-child-parent-security-act>.

<sup>234</sup> *The Child-Parent Security Act in New York*, FAMILY EQUAL., <https://www.familyequality.org/resources/child-parent-security-act-new-york/#what-is-cpsa> (last visited Feb. 28, 2021).

<sup>235</sup> *Id.*

who had dispositional control of an embryo who then transfers dispositional control and relinquishes all present and future parental and inheritance rights and obligations to a resulting child.”<sup>236</sup>

The parties should be required to fill out a written donor agreement in order to contractually agree to the terms of the donation. A donor agreement details the party’s intentions and responsibilities.<sup>237</sup> It should also explicitly state that “the donor does not intend to parent any child conceived” by the donated gametes.<sup>238</sup> Additionally, the agreement should state that the donor does not want either physical or legal custody of any children born from the donation.<sup>239</sup>

The Uniform Parentage Act (“UPA”), a model statute originally passed in 1973, only addressed artificial insemination in situations where the woman was married, and the husband was to be the father of the child.<sup>240</sup> Under the UPA, the sperm donor was not considered the father under three conditions: the artificial insemination was conducted under a physician’s supervision; the husband gave his written consent; and the physician filed the consent with the state health department.<sup>241</sup> The UPA was revised in 2000 and removed the requirement that the insemination must be performed by a physician.<sup>242</sup> The 2000 revised UPA “clarified that donors could not sue to establish parental rights or be sued and required to support the resulting child.”<sup>243</sup>

The 2017 revised UPA drastically minimized the focus on marriage or lack of marriage to govern sperm donation and instead focused on allowing the intended parent to acknowledge parentage.<sup>244</sup> Before 2017, in states that have adopted the UPA, the revised UPA, or have a similar statute, the intended parent rule did not apply if the

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<sup>236</sup> N.Y. FAM CT. ACT. LAW Art. 5-C §581-101 (2019).

<sup>237</sup> Richard B. Vaughn, *Assisted Reproductive Technology Law: 10 FAQs*, AM. BAR ASS’N, [https://www.americanbar.org/groups/family\\_law/publications/family-advocate/2019/summer/assisted-reproductive-technology-law-10-faqs](https://www.americanbar.org/groups/family_law/publications/family-advocate/2019/summer/assisted-reproductive-technology-law-10-faqs) (last visited Feb. 27, 2021).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Lisa Luetkemeyer & Kimela West, *Paternity Law: Sperm Donors, Surrogate Mothers and Child Custody*, 3 MO. MED. 112, 162 (2015).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 163.

<sup>244</sup> UNIF. PARENTAGE ACT 2017 § 301 (UNIF. L. COMM’N 2017).



woman is unmarried or if the artificial insemination is not performed by a doctor.<sup>245</sup> This would not have been a valid option for a biological father to avoid being legally responsible for the child. The change to acknowledging intended parents in the 2017 revised UPA may provide a solution in the case that the party against implantation would consent to implantation and potential birth of his biological child so long as he has no obligations to the future child.

### C. Adoption/Fostering

There are five different options for adopting: adopting children from foster care, adopting children from other states, adopting through an agency/attorney, adopting from outside the United States, and adopting an adult.<sup>246</sup> In New York, adopting through an agency can be expensive, costing approximately \$20,000 to \$45,000.<sup>247</sup> This option may not be feasible for the party who wants to exercise his or her constitutional right to have a child but does not have the money to adopt through an agency.

However, New York State “subsidizes the cost of adopting through the public foster care system, up to \$2,000.”<sup>248</sup> Parents who adopt through the foster care system are given a monthly stipend from the state until the child’s eighteenth birthday.<sup>249</sup> Instead of using the disputed preembryos, adoption through the foster care system is a lower cost method of adoption for a party. Both adoption and gamete donation are possible solutions for a party who wants to have a child but faces opposition to the use of the preembryo by a former spouse.

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<sup>245</sup> *Id.*

<sup>246</sup> *What Are My Choices in Adoption?*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/adoption/adoptive/choices> (last visited Nov. 22, 2020).

<sup>247</sup> David Dodge, *What I Spent to Adopt My Child*, THE NY TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/parenting/adoptioncosts.html#:~:text=An%20independent%20adoption%20can%20cost,fees%2C%20social%20workers%20and%20more.>

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

**IX. CONCLUSION**

New York should abandon the contract approach because it may force an unwilling person into parenthood. The decision to have a child must be a decision that is contemporaneously made by both parents, not a unilateral decision made by one of the parties. Consequently, the parties must contemporaneously agree to disposition of the preembryos as opposed to either party being bound by a consent agreement signed in vastly different circumstances.

Generally, even though the mutual contemporaneous consent approach allows the parties to contemporaneously give consent to any decision regarding the preembryos, it does not give a solution for when the parties are deadlocked. As long as the parties cannot agree, the embryos cannot be removed from their frozen storage to be used or disposed of. However, New York should implement the mutual contemporaneous consent model with a default rule that after the parties are divorced for five years, if they do not agree on disposition of the preembryos, the preembryos are considered abandoned and are thawed. In conclusion, New York should implement the mutual contemporaneous consent approach with a default rule for thawing of the preembryos if the parties cannot agree.