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Davis v. Davis: Establishing Guidelines for Resolving Disputes over Frozen Embryos

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NOTES

DAVIS v. DAVIS: ESTABLISHING GUIDELINES FOR RESOLVING DISPUTES OVER FROZEN EMBRYOS

In vitro fertilization (IVF) enables physicians to assist infertile couples in their efforts to conceive children.[1] Since 1978, this technology has resulted in the births of thousands of babies.[2] IVF and related technologies also have spawned complex legal questions that continue to challenge courts and legislatures in determining the legal status of the embryo and the corresponding rights and responsibilities of the genetic "parents." Little legal guidance, in the form of caselaw or statute, exists to guide the parties and courts in resolving disputes over frozen embryos.[3]

In the 1992 case *Davis v. Davis*,[4] the Tennessee Supreme Court was the first court to decide a "custody" dispute over seven frozen embryos between the divorced genetic "parents" following the couple's divorce.[5] Mr. Davis sought to prevent his former wife from having the embryos implanted, into either her own womb or that of another woman. Mrs. Davis sought "custody" of the embryos for another woman to gestate.[6] Without a prior agreement between the parties or controlling statutory or case law,[7] the court applied a balancing test that weighed the relative

1. Colleen M. Browne & Brian J. Hynes, Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. LEGIS. 97, 98 (1990).

2. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 440 (1990). More than 5,000 births were reported in 1987-88 in the United States. *Id.* at 440 n.8.

3. Browne & Hynes, *supra* note 1, at 97. "It appears that state and federal legislatures . . . have failed to enact effective laws to provide the judicial system with guidelines on how to decide issues connected with these new reproductive technologies." *Id. See also All Things Considered: Tennessee Court Favors Frozen Embryo* (NPR radio broadcast, June 7, 1992) [hereinafter *All Things Considered*] ("There are approximately 24,000 frozen embryos in clinics across the country and there are no national guidelines on what to do with them.").

4. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

5. *Id.* at 589.

6. *Id.* at 590.

7. *Id.*

[T]he Davises . . . did not execute a written agreement specifying what disposition

interests of the parties.[8] The court decided the case in favor of Mr. Davis,[9] and thus Mr. Davis will not become a parent against his will, and the frozen embryos will either remain in storage or be destroyed.[10]

This Note first provides a brief introduction to the medical technologies of IVF and cryopreservation. This Note then examines the law of reproductive autonomy, including the rights to bear and not to bear children. Next, this Note discusses the legal status of the embryo as considered by the courts, the legislatures, and legal commentators. This Note then examines the *Davis* decision and analyzes the ramifications of the decision in the area of IVF reproductive rights. Finally, this Note suggests guidelines for the resolution of similar disputes in the future and concludes that an agreement between the parties before IVF is undertaken will settle respective rights in advance and obviate the need for litigation.

I. TECHNOLOGICAL BACKGROUND

In vitro fertilization, commonly known as the "test tube baby" technique, is frequently used by infertile couples to assist in conception.[11] The union of a woman's ovum and a man's sperm in a petri dish produces an embryo, and pregnancy results upon the implantation of the embryo in the woman's uterus.[12] This seemingly simple process is fraught with expense and complications. The process can be particularly difficult for the woman, who must undergo laparoscopy, a surgical procedure through

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should be made of any unused embryos . . . . Moreover, there was at that time no Tennessee statute governing such disposition . . . .

In addition, because of the uniqueness of the question before us, we have no case law to guide us to a decision. . . .

Id.

8. *Id.* at 591.

9. *Id.* at 604.

10. *Id.* at 604-05.

11. Robertson, *supra* note 2, at 440.

12. Browne & Hynes, *supra* note 1, at 98. *See also* George P. Smith, II, *Australia's Frozen "Orphan" Embryos: A Medical, Legal and Ethical Dilemma*, 24 J. FAM. L. 27, 27 n.2 (1985-1986).

[T]he *in vitro* fertilization (IVF) process involves obtaining immature ova (or oocytes) from a woman's reproductive tract, placing them in a culture medium and then fertilizing them with sperm that itself has either been obtained normally from a donor bank or from the candidate's husband. Within several days after the conceptus has reached the blastocyst stage of development, it is transplanted (or transferred as a human embryo) into the genetic mother who produced the egg . . . .

Id.

which ova are retrieved from the ovaries.[13] The physician often extracts multiple ova during a single laparoscopy. Fertilization of multiple ova allows implantation of more than one fertilized egg at a time to increase the chance of pregnancy,[14] or the additional embryos may be frozen and stored for future use, thereby eliminating the need for additional surgery.[15]

Technicians may preserve embryos not immediately implanted by using cryopreservation, freezing the embryos in liquid nitrogen.[16] The frozen embryos may then be stored for future attempts at pregnancy.[17] Cryopreservation allows participants in IVF to minimize the burdens of the process and maximize the chances of successful pregnancy.[18]

II. Prior and Related Law

A. Reproductive Autonomy

Although procreation is not among the express rights enumerated in the Constitution, it is a judicially recognized fundamental right.[19] The right derives from the broader right of privacy[20] and includes decisions to bear[21] or not to bear children.[22]

In *Roe v. Wade*, the United States Supreme Court defined the right not to bear children.[23] Recognizing the physical burdens of unwanted pregnancy and the weighty burdens of unwanted parenthood, the Court concluded that a woman's right to privacy includes the decision to terminate

13. Browne & Hynes, *supra* note 1, at 98. The process also includes hormone treatment, which may interfere with the woman's menstrual cycle. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 99.

17. *Id.* Often clinics prefer to store embryos indefinitely rather than destroying them and being accused of abortion or murder. *Id.* However, the effect may be the same, since prolonged freezing may effectively destroy the embryos, which have a limited shelf-life. *All Things Considered*, *supra* note 3.

18. Browne & Hynes, *supra* note 1, at 99 (discussing the practice by IVF practitioners of fertilizing multiple ova and freezing those not used for later implantation).

19. Lori B. Andrews, *The Legal Status of the Embryo*, 32 Loy. L. Rev. 357, 358 n.5 (1986). Procreation is one of the "basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

20. Roe v. Wade, 410 U.S. 113, 152 (1973) (holding that a woman's right to privacy includes the right to abort a pre-viable conceptus).

21. *Skinner*, 316 U.S. 535, 541 (1942).

22. *Roe*, 410 U.S. at 154. *See also* Ellen Goodman, *And Now . . . Preconceptual Agreements*, Newsday, June 5, 1992, at 64 (noting that the right of procreational autonomy includes the "right to have children and the right to avoid having children").

23. *Roe*, 410 U.S. at 164-65.

a pregnancy.[24] This right is not absolute: the State has an interest in protecting the potential life of the developing fetus that courts must weigh against the woman's privacy right.[25] Prior to the point of viability, the State's interest must be balanced against the privacy and autonomy rights of the woman, and the State's interest must not interfere with these rights.[26] The Court concluded that the State's interest in protecting the potential life of the fetus becomes compelling at viability.[27]

In *Planned Parenthood v. Danforth*,[28] the United States Supreme Court addressed the constitutionality of a Missouri statute that imposed regulations on abortions.[29] The law required a married woman seeking an abortion to obtain the consent of her husband before undergoing the procedure.[30] The Court held that this provision was unconstitutional,[31] reasoning that neither the State nor the husband may interfere with the privacy of the woman in the early stages of pregnancy.[32] The Court recognized that the father had an interest in the health and development of the fetus,[33] but refused to allow his interest to outweigh the privacy inter-

24. *Id.* at 154. The Court considered the validity of a Texas statute proscribing most abortions. It held that a woman's right to privacy encompassed her "decision whether or not to terminate her pregnancy." *Id.* at 153. The Fourteenth Amendment protected this right of privacy from state restriction without due process. Accordingly, the Texas statute was held unconstitutional. *Id.* at 164-66.

25. *Id.* at 154-55. The right to privacy, including the right to secure an abortion, is a fundamental right and may be limited by the State only in furtherance of a compelling State interest. *Id.* at 155.

26. Browne & Hynes, *supra* note 1, at 116. "When the state's interest in the 'potential' human life of a pre-viable entity competes with the fundamental privacy/procreative right of a woman in whom that unborn life is implanted, the woman's privacy right prevails." *Id.*

27. *Id.* at 163. Viability, the point at which "meaningful life" is possible outside the womb, begins at the beginning of the third trimester. Browne & Hynes, *supra* note 1, at 108. The Court held that viability marks the period when the State could restrict or prohibit abortions. *Roe*, 410 U.S. at 163. For a discussion of the right of procreative autonomy as developed in *Roe v. Wade*, see Browne & Hynes, *supra* note 1, at 107-08.

28. 428 U.S. 52 (1976).

29. *Id.* at 56.

30. *Id.* at 84-85 (setting forth the text of the statute in the Appendix to the opinion). The relevant portion of the statute read as follows: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except . . . [w]ith the written consent of the woman's spouse, unless the abortion is . . . necessary in order to preserve the life of the mother." *Id.* at 85.

31. *Id.* at 69 (holding that the state may not require spousal consent as a prerequisite to abortion).

32. *Id.* "[S]ince the State cannot regulate or proscribe abortion during the first stage, . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id.*

33. *Id.* (recognizing the husband's interest "in the growth and development of the fetus").

est of the woman.[34] The Court concluded that where the interests of the parties conflict, the woman's interest must prevail because she bears the greater burden of an unwanted pregnancy.[35] Accordingly, a husband may not compel his pregnant wife either to bring the fetus to term or to have an abortion;[36] the procreative choice is hers alone.[37]

B. The Legal Status of the Embryo

Characterizing an embryo as a person, property or something else is critical to the determination of the embryo's legal rights, if any, and the parents' legal rights.

1. The Embryo as "Person"

Those who believe that life begins at conception[38] recognize the embryo's legal status as a person: if an embryo is a human being from conception, it is entitled to full legal protection of the rights of a person.[39] The legal ramifications of person status for abortion and IVF[40] are clear:

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34. *Id.* at 70 n.11 (noting that the effect of the invalid provision was "that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it" and that "[t]he State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason" the termination of the pregnancy).

35. *Id.* at 71.

> The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Id.

36. Andrews, *supra* note 19, at 406. The woman's wishes should prevail over the man's, because procreation is the right of the individual; she does not require his consent. *Id.*

37. *Id.* at 401-02 (noting that respect must be given to a person's autonomy in reproductive decisions).

38. John A. Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CENTER REP. Nov./Dec. 1989, at 7, 10 ("[A] minority believes that a new person exists at fertilization . . . .").

39. Smith, *supra* note 12, at 32. "[I]f one were to acknowledge that the foetus becomes a human being at the very instance of conception, then that entity would be entitled to the full protection of the law and able to seek legal redress should it be injured in some way upon actual birth." *Id.*

40. Techniques commonly used in IVF have the potential to cause harm to embryos. For example, many clinics offer as an alternative to donation the destruction of unused cryopreserved embryos. Indefinite freezing does not provide a harmless alternative to destruction of unused embryos; rather, "[t]his treatment indirectly destroys the embryo . . . because the frozen embryo deteriorates over time to a point at which it can no longer survive implantation." Browne & Hynes, *supra* note 1, at 101.

any procedure allowing or causing the destruction of an embryo is an unacceptable violation of the embryo's liberty, and may be considered murder.[41] However, there is by no means general agreement as to when life begins.[42]

In *Roe v. Wade*, the Supreme Court specifically refrained from deciding whether life begins at conception.[43] However, the Court's holding indicates that a fetus is not a person within the meaning of the Fourteenth Amendment.[44] In *Webster v. Reproductive Health Services*, however, the Court addressed the constitutionality of a Missouri statute declaring the legislature's findings that life begins at conception and that unborn children have protectable interests.[45] The Court did not decide the constitutionality of the findings[46] but rather characterized them as value judgments, noting that *Roe* leaves States free to make such value judgments regarding childbirth and abortion.[47] Value judgments may vary from state to state. For example, the state of Tennessee does not treat embryos as persons with rights.[48]

Although a minority of scholars maintains that life begins at conception, most do not vest an embryo with all the rights and attributes of

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41. Smith, *supra* note 12, at 33 (noting that if a fertilized egg has human status, its waste or destruction amounts to death).

42. *Id.* "[T]here is no unyielding legal, social, ethical or religious consensus on when life begins." *Id.*

43. *Roe*, 410 U.S. at 159.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Id.

44. *Id.* at 156-59. Noting that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment," *id.* at 157, the Court concluded "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158. *See also* Webster v. Reproductive Health Services, 492 U.S. 490, 568 n.13 (1989) (Stevens, J., concurring in part and dissenting in part) (noting that even Justices dissenting in *Roe* agreed with the characterization of "fetus" for Fourteenth Amendment purposes); Andrews, *supra* note 19, at 368 (noting that *Roe v. Wade* failed to find any possible prenatal application of the word "person" in the Constitution).

45. Webster v. Reproductive Health Services, 492 U.S. at 498-501. The action challenged the constitutionality of several provisions of the statute, including the preamble, which declared, "the life of each human being begins at conception." *Id.* at 501.

46. *Id.* at 506-07. For a discussion of the constitutionality of state statutes presuming that life begins at conception, see Browne & Hynes, *supra* note 1, at 108-09.

47. *Webster*, 492 U.S. at 506. "Roe v. Wade 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'" *Id.* (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

48. Robertson, *supra* note 38, at 7.

personhood.[49] Regardless of whether life begins at conception, the law may not consider the entity created at conception a legal person.[50] The more prevalent position, advocated by the 1979 Ethics Advisory Board of the United States Department of Health, Education and Welfare, recognizes that the human embryo is entitled to "profound respect," but not necessarily to the legal and moral rights inherent to personhood.[51] While the developing embryo possesses certain qualities generally attributed to persons, in the aggregate the personhood approach is inadequate as a legal framework for analyzing the embryo's legal status.[52]

2. The Embryo as "Property"

An alternative to the personhood approach is the recognition of the embryo as personal property.[53] This position is widely accepted by experts in reproductive technology.[54] Classifying embryos as property describes the interest of the "owners" in controlling their use.[55] Accordingly, the gamete providers[56] are considered the owners because they decide the embryos' fate.[57]

In one of the few reported cases implicating dispositional authority over frozen embryos, the United States District Court for the Eastern District of Virginia presumed a couple the owners of embryos created

49. *Id.* at 10. "While a minority believes that a new person exists at fertilization, most people would disagree that the earliest stages of postfertilized human life, which consist of four to eight undifferentiated cells that are not yet biologically individual, are themselves persons or entities with rights." *Id.*

50. John A. Robertson, *Davis: An Unwarranted Conclusion*, HASTINGS CENTER REP., Nov./Dec. 1989, at 11, 11. "[G]enetic uniqueness and potential to develop into a newborn infant does not mean that a human entity — the preimplantation embryo — is already a 'child' or 'human being' with rights and interests of its own." *Id.*

51. Smith, *supra* note 12, at 30.

52. Andrews, *supra* note 19, at 368.

53. *Id.* at 366-67 (discussing "property approach to the embryo"). This approach involves characterizing the embryo as the personal property of its progenitors to determine the legal rights of the respective parties. *Id.*

54. *See id.* at 366 (citing Ethical Statement of In Vitro Fertilization, 41 FERTILITY & STERILITY 12 (1984) ("[C]oncepti are the property of the donors.")).

55. Andrews, *supra* note 19, at 366-67.

56. The gamete providers include the man who furnished the sperm and the woman who furnished the ovum.

57. Robertson, *supra* note 38, at 9. "[T]he terms 'ownership' or 'property' refer to the locus and not the scope of decisional authority over embryos." *Id.* The decision-making power clearly rests with the gamete providers, but "their decisional authority can be limited, so that their 'property' or 'ownership' in embryos is less than their ownership of other kinds of property." *Id.*

from their gametes.[58] The property approach is not entirely satisfactory, however, because for embryos to be recognized as personal property, they must have economic value.[59] In *Del Zio v. Presbyterian Hospital of New York*,[60] the court rejected a claim for economic loss due to the wrongful destruction of embryos by a hospital; instead, damages were awarded for emotional distress.[61] Therefore unless economic value of embryos is recognized, embryos cannot be considered property,[62] and thus the property approach is an imperfect framework for analyzing the legal status of the developing embryo.[63] While it fairly describes the control exercised over the embryo by the parent/owners, the property approach may not accurately recognize the embryo's value.

Clearly neither the personhood approach nor the property approach sufficiently describes the unique legal status of the human embryo.[64] The embryo embodies characteristics of both person and property; the law must recognize this dualism and treat the embryo accordingly.

III. *DAVIS V. DAVIS*

A. Factual Background

Mary Sue Davis and Junior Lewis Davis, a married couple residing in Tennessee, decided to use IVF to try to conceive a child together after encountering a series of reproductive difficulties.[65] They employed multiple ova laparoscopy and cryopreservation to minimize the pain and expense of multiple ova extractions from Mrs. Davis.[66] The couple never

58. York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989) (presuming, without discussion, that the gamete providers had a property interest in the embryos). *See* Robertson, *supra* note 38, at 10 ("Jones v. York [sic] . . . assumes without question that embryos are the 'property' of the gamete providers . . . .").

59. Smith, *supra* note 12, at 31. "[F]or embryos to be considered personal property, they must be recognized in the law as having an *economic* value." *Id.*

60. No. 74-3588 (S.D.N.Y. Nov. 14, 1978).

61. *Id.* at 4. *See* Andrews, *supra* note 19, at 367-68 (discussing the facts and circumstances of *Del Zio*). *But see* Smith, *supra* note 12, at 35 n.39 (citing *Del Zio* as recognizing the loss of an interest akin to personal property "in the wrongful destruction of an extracorporeal embryo").

62. Smith, *supra* note 12, at 31.

63. *See* Andrews, *supra* note 19, at 368 ("[T]he property approach has not been accepted as a satisfactory framework within which to analyze the legal status of the embryo . . . .").

64. Andrews, *supra* note 19, at 366 (noting that the law classifies the embryo as neither person nor property).

65. Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

66. *Id.* at 592.

signed a consent form for the clinic to perform the procedure and no agreement existed between the couple or between the couple and the clinic as to the disposition of preserved embryos in the event of contingency such as divorce, death or a disagreement.[67] Mrs. Davis did not become pregnant through the IVF procedure.[68]

Mr. Davis filed for divorce in February 1989 and the disposition of the frozen embryos was the sole issue of contention in the property settlement of the divorce.[69] Mrs. Davis originally sought "custody" of the embryos so that she could bear a child herself, while Mr. Davis sought to prevent her from doing so to avoid the burdens of genetic parenthood.[70] By the time the action reached the Tennessee Supreme Court, Mrs. Davis sought to donate the embryos to another couple for implantation. Mr. Davis continued to oppose the use of the embryos by anyone and sought to have them destroyed.[71]

B. Procedural History

The trial court held that life begins at conception and that the embryos constituted human beings upon fertilization.[72] The court reasoned that because it was in the best interests of the "children" (the frozen embryos) to be brought to term, it granted custody to Mrs. Davis so that she could have them implanted.[73] The Tennessee Court of Appeals recognized Mr. Davis' right to avoid unwanted parenthood, and the lack of any compelling State interest in ordering implantation. The appellate court concluded that the parties shared an interest in the embryos and remanded the case to the trial court ordering that the Davises share dispositional authority.[74] Mrs. Davis appealed this decision, and the Tennessee Supreme Court granted review.[75]

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 589. "Any disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences." *Id.* at 603.

71. *Id.* at 590.

72. *See id.* at 589.

73. *See id.*

74. *See id.* This ruling presented obvious difficulties: "They couldn't split what they had joined together. He couldn't take back his sperm. She couldn't retrieve her ovum. Nor could they share custody of the pre-embryos: one week in her freezer, the next in his." Goodman, *supra* note 22, at 64.

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

> We granted review, not because we disagree with the basic legal analysis utilized

C. The Decision of the Tennessee Supreme Court

1. The "Person" vs. "Property" Dichotomy

The Tennessee Supreme Court began its analysis by addressing the question "whether the preembryos in this case should be considered 'persons' or 'property' in the contemplation of the law."[76] The supreme court agreed with the court of appeals that embryos are not "persons" under Tennessee law.[77] The court based its determination on a state statute that allowed an action for the wrongful death of a viable fetus,[78] and on case law that held that "a fetus is not a 'person' within the meaning of the statute."[79] The court also relied on Tennessee criminal statutes to support the notion that Tennessee does not treat an embryo as a "person."[80] The court further noted that the United States Supreme Court's decisions in *Roe v. Wade* and *Webster v. Reproductive Health Services* do not recognize the personhood of a fetus until viability, a "stage of fetal development [that] is far removed, both qualitatively and quantitatively, from that of the four- to eight-cell preembryos in this case."[81]

Although the court rejected the trial court's finding that the embryos are persons from the point of conception,[82] the court also rejected the court of appeals' treatment of embryos as marital property.[83] Relying on the ethical standards of the American Fertility Society,[84] the court con-

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by the intermediate court, but because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree.

Id.

76. *Id.* at 594.

77. *Id.*

78. TENN. CODE ANN. § 20-5-106 (1991 & Supp. 1993).

79. *Davis*, 842 S.W.2d at 594-95 (citing Davis v. Davis, No. 180, 1990 Tenn. App. LEXIS 642 (Tenn. App. Sept. 13, 1990)).

80. *Id.* at 595. Tennessee law protects viable fetuses from crimes to the person such as assault or murder, but does not include abortion among the protections. TENN. CODE ANN. §§ 39-13-107, 39-13-210 (1991 & Supp. 1993).

81. *Davis*, 842 S.W.2d at 595; Webster v. Reproductive Health Services, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring); Roe v. Wade, 410 U.S. 113, 162 (1973).

82. *Davis*, 842 S.W.2d at 595.

83. *Id.* at 595-96. "[B]y citing to *York v. Jones* but failing to define precisely the 'interest' that Mary Sue Davis and Junior Davis have in the preembryos, the Court of Appeals has left the implication that it is in the nature of a property interest." *Id.* at 596.

84. *Id.* at 596-97.

[T]he preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a per-

cluded that embryos possess attributes of both persons and property, but may properly be classified as neither. The court stated that embryos are a hybrid of property and person:

> We conclude that preembryos 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. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.[85]

2. *The Contract Theory*

Although no agreement existed between the parties in the case, the court indulged in extensive dicta regarding the importance of prior agreements to avoid and resolve such disputes over frozen embryos,[86] indicating that it would enforce such agreements.[87] The court then considered a theory of implied contract between the parties by virtue of their participation in the IVF program.[88] The court rejected this theory and concluded that furnishing gametes for IVF should not be considered an irrevocable commitment to reproduction because no meeting of the minds occurred as to the disposition of the embryos under these contingencies.[89]

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son, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.

Id. at 596 (quoting AMERICAN FERTILITY SOC'Y, REPORT ON ETHICAL CONSIDERATIONS OF THE NEW REPRODUCTIVE TECHNOLOGIES (June 1990) at 34S-35S).

85. *Id.* at 597.

86. *Id.*

87. *Id.* "[A]n agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." *Id.*

88. *Id.* at 598.

> It might be argued in this case that the parties had an implied contract to reproduce using *in vitro* fertilization, that Mary Sue Davis relied on that agreement in undergoing IVF procedures, and that the court should enforce an implied contract against Junior Davis, allowing Mary Sue to dispose of the preembryos in a manner calculated to result in reproduction.

Id.

89. *Id.*

> The problem with such an analysis is that there is no indication in the record that disposition in the event of contingencies other than Mary Sue Davis's pregnancy

3. The Right of Procreational Autonomy

The court next discussed at length the right of procreational autonomy based on the right of privacy under both the federal and Tennessee constitutions.[90] The court concluded that the right of procreational autonomy comprises two rights: the rights to bear and not to bear children.[91] These two rights conflict in the context of disputes over extracorporeal embryos, where no issue of bodily autonomy on the part of the woman will automatically outweigh any interest on the part of the man.[92] The court concluded that in the abortion context, the State may assert its interest in protecting potential life after the first trimester; however, in the IVF context, the early developmental stage of the embryos precludes any State interest.[93]

4. Balancing the Parties' Interests

The Tennessee Supreme Court concluded that the appropriate test balances the competing interests of the parties and assigns relative weight to the burdens and interests of each party in the dispute.[94] The court first analyzed the extreme psychological burdens of unwanted parenthood on Mr. Davis, particularly taking into account his upbringing and personal feelings about fatherhood.[95] The court then considered Mrs. Davis' po-

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was ever considered by the parties, or that Junior Davis intended to pursue reproduction outside the confines of a continuing marital relationship with Mary Sue. We therefore decline to decide this case on the basis of implied contract or the reliance doctrine.

Id.

90. *Id.* at 598-600; U.S. CONST., amend. XIV; TENN. CONST., art. I §§ 1-3, 7, 8, 19, 27. "Here, the specific individual freedom in dispute is the right to procreate. In terms of the Tennessee state constitution, we hold that the right of procreation is a vital part of an individual's right to privacy. Federal law is to the same effect." *Davis*, 842 S.W.2d at 600.

91. *Davis*, 842 S.W.2d at 601. "For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance — the right to procreate and the right to avoid procreation." *Id.*

92. *Id.* "The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of in vitro fertilization. None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here." *Id.*

93. *Id.* at 602. "[T]here is no state interest in these preembryos which could suffice to overcome the interests of the gamete-providers." *Id.*

94. *Id.* at 603.

95. *Id.* at 603-604.

Beginning with the burden imposed on Junior Davis, we note that the consequences are obvious. Any disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible

tential burden of being denied the right to donate the embryos so that another woman might bring them to term.[96] The court concluded that Mr. Davis' burden was greater:

> [W]e can only conclude that Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood. If she were allowed to donate these preembryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.[97]

The court suggested that its decision may have been different if Mrs. Davis had argued that the embryos were her only reasonable means for reproduction.[98]

D. Conclusion

The court concluded its opinion by establishing a framework for resolving similar disputes in the future:

> [D]isputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting

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> financial and psychological consequences. The impact that this unwanted parenthood would have on Junior Davis can only be understood by considering his particular circumstances, as revealed in the record.

Id. at 603.

96. *Id.* at 604. "Refusal to permit donation of the preembryos would impose on her the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children. . . . [T]his is not an insubstantial emotional burden. . . ." *Id.*

97. *Id.*

98. *Id.* "The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means." *Id.*

party obviously has the greater interest and should prevail.[99]

Applying that standard to the circumstances of this case, the court held in favor of Mr. Davis and affirmed the decision of the court of appeals.[100]

IV. ANALYSIS

A. Reproductive Autonomy

1. Rejection of Personhood Approach

The Tennessee Supreme Court properly considered and rejected the trial court's theory that life begins at conception and the necessary implication that an embryo is a person with legal rights.[101] If upheld, that theory would have impacted profoundly the field of reproductive medicine by limiting the available options of IVF participants once an embryo has been fertilized and by providing legal support for antiabortion arguments.[102] The Tennessee Supreme Court's decision garnered much attention and debate in the abortion arena.[103] Civil rights advocates considered the repudiation of the theory of conception as the beginning of life and the starting point for legal recognition of personhood a welcome correction to the dangerous and unfounded decision of the trial court.[104]

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99. *Id.* Note the remarkable similarity between the quoted passage and that in Robertson, *supra* note 38, at 12:

> Until the law prescribes otherwise, disputes over frozen embryos should be resolved first by looking to the joint wishes of the couple, and if they are not available or are unable to agree, to prior instructions which they gave for disposition of those embryos. If no instructions exist, we must then compare the relative burdens on each party of using or not using the embryos in question to see which party should prevail.

100. *Davis*, 842 S.W.2d at 604.

101. *See* Robertson, *supra* note 50, at 11. The trial judge's "conclusion that four-celled preimplantation human embryos are 'children' and 'human beings' is unprecedented and unwarranted. It has no discernible basis in common law precedents nor [sic] in Tennessee law (which recognizes a separate legal interest in prenatal human life only at viability)." *Id.*

102. Cynthia Mitchell, *Tennessee's Top Court to Hear Case of 7 Embryos; Deciding Their Fate an Issue in Divorce*, ATLANTA J. & CONST., May 9, 1992, at A3. The trial court's holding "that 'life begins at conception' . . . would likely have had a chilling effect on fertilization programs and fetal research and provide support for anti-abortion arguments." *Id.*

103. *A Heated Frozen Custody Battle*, U.S. NEWS & WORLD REP., June 15, 1992, at 16. The decision "had resonance in the abortion debate. Feminists were pleased that a parent's right to choose on a childbirth issue won the day; abortion foes complained that the ruling favored ending a potential life." *Id.*

104. *See* Duren Cheek, *Embryo Ruling: Man Can't Be Forced to Be a Father*, Gannett News Service, June 2, 1992, *available in* LEXIS, Nexis Library, Gannett News Service File

2. *Reaffirmation of Procreative Autonomy*

The *Davis* decision reaffirmed the right of procreative autonomy, expressly finding it a part of the privacy rights of both the federal and Tennessee constitutions.[105] While the decision was confined to IVF and the dispositional authority over frozen embryos, it may be interpreted as confirming a broader right to procreative decisionmaking.[106]

Because the *Davis* decision favored a man's procreative rights over a woman's, some feared that courts would allow a man a veto or superior power over a woman's procreative rights, which have already received much scrutiny and limitation.[107] While increasing regulation of a woman's right to an abortion and the recognition of greater rights in procreative decisions for men seems inconsistent,[108] the *Davis* court's recognition of the right of an *individual*, male or female, to control his or her reproduction should allay concern.[109] The *Davis* decision enhances the reproductive freedom of both sexes.[110]

(noting comment of Heidi Weinburg, executive director of the ACLU in Tennessee, that the decision "dispels the 'chilling effect' of a trial court ruling in the case that life begins at conception.").

105. Davis v. Davis, 842 S.W.2d 588, 598-600 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993). Grounding the right in the Tennessee constitution ensures that any erosion of the rights of privacy and procreative choice in the federal courts need not imperil those rights in Tennessee. *Attorney Sees Abortion "Direction" in Embryo Ruling*, UPI, June 2, 1992, *available in* LEXIS, Nexis Library, UPI File (quoting Charles Clifford, attorney for Mr. Davis).

106. Ronald Smothers, *Court Gives Ex-Husband Rights on Use of Embryos*, N.Y. TIMES, June 2, 1992, at A1. The decision "seemed to favor a person's right to choose whether to have a child." *Id.*

107. *See* Goodman, *supra* note 22, at 64 ("As women's reproductive rights are contracting, men's rights seem to be expanding.").

108. *See* Smothers, *supra* note 106, at A1, A16. Arthur L. Caplan, director of the Center for Biomedical Ethics, University of Minnesota, indicated that the apparent inconsistency "raises the question as to whether other courts would be willing to compel women to do what this court is not willing to compel a man to do." *Id.*

109. *See All Things Considered*, *supra* note 3. Pat King, Professor of Law, Georgetown University Law Center, explains:

> Some have been upset by the court's holding because in this case it was the father who did not want to be a parent, and they see it as emphasizing fathers' rights and male control over females. . . . I think a better interpretation is that the court is saying that either a man or a woman who has started down this road to reproduction, who changes his or her mind can do so and not be forced to be a parent . . . [unless] the other person can't procreate by any other means.

Id.

110. *See* Goodman, *supra* note 22, at 64 ("[A] man's right to privacy seems to reinforce a woman's. If he can't be forced into fatherhood by the state, surely she can't be forced into motherhood.").

3. Application to IVF and Frozen Embryos

A discussion of procreative rights in the context of disputes over extracorporeal embryos presents unique considerations: unlike disputes involving a pregnant woman, disputes over extracorporeal embryos do not implicate concern for the woman's bodily autonomy.[111] The notion of "sweat equity," that the woman has the greater interest because she bears the greater physical contribution and burden, does not apply.[112] Accordingly, in IVF, the difference in physical burdens of men and women does not justify automatically favoring the woman's interests.[113] Where a woman's bodily autonomy is not implicated, her procreative interests may be weighed against those of the man.[114] The choice is no longer solely in the province of the woman; the recognized right is that of the individual.

Following the United States Supreme Court's decisions in the contraception and abortion cases that recognize the rearing and gestational burdens of unwanted parenthood,[115] the *Davis* court recognized and gave significant weight to the psychological burdens of unwanted genetic parenthood.[116] The burdens of unwanted reproduction may include risks of financial liability and a significant psychosocial impact.[117]

The *Davis* case presented for the first time the two rights of procreative autonomy, the right to procreate and the right not to procreate, in tension.[118] These rights are at odds in the IVF setting. The court properly applied a balancing test to resolve the competing interests.[119]

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111. Robertson, *supra* note 38, at 11-12.

112. *Id.* at 7.

113. *Id.* The decision concerning an extracorporeal embryo "is unlike the abortion decision since honoring the man's wishes will not impose a physical burden on the woman and thus there is reason to give equal weight to his desires." Andrews, *supra* note 19, at 407.

114. *Id.*

115. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

116. Davis v. Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993). Unwilling genetic parenthood has been characterized as "traumatic" and akin to "psychological amputation." Andrews, *supra* note 19, at 405 n.260.

117. Robertson, *supra* note 38, at 8.

118. Goodman, *supra* note 22, at 64 ("The real conflict is between two rights to 'procreational autonomy.' The right to have children and the right to avoid having children.").

119. *Davis*, 842 S.W.2d at 604. "If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed." *Id. See* Browne & Hynes, *supra* note 1, at 116 ("a balancing test is appropriate for the resolution of such conflicts to prevent people from interfering with each other's rights").

B. Guidelines for Resolving Future Disputes

1. Legislation

Because of the dearth of legislation and precedent controlling IVF, there are scant guidelines available for the resolution of disputes arising out of this "new" reproductive technology.[120] The whole area of IVF remains virtually uncharted by state and federal legislatures.[121] A dire need exists for a legislative determination to guide the judiciary in the resolution of issues arising out of IVF.[122] Some suggest that the failure of the legislature to provide adequate guidelines in this area results from IVF's controversial nature and proximity to the abortion debate.[123] The *Davis* case highlighted the importance of guidelines for resolving such disputes; state legislatures should adopt relevant measures to facilitate such cases in the future.[124] Had Tennessee a statute requiring embryo transfer whenever possible, such guidance would have facilitated a simple (but different) solution to the *Davis* case.[125]

2. Preconceptual Agreements

The court correctly considered and rejected the theory that an implied contract existed between the parties by virtue of their participation in IVF that would have bound them to complete the reproductive process with the embryos.[126] As the court recognized, provision of gametes for IVF does not necessarily imply an agreement by the parties to follow through with parenthood, because many unexpected contingencies could arise that significantly alter the ability and desire to pursue parenthood.[127]

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120. Browne & Hynes, *supra* note 1, at 107 ("Judges . . . have virtually no guidance for resolving embryo issues").

121. *Id.* at 103-04. "[F]ederal and state legislatures have been virtually silent on issues affecting pre-implanted embryos. . . . Neither federal nor state governments have enumerated the legal rights of a frozen embryo and its parents." *Id.* at 104.

122. *Id.* at 97 ("[S]tate and federal legislatures . . . have failed to enact effective laws to provide the judicial system with guidelines on how to decide issues connected with these new reproductive technologies.").

123. *All Things Considered*, *supra* note 3.

124. Browne & Hynes, *supra* note 1, at 122 (urging state legislatures to adopt uniform legislation to guide courts in resolving disputes relating to IVF and frozen human embryos). For a discussion of the constitutionality of such statutes, see Robertson, *supra* note 38, at 10.

125. Robertson, *supra* note 38, at 10.

126. *See supra* notes 90-91 and accompanying text.

127. *Davis*, 842 S.W.2d at 598. "[C]reation of embryos alone should not be taken as an irrevocable commitment to reproduction." Robertson, *supra* note 38, at 7. *But see* Browne

The dicta in the opinion stressing the importance of prior agreements by the parties highlights the need for such agreements to resolve future disputes.[128] Unlike coital conception, IVF provides the unique opportunity for couples to provide in advance for the disposition of the embryos in the event of such contingencies as death, divorce or disagreement of the parties. Before the embryo is implanted in the woman, the couple's intent could be determined and the agreement could be enforced, because no bodily or gestational burdens are implicated.[129] Under *Davis*, such agreements would be determinative. States should require couples to sign a preconceptual agreement as a prerequisite to participation in IVF.[130]

3. *The Davis Framework*

The *Davis* opinion sets out a workable framework for resolving future disputes over frozen embryos. The framework considers the intent of the parties as expressed in a prior agreement. Absent such an agreement, the framework weighs the relative interests and burdens involved in achieving or avoiding procreation, including the financial and psychological consequences of unwanted parenthood, the emotional trauma of destroying unused embryos, and the ability of the party seeking implantation to bear children in the future.[131] In an area of scant legal guidance for the resolution of complex disputes involving fundamental rights, the framework sets a valuable legal precedent.

V. CONCLUSION

As awareness of the advantages of pre-IVF agreements increases and their use becomes widespread, there will no longer be a need for the *Davis* framework to resolve disputes over frozen embryos, because their disposition will commonly be decided in advance. However, the *Davis*

& Hynes, *supra* note 1, at 117 (arguing that persons who have created gametes outside the womb have freely exercised their procreative right and have assumed the risks of such decisions).

128. *See* Goodman, *supra* note 22, at 64 ("[I]t's the preconceptual agreement that counts.").

129. Robertson, *supra* note 38, at 11-12.

130. *Id.* at 10 (recommending that couples be required to declare before creation and storage what is to be done with the embryos in the event of disagreement, divorce, death, or other contingency).

131. *See supra* notes 96-101 and accompanying text. The court's "ruling laid out guidelines for childless couples seeking to use in vitro fertilization." Smothers, *supra* note 106, at A16 (quoting Mr. Davis).

decision remains significant as a reaffirmation of the procreative freedom of the individual, male or female. As reproductive technology advances, the law must keep pace, continuing to recognize as fundamental the autonomy of the individual in his or her procreative choices.

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