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Cori Schreider

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# CRYOPRESERVED EMBRYO DISPUTES: WEIGHING INTERESTS REGARDING GENETIC PARENTHOOD

CORI SCHREIDER\*

## I. INTRODUCTION

A woman in her forties is diagnosed with breast cancer.<sup>1</sup> Knowing she will likely undergo chemotherapy treatment that has the possibility of rendering her infertile, she and her husband decide to proceed with in vitro fertilization (“IVF”) in order to preserve the option of having a family after her cancer treatment.<sup>2</sup> The couple signs a consent agreement, which states that in the event of divorce or separation, any extra cryopreserved embryos will be discarded.<sup>3</sup> The couple divorces several years later,<sup>4</sup> and the woman, although not infertile because of the treatment, has only a 0–5% change of fertility due to her age, and wants to use the embryos—a decision her ex-husband opposes.<sup>5</sup> The court holds that the contract stands, and the embryos are to be discarded, thereby eliminating what is perhaps the only opportunity for the woman to ever have a biological child.<sup>6</sup>

This case, among many others coming through the state courts in the last decade, begs the question of whether one has a right to be or *not* be a genetic parent. One of ten couples in the United States is infertile, and assisted reproductive technology (“ART”) has given hundreds of thousands of individuals who lack reproductive capacity the opportunity to have genetic children.<sup>7</sup> Based on 2014 data from the Centers for Disease Control’s National ART Surveillance System, there were 208,786 ART cycles performed at 460 reporting clinics in the United States.<sup>8</sup> These cycles resulted in 57,332 live births

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\*J.D., University of Maryland Francis King Carey School of Law

1. Findley v. Lee, No. FDI-13-780529, 2016 WL 270083 (Cal. Super. Jan. 11, 2016).

2. *Id.* at 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 2.

7. NATIONAL ART SURVEILLANCE, CDC (Mar. 7, 2016), <http://www.cdc.gov/art/nass/index.html>.

8. ART SUCCESS RATES, CDC (Feb. 24, 2016), <http://www.cdc.gov/art/reports/index.html>.

and 70,352 live born infants.<sup>9</sup> IVF is the process by which an egg and sperm are combined manually, and the embryo is then transferred to the uterus.<sup>10</sup>

Often during this process more embryos are created than are needed.<sup>11</sup> Dr. Richard Scott, for example, who runs a fertility clinic in New Jersey, explained that he creates around twelve embryos per couple, implants two to four of those embryos, and freezes the rest in the event that the first attempt fails.<sup>12</sup> Due to this process, he stores up to 7,000 frozen embryos in his clinic at a time.<sup>13</sup> Couples can also keep embryos in storage not because they have excess embryos after implanting a few, but because they want to be proactive in freezing their embryos to use some time in the future if they think either party has a chance of becoming infertile.<sup>14</sup> Freezing embryos gives a 25-50% chance of pregnancy per frozen embryo transfer, which makes this option more preferable when compared to a woman freezing only her eggs without having them fertilized by sperm.<sup>15</sup> However, cryopreserving these embryos to implant at some time in the future can create a variety of complex questions regarding disagreements over their use, disposition, or donation.<sup>16</sup>

State courts have applied a variety of legal approaches to settle disputes about cryopreserved embryos. Part II of this paper will describe and evaluate the different methods that courts use to resolve these cases, including the balancing test, the contractual approach, and the contemporaneous mutual consent approach.<sup>17</sup> Part III of this paper will evaluate the arguments regarding one's right to be a genetic parent, and conversely one's right not to be a genetic parent.<sup>18</sup> Finally, Part IV will propose that in the event of disagreement regarding the future of cryopreserved embryos, courts should find in favor of the party seeking to avoid procreation, except in circumstances in which either party lacks the ability to have a genetic child by other means.<sup>19</sup>

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9. *Id.*

10. In Vitro Fertilization: IVF, AM. PREGNANCY ASS'N (2016), <http://americanpregnancy.org/infertility/in-vitro-fertilization/>.

11. *Id.* (The number of embryos implanted usually depends on the number of eggs collected and maternal age, since the rate of implantation decreases and women age. Thus, doctors will generally create more embryos than are needed.)

12. Daniel Schorn, *A Surplus of Embryos*, CBS NEWS (Feb. 9, 2006), <http://www.cbsnews.com/news/a-surplus-of-embryos/>.

13. *Id.*

14. *See, e.g.*, Findley, *supra* note 1 (Findley and Lee decided to freeze their embryos when they found out that Lee was diagnosed with breast cancer and would have to undergo chemotherapy treatment that could render her infertile).

15. Egg & Embryo Freezing, COLUMBIA DOCTORS CENTER FOR WOMEN'S REPRODUCTIVE CARE, <http://columbiafertility.org/fertility-services/fertility-preservation/#.VxmKfZMrK8U> (last visited Dec. 1, 2017).

16. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L. J. 179, 181 (2014).

17. *See infra*, Part II.

18. *See infra*, Part III.

19. *See infra*, Part IV.

## II. CURRENT APPROACHES TO DISAGREEMENTS OVER THE FUTURE OF CRYOPRESERVED EMBRYOS

### A. *The Balancing Test*

One model that courts have used to decide cases in which there is a disagreement between parties over the future of their cryopreserved embryos is the balancing test.<sup>20</sup> This approach weighs the relative interests of each party in using or not using the embryos. *Davis v. Davis* was the first case of this kind to reach a state supreme court.<sup>21</sup> The Davises were a couple who had cryopreserved embryos after years of unsuccessfully trying to conceive a child via intercourse.<sup>22</sup> When the couple separated, the husband sought to dispose of the embryos, while the wife preferred to donate them to another couple in need.<sup>23</sup> The court engaged in a substantial analysis of Mr. Davis' testimony, in which he described in detail how he was affected by his parents' divorce, and that he had suffered tremendously from the absence of his father in his life.<sup>24</sup> He connected this with his opposition to embryo donation: that the recipient couple may divorce, leaving "his" child in a single-parent setting, which, based only on his own experiences, he finds unfavorable.<sup>25</sup>

The court held in favor of the husband, ruling that in these situations the party wishing to avoid procreation should prevail.<sup>26</sup> While this "obviously," (to the court) outweighs Mrs. Davis' interest in donation, the court does not clearly determine if it would have reached the same outcome if Mrs. Davis wanted the embryos for herself.<sup>27</sup> The court does signal that the case would be "closer," but only if Mrs. Davis could not achieve parenthood "by any other reasonable means."<sup>28</sup> This analysis suggests that in weighing competing interests, the court will put the most weight on an individual's opposition to genetic parenthood.<sup>29</sup> However, even this does not seem to be a blanket rule, as the court still analyzed Mr. Davis' psychological reasoning for opposing the use of the embryos, which suggests that his motives were also important to the court's decision.<sup>30</sup>

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20. See, e.g., *Davis v. Davis*, 842 S.W.2d 288 (Tenn. 1992); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

21. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004).

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

23. *Id.* At 589–590.

24. *Id.* At 604.

25. *Id.*

26. *Id.* At 602.

27. *Id.*

28. *Davis*, 842 S.W.2d at 602.

29. *Id.* at 604 (stating that, while Mrs. Davis' interests are not insubstantial, "we can only conclude that Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood).

30. *Id.* (discussing Mr. Davis' history of "problems" caused by separation from his parents).

Ultimately, this is a fact-specific approach where the court must delve in to the interests and intent of both parties.

In a more recent decision, *Reber v. Reiss*, the court engages in the analysis that was discussed hypothetically in *Davis*.<sup>31</sup> The wife was diagnosed with breast cancer and decided to undergo IVF treatment in order to preserve the wife's ability to conceive a child after chemotherapy.<sup>32</sup> When the parties separated, the wife sought all of the embryos for implantation.<sup>33</sup> The husband opposed, arguing that it is against Pennsylvania public policy to force him to procreate with his wife.<sup>34</sup> Because the wife was now infertile, and created the embryos with her impending infertility in mind, the court held that the balancing of the interests tipped in her favor.<sup>35</sup>

While balancing the relative interests of the parties seems like a rational way to deal with the complex problem of frozen embryo disputes, there are several drawbacks to this approach. First, it lacks predictability, which could result in even more litigation. Because the court fails to set out a determinative standard by which it will rule in these disagreements, couples have little incentive to think about the future of their cryopreserved embryos when first deciding to undergo IVF, and possibly more incentive to bring their disputes to the courts. Additionally, the court in *Davis* made a seemingly subjective determination regarding the psychological impact that having a genetic child would have on Mr. Davis.<sup>36</sup> Another court may not have found the story of his troubled childhood so convincing.

Conversely, this approach is persuasive because it acknowledges the fact that decisions regarding relationships and family rearing are deeply personal and subject to change.<sup>37</sup> By balancing interests at the time when the parties are actually making the decision about whether or not to use embryos, they are not forcing parties to be bound by decisions they may have made via contract in the past.

### *B. The Contractual Approach*

In stark contrast to the balancing approach is the contractual approach, in which written agreements executed by the parties regarding the disposition of their embryos are presumed binding, so long as they are reasonable and

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31. 42 A.3d 1131 (2012).

32. *Id.* at 1133.

33. *Id.*

34. *Id.*

35. *Id.* at 1142.

36. *Id.* (relying on testimony about childhood trauma related to the divorce of his parents and being raised by his aunt).

37. *See, e.g., Davis*, 842 S.W.2d at 597 (“we recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems”).

unambiguous.<sup>38</sup> The advantages to this approach are numerous: efficiency, consistency and potentially less likely to result in litigation.<sup>39</sup> The contractual approach was first articulated by the New York Court of Appeals in *Kass v. Kass*.<sup>40</sup> In this case, the parties signed consent forms before undergoing IVF, indicating their mutual agreement to dispose of the embryos in the event that they could not agree on whether or not to use them.<sup>41</sup> When Mrs. Kass changed her mind and requested possession of the embryos so that she could have them implanted, Mr. Kass opposed.<sup>42</sup> However, the court held that the embryos should be destroyed, because the agreement was unambiguous as to the parties' intent and thus binding.<sup>43</sup> Despite the fact that one dissenting judge to the opinion found that it was more of an informal "informed consent" that failed to provide an unambiguous statement of intent, the court relied on the fact that the parties' intent was not only clear, but also mutual, and must be "scrupulously honored."<sup>44</sup>

In another case, *J.B. v. M.B.*, the couple signed a consent form prior to undergoing IVF treatment.<sup>45</sup> This form, in relevant part, stated that the couple agrees that all "control, direction, and ownership of [the] tissues will be relinquished to the IVF program under the following circumstances: 1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues. . ."<sup>46</sup> The couple divorced, and the man sought to donate the embryos to an infertile couple.<sup>47</sup> The court held that the existence of a valid, unambiguous agreement at the time of the IVF process setting out the parties' intention should guide the decision.<sup>48</sup> Citing the *Kass* court, the court pointed out the benefits of enforcing contracts in this context, even when weighed against public policy concerns.<sup>49</sup>

Jurisdictions that have adopted the contractual approach to embryo disputes are placing an emphasis on the ability of competent adults to make advance decisions regarding their reproductive abilities,<sup>50</sup> while simultaneously failing to

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38. See e.g., *Kass v. Kass*, 91 N.Y.2d 554 (1998).

39. Noel A. Fleming, *Navigating the Slippery Slope of Frozen Embryo Disputes: the Case for a Contractual Approach*, 75 TEMP. L. REV. 354 (2002).

40. *Kass v. Kass*, 235 A.D.2d 150 (N.Y. 1998).

41. *Id.* at 152.

42. *Id.* at 153.

43. *Id.* at 161.

44. *Id.* at 162.

45. 783 A.2d 707 (N.J. 2001).

46. *Id.* at 710.

47. *Id.*

48. *Id.* at 715.

49. *Id.* at 713 (stating that there is even room for reconsideration if there is a disagreement as to the disposition of the embryos. In that case, the court says that they can engage in an evaluation of the interests of both parties; though, generally, the party wishing not to become a genetic parent will usually prevail).

50. Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407 (2013).

recognize the uncertainty of what may happen in the future.<sup>51</sup> When couples are deciding to undergo IVF, they are likely hopeful for their future together and with a child, unable to realistically imagine a situation in which their marriage fails. Anne Drapkin Lyerly, M.D., a professor of obstetrics and gynecology at Duke University Medical Center, summarized these feelings stating that “when you’re pouring your money, your heart, and your soul into creating an embryo and creating a life, the last thing you want to think about is how you’re going to dispose of it.”<sup>52</sup>

One study quantified these feelings by surveying 2,210 patients from nine geographically diverse fertility clinics across the United States.<sup>53</sup> The purpose was to assess decisional conflict, which the study defined as “the extent to which patients with cryopreserved embryos reported personal uncertainty about disposition decisions and related deficits in knowledge and values clarity.”<sup>54</sup> The results revealed that parties felt “anguished” when presented with the decision of what to do with frozen embryos.<sup>55</sup> In fact, amongst patients who already successfully had a child through IVF, 40% could not even make a decision regarding disposition of their excess embryos.<sup>56</sup> The study ultimately revealed high rates of decisional conflict, and even more significantly, that “individuals’ attitudes about embryos change considerably over time.”<sup>57</sup> Similarly, in another study coming out of the University of California, researchers found that 72% of surveyed couples were undecided about the fate of their stored embryos.<sup>58</sup>

Such evidence reveals that contracts and consent forms cannot be relied upon for a number of reasons. First, individuals’ attitudes about embryos often dramatically change over time, evidenced by the fact that decisional conflict was higher for patients who were further along in the course of treatment.<sup>59</sup> Lower decisional conflict at the time of actually completing the disposition agreement compared with higher decisional conflict later in the process reveals the need to

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51. For instance, if one party loses their last chance to become a genetic parent due to the terms of the contract. *Id.*

52. Laura Beil, *What Happens to Extra Embryos After IVF?*, CNN (Sept. 1, 2009), <http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/>.

53. A.D. Lyerly, S. Nakagawa, & M. Kuppermann, *Decisional conflict and the Disposition of Frozen Embryos: Implications for Informed Consent*, 26 OXFORD J. 3 (Nov. 2010), <http://humrep.oxfordjournals.org/content/26/3/646.full>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Beil, *supra* note 52.

59. See Lyerly et al., *supra* note 53 (stating that patients surveyed varying times throughout the IVF process had changing opinions regarding the status of any excess embryos).

revisit the discussion about disposition preferences throughout the IVF treatment rather than only at the beginning.<sup>60</sup>

Courts have also held that upholding such agreements are contrary to public policy. *In re Marriage of Witten*, the court explained that, “to strike down a contract on public policy grounds, we must conclude that the preservation of the general public welfare. . . outweigh[s] the weighty societal interest in the freedom of contract.”<sup>61</sup> The Iowa state Supreme Court ultimately found that both case law and statutes regarding decisions involving family relationships are emotional ones that are subject to change, and therefore it would be against public policy to enforce such agreements.<sup>62</sup> The court explained that they have generally been reluctant to become involved in “intimate questions inherent in personal relationships,” and the decisions over embryos in the face of divorce falls under that category.<sup>63</sup> Thus, while some sort of consent form, and perhaps even counseling, should be mandatory simply to set out expectations of the treatment for the parties, they should not necessarily be legally binding in the face of a later disagreement.

### C. *The Contemporaneous Mutual Consent Approach*

This model is similar to the contractual approach in the way that, rather than balancing the interests of one party against another, it emphasizes the importance of both parties making decisions about the future of the cryopreserved embryos together.<sup>64</sup> However, unlike the contractual approach, it also addresses the difficulty of being able to predict what may happen in the future, prior to undergoing IVF.<sup>65</sup> Under this theory, both parties must agree to all decisions as to the disposition, donation, or implantation of embryos at the actual time when they are making the decision to implant, donate or discard excess embryos, rather than only before beginning IVF treatment in the first place. Otherwise, the embryos will simply remain frozen until a decision is reached.<sup>66</sup>

In *A.Z. v. B.Z.*, for example, a married couple conceived a child through IVF, and the remaining embryos from the process were frozen for potential future use.<sup>67</sup> The parties separated several years later, and the husband filed a motion to

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60. *Id.* (revealing that higher decisional conflict among patients *not* intending to become pregnant highlights the need to discuss disposition preferences throughout the process rather than only before the process begins).

61. *In re the Marriage of Arthur Lee Witten*, 672 N.W.2d 768, 780 (Iowa, 2003).

62. *Id.* For example, Iowa law imposes a seventy-two hour waiting period after the birth of a child before the biological parents may release parental rights. Iowa Code § 600A.4(2)(g) (July 1, 2013).

63. *In re the Marriage of Witten*, 672 N.W.2d at 781.

64. *See, e.g.,* Melissa Boatman, *Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes after Divorce*, 37 U. BALT. L. REV. 285, 292 (2008).

65. *Id.* at 293.

66. *Id.*

67. 725 N.E.2d 1051 (2000).

obtain an injunction against the wife from using the remaining embryos.<sup>68</sup> Despite the existence of several consent forms signed at the time of the IVF process, the court held that they refused to enforce any such agreement that would compel one party to become a parent against his or her will.<sup>69</sup> The court describes this as “forced procreation,” which would violate public policy and is therefore “not amendable to judicial enforcement.”<sup>70</sup> In *In re the Marriage of Witten*, the court similarly held that the embryos could not be disposed of unless they reach an agreement.<sup>71</sup> While the court did hold that disposition agreements generally do not violate public policy, in the event that there is a change of heart by one party, the emotional nature of these decisions is such that the agreement can no longer be upheld.<sup>72</sup>

This approach emphatically prioritizes the right not to procreate over the right to do so, and fails to address the possibility of there being any situation to the contrary. A significant amount of time could pass before reaching a decision, which is of much inconvenience to a party seeking to have a child. There are also downsides for the party seeking to avoid procreation. An individual who would prefer the embryos be disposed or donated must continue to pay the costs of storage while the parties work towards a decision, which can be as high as \$40 a month or even up to \$600 a year.<sup>73</sup> Ultimately, though, it seems unlikely that the party wishing to procreate will consistently prevail when this approach is used. The problem with this approach is best summarized by a footnote in *Reber v. Reiss*: “. . . If the parties could reach an agreement, they would not be in court.”<sup>74</sup>

Despite the pitfalls of each of these three approaches, no court has yet to come up with an alternative way to resolve frozen embryo disputes. Several states have enacted legislation to try to help the problem. For example, Louisiana classifies embryos as human beings and prohibits their destruction altogether.<sup>75</sup> New Hampshire and Florida both require a prior agreement for IVF participants, and NH additionally requires judicial preauthorization, as well as counseling prior to undergoing IVF.<sup>76</sup> New York and New Jersey have each considered bills that have not yet passed requiring disposition agreements that must set forth the parties’ wishes for the embryos in the event of death, divorce, or other changed circumstances.<sup>77</sup> Requiring agreements; however, still fails to address what will

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68. *Id.* at 1053.

69. *Id.* at 1060.

70. *Id.*

71. *In re the Marriage of Witten*, 672 N.W.2d at 781.

72. *Id.*

73. *Kass v. Kass*, 235 A.D.2d at 162.

74. *Reber v. Reiss*, 42 A.3d 1131 (2012) (further stating that “this approach strikes us as being totally unrealistic.”).

75. Kellie LaGatta, *The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation*, 4 FLA. COASTAL L.J. 99, 108 (2002)

76. *Id.*

77. *Id.*

happen if there is a disagreement sometime in the future over the agreement's terms. Thus, this current legislation and the failure of the courts to come up with a different solution leaves open the need for a more predictable way to settle these types of agreements.

### III. THE RIGHT NOT TO PROCREATE VERSUS THE RIGHT TO BE A GENETIC PARENT

In any dispute over cryopreserved embryos, the court must engage in some form of analysis in which it considers the importance of one party's interest in not becoming a genetic parent and the other party's interest in becoming one. This is the most obvious in the balancing approach, but also is apparent in the others.<sup>78</sup> For instance, the contractual approach generally prioritizes an individual's interest in not procreating, as most consent forms set out that embryos will be disposed of or turned over to the fertility clinic in the event of separation or divorce, and the court states that it is essential to uphold any contract that is legal and unambiguous.<sup>79</sup> In the contemporaneous mutual consent approach, the court is even more clearly emphasizing the importance of a right not to become a genetic parent, as one party's interest in procreating will under no circumstances be allowed if the other party objects.<sup>80</sup> I argue that while the right to not become a genetic parent generally should enjoy this prioritization, there are situations in which the right to be a genetic parent trumps.<sup>81</sup>

#### A. *The Right to Be a Genetic Parent*

An individual opposing procreation would likely argue that even in a case where the party seeking procreation cannot reasonably have a child by other means, he or she still does not have any right to be a genetic parent. Radhika Rao argues that while *Skinner v. Oklahoma* created a fundamental right to procreation, this negative right to be free from state interference does not call for "an affirmative obligation to assure the exercise of procreative choice by placing its prestige and power behind the enforcement of preconception contracts."<sup>82</sup> Following this analysis, when parties have decided to sign preconception contracts, the state cannot ensure that these agreements will be enforced all the way through. An individual has the right to resist compulsory sterilization, contraception, or abortion, but this right does not extend to an affirmative right to use assistive reproductive technology.<sup>83</sup> Furthermore, disputes arising out of pre-embryo disposition agreements are between private parties – not state actors

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78. *See supra*, Part II.A.

79. *See supra*, Part II.B.

80. *See supra*, Part II.C.

81. *See infra*, Part IV.

82. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1484 (May, 1995).

83. *Id.* at 1485.

– and thus it can be argued that it does not raise a constitutional issue that would be governed by *Skinner* or other cases citing the fundamental right to procreation.<sup>84</sup>

While these reasons may be compelling, and there likely is no constitutional right to be a genetic parent in this context, there are still numerous policy-based reasons as to why an individual who wants to have a biological child has the right to have one, including 1. The personal decision made by many choosing to undergo IVF, 2. Difficulties with the adoption process, and 3. Cultural and social significance placed on genetics.

### *1. Making the Choice to Undergo IVF*

Many couples choose to undergo IVF over adoption. IVF is a long, grueling and emotional process, which shows the importance that both a man and a woman place on having a child that is composed of both of their genetic material.<sup>85</sup> A doctor at the Center for Reproductive Medicine and Infertility at the New York Hospital-Cornell Medical Center described IVF as a “horrible process,” and that “people don’t understand how horrible a disease infertility is.”<sup>86</sup> One woman who described her process with IVF in a New York Times article said that she “had to get up at 5 every morning. . . you don’t feel so great. Your ovaries are swelling up. You’re cranky, tired, you have mood swings, you’re tense. And you want that baby.”<sup>87</sup>

The *Findley v. Lee* holding seemed to ignore this aspect of the IVF process.<sup>88</sup> The court suggested that because Lee knew that her marriage was failing, she could have taken steps to preserve additional eggs, knowing that the embryos she created with her husband would be destroyed if they did in fact divorce.<sup>89</sup> In addition to the problems inherent with the court assuming that Lee knew her marriage was failing, it also seems improper for the court to impose the burden on Lee to have her eggs extracted once again, given the physically and emotionally draining process of doing so.<sup>90</sup>

Furthermore, a couple’s reasoning for deciding to go through IVF, rather than deciding to not have a child, or to adopt, is a deeply personal one. One mother described her main reason for undergoing IVF as “a compelling, persistent desire to create a life, to bear and raise a child knowing that the one

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84. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1171 (Feb. 2008).

85. Since there are other avenues – like artificial insemination, adoption etc. *See id.*

86. Barbara Stewart, *Tough Choices: In Vitro vs. Adoption*, N.Y. TIMES (Jan. 8, 1995), <http://www.nytimes.com/1995/01/08/nyregion/tough-choices-in-vitro-vs-adoption.html?pagewanted=all>.

87. *Id.*

88. *See Findley, supra note 1.*

89. *Id.* at 34.

90. *Id.* at 37.

reason he exists is because our love brought him into being.”<sup>91</sup> She goes on to explain that this is the same drive felt by couples or individuals who decide to and eventually successfully adopt children, and the same as a couple who can conceive children in any other matter.<sup>92</sup> Though not quantifiable or rooted in law, such a deep-seeded desire is compelling in allowing a party to have possession of their embryos when that is their only chance of having a genetic child.

## 2. Difficulties With the Adoption Process

Additionally, there are reasons that lend support to the right to have a genetic child that are not purely emotional in nature. While IVF is a long, expensive process, adoption can sometimes be even longer and costlier. For instance, for younger women, there is a high chance of achieving success through IVF within three cycles, which can collectively be less expensive than adoption.<sup>93</sup> One single mother said she did not meet the financial threshold to get approval for adoption.<sup>94</sup> Adoption can also be a timely process, taking years to bring a child home.<sup>95</sup> Furthermore, there are possible barriers to adoption depending on marital and socioeconomic status.<sup>96</sup> For instance, public adoption agencies will often give a child to a married couple first and a single person as a secondary option.<sup>97</sup> According to the National Committee for Adoption, for every child put up for adoption, there are as many as 50-100 infertile couples looking to adopt.<sup>98</sup> Oftentimes, birth mothers who are a part of the process of seeking a family for their child will express an interest for their child to be adopted by a married couple, thereby disadvantaging single people.<sup>99</sup>

Private agencies are also available, but those too may have their own requirements as to age, marital status and income, sometimes even preferring particular religions.<sup>100</sup> Thus, while IVF is difficult both physically and emotionally, adoption, too, can be a long, emotional process. Therefore, the availability of adoption does not necessarily make it a substitute for IVF; rather, another alternative that is right for some couples, but should not be compelled upon others when faced with infertility.

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91. Julie Robichaux, *IVF Versus Adoption: Why 'Just Adopt' Is Not the Answer*, TODAY SHOW (Dec. 7, 2010), <http://www.today.com/parents/ivf-versus-adoption-why-just-adopt-not-answer-1C7398701>.

92. *Id.*

93. *Id.*

94. Kelly Wallace, *Infertility: When Adoption is Not an Option*, CNN (Apr. 27, 2015), <http://www.cnn.com/2015/04/23/living/feat-infertility-when-adoption-not-option/>.

95. Waldman, *supra* note 21 at 1056.

96. *Id.*

97. *Id.*

98. *Id.* at 1055.

99. *Id.*

100. *Id.*

### 3. Cultural, Historical and Social Reasons for Wanting Biological Children

Couples may also want a genetic child for cultural or historical reasons. Parents may want their child to share a common ancestry with them, if that ancestry is of cultural significance, or where physical traits are essential to cultural identity.<sup>101</sup> One example of a link between genetic traits and cultural identity occurs in the deaf community, one commentator observing that “. . .perhaps the parents feel that deafness. . .is an asset—tough at times but worthwhile in the end—like belonging to a racial or religious minority.”<sup>102</sup> In most cultures, the idea of a “blood bond” between parent and child is at least somewhat significant historically, and therefore it is natural to want a child in this way.<sup>103</sup> While there is a compelling argument against genetic determinism,<sup>104</sup> genes still have a social significance, which in turn causes individuals to put a high value on genetic traits.<sup>105</sup> Ultimately, individuals seeking to use frozen embryos to conceive a child would argue that these emotional, social, economic and historical reasons are compelling for them to get to have a genetic child over an opposing party under any circumstances.

#### B. The Right Not to be a Genetic Parent

However, there is also a strong public policy argument that there is a right not to procreate, meaning that both men and women have an interest in not having their genetic material used to conceive a child against their will. I, along with many of the courts, believe that as a general rule, this interest is the most compelling. This is because: 1. There is right against having one’s genetic material used without their consent; 2. The potential for coercion into having a social relationship with the child; and, 3. That an emphasis on the importance of genetics supports the idea of genetic essentialism.

##### 1. Using One’s Genetic Material Without Their Consent

An individual who does not consent to having a genetic child should generally not be compelled into parenthood. More specifically, a man, for example, has an argument that his sperm cells are his personal property and may not be taken to create a child when he is opposed to having one. However, sperm has not been classified fully as property. In *Hecht v. The Superior Court of Los Angeles County*, the appellate court cited to *Davis*, stating that sperm should be categorized as an intermediate position somewhere between property and

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101. Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury and Damages*, 74 N.Y.U. L. REV. 793, 801 (June 1999).

102. *Id.* at 804.

103. John Lawrence Hill, *What Does it Mean to be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (May 1991).

104. *See infra*, Part III.B.3.

105. *See Findley, supra* note 1.

persons.<sup>106</sup> The *Hecht* court was referring to the analysis in *Davis* whereby the Court refused to characterize pre-embryos as “persons,” but also refused to characterize the *Davis*’ interests as a property interest under property law.<sup>107</sup> The *Davis* court engaged in an analysis based on a report of the Ethics Committee of the American Fertility Society, identifying three possible positions to classify the status of an embryo: 1. That a pre-embryo is a human subject after fertilization; 2. A pre-embryo has a status no different from any other human tissue; and 3. adopted by *Davis*, that a pre-embryo is somewhere between numbers one and two.<sup>108</sup>

In *Hecht*, Mr. Kane stored 15 vials of sperm in a storage bank, and not long after, took his own life.<sup>109</sup> There was existing evidence that indicated that Mr. Kane intended his girlfriend, Ms. Hecht, to have his children with the sperm.<sup>110</sup> However, when Ms. Hecht attempted to claim the sperm from the sperm bank, the bank refused, and both the executor of Mr. Kane’s estate and Mr. Kane’s children submitted petitions to have the sperm destroyed.<sup>111</sup> The court analyzed that due to the status of the sperm as not quite a person, but not exactly property because of its potential for human life, they should be offered a particular respect.<sup>112</sup> Mr. Kane’s interest in the embryos were limited to “an ownership interest to the extent that he has decision making authority over the disposition of the sperm.”<sup>113</sup> Thus, it is not a true property interest, but an interest limited to one of decision-making authority.<sup>114</sup> Therefore, Mr. Kane’s intent for the sperm to be given to Ms. Hecht was to be adhered to.<sup>115</sup> Had the sperm been a true property interest, they would not have been awarded to Ms. Hecht, but rather made assets of Mr. Kane’s estate.<sup>116</sup>

Some scholars have criticized the *Hecht* ruling, stating that failing to recognize sperm in terms of property rights will lead to inconsistent results and less predictability from state to state.<sup>117</sup> While sperm, alone, leans more towards property than personhood, when it comes to frozen embryos, these are even less

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106. 16 Cal. App. 4th 836, 849 (Cal. App. Div. 1883).

107. *Id.*

108. *Id.* at 840.

109. *Id.*

110. *Id.* (Mr. Hecht’s will stated “I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht”).

111. *Id.* at 842.

112. *Id.* at 848.

113. *Id.* at 849.

114. *Id.*

115. *Id.* at 851.

116. *Id.*

117. Ernest Weintraub, *Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell*, 11 QUINNIPIAC HEALTH L. J. 1, 9 (2007) (stating that a failure to classify sperm as property will yield unpredictable results across states).

like a piece of property, considering the even greater potential for life when a sperm cell is already joined with an egg during the IVF process.<sup>118</sup> What the *Hecht* and *Davis* analyses do lend support to is the fact that the intent of the individual who uses their genetic material has an interest in its future.

It may be argued that there are similar situations whereby an individual's interest in their own genetic material does not always give them decision-making priority. For example, it is established not only that a woman has the right to have an abortion over the objection of the other party, but also that a woman has a right to have a child over an objection from the genetic child who would prefer she get an abortion.<sup>119</sup> This could create a situation in which a woman has a child, created with the sperm from a man who fully opposes having a biological child. Thus, a woman who wants to implant a frozen embryo without the consent of the man may argue that these situations are analogous: if a woman can have a child without the consent of her husband when it is already implanted, she can also have a child without the consent of her husband when it is not yet implanted. Arguably, engaging in the IVF process is beginning the biological process of having a child, and stopping it in his tracks is no different than compelling abortion.<sup>120</sup> Furthermore, while individuals may engage in intercourse without the intention of creating a child, individuals who decide to undergo IVF are doing so for the explicit purpose of eventually having a child, and therefore there is an even greater interest in bringing that intention to fruition.

However, this argument is flawed for several reasons. The abortion cases imply a right to be a gestational parent; they do not *establish* a right to be a genetic parent.<sup>121</sup> This is because the arguments in favor of a woman's right to an abortion absent the consent of the potential father are grounded in bodily integrity.<sup>122</sup> Along these lines, compelling abortion is different than compelling the disposal of pre-embryos. For instance, I. Glenn Cohen makes the analogy that while it could infringe on one's bodily integrity to force a tube down one's throat to stomach pump up pills as incriminating evidence, the same concern is not evident when a detective examines saliva on pills an individual has

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118. IVF success rates have increased over time, while pregnancy rates for Intrauterine Insemination Procedures have not. See *In Vitro Fertilization, IVF – Advantages Compared to Other Fertility Treatments such as Artificial Insemination*, ADVANCED FERTILITY CTR. CHI. (Apr. 22, 2016), <http://www.advancedfertility.com/ivfchanges.htm>.

119. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. (1976) (holding that that State does not have the constitutional authority to give one spouse the ability to unilaterally prohibit the wife from terminating her pregnancy); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that requiring spousal notification before obtaining an abortion placed an undue burden on the mother).

120. Ashley Marcin, *Embryo v. Fetus: Fetal Development Week by Week*, HEALTHLINE (Mar. 14, 2016), <http://www.healthline.com/health/pregnancy/embryo-fetus-development> (describing the differences between an embryo and a fetus, calling embryo formation the “baby’s basic foundation and framework,” and the fetus as “growth and development.”).

121. Cohen, *supra* note 84.

122. *Id.*

regurgitated without force.<sup>123</sup> When the “integrity” is broken because biological material is no longer attached to the body, there is no longer quite the same justification for avoiding bodily invasion.<sup>124</sup> Thus, a biological father’s interest in not having a child when an embryo is created is not halted by a woman’s bodily integrity as it would be if a biological father’s interest was in aborting an already conceived fetus. Therefore, the holding in *Hecht*, where Mr. Kane’s intent regarding the future of his sperm was adhered to, should be followed when one party does not intend to have their genetic material used to create a human life.<sup>125</sup>

## 2. Forced Social Relationships

A second argument for the right not to be a genetic parent are the psychological implications once the child is born.<sup>126</sup> There are varying degrees of relationships that a parent may have with a child: a genetic/biological relationship, a legal relationship and a social relationship.<sup>127</sup> Derek Ettinger describes the difference between genetic and social parenthood.<sup>128</sup> He explains that a genetic relationship does not guarantee any sort of normative relationship between parent and child; and conversely, a genetic connection is not necessary for the norms of social parenthood to exist.<sup>129</sup> Rather, social parenthood is defined through intentions, actions, and emotional and conceptual bonds.<sup>130</sup> Take adoption, for example. It is clearly the expectation that parents of adopted children fulfil the same obligations as would any biological parent.<sup>131</sup> On the other side of the coin are sperm donors: individuals who technically are biological parents, but are not expected to be social parents.<sup>132</sup> One study revealed that, of surveyed sperm donors, 80% would not want to be informed of pregnancies that resulted from their donation, 88% would not be interested in meeting their resulting offspring, and 60% stated they would not go forward with

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123. *Id.* at 1157.

124. *Id.*

125. See Findley, *supra* note 1.

126. See, e.g., *id.* (where Findley argues that he was disturbed by Lee’s discussion of the future of his potential child).

127. See, e.g., Derek J. Ettinger, *Genes, Gestation, and Social Norms*, 31 L. PHILOSOPHY 243 (May 2012).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See, e.g., Tim Bayne, *Gamete Donation and Parental Responsibility*, 20 J. OF APPLIED PHILOSOPHY 1 (2003) (rejecting the argument that gamete donors have parental responsibilities that they “treat too lightly”).

the donation if they knew their offspring could find their identity later in life.<sup>133</sup> This lends support to an argument that parental attachment is not biologically rooted, or else more sperm donors would seek out the identity of their genetic children.<sup>134</sup>

Yet, there is a clear and obvious difference between male IVF participants and sperm donors, in that the party opposed to having a child is not anonymous. Sperm donors generally do not have knowledge of where their genetic material is going, while the men in many of the aforementioned cases may have complicated relationships with the women who may gestate and parent their biological child.<sup>135</sup> Additionally, unlike sperm donors, most IVF participants engage in the process with the expectation that they are to become legal, genetic and social parents as a result.<sup>136</sup> Furthermore, these participants are either married or in some type of relationship at the time of IVF, and thus will always have some sort of connection, even after separation. In *Findley v. Lee*, for example, the woman looking to implant the cryopreserved embryos mentioned that she would speak ill of the child's father and his decision to not be a part of the child's life.<sup>137</sup> This not only has the potential to psychologically impact the genetic father, but also the child, who may feel neglected or unwanted.<sup>138</sup>

There may be an additional argument that legal and social implications do not have to be an issue if the party seeking to implant the embryos allows the other party to opt out, via contract, of legal, parental roles. This would include the general parental obligations that exist after divorce or separation, like custody and child support. While this would help to safeguard the opposing party, there is ultimately no guarantee that the psychological impact would be any less. Thus, the court's decision regarding the future of cryopreserved embryos should generally weigh in favor of the party seeking to avoid procreation.

### 3. *The Case Against Genetic Essentialism*

The final argument for the right not to be a genetic parent directly addresses the argument in Part II.A by stating that there is no compelling reason to have a genetic child. Genetic essentialism is the idea that our genes are the most important part of who we are as individuals, ignoring the way that "our cells and environments interrelate, the ways our physiological system functions as a whole

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133. Bjorn Pedersen et al., *Psychosocial Aspects of Donor Insemination: Sperm Donors—Their Motivations and Attitudes to Artificial Insemination*, 73 ACTA. OBSTET. GYNECOL. SCAND. 701, 702 (1994).

134. *Id.*

135. Waldman, *supra* note 21 at 1048.

136. *See, e.g., Findley, supra* note 1 (Findley and Lee were married when deciding to undergo IVF).

137. *Id.*

138. *Id.*

organism, and the ways our minds and hearts affect our being.<sup>139</sup> Though deviating slightly from the main premise of this paper, the argument against genetic essentialism can be well explained through the unfortunate situation where there is a mix-up during the course of using ART.<sup>140</sup> In *Perry-Rogers v. Fasano*, one couple's embryos (Perry-Rogers') were implanted in the wrong woman (Fasano).<sup>141</sup> While Fasano agreed to turn the baby over to his genetic parents, she sought visitation rights, which the genetic parents originally consented to in an agreement, but then subsequently denied.<sup>142</sup> When Fasano sought to enforce the visitation agreement, the court held that she did not have standing to dispute visitation of the child.<sup>143</sup>

By ruling in a purely procedural manner, the court failed to listen to any claims about the best interests of the child, the child's relationship with the Fasano's, or the role of the ART mistake in causing this dilemma in the first place.<sup>144</sup> The court essentially blames Fasano for forming a bond with this child when she knew it was not genetically related, as evidenced by their different races.<sup>145</sup> Though not an easy, nor common, situation to resolve, this ruling is problematic because it undermines the ability for a parent to form a bond with her non-biological child.<sup>146</sup> While the court acknowledges that a bond between a gestational carrier and fetus is often formed while *in utero*, it fails to rule with that idea in mind.<sup>147</sup> Thus, the court impliedly ruled under a genetic essentialism framework.

This is problematic for a number of reasons. While genetic information is useful scientifically; i.e. in predicting and treating illnesses, what constitutes a family is arguably not scientific at all.<sup>148</sup> Genetics fails to address the role of pregnancy and birth, as shown in the Fasano case, as well as the role of nurture after birth.<sup>149</sup> Furthermore, reducing individuals to their DNA can trap them into feeling as though they have to act a certain way, which can stifle individuals in reaching their full potential.<sup>150</sup> While there is a history of tying biological

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139. Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1 (2003).

140. *Id.* at 2.

141. 276 A.D.2d 67 (App. Div. 2000).

142. *Id.* at 68.

143. *Id.* at 74.

144. Weintraub, *supra* note 117.

145. *Id.* (claiming that this case was solved simply by way of "race-matching" to determine parental rights).

146. Bender, *supra* note 139 at 7.

147. *Id.* at 27.

148. *Id.* at 76 (arguing that there are not technical or scientific answers to complex human, familial problems).

149. *Id.* at 3 (stating that genetic essentialism "renders all our ways of nurturing and being nurtured by one another for naught").

150. *Id.* at 42.

reproduction with parental responsibility, the evolving definition of a family has made this connection weaker.<sup>151</sup> For instance, some states have begun to modify the application of “traditional” parental preference when it comes to custody disputes, such as by awarding custody of a child to a non-biological parent who has performed all functions of a primary caregiver, even when it is against the wishes of the legal caregiver.<sup>152</sup> The fact that the courts are willing to progress along with society shows that genetic parenthood is not necessarily prioritized over other factors, such as intent and actions.

It may be argued that, as discussed in Part III A, a decision to have a biological child is not based on scientific or even rational reasoning for wanting a biological child; but rather, is purely emotional.<sup>153</sup> A desire for a genetic child may be simply based on a gut-feeling that having a child through the IVF process is what is right for them, and they have a right to see that through.<sup>154</sup> Furthermore, there is often cultural and social significance associated with passing along genetics.<sup>155</sup> Without trying to undermine the validity of an individual’s emotions, this feeling is still likely, at least in part, encouraged by societal “norms”—that it is more accepted, or more desirable, to have a biological child, only because more families have biological children than non-biological children.<sup>156</sup> Even Fred Norton, who argues in favor of genetic affinity, admits that it is partially due to the “normative” experience of constructing a family unit that shares identifiable traits is what makes it more appealing for many.<sup>157</sup> Norton also concedes that interest in genetic affinity is not functional, but rather purely subjective and aesthetic; meaning, the role of genetics in personal identity is less determinative, and therefore parental interest in affinity is more so related to their children having symbolic, common traits.<sup>158</sup> Therefore, while a parent’s desire for a biological child should not be questioned, the reasoning behind the desire may not be compelling enough to outweigh an opposing party’s desire to not have a genetic child.

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151. David D. Meyer, *Parenthood in a Time of Transition: Tensions between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 133 (2006) (though changes in parentage laws have not changed fundamentally, some courts and legislatures have made attempts to “bend” traditional doctrines to account for non-traditional parents).

152. *Id.* (describing a situation in which a lesbian couple had shared parenting responsibility equally. When the couple separated, the court refused to give preference to the woman who had actually given birth to the child, and treated both women equally).

153. *See supra*, Part III.A.

154. *See supra*, Part III.A.

155. *See Findley, supra* note 1.

156. In 2009, U.S. citizens adopted around 13,000 children from 106 different countries. OFF AND RUNNING: FACT SHEET, MD. PUB. TELEVISION (Sept. 7, 2010), <http://www.pbs.org/pov/offandrunning/fact-sheet/>.

157. *See Norton, supra* note 101.

158. *Id.*

#### IV. GIVING PRIORITY TO GENETIC REPRODUCTION IN CASES OF LIMITED REPRODUCTIVE CAPACITY

While courts have engaged in balancing tests, sometimes placing weight on the desire of the mother to procreate due to a lack of alternative means of procreation, no court has forthrightly stated that when a woman or man cannot have a biological child by other means, they should always get possession of the embryos when there is a dispute. This resolution is most appropriate for a variety of reasons: First, it emphasizes the importance of genetic parenthood for both the party wanting to procreate and the party seeking to avoid procreation. Second, it creates predictability in these decisions, which can in turn decrease the amount of litigation, and in most instances, also give the parties sufficient notice as to the outcome of any future dispute, based on knowledge of their own reproductive capabilities.<sup>159</sup>

##### *A. The Right to Procreate and the Right Not to Procreate*

Arguments for the right not to have a genetic child and the right to have a genetic child are both properly addressed within this framework. As discussed in Part III, genetic parenthood clearly holds importance in our society.<sup>160</sup> This can support both the argument as to why individuals seeking to avoid genetic parenthood may feel so strongly about it; and, conversely, why those who wish to implant the embryos also feel strongly about being able to do so. Allowing disposal of embryos unless one party cannot have a genetic child by alternative means somewhat addresses the interests of both sides. If the embryos are disposed of, the party opposed to a genetic child will not have one, while the other party, if they have reproductive capacity, can still go through the IVF cycle with another partner or by using a sperm donor or an egg donor. This is not to downplay the difficult and emotional process of IVF, especially for a woman; however, as exemplified from the courts engaging in the balancing test, the party avoiding a genetic child should generally prevail, and in the end, both parties can eventually get what they want.<sup>161</sup>

However, the importance of a genetic child also lends support to an individual wishing to have a genetic child when it is his or her only opportunity to do so. Perhaps a woman has had cancer, and the chemotherapy rendered her infertile.<sup>162</sup> Or, she has undergone a hysterectomy and cannot carry a child on her own. And, perhaps the embryos she created through IVF with her then-

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159. Of course, reproductive capabilities are subject to change even after undergoing IVF, but in many instances a couple is deciding to go through the IVF process because either party knows they are at risk of becoming infertile due to illness, age constraints, etc.

160. *See supra*, Part III.

161. *See generally, supra*, Part I.A.

162. *See, e.g.*, Findley, *supra* note 1.

husband or partner was her last chance of producing eggs.<sup>163</sup> It is only in this situation that importance of having a genetic child outweighs opposition from the other party. Furthermore, in this situation, under this potential solution, the party seeking to avoid procreation would have no social or legal obligations to the child. They would not be obligated to pay child support, have any sort of custody, or any social role in the child's life. As discussed in Part II, it may be argued that this plan is not as full-proof as it may seem, as there are additional psychological implications for the opposing party that cannot be "waived."<sup>164</sup> However, hopefully with these safeguards in place, the opposing party would not feel as compelled to develop a social relationship as he/she otherwise would.

The court in *Szafranski v. Dunston* lays out the argument for priority in a limited reproductive context.<sup>165</sup> Although the court is engaging in a balancing test, the analysis exemplifies why such cases should always come to this resolution.<sup>166</sup> In that case, Karla was diagnosed with lymphoma and expected to be infertile as a result from the chemotherapy.<sup>167</sup> She underwent IVF with her boyfriend, Jacob, and created and froze three viable embryos.<sup>168</sup> The couple signed a consent form stating that, in the event of divorce or dissolution of the marriage or partnership, and disagreement regarding the embryos, the couple would donate the embryos to another couple.<sup>169</sup> Their relationship ended; Jacob wanted the embryos discarded, Karla wanted to use them.<sup>170</sup> The court refused to make a judicial determination that alternative methods of parenthood, like adoption, offer an acceptable substitution to genetic parenthood, and ultimately concluded that while Jacob's interest in not being a biological parent should not be undermined, Karla's interests, given her ovarian failure, must prevail.<sup>171</sup>

### *B. An Interest in Predictability and Efficiency*

Despite the *Szafranski* court reaching the right outcome, the way in which it proceeded is problematic. The court engaged in a lengthy discussion of the couples' intent, the informed consent agreement, their oral agreement, and Jacob's reasoning for not wanting a child, including his fear that having a biological child would prohibit him from finding love in the future.<sup>172</sup> In *Findley*, the court engaged in a similar analysis, and yet came to the completely opposite

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163. *Id.*

164. *See supra*, Part II.

165. 34 N.E.3d 1132 (2015).

166. *Id.* at 1136.

167. *Id.*

168. They were in a relationship at the time, though both acknowledged that they doubted their relationship would be long term. *Id.* at 1138.

169. *Id.*

170. *Id.* at 1145.

171. *Id.*

172. *Id.*

conclusion.<sup>173</sup> This lack of consistency will not encourage couples to thoroughly think through these types of situations before deciding to undergo IVF. Rather, an individual may feel more comfortable making a spur-of-the-moment decision to help his or her partner create a child, knowing that later on, if they want to dispute the agreement, they can do so and get out of being a parent. Conversely, having more stringent guidelines in place as to how disputes will be resolved will force couples to think through these possibilities ahead of time.

Additionally, the *Szafranski* case took four years of litigation to reach a final verdict.<sup>174</sup> Pregnancy is a time-sensitive matter, and when one's ability to procreate is on the line, waiting for years for a court to subjectively decide on the fate of one's potential child through use of the balancing test is unreasonable. Creating a more predictable ruling will help remedy this problem. First, couples deciding to have IVF treatment will usually have notice if either party is infertile or likely to become infertile. For instance, in both *Szafranski* and *Findley*, the parties wanted to preserve embryos in the event that the cancer treatment took away the women's reproductive capacities.<sup>175</sup> Thus, at this point, the men would be aware that if they were to oppose to the implantation of the embryos at some point in the future, the women would get to use the embryos if they so desired. This will not always be the case, as a couple could preserve embryos for a variety of reasons, and only later does one party become infertile; however, the outcome would have to be the same. The reverse could also happen, where a woman believes she will be infertile and then is found to be capable of producing eggs, but again, this would not change the application of the rule—if the woman is fertile, and the man opposes to her having his child, she will not be able to do so.

This predictability will allow couples to make more thoughtful decisions at the time the embryos are created and cryopreserved, and therefore less likely to litigate, knowing what the outcome will be. In the event that there is litigation, higher state courts will be less likely to hear appeals of these cases, as long as the lower courts follow the rule. The one aspect of this solution lacking in predictability is in defining infertility. Ultimately, this burden would fall onto the court to make a determination regarding at what point a woman or man is rendered "infertile," since with age-related infertility, and especially with men this may not be so certain.<sup>176</sup> While infertility may be more determinative when caused by illness, it can be less so when it is age-related. According to the World Health Organization, infertility is defined as "the failure to achieve a clinical

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173. See Findley, *supra* note 1.

174. Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), [http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html?\\_r=0](http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html?_r=0).

175. See Findley, *supra* note 1.

176. See, e.g., Findley, *supra* note 1. (A fertility doctor determined that due to Lee's age, her chances of successfully conceiving a child were 0-5%).

pregnancy after 12 months or more of regular protected sexual intercourse.”<sup>177</sup> Yet, the American Society for Reproductive Medicine includes in its definition that for women aged 35 and older, inability to conceive after six months is generally considered infertility.<sup>178</sup> However, neither of these definitions can be sufficient when determining infertility when deciding the disposition of embryos after divorce, since waiting that time period is unreasonable, nor would either party have a sexual partner after divorce. Thus, infertility would need to be determined by medical experts, and may not come down to a conclusive result

However, this one determination is still undoubtedly less complex than engaging in an analysis of the parties’ reasons for and against having biological children. Thus, an emphasis on efficiency, while also considering the interests of the parties by understanding their reproductive abilities, strikes a balance between the contractual approach and the balancing test. It may be argued that if efficiency and predictability are the goals, then the contractual approach should be the answer. However, as previously discussed, this approach undermines the emotionally fluid process of deciding to go through IVF.

## V. CONCLUSION

Decisions to start a family, especially when faced with reproductive obstacles, is a deeply personal one. The assistance of ART is tremendously useful to infertile individuals who want nothing more than to have a biological child. However, uncertainty regarding the future of relationships and personal health can bring about many problems between individuals who have frozen their embryos to be used sometime in the future. Though ART has been around for two decades, this is still fairly new technology and consequently, the courts have been faced with new dilemmas surrounding its use in the past several years.<sup>179</sup> Most jurisdictions have stuck to one of three frameworks for determining embryo disputes: the balancing test, the contractual approach, and the contemporaneous mutual consent approach.<sup>180</sup> However, in order to properly address the interests of all parties, the courts should adopt a more predictive and efficient standard. Implementing a rule that the opposing party prevails, with an exception in the case where one of the parties has no other means to have a biological child, properly gives weight to both parties’ while also ensuring more thoughtfulness in the parties’ decision-making and greater efficiency in the court system.

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177. INFERTILITY DEFINITIONS AND TERMINOLOGY, WHO, (2016), <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/>.

178. DEFINING INFERTILITY, AM SOC’Y REPROD. MED. (2014), [https://www.asrm.org/FACTSHEET\\_Defining\\_Infertility/](https://www.asrm.org/FACTSHEET_Defining_Infertility/).

179. WHAT IS ASSISTED REPRODUCTIVE TECHNOLOGY?, CDC (Nov. 14, 2014), <http://www.cdc.gov/art/whatis.html>.

180. *See supra*, Part V.

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CRYOPRESERVED EMBRYO DISPUTES

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