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Frozen Embryo Disposition in Cases of Separation and Divorce: How *Nahmani v. Nahmani* and *Davis v. Davis* Form the Foundation for a Workable Expansion of Current International Family Planning Regimes

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INTRODUCTION

“There is something deeply humane about this policy, the idea that people have the right to be parents It’s something that characterizes life here: the value placed on life.”¹ Israel is the world capital of *in vitro* fertilization (IVF).² It is also one of the few countries where IVF *and* surrogacy are legally permitted, regulated on a national level, and administered by an administrative rather than a judicial authority.³ By contrast, in the United States, IVF, while widely available, is one area in which federalism reigns, producing a hodgepodge of state legislation and regulation.⁴ However, Israeli and American jurisprudence on this issue, though limited, far outstrips the

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1. Dina Kraft, *Where Families are Prized, Help is Free*, N.Y. TIMES, July 17, 2011, at A5.

2. *Id.* (“Experts say Israel’s rate still far outstrips the rest of the world. Four percent of Israeli children today are the products of in-vitro fertilization, compared with about 1 percent estimated in the United States.”); *see also* John A. Collins, *An International Survey of the Health Economics of IVF and ICSI*, 8 HUM. REPROD. UPDATE 265, 268 (2002) (including a survey in which Israel had the highest rate of IVF cycles per million population per annum).

3. *See infra* Part I.B.

4. *See infra* Part I.A.

current international dialogue, particularly in regard to the issue of frozen embryo disposition in cases of separation and divorce. While the international community recognized a right to family planning as early as the Teheran Conference of 1968,⁵ the cryopreservation of embryos and the issue of their “custody” is such a recent innovation that international law has not yet caught up with medical developments.⁶ Faced with a continually shifting philosophical debate as to the proper balance between culture-dictated morality and individual autonomy, the international community lacks consensus on how to approach assisted reproductive technologies (ART).⁷ At the heart of the problem as it pertains to frozen embryo disposition in cases of separation or divorce is the absence of an international definition of an embryo and its status (i.e., “person” or “property”), which leads to problems of judicial classification (e.g., whether to use contract law principles when interpreting disposition agreements).⁸

5. International Conference on Human Rights, Teheran, Iran, Apr. 22–May 13, 1968, *Proclamation of Teheran*, ¶ 16, U.N. Doc. ST/HR/1/Rev.4 (Vol. 1/Part 1) (May 13, 1968) (“Considers that couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect.”).

6. The terms “embryo” and “frozen embryos” are used in this Comment for simplicity’s sake and not as a legal status judgment. In places where language from a case is cited directly, the term “pre-embryo” may be used. Scientifically, frozen embryos are in a pre-embryonic state similar to a zygote. The first time a baby was successfully born from a cryopreserved embryo was in Melbourne, Australia in 1984. Before this point, IVF procedures were performed shortly after fertilization. *See First Baby Born of Frozen Embryo*, N.Y. TIMES, Apr. 11, 1984, at A16.

7. The Universal Declaration of Human Rights recognizes “the right to share in scientific advancement and its benefits.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 27(1) (Dec. 10, 1948). Likewise, the Vienna Declaration and Programme of Action notes, “Everyone has the right to enjoy the benefits of scientific progress and its applications.” World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 11, U.N. Doc. A/CONF.157/23 (July 12, 1993). It is notable that although both of the above declarations insist on the dignity and human rights of the individual, neither makes a direct connection to assisted reproductive technologies.

8. Not even the term “reproductive rights” has an agreed-upon meaning in international dialogue. The African Charter on Human Rights specifically lists what it considers to be sexual and reproductive rights. *See Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* art. 14, July 11, 2003, *available at* <http://www.achpr.org/instruments/women-protocol/>. However, most documents referring to “reproductive rights” focus on family planning (“the right to decide the number and spacing of children”), female empowerment, and the right to privacy. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221; Convention on the Elimination of All Forms Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13. However, these sources do not address the dissolution of marriages or the increasing availability of assisted reproductive technologies. *See generally*

In the United States, the reproductive rights issue that continues to make the most noise, especially in presidential election years, is that of a woman's right to have an abortion. Only six state supreme courts have actually considered cases involving frozen embryo disposition and divorce/separation.⁹ The lack of clarity and cohesion on this issue within the United States¹⁰ is mirrored internationally. For example, China officially maintains a "one-child" policy, but there is evidence that ART guidelines are being flouted, particularly by the wealthy.¹¹ Other Western countries, including members of the European Union, exhibit the full spectrum of approaches to regulating ART.¹² Even when countries such as Sweden, Switzerland, and the United Kingdom do regulate the cryopreservation of embryos, they have no case law on the particular point of frozen embryo disposition in cases of separation and divorce.¹³ Thus, in the

Julia Gebhard & Diana Trimino, *Reproductive Rights, International Regulation*, in 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 930 (Rüdiger Wolfrum ed., 2012) (summarizing the extent of international initiatives and regulations in the area of reproductive rights).

9. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc).

10. *See infra* Parts I.A.1, II.D.

11. Though technically the Ministry of Health requires conformity of reproduction techniques with China's "family planning policy," surrogacy has become a way for the wealthy to bypass the one child restriction. While there is no specific law against surrogacy in China, the industry has operated in a gray area since 2001 when the Ministry of Health prohibited hospital-based surrogacy procedures and the commercial exchange of fertilized eggs and embryos. *See* Nicola Davison, *China's Surrogate Mothers See Business Boom in the Year of the Dragon*, THE GUARDIAN (Feb. 8, 2012), <http://www.guardian.co.uk/world/2012/feb/08/china-surrogate-mothers-year-dragon>. Scandal broke out in 2011 when it was discovered that a wealthy couple had eight babies, five via surrogacy. Due to the high cost of surrogacy (up to one million yuan), surrogacy tends to exacerbate the growing economic and social inequality in China's population. *See* *China Couple with Eight Babies Sparks Surrogacy Debate*, BBCNEWS (Dec. 21, 2011), <http://www.bbc.co.uk/news/world-asia-china-16275624>; *see also* Shan Li, *Chinese Couples Come to U.S. to Have Children Through Surrogacy*, L.A. TIMES, Feb. 19, 2012, <http://articles.latimes.com/2012/feb/19/business/la-fi-china-surrogate-20120219>.

12. At one extreme, Germany prohibits cryopreservation of fertilized eggs and all forms of surrogacy. Kirsten Riggan, *G12 Country Regulations of Assisted Reproductive Technologies*, THE CTR. FOR BIOETHICS & HUM. DIGNITY (Oct. 1, 2010), <http://cbhd.org/content/g12-country-regulations-assisted-reproductivetechnologies>. At the other extreme, Belgium offers complete ART coverage through its national health plan. *Id.* In between, there are countries such as Spain where surrogacy is not recognized, but the commercial donation of gametes is allowed for purposes of ART and research. *Id.*

13. *See id.* (indicating that both Sweden and Switzerland regulate for cryopreservation of embryos for up to five years); Human Fertilization & Embryology Act, 1990, c. 37, § 14(1)(d)(4) (U.K.) (stating that embryos may be stored for up to 5 years). However, most

area of frozen embryo disposition, while certain state practices and international human rights laws may reflect patterns that could form the basis of an international governance regime, it is not nearly consistent enough at present to rise to the level of customary law.¹⁴

Israel remains the sole country, other than the United States, that has dealt with this particular reproductive repercussion of divorce. Israeli and American jurisprudence, though limited, addresses the full gamut of possible approaches, often covering similar territory such as equality of the sexes, the balance between constitutional and basic rights, the enforceability of agreements, and the scope of consent.¹⁵ However, the two countries have reached opposite results, which is perhaps reflective of the personal and complex nature of the problem. The Israeli position, embodied in the seminal case of *Nahmani v. Nahmani*,¹⁶ promotes a presumption in favor of the party desiring implantation, while the American position, embodied in the *Davis* decision and five subsequent state supreme court cases,¹⁷ focuses on the autonomy of the individual and places the presumption squarely in favor of the party opposing parenthood.

This Comment will tell the story of both seminal cases, focusing primarily on the courts' conflicting views regarding rights-balancing and the application of contract law to the resolution of frozen embryo disposition disputes.¹⁸ My primary argument will be that, despite the holes in both countries' jurisprudence and the vagueness of current international reproductive rights protections, a practical combination

cases in the United Kingdom and Australia have dealt with post-death disposition, and not post-divorce disposition. See Jennifer Stoler, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459, 474-79 (1991).

14. See *infra* Parts I-II.

15. See *infra* Part II. See generally *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); CFH 2401/95 *Nahmani v. Nahmani* [1995-6] IsrLR 320 [1996] (Isr.). It is also worth noting here that both rounds of *Nahmani* in the Israeli Supreme Court occurred after the decision in *Davis*, and the *Davis* decision was both known and referred to by both the majority and minority judges on the Israeli bench.

16. CFH 2401/95 *Nahmani v. Nahmani* [1995-6] IsrLR 320 [1996] (Isr.) [hereinafter *Nahmani II*]. This was the final hearing and decision in the *Nahmani* case. The first appeal to the Israeli Supreme Court, CA 5587/93 *Nahmani v. Nahmani* [1995-6] IsrLR 1 [1995] (Isr.), will be referred to throughout as *Nahmani I*. When referring to the *Nahmani* saga in aggregate, I will simply use "*Nahmani*." The Israeli Supreme Court regularly refers to the two parties in this case as Ruth and Daniel. For the sake of consistency, I follow the court's approach.

17. See *supra* note 9.

18. See *infra* Part II.

of the Israeli and American approaches could provide a solid foundation for international consensus on embryo “custody” and disposition.

As a possible solution, I intend to offer the following compromise position that pulls elements from both *Davis* and *Nahmani*. Ideally, the state/judiciary would stay out of this type of intimate family issue. However, in view of the State’s interest in the health and welfare of its citizens, the couple’s interest in making a sound decision, as well as the prevention of medical malpractice, a standard framework should exist for disposition agreements. Such agreements should bear a presumption of validity and enforceability and be modifiable by mutual consent.¹⁹ In the absence of prior agreement, and despite the other party’s present objection, implantation should be allowed within a medically reasonable time (limiting the amount of time the embryos can be preserved), so long as the party desiring implantation has no alternative means of achieving parenthood (genetic or adoptive)²⁰ and agrees to take full legal responsibility for any resultant child. Should the disputing parties reconcile after the birth of the resultant child, the party who opposed implantation should be required to adopt the child in order to secure legal parenthood. In cases where there is no such reconciliation or adoption by the “biological” parent, the child born of the disputed embryo will not be allowed to inherit from their “biological” parent—just as they typically cannot from a sperm or egg donor—nor will the “biological” parent retain any legal responsibility in the case of the death or incapacity of the child’s legal parent.²¹

19. See *Davis*, 842 S.W.2d at 597.

20. In the final disposition of the *Davis* case, Mary Sue wanted to donate, rather than implant, the embryos into herself or a surrogate. *Id.* at 590. I refrain from addressing donation scenarios in my principal argument because both parties lose control/custody in a donation scenario, and donation is an area where *Nahmani* and *Davis* do not provide an appropriate foundation for international consensus. The *Davis* court itself indicated that its decision might have been closer had Mary Sue desired implantation for herself. *Id.* at 604.

21. However, note the recent case of a Kansas sperm donor being sued for child support. *Kansas: Sperm Donor is Ordered to Pay Support*, N.Y. Times, Jan. 2, 2013, at A13; Pia Gadkari, *Should Sperm Donors have Parental Duties?*, BBCNEWS (Feb. 19, 2013), <http://www.bbc.co.uk/news/world-us-canada-21482099>.

I. THE CASES: COMPLEX PROCEDURAL HISTORY MEETS UNIQUE CULTURAL CONTEXT

Davis and *Nahmani* were both watershed cases in their respective countries. However, the breadth and variety of the opinions issued by each country's judicial system, as well as the lack of subsequent jurisprudence, tempered *Davis* and *Nahmani*'s influence. Moreover, both high courts faced complicated fact patterns in these cases of first impression. First, there was no prior agreement regarding embryo disposition in either case. Second, by the end of the proceedings, the Davises were both remarried and no longer wanted to use the embryos themselves,²² while the Nahmanis were still married to each other (though leading separate lives)²³ and Ruth Nahmani still intended to have the embryos implanted in a surrogate in the United States and raise any resultant children herself.²⁴ Lastly, while the Davises and Daniel Nahmani had reproductive alternatives available to them, the use of her frozen embryos was Ruth's last chance at motherhood, genetic or otherwise.²⁵ The two courts would eventually choose to start from different premises and with different priorities: in the Israeli courts, Ruth's desire to achieve biological parenthood would be accorded special weight, whilst in Tennessee and indeed in post-*Davis* jurisprudence, the autonomy of the party not desiring parenthood took precedence.²⁶

A. *Davis v. Davis*

1. A Preliminary Note on ART in the United States

Contrary to the systematic and national approach employed by Israel, IVF is one area in which U.S. federalism holds almost monopolistic sway, producing a patchwork of legislation and regulation that varies from state to state.²⁷ The U.S. system, in which

22. *Davis*, 842 S.W.2d at 590.

23. See *Nahmani I*, [1995-6] IsrLR at 9.

24. *Nahmani I*, [1995-6] IsrLR at 9.

25. In view of her age and the strictness of Israeli adoption rules, adoption was an unlikely alternative. The Israeli Supreme Court did not even contemplate this option in its decision except to categorize adoption as an "unattractive" option. *Nahmani I*, [1995-6] IsrLR at 43-44.

26. See *supra* note 9.

27. See Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 69, 88 (2006). At least three states have enacted legislation addressing frozen embryos. *Roman v. Roman*, 193 S.W.3d 40, 44 n.6 (Tex. App. 2006) ("FLA. STAT. ANN. § 742.17 (couples must

healthcare is not treated as a universal right, is characterized by high cost, limited assistance from government or from insurance companies, and conflicting jurisprudence.²⁸ Even as late as 2006, less than a quarter of states required insurers to provide some form of ART coverage.²⁹ However, even though the financial burden is high, if an individual has the financial means to use ART, she does not have to go through the State intrusions involved in the Israeli process.³⁰ For example, in the American system, the payor has more choice regarding donor sperm and is not subjected to an evaluation conducted by a social worker.³¹ The *Davis* case was an early illustration of this uniquely American combination of accessibility to ART and the pitfalls of a patchwork regulatory system.³²

2. The Story of *Davis v. Davis*

This case arose from the divorce proceedings of Junior and Mary Sue Davis.³³ At issue was the disposition of seven frozen embryos in

execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances); N.H. REV. STAT. ANN. §§ 168-B:13–168-B:15, 168-B:18 (couples must undergo medical examinations and counseling; 14-day limit for maintenance of *ex utero* pre-zygotes); LA. REV. STAT. ANN. §§ 9:121–9:133 (pre-zygote considered “juridical person” that must be implanted) . . .”). As noted in the Introduction to this Comment and as will be discussed later, the existing jurisprudence is not much more extensive: only six state supreme courts and five state appellate courts have addressed frozen embryo disputes, with no federal legislation. For a complete list, see *supra* note 9. The only applicable statements made by the U.S. Supreme Court is that the right to procreational autonomy is a basic civil right, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and the fetus is not a human being under the Constitution, *Roe v. Wade*, 410 U.S. 113, 158 (1973). By extension, a frozen embryo would not be a person under the Constitution.

28. Waldman, *supra* note 27, at 87–88.

29. *Id.* at 88.

30. For a description of the Israeli process, see *id.* at 85. For the U.S. equivalent, see *id.* at 90.

31. *Id.* at 90. Despite this seemingly greater access to IVF, single and lesbian women in the United States face a more precarious legal situation in the United States than do their counterparts in Israel; even though some states have extended their parentage statutes to protect unmarried women, some courts have overridden their state legislatures, invoking the values of a traditional two-parent family in the face of a woman’s intent. See Melissa E. Fraser, Note, *Gender Inequality in In Vitro Fertilization: Controlling Women’s Reproductive Autonomy*, 2 N.Y. CITY L. REV. 183, 197–98 (1998) (discussing limitations on lesbians’ access to IVF programs). There is also a campaign in certain states such as Louisiana and North Dakota to define a “person” to include a fetus, contrary to the default position in most Western legal systems. See *Movement to Treat Fetuses as People Gains Ground*, THE TIMES-PICAYUNE (June 4, 2011), http://www.nola.com/politics/index.ssf/2011/06/movement_to_treat_fetuses_as_p.html.

32. See *infra* Part I.A.2.

33. See *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

cryogenic storage.³⁴ During their nine-year marriage, Mary Sue underwent multiple unsuccessful IVF procedures as well as five tubal pregnancies and a failed adoption.³⁵ In December 1988, the Davises tried the cryopreservation technique for the first time.³⁶ Two of the fertilized ova were unsuccessfully implanted in Mary Sue and the remaining seven were placed in cryogenic storage for future implantation.³⁷ At the time of the procedure, the Davises were informed that the likely storage life for the frozen embryos was two years and that they could donate the remaining embryos to another couple.³⁸ The Davises made no decision on donation at this time, nor did they sign any agreement with the clinic.³⁹ In fact, the record failed to indicate whether the Davises ever considered a contingency agreement.⁴⁰ At trial, the spouses disputed the status of their marriage at the time of the final implantation attempt.⁴¹

During the initial round of litigation, Mary Sue requested custody of the frozen embryos for implantation in herself, while Junior preferred their maintenance in a frozen state.⁴² The trial judge granted the divorce and awarded custody of the frozen embryos to Mary Sue.⁴³ For Judge Young, the primary issue was whether the Davises had accomplished their intent to produce a human being.⁴⁴ To that end, Judge Young chose to emphasize the status of the embryo as that of a human being (as opposed to property).⁴⁵ He also applied the doctrines of *parens patriae* and “best interests of the child” to the case: as the embryos are human beings, it follows that

34. *Id.*

35. *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *2 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

36. *Id.* at *3.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Davis*, 842 S.W.2d at 592.

41. *Id.* Junior Davis testified that he was aware that the marriage was unstable for at least a year but “hoped that the birth of a child would improve their relationship.” *Id.* Mary Sue Davis testified to having no knowledge of any problems in the marriage. *Id.* According to the record, a tentative plan existed to implant at least another one of the cryopreserved embryos in Mary Sue in March or April 1989. *Davis*, 1989 WL 140495, at *3. Junior filed the original divorce complaint. *Davis*, 842 S.W.2d at 589.

42. *Davis*, 842 S.W.2d at 589.

43. *Davis*, 1989 WL 140495, at *1.

44. *Id.* at *3.

45. *Id.* at *4.

their best interest is to be given to Mary Sue for implantation, thereby accomplishing the Davises' original purpose.⁴⁶

Junior Davis appealed the decision to the Tennessee Court of Appeals.⁴⁷ By this time, Mary Sue was domiciled in Florida and preferred to donate the frozen embryos to a childless couple.⁴⁸ The court of appeals reversed the trial court, emphasizing that the issue was one of control rather than custody, and that the Davises had a joint interest and an equal voice in the disposition of the frozen embryos.⁴⁹ The court of appeals also held that according sole custody to Mary Sue would constitute impermissible state action and would violate Junior's constitutionally protected right not to be forced into parenthood.⁵⁰ The court of appeals further observed that it would be equally inappropriate and inequitable to order Mary Sue to implant the ova against her will as it would be to order Junior to suffer the consequences of forced paternity.⁵¹

Mary Sue next petitioned for review by the Tennessee Supreme Court, which decided to hear the case (1) because of the case's importance in the development of the law of reproductive technologies, and (2) because it felt that the court of appeals had failed to provide sufficient guidance to the lower courts in the event of continued disagreement of the parties.⁵² By the time of the hearing before the Tennessee Supreme Court, both parties were remarried and neither wanted the embryos for themselves.⁵³

According to the Tennessee Supreme Court, the essential dispute was not the "status" of the embryos⁵⁴ or how long to store embryos,

46. *Id.* at *11.

47. *Davis v. Davis*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

48. *Id.* at *1 n.1. Junior wanted to discard the frozen embryos. *Davis*, 842 S.W.2d at 590.

49. *Davis*, 1990 WL 130807, at *3.

50. *Id.* at *2.

51. *Id.* at *3.

52. *Davis*, 842 S.W.2d at 590.

53. *Id.* Mary Sue preferred to donate the embryos and Junior preferred to discard them. *Id.* Junior Davis' new spouse was infertile. Brenda L. Henderson, *Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution under Florida Law*, 17 NOVA L. REV. 549, 550 n.5 (1992). Between the appellate court's decision and the supreme court hearing, Junior Davis expressed an interest in having at least one of the frozen embryos implanted in a surrogate. Mark Curriden, *Joint Custody of the Frozen Seven*, 76 A.B.A. J. 36, 36 (1990).

54. *Davis*, 842 S.W.2d at 594. The Tennessee Supreme Court dismissed the lower courts' consideration of status, declaring that the issue was not dispositive in this case. *Id.* The court agreed to address the question solely as a result of the requests of various amici curiae. *Id.*

but “whether the parties would become parents.”⁵⁵ The Tennessee Supreme Court found the answer in the constitutional right to privacy.⁵⁶ For the purposes of the case before it, the court concluded that the right of procreational autonomy is composed of two rights (*to* procreation and *to avoid* procreation) that are both subject to various protections and limitations.⁵⁷ The Davises, as equivalent gamete-providers, constituted the sole interested parties in the continuation or termination of the process; the State, lacking a public policy interest specifically in this area, cannot interfere.⁵⁸

In reaching its decision, the Tennessee Supreme Court first highlighted the absence of a written agreement and the lack of a relevant state statute in the case.⁵⁹ It then declined to implement any of the bright-line models proposed by scholars for resolving such disputes, opting instead for an interest-balancing test in disputes between progenitors where no prior agreement exists.⁶⁰ In this case, the court held that, absent an agreement between the parties, the Knoxville Fertility Clinic should be allowed to follow its normal procedures for the disposal of surplus or unwanted frozen embryos as long as it did not conflict with the court’s opinion.⁶¹ Applying the interest-balancing test to the facts at hand, the court emphasized the psychological and financial consequences of unwanted parenthood that would be placed on Junior and, in the opposite case, Mary’s

The Tennessee Supreme Court agreed with the court of appeals that frozen embryos could not be considered “persons” under Tennessee law, but it disagreed with the court of appeals’ award of “joint custody” because the term implied a property interest. *Id.* at 597. This, the court said, went too far. *Id.* at 595. The court concluded that the frozen embryos were neither persons nor property, that they occupy an “interim category that entitles them to special respect because of their potential for human life.” *Id.* at 597.

55. *Id.* at 598.

56. *Id.* This right is implied by both the Fourteenth Amendment and the Tennessee Constitution, Art. I, § 8, and it encompasses the right to procreate, or procreational autonomy. The court cited U.S. Supreme Court jurisprudence, including *Skinner v. Oklahoma*, 316 U.S. 535 (1942), in concluding that the right to procreational autonomy was included in the right to privacy, though its scope remains unclear. *Id.* at 600.

57. *Id.* at 601.

58. *Id.* at 601–02.

59. *Id.* at 590.

60. *Id.* at 590–91. The court adopted the following approach: first, ascertain the preferences of the progenitors. In case of a dispute, use a prior agreement between the parties. If no prior agreement exists, then employ an interest-balancing test. The objecting party will normally prevail if the other party has other reasonable alternatives for achieving parenthood. In no case should there be an automatic veto. *Id.* at 604.

61. *Id.* at 605.

knowledge that the IVF procedure had been futile.⁶² Donation would also cause Junior to lose both procreational autonomy and a potential relationship with his biological children.⁶³ The court concluded that Junior had the stronger interest.⁶⁴

The most important issue that the Tennessee Supreme Court addressed, at least according to the frequency with which later courts (including both *Nahmani* panels) referenced it, was one that the parties failed to raise on appeal: whether the Davises could have made a valid contingency agreement and whether that agreement would now be enforceable.⁶⁵ The supreme court reasoned that an agreement should be presumed valid and enforceable and that any modifications should be made by mutual agreement.⁶⁶ In the absence of modifications, the initial agreement would remain binding.⁶⁷

Upon rehearing, the main issue before the Tennessee Supreme Court was what guidance to give Junior Davis and the clinic director, Dr. King, as to the final disposition of the frozen embryos.⁶⁸ The clinic's normal procedure was donation, the exact disposition Junior sought to avoid.⁶⁹ The court concluded that if the parties could agree, the frozen embryos should be donated for research purposes; if not, then the clinic was permitted to discard the frozen embryos.⁷⁰ The court granted Junior Davis' petition and remanded the specific issue to the trial court for an appropriate conforming order.⁷¹

The U.S. Supreme Court denied certiorari in this case.⁷²

62. *Id.* at 603–04.

63. *Id.* at 604.

64. *Id.* The court conceded, however, that the case would have been closer if Mary Sue were still seeking implantation. *Id.*

65. The court decided that even without the issue being raised, it was clearly important to address it so as to give guidance to the lower courts for future interpretations. *Id.* at 597.

66. *Id.*

67. *Id.* According to the Tennessee Supreme Court, the court of appeals had failed to provide a formula for a situation in which there is no initial agreement and no subsequent agreement; its ruling in effect gave Junior Davis an absolute veto, assuring the destruction of the frozen embryos due to their limited shelf-life. *Id.* at 598.

68. *Davis v. Davis*, No. 34, 1992 WL 341632, at *1 (Tenn. Nov. 23, 1992).

69. *Id.* at *1.

70. *Id.* at *2.

71. *Id.*

72. *Stowe v. Davis*, 507 U.S. 911 (1993). Mary Sue Davis (now Stowe) was the Petitioner.

B. Nahmani v. Nahmani

1. A Preliminary Note on Israel's Reproductive Culture

Israel is “unapologetically pro-natalist.”⁷³ All Israeli women,⁷⁴ no matter their sexual orientation or marital status, are afforded access to IVF for up to two children at little to no cost. In fact, IVF is included in Israel's National Health Plan, instituted in 1996,⁷⁵ and ART is one area of Israeli life in which religious and secular law and attitudes converge.⁷⁶ The high value placed on life leads to significant support for an individual's right to be a parent.⁷⁷ Indeed, the State's efforts over the last sixty years have transformed procreation from a “private life quest into a public works project.”⁷⁸

2. The Unique Case of *Nahmani v. Nahmani*

Ruth and Daniel Nahmani married in March 1984.⁷⁹ In 1987, Ruth underwent a necessary operation that resulted in infertility.⁸⁰ The following year, the couple decided to attempt IVF, implanting the fertilized ova in a surrogate mother. However, in the late 1980s, Israel's Public Health Regulations precluded the implantation of ova into one other than the intended mother of the child.⁸¹ To comply with Israeli regulations and to cut costs, the Nahmanis decided to conduct the fertilization in Israel and the surrogacy in the United

73. Waldman, *supra* note 27, at 68.

74. All citizens of Israel, whether Jewish, Arab, or other, have the same rights to state fertility treatments. *Id.* at 82; Kraft, *supra* note 1. This benefit also applies to both married and single women. Waldman, *supra* note 27, at 82. In fact, single parents receive a number of state subsidies to make child-rearing feasible. *Id.*

75. Waldman, *supra* note 27, at 82–83.

76. Kraft, *supra* note 1.

77. *See id.* (“There is even a growing pool of single religious women using *in-vitro* fertilization, the efforts sanctioned by rabbis.”). Unlike some countries, in Israel, single parenthood is not stigmatized. Instead, it is seen as a life choice consistent with the national procreation plan. *See Nahmani I*, [1995-6] IsrLR at 47–48 (“One parent-families are accepted in our society with understanding and even entitled to various forms of assistance.”). According to some scholars, this sanctification of child-bearing has multiple historical and cultural antecedents: the Jewish people's covenant with God, the pressure to replace the lost generation of the Holocaust, and concerns about the increasing rate of intermarriage. *Id.*; *see also infra* Parts I.B.2., II; Waldman, *supra* note 27, at 70–75 (discussing the effect of Israeli culture on access to reproductive technology).

78. Waldman, *supra* note 27, at 87.

79. *Nahmani I*, [1995-6] IsrLR at 8.

80. *Id.*

81. Public Health (In Vitro Fertilization) Regulations, 1987, KT 5035, 978 (Isr.), *reprinted in* 14 ANN. REV. POPULATION L. 347 (1987) [hereinafter Public Health Regs.].

States.⁸² However, in order to obtain the consent of the Israeli hospital, the Nahmanis had to petition the Israeli Supreme Court for permission to proceed with their plan, which the court granted in 1991.⁸³ The Nahmanis completed the fertilization procedure, but in 1992, before they could proceed with the surrogate arrangement, Daniel Nahmani left Ruth for another woman.⁸⁴ Ruth applied to Assuta Hospital for the release of the fertilized ova in order to continue with the surrogacy process.⁸⁵ Daniel opposed this action in writing, both to Assuta Hospital and to the American surrogacy clinic.⁸⁶ Ruth then filed an action in the Haifa district court⁸⁷ in order to obtain the ova's release and the non-interference of Daniel.⁸⁸ The trial judge, Justice H. Ariel, found in Ruth's favor, relying on contract law principles to hold that Daniel's consent at the beginning of the process included consent for all stages of IVF; once the process began, he could no longer revoke his consent.⁸⁹ The judge further asserted that Daniel could not rely on a "change in circumstances" argument as he was the one who instigated the change.⁹⁰

a. The First Hearing before the Supreme Court of Israel

Daniel appealed the ruling to the Supreme Court of Israel.⁹¹ Sitting as the court of appeals, a five-judge panel reversed the district

82. Surrogacy was not permitted in Israel at this time. *Nahmani I*, [1995-6] IsrLR at 8. At the time of the litigation central to this Comment, there existed only a financial agreement between the Nahmanis and the American surrogacy clinic that did not include contingencies. No surrogate had yet been chosen, though testimony suggested that the Nahmanis had seen an example of a surrogate agreement. *Id.*

83. HCJ 1237/91 [1991] (Isr.); *see also Nahmani I*, [1995-6] IsrLR at 8.

84. *Nahmani I*, [1995-6] IsrLR at 8. This woman was not part of any of the litigation between the Nahmanis, though she had children with Daniel. *Id.* In fact, the Nahmanis never legally separated or divorced. *Id.* at 8-9. The Haifa Rabbinical Court recommended reconciliation but it never happened. *Id.* at 9. Therefore, the Nahmanis continued to be married throughout the course of the litigation discussed here.

85. *Id.* at 9.

86. *Id.*

87. The text of this decision is unavailable. A summary of this opinion is found in *Nahmani I*.

88. *Nahmani I*, [1995-6] IsrLR at 9.

89. *Id.* The court analogized the Nahmani situation to abortion cases: the husband does not have the right to prevent an abortion or force pregnancy on a woman, so Daniel should not have the right to stop the IVF/surrogacy procedure once the ova had been fertilized. *Id.* at 17. The court also worried that if the husband always won in these cases, he would have a trump card in marriage and in dissolution proceedings, a powerful veto on the rights of his wife. *Id.* at 9.

90. *Id.*

91. *Id.* at 9.

court's ruling by a 4-1 margin.⁹² The majority, led by Justice Strasberg-Cohen, framed the issue as whether a woman has the right to take possession of ova that were removed from her body and that were artificially inseminated with the sperm of her husband for the purpose of implanting them in a surrogate mother, when the husband opposes the procedure.⁹³ The court's analysis is focused on balancing the rights of the parties and the enforceability (or unenforceability) of the couple's agreement to pursue IVF and surrogacy. Though acknowledging that Ruth's right to be a parent is a basic right, the court observed that this right did not include an obligation on Daniel to help realize that right (i.e., "no forced parenthood").⁹⁴ Applying the fundamental Israeli legal principle of equality of the sexes, the majority concluded that the legal enforcement of unwanted parenthood would be improper and in violation of Daniel's procreational autonomy, not to mention void as against public policy.⁹⁵ On contractual grounds, the majority concluded that Daniel's "consent" amounted merely to an unenforceable "weak" agreement that did not imply consent to a continuation of the procedure in case of separation.⁹⁶ The majority also rejected the district court's interpretation of Daniel's consent and its reading of the Public Health Regulations as having gone too far.⁹⁷

Out of sympathy for Ruth's situation,⁹⁸ the majority also took the time to address—though it eventually dismissed—several additional claims outside the scope of its primary holdings: estoppel, difficulties of IVF procedure, alternative possibilities for motherhood, "status" of fertilized ova, and "best interests of the child."⁹⁹ The majority dismissed the first argument on the grounds that there was no promise or representation upon which Ruth could rely, and that initial consent to the procedure does not equal consent to the procedure's

92. *Id.* at 49.

93. *Id.* at 5.

94. *Id.* at 19. For the majority, the rights to be a parent and not to be parent were (as in *Davis*) two sides of the same coin, two constitutional rights derived from the right to freedom and self-fulfillment. *Id.* at 16.

95. *Id.* at 18 ("The imposition of parenthood is contrary to 'public policy' and proper legal policy, in that it is inconsistent with the basic values protected by our legal system."). The court also held that irrevocable consent to being a parent amounts to a full and eternal waiver of the right not to be a parent, thus constituting a waiver of a basic right. *Id.* at 19.

96. *Nahmani I*, [1995-6] IsrLR at 29–30.

97. *Id.* at 22–23.

98. *Id.* at 48.

99. *Id.* at 41–48.

continuation/completion even in the case of separation.¹⁰⁰ Strasberg-Cohen dismissed the next two claims as unavailable because Ruth did not have the right to impose the duty of parenthood on Daniel.¹⁰¹ Regarding “status,” the majority concluded that Jewish, Israeli, and Western law all pointed toward the lack of an independent right to life for the ova; thus, neither the “parents” nor the State have a duty to continue the procedure.¹⁰² Lastly, the majority concluded that the “best interests of the child” standard would not preclude relief in this case, were relief available.¹⁰³

By contrast, the sole dissenting opinion began with a declaration that no legal norm existed that would be applicable to the present situation and the enforcement of the obligations at issue.¹⁰⁴ Overcoming that objection,¹⁰⁵ Justice Tal responded point by point to Justice Strasberg-Cohen. For Justice Tal, the heart of the issue was the enforcement of obligations derived specifically from fatherhood rather than the general enforcement of parenthood.¹⁰⁶ Similar to the majority, Justice Tal then proceeded to discuss the balance of rights and even agreed that the right to non-parenthood was a basic right.¹⁰⁷ He also agreed that, in an ideal situation, there would be joint and continuing consent, with the parties knowing *ab initio* the consequence of their consent.¹⁰⁸ However, Justice Tal also observed that not only was this a unique case,¹⁰⁹ but that Daniel’s right to non-parenthood was *not* absolute. In fact, for Justice Tal, the debate was

100. *Id.* at 41–42. As Strasberg-Cohen noted, estoppel cannot magically override contract law, general law, and public policy. *Id.*

101. *Id.* at 43–44.

102. *Id.* at 44–46.

103. *Id.* at 47–48. The majority opinion reasoned that were relief otherwise available, the resultant child would have two parents who were married at the time of creation. *Id.* Furthermore, the court noted that one-parent families were relatively common in Israel, and not ostracized. *Id.*

104. *Id.* at 50 (Tal, J., dissenting) (“[T]here is not always only one legal solution . . . where there is such a competition, we should, in my opinion, prefer the solution that appears to be more just.”).

105. *Id.* at 49–50 (“But society has no tools for making decisions and enforcing them in the moral and social sphere, so it leaves the problem for the court to solve.”). On rehearing, Justice Tal addressed the lack of a governing legal principle in his discussion of how a court can “develop the law.” *Nahmani II*, [1995-6] IsrLR at 357–58 (Tal, J.).

106. *Nahmani I*, [1995-6] IsrLR at 52 (Tal, J., dissenting) (“In other words, is it proper to allow the biological procedure to continue, when at the end of it, if it is successful, it will impose an emotional burden and financial obligations on [Daniel], against his will.”).

107. *Id.* at 50.

108. *Id.* at 62.

109. *Id.*

between the “two evils” of forced parenthood (an inconvenience) and infertility (violation of a basic, fundamental right).¹¹⁰ According to Justice Tal, while both decisions will result in one of these two evils, infertility denies the woman her fundamental right to be a parent and thus trumps any right belonging to the husband.¹¹¹ In terms of consent, Justice Tal relied heavily on the doctrine of promissory estoppel and returned to the trial court’s argument that the original consent was sufficient to act as consent to the final goal (having a child).¹¹² Ruth relied on Daniel’s original consent, and based on this consent she irrevocably changed her situation by undergoing the procedure and using her husband’s sperm to fertilize the eggs.¹¹³ Again agreeing with the district court judge, Justice Tal concluded that Daniel was estopped both from objecting to the continuation of the procedure and to arguing a “change in circumstances.”¹¹⁴ Furthermore, since the Nahmanis were still married, Justice Tal thought that the court should have been concerned with compelling Daniel to carry out his moral obligations to Ruth under Jewish law.¹¹⁵

b. The Supreme Court of Israel Rehears *Nahmani*

Ruth Nahmani petitioned the court for rehearing. Because of the novelty of the case, the Israeli Supreme Court granted the rehearing and assigned it to an unprecedented eleven-judge panel.¹¹⁶ By a 7-4 majority, the court reversed its previous opinion and granted the

110. *Id.* at 53.

111. *Id.*

112. *Id.* at 56–57.

113. *Id.* at 54.

114. *Id.* at 57 (“[S]omeone who effects a change cannot argue that he is entitled to benefit of the change that he himself made, to the detriment of the other party.”).

115. *Id.* at 60.

116. Dalia Dorner, *Human Reproduction: Reflections on the Nahmani Case*, 35 TEX. INT’L L.J. 1, 2 (2000). In fact, the *Nahmani* case marked the first time that the Israeli Court granted a second hearing on a case previously heard by a panel of more than three judges. Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and its Impact on Israeli In Vitro Fertilization Law*, 7 CARDOZO J. INT’L & COMP. L. 325, 335 (1999). At the time the case was re-opened, both Daniel and Ruth Nahmani spoke to the press, Ruth expressing hope that she could still have a child, and Daniel expressing disappointment as a citizen of a democratic country. Naomi Segal, *Israeli Supreme Court Reconsiders the Fate of Frozen Embryos*, JWEEKLY.COM (Sept. 15, 1995), <http://www.jweekly.com/article/full/1591/israeli-supreme-court-reconsiders-the-fate-of-frozen-embryos/>.

fertilized ova to Ruth.¹¹⁷ Reflecting the complicated and novel nature of the subject matter, all eleven justices chose to write an opinion.¹¹⁸

The new seven-judge majority now held that an individual's interest in refusing parenthood could not be of primary concern because the absence of parenthood lacks inherent value.¹¹⁹ Despite some sympathy for Daniel, the court felt that Ruth's right to realize parenthood took precedence.¹²⁰ The majority relied on a number of arguments, many of which were previously addressed by Justice Tal in the first hearing: promissory estoppel, Jewish heritage, the weight of ethical justice in favor of granting parenthood, the primacy of the wish to create life, and the balance of "evils" (infertility vs. financial obligations).¹²¹ By contrast, the dissent, led by Justice Strasberg-Cohen, focused on the contract law elements of the case: (1) the scope of consent and its revocability; and (2) the validity of a partially-implemented agreement between the couple.¹²² The dissent argued that the situation did not meet the requirements for promissory estoppel, and that while there was an agreement, the consent lasted only as long as the family unit was intact.¹²³ Moreover, Israeli regulations¹²⁴ and public policy dictated that there be continuing mutual consent of both spouses at every stage of the IVF procedure.¹²⁵

No subsequent jurisprudence exists on this issue in the Israeli Supreme Court.

117. *Nahmani II*, [1995-6] IsrLR at 321–23. Majority opinions: Justices Tal, Dornier, Goldberg, Kedmi, Türkel, and Bach. Minority opinions: Justices Strasberg-Cohen, Or, and Zamir. President Barak joined the minority opinion.

118. For the sake of brevity, a short summary of the main points is inserted here. Details of the various justices' opinions will appear throughout the analysis section of this Comment. See *infra* Part II.

119. *Nahmani II*, [1995-6] IsrLR at 359 (Tal, J.).

120. See generally *Nahmani II*, [1995-6] IsrLR at 355–444.

121. *Id.*

122. *Id.* at 327–55 (Strasberg-Cohen, J., dissenting); *id.* at 444–58 (Or, J., dissenting); *id.* at 458–82 (Zamir, J., dissenting); *id.* at 483–88 (Barak, President, dissenting).

123. See, e.g., *Nahmani II*, [1995-6] IsrLR at 342–43 (Strasberg-Cohen, J., dissenting); *Nahmani II*, [1995-6] IsrLR at 456–57 (Or, J., dissenting).

124. See Public Health Regs., *supra* note 81.

125. *Nahmani II*, [1995-6] IsrLR at 346–47 (Strasberg-Cohen, J., dissenting).

II. *DAVIS* AND *NAHMANI*: RIGHTS, CONTRACTS, AND THE POTENTIAL FOR INTERNATIONAL AGREEMENT

In an ideal world, couples would make written provision for any and all contingencies regarding the disposition of frozen embryos before commencing the IVF process. In case of separation or divorce, this written agreement would ideally help avoid many of the issues the courts see today. The extent of any consent would have been stipulated at the beginning, and the terms would define whether the initial consent of both parties refers to the entire procedure through implantation or is merely a renewable and revocable type of consent to be determined at each stage of the process.

However, as duly noted by many of the justices on the Israeli Supreme Court and by the Supreme Court of Tennessee, this is not an ideal world. Both the Davises and the Nahmanis failed to present a concrete contractual claim because neither couple signed an agreement with their respective fertility or surrogacy clinics, and clearly the couples could not agree on whether even an oral agreement existed between spouses.¹²⁶ The contractual element thus spawned in the courts a multi-faceted discussion of implied consent, clarity of intent, and the legitimate expectations of the parties. Additionally, in the absence of an agreement and in the absence of a clear precedential deference to principles of contract law, both courts addressed at length the competing rights of the parties.¹²⁷

The extensive discussions of both courts provide a one-stop shop for international negotiators seeking a comprehensive summary of the principal arguments and points of dispute in the debate over frozen embryo disposition in case of divorce. Both *Nahmani* and *Davis* address the two principal elements of the debate—rights and contracts—from a variety of angles. Combining the most practical of their findings would create the foundation for a successful national/international framework. Though both courts preferred that the state/judiciary stay out of such intimate family issues, they also realized that non-involvement was impractical and actually impossible in situations of such intense disagreement. In view of the State's interest in the health and welfare of its citizens, the State should encourage the execution of agreements that provide for the

126. *Davis v. Davis*, 842 S.W.2d 588, 590, 598 (Tenn. 1992); *Nahmani I*, [1995-6] IsrLR at 8.

127. *See infra* Part II.A.

disposition of pre-embryos in the case of separation or divorce and promote the creation of uniform standards to aid couples in the decision-making process. Such agreements should bear a presumption of validity and enforceability and be modifiable by mutual consent.¹²⁸ In the absence of prior agreement, implantation should be allowed within a medically reasonable time (limiting the amount of time the embryos can be preserved), so long as the party desiring implantation has no alternative means of achieving parenthood (genetic or adoptive)¹²⁹ and agrees to take full legal responsibility for any resultant child.¹³⁰

A. *The Rights Debate*

A major compromise that the international community could make in favor of efficiency and clarity would be to eschew the interest or rights-balancing test where an agreement exists between the parties. The balance of rights discussion is more an ideological/philosophical issue rather than a practical issue: while the American justice system provokes a more constitution-based discussion on the issue of rights,¹³¹ the Israeli justices in *Nahmani* freely roamed the question's existential limits.¹³² At a minimum, the adoption of a presumption of contractual enforceability, presented as a natural outgrowth of the existing jurisprudence, might encourage other countries to agree to an expansion of the existing framework for the protection of individuals' family planning rights.¹³³

128. See *Davis*, 842 S.W.2d at 597.

129. See *supra* note 20 and accompanying text.

130. Another viable proposal takes into account the potential reconciliation of the parties. Should the disputing parties reconcile after the birth of the resultant child, the party who opposed implantation should be required to adopt the child in order to secure legal parenthood. In cases where there is no such reconciliation or adoption, the child born of the disputed embryo will not be allowed to inherit from their "biological" non-consenting parent, just as they cannot from a sperm or egg donor, nor will the "biological" parent retain any legal responsibility in the case of the death or incapacity of the child's legal parent.

131. See *Davis*, 842 S.W.2d at 598–603. This is not surprising given the supremacy of the U.S. Constitution and the Bill of Rights in the United States. See U.S. CONST. art. VI, cl. 2. By contrast, Israel relies on a series of Basic Laws in lieu of a written constitution. The first Basic Law was enacted in 1958. Basic Law: The Knesset, 5718-1958 SH No. 244 (Isr.). The most recent Basic Law was enacted in 2001. Basic Law: The Government, 5761-2001 SH No. 1780 (Isr.). The full text of the Basic Laws is available at the Knesset's website: http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm (last visited May 22, 2013).

132. See, e.g., *Nahmani II*, [1995-6] IsrLR at 355–73 (Tal, J.); *Nahmani II*, [1995-6] IsrLR at 424–44 (Mazza, J.).

133. See *supra* notes 5, 7–8 and accompanying text.

Unlike the *Nahmani II* court, the *Davis* court did not consider itself faced with a normative vacuum in approaching this case of first impression. While not explicitly found in either the Federal or Tennessee Constitution, the Tennessee Supreme Court declared that there is little argument that the right to privacy is grounded in the concept of liberty featured in those documents, specifically in the Fourteenth Amendment.¹³⁴ After finding that the right of privacy was also guaranteed under and protected by the liberty clauses of the Tennessee Declaration of Rights,¹³⁵ the *Davis* court proceeded to hold that the right of procreation was a vital part of an individual's right to privacy.¹³⁶ To support its reasoning, the court looked to the U.S. Supreme Court's decision in *Skinner v. Oklahoma*,¹³⁷ which found the right to procreate to be "one of the basic civil rights of man."¹³⁸ The *Davis* court concluded that the right of procreational autonomy, no matter its ultimate constitutional boundaries, "is composed of two rights of equal significance – the right to procreate and the right to avoid procreation."¹³⁹ Finding procreational autonomy consistent with Tennessee public policy and federal judicial precedent, the *Davis* court applied a balancing test that not only recognized Junior and Mary Sue as equivalent gamete-providers, but that also gave equal weight to the right to procreate and the right not to procreate.¹⁴⁰

What eventually tipped the balance for the *Davis* court was the burden of unwanted/forced parenthood on Junior.¹⁴¹ Donation of the pre-embryos, as Mary Sue requested, would, according to the court, rob Junior twice: not only would his procreational autonomy be defeated, any relationship with his offspring would be prohibited.¹⁴² He also would suffer the psychological consequences of knowing a child was out there, possibly born to a couple that would later

134. *Davis*, 842 S.W.2d at 598–99. The *Davis* court also cited Justice Brandeis' opinion in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), regarding the right to privacy as being "against the [power of] government, the right to be let alone – the most comprehensive of rights and the most valued by civilized men." *Id.* at 599.

135. *Davis*, 842 S.W.2d at 600.

136. *Id.*

137. 316 U.S. 535 (1942).

138. *Davis*, 842 S.W.2d at 600.

139. *Id.* at 601.

140. *Id.*

141. *Id.* at 604.

142. *Id.*

divorce.¹⁴³ The court did allow that the result of the balancing test would have been closer if Mary Sue still sought to use the pre-embryos herself, but only if she could not achieve parenthood by any other reasonable means (including adoption).¹⁴⁴

However, perhaps the most lasting legacy of the *Davis* court's decision is in fact the framework it laid out for future courts.¹⁴⁵ Taking its own advice and applying it to the facts of *Davis*, the Tennessee Supreme Court ordered that in the absence of an agreement between the former spouses, the clinic at which the pre-embryos were stored should be allowed to follow its normal procedures for the disposal of surplus or unwanted pre-embryos unless conflicting with the opinion in this case.¹⁴⁶

In both *Nahmani* hearings, the Israeli justices recognized the value of *Davis* and Western legal tradition as a guide to how to proceed in this situation, but the final *Nahmani II* majority skewed the balancing test in favor of Ruth from the very beginning, thereby undermining the same premise of equality espoused by the *Davis* and *Nahmani I* courts. Both sides in the *Nahmani* case, recognizing that it was truly a situation without precedent and lacking in legislative guidance, took a subjective view of justice and relied on rights-based arguments and various combinations of contract principles to make their arguments. The result was that the *Nahmani II* majority opinions have a tendency to focus on the search for the “just” result, whereas the minority opinions seek to find some justification (or at least a useful interpretation) in the existing law.¹⁴⁷

In *Nahmani I*, Justice Tal set out what would become the majority view on rehearing.¹⁴⁸ He focused on the non-absolute nature of the negative right (the right to non-parenthood).¹⁴⁹ He argued that Daniel's right could be “overridden by the liberty, dignity, privacy and autonomy of others.”¹⁵⁰ Tal regarded the “balance of evils” as

143. *Id.*

144. *Id.*

145. *Id.*; see also *supra* Part I.A.

146. *Davis*, 842 S.W.2d at 604–05.

147. See, e.g., *Nahmani II*, [1995-6] IsrLR at 376 (Dorner, J.) (“Indeed, not every moral duty is a duty in law. But the law must lead to a just result.”); *id.* at 329 (Strasberg-Cohen, J., dissenting) (“[W]e are not operating in a vacuum. We have at our disposal the rich world of existing law with all its branches that affect the issue under discussion.”).

148. *Nahmani I*, [1995-6] IsrLR at 49–62 (Tal, J., dissenting).

149. *Id.* at 50.

150. *Id.*

between the inconvenience of forced parenthood and infertility (aka the violation of a basic, fundamental right).¹⁵¹ For Tal, the sequence was clear: Daniel agreed to the procedure; Daniel changed his mind; ergo, Ruth's rights trump Daniel's.¹⁵²

Though the *Davis* court's opinion was readily available and indeed cited by the justices in the first and second hearings, the *Nahmani II* majority failed to see symmetry between the rights of being a parent and not being a parent.¹⁵³ For the *Nahmani II* court, the balance of rights discussion turned on human rights and ethics and not so much on individual liberty. Reasoning that the force of a yearning for a child is the most intense, the majority considered the ethical weight of the right to be a parent as being "immeasurably greater than" the weight of the right not to be a parent.¹⁵⁴ Moreover, the right to be a parent should be recognized alongside the right to life as an independent basic human right.¹⁵⁵ However, even Justice Tal conceded that existing authorities lacked clarity on this issue.¹⁵⁶ Undeterred, Justice Tal and the majority justices concluded that the right to be a parent should not be viewed simply as a derivative of the autonomy of the will, but as part of the basic right to life sanctified in Jewish history and in the history of mankind in general.¹⁵⁷ In view of the intensity of the implicated emotions, the ethical weight of the right to be a parent trumps the right not to be a parent,¹⁵⁸ or, as Justice Türkel concluded, the mere life potential of the fertilized ova immediately tipped the balance of rights in favor of Ruth.¹⁵⁹

151. *Id.* at 53.

152. *Id.*

153. *Nahmani II*, [1995-6] IsrLR at 359 (Tal, J.).

154. *Id.* at 408 (Türkel, J.).

155. *Id.*

156. *See, e.g., Nahmani I*, [1995-6] IsrLR at 61 (Tal, J., dissenting). Under Jewish law, the husband has a duty to give his wife a child if she wants one. *Id.* at 58. In the present case, although the difficulty of procreation originated with Ruth, Tal notes that Daniel knew of this difficulty, and therefore his consent again becomes an absolute moral obligation. *Id.* at 60.

157. *Nahmani II*, [1995-6] IsrLR at 407-08 (Türkel, J.).

158. *Id.*

159. *Id.* at 409. Justice Bach shared Türkel's preference for the position of the person who wishes to grant life and bring a living being into the world; even if the scales of justice were balanced here, "just this thought would tip the scales." *Nahmani II*, [1995-6] at 423 (Bach, J.). Despite Türkel's bold statement of "I choose life," there can be agreement on the "point of no return," or the moment where the wife's control over her body and the embryos becomes absolutely paramount: implantation. *Id.* at 344 (Strasberg-Cohen, J., dissenting). Justice Kedmi notes that the balance is already shifting towards continuation and

The *Nahmani II* majority's acknowledgment of *Davis* while arriving at the opposite result is particularly marked in those majority opinions, most notably that of Justice Dorner,¹⁶⁰ which took a more practical and straightforward approach to the rights issue. Dorner and her colleagues first asked themselves whether the husband's right not to be a parent, based on his 'ownership' of half of the genetic material of the ova fertilized with his sperm, really takes precedence over the right of Ruth, who also contributed half of the genetic material of these ova, to be a parent.¹⁶¹ Second, they asked themselves what effect the equality of the sexes had on the relationship of the parties to the fertilized ova.¹⁶² For Justice Dorner, equality of the sexes meant that Daniel and Ruth had equal status with regard to their relationship to the fertilized ova and that there was no reason to make a sex-based distinction with regard to the yearning for parenthood.¹⁶³ Dorner's balancing test incorporated the following factors: the current stage of the procedure (the more advanced, the greater the weight of the right to be a parent), the representations made by the parties, the expectations thus raised and

preservation once fertilization has occurred, but even he agrees that the parties have a joint right and double consent prior to implantation. *Id.* at 403–04 (Kedmi, J.). It is also notable that no regional or international convention has granted an absolute right to life to a fetus, even a viable one. *See Rhonda Copelon et al., Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS 120, 120–26 (2005) (highlighting approaches to a “right to life” across multiple international and regional agreements). Therefore, one can easily see grounds for an international consensus that frozen embryos, which have not even developed into fetuses, do not have an independent absolute right to life.

160. An interesting opinion that combines elements of Justices Tal and Dorner's approaches while presenting a unique take is that of Justice Goldberg. *Nahmani II*, [1995-6] IsrLR at 388–402 (Goldberg, J.). Justice Goldberg's conditional decision in favor of Ruth is a rational compromise. While concurring in the result, Goldberg found that both rights in play derive from the values protected by Israel's Basic Law: Human Dignity and Liberty and are in fact in stalemate. *Id.* at 390. Goldberg notes that even the ubiquitous “reasonable man” cannot help. *Id.* at 393. Goldberg reverts instead to the “lesser-of-two-evils” method to find the just solution. Both infertility and coerced parenthood involve emotional harm. Daniel's duties, mainly economic, may be mitigated by indemnification. Goldberg also adopted the reliance argument and the possibilities of alternative motherhood as factors. As a married woman, Ruth cannot freeze an ovum fertilized with the sperm of someone not her husband, and in any case she can no longer physiologically undergo another procedure. *Id.* at 400–02.

161. *Nahmani II*, [1995-6] IsrLR at 376 (Dorner, J.).

162. *Id.* at 382.

163. *Id.* By contrast, Strasberg-Cohen declared that it was by principle of equality that the court should *refrain* from imposing parenthood. *Nahmani I*, [1995-6] IsrLR at 18 (Strasberg-Cohen, J.). Both positions stem from an equally appropriate premise. The special status and the lifelong implications of parenthood lead not to the presumption in favor of the implanting spouse, but to equality of both spouses and the idea that parenthood should not be forced on an unwilling party.

any reliance (application of classic estoppel), and the alternatives that exist for realizing the right of parenthood.¹⁶⁴ Therefore, even though the Nahmanis, like the Davises, were equivalent gamete-providers, their rights were not equal, and Justice Dorner concluded that the factors tipped in favor of Ruth.¹⁶⁵

However, Justice Strasberg-Cohen (now in the minority), adhering to the *Davis* court's analysis, observed that the right to be a parent, while a basic right, did not impose an obligation on one's spouse to help realize that right.¹⁶⁶ She agreed with Daniel Nahmani and Junior Davis that parenthood should not be coerced by the legal system and that the procedure was based on joint parenthood.¹⁶⁷ Strasberg-Cohen also agreed with Justice Tal and the *Davis* court that the right to parenthood is not only derived from the right to individual autonomy, freedom, and dignity—also enshrined in the 1992 Basic Law: Human Dignity and Liberty¹⁶⁸—but is also a “basic human right to which every person is entitled.”¹⁶⁹ However, analogizing from a different area of the reproductive rights debate, she reasoned that, “just as a husband cannot oppose abortion by his wife, so a wife

164. *Nahmani II*, [1995-6] IsrLR at 385 (Dorner, J.). Justice Mazza classifies the competing rights in *Nahmani* as a fundamental/general right (the right to be a parent) vs. a specific right (the right not to be a parent of these specific ova). *Id.* at 424–26 (Mazza, J.). The restrictions that the two parties want to impose are also classifiable, a quasi-general restriction on Ruth (probable infertility or inaccessible parenthood) and a specific limitation on Daniel (the imposition of unwanted parenthood of these specific ova). *Id.* at 439. Justice Mazza points out, however, that while both restrictions are serious, they are not equal. *Id.* Not only is a quasi-general restriction more serious than a specific restriction, but Ruth's right is stronger, and the restriction on Daniel is less violative of his rights. *Id.* at 441. However, Mazza qualifies his preference for Ruth much as Justice Goldberg does, preferring a conditional grant subject to no financial demands on Daniel. Mazza argues that, should Ruth turn to Daniel with financial demands, it would put into doubt her good faith. *Id.* at 443–44.

165. *Id.* at 388 (Dorner, J.).

166. *Id.* at 333–36, 354 (Strasberg-Cohen, J., dissenting).

167. *Id.* at 333. The Attorney-General, in his opinion, argued that forced parenthood was contrary to public policy, legal policy, principles of equality between the sexes, and individual rights. *Nahmani I*, [1995-6] IsrLR at 10 (Strasberg-Cohen, J.). Justice Strasberg-Cohan also notes that “[t]he desire to minimize State intervention in relationships within the family unit, whether directly or through the legal system, emphasizes the right of autonomy of this unit, which is protected against intervention both in the relationship between the family unit and the State and in the relationship between the members of the family unit *inter se*.” *Id.* at 16.

168. Basic Law: Human Dignity and Liberty, 5752-1992 SH No. 1391 (Isr.).

169. *Nahmani I*, [1995-6] IsrLR at 14 (Strasberg-Cohen, J.) (quoting CA 451/88 A v. State of Israel 44(1) IsrSC 330, 337 [1990] (Isr.)).

cannot oppose her husband's demand to stop the fertilization proceedings."¹⁷⁰

Interestingly, the *Nahmani II* majority, while prioritizing the biological link on behalf of Ruth, often ignored the biological/emotional implications of unwanted parenthood for Daniel, choosing instead to merely note the financial and property implications of parenthood. By contrast, Justice Strasberg-Cohen believed that coercion exists even if the resultant child would have no relationship with Daniel.¹⁷¹ President Barak also noted this crucial detail in his opinion:

Ruth Nahmani is not merely asking to be a mother. Ruth Nahmani is asking to be the mother of the child of Daniel Nahmani . . . while Ruth does have a constitutional liberty to be a mother, she does not have an automatic constitutional right to be a mother to the child of Daniel Nahmani.¹⁷²

This is in stark contrast to the view of the majority, which believed that while the right to parenthood implicated the basic civil rights of man,¹⁷³ the right to non-parenthood contained no inherent value.¹⁷⁴ In fact, citing the Bible, Justice Tal asserted that taking away parenthood is akin to taking away one's life.¹⁷⁵ Squeezing the reasoning of *Davis* in support of his point, Tal argued that denying the interest of non-parenthood imposes undesirable burdens that are not the equivalent of taking a life.¹⁷⁶ However, the *Nahmani II* majority harps on "justice" to a fault, losing the principle of equality of the sexes that multiple justices list as paramount in the law.¹⁷⁷

170. *Id.* at 17.

171. *Id.* at 18 ("The coercion exists even if the desired child grows up with the mother without any relationship with the father who will live in another family unit, since the bond of parenthood cannot be severed.")

172. *Nahmani II*, [1995-6] IsrLR at 483-84 (Barak, President, dissenting).

173. *Id.* at 359 (Tal, J.) (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

174. *Id.*

175. *Id.* at 361.

176. *Id.* at 361-62.

177. In view of the sheer number of opinions, Justice Dorner suggested the following categorical division among the justices: 1) an absolute preference for the spouse who does not want to be a parent (Justice Strasberg-Cohen in both *Nahmani* cases); 2) absolute preference in all circumstances for the right to parenthood (Justice Kedmi in *Nahmani II*); and 3) justice as a balance of the rights of the specific parties (Justice Tal, in both *Nahmani* cases). *Id.* at 382-84 (Dorner, J.). In her later article on the *Nahmani* case, Justice Dorner

In order to forge a solid basis for expanding the existing family planning international law framework,¹⁷⁸ it is necessary to apply a narrowest grounds/broadest compromise approach to the dozen opinions involved here. The most practical framework would combine the idea of two equal rights¹⁷⁹ with the application of a balancing test in the absence of agreement.¹⁸⁰ The balancing test, slightly weighted toward the party desiring implantation, should include the following caveats: that the party desiring parenthood make no financial demands on the other party¹⁸¹ and/or it is the pro-implantation party's final shot at genetic or adoptive parenthood.¹⁸²

B. IVF Consent Agreements: Enforceable?

Ideally, decisions as to the disposition of frozen embryos would be made by both spouses and with the consent of both. However, in the absence of consent, the spouse wishing to continue with implantation should be allowed to do so, with caveats. Everyone can agree that when spouses originally agree to any assisted reproductive procedure, their agreement is based on the foundation of a functioning married life and a joint future that includes the birth of a child desired by both spouses.¹⁸³ Difficulties arise when the family unit and thus the main consent collapses, either through separation or divorce, before the joint goal is achieved. In these cases, such as *Nahmani*, a disposition agreement should already exist between the parties or uniform guidelines should dictate the presumptions in the absence of agreement. Informed consent requires an "awareness of the circumstances in which the consent will operate."¹⁸⁴ By its very nature, the IVF process embodies the consent of both spouses;

addressed the multiplicity of approaches to justice advocated by members of the *Nahmani II* majority: (1) an absolute approach to justice (espoused by Justices Kedmi and Türkel); (2) justice as that which does the least harm (Justices Goldberg and Mazza); and (3) justice as a balance of the "rights and circumstances of each side" (Justices Tal, Dorner, and Bach). Dorner, *supra* note 116, at 5–6.

178. See *supra* notes 5, 7–8 and accompanying text.

179. See *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992). For a thorough discussion of this idea, see the opinions of Justice Strasburg-Cohen in *Nahmani I* and *Nahmani II*.

180. See *Davis*, 842 S.W.2d at 603–04; *Nahmani II*, [1995-6] IsrLR at 355–73 (Tal, J.); *id.* at 373–88 (Dorner, J.).

181. *Nahmani II*, [1995-6] IsrLR at 401 (Goldberg, J.); *id.* at 443–44 (Mazza, J.).

182. See *Davis*, 842 S.W.2d at 604; *Nahmani II*, [1995-6] IsrLR at 361 (Tal, J.). Adoption is certainly a viable option, but it is rarely addressed by the courts.

183. *Nahmani II*, [1995-6] IsrLR at 337–43 (Strasberg-Cohen, J., dissenting).

184. *Id.* at 341.

without it, there is no possibility of beginning the fertilization procedure.¹⁸⁵

Despite the lack of an agreement in the *Davis* case,¹⁸⁶ the Tennessee Supreme Court made a point of addressing the issue of cryopreservation/IVF agreements, recognizing that the situation in *Davis* (no disposition agreement) would be an outlier in the future.¹⁸⁷ The court clearly understood the unique situation it faced: no initial agreement, no agreement since, and no formula from the court of appeals as to what to do if the parties cannot reach an agreement in the future.¹⁸⁸ For the *Davis* court, “establishing the locus of the decision-making authority in this context is crucial to deciding whether the parties could have made a valid contingency agreement prior to undergoing the IVF procedures and whether such an agreement would now be enforceable.”¹⁸⁹ Dismissing both an implied contract and a one-party veto theory as the basis for its analysis, the court declared that frozen embryo disposition agreements should be “presumed valid and should be enforced as between the progenitors.”¹⁹⁰ However, the court also recognized that “life is not static.”¹⁹¹ It therefore adjusted its rule to allow for mutually agreed-upon modifications that the court reasoned would protect the parties against some of the inherent risks of such agreements.¹⁹² However, in the absence of such an agreement, the court was clear that prior agreements should be considered binding.¹⁹³ This presumption of enforceability, with room for mutual modification, would become

185. *Id.* at 337.

186. *Davis*, 842 S.W.2d at 598. Additionally, the Davises “were not asked to sign any consent forms. Apparently the clinic was in the process of moving its location when the Davises underwent this last round and, because timing of each step of IVF is crucial, it was impossible to postpone the procedure until the appropriate forms were located.” *Id.* at 592 n.9. Unlike the majority and minority opinions of the *Nahmani II* court, the *Davis* court found no agreement between the Davises. *Id.* at 598.

187. *Id.* at 597. Despite the court’s reluctance “to treat a question not strictly necessary to the result in the case,” it concluded such discussion was necessary for the future guidance of all parties to IVF procedures in Tennessee. *Id.*

188. *Id.* at 598.

189. *Id.* at 597.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Davis' primary legacy, cited and utilized by later courts (including *Nahmani*).¹⁹⁴

A presumption of enforceability is desirable for reasons ranging from clinical efficiency to the minimization of misunderstandings and the maximization of procreative liberty. First, the embryo inhabits a legal gray area between property and person, the ambiguity of which supports the need for an unambiguous contract.¹⁹⁵ This status also helps to overcome the concerns of some courts of becoming too involved in what they consider "intimate questions inherent in the marriage relationship."¹⁹⁶ Second, the disposition agreements in question do not exist between the spouses but between the couple and the IVF clinic. The New Jersey Supreme Court, in observing that IVF is a widely-used procedure, recognized that there is a definite need for agreements between the participants and the clinics.¹⁹⁷ Such an agreement is therefore analogous to a business transaction, an area in which explicit agreements are encouraged, contingencies explored, and intentions spelled out in writing in order to avoid costly litigation down the road.¹⁹⁸ The New York Court of Appeals also noted the use of advance directives in healthcare that "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."¹⁹⁹ The court went on to assert that written agreements provide a necessary certainty in the "effective operation of IVF programs."²⁰⁰ Lastly, the freedom to contract is a well-established principle that supports the presumptive enforceability of embryo disposition agreements.

C. *Consent and Estoppel*

In establishing an international framework premised on the enforceability of agreements between spouses as to the disposition of frozen embryos, countries should follow *Davis* and the *Nahmani II*

194. *Nahmani I*, [1995-6] IsrLR at 21 (Strasberg-Cohen, J.); see also *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1055-57 (Mass. 2000); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

195. See *Davis*, 842 S.W.2d at 594-97. The court concluded that the pre-embryos in question occupied an "interim category that entitles them to special respect because of their potential for human life." *Id.* at 597.

196. See, e.g., *A.Z.*, 725 N.E.2d at 158.

197. *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

198. See *Kass*, 696 N.E.2d at 180.

199. *Id.*

200. *Id.*

minority to avoid the emotional pitfalls of promissory or classic estoppel.²⁰¹ The words “promise” and “representation” simply do not fit well with the special circumstances of spousal separation and embryo disposition. Furthermore, even if the grounds for estoppel were proven, the principal remedy is reliance damages, not the enforcement of an agreement.²⁰² For the sake of consistency, an international framework should simply rely on the enforceability of the agreement, with the caveats already noted above for last-chance parenthood and mutual modification.

Moreover, estoppel cannot replace consent, which is the true crux of the dispute and which goes back to the intentions of the parties.²⁰³ In fact, it is probably safe to assume that in most cases couples would believe that consent to IVF when the couple is together does not include consent to its continuation in case of separation. In Ruth’s case, she underwent the process in spite of the risks of the procedure, and likely would not have been daunted by the risk of a separation and refusal that did not exist at the time.²⁰⁴ In fact, as Justices Or and Zamir argued, there was no evidence in the record to show that the Nahmanis had ever considered the question of continuation of the procedure in case of separation.²⁰⁵ In sum, there was no representation upon which Ruth could rely.²⁰⁶ Lastly, the minority in *Nahmani II* noted that the Israeli Public Health Regulations²⁰⁷ and the recently enacted Surrogacy Law²⁰⁸ required continuing mutual consent for most medical procedures. Even Justice

201. By contrast, the *Nahmani II* majority, leaning heavily on the reliance element of estoppel, had to contort the facts and the law to make its argument. According to Justice Tal, as articulated fully in *Nahmani I*, Daniel’s original consent was the promise, and that consent was to the final goal of having a child, not simply of starting the IVF procedure. *Nahmani I*, [1995-6] IsrLR at 61 (Tal, J., dissenting). Ruth relied on Daniel’s promise by going through the first part of the procedure, an irrevocable change in the wife’s situation. *Id.* at 57. Tal even found evidence of the modern reliance interest in Talmudic law in addition to citing Australian case law and the U.S. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). *Id.* at 54–56. Justice Bach also brought up “moral” estoppel, arguing that estoppel existed because at one time Daniel wanted a child and submitted to the IVF process with that goal in mind. *Nahmani II*, [1995-6] IsrLR at 423 (Bach, J.).

202. See, e.g., *Nahmani I*, [1995-6] IsrLR at 42 (Strasberg-Cohen, J.).

203. *Nahmani II*, [1995-6] IsrLR at 476–77 (Zamir, J., dissenting).

204. *Nahmani I*, [1995-6] IsrLR at 42 (Strasberg-Cohen, J.).

205. *Nahmani II*, [1995-6] IsrLR at 476 (Zamir, J., dissenting).

206. *Id.*

207. See Public Health Regs., *supra* note 81, at nos. 8(b)(3), 9, 14.

208. The Surrogacy Agreement (Approval of Agreement and Status of the Child) Law was enacted on March 7, 1996. Justice Strasberg-Cohen discusses sections 2(1) and 5(c) of the new law on page 347 of *Nahmani II*.

Tal conceded that in an ideal world he would recommend joint and continuing consent, allowing the parties to know *ab initio* the consequences of their actions.²⁰⁹ It is this early awareness of each parties' obligations that this Comment seeks to encourage in its proposed framework for an international consensus.

Determining the terms of the parties' "joint will" or "legitimate expectations" is of prime importance where there is no agreement, or if an existing agreement requires interpretation. In *Nahmani II*, Justice Tal argued that recognizing the legitimate expectations of the parties requires the law to recognize the emotional aspect of ART.²¹⁰ The *Davis* court and the *Nahmani II* minority also conceded the special nature of the parties' agreement as well as the unique status of a frozen embryo (neither person nor property).²¹¹ Intentions are imputed to someone when there is no way of assessing the presumed intention of the parties; it can be imputed for considerations of justice or considerations of policy.²¹² Here, taking into account considerations of justice—including the balance of evils and the presence of the criteria for promissory estoppel—Justice Tal concluded that neither party should gain an unfair advantage and that "in the absence of explicit consent with regard to a case of separation, an intention should be imputed to the parties that no party can change his mind."²¹³

Justice Strasberg-Cohen rightly criticized the majority's rigid view of consent, which froze Daniel's consent to the IVF procedure at the moment of fertilization.²¹⁴ Daniel's contribution (from choosing the surrogate mother to the financial and legal liabilities

209. *Nahmani I*, [1995-6] IsrLR at 62 (Tal, J., dissenting).

210. *Nahmani II*, [1995-6] IsrLR at 362 (Tal, J.).

211. See *supra* note 195 and accompanying text; *Nahmani II*, [1995-6] IsrLR at 339–40, 347 (Strasberg-Cohen, J., dissenting); *Nahmani I*, [1995-6] IsrLR at 20–22, 44–45.

212. *Nahmani II*, [1995-6] IsrLR at 363 (Tal, J.).

213. *Id.* at 363–64. In addition, several justices have analogized embryo disputes to abortion cases. From Israeli abortion law Justice Tal infers that "[w]hen not speaking of interference in her body, the woman is not entitled to destroy the embryo without her spouse's consent; in exactly the same way, the man is not entitled to destroy the ova against the woman's wishes," and she is not entitled to destroy the ova against his wishes. *Id.* at 369–70. Under Israeli law therefore, "the wife [should be] entitled to continue the implantation procedure, notwithstanding the husband's opposition." *Id.* at 370. As explained in his estoppel reasoning, under Jewish law the husband has an unenforceable obligation to his wife to help her bring children into the world. As Justice Tal explains, "The husband is liable to help, and he most certainly is not permitted to sabotage the process." *Id.* at 372–73.

214. *Id.* at 340 (Strasberg-Cohen, J., dissenting).

incurred from legal parenthood) is far from over.²¹⁵ To support her argument that informed consent of both spouses at each stage of the procedure is required, Strasberg-Cohen cited the procedures and recommendations of several Western jurisdictions, including the United States.²¹⁶ Within Israel, Strasberg-Cohen referred to the 1987 Public Health (IVF) Regulations²¹⁷ and the recommendations of the Aloni Commission.²¹⁸ The former emphasized the need for spousal consent,²¹⁹ while the latter supported the *Davis* approach.²²⁰ Even the Surrogacy (Agreements) Law of 1996 required written consent between the surrogate and the intended parents; implantation is the point of no return (until then, the consent of both parties to the procedure is required).²²¹ According to Strasberg-Cohen, the final construction of the Surrogacy Law derived from the basic ethical

215. *Nahmani I*, [1995-6] IsrLR at 39 (Strasberg-Cohen, J.). Strasberg-Cohen also made the argument that, even if the original consent could continue in the new circumstances, enforcement would be contrary to sections 3(2) and 3(4) of the Contracts Law because the law is not interested in forcing a relationship he does not want and because the personal elements contained in the agreement here are much greater than in any contract for personal service. *Id.* at 38–39.

216. *Nahmani II*, [1995-6] IsrLR at 345 (Strasberg-Cohen, J., dissenting).

217. *Nahmani I*, [1995-6] IsrLR at 22–23 (Strasberg-Cohen, J.).

218. *Id.* at 24. The Aloni Commission was a “professional public commission” appointed by the Ministers of Justice and Health in June 1991 to “examine the question of *in-vitro* fertilization.” *Id.*; see also Waldman, *supra* note 27, at 83.

219. Public Health Regs., *supra* note 81.

220. *Nahmani I*, [1995-6] IsrLR at 24 (Strasberg-Cohen, J.) (“[I]n the absence of *joint and continuing consent*, no use should be made of the fertilized ova that were frozen until the end of the freezing period agreed by the spouses *but consent that was given at the beginning of the treatment shall be deemed to continue as long as neither of the spouses revokes it in writing* [A] man or woman should not be forced to be a father or mother against their will, even if they initially consented to this.”) (quoting REPORT OF THE PROFESSIONAL PUBLIC COMMISSION FOR EXAMINING THE ISSUE OF *IN-VITRO* FERTILIZATION 36 (1994)). The Public Health Regulations are also notable for the restrictions on the scope of IVF. See Public Health Regs., *supra* note 81, arts. 6, 8; see also *id.* no. 11 (“A fertilized ovum shall be implanted only in a woman who intends to be the mother of the child.”); 14(b) (“Each act relating to IVF in a married woman may only be performed with her husband’s consent.”).

221. *Nahmani II*, [1995-6] IsrLR at 347 (Strasberg-Cohen, J., dissenting). As in the United Kingdom, there is a five-year maximum for frozen embryo storage. See *id.*; Public Health Regs., *supra* note 81, no. 9. For additional discussion of the relevant Israeli policy surrounding mutual consent, see *Nahmani I*, [1995-6] IsrLR at 24 (Strasberg-Cohen, J.); *id.* at 62 (Tal, J., dissenting); and *Nahmani II* [1995-6] IsrLR at 454-55 (Or, J., dissenting). Note that the Surrogacy Law, though discussed in *Nahmani II*, was enacted too late to be applicable to *Nahmani II*.

recognition that regarded “parenthood as a journey taken by two people together.”²²²

A final element involving consent that was explicitly promoted by *Nahmani* and implicitly acknowledged by *Davis* is the requirement that any proposed agreement or contract requires good faith.²²³ Both Israel and the United States recognize this principle; it is notable that, despite the variations among the opinions, most of the justices, even in *Nahmani*, agree that the parties acted in good faith.²²⁴ Non-consent, like every legal act, requires good faith.²²⁵ Good faith demands that a contract is given a meaning that is consistent with the joint intentions of the parties and with the basic principles of the legal system.²²⁶ “Love and friendship cannot be forced,”²²⁷ and not giving consent because the “feeling of love, companionship, mutual respect, partnership and affection has disappeared is not, in itself, bad faith.”²²⁸ Though the justices might not approve of Daniel’s behavior, this does not mean that he acted in bad faith; even the district court, which ruled in favor of Ruth, found that Daniel acted in good faith.²²⁹

Therefore, a reasonable compromise position on contractual enforceability and consent would regard initial consent as non-absolute in the absence of an agreement regarding embryo disposition in the event of separation or divorce. Where there is agreement, such agreement would, as desired by the *Davis* court, be presumed valid and enforceable.²³⁰ Consent to such an agreement would be binding and enforceable unless otherwise stipulated, and always mutually modifiable.

222. *Nahmani II*, [1995-6] IsrLR at 347 (Strasberg-Cohen, dissenting). The “two people together” was a specific context unique to surrogacy at the time of the law’s enactment. IVF procedures are now open to all women no matter their sexuality or their marital status. Kraft, *supra* note 1; see also Waldman, *supra* note 27, at 68–69 (describing Israel’s “pro-natalist” culture).

223. *Nahmani II*, [1995-6] IsrLR at 386 (Dorner, J.).

224. *Id.* For additional discussions of “good faith” in *Nahmani*, see *id.* at 443–44 (Mazza, J.); and *id.* at 486–87 (Barak, President, dissenting).

225. *Id.* at 486 (Barak, President, dissenting).

226. *Id.* at 487 (“Daniel’s non-consent should be examined in its context. We are dealing with an intimate relationship between the spouses. We are concerned with a relationship in which love, companionship, mutual respect, partnership and affection are an inseparable part.”).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Davis v. Davis*, 842 S.W.2d. 588, 597 (Tenn. 1992).

D. Post-Davis American Jurisprudence Supporting Contractual Enforceability

The few developments in American jurisprudence since *Davis*²³¹ lend further support for the adoption of a presumption of enforceability for frozen embryo disposition agreements. Four of the five state supreme courts that have addressed divorce-related frozen embryo disposition since *Davis* have held that a disposition agreement between a couple and a clinic is presumptively enforceable.²³² The basic holding and reasoning of *Davis* continued to hold, albeit with some important factual differences: (1) all five couples at odds in these cases had signed agreements with the clinic involved in the storage of their embryos;²³³ (2) in all but one case the two parties were also the progenitors of the genetic material;²³⁴ (3) at

231. The issue has not appeared at all in Israeli Supreme Court jurisprudence since *Nahmani*.

232. *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) (holding that if donors cannot reach a mutual decision on disposition, then no use of the embryos can occur without the signed authorization of both donors); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (holding consent form signed by both parties and clinic giving woman control of pre-embryos after separation unenforceable); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (holding agreement regarding disposition of pre-embryos entered into at time of IVF enforceable, subject to each party's right to change their mind up until the use or destruction of pre-embryos); *Kass v. Kass*, 696 N.E. 2d 174 (N.Y. 1998) (holding that agreements between gamete donors regarding disposition of pre-embryos should generally be presumed valid, binding, and enforceable); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc) (holding that when a married couple gets divorced, if they could not reach a mutual decision on the disposition of their pre-embryos, they must petition the court for instructions). There are also five state appellate court cases, three of which involved the absence of an agreement. *Cahill v. Cahill*, 757 So.2d 465 (Ala. Civ. App. 2000) (holding pre-embryos to be the property of neither party absent a valid agreement between them); *Reber v. Reiss*, 42 A.3d 1131 (P.A. Super. Ct. 2012) (ruling that the wife, in the absence of an agreement between the parties, and likely confronting last opportunity for parenthood, should be awarded frozen pre-embryos); *In re Marriage of Nash*, No. 62553-5-I, 2009 WL 1514842 (Wash. Ct. App. 2009) (unpublished decision upholding decision of trial court to rule on disposition of frozen pre-embryos in absence of a valid agreement between parties); *In re Marriage of Dahl and Angle*, 194 P.3d 834 (Or. Ct. App. 2008) (holding valid agreements that indicate the clear intent of the parties regarding disposition of frozen embryos); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) (holding prior agreement regarding disposition of frozen embryos enforceable).

233. In the Massachusetts, New York, and New Jersey cases, the "agreement" at issue was a consent form. In *Litowitz*, the parties had signed an egg donation agreement and cryopreservation agreement. *Witten* also dealt with an embryo storage agreement. In all cases except *J.B.*, the wife asked the court for custody to implant, either herself or through a surrogate. The husbands all petitioned for the status quo, adherence to the agreement (donation to research in the case of *Kass*), or donation/adoption. In three cases (*Witten*, *Litowitz*, and *Kass*) the wife contested the agreement and in two cases (*J.B.* and *A.Z.*) the husband contested the agreement.

234. The exception was *Litowitz*, in which the couple used an egg donor.

least three of the couples already had children via natural or assisted means,²³⁵ and (4) only one female progenitor sought to defend her last chance at genetic parenthood.²³⁶

The analytical focus of these later cases also shifts from what was primarily a constitutional rights/interest-balancing discourse in *Davis* to a combination of contract enforceability and issues of public policy (e.g., whether a state could force unwanted parenthood on a person). These courts dismiss the status and best interests of the child argument entirely in favor of the contractual model arguments and a discussion of “forced unwanted parenthood” and public policy. The Supreme Court of Massachusetts added a dose of common sense mutual modification and contract promotion to the *Davis*-initiated premise of enforceability,²³⁷ while New Jersey’s Supreme Court inserted an evaluation of the progenitors’ preferences and a recognition of the trend towards the right not to procreate (autonomy) outweighing the right to procreate even in the face of prior agreement (the public policy argument).²³⁸ In the most recent state supreme court case, *In re Marriage of Witten*, the Supreme Court of Iowa summarized the pros and cons of what it saw as the three approaches to resolving such disputes that had appeared in American jurisprudence: (1) the contractual test (enforceable so long as not violative of public policy),²³⁹ (2) contemporaneous mutual consent,²⁴⁰ and (3) a balancing test.²⁴¹ The Iowa and New Jersey supreme courts also brought back an argument from *Nahmani II*: both courts allowed for a modified destruction order similar to the conditional grants proposed by Justices Goldberg and Mazza.²⁴²

What can be gleaned from the later decisions is that American courts, when they choose to rule on intimate family matters such as the disposition of frozen pre-embryos, actually downplay the positive

235. See *Litowitz*, 48 P.3d at 262; *J.B.*, 783 A.2d at 710; *A.Z.*, 725 N.E.2d at 1053.

236. She lost on contractual grounds. *Kass*, 696 N.E. 2d at 179–82.

237. See *A.Z.*, 725 N.E.2d at 1056–59.

238. See *J.B.*, 783 A.2d at 717–20.

239. *In re Witten*, 672 N.W.2d 768, 776 (Iowa 2003); see also *Litowitz*, 48 P.3d 261; *Kass*, 696 N.E. 2d 174; *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

240. *In re Witten*, 672 N.W.2d at 777. This approach was also recommended by the *Nahmani II* minority. See *supra* Part I.B.2.

241. *In re Witten*, 672 N.W.2d at 779; see also *J.B.*, 783 A.2d 707; *A.Z.*, 725 N.E.2d 1051; *Davis*, 842 S.W.2d 588. All three cases, however, exhibited some internal inconsistencies.

242. Goldberg and Mazza’s idea would permit embryo destruction unless the objecting party wished to pay the fees for continued storage until mutual agreement was reached. See *Nahmani II*, [1995-6] IsrLR at 401 (Goldberg, J.); *id.* at 443–444 (Mazza, J.).

right to parenthood in favor of individual freedom not to procreate.²⁴³ In contrast to *Nahmani II*, most American courts that have addressed the issue have ruled in favor of the party objecting to parenthood.²⁴⁴ However, the American cases lack consistency, sometimes resorting to public policy rationales as a work-around to the actual issues in dispute.

E. Obstacles to International Consensus: The Analytical Limits of Davis and Nahmani

While the above analysis provides valuable insight into the two countries' approaches to assisted reproductive technologies and their value as the potential foundation for an international framework, it is important to recognize the holes in both countries' jurisprudence. Israel has yet to deal with an embryo disposition case involving a written agreement or an oral contract; in fact, it has not yet dealt with this issue in the context of the Israeli Surrogacy Law or even with a couple who is actually divorced.²⁴⁵ U.S. courts remain inconsistent in their enforcement of agreements executed by couples and clinics, and the issue has not reached the U.S. Supreme Court. Moreover, disputes over the disposition of frozen embryos remain within the jurisdiction of state courts, despite the *Davis* court's discussion of constitutional rights such as the rights to privacy and procreational autonomy.²⁴⁶ The scientific uncertainty regarding the length of viability of frozen

243. As Professor Helene Shapo wrote, “[M]ost American courts have relied on biology . . . in order to locate decision-making authority over [frozen] pre-embryos. However, the courts have used biology in the negative sense by favoring individual autonomy and the right not to procreate over parental ties” Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 97 (2002).

244. See *supra* Part II.D. But see *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012) (ruling that the wife, in the absence of an agreement between the parties, and likely confronting the last opportunity for parenthood, should be awarded frozen pre-embryos).

245. A search of the available Israeli Supreme Court decisions and legal scholarship produced no evidence of additional jurisprudence on the matter. However, the Israeli legislature has made certain strides since *Nahmani* with the enactment of the Surrogacy Agreements Law and, after a ten-year debate, the enactment of a law permitting egg donation. See Dan Even, *Knesset Approves Bill Easing Restrictions on Egg Donation in Israel*, HAARETZ (June 7, 2010), <http://www.haaretz.com/news/national/knesset-approves-bill-easing-restrictions-on-egg-donation-in-israel-1.294755>; Elana Sztokman, *A Decade in the Making, Egg Donation Bill Passes Knesset*, JEWISH DAILY FORWARD (June 8, 2010, 9:51 AM), <http://blogs.forward.com/sisterhood-blog/128609/a-decade-in-the-making-egg-donate-on-bill-passes-kn/>; Judy Siegel, *Ova Donation Bill Set to Pass in Knesset*, JERUSALEM POST (Feb. 21, 2010), <http://www.jpost.com/HealthAndSci-Tech/Health/Article.aspx?id=169288>.

246. See *Davis*, 842 S.W.2d at 598–603.

embryos²⁴⁷ also retains the potential for court cases to become moot, though the *Davis* court in particular did not address the mootness issue. Moreover, except for *Kass*, no state supreme court has properly dealt with a case involving a party's last chance for genetic parenthood.²⁴⁸

Several important arguments and additional political minefields also remain unexplored. Most notably, neither country inserted adoption into the debate; genetic parenthood or freedom from genetic parenthood remain the only promoted options while adoption remains an "unattractive"²⁴⁹ or invisible alternative. In addition, an approach like that taken by the *Nahmani II* majority ("developing the law"²⁵⁰) would likely lead to grumblings about legislating from the bench, certainly from within the United States if not from elsewhere.

However, after considering the limits of the case, I agree with Northwestern Law Professor Helene Shapo's statement that the *Nahmani II* court did not adopt an "arguably wiser position than that of the U.S."²⁵¹ While Israel, with its public encouragement of parenthood, may remain the more "family-friendly"²⁵² regime, the fact that the *Nahmani II* court approached the case more as a matter of expectations and justice (favoring life) rather than building upon existing constitutional, contract, or other law, leaves the Israeli courts open to significant future challenges.

CONCLUSION

International law clearly needs to catch up with science. Medical research and surrogacy are global propositions, and access to IVF and

247. See *id.* at 598; see also Susan Donaldson James, *Eleven Years Later, Triplet No. 3 Arrives*, ABCNEWS (Dec. 28, 2010), <http://abcnews.go.com/Health/eleven-years-triplet-arrives-frozen-embryo-batch/story?id=12492208>.

248. Only the Pennsylvania Superior Court case, *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012), addressed this issue. There is also a dispute currently winding its way through the Maryland courts. Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, GREENBELTPATCH (Jan. 7, 2013), <http://greenbelt.patch.com/articles/judge-awards-maryland-woman-custody-of-frozen-embryos?national=patch&ncid=edlinkuspatc00000006>; Tracee Wilkins, *Judge Grants Stay in Divorced Couple's Battle Over Embryos*, NBCWASHINGTON (Jan. 14, 2013), <http://www.nbcwashington.com/news/local/Judge-Grants-Stay-in-Divorced-Couples-Battle-Over-Embryos-186873792.html>.

249. See *Nahmani I*, [1995-6] IsrLR at 43-44.

250. *Nahmani II*, [1995-6] IsrLR at 357 (Tal, J.).

251. Shapo, *supra* note 243, at 102.

252. Waldman, *supra* note 27, at 105.

cryogenic storage is no longer limited to a few “experiments.” Of course, increased access and increased opportunity provides new ammunition for marital disputes. This Comment, which seeks to propose certain guidelines regarding embryo disposition to which a majority of countries might be amenable, accepts the use of contract law as a reasonable compromise that avoids wading into the murky property/person “status” debate surrounding embryos. Contingency agreements in case of separation or divorce should be standard procedure at clinics who work with couples undergoing IVF treatments. The United States and Israel, as leaders both in assisted reproductive technologies and access to these technologies, should take the initiative to create a more comprehensive regulatory framework that would protect the rights of both parties in the couple and prevent excess litigation. However, the pace of change will remain slow so long as the United States retains its piecemeal and detached approach to assisted reproductive technologies and the international community continues to ignore the reproductive repercussions of divorce.