The New Frontier - IVF's Challenges for State Courts and Legislatures

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The New Frontier? IVF’s Challenges for State Courts and Legislatures

Mark Strasser*

I. INTRODUCTION

Couples make use of in vitro fertilization (IVF) for a number of reasons: they were unsuccessful at traditional attempts to conceive, or may anticipate future impaired fertility. By creating frozen embryos for future use, IVF offers the couple a chance at biological parenthood that may not otherwise be available.

Sometimes, couples with frozen embryos decide to end their relationships and cannot agree about whether or how their frozen embryos should be used. Many courts have been forced to resolve disputes regarding the future of frozen embryos. Applying various tests, courts historically refused to award embryos to someone wishing to use them over the other progenitor’s objection. Recently, however, some courts have granted custody of frozen embryos to progenitors wishing to implant them, notwithstanding the progenitor’s objections. Thus, as IVF technology develops, courts and legislatures will have to address a variety of novel issues with practical implications.

Part II of this article discusses several cases in which courts avoided very difficult issues when refusing to permit embryo implantation over the objections of a progenitor. The analyses of the facts and law were often unpersuasive, as if the courts had a predetermined result that they sought to justify. Part III discusses a few recent cases in which the court awarded possession to the progenitor wishing to use the embryos, ex-partner’s objections notwithstanding. But many legislatures have not addressed the numerous issues that implantation over a progenitor’s objections might raise. The article concludes with an outline of some of the issues that courts and legislatures should consider when they confront the legal implications of children resulting from embryo implantation after the progenitors’ relationships have ended.

II. NO INVOLUNTARY PARENTHOOD

Several state courts have addressed the proper way to resolve disputes regarding the disposition of frozen embryos. Some courts have emphasized the parties’ understanding at the time the embryos were created; others have required the consent of both progenitors before implantation can occur; and still others have tried to balance competing interests when deciding who should be awarded custody. Despite this varying methodology, the courts in all of these cases reach the same result, either delaying or precluding implantation, meaning that difficult issues that would have otherwise arisen were not decided.

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A. Davis

Davis v. Davis was the first frozen embryo contest decided by a state supreme court. Mary Sue and Junior Davis sought to end their marriage and have the court settle a dispute regarding the future of their seven frozen embryos, stored in a Knoxville facility.

Initially, Mary Sue wanted to implant the embryos herself in a post-divorce effort to become pregnant and have a genetically related child. Junior objected, preferring to leave them in their cryopreserved state “until he decided whether or not he wanted to become a parent outside the bounds of marriage.” By the time the case came before the Tennessee Supreme Court, however, the parties’ respective positions had shifted.

Both Junior and Mary Sue had remarried, and Mary Sue no longer wished to use the embryos herself. Instead, she wanted to donate them to a childless couple. Junior adamantly opposed implantation of the embryos, instead preferring that the embryos be destroyed.

The Tennessee court addressed several issues including whether fetuses should be treated as persons or property, and whether prior agreements about the disposition of frozen embryos should be enforceable against an individual who subsequently had a change of heart. After all, individuals with the benefit of hindsight might well not agree to provisions that seemed perfectly acceptable at the time of the agreement.

The Davis court held that “preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to

1. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992) (“... [T]here are apparently very few other litigated cases involving the disputed disposition of untransferred ‘frozen embryos,’ and none is on point with the facts in this case”).
2. Id. at 589.
3. Id.
4. Id.
5. Id. at 590.
6. Id.
7. Davis, 842 S.W.2d at 590.
8. Id. at 594.
9. Id. at 597 (“We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos 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.”).
10. Id. (“[T]he parties’ initial ‘informed consent’ to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.”).
special respect because of their potential for human life.”11 Here, the court attempted to steer clear of two views of the nature of frozen embryos. The first view, adopted by the trial court, was that frozen embryos are legal persons.12 The Davis court rejected that view and suggested that such a holding “would doubtless have . . . the effect of outlawing IVF programs in the state of Tennessee.”13 The second view, adopted by the Tennessee Court of Appeals, was that embryos were mere property.14 The Tennessee Supreme Court held that the “interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest,”15 although the Davises “do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.”16 That authority included the power to make sure that the preembryos were never used.17 The high court did not discuss how its holding may have differed if the appellate court had been correct in its holding that embryos were appropriately considered mere property. However, the Davis court noted that the fertility clinic was free to follow its usual procedures with respect to unused embryos “as long as that procedure is not in conflict with this opinion.”18 By that, the court presumably meant that, at the very least, the embryos could not simply be donated to a couple in need, even if that had been the clinic’s standard procedure or policy.19

When analyzing the constitutional dimensions of the issue before it, the Tennessee Supreme Court noted that “the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the

11. Id.
12. Id. at 595 (“[T]he trial court’s ruling would have afforded preembryos the legal status of ‘persons’ and vested them with legally cognizable interests separate from those of their progenitors.”).
13. Davis, 842 S.W.2d at 595. For a discussion of some of the possible effects on assisted reproductive technologies that might occur in a state in which embryos were treated as persons, see Mark Strasser, The Next Battleground? Personhood, Privacy, and Assisted Reproductive Technologies, 65 Okla. L. Rev. 177, 213–20 (2013).
14. See id. at 596 (“[T]he Court of Appeals has left the implication that [Mary Sue and Junior’s interest in the embryos] is in the nature of a property interest.”).
15. Id. at 597.
16. Id.
17. Id. at 604 (“[W]e can only conclude that Mary Sue Davis’s interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood.”).
18. Id. at 605.
19. Cf. id. at 604 (“[I]f the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.”).
right to avoid procreation."

The court analyzed the burdens imposed on these rights by noting that for Junior "[a]ny disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences." Because he was raised in a home for boys run by the Lutheran Church and had severe problems caused by his separation from his parents, he did not want his children raised in a single-parent home. Indeed, Junior claimed that he did not want to donate the embryos to a married couple, precisely because of the possibility that they might divorce.

Ironically, Junior may have been less worried about his children living in a single-parent household when the embryos were first created. The last effort to harvest Mary Sue's eggs occurred in December 1988. In February 1989, when Junior filed for divorce, he "testified that he had known that their marriage 'was not very stable' for a year or more, but had hoped that the birth of a child would improve their relationship." But if the marriage was not very stable, he presumably knew that the marriage might not last even if he and Mary Sue had a child together, which might well mean that their child would be raised in a single-parent home. In any event, the court held that Mary Sue's interest in avoiding the "burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children" could not out weigh Junior's interest in not being a parent.

The court noted that "the case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means." The court further observed that even if Mary Sue were unable to

20. Id. at 601.
21. Id. at 603.
22. Id.
23. Id. at 603–04.
24. Davis, 842 S.W.2d at 604 ("In light of his boyhood experiences, 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.").
25. Id.
26. See id. at 592.
27. Id.
28. Id. at 604.
29. Id. ("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.").
30. Davis, 842 S.W.2d at 604.
become pregnant via IVF, “she could still achieve the child-rearing aspects of parenthood through adoption.”

In its conclusion, the Tennessee court offered the following guidelines for resolving progenitors’ disputes about the use of frozen embryos. If they had once agreed, then “their prior agreement concerning disposition should be carried out.” Because the Davises had no prior agreement with respect to the disposition of the embryos in the event of divorce, the court employed a balancing test; first establishing the factors to balance. For example, the Davis court recognized that “the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men, [and] in this sense, it is fair to say that women contribute more to the IVF process than men.” However, the court’s balancing test did not include these factors, but others. “Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.” But, “[i]f no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered,” assuming it is the progenitor who wants to personally use them. “[I]f the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.” Thus, the Davis court emphasized the importance of couples’ expressly stating their preferences at the time of the embryos creation. But absent explicit directions, a balancing test should be employed that favors the interests of the progenitor seeking to avoid utilization of the embryos, because ordinarily the embryos will not be implanted.

B. Kass

In Kass v. Kass, the New York Court of Appeals addressed the enforceability of an agreement regarding the disposition of frozen embryos, even though the enforcement would mean that one of the parties would never be a parent of a biological child. Maureen Kass, divorced from Steven Kass, wanted to implant the embryos that the couple created during their mar-

31. Id.
32. Id.
33. Id. at 598.
34. Id. at 601.
35. Id. at 604.
36. Davis, 842 S.W.2d at 604.
37. Id.
38. Id.
riage. However, the couple agreed prior to the divorce that the embryos would not be implanted.

It was not clear whether the agreement, made in anticipation of the divorce, merely reiterated what had already been agreed at the time the embryos were created or, instead, represented an understanding that had not existed previously. If that agreement simply incorporated the parties’ original understanding, then reliance interests might have been implicated because, but for that agreement, one of the parties would never have agreed to create the embryos. In addition, regardless of whether either party detrimentally relied on the agreement, it represented the parties’ considered intentions at the time of the creation of the embryos, before the emotions associated with a possibly contentious divorce had colored their judgments.

The facts of Kass illustrate other reasons an agreement at the time of divorce might not reflect either the understanding that existed at the time the embryos were created or even informed, deliberate decision-making. Consider the following chronology of events. On May 20, Maureen Kass underwent a procedure whereby sixteen eggs were retrieved, out of which nine embryos were created. Four of those were transferred to Maureen Kass’s

40. Id.
41. See id. at 177 (“With divorce imminent, the parties themselves on June 7, 1993—barely three weeks after signing the consents—drew up and signed an ‘uncontested divorce’ agreement, typed by appellant, including the following: ‘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.’”).
42. See id. at 181-82 (“[T]he ‘uncontested divorce’ instrument . . . reaffirmed the earlier understanding that neither party would alone lay claim to possession of the pre-zygotes.”).
43. Cf. id. at 178 (noting that three appellate justices believed the that the IVF consent was ambiguous).
44. A separate question is whether each party has the same understanding of the agreement upon which he or she is detrimentally relying. See J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001) (“M.B., in a cross-motion filed in July 1998 . . . certified that he and J.B. had agreed prior to undergoing the in vitro fertilization procedure that any unused preembryos would not be destroyed, but would be used by his wife or donated to infertile couples.”) However, J.B. testified that he “endured the in vitro process and agreed to preserve the preembryos for our use in the context of an intact family.” J.B. also certified that “[t]here were never any discussions between the Defendant and I regarding the disposition of the frozen embryos should our marriage be dissolved.”
45. See Kass, 696 N.E.2d at 180 (noting that it is “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”).
46. Id. at 177.
sister, who was willing to be the couple’s surrogate. Regrettably, a pregnancy did not result. In addition, Kass’s sister announced her unwillingness to again undergo the rigors associated with surrogacy. This announcement would have been the source of significant, additional disappointment, because Maureen might have felt that she no longer had any way to have a biological child. The couple “then decided to dissolve their marriage,” another possible cause of sorrow or depression.

At this point, “the parties themselves on June 7, 1993—barely three weeks after signing the consents—drew up and signed an ‘uncontested divorce’ agreement.” Was the agreement executed at the advice of counsel? The opinion does not say. However, Maureen had a change of heart within three weeks, which might indicate that she had not been well advised, had not considered all relevant factors or, perhaps, that the prior decision-making process had not been sufficiently deliberate.

Should Maureen have been held to her agreement? Perhaps, although she had just experienced a series of events that may have seriously clouded her judgment. Given her change of heart shortly after having agreed not to use the embryos, and the lack of evidence that her ex-husband had detrimen-

47. Id.
48. Id. (“The couple learned shortly thereafter that the results were negative.”).

First, birth-control pills and shots of hormones are required to control and suppress the surrogate’s own ovulatory cycle and then injections of estrogen are given to build her uterine lining. After the transfer, daily injections of progesterone are administered until her body understands that it is pregnant and can sustain the pregnancy on its own. The side effects of these medications can include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, breast fullness, light headedness and vaginal irritation.

(quoting Amrita Pande, Not an ‘Angel,’ not a ‘Whore’: Surrogates as ‘Dirty’ Workers in India, 16 INDIA J. GEND. STUD. 141, 147 (2009)).

50. Kass doubted that she herself could have a successful pregnancy. See Kass, 696 N.E.2d at 175 (“[A]ppellant believed that, owing to prenatal exposure to diethylstilbestrol (DES) she might have difficulty carrying a pregnancy to term . . . .”).
51. Id. at 177.
54. See id. (“On June 28, 1993, appellant by letter informed the hospital and her IVF physician of her marital problems and expressed her opposition to destruction or release of the pre-zygotes.”).
tally relied on her transitory willingness not to use the embryos, it is not at all clear that the divorce agreement should have been enforced; unless it reflected the understanding at the time the embryos were created. A fuller record was required to determine whether the divorce agreement reflected that understanding. Unfazed by the possibility that there might have been a variety of reasons that the agreement at the time of the couple’s divorce did not reflect their previous understanding, and unwilling to make this inquiry, the New York Court of Appeals affirmed that the divorce agreement merely incorporated the couple’s previous understanding.

C. A.Z.

The New York Court of Appeals’ approach to interpreting agreements is illustrative when contrasted with the approach employed by the Supreme Judicial Court of Massachusetts. In *A.Z. v. B.Z.*, the court examined an agreement awarding frozen embryos to the progenitor wishing to use them. A.Z. and B.Z. “underwent IVF treatment from 1988 through 1991. As a result of the 1991 treatment, the wife conceived and gave birth to twin daughters in 1992.” However, the last egg retrieval and fertilization in 1991 resulted in “more preembryos [being] formed than were necessary for immediate implantation, and two vials of preembryos [being] frozen for possible future implantation.” In the spring of 1995, B.Z., the wife, had one of the vials of embryos thawed and one embryo implanted. She never informed her husband that she was doing this. Instead, he only learned of the implantation when he received information from the insurance company regarding the

55. *Cf. id.* at 178 (“[T]he dissent [in the intermediate appellate decision] would remit the case to the trial court for a full hearing”); *In re Marriage of Witten*, 672 N.W.2d 768, 781–82 (Iowa 2003) (“Divorce stipulations are also distinguishable. While such agreements may address custody issues, they are contemporaneous with the implementation of the stipulation, an attribute noticeably lacking in disposition agreements.”).

56. *Kass*, 696 N.E.2d at 181–82 (“[T]he plurality properly looked to the ‘uncontested divorce’ instrument, signed only weeks after the consents, to resolve any ambiguity in the cited sentence, [which] . . . reaffirmed the earlier understanding that neither party would alone lay claim to possession of the pre-zygotes.”).


58. *Id.* at 1053.

59. *Id.*

60. *Id.*
Relations between the husband and wife further deteriorated, ultimately resulting in the husband filing for divorce. It is unclear from the opinion whether the relationship’s deterioration was due to the attempted implantation without consultation (as this is the kind of decision that a couple would likely make jointly, and the husband might have felt that his wife’s unilateral action was a breach of a fundamental trust) or whether the relationship was already deteriorating and B.Z. wanted to become pregnant before the couple divorced. In any event, the parties were divorcing and a decision had to be made regarding the disposition of the embryos.

One complicating factor was that the couple had signed a consent form before each egg retrieval and fertilization. The first time they signed the form, the husband witnessed his wife fill it out to the effect “that if they ‘should become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant.’” However, the couple followed a different process when they signed each of the six subsequent consent forms. The husband would sign a blank form, which the wife then filled in and signed. It was not as if the wife surreptitiously changed the substance of the forms when given a blank, signed document. To the contrary, “[a]ll the words she wrote in the later forms were substantially similar to the words she inserted in the first October, 1988, form.” Nonetheless, the court viewed the fact that the husband had submitted a signed, blank form, on which the wife

61. Id.
62. Cf. id. (“The wife sought and received a protective order against the husband under G.L. c. 209A.”).
63. A.Z., 725 N.E.2d at 1053 (“During this period relations between the husband and wife deteriorated. The wife sought and received a protective order against the husband under G.L. c. 209A. Ultimately, they separated and the husband filed for divorce.”).
64. Or, it may be that the couple had been discussing having another child and A.Z. had adamantly refused. See Mark P. Strasser, You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce, 57 BUFF. L. REV. 1159, 1187 (2009) (“There was no discussion in the opinion whether, for example, A.Z. and B.Z. had discussed having more children prior to her last attempt and A.Z. had been adamant in not wanting more . . . .”).
66. Id. at 1054.
67. Id.
68. Id.
69. Id.
simply wrote what the previous agreement had said, as somehow contrary to the husband’s continued consent to the first form’s provisions.70

The court’s analysis was unpersuasive in other respects as well. For example, despite the clear language that “on the donors’ separation, the preembryos were to be given to one of the donors for implantation,”71 the court concluded that it was “dubious at best that it represents the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them.”72 Further, even if that form represented the intent at the time of each signing, the court noted that the “form [did] not state, and the record [did] not indicate, that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition.”73 Of course, if the parties did not intend the form to be legally binding, then one might not require exacting care in the drafting of the form. This is especially true where a person lacking legal training created the document. Nonetheless, because the form discussed the disposition of the embryos should the couple “separate” rather than “divorce,” the court suggested that the declaration had no application with respect to the disposition of the embryos upon the couple’s divorce.74

The court’s interpretation is more easily understood when one considers the court’s statement that “even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will.”75 This position is a stronger version of the position articulated in Davis.76 The Davis court suggested that when performing the balancing test focusing on “the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood,”77 courts should “[o]rdinarily [hold that] the party wishing to

70. Id. at 1057.
71. A.Z., 725 N.E.2d at 1056.
72. Id.
73. Id.
74. Id. at 1057 ("[T]he form uses the term ‘[s]hould we become separated’ in referring to the disposition of the frozen preembryos without defining ‘become separated.’ Because this dispute arose in the context of a divorce, we cannot conclude that the consent form was intended to govern in these circumstances.").
75. Id.; see also J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) ("We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos.").
76. Compare A.Z., 725 N.E.2d 1051, with Davis, 842 S.W.2d at 604.
77. Davis, 842 S.W.2d at 601.
avoid procreation should prevail.”

However, the *Davis* court would have enforced a clear and unambiguous contract specifying that the party wishing to use the embryos would get them. The Massachusetts court rejected that even a clear and unambiguous agreement about embryo disposition should be enforced, if that enforcement would mean that a progenitor might become a parent against his or her will.

D. *Litowitz*

In *Litowitz v. Litowitz*, the Washington Supreme Court avoided some difficult issues in an embryo custody dispute. The court interpreted a couple’s contract with a fertility center in a particular way, and then enforced that interpretation even though it did not reflect the current wishes of either party. Becky and David Litowitz married after having a child together. Shortly after giving birth, Becky had a hysterectomy, leaving her unable to produce eggs or carry a child to term. Nonetheless, the Litowitzes wished to have another child, so they created embryos with donor eggs and Litowitz’ sperm, and then employed a surrogate who gave birth to their daughter. Their two remaining embryos were cryopreserved at a California fertility clinic. The contract between the Litowitzes and the egg donor specified the following:

> 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 al-

78. *Id.* at 604.

79. *See id.* at 597 (“We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos 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.”).


82. *See id.*

83. *Id.* at 262.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Litowitz*, 48 P.3d at 262 (“Three of the five preembryos were implanted in a surrogate mother, producing a female child, M., who was born January 25, 1997.”).

88. *Id.* at 262–63.
allow any other party the use of said eggs without express written permission of the Egg Donor.\textsuperscript{89}

The contract with the fertility clinic specified that specific actions would take place as soon as one of the following triggering events occurred:

A. The death of the surviving spouse or in the event of our simultaneous death.
B. In the event we mutually withdraw our consent for participation in the cryopreservation program.
C. Our pre-embryos have been maintained in cryopreservation for five (5) years after the initial date of cryopreservation unless the Center agrees, at our request, to extend our participation for an additional period of time.
D. The Center ceases its \textit{in vitro} fertilization and cryopreservation program.\textsuperscript{90}

The action choices upon the occurrence of the triggering event included:

1. That our pre-embryos be donated to another infertile couple (who shall remain unknown to all parties concerned), selected by the attending physician and/or the medical director of the Program, in which case we would relinquish any and all claim of maternal and/or paternal right to the donated pre-embryos;
2. That our pre-embryos be donated for approved research and/or investigation;
3. That our pre-embryos be thawed but not allowed to undergo further development;
4. That our pre-embryos be disposed of in accordance with the best judgment [sic] of the professional staff of the Center.\textsuperscript{91}

The Litowitzes made clear that their choice was "#3-That our pre-embryos be thawed but not allowed to undergo further development,"\textsuperscript{92} although they subsequently changed their minds. When they filed for divorce, David wanted the remaining embryos donated to another couple, while Becky wanted them implanted in a surrogate,\textsuperscript{93} perhaps so that M., their daughter,\textsuperscript{94} might have a sibling with the same genetic parents.

Using the best interest test, the trial court awarded the embryos to David.\textsuperscript{95} The court offered several reasons:

\begin{itemize}
\item \textsuperscript{89} Id. at 263.
\item \textsuperscript{90} Id. at 263–64.
\item \textsuperscript{91} Id. at 264.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Litowitz, 48 P.3d at 264.
\item \textsuperscript{94} See id. (discussing "their daughter, M").
\item \textsuperscript{95} Id.
\end{itemize}
IVF’s Challenges for State Courts and Legislatures

1. "The child would be a child of a single parent. That is not in the best interest of a child that could have an opportunity to be brought up by two parents.

2. [T]he child may have a life of turmoil as the child of divorced parents.

3. [B]oth parties here are old enough to be the grandparents of any child, and that is not an ideal circumstance."96

The appellate court affirmed, reasoning that David could not be forced to be a parent against his will;97 Becky appealed.98

An additional complicating factor was that David sought to demonstrate to the Washington Supreme Court that Becky used drugs. David presented evidence of Becky’s alleged drug use to the trial court resulting in David being awarded primary custody of M.99 He also wanted to submit evidence suggesting that Becky had sought to hire someone to kill him.100

Becky claimed that she had the same rights to control the disposition of the embryos as did David by virtue of the contract with the egg donor.101 But the court reasoned that the contract with the egg donor controlled the disposition of the eggs, not the embryos that had been created from those eggs.102 Thus, as a condition of receiving the eggs, the couple had to show that they would not be sold or donated to anyone else, although the Litowitzes were free to use, or perhaps destroy, the eggs as they saw fit.103

The Litowitz court also noted that "[t]he cryopreservation contract provided 'in the event [the Litowitzes] are unable to reach a mutual decision regarding the disposition of [their] pre-embryos, they must petition a court of competent jurisdiction for instructions concerning the appropriate disposition

96. Id.

97. Id. at 265 ("In affirming the trial court, the Court of Appeals concluded the contracts signed by Petitioner and Respondent in California did not require Respondent to continue with their family plan to have another child and that Respondent’s right not to procreate compelled the court to award the preembryos to him.").

98. Id.


100. Id.

101. Id. at 268 ("The contract provides that the intended parents, Petitioner and Respondent, have a right to determine disposition of the eggs. Even though Respondent Litowitz, as the intended father, indeed has a biological connection to the preembryos, he has no greater contractual right to the eggs than Petitioner Litowitz has as the intended mother. Under that contract, Petitioner and Respondent would have equal rights to the eggs.").

102. Id. ("But the egg donor contract does not relate to the preembryos which resulted from subsequent sperm fertilization of the eggs.").

103. Id. at 262.
of [their] pre-embryos."'104 That is exactly what the couple did when they could not agree about the disposition of the embryos.105

Yet, litigation takes time,106 and the initial five-year cryopreservation term discussed in the agreement had already passed by the time the Washington Supreme Court issued an opinion. The Litowitz court explained that "[u]nder the five-year termination provision of the cryopreservation contract, the Center is directed by the Litowitzes to thaw the preembryos, and not allow them to develop any further."107 Indeed, it was not even clear "whether the two preembryos still exist[ed]"108 and, as the court noted, the case before the court would be moot if the clinic had already destroyed the embryos.109

The court reasoned that it did not have to decide whether Becky (who was not genetically related to the embryos) and David (who was) stood on the same footing with respect to the control of those embryos.110 Instead, because the time at which the embryos were to be thawed had already

104. Id. at 268.

105. See Litowitz, 48 P.3d at 273 (Sanders, J., dissenting) ("David and Becky Litowitz contracted that if they could not reach an agreement on the disposition of their remaining preembryos they were contractually bound to 'petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of' their preembryos. That is exactly what they did, and well within the five-year time frame.") (quoting from Petitioner's Ex. 410, at 3).

106. See Derek T. Muller, Judicial Review of Congressional Power Before and After Shelby County v. Holder, 8 CHARLESTON L. REV. 287, 291 (2013-2014) ("litigation is slow").

107. Litowitz, 48 P.3d at 269.

108. Id.

109. Id. at 269.

110. Id. at 271 ("It is not necessary for this court to engage in a legal, medical or philosophical discussion whether the preembryos in this case are 'children,' nor whether Petitioner (who was not a biological participant) is a progenitor as is Respondent (who was a biological participant)."); Cf. Deborah L. Forman, Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer, 24 J. AM. ACADEMY. MATRIM. LAW. 57, 101 (2011) ("Where only one member of the couple contributes gametes, only that party will have a genetic connection to the embryo and any resulting child. We might expect courts to view the gamete provider as the person with the greater claim to the embryo in the event of a dispute, although no statute or court precedent has yet made that clear.").
passed,\textsuperscript{111} the court suggested that the resolution of the case was easy—the embryos should be discarded.\textsuperscript{112}

This was not a satisfactory resolution of the case.\textsuperscript{113} First, assuming that the embryos had not yet been destroyed, it was at least possible that the parties might agree about the disposition of the embryos, if only to continue cryopreservation until an agreement could be reached.\textsuperscript{114} Assuming that the fertility clinic agreed,\textsuperscript{115} preserving the status quo would have been in accord with the contract. Second, the couple sought a court’s determination of the proper disposition of the embryos long before the five-year time period had elapsed.\textsuperscript{116} Arguably, when they sought guidance from the court they tolled the five-year limitation.\textsuperscript{117} Even if the Washington Supreme Court held to the contrary, that would not justify ordering the destruction of the embryos if they were still cryopreserved, especially considering neither party had asked to have the embryos destroyed.\textsuperscript{118}

Yet, the court’s order to destroy the embryos meant that several difficult issues would not be addressed. For example, the trial court used a best interest analysis to determine that David should receive the embryos. But such an approach would require further clarification. Should best interests be used only if the couple initially agrees that it be used or should that test be used generally in the IVF context? Using that test generally in the IVF context might have a chilling effect on the number of couples willing to freeze embryos, because some individuals may be unwilling to create embryos unless

\begin{itemize}
\item \textsuperscript{111} Id. at 271 ("Neither Petitioner nor Respondent has requested an extension of their contract with the Loma Linda Center. Under terms of the contract, then, the remaining preembryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation, which by simplest calculation would have occurred on March 24, 2001.").

\item \textsuperscript{112} Id. at 274 (Sanders, J., dissenting) ("But the majority’s disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the preembryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination.").

\item \textsuperscript{113} See Forman, supra note 110, at 63 (2011) (describing Litowitz as "a rather mystifying decision").

\item \textsuperscript{114} Litowitz, 48 P.3d at 263–64 (provision discussing extension of the five-year cryopreservation period).

\item \textsuperscript{115} See \textit{id.} at 263 (the clinic’s willingness was required for extension).

\item \textsuperscript{116} See \textit{id.} at 273 (Sanders, J., dissenting) (noting that assistance from the courts had been sought “well within the five-year time frame").

\item \textsuperscript{117} \textit{id.} (Sanders, J., dissenting) ("the judicial action which provided for the disposition of the preembryos was commenced well within the five-year window thereby tolling the contracted period of limitations").

\item \textsuperscript{118} See \textit{id.} at 274 (Sanders, J., dissenting) ("One thing the parties obviously did not intend was to destroy the whole object of the contract, the pre-embryos.").
\end{itemize}
they are certain they would be able to use the embryos later should they desire to do so.  

If the best interests test is to be used, what criteria should be employed? Age? Whether the parent is single? The trial court mentioned these factors but the couple likely did not anticipate that these were the kinds of factors that would be used by a court authorized to make a decision for them.

Some commentators suggest that, at the time they create embryos, couples may have some difficulty predicting how they will feel about using or donating those embryos years later. That point is well-taken; although, the same point might be made about other actions involving parenthood. Further, difficulties may only be compounded if couples are advised to include within their cryopreservation agreements a provision authorizing a court to decide the appropriate disposition of the embryos should the couple fail to come to an agreement. First, the Litowitzes incorporated such a

119. Justin Trent, Assisted Reproductive Technologies, 7 GEO. J. GENDER & L. 1143, 1144 (2006) ("Legal uncertainty about embryo control, parentage, and surrogacy contracts, creates a higher risk to would-be parents' rights, which could have a chilling effect on their decisions to engage in ART."); Cf. John A. Robertson, Precommitment Issues in Bioethics, 81 TEX. L. REV. 1849, 1872 (2003) ("Detrimental reliance by others is a good reason for enforcing Time 1 expressions of Time 2 preferences despite one party's Time 2 objections.").

120. See Litowitz, 48 P.3d at 264.

121. Someone like Becky who wanted them for her own use would likely not agree to a best interests test that made it less likely that she would be awarded custody because of her age. Further, because these disputes usually occur when the adults' relationship has broken down, it would be eminently foreseeable that she would be seeking to use them as a single parent. Finally, at least in part because people often have very strong feelings about the use or non-use of the embryos, the adults' relationship might well be less than amicable if they continued to be unable to agree about the disposition of the embryos. Even if the couple did not anticipate divorce, each party might nonetheless object to criteria that would foreseeably weigh against being able to use the embryos, should that person desire to do so. See id. (listing some of the court's criteria).

122. See Forman, supra note 110, at 74 (expressing "concerns about patients' inability to accurately predict their future preferences regarding disposition").

123. Cf. Lior Jacob Strahilevitz, The Right to Abandon, 158 U. PA. L. REV. 355, 383 (2010) ("Many birth parents, interviewed after the fact, 'expressed incredulity that they entrusted their child to strangers,' and nearly half of the birth parents interviewed described the decision to give their children up for adoption as a mistake they wished they could undo.").

124. See Forman, supra note 110, at 100 ("clinic consent forms should be drafted to make clear that disputes between the progenitors in the event of divorce or comparable change in relationship status will be decided by a court or other binding alternative dispute resolution process if the parties cannot reach agreement at that time").
provision in their cryopreservation agreement. That only resulted in prolonged litigation that resulted in an outcome undesired by both parties. Second, by authorizing a third party to decide who will be awarded the embryos without specifying, for example, the criteria to be used in a best interests analysis, the couple would only be adding another element of uncertainty. The parties would not know whether their own views at the time of embryo creation would remain consistent over time. They also would not know what views the judge making the decision would have. One judge might emphasize age, while another would not. Another judge might emphasize the importance of a two-parent family over a single-parent family. This might prove an especially heart-wrenching criterion in some cases. Consider a married couple with several frozen embryos to be used in IVF. They never have a successful pregnancy. They have a contentious break-up because one of the parties has an affair with someone whom that party plans to marry as soon as the divorce is final. It would add insult to injury for the aggrieved ex-spouse to lose custody of the embryos to the other ex-spouse and his or her new marital partner.

Reasoning that David should not be forced to be a parent against his will, the intermediate appellate court agreed that David Litowitz should be awarded the embryos. Donating embryos is different than destroying them. While David would not be the legal father of any children born as a result of the implantation of donated embryos, he still would have been their biological father and might have had some psychological reaction to such children being in the world. Perhaps he would not have been bothered by knowing that there might be a child in the world genetically related to him who he would never know. One of the reasons that the frozen embryo disputes have been so difficult to resolve is that the right not to procreate has been interpreted to include more than the right not to have parental responsibility for any child born of a post-divorce implantation. Otherwise, many of the contentious frozen embryo disputes would have been much easier to resolve—one individual would have his or her right to procreate respected by being

125. Litowitz, 48 P.3d at 268.

126. See id. at 264.

127. Cf. Mo. Rev. Stat. § 452.375 (8) (West 2011) (“As between the parents of a child, no preference may be given to either parent in the awarding of custody because of that parent’s age, sex, or financial status, nor because of the age or sex of the child.”).

128. See Litowitz, 48 P.3d at 264.

129. In other contexts, individuals might unwillingly become parents with support obligations even if conception occurred as a result of intentional deception. See Strasser, supra note 64, at 1189–92.

130. Cf. Davis, 842 S.W.2d at 603 (discussing the possible “psychological consequences” for Junior if the embryos he helped create were used to produce children).
awarded the embryos while the other individual would have his or her right not to procreate respected by having his or her parental rights and obligations terminated.\footnote{131}

E. \textit{Witten}

In all of the cases discussed thus far, the court precluded implantation of the disputed embryos, often by privileging the wishes of one of the parties. However, the \textit{Litowitz} court barred implantation even when neither party sought such a remedy. It is, of course, true that the court could simply decide to preserve the status quo and order that the embryos remain frozen until the parties reached a resolution.

In \textit{In re Marriage of Witten}, the Iowa Supreme Court discussed different approaches to resolving a frozen embryo dispute: (1) the contractual approach, (2) the contemporaneous mutual consent model, and (3) the balancing test.\footnote{132} After discussing the benefits and drawbacks of each,\footnote{133} the court decided to preserve the status quo.\footnote{134}

Arthur and Tamera Witten were seeking a divorce and they could not agree about the proper disposition of their frozen embryos. Tamera wished to keep the seventeen frozen embryos so that she would be able to raise a biological child.\footnote{135} Were implantation to lead to a successful pregnancy, Tamera would allow Arthur to choose between parenting the child or terminating his parental rights.\footnote{136} She opposed destroying or donating the embryos.\footnote{137} Arthur

\footnote{131. See infra notes 178–194 and accompanying text (discussing \textit{Nash v. Nash} in which this approach was employed).

132. \textit{In re Marriage of Witten}, 672 N.W.2d 768, 774 (Iowa 2003).

133. \textit{Id.} at 776–79.

134. \textit{Id.} at 783 ("A better principle to apply, we think, is the requirement of contemporaneous mutual consent. Under that model, no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the status quo would be maintained.").

135. \textit{Id.} at 772 ("Tamera asked that she be awarded ‘custody’ of the embryos. She wanted to have the embryos implanted in her or a surrogate mother in an effort to bear a genetically linked child.").

136. \textit{Id.} at 772 ("She testified that upon a successful pregnancy she would afford Trip [Arthur] the opportunity to exercise parental rights or to have his rights terminated.").

137. \textit{Id.} at 772–73 ("She adamantly opposed any destruction of the embryos, and was also unwilling to donate the eggs to another couple.").
also did not want the embryos destroyed. He was willing to donate them but did not want Tamera to use them.

Rejecting the contractual approach, the *Witten* court held “that agreements entered into at the time [IVF] is commenced are enforceable and binding on the parties, ‘subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo.’” Under the "contemporaneous mutual consent" model adopted by the Iowa court, “no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors.” The court understood that in many cases there would be no agreement. In that event, “the status quo would be maintained.” In the Wittens’ case, the lack of agreement meant that the embryos would remain cryopreserved with “the party or parties who oppose destruction . . . responsible for any storage fees.”

The *Witten* court’s approach has certain advantages. For example, couples at the time of divorce might be so angry that they would be unable to agree about anything and, indeed, one party might take a position just to spite the other. After time had passed, however, the parties might be able to reach a compromise that would make everyone better off.

The *Witten* approach also has drawbacks. In *Witten*, both Arthur and Tamera opposed the destruction of the embryos. But after hearing that cryopreservation costs would be borne by the party opposing destruction, it might be tempting for the party who cared less about the disposition of the embryos to withdraw any objections to their destruction, confident that the other party would continue to protect them and bear the full costs of doing so. Perhaps of more concern is that one party might take advantage of another party’s desire to be a genetic parent, and leverage this desire to se-

138. *Marriage of Witten*, 672 N.W.2d at 773 (“Trip testified at the trial that . . . he did not want the embryos destroyed.”).
139. *Id.* (“[H]e did not want Tamera to use them. He would not oppose donating the embryos for use by another couple.”).
140. *Id.* at 782 (quoting J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001)).
141. *Id.* at 783.
142. *Id.*
143. *Id.*
144. *Marriage of Witten*, 672 N.W.2d at 783 (“Turning to the present case, . . . the parties have been unable to reach a new agreement that is mutually satisfactory.”).
145. *Id.*
146. See *id.* at 772–73.
147. *Id.* at 783.
148. Strasser, *supra* note 64, at 1210 (“Someone who wanted to get back at an ex-spouse might well say that he or she had no interest in cryopreserving the embryos, thereby shifting the costs to his or her ex-spouse.”).
cure concessions on property distribution or spousal support that could not have been otherwise obtained.\[149\]

The Witten court seemed confident that requiring contemporaneous consent would mean that if the parties disagreed, the embryos would remain frozen until the parties agreed to destroy them,\[150\] because the party wishing to use them would eventually either tire of waiting, or feel too old to parent.\[151\] But this view ignores how the party with veto power might exact a heavy emotional or financial price upon the ex-spouse who was intensely committed to becoming a genetic parent.\[152\]

F. Roman

In the cases discussed above, embryos were implanted, although not always successfully. In Davis,\[153\] Kass,\[154\] and Witten,\[155\] no child was born as a result of IVF. In contrast, in A.Z.\[156\] and Litowitz,\[157\] the use of IVF led to

\[149\] Id. ("[T]he embryos might in effect be held hostage—they would be released for use only if the ex-spouse were willing to give up something valuable in return, for example, in a property settlement or in exchange for more favorable support terms.").

\[150\] Marriage of Witten, 672 M.W.2d at 783 ("The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs.").

\[151\] But cf Litowitz v. Litowitz, 48 P.3d 261, 264 (Wash. 2002) (noting that "both parties here are old enough to be the grandparents of any child").

\[152\] See Strasser, supra note 64, at 1210 ("[O]ne could imagine such a person imposing continuing psychic damage by hinting that he or she might consent to the ex-spouse's use of the embryos sometime in the future—the ex-spouse might well continue to be on an emotional rollercoaster when considering the possibility of finally becoming a parent.").

\[153\] See Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992) ("[T]he Davises went through six attempts at IVF, at a total cost of $35,000, but the hoped-for pregnancy never occurred.").

\[154\] See Kass v. Kass, 696 N.E.2d 174, 175–76 (N.Y. 1998) ("Now divorced, appellant (Maureen Kass) wants the pre-zygotes implanted, claiming this is her only chance for genetic motherhood. . . . [A]ppellant underwent the egg retrieval process five times and fertilized eggs were transferred to her nine times. She became pregnant twice—once in October 1991, ending in a miscarriage and again a few months later, when an ectopic pregnancy had to be surgically terminated.").

\[155\] See Marriage of Witten, 672 N.W.2d at 772 ("Tamera then underwent several unsuccessful embryo transfers in an attempt to become pregnant.").

\[156\] See A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2001) ("As a result of the 1991 treatment, the wife conceived and gave birth to twin daughters in 1992.").
the birth of a child. In *Roman v. Roman*, however, the couple creating the embryos never implanted them, although they unsuccessfully tried artificial insemination.

At the time Randy and Augusta Roman created their embryos, the couple signed an agreement "authoriz[ing] the storage of the embryos in a frozen state until the Center determined that appropriate conditions existed for transfer of the embryos to the woman's uterus and both husband and wife agreed to the transfer." In addition, the agreement specified that "the parties chose to discard the embryos in case of divorce." When Randy filed for divorce, the couple agreed about everything but the disposition of the embryos. Randy Roman wanted the embryos discarded, but Augusta wanted them implanted. Augusta said that in the event of a live birth, Randy would have neither parental rights nor parental responsibilities.

157. See Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002) ("Three of the five preembryos were implanted in a surrogate mother, producing a female child, M., who was born January 25, 1997.").


159. See id. at 42-43 ("On the night before the implantation, Randy expressed feelings to Augusta that led him to withdraw his consent to the implantation scheduled for the next day. . . . A month after they decided to wait, the parties signed an agreement to unfreeze three embryos and implant them. The agreement was contingent on the parties' obtaining approval from a counselor. That agreement never took effect because Randy and Augusta did not progress through counseling.").

160. Id. at 52 ("Augusta argues that she understood the embryo agreement to apply to remaining embryos only after implantation had occurred. She testified that she never agreed to destroy all the embryos without an opportunity to get pregnant.").

161. Id. at 42 ("Several attempts at artificial insemination . . . proved unsuccessful.").

162. Id.

163. Id. at 43 ("On December 10, 2002, Randy filed for divorce and Augusta filed a counterclaim for divorce that included claims for fraud and intentional infliction of emotional distress.").

164. See *Roman*, 193 S.W.3d ("The parties reached a final binding agreement during mediation as to the division of the marital property, except for the frozen embryos.").

165. See id. ("Randy asked the trial court to uphold their written agreement, which specified that the embryos be discarded.").

166. See id. ("Augusta wanted the opportunity to have the embryos implanted so that she could have a biological child.").

167. Id. ("If any children were born from the embryos, Augusta stated that Randy would not have parental rights or responsibilities.").
The court reviewed the cases from other jurisdictions and inferred that there was "an emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable, so long as the parties have the opportunity to withdraw their consent to the terms of the agreement." However, the Roman court noted that it was not bound by other states' laws, and sought to determine what local public policy required. After considering various state laws, the court announced that Texas policy somewhat differed from other states by "[a]llowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, [because it] best serves the existing public policy of this State and the interests of the parties." Because the parties agreed to destroy the embryos in the event of divorce, the court ruled that the embryos had to be destroyed.

The policy announced by the Roman court differed from the policy announced in Witten, in that the Roman court decided the initial agreement was enforceable unless both parties agreed to change the terms, whereas the Witten court said that the original agreement was only enforceable if both parties still agreed to those terms. Essentially, the Witten rule precludes any action unless both parties consent, but the Roman rule requires that the original contract be enforced, absent agreement to the contrary. While no implantation occurred in either case, a separate question is whether the Ro-

168. *Id.* at 48.

169. *Id.* at 48 ("Because we are not bound by state law from other jurisdictions, however, we will also review our own statutes to determine the public policy of this State in the context of embryo agreements.").

170. *Roman*, 193 S.W.3d at 50.

171. *See id.* at 54–55 ("[T]he embryo agreement provides that the frozen embryos are to be discarded in the event of divorce. . . . [T]he trial court abused its discretion in not enforcing the embryo agreement."); *see also In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) ("According to the agreement here, the parties designated wife to be the decision maker regarding the embryos. Wife’s stated preference for disposition of the embryos is expressed in the trial court’s order to destroy them, absent husband’s renewed agreement to donate them for scientific research.").


173. *See In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (initial agreement enforceable "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo." (citing *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)).
man court would have awarded the embryos to Augusta if the original agreement had so specified.\textsuperscript{174}

There are different ways to understand the various decisions involving frozen embryo disputes described above.\textsuperscript{175} For example, as the Witten court mentioned, one way to describe these cases is to note that different courts used one of three approaches: the contract model, the contemporaneous consent model, or interest balancing.\textsuperscript{176} However, some commentators have pointed out that there was a common result in these cases, even if the state courts used differing rationales. Namely, the embryos were never implanted against the wishes of one of the progenitors.\textsuperscript{177} As the cases discussed in the next section illustrate, however, the no-implantation-over-progenitor-objections rule is not always observed.

\section*{III. A New Trend?}

Recently, courts have been using some of the previously approved approaches to resolve embryo disputes in a way that results in the implantation of embryos, wishes to the contrary of one of the progenitors notwithstanding. While there have been too few cases to conclude that there is a new trend, this development is noteworthy for a few reasons. Mainly, the development could mean that both individuals who enter into such agreements and those professionals who advise them may have to modify existing practices. The cases involved a variety of fact patterns, some of which were reminiscent of the fact patterns that had occurred in the earlier cases.

\subsection*{A. Nash}

\textit{In re Marriage of Nash} involved an embryo dispute between James and Tina Nash at the time of their divorce.\textsuperscript{178} The cryopreservation agreement gave Tina the right to decide the disposition of the embryos,\textsuperscript{179} but the couple subsequently agreed that a court could determine who would be awarded

\begin{footnotes}
174. See Strasser, \textit{supra} note 64, at 1217 ("Some of the language of the \textit{Roman} decision suggests that an initial decision to give custody to Augusta would have been enforceable . . .").

175. See infra notes 184–85 and accompanying text.

176. \textit{Witten}, 672 N.W.2d at 774.

177. \textit{See} June Carbone \& Naomi Cahn, \textit{Embryo Fundamentalism}, 18 WM. \& MARY BILL RTS. J. 1015, 1021 (2010) ("Every court to rule on the issue has prohibited implantation even when the couple had signed an agreement that would have allowed it.").


179. \textit{See id.} at *1 ("[T]he provision in the cryopreservation agreement . . . gave Tina Nash the authority to determine disposition of the pre-embryos"); \textit{see also id.} at *2 ("Disposition of embryos to be determined by Patient.").
\end{footnotes}
custody of the embryos. Reminiscent of what occurred in A.Z., the husband testified that his wife filled out the form and that he signed the cryopreservation form without having read it.

While James argued that the cryopreservation agreement was not controlling because its applicability expired, the court decided the case on different grounds. The form itself directed that provisions would control only "if not addressed in the divorce settlement." The trial court held that "because the issue of which party would control the pre-embryos was addressed in the mediation agreement by directing the court to decide," the cryopreservation form's designation of Tina was not controlling.

The trial court engaged in an interest-balancing test. It noted that John wanted to have more children, and that it would not be reasonable to create more frozen embryos, especially given his advancing age. One element that played a role was that donor eggs were used to create the embryos at issue. But that meant that even if use of the frozen embryos led to a live birth, Tina would not have been forced to be a genetic parent against her will. That said, Tina was the mother of two children born from frozen

180. See In re Nash, 2009 WL 1514842, at *1 ("[T]he parties agreed the court would decide which party would have control over the frozen pre-embryos."); id. at *3 ("James also testified that a ‘key part’ of the agreement the parties reached at the mediation was that Judge North would decide which party would control the disposition of the remaining preembryos.").

181. See In re Nash, 2009 WL 1518482 ("James also testified that he did not read the cryopreservation agreement before signing it. James said that Tina signed the agreement first and initialed certain provisions, then gave him the agreement and told him to ‘initial here.’"); see also A.Z. v. B.Z., 725 N.E.2d 1051, 1054 (Mass. 2001) ("[I]n A.Z., the husband had testified that he had signed a blank form and that his wife had then filled it in.").

182. See Nash, 2009 WL 1514842, at *3 ("James also argued that . . . the donor agreement expired six months after completion of the retrieval procedure."); see also id. at *2 ("The donor agreement also provides that the terms of the agreement are only effective for six months from the date of completion of the retrieval procedure.").


184. Id. at *3.

185. See id.

186. See id. at *4 ("Husband wants the option of becoming a parent again.").

187. See id. ("The husband’s alternatives to achieve parenthood are not reasonable, as it would require him to restart the expensive process and the success of the process is questionable due to his age.").

188. See id. at *2 ("James and Tina entered into an agreement with an anonymous egg donor for the IVF procedure.").

189. See Nash, 2009 WL 1518458, at *4 ("Husband utilizing the embryos to procreate would not force wife into becoming a biological parent against her will.").
embryos, and any children born of the remaining frozen embryos would be genetic siblings of the two children.

The trial court also ruled that Tina would have no rights or obligations with respect to any children born of the contested embryos. Tina appealed the court’s holding that she would have no parental rights, noting that Washington state law “provides that a mother-child relationship is established by ‘a valid surrogate parentage contract.’” However, Washington law also provides:

If a marriage is dissolved before placement of eggs, sperm, or an embryo, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

Because of the absence of a record specifying her willingness to be a parent to any embryos born after the divorce, Tina was considered a legal stranger to any child resulting from the post-divorce implantation.

Precisely because Tina Nash was not genetically related to the embryos, she did not have a claim that using embryos over her objections would somehow violate her right to not procreate. It remains to be seen whether Nash will provide support for the proposition that an individual contributing gametes to potentially create embryos will have his or her right to not procreate respected as long as parental rights are terminated.

190. See id. ("Tina and James had two sons using the preembryos. H.N. was born in January, 2006 and T.N. was born in March, 2007.").

191. See id. at *1 ("Tina has two teenage daughters from a previous marriage.").

192. See id. at *4 ("The order also provides that '[n]o other person has any parental obligations or rights related to the embryos").


194. See id. (citing WASH. REV. CODE ANN. § 26.26.725(1) (West 2005)); see also TEX. FAM. CODE ANN. § 160.706 (West 2007) ("If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child."); ALA. CODE § 26-17-706(a) (1975); § 19-4-106(7)(a), C.R.S. (West 2009); 13 DEL. CODE ANN. tit. 13, § 8-706 (a) (West 1995); N.D. CENT. CODE ANN., § 14-20-64(1) (West 2005); N.M. STAT. ANN. § 40-11A-706(A) (West 2010); UTAH CODE ANN. § 78b-15-706(1) (West 2008); WYO. STAT. ANN. § 14-2-906(a) (West 2003).
B. Szafranski

Szafranski v. Dunson involved a dispute between non-marital parties about the disposition of frozen embryos.195 Karla Dunston was diagnosed with non-Hodgkin's lymphoma and was advised that the recommended treatment would likely destroy her fertility.196 Dunston was in a relationship with Jacob Szafranski, whom she asked to donate sperm so that she could create pre-embryos prior to the commencement of her treatment.197

Szafranski and Dunston consulted an attorney, Nidhi Desai, who “presented them with two possible arrangements: a co-parent agreement or a sperm donor agreement.”198 Dunston sent an email to Desai opting for the co-parent agreement, and Desai sent the couple a draft of such an agreement.199 The co-parenting agreement provided that the couple “would attempt to participate in at least one in vitro fertilization and pre-embryo transfer cycle”200 and that Szafranski “agree[d] to undertake all legal, custodial and other obligations to the child regardless of any change of circumstance between the parties.”201 The agreement further suggested that “[s]hould the intended parents separate, Karla will control the disposition of the embryos.”202 However, the “co-parent agreement was never signed by the couple.”203 Failure to sign the agreement notwithstanding, Szafranski deposited sperm, and eight eggs were retrieved from Dunsten.204 Their doctor advised them that fertilizing all of the eggs would give them the best chance of having a child, and they followed that advice.205

The eggs were fertilized in April, and Szafranski sent Dunston a text message ending their relationship in May.206 In August, Szafranski sought to

195. See Szafranski v. Dunson, 993 N.E.2d 502, 503 (Ill. App. Ct. 2013) (“This appeal is a case of first impression in Illinois involving a dispute between plaintiff-appellant, Jacob Szafranski, and defendant-appellee, Karla Dunston [ ], over the right to use pre-embryos created with appellant’s sperm and appellee’s ova.”).
196. Id. (“[H]er chemotherapy treatments would likely cause the loss of her fertility.”).
197. See id.
198. Id. at 504.
199. Id.
200. Id.
201. Szafranski, 993 N.E.2d at 504.
202. Id.
203. Id.
204. Id.
205. See id.
206. Id.
permanently enjoin Dunsten from using the pre-embryos. In response, Dunsten offered three distinct arguments as to why she should be permitted to use the embryos. First, she noted that although he did not sign the agreement, he performed his obligation under the agreement by providing the sperm samples. By doing so, he induced her to rely on his promise to help her have children biologically related to her. Further, he knew that fertilizing the eggs with his sperm would preclude her from fertilizing the eggs with donor sperm, which meant that the embryos represented her only chance to have children biologically related to her. Finally, even if the court found that his performance did not bind both parties to the agreement, and even if the court found her reliance on his promise to help her have children did not justify his being estopped from preventing her from using the embryos, the court should nonetheless find that her interest in being a parent outweighed his interest in not being a parent. Szafranski argued that his right not to be a parent was protected under the Illinois and United States Constitutions.

The Illinois appellate court noted that courts have used different approaches to resolve frozen embryo disputes, and each approach had benefits and drawbacks. “The benefits of a contractual approach are that it encourages parties to enter into agreements that will avoid future costly litigation, and that it removes state and court involvement in private family decisions.” However, the contractual approach may commit an individual to a course of action before he or she knows the contents or strengths of her

207. Szafranski, 993 N.E.2d at 504–05 (“On August 22, 2011, he filed a pro se complaint in the circuit court of Cook County seeking to permanently enjoin appellee from using the pre-embryos so as to ‘preserv[ ] [his] right to not forcibly father a child against his will.’”).

208. See id. at 505 (“[E]ven though he did not sign it, he fully performed his one ‘critical’ obligation under the agreement and provided sperm samples to create the embryos.”).

209. See id. (“She also asserted that appellant induced her to rely on his representation that he would help her have her own children.”).

210. See id. (“[S]he was harmed by that reliance because now she cannot go back and use a random sperm donor to fertilize her eggs.”); see also id. (“Appellee attached to her motion a letter from Dr. Eve Feinberg stating that appellee has ovarian failure as a result of her chemotherapy treatment which has ‘rendered [her] unable to conceive a child with the use of her own oocytes.’”).

211. See id. at 505 (“[T]he court should . . . balance the interests of the parties, finding that her interest in having her own biological children outweighs appellant’s interest in not fathering a child.”).

212. See id. (“Appellant claimed that he was entitled to summary judgment based on the right not to be a parent under the United States and Illinois Constitutions.”).

213. Szafranski, 993 N.E.2d at 506–08.

214. Id. at 506.
reactions to some future set of events. The contemporaneous consent model “benefits from ease of application and at least the appearance of respecting the rights of the parties’ involved,” although it is also not without fault. In many instances in which individuals are litigating over the right to control the disposition of their frozen embryos, they simply will not be able to reach an agreement. Or, any agreement reached might be unconscionable to one of the parties, because that person’s sole chance of being a biological parent was held hostage by the other party. The balancing approach requires courts to assess whose interests are more important in a “highly emotional and personal area.”

After analyzing the pros and cons of each approach, the Dunston court decided that contracts should be enforced when the parties have previously made their wishes clear. If that has not been done, then the court should conduct a balancing test. The court recognized that while not without fault, this approach was preferred over allowing an ex-spouse or partner to hold the embryos hostage. Although it was not clear what the lower court would do on remand, the Dunston court rejected Szafranski’s claim that his contemporaneous consent was required before implantation could occur

215. See id. at 507.
216. Id. at 511.
217. See id. (“[T]he Superior Court of Pennsylvania has aptly noted: ‘This approach strikes us as being totally unrealistic. If the parties could reach an agreement, they would not be in court.’”) (citing Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012).
218. See id. at 512 (citing Strasser, supra note 64, at 1210).
219. Szafranski, 993 N.E.2d at 512 (citing In re Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003)).
220. See id. at 514 (“[T]he best approach for resolving disputes over the disposition of pre-embryos created with one party’s sperm and another party’s ova is to honor the parties’ own mutually expressed intent as set forth in their prior agreements.”).
221. See id. at 515 (“In addition to holding that agreements between the parties should be honored, we further hold that where there has been no advance agreement regarding the disposition of pre-embryos, ‘then the relative interests of the parties in using or not using the preembryos must be weighed.’”) (citing Davis v. Davis, 842 S.W.2d 588, 604 (1992)).
222. See id. (“[W]e acknowledge that this is not an ideal way to resolve a dispute implicating reproductive rights . . . .”).
223. See id.
224. See id.
and was sympathetic to the claim that “a party’s inability to have a child weighs in her favor.”

C. Reber

In Reber v. Reiss, a Pennsylvania Superior court was asked to decide who should be awarded the couples’ frozen embryos. Andrea Reiss had been diagnosed with breast cancer, and she and Brett Reber were advised that they should use IVF if they wished to have a child. Andrea deferred her cancer treatments so that she and her husband could harvest the eggs and create the embryos. Andrea then had extensive treatment. Brett filed for divorce from Andrea two and a half years after the embryos were created. He then began a relationship with someone else and they had a son together. The parties and the trial court characterized the embryos as property subject to equitable distribution. Brett made his intention clear to have the embryos destroyed, while Andrea made clear that she intended to have the embryos implanted. There was no prior agreement between the parties about what should be done with the embryos in the event of divorce, and it seemed extremely unlikely that the parties could come to an agreement at the


226. Reber, 42 A.3d at 1132 (“In November 2003, Wife, at the age of 36, was diagnosed with breast cancer.”).

227. Id. (“As a result of the diagnosis and proposed recommended cancer treatments, the parties were advised to undergo in vitro fertilization (IVF) to preserve Wife’s ability to conceive a child.”).

228. See id. at 1132–33 (“To accommodate the IVF process, Wife deferred the commencement of her cancer treatment for several months. In February and March 2004, Husband and Wife underwent the IVF process resulting in the production of thirteen pre-embryos using Husband’s sperm and Wife’s eggs.”).

229. See id. at 1133 (“After undergoing the IVF process, Wife proceeded with extensive breast cancer treatments including two surgeries, eight rounds of chemotherapy and 37 rounds of radiation.”).

230. See id.

231. Id. (“Approximately 18 months after he and Wife separated, Husband’s biological son [from another woman] was born.”).

232. Reber, 42 A.3d at 1133 (“The parties agree, as does the [trial] court, that the pre-embryos are marital property subject to equitable distribution.”).

233. See id. at 1134.
The court reasoned that the best way to resolve this issue was to balance the interests of the parties.\textsuperscript{235} The court accepted that Andrea would be extremely unlikely to have a child biologically related to her if she were precluded from using the embryos.\textsuperscript{236} The court distinguished between having a biologically-related child from having a child through adoption, suggesting that the two should not be equated.\textsuperscript{237} Because of her health history and her age, Andrea would not likely be viewed favorably when seeking to adopt.\textsuperscript{238} The likelihood that she would be unable to adopt led the court to "conclude that Wife's compelling interests in using the pre-embryos include the fact that these pre-embryos are the option that provides her with what is likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all."\textsuperscript{239}

Brett argued that "he, himself, was adopted and he would not want any of his children not to know his or her biological father."\textsuperscript{240} The court noted that the husband's concerns, "based on his own life experiences, are not unreasonable,"\textsuperscript{241} although those concerns were mitigated because the husband could play a role in the child's life if he desired.\textsuperscript{242} The husband also worried that he might be financially responsible for any child born. While the court seemed to credit the wife's claim that she would do her utmost to prevent Brett from having to pay support for the child,\textsuperscript{243} it expressly refused to rely on that assertion.\textsuperscript{244} The court rejected the husband's claim that he never intended to have a child with his wife, noting that he "voluntarily provided Wife sperm when her doctors suggested she undergo IVF to preserve her

\textsuperscript{234} See id. at 1136 ("[N]either party had signed the portion of the consent form related to the disposition of the pre-embryos in the event of divorce or death of one party. Also, it was quite obvious that Husband and Wife could not come to a contemporaneous mutual agreement regarding the pre-embryos.").

\textsuperscript{235} Id. ("[T]he balancing approach is the most suitable test.").

\textsuperscript{236} See id. at 1138.

\textsuperscript{237} See id. ([S]imply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test.").

\textsuperscript{238} Reber, 42 A.3d at 1138.

\textsuperscript{239} Id. at 1140.

\textsuperscript{240} Id.

\textsuperscript{241} Id.

\textsuperscript{242} See id.

\textsuperscript{243} See id. at 1141.

\textsuperscript{244} Reber, 42 A.3d at 1141 ("[T]he trial court did not err in the weight it gave to Wife's vow not to seek support-the trial court did not rely on the vow and appropriately left open such a determination until the issue becomes an actual case or controversy before the court.").
fertility." In any event, absent an agreement specifying what should be done with the embryos, the competing interests favored the wife’s opportunity to have a child.

A separate issue involves whether a child born post-divorce should be entitled to support from the unwilling progenitor. Several states have passed laws specifying that an individual will not be subject to support obligations if an embryo is implanted post-divorce contrary to the wish of that progenitor, although even more states have not addressed this issue through their laws. In states where this issue has not yet been addressed by the legislature, courts will have little guidance with respect to the proper approach to take.

D. Lewis

Consider Commissioner of Social Services v. Lewis, where Lewis’s marriage with his wife was dissolved in May, 2008. Incorporated within the judgment dissolving their marriage was the parties’ agreement to have their frozen embryos destroyed. Nonetheless, Lewis’s ex-wife had one of the embryos implanted, which led to a live birth. At issue was whether the ex-husband could be required to support the child.

Connecticut did not have applicable statutory law. When the husband pointed to a Model Act suggesting that he not be required to pay support, the court noted that the state had not adopted this act, even though it had

245. Id. at 1140.
246. See id. at 1142 (“[B]ecause Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely Wife’s only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all, we agree with the trial court that the balancing of the interests tips in Wife’s favor.”).
249. See id. (“The judgment of dissolution incorporated by reference an agreement of the parties (the agreement) which included a provision that the parties agreed to destroy embryos created and stored during the marriage.”).
250. See id. (“The plaintiff caused herself to be implanted with an embryo after the dissolution and a child was born on March 30, 2009.”).
251. See id. at *5 (“At this time there are no statutes that relieve a parent of a child conceived through in vitro fertilization (IVF) from the duty to support.”).
252. See id. (“The defendant further states that the American Bar Association Model Act Governing Assisted Reproductive Technology . . . provides that ‘[i]n the event that a transfer [of an embryo] occurs after receipt of notice in a record of that individual’s intent to avoid gestation . . . that intended parent will not be the parent of a resulting child.’”).
adopted others. The magistrate found that the defendant voluntarily created the embryos. Further, while the couple had agreed to destroy the embryos, the defendant had nonetheless subsequently admitted paternity of the child born from the embryo. Finally, when he admitted paternity, he had not taken any exception to supporting the child, presumably because a blood test would reveal that he was the child’s father, resulting in a support obligation. The order of support was affirmed.

A separate question was whether the ex-husband could sue his former wife for willfully violating the agreement to destroy the embryos. Although this was not resolved, forcing the mother to reimburse the father for his support would undermine the rationale used by the magistrate because “in the absence of statutory authority[,] it is in the best interest of the child to be supported by both parents.” Thus, if one of the reasons to order support from both parents is that the child would thereby benefit, ordering the mother to reimburse the father for his support as part of the damages award for violating the order to destroy the embryos would deplete the family purse that provided for the child. Parents are not permitted to bargain away child

253. See id. at *2 (“The defendant properly points out that Connecticut has, in other instances, enacted legislation in substantial conformity with other model acts. The legislature has not done so, at least not yet, in this regard.”).

254. Lewis, 2013 WL 5969110, at *2 (“[T]he defendant signed a prior consent for the IVF . . . .”).

255. See id. (“[T]he defendant . . . volitionally signed the acknowledgment of paternity[.]”).

256. See id. at *4 (“The defendant did not refuse to sign the form. He was represented by counsel at the juvenile court proceeding and his counsel took his acknowledgement on the form. There is no evidence that he took any steps to disavow his obligation to support the child—until he was served with the support petition.”).

257. See id. (“The defendant freely acknowledges that he is the biological father of the child and avers that, if he had declined to sign the acknowledgement, a DNA test would establish his biological paternity and the end result would have been a judgment of paternity and a finding of an obligation to support.”).

258. See id. at *6.

259. See id. at *4 (“The magistrate properly determined that his decision to require the defendant father to pay support does not diminish any relief that may be afforded to the defendant if the plaintiff is found to be in contempt for willful violation of the terms of the judgment.”).


261. Cf. Higginbotham v. Higginbotham, 857 So.2d 341, 342 (Fla. Dist. Ct. App. 2003) (“[I]t is difficult to grasp how it is in the best interest of the child to deplete the resources of the family.”).
support if doing so would undermine the child’s best interests. It would seem surprising that the parent would be forced to pay child support but could also recoup those costs (perhaps in addition to others) in a suit against the child’s custodial parent.

The Lewis court did not discuss whether the ex-husband might seek damages against other parties; for example, if someone wrongfully implanted the embryo while knowing that one of the progenitors had not given consent. States have adopted different ways to deter wrongful implantations, and tort liability might be another way to assure that implantation only takes place with appropriate consent from the parties. But was Lewis’s consent needed before the implantation? When Lewis and his wife signed the consent form, did they agree that only her authorization was necessary? Regardless, states will have to decide the conditions under which an individual who contributes gametes to produce embryos may be held financially responsible for children born after the implantation of such embryos, if that implantation occurred without the individual’s consent.

IV. Conclusion

Counseling individuals and couples interested in using IVF is increasingly complex. In some jurisdictions, the initial agreement regarding the disposition of frozen embryos is enforceable, but in other jurisdictions even a clear and unambiguous agreement will not be enforced if one of the parties has since changed his or her position. In some instances, individuals who fear the loss of future fertility may be better served by cryopreserving sperm or eggs rather than embryos, because cryopreserving the latter may result in that individual becoming a genetic parent to the other progenitor’s veto. That said, some recent cases suggest that progenitors will not always be afforded the power to veto implantation of embryos that they helped create and, further, that those progenitors may be held legally responsible for child support.


263. See Lester v. Lester, 736 So.2d 1257, 1259 (Fla. Dist. Ct. App. 1999) (“The fact that parents may not waive or otherwise ‘contract away’ their child’s right to support . . . does not preclude them from making contracts or agreements concerning their child’s support so long as the best interests of the child are served.”) (citing Warrick v. Hender, 198 So.2d 348, 351 (Fla. Dist. Ct. App. 1967)).

264. See, e.g., LA. REV. STAT. ANN. § 14:101.2 (West 1999) (“A. No person shall knowingly use a sperm, ovum, or embryo, through the use of assisted reproduction technology, for any purpose other than that indicated by the sperm, ovum, or embryo provider’s signature on a written consent form. B. No person shall knowingly implant a sperm, ovum, or embryo, through the use of assisted reproduction technology, into a recipient . . . without the signed consent of the . . . provider and recipient.”).
Courts sometimes discuss the right to procreate and the right not to procreate without explaining what these rights protect. For example, does the right not to procreate include the right not to be a genetic parent against one’s will, even if local law imposes no obligations on the unwilling progenitor with respect to a child born of an implantation after the end of the adults’ relationship? Specification of what that right includes should also discuss the conditions, if any, under which one waives that right. Presumably, authorizing an embryo implantation involves a waiver of the right not to procreate with respect to the implanted embryo. However, agreeing to an implantation now does not waive the right to object to future implantations.

Courts may be using the expressions “right to procreate” and “right not to procreate” as a shorthand way of recognizing that important interests are implicated when the possible implantation of embryos is at issue. Where the right not to procreate precludes a progenitor from donating embryos to a third party over the other progenitor’s objections, the court is recognizing that individuals may have an interest in not having children that the progenitor will never know, even if the progenitor will have no legal obligations with respect to that child. Yet, the interest one has in not being a parent may be outweighed by the other progenitor’s interest in using the embryos himself or herself if that is the only way to have a genetically-related child. Yet, it is also true that some courts treat the right not to be a parent as affording a kind of veto power, which precludes frozen embryos being used by anyone over the progenitor’s objections, prior agreement to use the embryos notwithstanding.

Some states have passed legislation that denies a progenitor parental rights and obligations if the ex-partner has the embryo implanted after the adults’ relationship has ended. By doing so, states presumably make it more likely that at least some individuals will not object to the use of frozen embryos by the ex-partner. It is unclear whether individuals can achieve a similar result by contract, i.e., one party agrees not to contest the use of the embryos if no rights or obligations will be imposed on that party with respect to any child born from the embryos.

Many states are silent regarding the progenitor’s obligation to children born as a result of implantation, even when that implantation was not performed with the progenitor’s consent. Without such laws, it is not even clear what law should be considered when courts are deciding whether an obligation can be imposed. As a general matter, individuals are financially responsible for their biological children, even if they had no interest in being or becoming a parent. Yet, there are various respects in which IVF is not analogous to coital reproduction, which may mean that our general approaches to parental responsibility from coital intimacy are inapplicable to the IVF context.

Until recently, courts were not forced to address the implications of an individual becoming an unwilling parent because of a prior IVF agreement, or even how to weigh competing interests with respect to parenthood in the IVF context. Because the differing approaches all (allegedly) led to the same
IVF's Challenges for State Courts and Legislatures

answer—do not implant absent concurrent consent—courts were able to avoid issues that would be raised were implantation permitted, and a child born. But now that courts are acknowledging that the agreements and background interests may require permitting implantation, courts and legislatures will have to work out a host of issues.

The frozen embryo custody disputes usually involve one individual who wants to donate or destroy the embryos, and another who wishes to use them. Suppose, however, that each of progenitors wants to implant the embryos. What criteria should be used in such a case? Would it matter if one of the parties was more likely to have a successful implantation? Should custody of any child resulting from implantation be decided later in light of a best interests test, considering all of the great personal costs that one of the parties might have incurred to bring about the live birth?

Where there was a perceived unwritten rule that embryos would not be implanted over a progenitor's objections, choice of law considerations might not have been considered very important. However, if only some states are willing to award embryos to the progenitor, choice of law considerations will become more prominent, especially if the progenitors live in different states. In short, now that frozen embryos may be implanted over one of the progenitor’s objections, state legislatures and courts would be well-advised to pass laws and offer analyses that guide dispute resolution in an area of law with fierce contests over extremely important interests.
Comments