1999

Divorce and the Disposition of Frozen Embryos

Mark C. Haut

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol28/iss2/8

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

DIVORCE AND THE DISPOSITION OF FROZEN EMBRYOS

I. INTRODUCTION

With each advancement in modern science come new ethical and moral dilemmas for humanity. Until legislation catches up with these new dilemmas, the responsibility of defining the rights that people have in this scientific age will fall upon the courts. One of the advances in this scientific age is the process of in vitro fertilization ("IVF"). IVF and cryopreservation allow for a couple’s fertilized egg to be frozen for many years. In the last decade however, disputes have arisen over the disposition of these fertilized eggs upon a couple’s dissolution of marriage.¹

Since 1978, when the first baby was born through the use of IVF, thousands of people, who previously would have been deemed infertile, have had the opportunity to have genetic offspring.² Considering the fact that one in eight married couples in America are infertile, this advancement is extremely important because it gives these couples hope to conceive a child.³ However, as with many advancements, conflicts inevita-

---

¹ There exists a disagreement over the proper term for fertilized eggs at the beginning stage of their development, when the in vitro fertilization ("IVF") procedure is undertaken. Some use the term preembryos, which refers to the product of gametic union from fertilization until the appearance of the embryonic axis. See Toby Solomon & James B. Boskey, Who Owns the Ova?, N.J. LAW., July-Aug. 1991, at 20, 22. This is approximately 14 days from fertilization. See id. However, it also has been argued that nothing exists before the embryos, and the term "preembryo" creates a false distinction. See id. Throughout this Note the terms fertilized egg, embryo and preembryo will be used interchangeably.


³ See Jennifer Marigliano Dehmel, Note, To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos, 27 CONN. L. REV. 1377, 1382 (1995) (stating that 23,468 embryos were in frozen storage in the United States as of 1990).

⁴ See Nicole L. Cucci, Note, Constitutional Implications of In Vitro Fertilization Proce-
bly arise. The eggs that are removed from a female can be fertilized and stored for many years; this process is financially, mentally, and physically burdensome. Due to this burden, it is inevitable that some couples will get a divorce while embryos are still frozen and awaiting implantation. A problem arises when the parties do not agree as to the disposition of the fertilized eggs. In most cases, litigation ensues when the wife wishes to implant the eggs but the husband seeks to have them destroyed.

Few courts have been confronted with this situation. Of the courts that have addressed this issue the responses have varied, not only among different jurisdictions, but also between courts in the same jurisdiction. Recently, the issue of the disposition of fertilized eggs came before the New York State Court of Appeals. There, the court held that a prior agreement between a husband and wife regarding the disposition of fertilized eggs is binding. However, the court refused to address what position it would take in a situation where no prior agreement exists between the parties.

This Note urges that in future cases, when the parties do not have a prior agreement, the New York courts should give joint dispositional control to the gamete providers. This rule would prevent use of the fertilized eggs by either party when there is no agreement. When there is a prior agreement as to the disposition of the embryos, the agreement should control, but this Note contends that courts should allow for contract defenses in such cases.

5. See Dehmel, supra note 3, at 1381.
6. See id.
7. See Ruth Colker, Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not, 47 Hastings L.J. 1063, 1063 (1996). However, this is not always the case. In a recent New Jersey case, the husband wanted the embryos preserved to be used with another woman or to donate to an infertile couple, whereas the wife sought to have the embryos destroyed. For a discussion of this case, see Elise Young, Judge Orders Embryos Destroyed—Sides with Woman in Divorce Dispute, The Record (N. J.), Sept. 29, 1998, at A1, available in 1998 WL 5820406. The court ultimately held for the wife and ordered that the eggs be destroyed. See id.
10. See id. at 182.
11. See id. at 179.
Part II of this Note describes the IVF procedure, including the process of cryopreservation. Part III describes the different approaches that various courts have taken regarding the disposition of the embryos. These approaches include the right to life view, the property view, and the deserving special respect view. Part IV describes a recent case, Kass v. Kass, tracking the decision from the trial level to New York State's highest court. Part V analyzes the different approaches in the absence of a prior agreement and advocates adopting the property view. Finally, Part VI asserts that while prior agreements should be held binding, various contract defenses nonetheless should be allowed when circumstances have sufficiently changed.

II. THE IVF PROCESS AND CRYOPRESERVATION

The IVF process begins with the stimulation of a woman's ovaries causing the release of multiple eggs. The eggs are then surgically removed by a laparoscopy or ultrasound-directed needle aspiration. This procedure is invasive and uncomfortable. The eggs are then placed in a petri dish, where the sperm cell fertilizes the egg, and after three to four days, the fertilized egg reaches the morula stage and may be frozen in liquid nitrogen for preservation and storage. This process is called cryopreservation. At this stage, the morula is considered a preembryo, which does not have any differentiated organs or a nervous system.

There are several reasons to undergo cryopreservation of one's eggs. First, IVF is costly, time consuming, and emotionally and physically burdensome, and cryopreservation reduces the number of IVF procedures that are necessary because many eggs can be harvested and frozen for later implantation. In addition, "cryopreservation reduces the risk of multiple pregnancies because only one frozen embryo needs to be implanted at one time." It also helps to increase a woman's

12. See Dehmel, supra note 3, at 1382-84.
13. See id. at 1380-81.
15. See Dehmel, supra note 3, at 1381; Steinberg, supra note 14, at 318.
16. See Steinberg, supra note 14, at 318.
18. See Steinberg, supra note 14, at 318.
19. See Dehmel, supra note 3, at 1381.
20. See Gunsburg, supra note 17, at 2211.
21. See id.; Steinberg, supra note 14, at 318.
22. Gunsburg, supra note 17, at 2211. Because of the small chance of pregnancy, usually
chances of becoming pregnant because the egg is implanted at the optimal time of her menstrual cycle.23 Finally, cryopreservation delays the ethical considerations that a couple might face regarding what to do with the excess embryos.24 During the implantation process, the eggs are transferred to the woman’s uterus through a cervical catheter, and if one of the preembryos implants to the uterine wall, it differentiates, develops into a fetus, and nine months later a birth results.25

While there are tremendous benefits to cryopreservation, the disadvantage is that the lapse of time between the IVF procedure, freezing, and implantation gives the married couple an opportunity to change their minds about the process as well as their marriage.26 When the couple decides to get divorced, they may disagree on the disposition of the embryos. The options available, as to the disposition of the embryos, are implantation (either in the mother, a surrogate, or the husband’s new wife), donation, or allowing the embryos to thaw, therefore expiring on their own.27 As previously discussed, the usual scenario involves the wife’s wish to implant the eggs while the husband seeks to have them destroyed.28 Unfortunately for couples who disagree and ultimately litigate the matter, the responses from the courts have not been uniform, and have resulted in the enumeration of several different approaches.

III. THE DIFFERENT APPROACHES

Many differing views about IVF have been espoused by both courts and commentators. The three prevailing views are the right to life position, the property approach, and the deserving special respect position.29 At one extreme is the right to life approach, advocating that life begins at fertilization and, therefore, no embryos may be destroyed.30 At the other extreme is the property approach, which focuses on the rights of

---

23. See Dehmel, supra note 3, at 1381.
24. See Gunsburg, supra note 17, at 2211.
25. See Dehmel, supra note 3, at 1381.
26. See Gunsburg, supra note 17, at 2211.
27. See Robyn Shapiro, Who Owns Your Frozen Embryo?, Hum. RTS., Spring 1998, at 12, 13 ("Dispositional options may include: destruction of their embryos, donation for research, storage, or donation to another infertile couple.").
28. See supra note 7 and accompanying text.
29. See Dehmel, supra note 3, at 1382.
30. See infra notes 33-55 and accompanying text.
the gamete providers, supporting a consensus between both parties as to the use of the embryos. Occupying a place between the two is the special respect approach, which advocates a balancing test that takes into account the rights of all parties.

A. Right to Life

Supporters of the right to life approach believe that life begins at conception and, therefore, preembryos must be afforded the full rights and protections of persons under the law. Under this view, the destruction of a preembryo is equivalent to the destruction of a human being. According to this approach, the husband's right to avoid procreation is waived and ceases to exist after participation in the IVF program.

This view argues that Roe v. Wade is not implicated by the divorce/fertilized egg cases. Roe held, in part, "that the rights of the fetus during the first 'trimester' . . . are negligible, and during that trimester the state could not interfere with the mother's right to seek an abortion." This view believes that Roe dealt with a woman's right to terminate her pregnancy and when these issues of bodily integrity are not involved, the state may protect preembryos as life. The right to life position values human life and likens the devaluation of life to a Holocaust.

Two courts, the Tennessee circuit court in Davis v. Davis, and the New York trial court in Kass v. Kass, have embraced the right to life.

31. See infra notes 56-68 and accompanying text.
32. See infra notes 69-84 and accompanying text.
33. See Dehmel, supra note 3, at 1382.
37. Steinberg, supra note 14, at 331.
38. See Colker, supra note 7, at 1068.
39. See id. at 1076. One commentator states: "[W]e live in a society which faces a crisis of disrespect for life. Capital punishment is thriving along with murder; vegetarianism is unpopular and often derided; and some courts insist on describing the fetus as merely 'property.' The ultimate crisis resulting from such a devaluation of human life would be another Holocaust.

Id. (footnotes omitted).
position. In *Davis*, the court held that the eggs were human lives and awarded the wife, Mary Sue Davis, the right to implant them. The *Kass* court ruled similarly, awarding the eggs to the wife, Maureen Kass; however, the court would have honored a contract had one existed.

One state has codified the right to life position. In Louisiana, the embryo is considered a judicial person, and the law states that the embryos are not considered property and that the hospital is responsible for them. The statute also states that the embryo may not be intentionally destroyed, and if the IVF patients renounce their parental rights, then the embryo shall be available for adoptive implantation. "Doubts exist, however, as to the constitutionality of this Louisiana law," and at least one commentator has suggested that the statute will face a constitutional challenge in the near future.

Critics of the right to life view believe *Roe* held that a fetus is not considered a legal person during the first trimester, and that states may not decide when life begins. Therefore, critics of the right to life position argue that there is an anomaly in the right to life view: preembryos are afforded greater protection than they are later in development as fetuses. A preembryo has a rudimentary biological status when compared to a fetus. "Fetuses . . . are much closer to viability than are preembryos," and because a fetus is not a legal person, then it logically follows that neither is a preembryo. Furthermore, if this argument is taken to its conclusion, then courts could order implantation or donation to

---

42. See *Davis*, 1989 WL 140495, at *11.
44. See L.A. REV. STAT. ANN. § 9:123 (West 1997) ("An in vitro fertilized human ovum exists as a judicial person until such time as the in vitro fertilized ovum is implanted in the womb . . . .").
45. See id. at § 9:126.
46. See id. at § 9:130.
48. See Cucci, supra note 4, at 438.
49. See Trespalacios, supra note 34, at 812.
50. See id. at 811.
52. Id. at 540.
53. See id. at 539-40. "Therefore, according to the view of the Supreme Court as defined by *Roe* and its progeny, only a compelling state interest can override a parent's privacy and procreational rights in the cryopreservation or destruction of a preembryo." Id. at 540.
While this view has some support, the higher courts and the majority of commentators do not agree with the right to life approach.55

B. Property View

While the right to life approach supports the party desiring implantation, the other extreme, the property approach, does not allow either party to implant the embryo against the will of the other.56 Under this approach, the preembryos are not entitled to state protection.57 Moreover, because it would be repugnant to implant the preembryos against the will of the woman, proponents of the property view do not consider the right to life view valid.58 The property view provides that the gamete providers should have joint control over the preembryos.59 "Because preembryos have the same reproductive significance for each gamete-donor, the property model concludes that both 'parents' have equal say in their disposition when no bodily interests are implicated."560

The property approach is not popular among some right to life commentators because of the notion of embryos being classified as property.61 However, the notion of property does not signify that the embryos can be treated as property in all respects, but rather it merely grants decision-making authority regarding the disposition of the fertilized egg.62

This view has had some support from the bench. In York v. Jones,63 the court held that a bailor-bailee relationship was created between a married couple and the hospital that runs the IVF program.64 Therefore,

54. See Trespalacios, supra note 34, at 807.
55. See Cucci, supra note 4, at 442 ("Overwhelmingly, the literature advocates the 'special-respect' status of the embryo."); Dehmel, supra note 3, at 1384 ("The 'special respect' view has garnered the most support both nationally and internationally."); Alise R. Panitech, Note, The Davis Dilemma: How to Prevent Battles over Frozen Preembryos, 41 CASE W. RES. L. REV. 543, 561 (1991) (noting that most American scholars and national commissions on IVF worldwide view preembryos as having "separate, special status"); John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 447 (1990) ("Precisely because the early embryo is genetically unique and has the potential to be more, it operates as a powerful symbol or reminder of the unique gift of human experience.").
56. See Carow, supra note 51, at 543; Trespalacios, supra note 34, at 817.
57. See Trespalacios, supra note 34, at 814.
58. See id. at 813-14.
59. See Steinberg, supra note 14, at 320.
60. Carow, supra note 51, at 543.
61. See supra note 39 and accompanying text.
62. See Robertson, supra note 55, at 454-55.
64. See id. at 425.
the court concluded that the hospital could not refuse to transfer the fertilized egg to another facility if the couple wished to terminate the bailor-bailee relationship.\textsuperscript{3}

The court's treatment of the preembryos as property also was used as part of the rationale in the opinion of the Tennessee Court of Appeals in \textit{Davis}\textsuperscript{66} as well as the concurring opinion of the New York Appellate Division Court's decision in \textit{Kass}.\textsuperscript{67} The concurring opinion in \textit{Kass} reasoned that the objecting party's right to veto implantation of an embryo is a fundamental right, grounded in the principle of procreative autonomy.\textsuperscript{68}

\section*{C. Special Respect View}

The special respect view strikes a compromise between the right to life approach and the property approach.\textsuperscript{69} This approach has been adopted by the Tennessee Supreme Court\textsuperscript{70} and most commentators,\textsuperscript{71} including the American Fertility Society.\textsuperscript{72} The special respect approach recognizes the special significance of preembryos and their potential to become full-fledged individuals.\textsuperscript{73} The belief is that preembryos deserve a special respect that is greater than that afforded to inanimate objects or even human tissue;\textsuperscript{74} therefore, when deciding on the disposition of the egg, this approach urges the court to take into account the preembryo's special significance, without ignoring the gamete providers' interests.\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{65} See \textit{id.} at 427.
\item \textsuperscript{68} See \textit{id.} at 165-66 (Friedmann, J., concurring).
\item \textsuperscript{69} See Carow, supra note 51, at 555-56. The special respect model places the preembryos on a continuum between persons and property. See \textit{id.} at 555. This approach is correct because preembryos are not persons according to constitutional precedent, but rather are genetically unique, with the potential to develop into newborn persons. See \textit{id.} at 555-56 (emphasis added).
\item \textsuperscript{70} See \textit{Davis v. Davis}, 842 S.W.2d 588, 597 (Tenn. 1992), \textit{reh'g in part}, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992), \textit{cert. denied}, 507 U.S. 911 (1993). Although the court adopted the special respect approach, it preferred to defer to a contract resolution. See \textit{id.}
\item \textsuperscript{71} See Cucci, supra note 4, at 442; note 55 and accompanying text.
\item \textsuperscript{72} See Lynne M. Thomas, Comment, \textit{Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?}, 29 \textit{St. Mary's L.J.} 255, 288 (1997) (noting that the American Fertility Society argues that embryos are neither persons nor property).
\item \textsuperscript{73} See Steinberg, supra note 14, at 320.
\item \textsuperscript{74} See \textit{id.}
\item \textsuperscript{75} See Carow, supra note 51, at 561.
\end{itemize}
While the property approach requires decisions regarding the egg to be consensual, and the right to life approach requires the interest of the preembryo to be paramount, the special respect approach is marked by a compromise: balancing interests. The special respect approach recognizes two competing interests involved in the disposition of a fertilized egg: the right to procreate and the right to avoid procreation.

In resolving this issue, the Davis court created a balancing test to determine who controls the disposition of the fertilized egg. The court held that if the gamete providers cannot agree on how to dispose of the eggs, then a prior agreement, if one exists, controls. Without a prior agreement, the party who seeks destruction of the embryos should prevail unless certain requirements are met by the other party. If the litigant favoring implantation wishes to donate the eggs to a third person, then the party opposed to implantation should still prevail. However, if the wife wants the egg to implant into herself and she has no other reasonable means of achieving parenthood, then the argument allowing her to use the preembryos for implantation should be considered.

While this approach has the most support, there are various flaws in the reasoning, which are addressed later in this Note. Before analyzing the different approaches in depth, it is necessary to review the holdings and the reasoning of the Kass courts.

IV. KASS V. KASS

Maureen and Steven Kass were married on July 4, 1988 and immediately began trying to conceive a child. Unable to conceive, the

76. See Thomas, supra note 72, at 290.
77. See id.
79. See id.
80. See id. The other party must demonstrate an intention to use those embryos in the party’s own pregnancy and a lack of any reasonable alternatives for achieving parenthood other than through the use of the embryos at issue. See id.
81. See id.
82. See id.
83. The right to life view has been rejected by higher courts and the majority of commentators. See Cucci, supra note 4, at 442; see also infra notes 129-151 and accompanying text. The property view has had some support at the federal district court level and as a component of that rationale in the mid-level appellate courts of New York and Tennessee. See supra notes 63-67 and accompanying text. The special respect view has been adopted by the Tennessee Supreme Court and most commentators. See supra notes 55, 70-72 and accompanying text.
84. See infra notes 187-90 and accompanying text.

Published by Scholarly Commons at Hofstra Law, 1999
couple turned to John T. Mather Hospital's IVF program in 1989. Between March 1990 and June 1993, the couple underwent ten unsuccessful attempts to have a child through the IVF procedure. Although Mrs. Kass became pregnant twice, she suffered one miscarriage, and the other pregnancy had to be surgically terminated. On May 12, 1993, before the final IVF procedure, the couple signed several informed consent agreements that provided for a divorce court to distribute the frozen embryos. On May 20, 1993, doctors retrieved sixteen eggs from Mrs. Kass, nine of which resulted in preembryos. Four of these eggs then were transferred to Mrs. Kass's sister, who had volunteered to be a surrogate mother, and the remaining five were cryopreserved. After the sister's pregnancy test results came back negative and she no longer agreed to participate in the program, the couple decided to get a divorce. Just three weeks after signing the informed consent documents, on June 7, 1993, the parties signed an uncontested divorce agreement. These agreements stated that neither Maureen Kass, nor Steven Kass, would lay claim to the custody of the pre-zygotes, and that the preembryos would be disposed of in the manner outlined in the consent agreements. However, one month later Maureen Kass instituted a matrimonial action requesting sole custody of the fertilized eggs 'so that she could undergo another implantation procedure.' Mr. Kass objected to the preembryos' being removed and wanted Mrs. Kass precluded from any future attempts at pregnancy. In addition, he counterclaimed for specific performance, requesting the court to enforce the parties' agreement, thereby allowing the IVF program to use the preembryos for research, as designated in one of the informed consent agreements.

A. The Trial Court

The holding of the trial court was consistent with the right to life position, except for the court's willingness to defer to a contract if it had

86. See id.
88. See Kass, 696 N.E.2d. at 176.
89. See id.
90. See id. at 177.
91. See id.
92. See id.
93. See id.
94. Id.
95. See id.
96. See id.
found one to exist. The trial court found unconvincing Mr. Kass's argument that a husband has a right to avoid procreation. The court reasoned that the husband's rights are "waived and [therefore] non-existent after his participation in [the IVF] program." It further reasoned that one cannot have rights to take "positive steps" to destroy "potential human life." Finally, the court held that Maureen Kass had the exclusive right to determine the fate of her preembryos.

B. The Appellate Division

The Appellate Division reversed the decision of the trial court by holding that the woman's right to privacy and bodily integrity are not implicated before actual implantation. The court also held that when the parties to the IVF procedure have determined the disposition of the fertilized eggs, that agreement should control. The panel was split on whether the agreement at issue was sufficient, with the plurality holding that it unambiguously indicated the parties' desire to donate the preembryos. The plurality believed that there was no need to decide whether the balancing test used by the Davis court should be adopted. Judge Friedmann, concurring, believed that, except in the most exceptional circumstances, the objecting party should have a veto over a former spouse's proposed implantation. Judge Friedmann concluded that the financial and emotional burdens of unwanted parenthood were too great to overcome in most instances.

Judge Miller, dissenting, rejected a presumption in favor of either party and decided that the fate of the preembryo required a balancing test as to the parties' interests, burdens, background, psychological, fi-

98. See id. at *3.
99. Id.
100. Id.
101. Id. at *4.
103. See id. at 162-63.
104. See id. at 163.
106. See Kass, 235 A.D.2d at 156.
107. See id. at 165 (Friedmann, J., concurring).
108. See id. at 167.
financial, and physical circumstances. The dissent would have remitted the case to the trial court for a full hearing on these factors.

C. The Court of Appeals

The Court of Appeals affirmed the Appellate Division Court's decision that the disposition of a preembryo does not implicate a woman's right of privacy or bodily integrity in the areas of reproductive choice. Although the court recognized the difficulty in making prior agreements, the court encouraged couples to enter into them and held that these agreements should be valid.

The "contracts" in question were informed consent agreements, signed by both Mr. and Mrs. Kass. One portion of the informed consent provided:

In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.

Another section of the informed consent stated: "The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes.

The couple then agreed on the use of the embryos:

109. See id. at 178 (Miller, J., dissenting).
110. See id. at 182.
112. See id. at 180. The court stated:
While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. . . . Divorce; death, disappearance or incapacity of one or both partners; aging; the birth of other children are but a sampling of obvious changes in individual circumstances that might take place over time.

Id.
113. See id. ("Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing.").
114. See id. ("These factors make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis.").
115. Id. at 176 (quoting the informed consent agreement between Mr. and Mrs. Kass).
116. Id. (quoting the informed consent agreement between Mr. and Mrs. Kass).
In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to . . . :

(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program . . . . 117

Finally, at issue was a signed uncontested divorce agreement which stated: "'The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes.'" 118

These sections left open the question of whether there was a clear contract as to the disposition of the embryos in the event of a divorce. One possible construction was that the section that allowed for donation of the embryos in any unforeseen circumstances did not cover divorce, since another part of the consent agreement provided that, in the context of a divorce, the question of ownership would be decided in a property settlement. 119 The uncontested divorce agreement stated that the embryos should be disposed of in a manner outlined in the consent form, which would be a property settlement by a court. 120 The other interpretation was that the section allowing for divorce was used only to confer jurisdiction on the court, and was designed to insulate the hospital and the IVF program from liability. 121 Also, according to this interpretation, any ambiguity was resolved by the uncontested divorce agreement, which provided that "neither party shall lay claim to the embryos." 122 The court adopted the latter approach. 123

By deciding this case in the contract arena, the court avoided the issue of the disposition of the embryos in the absence of a prior agreement. 124 The court stated: "Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal

---

117. Id. at 176-77 (quoting the informed consent agreement between Mr. and Mrs. Kass).
118. Id. at 177 (quoting the divorce agreement between Mr. and Mrs. Kass) (alterations in original).
120. See id.
121. See id. at 160.
122. Id. at 160-61.
123. See id. at 161.
124. See id.
we have no cause to decide whether the pre-zygotes are entitled to ‘special respect.’” Consequently, the court only dealt with the disposition issue as if it were a contract case, and did not analyze the questions which would arise as to the disposition of the eggs if there had been no prior agreement. The court stated that common law contract principles would apply to cases involving dispositional agreements,\footnote{Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).} and, furthermore, ambiguity in such agreements is a question of law for the courts.\footnote{See id. at 180-81.} Although the court held that prior disposition agreements are binding, it did not discuss the possible contract defenses that may be raised in these unique situations, aside from normal common law principles.\footnote{See id. at 180.} Additionally, the decision of the court left a void in New York’s law as to the disposition of fertilized embryos in situations without a prior agreement. This question could have been answered if the court had found that the informed consent forms did not constitute a contract for the disposition of the embryos in case of divorce. Furthermore, the court could have, and should have, dealt with the issue in its discussion, to provide guidance to couples in the future.

V. ANALYSIS IN THE ABSENCE OF A PRIOR AGREEMENT

The Court of Appeals should not have avoided the issue as to who controls the disposition of the fertilized eggs when there is no prior agreement. It had the opportunity to give guidance to couples who undergo the IVF procedure in the future, but instead the court failed to help them plan for any contingencies. When future cases arise, the court should adopt the property approach, therefore allowing only joint dispositional control over the frozen embryos. When the parties to an IVF procedure do not specify their wishes in a prior agreement, neither party should have use of the embryos against the will of the other. With the property approach as a default rule, parties could choose to contract for a different result. When taken into account, several key considerations indicate that this is the soundest approach.

A. Characterization of the Embryo

The first consideration is whether the embryo is considered “life.” While there is no settled definition of “life,”\footnote{“Life” has been defined in a variety of ways, which includes the physiological, metaphysical, and legal views of life.} embryos can be consid-
erected to be alive, just as an amoeba or any other single-celled organism is considered alive. While embryos may be considered to be some rudimentary form of life, the real issue is whether they are persons and, as such, deserving of the protection that the law affords all persons.

The majority of commentators do not believe that embryos are human life that should be afforded rights or duties. It is true that from the moment of conception new genetically unique cells exist with the potential for human life; however, this does not entitle them to the same status and rights of all other living human beings. First, "embryo[s] lack the ability to interact, be conscious, have experiences, or be sentient." Moreover, "[s]ince the embryo does not have differentiated organs, much less the developed brain, nervous system, and capacity for sentience that legal subjects ordinarily have, it cannot easily be regarded as a legal subject." Additionally, all forms of animal life, insect life, and plant life have many of the aforementioned characteristics and are more advanced than the four to eight celled embryo, yet we regularly kill these forms of life and only protect them in limited circumstances.

So, the question arises as to why these four to eight cells should be treated as human life, with the legal rights that accompany this status. One might argue that because these cells are human, this places them above all other animal, insect, and plant life which are more advanced. However, the mere fact that these cells are human cannot be the determinative factor, since we kill human cells all the time. When we scratch or sunbathe we kill skin cells; we remove kidneys, appendixes, and even legs when necessary; we kill millions of sperm cells each time a man ejaculates. There is no outcry to save all of these cells simply because

130. See THE RANDOM HOUSE COLLEGE DICTIONARY 44 (rev. ed. 1982) (defining an amoeba as "a microscopic, one-celled animal consisting of a naked mass of protoplasm constantly changing in shape as it moves and engulfs food").

131. See Robertson, supra note 55, at 444; see also supra note 55 and accompanying text.

132. See id.

133. Id.


135. See Steinberg, supra note 14, at 318 and text accompanying notes 18-19.

136. Some choose to quote the Bible:

And God said: 'Let us make man in our image, after our likeness; and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.'

Genesis 1:26.
they are live human cells. Therefore, the only argument remaining as to why these four to eight cells should be considered human life, with the accompanying legal rights, is their potential for human life. However, a woman’s own body functions in a way that destroys that potential for human life more times than it saves it. “Only a small portion of fertilized eggs develop to the blastocyst stage,” the stage the embryo reaches before implantation. Of those that do make it to this stage “[o]nly one in ten . . . implants and initiates [a] true pregnancy.” Even at this point, the body wastes about 30 to 40% of implanted embryos. If we accept the concept that embryos are human life because of their potential for life, then we must recognize the fact that women’s bodies function to destroy life more often than they create it. This is an absurd and unacceptable conclusion. The proper conclusion is that an embryo cannot be considered human life with full legal rights.

While this appears to be the logical determination, the battle over what constitutes human life is wrought with moral, ethical, and religious opinions. This battle need not extend to the legal definition of embryos, because the law predominantly does not consider preembryos life. Under the vast majority of state wrongful death laws a fetus must be viable in order to recover for in-utero death, and because preembryos are not viable, wrongful death laws are not applicable to them. In addition, laws against homicide do not protect embryos, and the discarding of embryos is not prohibited. The view that embryos are “life” is not...
judicially accepted. "Both Roe v. Wade" and Planned Parenthood v. Casey prevent states from interfering in a woman's reproductive decision prior to the viability of the fetus. As previously discussed, the view that preembryos are life would create an anomaly in the law such that preembryos would be protected as wards of the state, but these same preembryos would have no such protection later when they reach the stage at which they could be aborted. If a fetus lacks legal status as a person, one must reach the same conclusion with respect to preembryos, since a fetus is much closer to viability than a preembryo. The concept that preembryos are human beings generally is held only by religious communities and, as is shown by the various state laws on the matter, has little legal support.

Having established that embryos are not "life," it is now necessary to consider whether embryos are property, or whether they fall into some interim category, "deserving special respect." However, this part of the analysis is not relevant in the context of divorce cases. The legal status of embryos only matters in the context of whether they are considered human life, since this is the only characterization that would affect the rights of the parties in a divorce. And, as discussed previously, the view that embryos are human life has little legal support. The reason why the characterization of embryos is not important in either the property approach or the special respect approach is that the characterization does not affect the fate of the embryo. The property approach does not attempt to characterize the embryos, but instead centers on the parties' rights. And, although the special respect approach states that the embryo has special significance and a greater status than personal property and other biological objects, this approach focuses on the competing

See id. at 464. Finally, a few states have eliminated the viability requirement altogether. See id. at 463. Elimination of viability as a requirement has withstood constitutional challenges in People v. Davis, 872 P.2d 591, 599 (Cal. 1994) (en banc), and People v. Ford, 581 N.E.2d 1189, 1201 (Ill. App. Ct. 1991). While there are these few exceptions under which embryos might be protected, the majority of states protect only fetuses. See Tsao, supra at 460-65.

147. Thomas, supra note 72, at 285-86.
148. See Trespalacios, supra note 34, at 811.
149. See Dehmel, supra note 3, at 1383.
150. See Simon, supra note 47, at 150.
151. See supra notes 143-44 and accompanying text.
152. See Steinberg, supra note 14, at 328 ("[T]he 'special status' approach ... does not afford the embryo a status that dictates a different result.").
153. See Dehmel, supra note 3, at 1384.
154. See Steinberg, supra note 14, at 320.
interests of the parties and not on the characterization of the embryo.\footnote{See \textit{id.} at 329 ("The court must make an 'all-or-nothing' determination: the embryo either will or will not be implanted.").} One supporter of the special respect approach states: "In most instances, the embryo's legal status will be determined by the importance of competing interests of bodily integrity, procreative choice, and family formation, and not by whether the early embryo is a prenatal subject of rights, or merely a living, human entity that deserves special respect."\footnote{Robertson, supra note 55, at 449.}

Now that it has been established that the embryo is not human life and that further characterization is not important, it is necessary to shift the focus away from determining the status of the embryo to examining the competing rights of the parties. The two prevailing approaches in this area are the property rights model and the special respect model. As discussed,\footnote{See supra note 56-68 and accompanying text.} the property rights model gives joint dispositional control to the gamete providers,\footnote{See supra note 59 and accompanying text.} whereas the special respect approach creates a balancing test between the two competing interests.\footnote{See supra note 78 and accompanying text.}

\section*{B. Competing Interests: The Right to Procreate and the Right to Avoid Procreation}

The two competing interests in frozen embryo disposition cases are the right to procreate and the right to avoid procreation.\footnote{See Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992), \textit{reh'g in part}, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992), \textit{cert. denied}, 507 U.S. 911 (1993).} "In a long line of cases, the United States Supreme Court established that an individual may, without \textit{unjustified} government interference, make decisions relating to marriage, procreation, contraception, abortion, family relationships, child rearing, and 'whether to bear or beget a child.'\footnote{See \textit{Skinner v. Oklahoma}, 316 U.S. 535, 541 (1942) (stating that marriage and procreation are among 'the basic civil rights of man.... [F]undamental to the very existence and survival of the race').} The right to procreate, while not explicitly granted by the United States Constitution, has been established by the Supreme Court,\footnote{See \textit{Davis}, 842 S.W.2d at 601.} and this right of procreative autonomy is composed of the right to procreate and the right to avoid procreation.\footnote{See \textit{Trespalacios}, supra note 34, at 822.} The problem that arises is that the enforcement of one person's rights necessarily denies the rights of other parties.\footnote{See \textit{Monique Vinet Imbert}, Note, \textit{The Golden Egg: In Vitro Fertilization Produces Adjudication}, 17 \textit{Rutgers Computer \\& Tech. L.J.} 495, 505-06 (1991) (citations omitted).}
Because of this conflict, it is necessary to determine whether these rights are equal or whether one right should take priority over the other.

Some commentators argue that the right to procreate is either superior to the right to avoid procreation, or that the right to avoid procreation does not exist at all in the context of IVF. According to these arguments, depriving either party of the embryos amounts to a deprivation of their right to procreate. The parties exercised their rights to procreate when they decided to undergo the IVF procedure. They should not be allowed to decide against procreation when that decision denies the other party access to the preembryo. It also is argued that this right of procreation is stronger for women because they are reproductively poorer than men are in that they have fewer eggs and experience declining fertility over time. In addition, this view places special emphasis on the fact that women may have to undergo painful and repeated IVF procedures.

One rationalization for this argument is the implied contract model. The assumption of this model is that the only reason the parties underwent the IVF procedure was to create and implant a preembryo. According to this model, "the parties mutually performed in furtherance of this intent... [by] provid[ing] gametes for the IVF procedure." Therefore, "through the bilateral exchange of promises... the parties create[d] a contract whether or not they have signed a written agreement." A party's right to procreation thus prevails over the right to avoid procreation because an implied contract is read into every case.

The majority of commentators, however, believe that the right to avoid procreation is superior to the right to procreate. According to

---

165. This view disagrees with the interpretation that the holding of Roe includes the right to make fundamental decisions concerning the destiny of one's gametes, instead stating: But Roe only dealt with the fundamental right to make reproductive decisions when the means chosen by the state involved forcing a woman to remain pregnant against her wishes. Put differently, Roe is not about the right of a woman to kill the fetus; Roe is about the right of a woman not to be pregnant. . . . Applying this analysis to Davis and Kass, we see that none of the parties has a right protected by Roe, because none of them are pregnant.

Colker, supra note 7, at 1068.

166. See Trespalacios, supra note 34, at 823.

167. See Colker, supra note 7, at 1063.

168. See id. at 1072.

169. See Trespalacios, supra note 34, at 828.

170. Id.

171. Id. at 829.

172. See id.

173. This view is taken by the property approach and the special respect approach. "The Special Respect view is the majority position and most experts in the field agree with this model."
this view, there are compelling reasons that this right must trump the right to procreate. First, the argument that parties have exercised their right to procreate by agreeing to the IVF procedure is rejected. Since "individuals own their gametes ... [and may] determin[e] whether and to whom they will be made available for reproduction or research, it follows that they would have joint authority over the intended product that results from the combination of their gametes." Additionally, there are so many contingencies that can intervene to change the original plans that creation of the embryos alone should not be taken as an irrevocable commitment to reproduce. The decision to procreate is not made at the time of gamete donation. The implied contract model also misconstrues the parties' intent since they were not choosing merely to reproduce, but rather intended to have a child as a couple.

Another compelling reason why avoiding procreation is a superior right is that an unwilling mother or father may have legal obligations of support until the offspring reaches majority. It is debatable whether legal duties would attach or whether the law would be changed. However, "[e]ven if no rearing duties or even contact result, the unconsenting partner will know that biologic offspring exist, with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite." Furthermore, the fact that a woman has gone through a painful IVF procedure or may have to endure another

---

Carow, supra note 51, at 562 (footnote omitted); see also supra note 55 and accompanying text.

174. Robertson, supra note 55, at 457.
175. See id. at 475 ("Solutions to such disputes cannot be found in the mere fact that a person has provided gametes to create an external embryo, as so many additional steps and decisions must be made before those embryos are used to initiate pregnancy.").
176. See Dehmel, supra note 3, at 1400.
177. See id.
178. See Robertson, supra note 55, at 477.
179. One view is that a legal father would be held responsible. Unless a statute provides an exemption, as occurs with artificial insemination by donor, the traditional rule is that a man providing sperm for insemination or conception is the legal father, with attendant rearing rights and duties, including support requirements.

... Although the male is not engaging in sex, he is engaging in a transaction that makes offspring possible, and thus on policy grounds could be held responsible for resulting offspring.

Robertson, supra note 55, at 477 (footnote omitted). The opposing view argues:

[S]perm donors who receive compensation for their services already benefit from an array of statutes that protect them from child support obligations. Their procreational autonomy to both donate sperm and have no parenting obligations are well protected. As new situations arise, I have every confidence that society will, on its own, protect male procreational interests.

Colker, supra note 7, at 1070 (footnote omitted).
180. Robertson, supra note 55, at 479.
does not stand up against the irreversibility of becoming an unwanted genetic parent. Regardless of the effort that each party has to endure, the final product consists of forty-eight chromosomes, with each of the parties having contributed equally. If a man needed surgery or various therapies so that he could produce an offspring it would be folly to consider a balancing test as to who put in more effort to the creation of the embryos. "The impact of unwanted parenthood simply is more burdensome and irreparable than the consequences [of] forfeiting use of particular embryos." Finally, by not allowing forced parenthood, the court’s interest is advanced by ensuring that the child will have two parents, married or divorced, to provide love and support. In addition, the court’s interest is advanced by not placing a financial burden on an unwilling parent. Finally, by not allowing forced parenthood, both society’s and the court’s interests are safeguarded by “protecting the fundamental right to autonomy over procreative decisions.”

Since the special respect approach and the property approach both advocate that the negative right to avoid procreation is greater than the positive right to procreate, the question arises as to precisely how they differ. The special respect model gives veto power to the party opposing implantation in all scenarios, except in those cases in which the mother will have no other chance to have children. A close examination of the special respect model demonstrates that it is actually the property model, dressed up in euphemisms, with an escape mechanism available in limited circumstances. Although this model appears as though it is giving special respect to the embryo because it spawns long opinions and commentaries on how the embryo is something more than property, it actually gives special respect to the woman. Allowing the embryo to be discarded in all but this one limited situation is not giving the embryo special respect, especially since the situation focuses on the woman’s infertility and not the embryo. While the characterization of

181. See id. at 482.
182. See Shapiro, supra note 27, at 24 (“Allowing one party to use the embryo to create a child over the objection of the other would not be consistent with the parties’ intent in initially agreeing to participate in IVP, and it would contravene their status as equal contributors to the embryo’s creation.”).
183. Dehmel, supra note 3, at 1402.
184. See Steinberg, supra note 14, at 324.
185. See id.
186. Id.
187. See supra notes 80-82 and accompanying text.
188. See Steinberg, supra note 14, at 330 (“[T]he only clear distinction between the ‘special status’ and ‘pure property’ approaches is the court’s acknowledgment of the need for reverence in writing their decisions.”).
the egg is not instructive for deciding a special respect case and the embryo actually may not get any special respect, the substance of this approach is that it gives one party the veto power, except when the other party has no reasonable means of achieving pregnancy. Therefore, the special respect approach is equivalent to the property approach. The only difference is that the special respect approach allows for a limited exception because of a feeling of moral obligation to the mother or father.

Because the special respect and property doctrines are indistinguishable except for this one aspect, the final issue is whether this exception should exist for the parties. Although there is strong support for the position that a woman should receive the embryo when she has no other alternatives to having children, the courts should not allow for this limited exception due to the aforementioned reasons regarding the negative right to avoid procreation. These reasons do not change or be-

189. See id. (discussing special respect status, the author states that “the ultimate result has been the same as under the ‘pure property’ approach”).

190. See Bailey, supra note 134, at 768-69. The author, discussing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), states:

The court then stated that while this conclusion meant that the Davises could not have a true property interest in the preembryos, they did have “an interest in the nature of ownership to the extent that they have decision-making authority concerning disposition of the preembryos.” Since the concepts of ownership and property are inextricably linked, the court was in effect concluding that the Davises had an interest in the nature of a property interest. The appropriateness of this conclusion is difficult to evaluate because the court made no distinction between the effects of an ownership interest and the effects of an interest “in the nature of ownership.” Yet, as William James observed, if there is no distinction between the practical effect of two categories, the two categories must be considered identical. Thus, the purported “interim category” between property and persons collapses because the “interim category” is indistinguishable from “property,” and the court’s dictum only serves to confuse the analysis.

... By making decision making authority the basis of its decision, though, the court rendered any discussion of the nature of the preembryos irrelevant.

Id. (footnotes omitted).

191. See Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) reh’g in part, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992), cert. denied, 507 U.S. 911 (1993) (“If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.”). This view is consistent with the special respect approach which, as mentioned, has garnered the most support. See supra note 55; John Dwight Ingram, In Vitro Fertilization: Problems and Solutions, 98 DICK. L. REV. 67, 82 (1993) (explaining the author’s opinion that if the partner who wishes to use or keep the embryos “has no reasonable likelihood of reproductive opportunity with a new partner, the interest of the person wishing to enjoy the pleasures and satisfactions of parenthood should outweigh any psychological discomfort of the unwilling partner, especially if all financial obligations are statutorily negated.”) (footnote omitted); Robertson, supra note 55, at 481 (“One might reasonably argue that the equities tip in favor of the party who has no alternative opportunity to reproduce, because the pleasures of parenthood will be deeper and more intense than the discomfort of unwanted biologic offspring.”).
come any less significant simply because one party’s prospects for children have decreased. When parties agree to participate in the program, it is not an agreement to reproduce regardless of the circumstances. The agreement is to have a child together. Implicit in this agreement is the idea that they both will be parents to the child and raise the child together. This agreement should not be converted into a unilateral decision because, at this stage, the parties have not yet reached the point where body integrity issues are implicated; this point occurs when the woman is pregnant or has a child. Moreover, it is at this point when life and death issues arise, since a fetus, at a certain point, and a child both have personhood. In this scenario, none of the life, death, or bodily integrity issues have arisen and, therefore, both spouses should be allowed to change their minds. “[T]he trauma ... of a divorce alone should grant both parties the opportunity to reconsider the procreation decision.” Parties can change their minds before their gametes are used, and they can agree to abandon the program together. In both of these scenarios, we treat the party’s interest as an ownership/property interest. This concept should not change in this context. Objecting to the use of the embryos is simply another situation in which we should treat the parties as having an ownership interest in the embryos. Unfortunately, all of these reasons are blurred because of pity for the party who cannot have an offspring. There is nothing wrong with pitying a woman or a man who cannot have a child by any other means. This pity leads to the desire to rectify the situation by creating a judicial exception; however, pity should not blind justice. It is an injustice to force a child on a person who does not desire one, especially since, at this stage, we are not dealing with a human child or fetus with legal rights and a woman’s bodily integrity has not yet been implicated.

192. See Shapiro, supra note 27, at 24.
193. See Dehmel, supra note 3, at 1400 (“Instead of the ultimate goal being mere pregnancy, the parties might only have intended to have a child as a couple.”).
194. See Steinberg, supra note 14, at 328 (“In ‘frozen embryo’ disputes, the destruction of the morulae does not require the compromise of the woman’s bodily integrity.”).
195. Dehmel, supra note 3, at 1400.
196. See Steinberg, supra note 14, at 330 (“Couples may freeze away embryos and either change their minds or conceive normally, and never give birth to children through IVF.”).
197. See id. at 329 (“Courts considering this issue have been appropriately sympathetic to those who desire children but are unable to have them without using these procedures. The inability to have children is regrettable, but the potential parents desiring children are not suffering an extraordinary or unusual loss.”).
198. See id. at 328. (“In the absence of a question about bodily integrity, the constitutional right to control one’s own procreation should prevail.”).
The law in this area should rest upon notions of fairness and common sense. Allowing one party to use the embryo over another's objection violates most people's notion of common sense. It does not seem right to allow a husband to give the embryos that he has created with his former wife to his new wife so that they can raise a child. Most would cry injustice. The same holds true for the reverse situation. It is important to listen to what our base core of human feelings tells us.

For all of the above reasons, the property approach should be adopted in cases in which the parties have failed to enter into a prior agreement. This is an attractive rule because it is judicially economic; it provides a "bright-line rule," which would lead to fair, predictable results in court. Clear notice of the applicable rule would inform couples of the consequences of freezing embryos and permit them to negotiate an alternative solution. This is where the Kass court failed. The court had an opportunity to give guidance to couples entering the IVF procedure but chose not to. Instead, the court decided the case solely in the contract arena when the consent forms, arguably, were not clear as to the embryos' disposition in case of divorce. However, even if the contracts were complete on their face, the court could have given some guidance to future couples by discussing these issues. The reason for doing this is that while it is true that prior agreements should generally be binding, couples should know the backdrop when negotiating their contracts. A couple may not be able to agree or may choose not to think about the consequences of divorce since it may be too nebulous to consider. Couples should have a bright line rule to guide them in negotiating and deciding whether they want to enter into a contract. A true balancing test does not give any notice as to what couples should do when negotiating a contract. A clear default rule stating that neither party will get use of the embryos without the other's consent would allow parties to negotiate that consent/right away if they choose to.

VI. ANALYSIS OF CASES WITH A PRIOR AGREEMENT

The previous discussion as to the benefits of a bright line default rule leaves the door open for parties to negotiate alternative solutions by entering into a binding agreement as to the disposition of the fertilized

199. See Carow, supra note 51, at 559.
200. See John A. Robertson, Assisted Reproductive Technology and the Family, 47 HASTINGS L.J. 911, 918 (1996) ("At one level it may not matter what the default rule is, as long as it is clear and the parties are given advance notice of it.").
embryos. This assumes that parties ought to be allowed to make such agreements. The contract framework "assumes that courts prefer to address the rights of the parties, rather than the rights of the pre-embryo."202 This assumption is consistent because preembryos are not considered human life and therefore have no legal rights.203 Agreements between couples for future disposition of embryos have been accepted by commentators and by courts in both New York and Tennessee.204 While there are various reasons to hold prior agreements binding, it has been recognized that it is difficult to make these types of agreements. For example, in Kass the court recognized the difficulty of making a prior agreement, but then nonetheless held the agreements to be binding.205 While it is correct to hold these agreements as binding, courts should allow for contract defenses in future cases given the recognized difficulty in making these agreements in the first place. Furthermore, couples should not be forced into making a contract at the time that they enroll in the IVF program. It is necessary to analyze several legal points to come to this determination.

A. Prior Directives Should Be Legally Enforceable

There are numerous reasons why IVF agreements should be enforced. The gamete providers' procreative liberty is ensured when they have authority to make decisions regarding the future disposition of their preembryos.206 This is a primary reason for making prior directives regarding frozen embryos binding on the parties.207 To exercise that control, it is necessary for "gamete providers [to] have the power to make binding agreements for [the] future disposition of embryos."208 These advance agreements would have little purpose if they were enforceable only in the event that the parties continue to agree.209 Without the authority to make these agreements, these personal decisions would be made by others, such as the state or an IVF program.210 "Clear rules

202. Trespalacios, supra note 34, at 826.
203. See supra notes 141-51 and accompanying text.
206. See Robertson, supra note 201, at 415.
207. See id.
208. Id.
209. See Kass, 696 N.E.2d at 180.
210. See Robertson, supra note 201, at 415. Robertson states:
    If the prior agreement is not binding, then the IVF program, a court, or a legislature will
upholding the enforceability of contracts provide the necessary incentives for the parties to bargain meaningfully and agree on precise terms.

Through negotiation and execution, the donors would understand that their decisions might change between IVF and implantation. In addition, the knowledge that the agreements will be legally enforced emphasizes how important and serious the consent process is. Another benefit of advance agreements is that they provide certainty to the parties that their wishes will be followed. Finally, a party may not have agreed to undergo the IVF process if there would be any risk of implantation and reproducing despite a divorce. A combined rule of joint dispositional authority without a prior agreement and a rule allowing parties to specify their wishes in a contract would maximize procreative liberty.

There is general agreement that couples should put their wishes in an advance agreement. The Kass court stated that "parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing." With rules enforcing prior agreements there will be no misunderstanding as to the law. It is in the best interest of the parties to know, in advance, what the dispositional rules will be.

determine the disposition of frozen embryos. That decisionmaker might order dispositions different than would the gamete provider, thus interfering more with procreative interests than would holding one to a freely chosen future disposition. The parties are left with less control over their procreative interests than if they have the ability to make advance binding agreements for disposition of embryos.

_id. at 415-16.

211. Shapiro, supra note 27, at 24.
212. See Trespalacios, supra note 34, at 828.
213. See Kass, 696 N.E.2d at 180.
214. See Robertson, supra note 201, at 416.
215. See id. at 420.
216. See Carow, supra note 51, at 574 ("In vitro fertilization clinics should require couples being treated for infertility to sign cryopreservation agreements before treatment begins."); Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger?, 34 Hous. L. Rev. 609, 623 (1997) ("The divergence of opinion in Davis and Kass, if nothing else, signals the need for couples to clearly, and with as much specificity as possible, indicate their dispositional desires prior to initiating any fertility regimen."); Ingram, supra note 191, at 72 ("A statute should expressly require that the parties directly involved in IVF—the potential parental couple and the clinic or other medical facility—must enter into a complete and binding agreement covering every possible issue that can be foreseen."); Robertson, supra note 201, at 414 ("Prior directives present the best way to maximize the couple's reproductive freedom, to give advance certainty to couples and IVF programs, and to minimize disputes and their costs.").
218. See Robertson, supra note 201, at 418.
DISPOSITION OF FROZEN EMBRYOS

B. Contract Defenses

Those that believe prior agreements should be enforced also recognize the difficulty of making a prior agreement. Some of the difficulties in making a prior agreement for the disposition of embryos are "the inability to foresee how one will feel when the stated contingency occurs and . . . the possibility of unfairness that could arise when a party's circumstances have changed." At the time of the IVF procedure it is extremely difficult for the parties to contemplate theoretical and hypothetical contingencies and give directions for future disposition based on them. Furthermore, it would be inequitable to bind the parties to a reproductive decision made at a time when their needs and interests may have been completely different. These needs and interests may have drastically changed during the span of years between a married couple's decision to have a child and their subsequent decision to get divorced and wage a court battle over the frozen embryos. The Kass court recognized the existence of these difficulties as a result of the uncertainty inherent in the IVF process. The court listed "[d]ivorce; death, disappearance or incapacity of one or both partners; aging; [and] the birth of other children" as being among some of the obvious changes in circumstances that might take place over time. In addition, no agreement can possibly anticipate the full range of possibilities that could arise after cryopreservation. Finally, there is the problem that the "language [of the disposition agreements] may be vague, making them of little use in resolving disputes."

In most situations where the contract has been executed properly it should be enforced, thereby carrying out the intent of the parties. However, the difficulties of making a contract raise the issue of whether such difficulties should render the contract unenforceable in situations when the "changed circumstances make enforcement of the agreement unreasonable."

219. Id. at 419.
220. See id. at 418.
221. See id.
223. Id.
225. Id.
One reason for allowing contract defenses in IVF cases is that these cases involve more than a simple commercial contract. IVF contracts involve life choices. "Contract law is primarily an instrument of commercial transfer." As such, the law of contracts is "concerned with the securing and protection of those economic interests that result from assurances," whereas an IVF contract involves becoming a parent. Given the seriousness and irreversibility of unwanted genetic parenthood, the contract should not be binding in all situations. A court should have the power to protect parties when enforcement of the contract would create a grossly unreasonable result. This leaves the issue of what kinds of protection the court may wish to afford.

One possibility is for the courts to employ the doctrine of unconscionability. Even in cases of normal contract disputes, portions of the contract, or the whole contract, may not be enforced when considered unconscionable. While it is difficult to pin down a workable definition of "unconscionability," one author suggests that it is a provision that "no fair-minded person would impose on another and that no competent person would freely and knowingly submit to." The comment in the Uniform Commercial Code ("UCC") describes it as a principle of unfair surprise and oppression. Oppression, in certain situations, could be considered something that is not only unexpected but also that is hard on the complaining party. While unconscionability arises in cases of duress, coercion, oppressive bargaining power and adhesion, it also can be used when there is no casual connection between the terms of the contract and the hardship on the parties. Courts can "refuse[] enforcement because the contract itself . . . [is] too one-sided."

In the embryo disposition scenario, although the terms of the contract may not be unconscionable (i.e. allowing for implantation upon divorce), enforcement of the contract may be unconscionable given the situation of the parties. The woman could be an alcoholic, have an abusive relationship with a new man, have a disease that would put future...

228. Id. (quoting Murray on Contracts § 1 at 2 (2d rev. ed. 1974)).
229. See supra notes 170-72 and accompanying text.
234. See id.
235. Id.
children at risk, or already have several children. This could lead to a claim that no fair-minded person would impose unwanted parenthood on another given these circumstances. While this is not the traditional use of the doctrine, unconscionability has taken many forms, ranging from equity to the common law, and it has been codified in various sources, including the UCC.236 Allowing it to be used in this situation is not implausible.

Another possibility is to use the independent doctrine of "changed circumstances" in these cases. This doctrine has been used in cases in which changed circumstances warranted a modification of child custody or child support decrees.237 Aside from these child decree cases however, a "subset" of contract law involves the determination of "‘when changed circumstances should excuse non-performance.’"238 This is what a Massachusetts court did in AZ v. BZ.239

In AZ v. BZ, the couple had signed a standard consent form, which assigned the rights to the frozen embryos in the event of separation.240 The court noted that the couple already had twins, and the court used other facts to explain why the agreement should not be enforced due to changed circumstances.241 In determining whether the circumstances warranted the contract to be unenforceable, the court looked to foreseeability.242 Under this line of reasoning, if the events were unforeseeable when making the contract, then the circumstances have changed enough to make the contract unenforceable.243 However, it is questionable whether this case should be the leading case for "changed circumstances," since it is debatable whether the "changed circumstances" here are more than a mere change of mind.244 Despite this, the idea of changed circumstances is a prudent one.

236. See generally Leff, supra note 233 (describing the various forms of unconscionability).
240. See id. at 10.
241. See id. at 24.
242. See id.
243. See Steinberg, supra note 14, at 326-27.
244. See id. at 327-28. Regarding the reasoning of the court in the AZ case, the author suggests:

Most of these events ... are hardly extraordinary in a divorce process.
It is good policy to allow for contract defenses such as unconscionability or changed circumstances to prevent the enforcement of these contracts in certain circumstances. Some argue, however, that the agreements should not be left open to attack by claims of changed circumstances—that the “disposition of embryos raise few problems of foreseeability or changed circumstances different from those that arise in a vast array of other transactions which are held binding, despite a changed situation that makes the original agreement now undesirable to one of the parties.” However, it would be inconsistent to acknowledge all of the difficulties in making this type of contract only to allow it to be enforced in all circumstances. In addition, to force people into making such agreements (either by law or as conditioned on entering the IVF program) and not to allow for these defenses renders people who feel overwhelmed by all the contingencies helpless. Instead, these defenses should be allowed only in situations where there is more than a mere change of mind. If a procreational contract would be unenforceable due solely to a change of mind, it would render these types of contracts useless. However, when circumstances have changed where the events were unforeseeable, or enforcing the contract would be unconscionable, then parties should be allowed out of the agreement in light of its speculative nature.

While there is concern that these contracts could be rendered unenforceable for a mere change of mind, we should feel confident that courts would be able to deal appropriately with this type of situation. Although the subject matter of these disputes may be novel, the common law principles governing contract interpretation are not. Most trial courts are not particularly experienced with issues of embryo status and, therefore, may be prone to error. However, trial courts would not have to deal with that situation because of the bright line rule proposed earlier, and instead will be faced with litigation involving contract disputes, with which courts have ample experience.

... [T]he judge [may have] attached weight to the wife’s testimony—that she regretted the dissolution of the marriage—and believed that her use of the embryos was an attempt at reconciliation or manipulation of the husband.

... In essence the “changed condition” in the AZ case was the couple’s divorce, exactly the condition for which the informed consent form was designed to provide a contingency plan.

*Id.* at 327-28.


246. See *id.* at 419 (discussing how a mere change of mind is insufficient to override the agreement).


248. See Robertson, *supra* note 201, at 418.
C. Compelling Parties to Contract

The final issue is whether parties should be forced into contracting. In fact, Florida law mandates that couples must enter into a prior agreement before beginning the IVF process. The Florida statute provides that a couple and the physician shall enter into a written agreement that provides for the disposition of the embryo in the event of divorce, death, or other unforeseen circumstances. This statute was enacted despite the knowledge of the difficulty that exists in making this type of agreement. However, these difficulties are among the reasons why parties should not be forced into a contract.

The first reason, the difficulty of making an agreement, already has been discussed. The fact that there is such a recognized difficulty in making these agreements necessitates that people not be forced into these contracts. Forcing people into contracts may seem attractive when there is an absence of law on the subject, and this would also allow more procreative liberty because a couple may be unsure about what would be done with the embryos. Additionally, a couple may not know if a court would adopt the right to life approach, as the trial courts did in New York and Tennessee. However, with the bright line rule using the property approach as the default rule, this concern should dissipate. Couples will know what will happen to their embryos if they no longer agree. If they desire a different result, they can choose to contract and waive the rights the law would otherwise give them.

Another reason why people should not be forced into making disposition agreements is that claims of adhesion would inevitably arise, rendering contracts unenforceable. An adhesion contract is a contract under which one party must either adhere entirely to its stated terms or refuse altogether—take it or leave it. If forced into contracting, an objecting couple might argue that it was an adhesion contract because they were forced into signing standard forms before participating in the IVF program. They could argue further that they had no other alterna-

250. See id.
251. See Kass, 696 N.E.2d at 180; supra notes 219-23 and accompanying text.
252. See supra notes 205 and 219-23 and accompanying text.
253. See supra notes 210, 214-15 and accompanying text.
255. See Leff, supra note 233, at 505.
tives available to them offering "less onerous conditions," or that the law mandated that they sign certain provisions. 256 "The reproductive future of a person will hinge on a signed form, without any clear assurance that the form was executed in a knowing and informed way." 257 Thus, giving couples the choice of whether or not to enter into a disposition agreement would help deter claims of adhesion.

Instead, guidelines should be established that explain the choice that the couple has. The couple could choose to sign a form regarding the disposition of the embryos, negotiate their own agreement, or not contract at all. All that would be required is that doctors must explain fully these options to the patients. This would not impose a heavy burden since doctors must explain the risks of numerous procedures and receive a patient's consent before beginning any program anyway. With parties fully informed as to their rights, procreative liberty would be maximized and claims of adhesion would decrease.

One possible argument against this framework is that there may be little difference in choosing not to contract with the law espousing the property approach and choosing to contract in a manner consistent with the property approach. However, there is enough of a difference to make sense. There is a difference between choosing not to allow for dispositional authority and having the law make that choice for you. It is easier for the law to make a choice for a person who cannot consider all the possible contingencies. For those who cannot think of or consider the contingencies, the law makes the choice for them. In addition, couples can choose to not deal with this nebulous situation at first, and then decide to contract later in the process. This is more easily done than revising an original contract, because the party may not agree to the modifications. 258 Finally, when a contract has holes in it, there is the bright line default rule to fall back on.

VII. CONCLUSION

This Note proposes an analytical framework for the disputes that have arisen over the disposition of fertilized eggs. This framework is necessary since thousands of people have used IVF and disagreements may arise while the embryos are cryopreserved. This framework would

256. See Robertson, supra note 201, at 423.
257. Id. at 422.
258. See Feliciano, supra note 224, at 344 (stating that even if the contract contains provisions for modification "a dispute could arise if one spouse wants to modify and the other does not").
DISPOSITION OF FROZEN EMBRYOS

consist of utilizing the property approach in the absence of a prior agreement, and allowing parties to make binding agreements as to the disposition of their frozen embryos when couples divorce. A bright line rule espousing the property approach would not make as much sense without the opportunity to negotiate an alternative solution in disposition agreements. Furthermore, enforcing prior agreements makes more sense when the parties have a backdrop to negotiate against, especially when they are not forced into contracting but rather choose to do so out of their own free will.

The New York Court of Appeals should adopt this framework when this issue arises in the future. The Court of Appeals correctly held that contracts between participants in the IVF are binding. However, in future cases, the court should allow for the contract defenses of unconscionability and changed circumstances. The court deferred deciding the issue as to who controls the disposition of the embryo in the absence of a prior agreement but it should not hesitate to adopt the property approach in the future. This combined framework will give certainty as to the law and maximize all parties’ rights.

Mark C. Haut*

I would like to express my thanks to each and every member of the Hofstra Law Review, particularly Diane Corrigan-Hancock and the Managing Editors of Volume 28. I am especially proud to have been a member of and to have worked with the Editorial Board of Volume 28. Their dedication, excellence, and commitment to the journal has been demonstrated daily. Furthermore, I would like to thank my family for their love and support. My parents’ and sister’s unending encouragement and belief in me has taught me that through hard work one can accomplish anything. I could never have succeeded in law school and in life without the lessons and the values my parents have instilled in me. This Note is in memory of my Uncle, Henry Haut, whose life was an inspiration to all those who knew him. Finally, and with the utmost gratitude, I dedicate this Note to Lauren Fischer, whom I love dearly.