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Battle for Baby: Proposed Legislation for Custody Battles over Frozen Pre-Embryos

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Abstract

The use of in vitro fertilization to have a biological child is on the rise due to rising infertility and the desire of same-sex couples to have a biological child. In vitro fertilization allows for a couple who may not otherwise be able to have a biological child have one by combining sperm and eggs in a laboratory and cryogenically freezing the resulting embryo for implantation. As the use of in vitro fertilization is on the rise, so too are the complications that come with the use of in vitro fertilization. For example, courts handle custody battles over the use or disposition of the frozen pre-embryos, often with dire consequences for one or both sides. By having state legislatures propose and adopt legislation concerning in vitro fertilization and custody battles over frozen pre-embryos, the courts will avoid messy custody battles over the embryos. This comment calls for nationwide implementation of state statutes regarding the custody aspect of frozen pre-embryos begotten through in vitro fertilization. After providing a general overview of the in vitro fertilization process and how the courts have handled disputes over frozen pre-embryos, the author sets out the necessary components of a proposed state statute regarding disputes over frozen pre-embryos.

Keywords : Legislation, In Vitro Fertilization, Divorce, Custody, And Parentage

I. Introduction

Imagine after several years of marriage with your partner and trying to have children unsuccessfully, you find out that you have cancer and need to go through radiation, which will nullify your chances of having children in the future. Your partner agrees to go through in vitro fertilization in order to have children in the future when you're finished with your cancer treatments and ready to build your family. Immediately after your cancer treatments,

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your partner files for divorce. Your partner states that s/he no longer wants to proceed with implanting the fertilized eggs begotten through the in vitro fertilization you two had done prior to beginning cancer treatments because s/he no longer wants to be legally responsible for those offspring. Sadly, these fertilized eggs are your only chance at having children. What do you do?

Recently, the issue of couples fighting over custody of their frozen pre-embryos obtained through in vitro fertilization has been in the news. Actress Sofia Vergara is currently fighting with her ex-fiancé, Nick Loeb, over the custody of their frozen embryos.[1] Both Loeb and Vergara signed a contract stating that, "they would only use the embryos if both of them agreed to it."[2] Now, Loeb wants the contract dissolved so that he can use the embryos without Vergara's approval.[3] Also in the news is the story of Dr. Mimi Lee and her ex-husband.[4] Like so many of the cases involving custody disputes over frozen pre-embryos, Dr. Lee and her husband underwent in vitro fertilization after Dr. Lee was diagnosed with cancer.[5] Now that they are going through a divorce, Dr. Lee requested custody of the frozen pre-embryos in order for her to have biological children after completing cancer treatment.[6] Stories like Sofia Vergara's and Dr. Mimi Lee's are not uncommon as the news suggests. Many couples struggle over what to do with their frozen pre-embryos in the court system.

The in vitro fertilization system (IVF) is a process that allows couples that have problems with reproduction to produce children outside the natural way of procreating. Although IVF is not a new process by which infertile couples can have children, many of the legal challenges associated with the IVF process have recently begun to be hotly disputed both in the courts and in state legislatures. This article explores the use of the court system to resolve custody disputed between couples that have divorced or broken up and who are fighting over fertilized eggs done through in vitro fertilization. Generally, a custody dispute over fertilized eggs – where one partner no longer wants the fertilized egg to be implanted – have been reserved for the courts to decide. However, courts are split on the issue of how to decide whether to allow one party to proceed with implanting the fertilized eggs against the wishes of the other partner when the fertilized eggs are the only chance for

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1 *Embryo wars: Avoiding Sofia Vergara's legal woes*, MSNBC.com, http://www.msnbc.com/msnbc/embryo-wars-sofia-vergara-legal-woes (last visited December 31, 2015).

2 *Id.*

3 *Id.*

4 Jonathan LaPook, *Feuding couples bring embyro battles to court*, CBS News (July 14, 2015), http://www.cbsnews.com/news/ex-couples-enter-unusual-court-fight-over-frozen-embryos/ (last visited December 31, 2015).

5 *Id.*

6 *Id.*

one partner to have children. The courts should be the last resort in cases such as these, insomuch that the state legislatures should provide guidelines as how to solve custody disputes over fertilized eggs.

In this article, I will first discuss the in vitro fertilization procedure, to provide a background as to how the process works for those struggling with conception. Then I will discuss how courts treat the frozen eggs when custody over the eggs is presented before the courts. Next, I will discuss major court cases that decide the issue over who gets custody of frozen eggs when one person no longer wants to become a parent after a breakup. Finally, I will look at state statutes and will propose legislation regarding the custody of frozen eggs in custody disputes. I will conclude this article by arguing that state legislatures should have guidelines as how to solve custody disputes over frozen, fertilized eggs when one parent no longer wants to be a parent and the other parent needs those eggs as their last chance to have children.

II. The IVF Procedure

In vitro fertilization (IVF) is a process used to help couples who have problems with procreation to conceive children outside the natural way of reproduction. The first baby born using the IVF process was Louise Brown born on July 25, 1978.[7] Since then, the doctors involved in Louise Brown's birth, Dr. Edwards and Dr. Steptoe, have perfected the technique of the "test tube baby."[8] The in vitro fertilization process takes sperm from the male donor and eggs from the female donor and combines the sperm and the eggs in the laboratory to fertilize the egg.[9] This allows couples that have been classified as infertile to have their own biological children.[10] It also allows same-sex couples to have a biological child from one of the parents.[11] To begin the in vitro fertilization process, the doctor gives the female donor hormone drugs to stimulate ovulation.[12] These hormone drugs "stimulate the ovaries, which normally produce one egg per month, to produce close to twenty eggs per month."[13] When ovulation of the eggs in the female donor's body ends, the doctor harvests the eggs and prepares them to be fertilized in the laboratory.[14]

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[7] Anthony John Cuva, Note, *Legal Dimensions of in Vitro Fertilization: Cryopreserved Embryos Frozen in Legal Limbo*, 8 N.Y.L. Sch. J. Hum. Rts. 383 (1991).

[8] *Id.*

[9] Jean Voutsinas, *In Vitro Fertilization,* 12 Prob. L.J. 47, 48 (1994-1995).

[10] Cuva, *supra* note 7, page 384.

[11] *Id.*

[12] Voutsinas, *supra* note 9, page 48.

[13] *Id.*

The harvesting of the eggs is a costly and dangerous process, as the female donor has to undergo general anesthesia to retrieve the eggs, with the cost of retrieval around $7,500.[15] During the egg retrieval process, the doctor will gather most of the eggs, if not all the eggs, in order to increase the couple's chance of fertilizing one or more eggs.[16] After the eggs are retrieved from the female donor, the doctor places the eggs in a culture and fertilizes the eggs with the sperm obtained from the male donor.[17] If fertilization of the eggs and sperm in the culture occurs, and the pre-embryo beings to divide, the doctor then transfers the fertilized egg to the uterus of either the female donor or a surrogate who will carry the baby until term.[18] Another option for the doctor is to preserve the fertilized egg through a cryopreservation process. Under the cryopreservation process, the doctor freezes the extra embryos that were not implanted into the female donor or surrogate for future use.[19] During the cryopreservation process, the embryos, which consist of only a few cells, are submerged into a temperature of -196 degrees Fahrenheit to preserve the genetic qualities of the cells.[20] As noted by Gail Sillman, "Cryopreservation increases the number of potential transfer cycles and thus decreases the cost of IVF by eliminating the necessity of another retrieval session."[21] She continues, "Cryopreservation also purportedly improves a woman's chances for pregnancy, because 'the embryo can be inserted during a nonstimulated cycle which is thought to enhance the embryo's chance of implantation.'"[22]

The process of fertilization poses many risks and complications for couples involved. Tracey S. Pachman, author of *Disputes over Frozen Preembryos & the "Right Not to be a Parent,"* notes, "The IVF process is reportedly physically uncomfortable, emotionally draining, and financially burdensome."[23] The need for state legislation to control IVF, especially regarding custody of fertilized eggs, is greatly increasing, as an estimated 188,000 frozen fertilized eggs exist in the United States alone.[24]

According to Ms. Pachman, "The question of who should decide what should be done regarding the use and disposition of frozen pre-embryos has been the subject of a broad

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14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 48-49.

19 *Id.* at 49.

20 Kathryn L. Honea & Benjamin J. Younger, *Legal Dilemmas of in-Vitro Fertilization,* 4 Health Law. 12 (1989-1990).

21 Voutsinas, *supra* note 9, page 48.

22 Gail D. Sillman, *In Vitro Fertilization and Cryopreservation*, 67 Mich. B.J. 601 (1988).

23 Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not to be a Parent"*, 12 Colum. J. Gender & L. 130.

24 *Id.*

public policy that has resulted in legislation in a few states."[25] Due to a lack of state legislation, courts generally resolve disputes over frozen pre-embryos when the couple that initiated the IVF process break up and fight over control of the frozen pre-embryos, especially when one "parent" no longer wants the pre-embryos to be implanted for reproduction uses.[26]

III. Custody over IVF Eggs

Due to a lack of state legislation concerning the custody over IVF eggs, courts have been left to decide how to treat custody. The courts have identified three different characteristics of treating IVF eggs in the legal system.[27] Each characteristic has distinct consequences in the legal system, depending on the IVF egg's classification. One classification by the courts is treating the eggs merely as property.[28] On the other side of the spectrum, the courts have classified the eggs as a person, entitled to full rights as a legal person.[29] The third classification is more of a middle ground, in which the courts treat the egg as neither property nor a person, but consider that the egg is "nevertheless entitled to special care and respect because of its unique status as a potential life."[30]

A. Courts Treating Eggs as Property

In a minority of cases, the courts have treated frozen pre-embryos as property. In *York v. Jones*, the Yorks sued The Howard and Georgeanna Jones Institutes for Reproductive Medicine (Jones Institute) for the release and transfer of their frozen pre-embryos to the Institute for Reproductive Research at the Hospital of the Good Samaritan.[31] The Yorks sued Jones Institute on a conversion[32] theory, claiming that according to the contract signed by both parties, the frozen pre-embryos were their property and Jones Institute had kept it from them against their will.[33] A federal court in Virginia held that the frozen

[25] *Id.*

[26] *Id.* at 131.

[27] Andrea Fischer, *Solomon and in Vitro Fertilization: Characterization and Division of Embryos in the Case of Divorce*, 11 J. Contemp. Legal Issues 263 (2000-2001).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] York v. Jones, 717 F. Supp. 421, 422 (1989).

[32] Conversion is defined as "a distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his title or rights therein, or in derogation, exclusion, or defiance of such title or rights." Balentine's Law Dictionary 3rd Edition.

pre-embryos were the property of the Yorks within the parameters of the bailor-bailee relationship[34] between the Yorks and Jones Institute.[35] The court found that within the contract between the Yorks and Jones Institute, Jones Institute constantly referred to the frozen pre-embryos as the property of the Yorks.[36] In finding for the Yorks, the court noted that the cryopreservation agreement between the two parties "should be more strictly construed against [Jones Institute], the parties who drafted the agreement."[37] Due to the nature of the contract itself and Jones Institute referring to the frozen pre-embryos as the property of the Yorks, the court found that Jones Institute should be held to its own classification of the pre-embryos as property.

In *Dahl v. Angle*, the court found that a contract that gives the right to dispose of frozen pre-embryos constitutes personal property due to the nature of the contract.[38] In 2004, a husband and wife underwent IVF in order to conceive a second child.[39] After several failed attempts at conception through IVF, the couple terminated their marriage, without deciding on what to do with the remaining frozen pre-embryos.[40] In the divorce proceedings, that court was asked whether the frozen pre-embryos qualified as marital property.[41] In determining that the frozen pre-embryos were in fact marital property, the court noted, "although the language of the embryo storage agreement does not control what constitutes personal property under ORS 107.105, it does indicate that the parties understood that husband and wife had the 'exclusive right to possess, use, enjoy, or dispose of' frozen embryos."[42] In treating the frozen pre-embryos as marital property, the court noted a problem that arises due to the emotional attachment to the potential children. The court in *Dahl* noted, "The division of property rarely gives rise to this level of deeply emotional conflict and, notwithstanding the idea that some properties are unique and personally meaningful, a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value."[43]

A similar case that treats frozen pre-embryos as property is *Litowitz v. Litowitz*.[44] In

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33 York, 717 F. Supp. at 424.

34 The Court noted that even though the Yorks and Jones Institute did not express intent to create a bailment, the element of lawful possession was established to create a bailment. *Id.*

35 *Id.* at 425.

36 *Id.*

37 *Id.* at 426.

38 Dahl v. Angle, 194 P.3d 834, 839 (2008).

39 *Id.* at 836.

40 *Id.*

41 *Id.* at 838.

42 *Id.* at 838-39.

43 *Id.* at 839.

Litowitz, Becky Litowitz and her husband David decided to have another child after Becky had undergone a hysterectomy.[45] Five pre-embryos were created using an egg obtained from an egg donor and sperm from David.[46] David and Becky entered into a contract with the egg donor and her husband.[47] The contract provided, "All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg(s). In no event may the Intended Parents allow any other party the use of said eggs without express written permission of the Egg Donor."[48] As part of their divorce proceedings, Becky argued that she had a property right to the frozen pre-embryos.[49] The court held that the egg donor agreement gave equal rights over the eggs to both Becky and David because the language of the contract deemed the frozen pre-embryos property of both intended parents.[50]

The *York* and *Dahl* decisions are not however, universal example cases for courts or legislatures looking to treat frozen pre-embryos as property. Jean Voutsinas in her article, *In Vitro Fertilization*, noted, "The limited use of the bailor-bailee relationship does not indicate whether the York court would be willing to give the gamete providers all of the rights which are typically associated with ownership of personal property."[51] Many problems arise with treating frozen pre-embryos as property under contract principles. For instance, the cryopreservation contract between the Yorks and Jones Institute did not provide the Yorks with unlimited rights against Jones Institute with regards to the use, transfer or destruction of the frozen pre-embryos.[52]

Other problems arise when treating frozen pre-embryos as property. The easiest division of the embryos would be in simple divorce cases where each spouse gets half of the embryos.[53] However, this generally is not the case when it comes to custody battles over the frozen pre-embryos. The major issue arises when one spouse wants the embryos to be implanted and the other spouse does not want to become a parent.[54] In these cases, the court needs to determine whose interests outweigh the other's, in either becoming a biological parent or not becoming a biological parent.[55] Andrea Fischer in her article,

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44 Litowitz v. Litowitz, 48 P.3d 261 (2002).
45 *Id.* at 262.
46 *Id.*
47 *Id.* at 263.
48 *Id.*
49 *Id.* at 266.
50 *Id.* at 268.
51 Voutsinas, *supra* note 9, page 60.
52 *Id.*
53 Fischer, *supra* note 27, page 267.
54 *Id.*

Solomon and in Vitro Fertilization: Characterization and Division of Embryos in the Case of Divorce, noted, "A court's order that embryos be auctioned off and converted to cash would be greeted with shock, likely outrage by parties and public alike."[56]

B. Courts Treating Eggs as a Person

Some courts addressing the issue of frozen pre-embryos have treated these fertilized eggs as persons with respect to the legal status of the eggs. In *Davis v. Davis*, the court treated the frozen, fertilized eggs as persons when determining the custody of the eggs after a divorce.[57] In *Davis*, the wife, Mary Sue Davis, asked for custody of the frozen embryos in a post-divorce effort to become pregnant.[58] Mary Sue sought the custody of the embryos because after a prior tubal pregnancy, doctors removed both fallopian tubes, rendering her unable to become pregnant on her own without the use of in vitro fertilization.[59] In 1985, both Mary Sue and her husband Junior underwent six attempts at IVF, all which totaled $35,000.[60] After several complications with the hormone injections used to simulate the ovaries into producing multiple eggs, the Davises opted to postpone another round of IVF until later, when the clinic could use cryogenic preservation to freeze any additional eggs for further use.[61] In 1988, the Davises underwent another round of IVF, which successfully cultivated nine eggs for fertilization.[62] After that successful round of IVF, one fertilized egg was transferred and the rest were cryogenically frozen for future use.[63] A pregnancy did not occur from the transfer of the fertilized egg to Mary Sue's uterus and soon afterward Junior filed for divorce.[64]

Ultimately the issue of the custody of the remaining frozen embryos came before the Tennessee Supreme Court.[65] The Tennessee Supreme Court differentiated the difference between an "adult", a "child", a "fetus", and an "embryo."[66] In reviewing multiple views on the legal status of frozen pre-embryos, the Court found that the "pre-embryos are not,

55 *Id.* at 268.
56 *Id.* at 266.
57 Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
58 *Id.* at 589.
59 *Id.* at 591.
60 *Id.*
61 *Id.* at 592.
62 Davis, 842 S.W.2d at 592.
63 *Id.*
64 *Id.*
65 *Id.* at 590.
66 *Id.* at 592-93.

strictly speaking, either "persons" or "property," but occupy an interim category, as a quasi-person, that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning the disposition of the pre-embryos, within the scope of policy set by law."[67] Because the embryos were treated as quasi-persons, and not property, the court used Tennessee's domestic relations law and found that the doctrine of *parens patriae* controlled over the frozen pre-embryos.

After determining that the pre-embryos fall within the category of a quasi-person in regards to their legal status and the doctrine of *parens patriae* applied, the court first looked at the enforceability of a contract regarding the use or disposition of the eggs.[68] Even though the Davises did not have a contract regarding the use or disposition of their eggs, the court held that "an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors."[69] The court furthered that such agreements would be the most practical form to take in deciding such custody issues that arise over frozen pre-embryos, but noted that "life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems."[70]

As a result of this definition of the embryo as a person, the court established grounds to examine Mary Sue and Junior's interests as parents of the embryo and not simply property owners.[71][72] According to the Tennessee Supreme Court in *Davis*, "The United States Supreme Court has never addressed the issue of procreation in the context of in vitro fertilization. Moreover, the extent to which procreational autonomy is protected by the United States Constitution is no longer entirely clear."[73] The *Davis* court noted, "For the purposes of this litigation 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. Undoubtedly, both are subject to protections and limitations."[74] In determining whose right to procreation

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[67] Davis, 842 S.W.2d at 597.

[68] *Id.* at 597-98.

[69] *Id.* at 597.

[70] *Id.*

[71] Procreational autonomy is the right to procreate and the right to avoid procreation. Campbell v. Sundquist, 926 S.W.2d 250, 263 (Tenn. Ct. App. 1996).

[72] *Id.* at 598.

[73] Davis, 842 S.W.2d at 601.

matters more (Junior's or Mary Sue's), the court balanced both parties' interest in the frozen pre-embryos.[75] The Davis court began with looking at Junior's interest in not becoming a parent. "Beginning with the burden imposed on Junior Davis, we note that the consequences are obvious. Any disposition which results in the gestation of the pre-embryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences. The impact that this unwanted parenthood would have on Junior Davis can only be understood by considering his particular circumstances, as revealed in the record."[76] The court noted Junior's feelings regarding the potential for him becoming a father by Mary Sue using the frozen pre-embryos.

> Junior Davis is vehemently opposed to fathering a child that would not live with both parents. Regardless of whether he or Mary Sue had custody, he feels that the child's bond with the non-custodial parent would not be satisfactory. He testified very clearly that his concern was for the psychological obstacles a child in such a situation would face, as well as the burdens it would impose on him. Likewise, he is opposed to donation because the recipient couple might divorce, leaving the child (which he definitely would consider his own) in a single-parent setting.[77]

While the court looked at Junior Davis's interest in avoiding parenthood, the court also weighed Mary Sue's interest in having her own biological children.

> Balanced against Junior Davis's interest in avoiding parenthood is Mary Sue Davis's interest in donating the pre-embryos to another couple for implantation. Refusal to permit donation of the pre-embryos would impose on her the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the pre-embryos 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's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood. If she were allowed to donate these pre-embryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no

74 *Id.*

75 *Id.* at 603.

76 *Id.*

77 *Id.* at 604.

> control over it. He testified quite clearly that if these pre-embryos 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. The case would be closer if Mary Sue Davis were seeking to use the pre-embryos herself, but only if she could not achieve parenthood by any other reasonable means … Further, we note that if Mary Sue Davis were unable to undergo another round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption. The fact that she and Junior Davis pursued adoption indicates that, at least at one time, she was willing to forego genetic parenthood and would have been satisfied by the child-rearing aspects of parenthood alone.[78]

The court ultimately held that Junior's interests in opposing the implantation of the fertilized egg outweighed Mary Sue's interests of having children of her own.[79] In deciding in favor of Junior, the court laid out a foundation for other courts to decide similar custody disputes over frozen pre-embryos.[80]

> [D]isputes involving the disposition of pre-embryos 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 pre-embryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[81]

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[78] *Id.*

[79] Davis, 842 S.W.2d at 604.

[80] *Id.*

[81] *Id.*

Treating the frozen pre-embryos as a person creates numerous problems in both divorce proceedings and in general legal proceedings.[82] During the time an embryo is cryogenically frozen, it has not been implanted in the womb in order to begin a pregnancy.[83] Because the embryo is not implanted in the womb, it biologically cannot be classified as a person.[84] By classifying an embryo as a person, the courts open up a floodgate as to what else can be classified under the legal status as a person.[85]

IV. Alternative Approaches

The following cases are a sample of the different ways courts have resolved custody disputes over fertilized eggs done through in vitro fertilization other than treating the eggs as either a person or property.

In *Szafranski v. Dunston*, the Illinois Appellate Court, First District, decided in favor of the parent who no longer could have children without the use of IVF.[86] In 2010, Jason Szafranski and Karla Dunston entered into an agreement to undergo IVF.[87] In March 2010, Karla was diagnosed with non-Hodgkin's lymphoma and was told by her doctor that she would "most likely" lose her ability to have a child if she underwent chemotherapy.[88] After discussing her desire to have a child with Jacob, Karla met with Dr. Kazer, a fertility specialist with the Northwestern Medical Faculty Foundation (Northwestern).[89] During their meeting, Karla and Dr. Kazer discussed Karla's ability to have a biological child through IVF.[90] After discussing her options of using an anonymous sperm donor versus a known sperm donor, Jacob agreed to "provide sperm to make pre-embryos with [Karla]."[91] After several rounds of IVF, Jacob and Karla's relationship deteriorated, culminating with Jacob ending their relationship via text message in May 2010.[92] In June, Jacob sent Karla an email outlining his hesitation about going forward with the implantation of the fertilized pre-embryos.[93] After emailing back and forth about the use and custody of the pre-embryos, Jacob sued to enjoin Karla from using them,

82 Fischer, *supra* note 27, page 264.
83 *Id.*
84 *Id.*
85 *Id.*
86 Szafranski v. Dunston, 2015 IL App (1st) 122975-B, 34 N.E.3d 1132.
87 *Id.* at ¶ 1.
88 *Id.* at ¶ 8.
89 *Id.* at ¶ 8-9.
90 *Id.* at ¶ 9.
91 *Id.* at ¶ 10-11.
92 Szafranski, 2015 IL 122975-B, ¶ 12, 20, 21.
93 *Id.* at ¶ 22-4.

and Karla filed a counterclaim seeking sole custody and control over the pre-embryos.[94]

In determining who should get custody over the pre-embryos, the court heard testimony from Jacob, Karla, Dr. Kazer, Ashley Harris, Jacob's former girlfriend, and Nidhi Desai, a lawyer who drafted a co-parenting agreement for the couple prior to them undergoing IVF, along with "the Informed Consent dated March 25, 2010; the draft Co-Parent Agreement prepared by Desai on March 29, 2010; and the e-mails between Jacob and Karla, along with the attachments to the e-mails."[95] In Jacob and Karla's first case regarding their frozen pre-embryos, *Szafranski I*, "[the court] held that the dispute should be settled, first, by honoring any advance agreement between the parties regarding the disposition of the pre-embryos. Alternatively, in the absence of such an agreement, the circuit court should resolve the issue weighing the parties' relative interests in using or not using the pre-embryos."[96] In determining that Karla was entitled custody over the frozen pre-embryos, the court noted Karla and Jacob's oral contract on March 24, 2010, in which Jacob agreed to donate sperm to fertilize Karla's eggs.[97] Even though the court looked at the contract between the parties, the court also looked at the interests of both parties, and balanced them against each other.[98] In Jacob's case, the court observed that Jacob did not want to become a parent because of the impact a child would have on any future romantic relationships.[99] On the other hand, the court noted Karla's interest in having a biological child, which would be impossible without the use of the frozen pre-embryos.[100] In weighing both interests, the court deemed that Kayla's interest outweighed Jacob's interest in not using the frozen pre-embryos.

> [T]he circuit court's ruling, that Karla's interest in using the pre-embryos outweighs any interest Jacob has in preventing their use, was against the manifest weight of the evidence. At the heart of the evidence is an irrefutable fact: the sole purpose for using Jacob's sperm to fertilize Karla's last viable eggs was to preserve her ability to have a biological child in the future at some point after her chemotherapy treatment ended. The parties both recognized this when they agreed to create the pre-embryos together.[101]

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[94] *Id.* at ¶ 1, 26-8

[95] *Id.* at ¶ 30.

[96] *Id.* at ¶ 65.

[97] Szafranski, 2015 IL App 122975-B at ¶ 70.

[98] *Id.* at ¶ 126.

[99] *Id.*

[100] *Id.* at ¶ 127.

[101] *Id.* at ¶ 128.

In concluding that Karla had sole custody and control of the pre-embryos, the court reaffirmed their "prior ruling that there is 'no constitutional obstacle to honoring an agreement regarding the disposition of pre-embryos, and where there has been no advance agreement regarding the disposition of pre-embryos, then to balance the parties' interests in the event of a dispute.'"[102]

Similarly, in *Reber v. Reiss*, the court awarded Andrea Lynn Reiss sole custody of the frozen pre-embryos she created with her husband.[103] In 2003, Andrea was diagnosed with breast cancer.[104] Prior to undergoing cancer treatments, Andrea and her husband, Bret Howard Reber, were advised to undergo IVF to retain their ability to have biological children.[105] After fertilization, the embryos were cryogenically frozen until Andrea completed cancer treatments and could proceed with implantation.[106] In 2006, Bret filed for divorce and had a biological child of his own with another woman in January 2008.[107] In 2010 the trial court heard argument over "whether the pre-embryos should be awarded to Wife for implantation or be awarded to Husband for either donation to research or destruction."[108]

In finding for Andrea, the court noted several approaches used by other courts in resolving pre-embryo custody disputes.[109] The court noted that, "These jurisdictions have conducted three types of analyses: the contractual approach, the contemporaneous mutual consent approach, and the balancing approach."[110] After reviewing the different types of approaches used, the court then determined that the trial court did not err by using the balancing approach.[111] In doing its own balancing test, the court noted Andrea's desire to have biological children.[112] The court noted that, "There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to [Andrea], it does not mean that such options should be given equal weight in a balancing test."[113] The court also looked at Bret's desire not to have children from the pre-embryos because he was adopted as a child and would not want any of his children going through the same experience he

[102] *Id.* at ¶ 134.
[103] Reber v. Reiss, 42 A.3d 1131 (2011).
[104] *Id.* at 1132.
[105] *Id.*
[106] *Id.* at 1133.
[107] *Id.*
[108] *Id.* at 1134.
[109] Reber, 42 A.3d at 1134.
[110] *Id.*
[111] *Id.* at 1137.
[112] *Id.*
[113] *Id.* at 1138.

went through in not knowing his biological father.[114] In awarding Andrea the sole custody and control of the pre-embryos, the court found that "because Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely [Andrea]'s only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all," her interest far outweighed Bret's interest in not implanting the pre-embryos.[115]

The court in *Cahill v. Cahill* took a strict contractual approach when it declined to award custody of the frozen pre-embryos to the either the wife or husband.[116] Deborah and Patrick married in 1993.[117] The couple had problems naturally conceiving during their marriage and sought help in the form of IVF from the University of Michigan.[118] During the IVF procedure, the doctors at University of Michigan fertilized six eggs from Deborah using Patrick's donated sperm.[119] Three of the fertilized embryos were implanted in Deborah and the remaining three were cryogenically frozen for future use.[120] Deborah gave birth on November 11, 1995 to triplets, with only one child surviving.[121] Deborah and Patrick separated in 1996 and later filed for divorce.[122] In her counterclaim, Deborah sought custody of the frozen pre-embryos, contending that they were not property to be split up in the divorce proceeding, but the custody matters concerning the pre-embryos should be reserved for a subsequent hearing.[123]

In awarding the frozen pre-embryos to the University of Michigan, the court gave custody based on the contract that existed between the husband and wife.[124] At trial, Deborah refused to present to the court the contract signed by the parties when they underwent IVF.[125] Upon failing to produce the contract, Patrick produced, in lieu of the original contract, a similar form agreement to the one signed by the couple that was standardly used by the University of Michigan before undertaking an IVF procedure.[126] In holding that marital property is to be litigated during a divorce proceeding, the court held that the frozen pre-embryos were not essentially marital property, but instead left the issue

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114 *Id.* at 1140.

115 Reber, 42 A.3d at 1142.

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

117 *Id.* at 465-66.

118 *Id.* at 466.

119 *Id.*

120 *Id.*

121 Cahill, 757 So. 2d at 466.

122 *Id.*

123 *Id.*

124 *Id.* at 467.

125 *Id.*

126 *Id.*

to be litigated as to whether the embryos were property of the Cahill's or property of the University of Michigan.[127]

Splitting both approaches down the middle, the court in *In re Marriage of Witten* awarded custody to neither husband nor wife, but instead held that neither husband nor wife could use or dispose of the frozen pre-embryos without the consent of the other.[128] Prior to the divorce filing in 2002, Arthur (known as Trip) and Tamera Witten were married for approximately seven and a half years.[129] During their marriage, Trip and Tamera had problems conceiving children naturally and turned to IVF to conceive a biological child.[130] Prior to undergoing IVF, the couple signed a document, which stated that the embryos would only be released with the signed approval of both [Trip and Tamera].[131] During their attempts at conceiving a child through IVF, Tamera underwent several unsuccessful embryo transfers at the University of Nebraska Medical Center.[132] At the time of Trip filing for divorce in 2002, the couple had seventeen frozen pre-embryos that remained cryogenically frozen at the University of Nebraska Medical Center.[133]

During their divorce proceedings, Tamera requested custody of the frozen pre-embryos to have implanted at a later date so she could have a biological child.[134] She provided Trip with the ability to exercise or terminate his parental rights, whichever he preferred.[135] She did not want the eggs destroyed or donated to another couple in the event that Trip would not allow her to implant the eggs in her uterus.[136] Trip, on the other hand, did not want the embryos implanted by Tamera or destroyed.[137] Instead, he wanted the eggs donated to another couple to give someone else the chance to have a child.[138] Trip requested that the court enter an injunction preventing either party from transferring, releasing, or using the embryos without the written consent of both himself and Tamera.[139]

In deciding the issue of the custody of the eggs, the court[140] looked at the three types of approaches as previously discussed in *Reber v. Reiss*.[141] In utilizing the best interests test,

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127 *Id.*
128 In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
129 *Id.* at 772.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 In re Marriage of Witten, 672 N.W.2d at 772.
135 *Id.*
136 *Id.* at 772-773.
137 *Id.* at 773.
138 *Id.*
139 In re Marriage of Witten, 672 N.W.2d at 773.
140 *Id.* at 774.
141 Reber, 42 A.3d at 1134.

the court determined that "the [Iowa] legislature did not intend to include fertilized eggs or frozen embryos within the scope of section 598.41."[142] In holding that the Iowa legislature did not address the custody of frozen pre-embryos in its statute, the court moved on to looking at the storage agreement signed by the parties before they underwent the IVF procedure.[143] The court noted, "The currently prevailing view — expressed in three states — is that contracts entered into at the time of in vitro fertilization are enforceable so long as they do not violate public policy."[144] After looking at the downsides to the contractual approach, the court considered the mutual consent model that "propose[s] 'no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo.'"[145] The court also looked at the balancing approach and determined that like the contractual approach, the balancing approach has several downsides.[146] The court noted that, "The obvious problem with the balancing test model is its internal inconsistency."[147] In ultimately deciding that neither husband nor wife could use or dispose of the frozen pre-embryos without the consent of the other, the court rejected both the contractual approach and balancing model in favor of utilizing the mutual consent model.[148]

> We think judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their current views and values. They also reveal awareness that such decisions are highly emotional in nature and subject to a later change of heart. For this reason, we think judicial enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against the public policy of this state.[149]

The court in *In re Marriage of Witten* rejected a contractual approach completely, instead opting for the mutual consent approach on the basis of public policy. As seen in all of these approaches, the courts are split on how to treat frozen pre-embryos in custody disputes. Because of the multitude of legal questions surrounding the status of frozen pre-embryos, state legislatures should determine through statutes how to treat frozen

142 In re Marriage of Witten, 672 N.W.2d at 776.
143 *Id.*
144 *Id.*
145 *Id.* at 778.
146 *Id.* at 779.
147 *Id.*
148 In re Marriage of Witten, 672 N.W.2d at 782.
149 *Id.* (Emphasis added in original).

pre-embryos, especially in cases of custody disputes over the embryos. The *York* decision illustrates the need for legislatures to propose and adopt guidelines regarding the contracting of and for the in vitro fertilization process. The *York* court left open for legislatures the possibility of contracting the frozen pre-embryos as marital property in custody disputes where one person no longer wants to proceed with the IVF reproduction process and the other person wants to proceed as their last hope of having children. The *Dahl* court also illustrated the need for legislatures to propose and adopt guidelines regarding the contracting of and for the in vitro process itself. Problems arise when treating frozen pre-embryos as marital property and it is clear that the *Dahl* court struggled with the emotional attachment to the frozen pre-embryos. Statutes imposed by legislatures can control and attack these issues head-on so that courts like the *Dahl* court don't have to guess at how to deal with the division of frozen pre-embryos as marital property.

V. Statutes

As seen in *In re Marriage of Witten*, states legislatures have struggled with codifying into statute custody of frozen pre-embryos begotten through the IVF procedure.[150] The first instance in which Congress saw a need to enact a federal statute regarding the IVF procedure happened after a fatal plane crash in which an American couple who had undergone IVF died without proclaiming a means to dispose of their cryogenically frozen embryos.[151] In 1981, an American couple flew to Australia to undergo IVF.[152] After successfully implanting one embryo and cryogenically freezing the rest, the couple died on the way home to America.[153] Without having a means to which to dispose of the frozen embryos, the Australian government donated them to an anonymous recipient.[154] After discussing different manners of disposing of the embryos in the United States Congress through hearings, no federal statute was enacted, leaving states to enact their own statutes concerning IVF.[155] Historically, matters of parentage have been matters of the states, not the federal government. The states have an invested interest in the potential life of an embryo.

Even though states have begun to legislate the IVF procedure, they still fail to address the custody aspect of frozen pre-embryos. An example of the general statute that most

150 E.g. In re Marriage of Witten, 672 N.W.2d at 776.

151 Cuva, *supra* note 7, page 383.

152 *Id.*

153 *Id.*

154 *Id.* at 386.

155 *Id.*

states use is comes from North Dakota, "In disputes arising between any parties regarding an In Vitro Human embryo, the standard for resolving such disputes is in the best interest of the In Vitro Human embryo."[156] Georgia's statute reads exactly the same, even though its state legislature has no ties with North Dakota. "In disputes arising between any parties regarding the in vitro human embryo, the judicial standard for resolving such disputes shall be the best interest of the in vitro human embryo."[157] When looking at such vague statutes, the courts are left with the question of what is the best interest for the child, or in this case, the embryo. The best interest for the embryo ultimately depends upon the embryo itself, making the best interest standard a broad standard that will vary from case to case.

The most progressive state statute concerning the custody of frozen pre-embryos comes from Mississippi:

> A legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient-intended parent before embryo transfer. A written contract shall be entered into between each legal embryo custodian and each recipient-intended parent before embryo transfer for the legal transfer of rights to an embryo. The contract shall be signed by each legal embryo custodian for the embryo and by each recipient-intended parent in the presence of a notary public and a witness. Initials or other designations may be used if the parties desire anonymity. The contract may include a written waiver by the legal embryo custodian of notice and service in any legal adoption or other parentage proceeding that may follow.[158]

By designating a contract-based approach, the Mississippi statute gives a good outline of what should happen in custody disputes of frozen pre-embryos than the use of a best interest standard most states use.

A similar statute out of Florida holds that a couple undergoing IVF must enter into a written agreement providing for the disposition of the frozen pre-embryos:[159]

> A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of

[156] 2013 Bill Text ND S.B. 2302.
[157] 2007 Bill Text GA H.B. 1358.
[158] 2013 Bill Text MS S.B. 2661.
[159] Fla. Stat. Ann. § 742.17 (1993).

> a divorce, the death of a spouse, or any other unforeseen circumstance. Absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm. Absent a written agreement, decision making authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple.[160]

Florida's statute gives a clear indication of what should be done with frozen pre-embryos in the event of a divorce, death of a spouse, or any unforeseen circumstance. Florida's statute allows for the courts to follow a clear path for determining custody disputes through the use of a contract entered into by the parties before the IVF process begins.

The courts have noticed the lack of state statutes concerning IVF.

> As these [reproductive] technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.[161]

It is clear that states need to legislate what should be done with frozen pre-embryos in the event of a divorce, death of a spouse, or any unforeseen circumstance.

VI. Balancing of Parties' Interest of Having Children

Unlike Iowa's approach applied in *In re Marriage of Witten*[162], most courts believe that the mutual consent model is a lose-lose situation. Neither the husband nor the wife gets the custody of the frozen pre-embryos, and most likely will never fully agree on what to do with the frozen pre-embryos. While the frozen pre-embryos await resolution between the two parties, neither party can exercise their right to procreation.[163] In her article *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, Meagan R. Marold notes that, "In addition [to the lawsuit], the party who does not want to destroy the embryos is forced

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160 *Id.*

161 Woodward v. Comm'r, 760 N.E.2d 257, 272 (2002).

162 In re Marriage of Witten, 672 N.W.2d at 776.

163 Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 Hastings Women's L.J., 179, 179-97 (2014).

to pay the storage costs, 'effectively punishing that party for pursuing those rights.'"[164] Because the mutual consent approach has so many disadvantages, most courts use either the contract approach or the balancing test approach, as either one affords the court an approach that allows the court to follow so as to strictly apply in every case.

In the balancing approach, the procreational interests of both parties must be considered. Generally, most courts determine that the decision not to beget a child outweighs the desire to have a child. In *A.Z. v. B.Z.*, the court held that they "would not enforce an agreement that would compel one donor to become a parent against his or her will."[165] The court found that, "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."[166] The court reasoned that:

> [I]ndividuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.[167]

In so holding, the court upheld that a persons right not to procreate outweighs another's interest to procreate. The court in *Davis* held a similar view:

> 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 pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[168]

However, some courts do recognize the balance the interest of the person who can no longer have children without IVF as the more important interest. In *J.B. v. M.B.*, the husband, M.B., "contends that his constitutional rights outweigh J.B.'s right not to procreate

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164 *Id.*

165 A.Z. v. B.Z., 725 N.E.2d 1051,1057 (2000).

166 *Id.* at 1057-58.

167 *Id.* at 1058.

168 Davis, 842 S.W.2d at 604.

because her right to bodily integrity is not implicated, as it would be in a case involving abortion."[169] In holding that M.B.'s right to procreate outweighs J.B.'s right not to procreate the court reasoned, "J.B.'s right not to procreate may be lost through attempted use or through donation of the pre-embryos. Implantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions."[170] The court thereby upheld J.B.'s right to procreate over M.B.'s right not to procreate.

VII. States' Interest in Frozen Pre-Embryos

As we have seen, the courts dictate the use or disposition of frozen pre-embryos in custody battles over the embryos. However, in doing a balancing test of the interests of the frozen pre-embryos the courts don't account for the state's interest in the frozen pre-embryos and the potential life that comes from them. The courts in making decisions regarding the custody of frozen pre-embryos in divorce and break-ups must take into account the state's interest, while preserving the individual's right to privacy to make their own decisions.

The Supreme Court has addressed the state's interest in potential children in both *Roe v. Wade*[171] and *Planned Parenthood v. Casey*.[172] As seen in the discussion in the majority and dissents in *Roe v. Wade*, the state has an interest in the potentiality of human life, through the regulation and prohibition of abortions.[173] The court in *Roe* noted, "The State's interest and general obligation to protect life then extends, it is argued, to prenatal life."[174] Even though abortions were not completely struck down in *Roe*, the state's interest in the fetus's potential life remained.[175] Regardless, "*Roe* stands for the proposition that the state does not have a compelling interest in protecting the life of a fetus until the fetus is considered viable ."[176] When considering an embryo, made up of only a few cells, it is less than a fetus before its point of viability.[177] The state has a clear interest in the potential life of any children who may become state citizens when they come to vitality. When applying the balancing test in Roe, "the Supreme Court concluded that the mother's privacy rights outweighed the nonviable

169 J.B. v. M.B., 783 A.2d 707, 712 (2001).
170 *Id.* at 717.
171 Roe v. Wade, 410 U.S. 113 (1973).
172 Planned Parenthood v. Casey, 505 U.S. 833 (1992).
173 Roe, 410 U.S. at 113.
174 *Id.* at 150.
175 *Id.* at 163.
176 Cuva, *supra* note 7, page 390.
177 *Id.*

fetus' rights."[178] Therefore, even though the mother's privacy rights outweigh the state's rights, the state still has an interest in the fetus' potential life.[179] However, the state's interest in a potential life is not absolute. The Casey court noted, "Our cases recognize 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. "'[180] Such choices are not up to the state itself, but are part of a fundamental right of privacy that belong to the men and women themselves whom are making the decision.[181] However, fundamental rights are not absolute when the state has a compelling interest in the subject matter.[182] In cases of IVF, it is suggested that the state has a compelling interest in limited IVF to married couples so as to avoid issues of illegitimate children and determining child custody.[183] The state has a compelling interest in preserving the notion of a traditional family, with two married, heterosexual parents.[184] However, unmarried persons who wish to have a child through IVF are not completely barred.[185] The notion of a traditional family with two married, heterosexual parents is no longer a compelling interest for the state. As the traditional family evolves, the state no longer has a compelling interest in preserving the notion of the traditional family. In *Adoption of Tammy*, the court allowed two unmarried women, Susan and Helen, to adopt Susan's biological child, Tammy.[186] The court reasoned that the unmarried status of Susan and Helen in no way affected Tammy's best interests.[187] The court noted that, "Adoption will not result in any tangible change in Tammy's daily life; it will, however, serve to provide her with a significant legal relationship which may be important in her future."[188] The *Obergefell* court stated in regards to raising children in a home with same-sex parents, "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted."[189] The *Obergefell* court noted that, "[Allowing same-sex couples to adopt has] provide[d] powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[190]

Thus, in making decisions regarding the custody of frozen pre-embryos in divorce and

178 *Id.*

179 *Id.*

180 Casey at 851.

181 *Id.*

182 Nicole L. Cucci, Note, *Constitutional Implications of In Vitro Fertilization Procedures*, St. John's L. Rev. 417, 428 (1998).

183 *Id.*

184 *Id.*

185 *Id.* at 429.

186 Adoption of Tammy, 619 N.E.2d 315 (1993).

187 *Id.* at 320.

188 *Id.*

189 Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

190 *Id.*

break-ups, the courts must take into account the state's interest, while preserving the individual's right to privacy to make their own decisions. This is a hard task for the courts to tackle, and it would be best suited for state legislatures to dictate to the courts how to handle custody disputes over frozen pre-embryos.

VIII. Proposed State Statute Regarding Custody Disputes of Frozen Pre-Embryos

As established above, current state statutes regarding legislation over the custody of frozen pre-embryos are severely lacking and need increased guidance for the courts to determine the outcome of custody battles over frozen pre-embryos. I suggest a proposed state statute to give better guidance for the courts and the legislatures to handle custody battles, while taking into account both parties' interests in the frozen pre-embryos, as well as the state's interest in a potential life. In proposing legislation for the states to use as a guideline, I will take portions from state statutes currently existing and case law previously discussed.

To begin, the procedure prior to entering into the IVF procedure itself will be outlined as a guideline for couples undergoing the IVF procedure. Even though "courts have been reluctant to enter judgment in this type of dispute, viewing a decision to undergo an IVF procedure and determination of any remaining embryos as intensely private and personal matters best resolved by the perspective parents,"[191] the use of a contract before entering into the IVF procedure will allow the courts to focus on the true desires of each party undergoing the procedure. Prior to entering into the IVF procedure, the couple that wishes to undergo the procedure must sign a contract that details what is to be done with the frozen pre-embryos in the event of a divorce or break-up. Included in these details shall be "the parental rights and duties of the donors, as well as their legal rights and duties regarding the disposition of in vitro human embryos that were not transferred due to either of the fertility patient's death, divorce, abandonment, or dispute over the custody of the in vitro human embryo."[192] The agency that is conducting the IVF procedure is responsible for "an explanation [to both parties] that there may be consequences and that it is advisable to seek independent legal counsel."[193] "The use of a contract prior to entering into the IVF procedure is necessary to account for the human emotions [that] run particularly high when a married couple is attempting to overcome infertility problems."[194] The court in *Koss*

[191] Peter E. Malo, *Deciding Custody of Frozen Embryos: Many Eggs are Frozen but Who is Chosen*, 3 DePaul J. Health Care L. 307, 307-33 (2002).

[192] 2013 Bill Text MS S.B. 2661.

[193] 2010 Bill Text FL S.B. 2240.

[194] Davis, 842 S.W.2d at 597.

v. Koss noted, "While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. All agreements looking to the future to some extent deal with the unknown."[195] The court in *Roman v. Roman* expressed, "that allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties."[196] Therefore, voluntary contracts entered into before the IVF procedure takes into account both the state's interests and the interests of the parties.

In regards to relinquishing the embryos, the phrase "embryo relinquishment" will refer to the relinquishment of rights and responsibilities by the person who has legal rights over the embryo(s) and is perceived by the state as the legal guardian or parent of the embryo(s).[197] With regards to the relinquishment of the embryo(s), "A legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient-intended parent before embryo transfer."[198] The donor cannot relinquish his or her rights after the implantation of the embryos into the womb. If the donor of the egg or sperm wishes to relinquish his or her rights to the frozen pre-embryos, the donor "shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and pre-embryos shall be permitted."[199] The donor who has relinquished his or her rights to the frozen pre-embryos will not be subject to legal responsibilities over any children once they are born. These legal responsibilities include but are not limited to child support, custody arrangements, and visitation.

If a custody dispute over the frozen pre-embryos arises after the signing of the contract between the two parties and no relinquishment will be had by either party, the court may balance the interests of both parties in determining who should get custody of the frozen pre-embryos.[200] The use of a balancing test of the interests of the parties shall only be used in extraordinary circumstances. The court should only render a discussion of the contract previously signed, if and only if, one party no longer has the ability to have children without the use of the frozen pre-embryos. If one party to the custody dispute of the frozen pre-embryos no longer has the capability to produce children without the use of the frozen pre-embryos, the court shall weigh their interest as stronger than that of the party who does not wish to use the pre-embryos.[201] As the court stated in *Reber*,

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195 Kass v. Kass, 696 N.E.2d 174, 180 (1998).

196 Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006).

197 Modeled after Mississippi's 2013 Bill Text MS S.B. 2661.

198 2013 Bill Text MS S.B. 2661.

199 2010 Bill Text FL S.B. 2240.

200 Similar to the balancing test used in Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

201 Homologous to the reasoning in Szafranski v. Dunston, 2015 IL App (1st) 122975-B, 34 N.E.3d 1132.

> There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to [the person who cannot have biological children], it does not mean that such options should be given equal weight in a balancing test.[202]

When applying the balancing test, courts should not use adoption as a factor weighing against one's right to procreate. The balancing test should strictly consider the consequences a person faces without the right to use the frozen pre-embryos against the consequences the other party faces if the frozen pre-embryos are used.

IX. Conclusion

The increased popularity of using in vitro fertilization to conceive a biological child makes it necessary for state legislatures to step in and write legislation to serve as a guide for all IVF matters. As seen above, most state statutes concerning IVF legislation are too broad and leave the courts with too many questions when deciding cases over the custody of frozen pre-embryos. Legislation by the states would ensure how courts are to classify frozen pre-embryos- as either persons, property, or something in between. Cuva writes in his note that, "Constitutional procreative liberties which protect individuals from unwanted offspring and accompanying burdens, should be given great weight by the legislature."[203] In allowing for constitutional procreative liberties of one's right to decide whether to procreate or not, legislatures should follow a contract-based approach, before the couple enters into IVF, to account for all possibilities that may arise during a custody dispute later on. The contract would ensure how to dispose of the frozen pre-embryos and how to settle on custody matters should they arise. As I suggested in my proposed legislation, balancing of both parties' interests, as well as the state's interests, should only be used in extraordinary cases when one party can no longer have biological children without the use of the frozen pre-embryos.

Even though the issue of custody battles over frozen pre-embryos only encompasses part of the legal and moral debates over in vitro fertilization, the legislature should enact at minimum some sort of guideline to guide not only the courts, but the public as well on

"The circuit court's ruling, that Karla's interest in using the pre-embryos outweighs any interest Jacob has in preventing their use, was against the manifest weight of the evidence."

[202] Reber, 42 A.3d at 1138.

[203] Cuva, *supra* note 7, page 412.

the issues behind in vitro fertilization. In this note, I have proposed a piece of legislation for state legislatures to abide by when drafting their own legislation concerning IVF. Because of the number of issues surrounding custody battles over frozen pre-embryos in the court system, it is clear that the state legislatures should be the ones to give a guideline to the courts as how to handle such disputes. It is only then that the courts will be able to fully resolve all legal aspects of custody battles over frozen pre-embryos and other problems that arise with the in vitro fertilization procedure.

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