

Comment,
THE DISPOSITION OF FROZEN EMBRYOS
AT DIVORCE

I. Introduction

The advancement of Assisted Reproductive Technology (ART) processes in which eggs or embryos are handled¹ has posed new legal and ethical issues, as is the case with any other modern advancement. In vitro fertilization (IVF), which “involves combining eggs and sperm outside the body in a laboratory,”² accounts for 99% of ART procedures.³ Since the first IVF birth took place in the United Kingdom in 1978, more than eight million babies worldwide have been born through IVF.⁴ IVF has been an invaluable advancement in medicine and technology for many individuals and couples who are unable to conceive naturally. However, problems arise when the relationship terminates and the progenitors⁵ disagree about what should be done with their remaining embryos.

The issues of custody, parental rights, and procreational autonomy that surface in disputes over the disposition of embryos are often issues of first impression for courts in many states.⁶ Most states lack an established approach for determining the dis-

¹ *What Is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/whatis.html> (last updated Oct. 8, 2019).

² *Infertility and In Vitro Fertilization*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization#1> (last visited Dec. 30, 2020).

³ Christina L. Preville, *Collaborative Law in Pennsylvania and the Frozen Embryo Debate*, 8 J. ENV'T'L. & PUB. HEALTH L. 80, 91 (2013).

⁴ Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN HEALTH (July 3, 2018, 6:04 AM), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

⁵ Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 261 (1990) (Progenitors “refers to the ‘gamete providers,’ those individuals who provide the egg or sperm cells from which the preembryo is created”).

⁶ See generally Mary Joy Dingler, *Family Law’s Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U. L. REV. 293, 294 (Oct. 2019).

position of frozen embryos in the face of disputes.⁷ Courts in the few states that have addressed the issue of the disposition of frozen embryos find difficulty maintaining uniformity in their decisions.⁸ In addition, courts are usually left without clear statutory guidance for settling the issue. Couples are often left with inconsistent, and at times, inequitable outcomes as a consequence of this unfamiliar and uncommon area of family law.

Part II of this Comment explains the IVF process by giving a general overview of the creation of embryos, the cryopreservation of embryos, and the development of a disposition agreement. Part III delves into the question of whether embryos are persons or property of the progenitors – an issue that remains largely unanswered. Part IV sets out the three main approaches courts have employed to determine the disposition of frozen embryos in the event of a divorce and disagreement between the parties. Finally, Part V discusses the laws in three states, Arizona, California, and Florida, that have adopted statutory schemes to address the disposition of frozen embryos.

II. The Creation of Frozen Embryos: The IVF Process

In vitro fertilization, the most common and most effective form of ART,⁹ results in an estimated 40,000 to 60,000 births each year in the United States.¹⁰ The advancement of IVF has made conception possible for many people, including individuals who are infertile or suffer from genetic issues, women over the age of forty, individuals who may be undergoing treatment for a terminal illness, single-by-choice parents, and individuals in

⁷ Sarah B. Kirschbaum, *Who Gets the Frozen Embryos During a Divorce? A Case for the Contemporaneous Consent Approach*, 21 N.C. J.L. & TECH. 113, 117 (Dec. 2019).

⁸ *Id.* at 116.

⁹ Kelly Burch, *12 IVF Truths No One Tells You About*, CCRM FERTILITY, <https://www.ccrmivf.com/news-events/ivf-truths/> (last visited Dec. 14, 2020); *In Vitro Fertilization (IVF)*, MAYO CLINIC, (June 22, 2019), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

¹⁰ *IVF by the Numbers*, PENN MEDICINE, (Mar. 14, 2018), <https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers#:~:text=61%2C740%3A%20The%20latest%20SART%20report,births%20annually%20are%20via%20IVF.>

LGBTQ+¹¹ partnerships.¹² In treating infertility, less-invasive forms of treatment, including the use of fertility drugs or intrauterine insemination,¹³ are usually undertaken before undergoing IVF.¹⁴ The IVF procedure is achieved either by using the eggs and sperm of each individual in a partnership or by using eggs, sperm, or embryos from a donor.¹⁵

The IVF process involves removing eggs from the woman and sperm from the man in a laboratory.¹⁶ Using insemination techniques, the separated sperm and eggs are combined in the laboratory for the fertilization process.¹⁷ A fertilized egg then forms a pre-embryo¹⁸ or embryo,¹⁹ which is subsequently transferred back into the uterus with the hope of a resulting pregnancy.²⁰ Although it sounds simple, the IVF process is costly, lengthy, and invasive for the woman individually and the couple

¹¹ *What Does LGBTQ+ Mean*, OK2BME, <https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/> (last visited Aug. 14, 2020). LGBTQ+ refers to all communities and identities sharing a common experience, including Lesbian, Gay, Bisexual, Transgender, Transsexual, 2/Two-Spirit, Queer, Questioning, Intersex, Asexual, Ally, +Pansexual, +Agender, +Gender Queer, +Bigender, +Gender Variant, +Pangender. This list is not exhaustive and is not meant to exclude LGBTQ+ identities that do not appear.

¹² *In Vitro Fertilization*, *supra* note 9.

¹³ *Id.* (“A procedure in which sperm are placed directly in [a woman’s] uterus near the time of ovulation”).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *IVF Treatment*, CCRM FERTILITY, <https://www.ccrmivf.com/services/ivf-fertilization/> (last visited Dec. 14, 2020).

¹⁷ *Id.*

¹⁸ Derek Mergele-Rust, *Splitting the Baby: The Implications of Classifying Pre-Embryos as Community Property in Divorce Proceedings and Its Impacts on Gestational Surrogacy Agreements*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 505, 508 (2016) (“A pre-embryo is the organism existing before fourteen days of development, prior to the attachment to the uterine wall and the development of the primitive streak”); Elissa Strauss, *The Leftover Embryo Crisis*, ELLE, (Sept. 29, 2017), <https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/> (The term pre-embryo is used by some medical experts in categorizing embryos that have not yet been implanted into the uterus).

¹⁹ Jon Johnson, *Embryo Freezing: What You Need to Know*, MEDICAL NEWS TODAY, (Mar. 13, 2019), <https://www.medicalnewstoday.com/articles/314662>.

²⁰ *IVF Treatment*, *supra* note 16.

as a whole, with no guarantee of success.²¹ The full IVF cycle involves several stages including ovarian stimulation, egg retrieval, sperm retrieval, fertilization, embryo transfer, and cryopreservation.²²

The first stage of the IVF cycle, ovulation induction, involves the treatment of a woman who chooses or is able to use her own eggs.²³ During treatment, the woman takes synthetic hormones along with other fertility medications to stimulate her ovaries to produce more than one egg.²⁴ This two-week process involves multiple vaginal ultrasounds and blood tests to determine whether the woman's eggs are ready for retrieval.²⁵ Egg retrieval, the second stage of the IVF process, involves the collection of a woman's mature eggs through transvaginal ultrasound aspiration.²⁶ During this procedure, the woman is sedated and an ultrasound guide containing a needle is inserted through the woman's vagina to retrieve her eggs.²⁷ Following retrieval, the mature eggs are incubated in a nutritive liquid.²⁸

Sperm retrieval is a relatively uncomplicated and straightforward stage of the IVF process. During sperm retrieval, a semen sample is provided by a donor or the male partner who chooses and is able to use his own sperm.²⁹ After the sperm have been retrieved and are separated from the semen fluid, the fourth stage of fertilization can begin.³⁰ The fertilization process often employs one of two methods: insemination or intracytoplasmic sperm injection (ICSI).³¹ The conventional insemination method involves the mixing and incubation of the mature eggs and

²¹ *See id.* (The average cost of IVF is between \$12,000 and \$17,000 for one full cycle); *See also In Vitro Fertilization, supra* note 9 ("IVF can be time-consuming, expensive and invasive." A full IVF cycle can take approximately three weeks. More than one cycle can be required in some cases).

²² *In Vitro Fertilization, supra* note 9.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *In Vitro Fertilization*, MEDLINEPLUS, <https://medlineplus.gov/ency/article/007279.htm> (last updated Jan. 5, 2021).

healthy sperm.³² Through ICSI, a method that may be used if chances of fertilization are particularly low, a single sperm is directly injected into each egg.³³

Embryo transfer is the final stage of the IVF process. Two to five days following egg retrieval, the woman will undergo a procedure during which she is mildly sedated.³⁴ A catheter containing one or multiple embryos is inserted into the woman's uterus, with the hope of at least one of the embryos implanting into the woman's uterine lining.³⁵ The full IVF process often produces several embryos to increase the chances of success.³⁶ In an effort to preserve the remaining embryos for future use, the embryos are frozen and stored through a process called cryopreservation.³⁷ During cryopreservation, the cell's water is replaced with cryoprotectant, the embryo is frozen through slow freezing or vitrification, and the embryo is stored in liquid nitrogen.³⁸

Cryopreservation is often utilized because of its ability to make future IVF cycles less expensive and less invasive.³⁹ As of 2018, it was estimated that there were more than one million frozen embryos currently being stored in fertility clinics around the United States.⁴⁰ Frozen embryos can viably remain in storage for an indefinite period of time.⁴¹ However, maintaining storage of frozen embryos can be costly, averaging between \$300 and \$1,200 a year, as long as the progenitors choose to keep them at the fertility clinics and facilities.⁴² Cryopreservation can be a good

³² *In Vitro Fertilization*, *supra* note 9.

³³ *Id.*; Medline Plus, *supra* note 31.

³⁴ *In Vitro Fertilization*, *supra* note 9.

³⁵ *Id.*

³⁶ Johnson, *supra* note 19; *See also In Vitro Fertilization*, *supra* note 9.

³⁷ Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 495 (1999).

³⁸ Johnson, *supra* note 19 (Slow freezing involves "placing the embryos in sealed tubes, then slowly lowering their temperature." The vitrification method "freezes the cryoprotected embryos so quickly that the water molecules do not have time to form ice crystals. This helps protect the embryos and increase their rate of survival during thawing.).

³⁹ *In Vitro Fertilization*, *supra* note 9.

⁴⁰ *Infertility and In Vitro Fertilization*, *supra* note 2.

⁴¹ Johnson, *supra* note 19; Tamar Lewin, *Industry's Growth Leads to Left-over Embryos, and Painful Choices*, N.Y. TIMES, (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html>.

⁴² Lewin, *supra* note 41.

option for individuals and couples who are certain that they will use their embryos in the future or for those who are undecided on the future use of their embryos. However, complex legal and moral disputes arise when progenitors do not agree on the use and custody of their frozen embryos.

Before undertaking the IVF process, both patients are encouraged to⁴³ complete and sign an IVF contract or disposition agreement detailing the disposition of their frozen embryos.⁴⁴ The agreement provides the clinic with guidance on the use or non-use of the couple's frozen embryos in the event of their separation, divorce, death, or cessation of treatment.⁴⁵ The IVF contract or disposition agreement is usually provided by the IVF clinic or drafted by an attorney.⁴⁶ The primary options given to a couple for the disposition of their frozen embryos in the event of a divorce include donating the embryos to research or to another couple, keeping the frozen embryos in storage indefinitely, awarding the embryos to one biological parent, or discarding the embryos.⁴⁷

Despite having signed a disposition agreement prior to beginning IVF, it is likely that one or both progenitors will change their mind about their wishes for the disposition of their embryos.⁴⁸ Studies estimate that 71% of couples have different preferences for the disposition of their frozen embryos after they complete IVF treatment compared to their dispositional preferences prior to beginning treatment.⁴⁹ Further complicating matters, most couples do not contemplate their possible divorce or separation at the time of signing the disposition agreement.⁵⁰ In

⁴³ *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998) (The court reasoned that parties "should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing.").

⁴⁴ Kirschbaum, *supra* note 7, at 116.

⁴⁵ Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 66 (Jan. 2018); Mergele-Rust, *supra* note 18, at 509.

⁴⁶ Kirschbaum, *supra* note 7, at 116.

⁴⁷ *Id.*

⁴⁸ *Id.* at 134.

⁴⁹ Susan C. Klock et al., *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69, 69–70 (2001).

⁵⁰ Kirschbaum, *supra* note 7, at 133.

the wake of divorce and disagreement, progenitors are left to speculate about the possible characterization and disposition of their frozen embryos whether or not they signed a disposition agreement. An extensive body of family law has been established regarding the division of jointly owned property in the event of a divorce; unfortunately, the law determining the division of jointly owned frozen embryos is unclear.⁵¹ The issue of determining the division of frozen embryos is complicated by the confusion surrounding characterization of frozen embryos.

III. Characterization of Frozen Embryos: Persons or Property?

The issue concerning the proper disposition of frozen embryos in the event of a divorce is further complicated by the unresolved and indeterminate nature of embryos. Understandably, courts struggle with settling the question of whether to define an embryo as a person or property. The medical community “uses the term embryo from the moment that cells divide after fertilization until the eighth week of pregnancy.”⁵² The IVF embryo or pre-embryo is a complex structure, with the potential for developing into human life.⁵³ The American Society of Reproductive Medicine (ASRM) supports affording embryos an “interim status.”⁵⁴ ASRM states that embryos should be given “profound respect” but not the exact same rights as humans.⁵⁵

The U.S. Supreme Court has not yet addressed the characterization of embryos or other reproductive tissue.⁵⁶ The majority of courts that have addressed the characterization of frozen embryos found that they are property of a special or unique character.⁵⁷ Because of their potential for human life, courts often

⁵¹ Debele & Crockin, *supra* note 45, at 75.

⁵² Johnson, *supra* note 19.

⁵³ See generally Debele & Crockin, *supra* note 45, at 63.

⁵⁴ *Id.* at 68-69.

⁵⁵ *Id.* at 69.

⁵⁶ *Id.* at 73; *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe v. Wade*, the U.S. Supreme Court declined to characterize fetuses as judicial persons.

⁵⁷ See Debele & Crockin, *supra* note 45, at 68; *In re Marriage of Rooks*, 429 P.3d 579, 583 (Colo. 2018) (The Supreme Court of Colorado held that an embryo is marital property of a special character); *Gadberry*, 507 S.W.3d 127 (Balancing the competing interests of the parties, the Court of Appeals of Mis-

hold that embryos occupy an intermediate category between persons and property.⁵⁸ In dissolution of marriage cases, courts have characterized embryos as a “unique form of joint marital property that could not simply be valued and divided.”⁵⁹

Louisiana is one of the few states that has adopted legislation defining the characterization of embryos. Louisiana’s statute explicitly defines human embryos as “biological human being[s] which [are] not the property of the physician who acts as an agent of fertilization, or the facility clinic which employs him or the donors of the sperm or ovum.”⁶⁰ Louisiana legislation goes further to define an IVF “human ovum” as a “juridical person which cannot be owned by the in vitro fertilization parent.”⁶¹ The human embryo cannot be created or destroyed for exclusive purpose research.⁶² Louisiana’s statute further instructs the proper judicial standard of disposition of the embryo is the best interest of the embryo.⁶³

The characterization of frozen embryos remains unclear. Whether the court determines that a frozen embryo is a person or property or of an intermediate status has a great impact on the disposition outcomes. The characterization of frozen embryos in disputes over their custody and use also plays a large role in the court’s determination of which approach to utilize in resolving the dispute.

IV. Judicial Approaches to Resolving Disputes

Courts presented with disputes regarding the disposition of a couple’s frozen embryos at their divorce are often faced with issues of first impression. With a lack of legislative guidance or precedent, courts grapple with complicated contractual, property,

souri, Eastern District concluded that embryos are marital property of a special character); *Davis*, 842 S.W.2d at 597 (The Supreme Court of Tennessee concluded that embryos are “not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

⁵⁸ Dingler, *supra* note 6, at 315.

⁵⁹ Debele & Crockin, *supra* note 45, at 68.

⁶⁰ LA. REV. STAT. ANN. § 9:126 (2020).

⁶¹ LA. REV. STAT. ANN. § 9:130 (2020).

⁶² Debele & Crockin, *supra* note 45, at 71.

⁶³ LA. REV. STAT. ANN. § 9:131 (2020).

and constitutional matters.⁶⁴ This part of the Comment details the principal approaches courts have applied when determining the disposition of frozen embryos at divorce: the contractual approach, the balancing approach, and the contemporaneous mutual consent approach. In general, the goal of each approach is to “(1) secure both parties’ consent where possible, and (2) avoid results that compel one party to become a genetic parent against his/her will.”⁶⁵

Courts that have addressed embryo-disposition cases are generally in agreement that the contractual approach should apply first in cases where the progenitors have an existing agreement stating their dispositional choices.⁶⁶ In absence of an agreement, the courts then employ a balancing approach to resolve such disputes.⁶⁷ The contemporaneous mutual consent approach is less commonly applied by courts.⁶⁸ Although the three judicial approaches have given courts a starting point for resolving embryo-disposition disputes, the inconsistencies in the approaches often lead to inequitable and contradictory outcomes.⁶⁹

A. *The Contractual Approach*

The contractual approach is most commonly utilized by courts in determining disputes surrounding the custody of frozen embryos.⁷⁰ The majority of states whose courts have addressed

⁶⁴ See generally Mergele-Rust, *supra* note 18, at 507.

⁶⁵ Rooks, 429 P.3d at 585.

⁶⁶ Dingler, *supra* note 6, at 296.

⁶⁷ See generally Rooks, 429 P.3d at 581; Kirschbaum, *supra* note 7, at 125.

⁶⁸ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

⁶⁹ Dingler, *supra* note 6, at 295.

⁷⁰ Kirschbaum, *supra* note 7, at 123; *Dahl v. Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008) (The parties executed an agreement with the fertility clinic providing that the disposition of the frozen embryos would be directed by the parties’ joint written authorization. In absence of authorization, the wife would decide the disposition of the frozen embryos. At their divorce, the wife wanted the embryos destroyed while the husband wanted them donated to another couple. The Oregon Court of Appeals determined that the agreement was clear as to the parties’ intent. The court further stated that courts “should give effect to agreements showing the parties’ intent for the disposition of frozen embryos.”); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) (The parties signed an embryo agreement with the fertility clinic prior to starting IVF, stating that

the issue of embryo disposition have used this approach as the first step for resolving such disputes.⁷¹ Courts generally apply the contractual approach when the parties have an existing IVF contract or disposition agreement stating their intent regarding the disposition of their frozen embryos.⁷² Under the rationale that competent adults should be free to contract, the disposition agreement is presumed by the court to be valid and enforceable.⁷³ Absent a violation of the state's public policy, the court will typically determine that the agreement is binding and award disposition of the frozen embryos in accordance with the agreement.⁷⁴ The New York Court of Appeals was the first court to apply the contractual approach in 1988 in *Kass v. Kass*.⁷⁵

Prior to undergoing IVF treatment, Maureen and Steven Kass signed an agreement with the clinic providing that any remaining embryos would be used for research.⁷⁶ At the time of their divorce, Maureen changed her preferences regarding embryo disposition and sought custody of the embryos for future implantation.⁷⁷ Steven objected, arguing the embryos should be donated for research as was agreed to prior to treatment.⁷⁸ In accordance with state contract law, the New York Court of Appeals held that the existing agreement between the parties was

their frozen embryos would be discarded in the event of divorce. The Texas Court of Appeals, First District, applying the contractual approach, upheld the validity and enforceability of the agreement and held that the agreement governed the disposition of the parties' embryos.); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (The Supreme Court of Washington applied basic principles of contract law in disposing the parties' frozen embryos in a manner that comported with the parties' written cryopreservation agreement.).

⁷¹ *Terrell v. Torres*, 246 Ariz. 312, 320 (Ariz. Ct. App. 2019); *Rooks*, 429 P.3d at 592; *Bilbao v. Goodwin*, 217 A.3d 977, 985 (Conn. 2019) (citing courts in eight states which have employed the contractual approach.); *Szafranski v. Duston*, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013); *Kass*, 91 N.Y.2d at 564-66, *Dahl*, 194 P.3d at 840; *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *Roman*, 193 S.W.3d at 50 (Tex. App. 2006)).

⁷² See generally *Dinger*, *supra* note 6, at 296.

⁷³ *Bilbao*, 333 Conn. at 608; *Kirschbaum*, *supra* note 7 at 123.

⁷⁴ See generally *Kirschbaum*, *supra* note 7, at 132; See also *Bilbao*, 333 Conn. at 614.

⁷⁵ *Mary Ziegler, Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 525 (2018).

⁷⁶ *Kass*, 91 N.Y.2d at 558.

⁷⁷ *Id.* at 560.

⁷⁸ *Id.* at 556.

enforceable and controlling.⁷⁹ The court found that the parties “clearly manifested their intention” for disposition of their frozen embryos in their written contract.⁸⁰ The court determined the embryos would be donated to research as the parties had agreed in writing.

1. *Recent Application of the Contractual Approach*

In 2019, the Supreme Court of Connecticut in *Bilbao v. Goodwin* also adopted the contractual approach, reasoning that it was the appropriate first step for determining the disposition of embryos in the event of divorce.⁸¹ Following IVF treatment, Jessica Bilbao and Timothy Goodwin stored their remaining embryos for possible future implantation.⁸² The parties signed a standardized contract with the fertility clinic in which they initialed and checked a box providing that their embryos would be discarded in the event of their divorce.⁸³ Bilbao filed for dissolution of the marriage and asked for the embryos to be discarded in accordance with their existing agreement.⁸⁴ Goodwin had a change of heart and wanted to have the embryos preserved or donated.⁸⁵ Goodwin argued the existing agreement was unenforceable and therefore should not control the disposition of the embryos. Goodwin also argued that because their embryos are human life, they must be awarded to him as the party seeking to preserve them.⁸⁶

The trial court found the agreement unenforceable because “it ‘was little more than a ‘check the box questionnaire,’ which had ‘neither consideration nor a promise.’”⁸⁷ In determining the disposition of the embryos, the trial court proceeded as if the embryos were property subject to distribution.⁸⁸ Because it

⁷⁹ *Id.* at 561.

⁸⁰ *Id.* at 568.

⁸¹ *Bilbao*, 217 A.3d at 986.

⁸² *Id.* at 980-81.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 982.

⁸⁷ *Id.* at 984.

⁸⁸ *Id.* at 982. The issue of whether an embryo is human life or property of its progenitors was not reviewed or determined by the Supreme Court of Connecticut.

found the agreement unenforceable, the trial court adopted a balancing approach in which it weighed the parties' interests in the embryos.⁸⁹ The trial court awarded the embryos to Bilbao finding her interest in the embryos outweighed Goodwin's interest.⁹⁰

Applying the contractual approach, the Supreme Court of Connecticut reversed the trial court's conclusion that the agreement was unenforceable.⁹¹ Addressing the trial court's concern for check-box agreements, the state supreme court held that agreements in which the progenitors "indicated a disposition choice in some manner other than by writing it out in full" are sufficient and enforceable.⁹² The court reasoned that disposition agreements "encourage the private resolution of family issues."⁹³ Additionally, the court found that application of the contractual approach was consistent with Connecticut's public policy of "enforcing intimate partner agreements."⁹⁴

In the most recent state supreme court case determining the disposition of frozen embryos, *Terrell v. Torres*, the Supreme Court of Arizona also adopted the contractual approach. Before undergoing cancer treatment, Ruby Torres was told by her doctor that the treatment could lead to infertility.⁹⁵ In hopes of having children in the future, Torres sought out IVF treatment and asked her then boyfriend, John Terrell, to donate his sperm.⁹⁶ Before beginning IVF treatment, Terrell and Torres signed an embryo disposition form required by the fertility clinic, in which they agreed to donate the embryos to another couple in the event of divorce, separation, death, or incapacitation.⁹⁷ The couple married shortly after and underwent the IVF process,

⁸⁹ *Id.* at 984.

⁹⁰ *Id.* at 982.

⁹¹ *Id.* at 984.

⁹² *Id.* at 990.

⁹³ *Id.* at 987.

⁹⁴ *Id.*

⁹⁵ *Terrell v. Torres*, 456 P.3d 13, 16 (Ariz. 2020).

⁹⁶ *Id.* at 14.

⁹⁷ *Id.* at 16. Similar to the parties in *Bilbao v. Goodwin*, Terrell and Torres indicated their disposition decision by checking and initialing the corresponding box.

producing several embryos that were preserved and stored.⁹⁸ But before they could produce any children, Terrell filed for divorce.

Terrell, wishing to prevent having any children with Torres in the future, argued the remaining frozen embryos should be donated to another couple in accordance with their disposition agreement.⁹⁹ However, Torres changed her previous decision and wanted to keep the embryos for future implantation.¹⁰⁰ The family court applied a balancing approach and held that Terrell's right to not be a parent outweighed Torres's right to procreate.¹⁰¹ The court of appeals interpreted the disposition agreement as providing the court discretion to award the embryos.¹⁰² The court of appeals also employed a balancing approach, but came to the opposite conclusion. In balancing the parties' interests, the court found Torres's interest exceeded Terrell's and awarded the embryos to Torres.¹⁰³

The Supreme Court of Arizona affirmed the family court's decision to award the frozen embryos to Terrell but found the family court and the court of appeals both erred in applying a balancing approach, rather than enforcing the parties' agreement.¹⁰⁴ The court held that the dispositional choice was not left to the court's discretion.¹⁰⁵ In determining the disposition of embryos at divorce, the court noted that it must first look to any existing contracts.¹⁰⁶ Citing the reasoning of *Kass*, the court stated that disposition agreements "should generally be presumed valid and binding, and enforced in any dispute between them."¹⁰⁷ The state supreme court also noted that contracts between divorcing couples directing the disposition of their property are traditionally enforced.¹⁰⁸ In applying the contractual approach, the court should seek to "discover and effectuate the

⁹⁸ *Id.* at 14.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 15.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Terrell v. Torres*, 456 P.3d 13, 15 (Ariz. 2020) (citing *Kass v. Kass*, 91 N.Y.2d 554, 565 (N.Y. 1998)).

¹⁰⁸ *Id.*

parties' expressed intent."¹⁰⁹ The Supreme Court of Arizona held the parties' agreement regarding the disposition of their cryopreserved embryos in the event of their divorce directed the disposition of those embryos.¹¹⁰

2. *Support and Criticism of the Contractual Approach*

Although the contractual approach to determining the disposition of frozen embryos at divorce is relatively established and employed in disputes in which couples have an existing disposition agreement, there are supporters and critics of this approach. The largest argument in support of the contractual approach is that it maintains and maximizes the procreative autonomy of progenitors, by allowing the couple to make their own decisions rather than the allowing the court to control such a personal choice.¹¹¹ Proponents of this approach also contend that this approach helps couples avoid highly emotional and costly litigation.¹¹² Finally, supporters assert that the contractual approach encourages thoughtful discussion between the parties before divorce, which can minimize future uncertainty.¹¹³

On the other hand, critics of this approach argue that it is too harsh in circumstances where one party has a change in heart.¹¹⁴ Opponents contend that because of the approach's strict adherence to the parties' previously agreed to positions, it does not give the courts any room to adapt to changed circumstances to hold otherwise.¹¹⁵ The contractual approach is criticized for ignoring the possibility that progenitors will change their mind regarding the disposition of their embryos once they divorce,

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 14.

¹¹¹ *Bilbao*, 217 A.3d at 984 (citing *Kass v. Kass*, 91 N.Y.2d 554, 565-66 (N.Y. 1998)). The contractual approach "[m]aximize[s] procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."; *Id.* (citing *Kass v. Kass*, 91 N.Y.2d 554, 565-66 (N.Y. 1998) "Proponents of the contractual approach primarily argue that this approach allows 'the progenitors—not the [s]tate and not the courts . . . [to] make this deeply personal life choice'"; *Dinger*, *supra* note 6, at 301.

¹¹² *Bilbao*, 333 Conn. at 609.

¹¹³ *Id.* at 613.

¹¹⁴ See *Mergele-Rust*, *supra* note 18, at 523.

¹¹⁵ *Id.*

something they may have not fully contemplated before signing an agreement.¹¹⁶

B. *The Balancing Approach*

In resolving disputes regarding the disposition of frozen embryos where the divorcing couple does not have an existing disposition agreement or the agreement is unenforceable, courts are forced to apply the balancing approach. Under this approach, courts balance each progenitor's interest in the frozen embryos.¹¹⁷ This balancing-of-interests test often involves weighing one party's interest in procreating against the other party's interest in not procreating.¹¹⁸ Factors that are commonly taken into consideration under this test are: "intended use of the pre-embryos, ability of each respective spouse to reproduce through other means, reasons for pursuing in-vitro, emotional consequences, [and] bad faith."¹¹⁹ Courts often find that the party seeking to avoid procreation prevails.¹²⁰ However, that is not always the case, leading to contradictory and uncertain outcomes.¹²¹

In 1992, the Supreme Court of Tennessee had its first encounter with a dispute involving the disposition of frozen em-

¹¹⁶ See generally *Bilbao*, 217 A.3d at 984.

¹¹⁷ *Id.* at 985.

¹¹⁸ Dingler, *supra* note 6, at 318.

¹¹⁹ *Bilbao*, 333 Conn. at 610.

¹²⁰ *Davis*, 842 S.W.2d at 604; See generally *Ziegler*, *supra* note 75, at 558.

¹²¹ *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015) (The Illinois Appellate Court, First District balanced the parties' competing interests and found that the wife's interest in using the embryos after becoming infertile was paramount to the husband's interest in avoiding parenthood.); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (At divorce, the parties disagreed on the disposition of their frozen embryos despite having a signed agreement with the fertility clinic stating that in the event of divorce, the embryos would revert back to the clinic. At divorce, the wife, although infertile, wanted the frozen embryos discarded while the husband wanted to keep the embryos to have children. Using the balancing approach, the Supreme Court of New Jersey weighed the parties' interests and held that the wife's interest in avoiding parenthood outweighed the husband's interest in using the frozen embryos.); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012) (The Superior Court of Pennsylvania employed the balancing test and found that the wife's interest in using the embryos, where that was her only opportunity to have biological children, outweighed the husband's interest in avoiding procreation.).

bryos at divorce in *Davis v. Davis*. During their marriage, Mary Sue and Junior Davis decided to undergo IVF treatment in the hope of procreating. However, prior to beginning IVF, the couple did not enter into an agreement directing the disposition of their cryogenically-preserved embryos in the event of divorce, separation, or death.¹²² Upon dissolution of their marriage, Mary Sue wished to have control over the frozen embryos for donation to another couple.¹²³ Junior objected, preferring to leave the embryos frozen.¹²⁴

The trial court determined that the frozen embryos were “‘human beings’ from the moment of fertilization,” and awarded custody of the embryos to Mary Sue.¹²⁵ The court of appeals disagreed with the trial court’s finding that embryos are “persons,” but did not specify whether they were in fact “property.”¹²⁶ The court of appeals found the Davises had a joint interest in the frozen embryos and awarded joint custody.¹²⁷ The Supreme Court of Tennessee agreed with the court of appeals that embryos are not persons.¹²⁸ The court further concluded that embryos are neither persons nor property but “occupy an interim category that entitles them to special respect.”¹²⁹

The Supreme Court of Tennessee acknowledged that the contractual approach would be appropriate in determining embryo disposition when the parties have an agreement, and that the agreement should be presumed valid and binding.¹³⁰ In the absence of an existing disposition agreement between the Davises, the state supreme court was forced to apply the balancing approach. Balancing the parties’ interests, the court considered “the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”¹³¹ The court found that Junior’s interest in avoiding procreation and parenthood outweighed Mary Sue’s in-

¹²² *Davis*, 842 S.W.2d at 590.

¹²³ *Id.* at 589-90.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 594

¹²⁷ *Id.* at 595.

¹²⁸ *Id.* at 594.

¹²⁹ *Id.* at 597.

¹³⁰ *Id.*

¹³¹ *Id.* at 603.

terest in donating the embryos to another couple.¹³² The state supreme court further held that the party seeking to avoid procreation wins, “assuming that the other party has a reasonable possibility of achieving parenthood.”¹³³

1. *Recent Application of the Balancing Approach*

Mandy and Drake Rooks married in 2002 and were able to successfully conceive three children using IVF.¹³⁴ The parties signed an agreement with the fertility clinic prior to starting IVF treatment, but the agreement did not address the disposition of their remaining embryos in the event of their divorce.¹³⁵ When they divorced, Mandy wanted to keep the cryopreserved embryos for future implantation. At trial, Mandy testified that she believed she was no longer able to have children “naturally.”¹³⁶ Drake, opposed to having more children with Mandy, argued to have the frozen embryos discarded.¹³⁷

The trial court awarded the frozen embryos to Drake for disposal, concluding that Drake’s right to avoid parenthood outweighed Mandy’s interest in having more children.¹³⁸ The trial court reasoned that the balancing approach should be applied “if the parties’ agreement did not specifically address the disposition of the pre-embryos, or was ‘so ambiguous as to be unenforceable.’”¹³⁹ The court of appeals affirmed, agreeing that the balancing approach was appropriately applied in the absence of a valid agreement directing the disposition of embryos at divorce.¹⁴⁰

Although the Supreme Court of Colorado recognized the inherent adequacies of the balancing approach, it agreed that the balancing test should be employed where, as here, the existing

¹³² *Id.* at 604.

¹³³ *Id.* at 604.

¹³⁴ *Rooks*, 429 P.3d at 581.

¹³⁵ *Id.* at 582-83. The disposition plan between Mandy and Drake Rooks with the clinic stated in the event of divorce or dissolution of marriage “disposition of [their] embryos will be part of the divorce/dissolution decree paperwork.” *Id.*

¹³⁶ *Id.* at 583.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 584.

disposition agreement failed to specify the disposition of the couple's frozen embryos at divorce.¹⁴¹ However, the court reversed and remanded, finding that the trial court and court of appeals considered inappropriate factors in applying the balancing approach.¹⁴² The state supreme court listed six factors that should be considered under the balancing approach:

The intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking IVF in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation.¹⁴³

The court went further and specified three factors that should not be considered by the court:

Whether the spouse seeking to use the pre-embryos to become a genetic parent can afford a child . . . the sheer number of a party's existing children, standing alone . . . whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.¹⁴⁴

In applying the balancing approach, the court noted that "courts should strive to award pre-embryos in a manner that allows both parties to exercise their rights to procreational autonomy."¹⁴⁵ Delineating specific factors to be considered under the approach, the state supreme court reasoned held that the balancing approach was the correct approach for the dispute. The dissent argued that the contemporaneous mutual consent approach was the appropriate method because the constitutional rights of the progenitors will not be overruled by the court.¹⁴⁶

2. *Support and Criticism of the Balancing Approach*

The balancing approach, like each of the other two approaches, has its strengths and weaknesses. However, this ap-

¹⁴¹ *Id.* at 586; *See also* Dingler, *supra* note 6, at 302.

¹⁴² *Id.* at 586.

¹⁴³ *Id.* at 595.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 585.

¹⁴⁶ *Id.* at 595.

proach receives the most criticism of all the approaches.¹⁴⁷ Opponents of the balancing approach point to several issues of inconsistency, unpredictability, and inequity.¹⁴⁸ Because it is highly fact-dependent, the approach yields a range of outcomes depending on the jurisdiction.¹⁴⁹ This leaves progenitors vulnerable and unsure about the future of their frozen embryos. The balancing approach puts the disposition decisions in the hands of the court.¹⁵⁰ Progenitors may also be left feeling frustrated as their autonomy to make decisions regarding the disposition of their frozen embryos is taken away. The court has overwhelming discretion in applying the balancing approach, which can lead to prejudices or biases affecting the decisions. Even more detrimental, the balancing approach “can send a powerful message about the relative weakness of the constitutional rights at stake in assisted reproduction.”¹⁵¹

C. *The Contemporaneous Mutual Consent Approach*

Similar to the contractual approach, the contemporaneous mutual consent approach hinges on the notion that “decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed.”¹⁵² In an attempt to utilize principles from both the contractual approach and the balancing approach, the contemporaneous mutual consent approach requires both parties to agree to the disposition at the time of disposition.¹⁵³ Under this approach, if one party changes their

¹⁴⁷ *Bilbao*, 217 A.3d. at 985 (“[T]he balancing approach ultimately puts the disposition of a preembryo in the hands of a court and not in the hands of the progenitors.”); Ziegler, *supra* note 75, at 558-59 (Criticizing the balancing approach, stating that the effect of judges’ prejudices and biases in weighing the parties’ interests can lead to unpredictable and unfair outcomes).

¹⁴⁸ *Witten*, 672 N.W.2d at 779 (“The obvious problem with the balancing test model is its internal inconsistency”).

¹⁴⁹ See generally Kirschbaum, *supra* note 7, at 126; see also Ziegler, *supra* note 75, at 557.

¹⁵⁰ *Bilbao*, 217 A.3d. at 985.

¹⁵¹ Ziegler, *supra* note 75, at 567.

¹⁵² *Witten*, 672 N.W.2d at 777 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999)).

¹⁵³ *Bilbao*, 217 A.3d. at 985.

dispositional decision at the time of enforcement, the contract will no longer be binding.¹⁵⁴ The parties must come to an agreement regarding the disposition of their embryos, regardless of any existing written agreement between them.¹⁵⁵ Frozen embryos must remain in storage until the parties can come to a mutual agreement.¹⁵⁶ If the progenitors come to a contemporaneous agreement regarding the disposition of their frozen embryos, their mutual decision will be enforced by the court.¹⁵⁷ However, if the progenitors are not able to come reach a mutual, contemporaneous agreement, their frozen embryos will remain in storage.

Few states have adopted the contemporaneous mutual consent approach.¹⁵⁸ The Iowa Supreme Court was the first to apply the approach in 2003 in *Witten v. Witten*.¹⁵⁹ During their marriage, Arthur and Tamera Witten decided to undergo IVF treatment due to infertility issues. Prior to commencing the IVF process, Arthur and Tamera signed an informed consent document with the clinic providing that the embryos would be transferred or released for disposition only with the written consent of

¹⁵⁴ See Coleman, *supra* note 94, at 89.

¹⁵⁵ Mergele-Rust, *supra* note 18, at 522.

¹⁵⁶ Coleman, *supra* note 94, at 110 (“No embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo”).

¹⁵⁷ *Id.*; Kirschbaum, *supra* note 7, at 118.

¹⁵⁸ Dinger, *supra* note 6, at 296; *Rooks*, 429 P.3d at 592. (The Supreme Court of Colorado specifically rejected the contemporaneous mutual consent approach); *Witten*, 672 N.W.2d 768 (The Iowa Supreme Court applied the contemporaneous mutual consent approach); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (Prior to beginning IVF, the parties signed a consent form stating that, in the event of divorce, the embryos would be awarded to the wife based on her infertility. When the parties divorced, the husband changed his preferences and decided that he did not want to be become a parent. The Massachusetts Supreme Judicial Court held that they would not enforce a contract, even if it was valid, that would compel one party to become a parent against their wishes.); *McQueen*, 507 S.W.3d 127 (Mo. Ct. App. 2016) (The Missouri Court of Appeals, Eastern District affirmed the trial court’s decision awarding the frozen embryos to both parties jointly and ordering that “no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization” of both parties.” The court found that ordering contemporaneous mutual consent between the parties left such an intimate decision in their hands without unwarranted governmental intrusion.).

¹⁵⁹ 672 N.W.2d 768 (Iowa 2003).

both parties.¹⁶⁰ At the dissolution of their marriage, Tamera had a change of heart and sought custody of the frozen embryos for future implantation.¹⁶¹ Arthur opposed Tamera's desire to use the embryos but did not want them destroyed.¹⁶² The trial court held that the existing agreement governed the dispute and enjoined both Tamera and Arthur from using or disposing of the frozen embryos without the consent of the other.¹⁶³ The Iowa Supreme Court affirmed.¹⁶⁴

In applying the contemporaneous mutual consent approach, the Iowa Supreme Court held that disposition agreements at the time of IVF are enforceable and binding, but in the event of "a later objection to any dispositional provision," the agreement no longer controls.¹⁶⁵ The court found that requiring contemporaneous mutual consent when one party has a change of heart was in line with the public policy of the state.¹⁶⁶ In recognizing the general emotionality of familial relationships and their susceptibility to change, the court noted its reluctance to involve itself in "intimate questions inherent in personal relationships."¹⁶⁷ The state supreme court held that the parties were required to keep their embryos in storage indefinitely until the parties came to an agreement on their disposition.¹⁶⁸ Because this approach has not been adopted by many courts, there is little known about its lasting effects.

1. *Support and Criticism of the Contemporaneous Mutual Consent Approach*

The contemporaneous mutual consent approach has been adopted by few courts and has similarly received little criticism or support. The greatest strength of this approach is its respect for the progenitors' right to contract between themselves and make decisions regarding their frozen embryos.¹⁶⁹ The approach

¹⁶⁰ *Id.* at 772.

¹⁶¹ *Id.*

¹⁶² *Id.* at 773.

¹⁶³ *Id.* at 772-73.

¹⁶⁴ *Id.* at 772.

¹⁶⁵ *Id.* at 782.

¹⁶⁶ *Id.* at 783.

¹⁶⁷ *Id.* at 781.

¹⁶⁸ *Id.* at 783.

¹⁶⁹ Kirschbaum, *supra* note 7, at 130.

provides parties with more certainty and consistency because of its “additional safeguard of mutual assent.”¹⁷⁰ The main weakness of the contemporaneous mutual consent approach is the potential for frozen embryos to stay in storage indefinitely if progenitors never reach a contemporaneous agreement.¹⁷¹

V. Statutory Approaches to Determining the Disposition of Frozen Embryos

Without a proper statutory response, courts first facing the issue of embryonic disposition at divorce are forced to look to inconsistent rulings and a slim body of case law as a guide. Few states have enacted legislation regulating the IVF process or the disposition of frozen embryos.¹⁷² Proponents of legislative reform in the area of embryonic-disposition disputes argue that enacting on-point legislation will lead to more equitable and certain results for divorcing couples.¹⁷³ However, critics warn that overly broad or narrow statutes could have grave consequences. This part of the Comment explores statutes in three states that address the disposition of frozen embryos.

Following the ruling in *Terrell v. Torres*, the state of Arizona adopted legislation regarding the disposition of frozen embryos at divorce. In resolving disputes over the disposition of embryos, the Arizona statute directs courts to award the embryo “to the spouse who intends to allow the in vitro human embryos to develop to birth.”¹⁷⁴ Arizona’s statute directs the disposition of embryos at divorce regardless of an existing contract between the parties.¹⁷⁵ A prior agreement between the parties will automatically be deemed unenforceable by the court and will not control the disposition of the parties’ frozen embryos.¹⁷⁶

¹⁷⁰ *Id.* at 134.

¹⁷¹ *Id.* at 139.

¹⁷² Dingler, *supra* note 6, at 304.

¹⁷³ *Id.* at 305.

¹⁷⁴ ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2020).

¹⁷⁵ ARIZ. REV. STAT. ANN. § 25-318.03(B) (2020).

¹⁷⁶ *Arizona Married Couples Lose Control of Their Embryos*, ACADEMY OF ADOPTION & ASSISTED REPRODUCTIVE ATTORNEYS, (Feb. 7, 2019), <https://adoptionart.org/2019/02/07/married-couples-lose-control-of-embryos/> [hereinafter *Arizona Married Couples*].

In situations in which only one spouse wants to keep the embryos for future use, the spouse who provided gametes and does not wish to keep them automatically has no parental responsibilities, rights, or obligations with respect to the resulting child.¹⁷⁷ However, that spouse can choose to be the legal parent of the resulting child if both spouses agree to it in writing.¹⁷⁸ However, if both spouses want to keep the embryos, the spouse who did not provide gametes (sperm or egg) during the IVF process will be divested of custody.¹⁷⁹ This provision will ultimately have a larger effect on LGBTQ+ couples, in which only one spouse is able to provide gametes for the embryo, than their heterosexual counterparts.

Critics of Arizona's new law argue that it could lead to unwarranted government intrusion into the decisions of individuals and couples.¹⁸⁰ Critics of Arizona's statute also have concerns that it will lead to the creation of a new, inadequate balancing-of-interests approach.¹⁸¹ The law favors the right to procreate over the right to not procreate. The result of a balancing approach would certainly direct the award of the frozen embryos to the progenitor who wants to keep them for future implantation or donation to another couple.

Florida's statute requires couples to sign a written disposition agreement providing for the disposition of their embryos in the event of divorce or death prior to commencing IVF treatment.¹⁸² However, the statute further states that in absence of a written agreement, the couple will have joint decision-making authority regarding the disposition of the embryos.¹⁸³ Proponents of Florida's statute contend that, because of its requirement of written agreements between couples, it places decisional power in the couple's hands rather than giving deference to the courts.¹⁸⁴

¹⁷⁷ ARIZ. REV. STAT. ANN. § 25-318.03(C) (2020).

¹⁷⁸ *Id.*

¹⁷⁹ *Arizona Married Couples*, *supra* note 176.

¹⁸⁰ *Id.*

¹⁸¹ Dingler, *supra* note 6, at 309.

¹⁸² FLA. STAT. § 742.17 (2020).

¹⁸³ FLA. STAT. § 742.17(2) (2020).

¹⁸⁴ *Id.* at 310.

Similar to Florida, California's law requires fertility clinics to provide patients with a form listing the six options for disposition of their embryos in the event of death or divorce.¹⁸⁵ Although the statute does not require or enforce the resulting agreement, it still provides the parties with guidance for documenting their preferences before undergoing IVF treatment.¹⁸⁶ The statute also provides the possibility that the dispositional decision will remain with the parties rather than the California courts. However, critics of California's statute still have concerns that this could result in unending litigation and uncertainty over the disposition of the frozen embryos.¹⁸⁷ Courts have recognized the need for legislation regarding the disposition of frozen embryos in the event of a couple's divorce, undoubtedly many more will now take this initiative.¹⁸⁸

VI. Conclusion

Assisted reproductive technology is an innovative technological advancement that has aided numerous individuals and couples who are unable to conceive naturally. The most common method of ART, in vitro fertilization, has resulted in millions of births worldwide since its inception.¹⁸⁹ Courts faced with determining the disposition of frozen embryos in the event of a couple's divorce are often presented with a host of legal and moral issues of first impression involving contract interpretation and enforcement, property rights, custodial rights, parental rights, and procreational autonomy. The current state of this emerging area of family law is still in its developing stages. The established judicial and statutory approaches have provided

¹⁸⁵ CAL. HEALTH & SAFETY CODE § 125315(b)(1) (2020) (dispositional options include: "Made available to the living partner, donation for research purposes, thawed with no further action taken, donation to another couple or individual, other disposition that is clearly stated").

¹⁸⁶ See generally Dingler, *supra* note 6, at 307.

¹⁸⁷ *Id.* at 307-08.

¹⁸⁸ *Id.* at 305.

¹⁸⁹ Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN HEALTH (July 3, 2018, 6:04 AM), <https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html>.

some guidance, but still leave much to be desired by courts and progenitors hoping to settle such personal disputes.

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