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Disposition of Frozen Embryo Disputes: The Alternative Resolution Model

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PART I: INTRODUCTION

After a year of attempting to conceive a child naturally, Tara and Jacob decide to consult a fertility specialist who suggests that they undergo in vitro fertilization (IVF). Tara has oocyte retrieval. Her eggs are subsequently combined with Jacob's sperm in the laboratory, and six embryos are created as a result. Three embryos are transferred into Tara's uterus, and the remaining embryos are cryopreserved for future use. Tara successfully conceives a child, and nine months later the couple becomes parents to a healthy baby girl. Unfortunately, Tara and Jacob's marriage begins to deteriorate and the couple files for a divorce. Notwithstanding the end of their union, Tara is eager to have another child and would like to initiate a pregnancy through the use of the remaining embryos. Jacob, on the other hand, would like to have the embryos destroyed. Which of them should prevail?

Although Tara and Jacob are a hypothetical example, their problem is becoming increasingly real for couples that turn to Assisted Reproductive Technology ("ART"). In the United States, approximately 500,000 embryos are stored in a cryogenic state without a definitive plan for their disposition.[1] When the intended parents no longer agree on the fate of their embryos, they ask the court to resolve this controversial issue for them. Although courts employ a number of approaches to decide embryo disposition disputes, none of them lead to satisfactory outcomes. The three adversarial approaches are: 1) constitutional model, 2) contractual model, and 3) mutual consent model.

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[1] Molly O'Brien, *An Intersection of Ethics and Law: The Frozen Embryo Dilemma and the Chilling Choice Between Life and Death*, 32 WHITTIER L. REV. 171 (2010).

The problematic nature of adversarial model stems from its over-simplified presumptions of progenitors' interests and intentions. Under the current system, progenitors surrender their beliefs, intentions, and unique circumstances from being considered in the resolution process.[2] Courts frequently overlook the highly sensitive nature of disputes that involve a potential birth of a child and instead choose to relentlessly employ a rigid analytical framework. Instead of setting bright line rules, courts should attempt to create more a flexible standard that considers the unique circumstances of each dispute. Flexibility of the alternative dispute resolution model allows parties to deliberate on the issues that are outside the scope of the current legal frameworks and come forward with creative solutions that are not available under the adversarial model. [3]

PART II: THE RELEVANT ISSUES AND THE CIRCUMSTANCES UNDER WHICH DISPUTES ARISE

As advances in reproductive technologies become more prominent, couples that are unable to naturally conceive a child increasingly turn to ART.[4] One of the most widely utilized methods of ART is in vitro fertilization ("IVF").[5] During IVF, a female's egg cells are fertilized by a male's sperm in a laboratory setting and allowed to divide into eight-cell embryos.[6] The resulting embryos are either implanted in the uterus of the

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[2] Kass v. Kass, 91 N.Y.2d 554, 563, 696 N.E.2d 174, 179 (1998).
[3] Edward Brunet & Charles B. Craver, *Alternative Dispute Resolution: The Advocate's Perspective 4* (1997).
[4] Wendy Wendland, *Adopting Frozen Embryos; More Hope for Infertile Couples*, CHI. TRIB., Jan. 15, 2001, at 3.
[5] John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 441 (1990).
[6] *Id.*

female or cryogenically preserved for possible future use.[7] Today's advanced preservation techniques allow embryos to remain viable for years after they have been created.[8]

At times, the cryopreserved embryos outlast the relationship of their intended parents. Although the certain aspects of each dispute significantly differ, the essential plot line remains the same. After more than a year of unsuccessful attempts to conceive a child, the couple seeks IVF treatment. A number of embryos are successfully created, some of which are cryogenically preserved for potential future use. The relationship between the intended parents begins to deteriorate and they file for a divorce. During the divorce proceeding, one party seeks to have the embryos brought to term. The other party seeks to have the embryos destroyed, donated to another couple, or left in the preserved state. Since the parties are unable to agree on disposition of the embryos, they turn to the judicial system for resolutions.

A. Fundamental Determinations

To successful ascertain an analytical framework that will guide the embryo disposition proceeding, the court must make two fundamental determinations. First, the court must assign a legal status to the embryo.[9] Second, the court must determine which of the progenitors interests will be legally recognized.[10] Once the embryo status is

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[7] *Id.*

[8] *See Embryo Cryopreservation Reaches 20 Year Milestone*, http:// http://www.infertilitydoctor.com/2004/03/02/embryo-cryopreservation-reaches-20-year-milestone/ (last visited Nov. 01, 2011).

[9] Davis v. Davis, 842 S.W.2d 588, 594-97 (Tenn. 1992) *on reh'g in part*, 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

[10] Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1066-69 (1996).

assigned and the legally recognized interests are determined, the court can decide which of the three adversarial methods would resolve the dispute in the best manner.

1. Determination of Embryo Status

Presently, courts have characterized embryos as either: 1) property,[11] 2) property deserving of special respect,[12] or 3) human life.[13]

If the court chooses to characterize embryo as "property," the dispute will be resolved under contract and property law principles.[14] Consequently, considerations that become material to the resolution of the embryo dispute are interpretation and enforceability of the contract as well as application of marital property law.[15] In *York v. Jones*, the court classified embryos as "property," and held the fertility clinic was liable for unlawful conversion of property when the clinic refused to release the embryos to the progenitors.[16] However, courts are generally reluctant to characterize embryos as plain "property."[17] Such classification essentially eradicates parties' interest in embryos for its potential to develop into live beings.[18]

Contrary to *Jones*, the Louisiana Legislature statutorily classified embryo as "person."[19] The statute directs courts to resolve embryo disputes in accordance with "best interest of the in vitro fertilized ovum."[20] Since the standard closely resembles that

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[11] York v. Jones, 717 F. Supp. 421, 424-27 (E.D. Va. 1989).
[12] *Davis*, 842 S.W.2d at 597.
[13] La. Rev. Stat. Ann. §§ 9:121 (2011).
[14] John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409-10 (1990).
[15] Kass v. Kass, 696 N.E.2d 174, 179-81 (1998).
[16] *York*, 717 F. Supp. at 426-27.
[17] *See Davis*, 842 S.W.2d at 596-97; *See also Kass*, 696 N.E.2d at 178-79.
[18] *Id.*
[19] § 9:123.
[20] § 9:131.

of "best interest of the child," it is hard to presume that courts would rule in any way other than in favor of progenitor seeking implantation.[21] Otherwise, courts would be forced to "weigh the value of being versus nonbeing," which is a controversial issues that is frequently viewed as being inappropriate for courts.[22] Furthermore, classifying embryo as "person" invokes constitutionally protected rights that are powerful enough to potentially outlaw IVF programs.[23] For the forgoing reasons, Louisiana is the only jurisdiction that characterizes embryos as "persons."

The most broadly adopted embryo status is "property deserving special respect."[24] The court in *Davis v. Davis* was the first to adopt the "special respect" classification.[25] The court recognized that embryo's ability to develop into a live being through implantation and gestation makes it more than plain property.[26] Under "special respect" classification, progenitors have "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."[27] The "special respect" designation allows progenitors to contract regarding disposition of embryos.[28] Moreover, this designation elicits progenitors' constitutional interests in procreation.[29] The status of "special respect" does not confine courts to strict bounds of property or family law, and leaves some ambiguity

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[21] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1755-56 (1993).
[22] Hester v. Dwivedi, 733 N.E.2d 1161, 1164 (Ohio 2000) (*quoting* Bowman v. Davis, 356 N.E.2d 496, 499 n.3 (Ohio 1976)).
[23] *Davis*, 842 S.W.2d at 595.
[24] *Id.* at 597.
[25] *Id.*
[26] *Id.* at 596-97.
[27] *Id.*
[28] *Id.* at 597-98.
[29] *Id.*

in the analytical framework.[30] However, courts that adopted "special respect" status typically treat embryos more as property rather than person. This is evident by courts' willingness to allow destruction or donation of embryos to research, and freedom to contract on their disposition.[31]

2. The Legally Recognized Interests and The Role of Progenitors

An equally important issue in resolution of embryo disputes is the determination of legally recognized interests of progenitors. Since both progenitors contribute their genetic material to the creation of embryo, they both have a substantial interest in the outcome of the dispute.[32] Although courts unanimously agree that progenitors have interests in disposition of embryos, courts are unable to come to a consensus on the nature of those interests.[33] In fact, procreation and parenthood are the only interests that courts have universally recognized.[34] Consequently, numerous significant interests such as belief in preservation of human life[35], disproportionately greater involvement of women in creation of embryos[36], as well possibility of viewing the issue from the best interest of the child[37] have been ignored.

Courts also disregard circumstances surrounding the parties' relationship prior to disassociation. Typically, when intended parents enter IVF treatment they are involved

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[30] *Id.* at 594-97.
[31] *Id.* at 597.
[32] *Id.*
[33] Colker, *supra* note 10, at 1066-69.
[34] *See Id.*
[35] J.B. v. M.B., 170 N.J. 9, 15, 783 A.2d 707, 711 (2001).
[36] Davis v. Davis, 842 S.W.2d 588, 600 (Tenn. 1992).
[37] *In re* Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003).

in a committed relationship with hopes of becoming parents in the near future.[38] Ideally, a couple would undergo IVF treatment because both progenitors seek to achieve parenthood. However, there are instances when coercion and desperate attempts to avoid conflicts could force a progenitor to agree to IVF. This is precisely the reason some scholars have argued that agreements between couples prior to their separation should be viewed as highly suspect.[39] Nevertheless, courts do not conduct a fact intensive analysis that would allow them to uncover such instances.

Another important consideration that is frequently disregarded by courts is reliance.[40] Some progenitors choose to undergo IVF because of medical conditions that render them unable to have biological children in the future.[41] Whether those progenitors should be granted a special consideration is a contested issue, which only a few courts have addressed.[42] The court in *Davis* held that progenitor who is unable to have a child through any means other than implantation would be awarded the embryos notwithstanding the other party's opposition.[43] However, if adoption is a viable option, progenitor will be deprived of the only chance to have a genetically related child.

Another consideration that is overlooked by courts, but is frequently discussed by the academics, is the disproportionate burden and physical commitment that females have to endure during IVF process.[44] Typically, an intended mother undergoes months of

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[38] Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 97-104 (1999).
[39] *Id.* at 102-04.
[40] *Id.* at 102.
[41] Kass v. Kass, 696 N.E.2d 174, 175 (1998).
[42] Robertson, *supra* note 14, at 414-16.
[43] Davis v. Davis, 842 S.W.2d 588, 603-05 (Tenn. 1992).
[44] John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 441-46 (1990).

hormonal therapy, painful egg extractions, and a harvesting process.[45] The unequivocally greater burden on the woman has led to a proposed presumption in favor of the female progenitor's preference.[46] Despite the fact that courts have not adopted this presumption, women's often painful and life-altering involvements in IVF should not be left without proper respect and recognition.

PART III: CURRENT JUDICIAL RESOLUTION APPROACHES

Currently, there are three judicial approaches that have been employed by courts in embryo disposition disputes. Fist, constitutional approach centers on balancing each progenitor's interests in procreation. Second, contractual approach primarily focuses on prior directives signed by the intended parents. Last, contemporaneous mutual consent approach seeks to preserve status quo until parties can reach a consensus.

A. Constitutional Model: Balancing Interests in Procreation

The constitutional model focuses on balancing each progenitor's constitutionally protected interest in procreation. The court in *Davis v. Davis* was the first to implement the balancing test as the controlling analytical framework in resolution of the dispute.[47] The court in *Davis* held that generally disputes between intended parents should be decided according to prior directives created by the parties.[48] However, since the Davises did not enter into an express agreement regarding disposition of the embryos, the dispute was resolved by examining their constitutional rights to privacy.[49]

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[45] *Davis*, 842 S.W.2d at 601-02.
[46] Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 403 (1986).
[47] *Davis*, 842 S.W.2d 588.
[48] *Id.* at 597.
[49] *Id.* at 598-603.

The court held that "a vital part of individual's right to privacy" is the right to procreate and the right to avoid procreation, each being of equal significance.[50] In the process of balancing these conflicting rights, the court analyzed the "positions of the [progenitors], the significance of their interests, and the relative burdens that [would] be imposed by differing resolutions."[51] However, the dispositive factor transpired from weighing the burden of "unwanted parenthood" that would be imposed on the intended father against the intended mother's desire to donate the embryo to another couple.[52]

The court held that the burden of unwanted parenthood outweighed the desire to donate the embryo to another couple.[53] Consequently, the intended father was granted the control over embryos.[54] The court found the intended mother's interests to be less significant because she did not seek to use the embryos for her own use.[55] Moreover, she was physically able to undergo another round of IVF if she wished to become a parent in the future.[56] On the other hand, if embryos were donated to another couple, the father "would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."[57]

Courts continue to rule in favor of progenitors who seek to discard embryos.[58] Courts justify this generalized outcome by emphasizing the concern of forever foregoing

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[50] *Id.* at 600-01.
[51] *Id.* at 603.
[52] *Id.* at 604.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] J.B. v. M.B., 783 A.2d at 707, 719-20 (2001).

the right to avoid procreation if implantation leads to childbirth.[59] According to judges, birth of a biologically related child would lead to "life-long emotional and psychological repercussions."[60] This presumption coupled with judges' limited inquiry into circumstances surrounding the dispute make judges reluctant to grant embryos to progenitor seeking implantation.

Although courts refer to the right to procreate and avoid procreation as being equal, as of today, no court has awarded control over embryos to the progenitor seeking implantation.[61] Moreover, the only recognized exception to this general outcome arises when progenitor is unable to achieve parenthood through any other means, potentially even adoption.[62] Total inability to achieve parenthood appears to be the threshold requirement that procreation-seeking progenitors have to show to be granted a chance at succeeding in litigation.[63] However, as of today, this narrow exception has not been invoked in judicial proceedings.

B. Contractual Model: Enforcement of Prior Directives

The predominant approach used by courts to resolve embryo disputes is the contractual model, which focuses on progenitors' initial intent. Seven of the ten appellate decisions involving embryo disputes implemented the contractual approach.[64] In rare instances do progenitors create agreements among themselves regarding disposition of

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[59] *J.B.*, 783 A.2d at 719-20.
[60] *Id.*
[61] Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1224 (2009); *see also* Margaret E. Swain, *What Art Clients Don't Know Can Hurt Them!*, FAM. ADVOC., Fall 2011, at 18, 20.
[62] Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 62 (2011).
[63] *See Id.*
[64] Forman, *supra* note 62, at 66.

the unused embryos.[65] However, most progenitors are required to complete informed consent forms provided by clinics prior to undergoing an IVF procedure.[66] Typically, every informed consent form asks progenitors to specify what they intend to do with the remaining preserved embryos in case of divorce, death, or other events that will inhibit them from jointly deciding on the disposition question.[67] Although consent forms are agreements created between progenitors and IVF clinics rather than parties directly, courts have been eager to utilize these forms as interpretative guides to parties' initial intent.[68]

Courts have not hesitated to enforce parties' prior directives when those directives called for destruction or donation of frozen embryos.[69] The leading case on contractual approach, *Kass v. Kass*, held that prior directive created by parties are a reliable manifestation of their intent.[70] Moreover, those directives are "presumed valid and binding, and [will be] enforced."[71] According to the *Kass* court, strict adherence to prior agreements creates predictability that all parties can rely on.[72] Since progenitors are the ones who made the choice on the consent form, there is no uncertainty left for courts to decide.[73]

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[65] Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 918-33 (2000).
[66] *Id.*
[67] *See* Coleman, *supra* note 38, at 109-17.
[68] Kass v. Kass, 696 N.E.2d 174, 180 (1998).
[69] Roman v. Roman, 193 S.W.3d 40, 52 (Tex. App. 2006); *Kass*, 696 N.E.2d at 180, *In re* Marriage of Dahl, 2008 WL 4490304 (Or. Ct. App. 2008); Cahill v. Cahill, 757 So.2d 465, 467 (Ala. Civ. App. 2000); Karmasu v. Karmasu, 2009 WL 3155062 (Ohio Ct. App. 2009); Dodson v. Univ. of Ark. for Med. Sci., 601 F.3d 750 (8th Cir. 2010).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

Courts acknowledge, yet dismiss, significant deficiencies that are associated with contractual approach. Judges recognize that sometimes couples may place a checkmark on a consent forms without considering the implication of that choice.[74] Furthermore, embryos' prolonged viability gives couples ample opportunities to change their minds regarding disposition of the embryos.[75] Yet, courts state that predictability overrides these very important concerns.[76]

Litowitz v. Litowitz is an excellent illustration of the dangers associated with contractual model.[77] The court in *Litowitz* enforced a prior directive that was contrary to the requests of both parties.[78] During the litigation proceeding, the intended mother was asking the court to allow the embryos to be used for implantation in a surrogate, while the intended father requested the embryos to be donated to another couple.[79]

The court chose to resolve the couple's dispute by relying on the cryopreservation contract signed by the Litowitzs prior to undergoing IVF.[80] According to the cryopreservation contract, the couple agreed that the embryos would be cryopreserved for five years.[81] Upon expiration of the five year period, the couple had the option to request the preservation to be prolonged, otherwise, the embryos would " 'be thawed but not allowed to undergo further development' "[82] The court held that since the couple did not

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] 48 P.3d 261 (Wash. 2002).
[78] *Litowitz,* 48 P.3d at 263.
[79] *Id.*
[80] *Id.*at 267-68.
[81] *Id.*at 268.
[82] *Id.*

seek an extension and the five years have elapsed, the embryos should be discarded in accordance with the prior directive.[83]

The *Litowitz* court precluded both parties from exercising their rights to the embryos.[84] Furthermore, the court contradicted the fundamental conviction of the contractual approach which is "[t]o the extent possible, it should be the progenitors-not the State and not the courts-who… make this deeply personal life choice."[85]

C. Contemporaneous Mutual Consent Model

The last approach that courts have employed to resolve embryo disputes is the contemporaneous mutual consent model. First adopted by the court in *In re Marriage of Witten*, mutual consent model focuses on the present, as opposed to initial, intent of progenitors.[86] The court in *Witten* explained its decision for adopting the new approach by highlighting the inherent inadequacies of the contractual model.[87] The court found that couples that choose to undergo IVF treatment are more likely to make decision based on impulse and emotions rather than "rational deliberations."[88] Furthermore, wrongful predictions regarding how one will feel about his decisions in the future can have "grave repercussions."[89] Enforcement of prior directive could force individuals to make life-altering adjustments to accommodate for the birth of a child and the associated responsibilities of childrearing. On the other hand, a person could be deprived of the

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[83] *Id.* at 269-272.
[84] *Id.*
[85] Kass v. Kass, 696 N.E.2d 174, 180 (1998).
[86] 672 N.W.2d 768, 777-83 (Iowa 2003).
[87] *Witten,* 672 N.W.2d at 779-83.
[88] *Id.* at 777.
[89] *Id.* at 778.

only chance to have a genetically related child, resulting in devastating effects on the person's physical and emotional wellbeing.

The court in *Witten* chose to refrain from making such life-altering decisions. The court concluded that in situations when progenitors no longer agree regarding disposition of their embryos, the court would preserve status quo until the parties can reach a "mutually satisfactory" decision.[90] Until parties reach an agreement, the party opposing destruction will be responsible for the associated fees of keeping the embryos cryogenically preserved.[91]

PART IV: THE INADEQUECIES OF ADERSARIAL APPROACHES

Although the judicial system employs numerous approaches to resolve embryo disputes, the substantial deficiencies associated with each approach prevent them from effectively fulfilling their function.

A. The Balancing Test

Application of the balancing test in resolution of embryo disputes appears to be more of a pretextual practice rather than a legitimate balancing of progenitors' constitutional rights. Courts that adopted the balancing test have acknowledged that the right to avoid procreation will generally prevail, unless no other reasonable means to achieve parenthood exist.[92] However, as previously mentioned, no court has every invoked the exception and awarded custody over embryos to the party seeking

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[90] *Id.* at 783.
[91] *Id.*
[92] *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992); *see also* J.B. v. M.B., 783 A.2d at 707, 720 (2001).

implantation.[93] Therefore, the exception can be accurately classified as a "bright line escape hatch," rather than an applicable standard.[94]

An "escape hatch" is a tool that judges can use to formulate bright-line rules.[95] Essentially, "[t]he escape hatch permits the [c]ourt to create predictable, clear-cut rules that cover virtually all relevant situations without completely sacrificing flexibility or permitting those protected by the rule to flagrantly abuse their trust."[96] In the context of embryo disputes, courts created a bright line rule against forced procreation with an "extremely narrow and possibly futile exception."[97]

Feminist legal scholars have argued that resolution of embryo disputes through application of the balancing test inhibits a woman's ability to exercise her interests in procreation.[98] Since the party seeking implantation is generally a female, the law, in effect, discriminates against females by always granting embryos to the party seeking to avoid procreation.[99] Moreover, female's contribution to IVF process is incomparably

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[93] Jennifer L. Medenwald, *A "Frozen Exception" for the Frozen Embryo: The Davis "Reasonable Alternatives Exception,"* 76 IND. L.J. 507, 519 (2001).
[94] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term--Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 25, 87 (1992).
[95] James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum,* 27 ARIZ. ST. L.J. 773, 788 (1995).
[96] *Id.* at 790.
[97] Kimberly Berg, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 518 (2006).
[98] See, *e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).; A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000); J.B. v. M.B., 783 A.2d at 707, 716 (2001); Kass v. Kass, 696 N.E.2d 174, 181 (1998); Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).
[99] Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 466 (1999).

greater than male's. Yet, women's rights are essentially eviscerated under the presumptive rule of procreation avoidance.[100]

B. The Contractual Model

The contractual model has been criticized as a significantly problematic approach. First of all, courts have acknowledged that couples never perceive clinical informed consent forms as binding between them.[101] Rather the intended parents perceive the forms as a contract between them and the IVF clinic.[102] Consequently, an informed consent form "does not represent the progenitors' intent to direct a disposition for the embryos [dispute] when they no longer agree about their pursuit of IVF treatment."[103]

Furthermore, the rigid construct of the contractual model does not account for changes in circumstances that couples cannot predict when they begin IVF process.[104] For instance, the intended mother may suffer a medical condition that renders her unable to have genetically related children without the use of the preserved embryos.[105] Moreover, one of the progenitors may experience serious financial difficulties post divorce, yet be forced to become a parent and financially support the child.[106] Inability to predict the future and the changing circumstances is an important factor that is disregarded by judges under the contractual approach.

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100 Andrews, *supra* note 46, 358-59.
101 Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2125 (2007).
102 *Id.*
103 *Id.*
104 *See In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003).
105 *See* Coleman, supra note 38, at 97-104.
106 *Id.*

Some statistical data suggests that couples that undergo IVF treatment are prevalent to altering their initial embryo disposition decision.[107] An IVF clinic at Northwestern University conducted a study that observed 41 post-IVF couples and their decisions regarding cryopreserved embryos.[108] Upon expiration of the three-year storage deadline, "only 12 of these couples (29 percent) kept their initial disposition choice; 29 couples (71 percent) changed their preferences."[109] Despite the small sample size, the study reveals important patterns in intended parent's behavior that courts should not ignore.

Contractual approach has also been criticized for enforcing ambiguous consent forms and disregarding public policy concerns.[110] In *A.Z. v. B.Z.*, the court rejected enforcement of a prior directive, finding that the directive did not represent clear intentions of the parties regarding disposition of the embryos in the event of a future dispute.[111] The court also expanded its analysis to prior directives in instances when no issue of ambiguity was present.[112] The court held that agreements, which expressly grant control of the embryos to the progenitor seeking implantation, should never be enforced over the objection of the other party.[113] Such agreements would result in one progenitor becoming a parent against his will.[114] The court held that "forced procreation is not an

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[107] Susan C. Klock et al., *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69 (2001).
[108] *Id.* at 69.
[109] *Id.*
[110] A.Z. v. B.Z., 725 N.E.2d 1051, 1056-57 (Mass. 2000).
[111] *A.Z.*, 725 N.E.2d at 1056-58.
[112] *Id.* at 1057-58.
[113] *Id.* at 1056-58.
[114] *Id.* at 1057.

area amendable to judicial enforcement" and would violate public policy.[115] The court equated embryo disposition contracts to other familiar contracts such as promise to marry and give up a child for adoption prior to birth, which are in violate public policy and are not enforceable.[116]

C. Contemporaneous Mutual Assent

Although at the outset the contemporaneous mutual assent model appears to be neutral towards both parties in a dispute, in actuality, it favors the party seeking procreation avoidance. By imposing storage fees on the party opposing destruction of embryos, the court essentially suggests that the person wishing to avoid procreation "has an unparalleled interest in preserving this right."[117] If courts considered the right to procreate to be of equal importance, then both parties would be compelled to carry the financial burden of continued storage.[118] By forcing the party who opposes destruction to pay continuous storage fees, "the court not only ignores this party's procreative rights but effectively punishes that party for pursuing those rights."[119]

Furthermore, "rather than giving control to the individual, the status quo strips control from the individuals by giving equal power to both progenitors who are free to oppose one another."[120] Status quo approach provides no incentive for the party seeking embryo destruction to come to a consensus with his former spouse.[121] Consequently, the

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115 *Id.* at 1058.
116 *Id.*
117 Berg, *supra* note 97, at 520.
118 *Id.*
119 Jessica L. Lambert, *Developing A Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 563 (2008).
120 Upchurch, *supra* note 101, at 2137.
121 *See In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).

party seeking destruction can have their wishes indirectly fulfilled by holding the embryos indefinitely preserved or at least until they are no longer viable for implantation.

D. The Main Issue Associated With All Adversarial Approaches

Regardless of the approach courts choose to adopt, the outcome is remarkably the same: avoidance of procreation.[122] If the judicial analysis is based on balancing the constitutional right to procreate and avoid procreation, the right to avoid procreation is seen as supreme and consequently prevails.[123] If a prior directive with "conflicting" and "ambiguous" terms exists, courts nevertheless find that the contract represents a "clear" manifestation of the parties' intent to either donate or destroy the embryo.[124] Furthermore, when contracts explicitly call for awarding the embryos to the party seeking procreation, courts find such contracts contrary to public policy and therefore unenforceable.[125] Evidently, if one of the gamete donors opposes implantation, it is virtually impossible for the other donor to prevail in the dispute.

Remarkably, the prejudicial favoritism toward procreation avoidance has no legal justification. There is no constitutional basis for granting the right to avoid procreation greater significance.[126] Furthermore, contract law generally does not release from liability parties that are contractually bound to commitments in adoption, surrogacy, or egg and sperm donation, despite ambiguities or public policy concerns that may

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[122] Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J. L. & GENDER 285, 320 (2005).
[123] *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 602 (Tenn. 1992); J.B. v. M.B., 783 A.2d at 707, 716-17 (2001).
[124] *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 181-82 (1998); *Witten*, 672 N.W.2d at 773.
[125] *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000); *J.B.*, 783 A.2d at 719; *Witten*, 672 N.W.2d at 781
[126] *See Davis*, 842 S.W.2d at 601.

accompany those agreements.[127] Instead, the preferentialism toward procreation avoidance rests upon preconceived notions of the role that biological ties play in parental attachment to a child.[128]

Contrary to courts' preconceived notions, a large body of social science data suggests that biology is not a determinant factor in formation of attachment to a child.[129] Instead, parental attachment is viewed as a "social construct," which is very context-specific and depends upon various societal influences.[130] Researchers have identified at least five predictive factors of parental "disengagement."[131] First, a considerable geographic distance that prevents physical visitations may sever the relationship between a parent and a child.[132] Second, quality of one's relationship with the other spouse is a strong indicator of parental involvement.[133] A diminished father-child bond usually

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[127] *See, e.g., In re* Brittany H., 243 Cal. Rptr. 763 (Cal. Ct. App. 1988); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989).

[128] *Kass*, 663 N.Y.S.2d at 592-93.

[129] *See, e.g.*, Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *The Disappearing American Father? Divorce and the Waning Significance of Biological Parenthood, in* THE CHANGING AMERICAN FAMILY: SOCIOLOGICAL AND DEMOGRAPHIC PERSPECTIVES 197, 214-18 (Scott J. South & Stewart E. Tolnay eds., 1992); Gina R. Hijjawi et al., *An Exploratory Analysis of Father Involvement in Low-Income Families* (2003), *available at* http://crcw.princeton.edu/workingpapers/WP03-01-FF-Hijjawi.pdf (last visited Nov. 18, 2011).

[130] *See, e.g.*, Susan D. Stewart, *Nonresident Mothers' and Fathers' Social Contact with Children*, 61 J. MARRIAGE & FAM. 894, 899-900 (1999); Hijjawi, *supra* note 129.

[131] *See* Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *When and Why Fathers Matter: Impacts of Father Involvement on the Children of Adolescent Mothers, in* YOUNG UNWED FATHERS 124-25 (Robert I. Lerman & Theodora J. Ooms eds., Temple Univ. Press 1993).

[132] Kay Pasley & Sanford Braver, *Measuring Father Involvement in Divorced, Nonresident Fathers, in* CONCEPTUALIZING AND MEASURING FATHER INVOLVEMENT 217, 222 (Randal D. Day & Michael E. Lamb eds., 2004).

[133] *See* Sanford L. Braver et al., *Promoting Better Fathering Among Divorced NonResident Fathers, in* FAMILY PSYCHOLOGY: THE ART OF THE SCIENCE (W. M. Pinsof & J. Lebow eds., May 2005).

results when a romantic relationship between the father and the mother ends.[134] Moreover, the parent-child relationship usually suffers if the father proceeds to have a family with a new partner.[135] Next, a father's financial inability to provide for the child usually leads to his emotional detachment from the child.[136] Lastly, community, peers, and family relations influence the strength of the bond that develops between a parent and a child.[137] In communities where pregnancy and childrearing frequently occur without paternal involvement, genetic connections are viewed as weak indicators of whether a man will assume a fatherly role in the child's life.[138] Similarly, young adults who do not share strong bonds with their fathers usually develop detachment from their own children.[139]

Evidently, presence of biological ties alone does not lead to lifelong psychological ties. Therefore, courts' relentless imposition of procreation avoidance is meritless. Instead of asking "What does the data on psychological parenthood actually show?" judges ask, "Can I think of any illustrations where such psychological harm might result?"[140] Certainly there will be instances where biological ties coupled with predisposition of social factors will lead to strong emotional ties.[141] However, typical

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[134] *Id.*
[135] *See generally* Frank F. Furstenberg, *Good Dads-Bad Dads: Two Faces of Fatherhood, in* THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY 193, 203-04 (Andrew J. Cherlin ed., 1988).
[136] *See* Hijjawi, *supra* note 129, at 25-26.
[137] *Id.* at 14-15.
[138] *Id.* at 14-15.
[139] *Id.* at 26-27.
[140] *See* Cass Sunstein, *Social Influences and Behavioral Economics*, 97 NW. U.L. REV. 1295, 1297 (2003).
[141] *See* Waldman & Herald, *supra* note 122, at 320.

circumstances surrounding embryos disputes point to the opposite conclusion.[142] It is unjust for courts to create unsubstantiated presumptions of psychological attachments that deprive progenitors from a tangible opportunity to exercise their procreational rights.

PART IV: Alternative Dispute Resolution: Mending the Adversarial Deficiencies

To avoid issues commonly associated with adversarial process, embryo disputes should be decided under an alternative dispute resolution called arbitration. Unlike adversarial judicial process, arbitration allows for greater flexibility without constraints of overly simplistic tests.[143] Moreover, arbitration is not limited to principles of contracts or legally recognized interests of progenitors.[144] The alternative dispute resolution model allows progenitors to tailor the resolution analysis according to their true individual interests.[145]

Arbitration is the most suitable form of alternative dispute resolution in instances when parties do not believe they can jointly reach an amicable solution.[146] An arbitrator is a neutral third party chosen by progenitors to render a binding decision in their dispute.[147] Parties are free to choose someone with expertise in family law, whom they both "respect and feel comfortable making decisions that will greatly affect their

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142 *Id.*
143 Brunet & Craver, *supra* note 3, at 4.
144 Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 425-29 (2005).
145 *Id.*
146 Kimberly A. Sackmann, *Northern's Exposure: Protecting the Best Interests of the Child: Arbitration as an Alternative to Custody Litigation*, 18 DCBA BRIEF 32 (2006).
147 Joan F. Kessler et. al., *Why Arbitrate Family Law Matters*, 14 J. AM. ACAD. MATRIM. LAW. 333 (1997).

lives."[148] Since arbitration proceeding is not bound by substantive law or legal precedent, it allows for "greater self-determination of the process by the participants."[149] Due to the greater self-determination, the parties are generally more accepting of the final decision and are less likely to experience resentment or hostility toward each other.[150]

Arbitration's reduced emphasis on formality of the process allows parties to settle disputes in a time and cost efficient manner.[151] Extensive backlogs associated with majority of court systems substantiality prolong the duration of embryo disputes.[152] On the other hand, arbitration allows parties to choose the date and time when the arbitration will take place.[153] The efficiency of the process reduces the associated costs, thereby, making arbitration a financially accessible option for couples that cannot afford litigation.[154] Most importantly, arbitration is less antagonistic and reduces the stress and trauma that is frequently associated with litigation proceedings.[155]

The analytical framework of the adversarial process is largely determined by the status that the court assigns to the embryo. The status dictates the legal rights and relevant issues that the court will consider in resolving the embryo dispute. While most courts adopt property deserving special respect status, the special respect classification

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148 Kessler, *supra* note 147, at 336.
149 *See* Andre R. Imbrogno, *Arbitration as an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413, 415 (2003); *see also* Kessler *supra* note 147, at 337.
150 *Id.*
151 *Id.*
152 Nicole Pedone, *Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interest of Children*, 36 FAM. & CONCILIATION COURTS REV. 65, 72 (1998).
153 *Id.*
154 *Id.*
155 *Id.*

has greater resemblance to plain property than human life.[156] However, many people would be reluctant to view embryos as plain property.[157] "Precisely because the early embryo is genetically unique and has the potential to be more, it operates as a powerful symbol ... of the unique gift of human existence."[158] By virtue of being a powerful symbol of human existence,[159] embryos should not be simply placed under the umbrella of contract law.

Embryo disputes revolve around highly personalized and diverse beliefs about origin of human life. The controversial nature of this issue makes it is improper for courts to uniformly impose "special respect" status upon every couple that enters the courtroom. Some couples strongly believe that embryo is human life and should never be destroyed.[160] Unfortunately, under the adversarial model, courts cannot consider individual beliefs of intended parents.[161] Instead, courts assign a particular status to the embryos and based on the assigned status, determine the nature of the associated progenitor rights.[162] Legal precedent is created. Thereafter, that legal precedent will be binding upon every couple that enters the courtroom, irrespective of their individual beliefs.[163]

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156 *See supra* note 31 and accompanying text for discussion of classifying embryos as property deserving special.
157 Robertson, *supra* note 44, at 447.
158 *Id.*
159 *E.g., In re* Marriage of Dahl, 194 P.3d 834, 837 (Or. Ct. App. 2008); Robertson, *supra* note 44, at 447.
160 Robertson, *supra* note 44, at 444.
161 Upchurch, *supra* note 144, at 431.
162 *Id.*
163 *Id.*

To avoid imposition of highly ethical conclusions on individuals, every couple should be entitled to assign a status to their embryos.[164] Progenitors should be empowered to introduce their personal notions into the resolution process, since they are the ones who could ultimately attain parental responsibilities.[165] Taking embryo disputes outside the courtroom would avoid creation of legal precedent and allow for greater flexibility in the resolution process.[166]

Under the adversarial model, courts limit the scope of analysis to the constitutionally protected interests in privacy and specifically procreation.[167] However, focusing strictly on procreational rights substantially oversimplifies the nature of embryo disputes and diminishes parties' expectations of receiving a cognizant and fair resolution. Interests such as: progenitor's belief in embryo being human life, a woman's substantially greater physical and emotional burdens of undergoing IVF, emotional attachment to embryo, and best interests of embryo are precluded from consideration.[168]

Furthermore, the adversarial model ignores the "emotionally charged" nature of IVF process and the possibility of coercion or reliance being the major provoking factors in enduring IVF.[169] It seems innately unfair to deprive a female of her only chance to become a mother, when she desperately relied on her former spouse's consent for

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[164] *See* Brunet & Craver, *supra* note 3, at 4.
[165] *See* Coleman, *supra* note 38, at 104-09.
[166] Brunet & Craver, *supra* note 3, at 6-10.
[167] 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, 366-69 (1991).
[168] *E.g.*, J.B. v. M.B., 783 A.2d at 707, 712-19 (2001); Davis v. Davis, 842 S.W.2d 588, 601-02 (Tenn. 1992).
[169] *See* Coleman, *supra* note 38, at 123-25.

implantation prior to undergoing hysterectomy.[170] It would seem equally unfair to have a man, who was coerced into IVF by his ex-wife but finally gathered the courage to walk away from a dysfunctional relationship, to be forced into parenthood.[171] The adversarial model's inability to adequately account for situations, such as the ones mentioned above, is one of the reasons why the alternative dispute resolution model should be adopted.[172]

Under the alternate dispute resolution model, parties would be free to choose which interests are significant to the resolution of their particular dispute.[173] Progenitors would no longer be limited by the legally recognized interest in procreation and personal autonomy.[174] In arbitration, intended parents could introduce into the analysis their religious beliefs, which may not condone destruction of embryos.[175] Moreover, couples would finally have the ultimate decision-making authority that courts frequently emphasize but fail to provide. Releasing progenitors from the constraints of the adversarial process would truly empower them as the ultimate decision-makers.[176]

V. CONCLUSION

The highly personalized nature of embryo disputes makes it extremely difficult for courts to arrive at satisfactory judicial resolutions. Rarely if ever do courts attempt to understand the specific circumstances of each couple's dispute. Instead, courts resort to

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[170] *See supra* note 40 and accompanying text for the discussion of reliance in embryo disputes.
[171] *See* Kass v. Kass, 696 N.E.2d 174, 175 (1998); Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002).
[172] Upchurch, *supra* note 144, at 434.
[173] *Id.*
[174] *See Kass*, 696 N.E.2d at 174.
[175] Coleman, *supra* note 38, at 87-88.
[176] Upchurch, *supra* note 144, at 433.

overly simplified tests that narrow the scope of disputes. Courts either limit the analysis to constitutional interests in procreation or relentlessly enforce prior directives without regard to progenitors' present intentions. Although, courts frequently proclaim their desires to vest the ultimate power in progenitors, in actuality, disputes are resolved based on judges' preconceived notions. Instead of providing progenitors with ample opportunity to determine the most suitable outcome, courts incessantly favor progenitors who desire to avoid procreation.

The unequal treatment of progenitors partially stems from court's characterization of embryos as "property deserving special respect." Although courts have chosen a status that appears to accurately portray societal notions of embryos, in practice, "special respect" classification proved to be nothing other than plain property. Such an insensate treatment of embryos is very problematic, considering the controversy surrounding beliefs in origin of life.

The inadequacies that are associated with the adversarial model can be effectively corrected by the alternative dispute resolution. Releasing embryo disputes from the adversarial constraints will furnish intended parents with power to influence the resolution process and the final decision. Progenitors will decide which issues and interests are relevant to resolution of their particular disputes. Moreover, intended parents will have complete discretion over classification of their embryos. By granting progenitors authority over disposition of their embryos, courts will not only avoid intrusions into sensitive and private matters but also allow couples to reach decisions that are tailored to their unique circumstances rather than legislative precedent.