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FROZEN EMBRYOS: NEW TECHNOLOGY MEETS FAMILY LAW

Natalie K. Young*

INTRODUCTION

A wide variety of reproductive technologies is now available for infertile couples seeking to raise biologically related offspring. These techniques include artificial insemination,¹ *in vitro* fertilization (IVF),² and embryo transfer (ET).³ Many IVF programs have gone an additional step and now offer cryopreservation⁴ of embryos, a technological advance that further complicates the already existing issues concerning basic IVF.⁵ This

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1. Artificial insemination is the injection of semen, whether from the husband or a donor, by artificial means into a woman's uterus for the purpose of achieving pregnancy. Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1643 (1984).

2. *In vitro* fertilization "is the method of uniting egg and sperm outside the body and transferring the resulting embryo to a woman's uterus to achieve pregnancy." Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1082-83 (1986) [hereinafter Note, *Frozen Embryos*]. For further discussion of IVF, see Robertson, *Embryos, Families & Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 947-51 (1986) [hereinafter *New Reproduction*].

3. A woman is artificially inseminated with the sperm of the husband of an infertile woman and the resulting embryo is flushed out and transferred to the uterus of the sperm source's wife. *New Reproduction*, *supra* note 2, at 950-51.

4. Cryopreservation is the procedure of freezing embryos in liquid nitrogen for storage and later use. Note, *Frozen Embryos*, *supra* note 2, at 1083.

5. Two issues concerning IVF are "whether IVF and ET should be restricted to married couples, and whether reported success rates are based on so many different factors that they are rendered unreliable at best and deceptive at worst." Garcia, *Reproductive Technology For Procreation, Experimentation, and Profit*, 11 J. LEGAL MED. 1, 4-5 (1990) [hereinafter *Reproductive Technology*]. Other issues focus on questions concerning "the rights and obligations among the [IVF] participants . . . and the duty physicians practicing in the field owe to their patients." *Id.* at 7. See also Robertson, *Ethical and Legal Issues in Cryopreservation of Human Embryos*, 47 FERTILITY & STERILITY 371 (1987).

recent scientific development is raising unprecedented questions concerning the legal status of the frozen embryo.⁶

Request for and use of reproductive technologies is expanding⁷ in part due to increasing infertility among persons with the means to finance these medical services.⁸ It is estimated that between two and three million Americans are unable to have children without medical assistance.⁹ Thus, many couples have turned to noncoital reproductive techniques to create a family.¹⁰ Unlike artificial insemination, IVF permits infertile women with damaged fallopian tubes to actually bear their own child.¹¹ How-

6. Controversial issues concerning the use of embryos include "whether embryos are humans that should be accorded the respect and rights of a human, and whether the neglectful treatment or willful destruction of embryos should be declared morally reprehensible and against the law." *Reproductive Technology*, *supra* note 5, at 7. Issues also arise regarding the handling of excess embryos. Such issues concern "the possible harm to embryos as a result of thermal manipulation and the legal, moral, and ethical status of frozen embryos." *Id.*

7. Today, thousands are born from artificial insemination and IVF techniques each year in the United States alone. Note, *Frozen Embryos*, *supra* note 2, at 1081. In recent years, the demand for infertility services has risen. See OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 50, 55 (1988) [hereinafter *OTA, Infertility*]. See also J. YEH & M. YEH, LEGAL ASPECTS OF INFERTILITY 2-3 (1991) [hereinafter *INFERTILITY*] (increase in number of physician visits for infertility services).

8. Peters, *Protecting The Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 490 (1989) [hereinafter *Protecting The Unconceived*].

"Infertility is now appearing with greater frequency among large numbers of white, educated middle and upper income women in their twenties and thirties." *New Reproduction*, *supra* note 2, at 945. "The rising rate of infertility can be explained by changes in sexual behavior, work roles, and postponement of marriage and childbearing." *Id.* "Unlike the poor, [middle class women] usually have the health insurance or private means to cover the costs of infertility treatment." *Id.* at 946. "Widespread publicity about the latest fertility treatment, the absence of easily adoptable children, and a growing number of physicians entering this field, also contribute to the interest in IVF." *Id.* See also *INFERTILITY*, *supra* note 7, at 3 (other factors contributing to the increase in demand for infertility services).

"From 1965 to 1982, infertility in married women aged 20 to 24 rose from 3.6% to 10.6%." Note, *Frozen Embryos*, *supra* note 2, at 1079 n.2. "Roughly one-sixth of all people of childbearing age in the United States suffer from infertility." *Developments - Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1526 (1990) [hereinafter *Medical Technology and the Law*]. Government statistics, available only for married couples, indicate that primary fertility (the inability to have a child) doubled between 1964 and 1982. *OTA, Infertility*, *supra* note 7, at 50. The number of couples suffering from secondary infertility (couples who are parents at least once but are unable to have another child), however, has decreased, making the overall rate of infertility fairly constant. *Id.*

9. *Protecting The Unconceived*, *supra* note 8, at 490.

10. See, e.g., *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

11. Most infertility treatments result in fertilization of the egg within the woman's body. With IVF, however, fertilization of the egg occurs outside the body, after which the

ever, the odds of successfully achieving pregnancy by this method are no more than ten to twelve percent.¹² Still, IVF may be the only way for some couples to have a child. The embryo freezing technique further facilitates the opportunity for couples to become parents through IVF.¹³

fertilized egg is placed in the uterus. IVF allows fertilized eggs to reach the uterus of a woman with blocked fallopian tubes. *New Reproduction*, *supra* note 2, at 944.

IVF involves the aspiration of several eggs from the follicles "through a surgical procedure known as laparoscopy. To enhance the process, practitioners of IVF generally administer hormones to the woman, resulting in the release of more than the usual, single egg during ovulation." Following insemination of the egg by the sperm and the subsequent cleavage, the fertilized egg is transferred to the uterus. Note, *Frozen Embryos*, *supra* note 2, at 1082-83. See *New Reproduction*, *supra* note 2, at 948, for further information on the administration of hormones and cleavage of the fertilized egg.

"Implanting more than one fertilized egg increases the probability of successful pregnancy." Note, *Frozen Embryos*, *supra* note 2, at 1083. "One clinic which boasts of one of the highest birth rates using artificial insemination reports a 20% chance of pregnancy if one embryo is implanted, a 28% chance if two are implanted, and a 38% chance if three are used." *Id.* at 1083 n.25.

12. *Medical Technology and the Law*, *supra* note 8, at 1539 & n.93. The likelihood that a transferred embryo will implant is estimated to be one in ten, which results in a lesser chance that it will come to term, since 25% to 35% of implanted embryos often spontaneously abort. See Grobstein, Flower & Mendelhoff, *External Human Fertilization: An Evaluation of Policy*, 222 SCI. 128-29 (1983). In May 1984, it was reported that 1209 out of 9641 IVF treatment cycles resulted in pregnancies, giving a 13% viable pregnancy rate. Another way to determine the pregnancy rate is per number of embryos transferred, which ranges from 10% viable pregnancies per single embryo transfer, to 19% per three embryos transferred. However, most programs do not achieve this rate. Soules, *The In Vitro Fertilization Pregnancy Rate: Let's Be Honest With One Another*, 43 FERTILITY & STERILITY 511-12 (1985).

13. The remaining embryos could be stored for future implantation. Freezing would enable the couple to avoid ovarian stimulation and laparoscopy on subsequent cycles if later attempts at IVF were undertaken. Only the implantation phase of IVF would be necessary. *Davis v. Davis*, 15 Fam. L. Rep. (BNA) No. 46, at 2098 (Blount County Cir. Ct., Tenn., Sept. 26, 1989).

Furthermore, "where several eggs are obtained and fertilized, it may be dangerous or undesirable to implant them all at once No more than three embryos should be implanted at one time to avoid the risks involved in multiple pregnancies." Note, *Frozen Embryos*, *supra* note 2, at 1083. "The risks of multiple gestation are to the mother and to the offspring. The mother may have to have a cesarean section, and may experience more complications during pregnancy. Multiple gestation leads to prematurity and a high neonatal mortality rate." *New Reproduction*, *supra* note 2, at 977 n.127.

Since the ovarian stimulation drugs and anesthesia administered during IVF treatment could cause the uterus to be less likely to accept a transferred embryo, another benefit of embryo transfer after storage is that it may improve the chances of achieving pregnancy because the body would have time to free itself of the drugs prior to embryo transfer. *New Reproduction*, *supra* note 2, at 949.

Moreover, at some point in time, embryo freezing becomes a necessity for some women such as "those who do not produce a child from their first attempt at implantation or those who wish to have more children in the future." Note, *Frozen Embryos*, *supra* note 2, at 1084 (anticipation of future damage to the ovaries or eggs, anticipation

Statistics show the increased use of IVF and embryo freezing procedures.¹⁴ Given this fact, the likelihood of legal controversy arising from utilization of these techniques is quite high.¹⁵ In turn, the need for legislation at the state level regarding cryopreserved human embryos will become more urgent.¹⁶ The fundamental decision for state legislatures will be whether frozen embryos should be treated as life or as property.

This article addresses the various reasons and legal arguments for treating embryos as life, or in the alternative as property. In particular, this article analyzes the legal status of frozen embryos in a marital dissolution proceeding from a custodial point of view and a marital property point of view.¹⁷ Part I sets forth a broad policy perspective on the doctrinal choices that must be made in determining the legal status of the embryo. Part II first explores the possibility of classifying frozen embryos as human life and then presents a legal analysis, derived from

of radiation or other therapy which might damage the ovaries, or damage to ovaries, rendering subsequent laparoscopy difficult or impossible).

14. In 1988, 22,649 IVF cycles and 1,025 frozen embryo transfer cycles were performed. Medical Research International and the Society for Assisted Reproductive Technology, The American Fertility Society, *In Vitro Fertilization-Embryo Transfer in The United States: 1988 Results from the IVF-ET Registry*, 53 FERTILITY & STERILITY 13, 14, 18 (1990). In 1987, 14,647 IVF cycles and 490 frozen embryo transfer cycles were performed. Medical Research International and the Society for Assisted Reproductive Technology, The American Fertility Society, *In Vitro Fertilization/Embryo Transfer in The United States: 1987 Results from the National IVF-ET Registry*, 51 FERTILITY & STERILITY 13, 15, 17 (1989). In 1985 and 1986, there were 2389 and 2864 IVF cycles, respectively, and 26 and 112 frozen embryo transfer cycles, respectively. Medical Research International, The American Fertility Society Special Interest Group, *In Vitro Fertilization/Embryo Transfer in The United States: 1985 and 1986 Results from the National IVF/ET Registry*, 49 FERTILITY & STERILITY 212-13 (1988). In recent years, the demand for infertility services has risen. *OTA, Fertility*, *supra* note 7, at 55.

15. A few state courts have already encountered cases concerning frozen embryos. See *Davis v. Davis*, 15 Fam. L. Rep. (BNA) No. 46, at 2097 (Blount County Cir. Ct., Tenn., Sept. 26, 1989) (a divorcing couple fought over what should happen to their seven frozen embryos); *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (a couple wanted to transport a frozen embryo from Norwalk, Virginia, to Los Angeles, California, against the wishes of the IVF program). Also, the controversy surrounding frozen embryos escalated upon the death of a wealthy Los Angeles couple and the discovery of two "orphaned" embryos which the couple had frozen and stored in Australia. *N.Y. Times*, June 18, 1984, § 2, at 10, col. 5.

16. Because our legal system traditionally commits to the states the development of property laws and domestic relations laws, this analysis also follows state law. This article will use California as an example for that type of legislation.

17. Family dissolution proceedings involve the granting of child custody and the awarding of marital property. Therefore, the frozen embryo of a divorcing couple will either be the subject of a custody award or of a property distribution.

the general principles of family law, for treating frozen embryos as minor children in a marital dissolution proceeding. Part III explores the possibility of classifying frozen embryos as property and then more specifically as marital property in a marital dissolution proceeding. Part IV concludes that state legislation is needed stating that embryos should be treated as property and not as human life.

I. POLICY CONSIDERATIONS

Given that there is currently no legislation or case law stating whether the embryo can be regarded as human life or as property, policy considerations become instrumental in the process of determining the legal status of the embryo. Since the embryo is created in the earliest stages of human development, policy considerations concerning such areas of human reproduction as abortion, contraception, and fetal protection are particularly relevant.

The main policy choice is influenced by the tendency in our country to sometimes treat human beings as property. This tendency is historically illustrated by the ownership of blacks as slaves¹⁸ and by the treatment of wives as the property of their husbands. From this treatment of human beings as property seems to flow a sacrifice of one's civil liberties,¹⁹ i.e., the placing of the property of some above the humanity of others. This notion indicates that a choice must sometimes be made as to what will be treated as property and what will be treated as life.

The presence of such a choice is particularly apparent upon

18. Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990) [hereinafter *Exploration of Property Archetypes*]. Furthermore, in *UAW v. Johnson Controls*, 886 F.2d 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990), all women of childbearing age, regardless of their intent to have children, were barred from working in a battery manufacturing plant for fear of exposing their fetuses to lead poisoning. Thus, the female employees were disfranchised and disowned "to the ideal, nonexistent, unborn, uncarried, unconceived, and unthought-of child." *Id.* at 86-89.

19. *Id.* at 82, 93. "Brazilian employers, fearing that they will have to pay benefits under Brazil's new maternity laws, ask their female employees to provide proof of sterilization." *Id.* at 89. "The Brazilian situation builds economic incentives for poor women . . . to just say no to ever having children - incentives to give up a part of themselves in order to reap a pecuniary benefit." *Id.*

the examination of fetal protection cases.²⁰ In these cases, the fetus seems to be given greater attention than the woman and her body.²¹ If women assert their own interests through their fetuses, then the fetuses are considered separate persons. However, the result of contending that fetuses are persons, and hence that fetuses are life, would be that women would then submit themselves to treatment as property.²² This idea implicates a choice as to whether the embryo or the woman should be treated as property.

If the woman were to be treated as property and the fetus as life, then the woman's interests would be sacrificed for those of the potential life. However, by treating the fetus as property and the woman as life, the interests of the actual living person, i.e., the woman, would be promoted. The more logical choice would be to promote the interests of the already existing person and thus, treat the embryos as property by treating the woman, as she should be, as life. It follows that the embryo should be treated as property that can be regulated to further the interests of the woman, rather than treating the body of the woman as property that can be regulated to further the interests of the embryo. If a choice must be made between treating the potential life as life or treating the woman as life, the latter should be given the status of life, since she is an actual, legally, socially, and biologically recognized human being.

Three major positions have evolved as a result of the debate over the moral status of the embryo. The first position holds that the embryo is a person that exists from the point of concep-

20. See *Missouri Fetus Unlawfully Jailed, Suit Says*, N.Y. Times, Aug. 11, 1989, at B5, col. 3 (a pregnant inmate was suing the state on behalf of her unborn fetus, asserting the lack of due process accorded the fetus in placing it in jail); Churchwille, *D.C. Judge Jails Woman as Protection for Fetus*, Wash. Post, July 23, 1988, at A1, col. 5 (a pregnant woman was imprisoned to protect the fetus from the woman).

21. "Her needs are suppressed in favor of a conceptual entity that is 'innocent,' ideal, and all potential." *Exploration of Property Archetypes*, supra note 18, at 92-93.

22. In bargaining this way, however, pregnant women trade in interests larger than the world of prisoner's rights. In having the fetus declared an other person, in allowing separation in order to benefit the real mutuality, they enslave themselves to the state. They become partialized in the commodification of that bargain

Id.

tion or fertilization and is entitled to the rights of a person.²³ The second position views the embryo as a living human entity that should be accorded "special respect,"²⁴ although not the same respect accorded to persons.²⁵ Finally, the third position argues that the embryo is neither a person nor even a rights-bearing entity.²⁶ This article will discuss these positions and their relevant policy considerations and ultimately arrive at a conclusion that is consistent with the policy choice in favor of treating embryos as property and women as life.

The first position, which holds that the embryo is a person, is a view held by right to life groups²⁷ and various religions, including the Catholic Church.²⁸ Under this position, the embryo must be provided the opportunity for implantation,²⁹ and the embryo must not be destroyed or harmed.³⁰ Relevant to the discussion that embryos are persons is the impact of religion and science on this position.

The first point to be examined is the possible role that reli-

23. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 444 (1990) [hereinafter *Early Embryos*]. See also *New Reproduction*, *supra* note 2, at 971 (the embryo-as-person position "views the embryo as a human subject after fertilization and requires that it be accorded the rights of persons"). See also Note, *Frozen Embryos*, *supra* note 2, at 1089-90 (some view the embryo as a person that should be accorded all of the claims and rights of a person).

24. "The term 'special respect' is taken from several influential advisory bodies that have examined new reproductive technologies." *Early Embryos*, *supra* note 23, at 446 n.31.

25. *Id.* at 446. See also *New Reproduction*, *supra* note 2, at 972-75 ("the preimplantation embryo deserves respect greater than that accorded human tissue, but not the respect accorded persons"). See also Note, *Frozen Embryos*, *supra* note 2, at 1089-91 ("the embryo is a living human entity deserving respect, though not meriting the same protections as people").

26. *Early Embryos*, *supra* note 23, at 445. See also *New Reproduction*, *supra* note 2, at 972-74 ("the embryo has no status different from that of any other extracorporeal human tissue").

The prevailing legal view, articulated by the Supreme Court in *Roe v. Wade*, is that fetuses are not persons within the meaning of the fourteenth amendment, and thus, are not entitled to either its due process or equal protection guarantees. If a fetus is not a person, then *a fortiori* an embryo certainly is not.

Note, *Frozen Embryos*, *supra* note 2, at 1089.

27. Note, *Frozen Embryos*, *supra* note 2, at 1090.

28. *New Reproduction*, *supra* note 2, at 971 n.103.

29. *Id.* at 971.

30. *Early Embryos*, *supra* note 23, at 444. See also *New Reproduction*, *supra* note 2, at 971 (freezing and most kinds of embryo research may harm the embryo).

gious doctrines may play in the determination of whether embryos are persons. Reliance on an "ensoulment" claim³¹ would lead to the conclusion that life begins at conception and, therefore, that embryos are persons. However, the point at which human life legally begins is not solely a matter of religion,³² and the Establishment Clause³³ does not prevent legislation which answers the question of whether embryos are persons. Only a legitimate secular purpose for the legislation is necessary to enact a law that is in conflict with someone's religious beliefs.³⁴ Since the proposition that embryos are life should not be based on religion, the policy choice in favor of treating embryos as property and women as life still holds.

The next point to be examined is the role of science in the determination of whether embryos are persons. Personhood is not a matter of fact.³⁵ It is a legal and moral status that is given at a certain point in human biological development depending on the normative context.³⁶ Since the point at which an embryo

31. An "ensoulment" claim is the claim that God infuses a human soul into every fertilized egg. Rubinfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 625 (Feb. 1991) [hereinafter *When Life Begins*].

32. If this determination were solely a religious one, then no prohibition of abortion could be sustained, since the Establishment Clause would preclude states from enacting any particular answer into law. *Id.* at 614.

33. The Establishment Clause is the provision of the first amendment to the U.S. Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

34. *E.g.*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 1204-05 (2d ed. 1988). A legitimate secular purpose could be regulation of abortion or regulation of IVF and embryo transfer procedures.

35. *When Life Begins*, *supra* note 31, at 601. The facts regarding human biological development by themselves are not dispositive; it is a question of attaching significance to these facts. *Id.* at 619.

36. *When Life Begins*, *supra* note 31, at 601, 617, 627. Personhood is no different in its conceptual structure from another status conferred later in life: adulthood. *Id.* at 601.

Because personhood is a matter neither of religion nor of fact, we must conceptualize personhood in exactly the same fashion as we conceptualize adulthood: as a conclusory term designating a point at which we choose to attach to a developing human a certain legal or moral status. This status will depend not on an inherently dispositive developmental event, but on a combination of the developmental facts and the consequences that follow from the status. Thus, our determinations of "adulthood" may well differ in different contexts.

Id. at 619.

Regarding the legal status of personhood, there need be no absolute answer. *Id.* at 601. "Different answers may be appropriate in different contexts - abortion, inheritance, assault, and so forth - depending on the particular legal or moral considerations at is-

becomes a person is not a question of fact, the law need not adopt a medical determination of when life begins.³⁷ However, for an embryo to be a person, life would have to begin at least at the point of conception. This is not a plausible proposition.

First, an embryo is not created during the earliest steps in embryonic development, that is, at the point of conception or fertilization.³⁸ Second, the embryo is not yet individual since twinning or mosaicism could still occur.³⁹ Third, the embryo lacks the rudimentary structures of a nervous system.⁴⁰ Although genetic completion occurs at fertilization, holding all the necessary genetic information about an individual human being is not the same as being a human being.⁴¹ Personhood cannot be based on the fact that a line cannot be drawn in our ontogeny distinguishing between an embryo and a human being.⁴² Because the embryo is not an individual, because it lacks a differentiated nervous system, and because it is not sentient, an embryo cannot be treated as a person.⁴³ Thus, conception is not a point in human biological development at which the status of per-

sue." *Id.*

37. "Because of the normative nature of the judgment of personhood, neither medical nor scientific expertise can ever be dispositive." *Id.* at 619.

38. *New Reproduction*, *supra* note 2, at 969. "The zygote, morula, and early blastocyst stages may be regarded as pre-embryonic stages (sometimes referred to as the conceptus or pre-embryo), with the term 'embryo' reserved by some persons for the rudiments of the whole individual that appear at the end of the second week after fertilization." *Id.* at 969-70.

39. *Id.* at 970. Twinning produces two individuals; mosaicism produces less than one. *Id.* "Developmental individuality in the sense of singleness is not established until an embryonic axis is formed, an event which roughly corresponds to the time of implantation and to the initiation of physiological changes of pregnancy in the mother." *Id.*

40. *Id.*

The embryonic disc, axis, and primitive streak, which begin to emerge at or after implantation, are the precursors of embryonic and fetal nervous structures. Until they emerge there is no possibility of feeling or experience of any sort. It is considerably later in gestation - roughly six to eight weeks - that a spinal column and nervous system develop.

Id.

41. *When Life Begins*, *supra* note 31, at 625.

42. *Id.* "Because the development of this genetically complete zygote is a gradual, incremental process, 'there is no nonarbitrary line separating a fetus from a child.'" *Id.* "But that does not make it correct - nor even plausible - to conclude that the thing at one end of the spectrum is the thing at the other. No nonarbitrary line separates the hues of green and red. Shall we conclude that green is red?" *Id.*

43. Personhood cannot begin at conception because there are some developmental factors that do not exist in a blastocyst. *Id.* at 627.

sonhood can be conferred. Once again, this result is consistent with the policy choice in favor of treating embryos as property and women as life.

The second position holds that greater respect is due embryos because of their potential to become persons and because they are a symbol of human life.⁴⁴ Since the embryo is genetically unique and has the potential to develop into a person, it serves as "a powerful symbol or reminder of the unique gift of human existence."⁴⁵ Also, since it touches the consciousness of society more effectively than other human tissue, it deserves special treatment even if it is not itself a rights-bearing entity.⁴⁶ This view is reflected in official and professional reports, in the legal arena, and in ethical and philosophical discussions.⁴⁷

Although the potential life has no interests as an independent person that the state can claim to be protecting, the potential life may at least have potential interests.⁴⁸ But, the potential cannot be said to possess the very qualities that differentiate it from the actual.⁴⁹ The distinguishing feature of personhood is that human beings have interests unto themselves that mandate moral respect, and a human being's life should receive more re-

44. *New Reproduction*, *supra* note 2, at 972. See also *Early Embryos*, *supra* note 23, at 446 (the embryo may be accorded special respect because it is genetically unique, living human tissue that has the potential to develop into a fetus and newborn).

45. *Early Embryos*, *supra* note 23, at 447. "Such symbolizing is an essential part of any human community, and helps constitute and identify the community's values." *New Reproduction*, *supra* note 2, at 975 & n.119.

46. *Early Embryos*, *supra* note 23, at 447.

While other objects or entities may also serve this function, the embryo serves it especially well because of its role in the series of events that lead to the birth of a child. Yet because of its rudimentary development and its slim chances of implanting and coming to term, it is a less powerful symbol of human community than are more developed fetuses or recently dead cadavers.

Id. at 448.

"We may choose to treat the embryo differently than other human tissue as a sign of respect for human life generally." *New Reproduction*, *supra* note 2, at 974.

47. *New Reproduction*, *supra* note 2, at 972 & nn.105-08. See also *Early Embryo*, *supra* note 23, at 446 n.31.

48. *When Life Begins*, *supra* note 31, at 611.

49. *Id.* at 612. "Ice, potentially a liquid, does not conform to the shape of a container to which it is transferred; if it did, we would be obliged to admit it was already a liquid." *Id.*

spect than any other worldly thing.⁵⁰ To attribute these features to a "potential" person is to transform the potential into the actual.⁵¹

Conception, like viability, brings the potential life an important step closer to actualization, but the potentiality of human life may exist before as well as after these two events.⁵² A potential life cannot possess an actual interest in anything - and certainly not in its own life - unless it is deemed to be an actual rather than a potential life.⁵³ Furthermore, if the state were to have a compelling interest in protecting potential life from the point of conception, controversial results would follow.⁵⁴ Hence, this position is also consistent with the policy choice in favor of treating embryos as property and women as life.

The third position holds that the embryo is not a person or even a rights-bearing entity.⁵⁵ Because the embryo is not yet an individual, because it lacks a differentiated nervous system, and because it is not sentient, an embryo cannot be treated as a person.⁵⁶ The potential to become a person does not mean that an actual person already exists or that the potential person should be treated as an actual person and be entitled to the same rights

50. *Id.*

51. *Id.* "Consider the extraordinary consequences of ascribing to potential human life an actual interest in being born. The potential children of a proposed marriage are potential persons too. The unfertilized ovum that may be fertilized on any given night also represents a potential human life." *Id.*

52. *Id.* "An unfertilized ovum also has the potential to develop into a whole human being, but that does not make it a person." *Id.* at 625. The argument that potential development plus genetic completion equals personhood also fails because nucleic transplantation technology gives non-zygotic cells the potential for such development. *Id.*

53. *Id.* at 612-13.

54. *Id.* at 613.

A state could forbid not only abortion, but contraception as well. More than this, a state could compel individuals to marry or procreate with specified individuals and at specific times, all in the name of protecting potential lives. If potential life has an interest in being born, and if the state can invoke that interest to supersede the right of privacy, these possibilities, which may or may not be farfetched, would be well within the arguable scope of constitutional legislation.

Id.

55. This view seems to "maintain that as long as those with decision making authority over the embryo consent, no limits should be imposed on actions regarding embryos." *New Reproduction, supra* note 2, at 972. This notion is exemplified by the willingness of some to allow discard and research on embryos. *Id.* at 972 n.104.

56. *See supra* notes 35-43 and accompanying text.

as an actual person.⁵⁷ This view is consistent with the policy choice of treating embryos as property, rather than human life, so that the actual living person can be treated as life.

Even though three possibilities exist, the legal analysis will not focus on the second position because the legal analysis is situated in prevailing law. Under prevailing law, there is a choice of either property or life. There is no intermediate category. Hence, the legal analysis will address only the positions of the embryo as life and the embryo as property.

II. CUSTODY ANALYSIS

A. WHETHER EMBRYOS CAN BE CONSIDERED HUMAN LIFE UNDER PREVAILING LAW

Historically, the fetus has not been treated as a legal entity in its own right and has not been protected by laws against homicide or wrongful death.⁵⁸ For instance, many infanticide and homicide statutes prohibit actions for the death of a fetus, although some infanticide and homicide statutes permit actions if the fetus was viable when injured.⁵⁹ At common law, the fetus

57. See *supra* notes 48-54 and accompanying text.

58. See *infra* notes 59-61 and accompanying text.

Legal personhood requires that the fetus be born alive - separated from the mother and existing independently, albeit with support. *New Reproduction*, *supra* note 2, at 973. The extracorporeal embryo is not likely to be included in this definition of person because of its rudimentary biological status, and because it must be transferred to a uterus for development, and eventually birth, to occur. *Id.*

Indeed, the biology of early embryo development strongly supports the view that the preimplantation embryo is not a person or a rights-bearing entity in its own right. *Id.* at 974. Specifically, the embryo biologically is not yet an individual, it lacks a differentiated nervous system, and it is not sentient before implantation. *Id.* at 968-70. Prior to implantation and for some time thereafter, preimplantation embryos do not qualify for protection given the absence of any current legislation or case law entitling the embryos to rights traditionally associated with human beings. *Id.* at 974.

59. See, e.g., *People v. Smith*, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (the homicide statute applies only to a viable fetus, namely, one capable of living outside the uterus); *Bayer v. Suttle*, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972) (the legislature did not intend to include an unborn child within the meaning of "person" in the wrongful death statute); *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (the only viable fetus that is a "human being" within the meaning of the homicide statutes is one in the process of being born); *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947) (for the purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed).

had limited rights in torts and property.⁶⁰ Additionally, the Supreme Court has never ruled on the constitutionality of the position that life begins at conception.⁶¹

As in so many aspects of reproductive rights, the principles set forth in the twin cases of *Roe v. Wade*⁶² and *Webster v. Reproductive Health Services*⁶³ govern the basic analysis here. *Roe* held that the state's interest in potential life begins at viability.⁶⁴ Thus, under *Roe*, the state's interest in potential life could not encompass the existence of the embryo. Under *Webster*, however, the Supreme Court stated in dicta that the state has a compelling interest in protecting potential life even before viability.⁶⁵ Therefore, if a state were to hold that its interest in the

60. See, e.g., *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E. 2d 1324 (1984) (allowing tort recovery by a fetus, but only after the point of viability); *Wallace v. Wallace*, 120 N.H. 675, 421 A.2d 134 (1980) (finding that an action for an automotive death could not be brought on behalf of an aborted nonviable fetus).

61. See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (declining to rule on the constitutionality of a Missouri statute stating that life begins at conception).

62. 410 U.S. 113 (1973).

63. 109 S. Ct. 3040 (1989).

64. *Roe*, 410 U.S. at 163. In *Roe*, a pregnant single woman challenged the constitutionality of Texas criminal abortion statutes that made it a crime to procure or attempt to have an abortion, except on medical advice for the purpose of saving the life of the mother. *Id.* at 117-18.

The Supreme Court held that the state has an important and legitimate interest in preserving and protecting both the health of the pregnant woman and the potentiality of human life as embodied by the fetus. *Id.* at 162. These interests are separate and distinct; and each interest grows in importance as the woman approaches term and at some point during pregnancy becomes "compelling." *Id.* at 162-63. The state's interest in the health of the mother becomes compelling at approximately the end of the first trimester. *Id.* at 163. "This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* The interest in potential life becomes compelling at viability, which occurs generally after 26 weeks. *Id.* at 160, 163. "This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Id.* at 163.

Consequently, prior to the end of the first trimester a pregnant woman and her physician are entitled to determine whether the pregnancy should be terminated, and the decision will be free of any interference by the state. *Id.* at 163. Subsequent to the first trimester, the state may regulate the abortion procedure in ways that are reasonably related to the preservation of the mother's health. *Id.* at 163-64. After viability, however, a state may regulate or prohibit an abortion, except where the mother's life or health is at stake, in order to further the state's interest in potential life. *Id.*

65. *Webster*, 109 S. Ct. at 3056-57. State-employed health care professionals and facilities challenged a Missouri statute that specified that a physician, prior to performing an abortion on any woman whom he or she has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing such medical examinations and tests as are necessary to make a finding of the fetus' gestational age,

fetus (i.e. "potential life") starts at the point of conception, then arguably the state could also claim an interest in the "life" of the embryo. A state could argue that the embryo is "potential life."

The Supreme Court holds that each state can bestow some legal cognizance on the fetus according to the individual state's interest in potential life.⁶⁶ However, the law still seems to hold that the fetus, for now, represents only the potentiality of life.⁶⁷ As such, a preimplanted embryo would have no greater right or status than that of a fetus. Therefore, under prevailing law it is, if anything at all, at most "potential life." However, as of now, no legislation or case law has regarded the embryo as either human life or "potential life."

Despite the considerable controversy surrounding legal regulation of human reproduction, only one reported case has addressed the specific issue of the legal status that should be accorded to a frozen embryo. The Tennessee case *Davis v. Davis*⁶⁸ involved the disposition of a divorcing couple's seven frozen embryos. Prior to divorce, the infertile couple attempted to have a child by IVF. Nine of Mrs. Davis' eggs were fertilized by Mr. Davis' sperm.⁶⁹ Two of the fertilized eggs were implanted in Mrs. Davis' womb⁷⁰ and the remaining seven embryos, which became the subject of the litigation, were preserved cryogenically.⁷¹

weight, and lung maturity. *Id.* at 3054-58. The Supreme Court held that this section of the statute regulating the performance of abortions was constitutional since it permissibly furthered the state's interest in protecting potential human life. *Id.*

Despite the uncontradicted medical evidence that established that a 20-week fetus is not viable, and that 23 ½ to 24 weeks' gestation is the earliest point at which a reasonable possibility of viability exists, the Court held that since there may be a four week error in estimating gestational age, testing for viability at 20 weeks would "permissibly" further the state's interest in potential life. *Id.* at 3055-56.

Without specifically overturning *Roe*, the Court undermines the reasoning and precedential strength of *Roe* by stating in strong dicta that there is no reason why the state's compelling interest in protecting potential human life should not exist throughout pregnancy rather than coming into existence only at the point of viability. *Id.* at 3056-57. Therefore, a state can arguably implement severe restrictions on the right to procure an abortion, prior to viability, based on the state's compelling interest in potential life.

66. *Roe*, 410 U.S. at 162.

67. *Id.*

68. 15 Fam. L. Rep. (BNA) No. 46, at 2097 (Blount County Cir. Ct., Tenn., Sept. 26, 1989).

69. *Id.* at 2098.

70. *Id.* Implantation of the two embryos did not result in pregnancy. *Id.*

71. *Id.*

Subsequently, the couple decided to divorce. As to the frozen embryos, Mrs. Davis wished to implant them and Mr. Davis wished them destroyed.⁷² The trial judge held that embryos are not property, but human life,⁷³ and that the doctrine of *parens patriae* controls in matters concerning the “*in vitro* children.”⁷⁴ The “best interests of the children, *in vitro*,” requires that they be made available for implantation in a woman to give them the opportunity to be born.⁷⁵ Accordingly, the trial judge awarded custody of the frozen embryos to Mrs. Davis for the purpose of giving them the chance for live birth.⁷⁶

On appeal, the Tennessee Court of Appeals, without determining the legal status of the embryo, overturned the ruling of the trial judge and granted the parties “joint custody over the fertilized ova and . . . equal voice over their disposition.”⁷⁷ Since the trial court ruling, each party had married other spouses and neither wanted to implant the embryos. Mrs. Davis, however, wanted to have the embryos donated to another infertile couple.⁷⁸ But Mr. Davis preferred to have custody himself rather than donate the frozen embryos to a third party.⁷⁹ The Tennessee Court of Appeals held that the couple should “share an interest in the seven fertilized ova.”⁸⁰

In reaching its conclusion, the *Davis* appeals court looked to existing Tennessee law regarding the treatment of fetuses in the womb and the decisions of the United States Supreme Court

72. *Id.* at 2104. The Davises had made no prior agreements regarding the disposition of any remaining frozen embryos should they no longer desire to use the embryos. *Id.* at 2099.

73. *Id.* at 2103. After hearing conflicting expert testimony, the trial judge concluded that “the cells of human embryos are comprised of differentiated cells, unique in character and specialized to the highest degree of distinction.” *Id.* at 2102.

74. *Id.* at 2103. “The doctrine of *parens patriae* is most commonly expressed as the ‘best interests of the child doctrine’ and its sole objective is to achieve justice for the child.” *Id.* at 2104.

75. *Id.* The trial judge rationalized that to allow the frozen embryos to remain frozen for more than two years “is tantamount to the destruction of these human beings.” *Id.* Unless the embryos are implanted, “their lives will be lost; they will die a passive death.” *Id.*

76. *Id.*

77. 1990 Tenn. App. LEXIS 642 [hereinafter *Davis*].

78. *Davis*, 1990 Tenn. App. LEXIS 642 at 1.

79. Curriden, *Joint Custody of the Frozen Seven*, A.B.A. J., Dec. 1990, at 36.

80. *Davis*, 1990 Tenn. App. LEXIS 642 at 9.

concerning the constitutional right to beget a child.⁸¹ Under Tennessee law, viable fetuses in the womb are not given the same protection as persons.⁸² Even after viability, the fetus is not granted the same legal status as that of a born person.⁸³ Furthermore, a fetus is not a person within the meaning of the Tennessee Wrongful Death Statute.⁸⁴ Accordingly, if an embryo were to be considered human life, the embryo would be entitled to more legal protection than a more developed fetus is entitled to under Tennessee law and this conclusion is inconsistent with the policy decisions behind that state's fetal laws.

Although the *Davis* appeals court avoided answering the question of whether embryos are human life, this single instance of judicial consideration of the issues presented by frozen embryos suggests that embryos are not likely to be legally recognized as human life. The *Davis* case is consistent with the policy choice of treating embryos as property and women as life so that the interests of the actual living persons are promoted.⁸⁵ Hence, embryos would be considered property, allowing women to be considered life. Women would not be treated as property for the sake of the potential life. *Davis*, however, illustrates the danger of leaving this area without legislation.

B. APPLICATION OF EXISTING CUSTODY LAWS

Assuming the existence of legislation protecting the embryo over the woman, existing custody laws for minor children could then conceivably apply to frozen embryos.

81. The United States Supreme Court has recognized that an individual has a constitutional right to bear or beget a child. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 38 U.S. 479 (1965). Consequently, the *Davis* appeals court held that "it would be repugnant and offensive to constitutional principles to order [Mrs. Davis] to implant these fertilized ova against her will." *Davis*, 1990 Tenn. App. LEXIS 642, at 8-9. The *Davis* appeals court further stated that "[i]t would be equally repugnant to order [Mr. Davis] to bear the psychological, if not the legal, consequences of paternity against his will." *Id.* at 9. Therefore, unless the couple agreed on the use, the embryos would remain frozen indefinitely. *See Curriden, Joint Custody of the Frozen Seven*, A.B.A. J., Dec. 1990, at 36.

82. *Davis*, 1990 Tenn. App. LEXIS 642 at 7.

83. *Id.* at 8. Furthermore, Tennessee's murder and assault statutes provide that although an attack or homicide of a viable fetus may be a crime, abortion is not. *Id.*

84. *Id.* at 7.

85. *See supra* notes 18-22 and accompanying text.

1. *What Is In The Best Interest Of The Embryo?*

The fundamental principle in custody disputes is what is “in the best interest of the child.” Here, the standard would be what is “in the best interest” of the embryo, or the child-to-be. The best interest standard might require implantation of the embryo as soon as possible, since this would give the embryo the best chance for live birth. Such a proposition, however, may result in choosing the interests of the embryo (i.e, the potential life) over those of the egg and sperm donors, that is, the actual living persons.

2. *Persons To Whom Custody Can Be Awarded*

California custody laws provide that custody of minor children should first be awarded to either or both parents, based on what the court deems to be “in the best interest of the child.”⁸⁶ Under California law, in an action between parents regarding custody of their minor children, each is equally entitled to custody.⁸⁷ After the parents, custody should go to the person or persons with whom the child has been living in a “wholesome and stable” environment.⁸⁸ Last, the award should go to any person or persons that the court determines will be suitable and capable of providing adequate and proper care to and guidance for the child.⁸⁹

The above scheme of custodial preference to frozen embryos suggests that custody should first be awarded to either biological parent, if the court determined such decision to be “in the best interest” of the embryo. If the clinic where the embryo is kept, while awaiting adoption by another infertile couple, could be viewed as a “wholesome” temporary home, then arguably custody could be awarded to the clinic. Custody might also be awarded to another infertile couple who could provide adequate and proper care to the embryo. However, an award of custody to someone other than the biological parents would result in sacrificing the interests of the biological parents for those of the po-

86. CAL. CIV. CODE § 4600(b)(1) (Deering Supp. 1991).

87. *See, e.g., Kemmer v. Kemmer*, 142 Cal. App. 2d 233, 298 P.2d 26 (1956).

88. CAL. CIV. CODE § 4600(b)(2) (Deering Supp. 1991).

89. CAL. CIV. CODE § 4600(b)(3) (Deering Supp. 1991).

tential life.

In the case of minor children, before a court may award custody to a person or persons other than a parent, without the consent of the parents, it must find that an award of custody to a parent would be detrimental to the child.⁹⁰ Analogously, in the case of frozen embryos, the court could feasibly decide that it may be "in the best interest" of the embryo not to award custody to the biological parents, as for instance where the likelihood of implantation of the embryo by the couple is minimal. In such a situation, the court could grant custody to a third party. Again, the decision would result in sacrificing the interests of the biological parents for those of the potential life.

Under existing custody laws, the principal consideration in determining the custody of a minor child is the welfare and "best interest of the child,"⁹¹ or in this case, the frozen embryo. Custody laws provide that if the child is of sufficient age and capacity to make an intelligent preference, the court must consider that preference in determining to whom custody of the child should be awarded.⁹² The feelings and desires of the parents should be considered only insofar as they affect the "best interest of the child."⁹³ The financial condition, interests, morals, and dispositions of each parent are factors to be considered by the court.⁹⁴ Other factors include the age and temperament of the child as well as his or her love for either or both parents.⁹⁵ No finding of unfitness is necessary for the court to award custody to one parent over the other in accordance with what in its sound discretion it determines is "in the best interest of the child."⁹⁶

90. CAL. CIV. CODE § 4600(c) (Deering Supp. 1991).

91. See, e.g., *In re Marriage of Pollard*, 97 Cal. App. 3d 535, 158 Cal. Rptr. (1979); *In re Marriage of Coleman*, 26 Cal. App. 3d 56, 102 Cal. Rptr. 629 (1972); *Gobar v. Gobar*, 175 Cal. App. 2d 129, 345 P.2d 480 (1959).

92. CAL. CIV. CODE § 4600(a) (Deering Supp. 1991).

93. See, e.g., *In re Miller*, 179 Cal. App. 2d 12, 3 Cal. Rptr. 450 (1960); *Taber v. Taber*, 209 Cal. 755, 290 P. 36 (1930).

94. See, e.g., *Mathewson v. Mathewson*, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962).

95. See, e.g., *Rude v. Rude*, 148 Cal. App. 2d 793, 307 P.2d 679 (1957).

96. See, e.g., *Adleson v. Adleson*, 160 Cal. App. 2d 1, 324 P.2d 674 (1958); *Ducharme v. Ducharme*, 152 Cal. App. 2d 189, 313 P.2d 33 (1957).

On the other hand, if the court determines that a parent is not a fit custodian, and if there is evidence supporting that finding, the child should not be left in that parent's

Many of these considerations, such as the child's preference, age, temperament, and love of either parent, become inapplicable when determining custody of a frozen embryo because the embryo is not yet capable of having the feelings that human beings experience. However, the financial condition, interest, morals, and dispositions of each parent, as well as their feelings and desires, would still be relevant considerations since these factors could indicate the kind of environment each parent can provide for the child-to-be. On the other hand, in determining the best interest of the embryo, the court may encounter new considerations, such as the lapse of time until implantation of the embryo, the likelihood of success of implantation, and the ability of an interested woman to carry the embryo to term.

In applying these factors to frozen embryos, the courts would face one of two basic choices: award custody of the embryo to the ex-wife if she wishes to implant the embryo, or award custody to the ex-husband if the husband desires to have the embryo implanted in another woman (such as his new wife or a surrogate mother). A court would then have to determine which situation would be "in the best interest" of the embryo. Since existing custody laws provide that custody should be awarded in the first instance to either parent, the partner wishing to procreate might be awarded custody, and thus be permitted to implant the embryo, even though the other partner may wish to avoid having biological offspring.⁹⁷

A repercussion of existing laws might be that if the wife did not want to implant the embryo, then the husband who desired to implant the embryo in a third party could get custody. Conversely, if the husband did not want to implant the embryo in a third party, then the wife who desired to implant the embryo

custody. *See, e.g., In re Marriage of Wellman*, 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980) (in finding that a person is an unfit parent, the court is obligated to consider all the evidence bearing upon that question); *Stack v. Stack*, 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961) (finding no support for lack of fitness of the mother); *Clarke v. Clarke*, 35 Cal. 2d 259, 217 P.2d 401 (1950) (considering the personal behavior and characteristics of the parent).

The requirement of fitness for being awarded custody of a minor child involves more than affection and ability to feed, clothe, and house the child properly; it also necessitates an environment that will not be detrimental to the child's character and morals. *See, e.g., Kelly v. Kelly*, 173 Cal. App. 2d 469, 343 P.2d 391 (1959); *Reynolds v. Reynolds*, 149 Cal. App. 2d 409, 308 P.2d 921 (1957).

⁹⁷ *New Reproduction*, *supra* note 2, at 981.

could get custody. In these situations, the interests of one partner are sacrificed for those of the other partner and of the potential life. This notion is inconsistent with the policy choice of treating the potential life as property so that the interests of actual living persons can be promoted.

If neither biological parent was interested in having the embryo implanted, the courts could consider a third alternative: award custody to an infertile couple other than the biological parents. If the court was to find that the best interest of the embryo would require that it be given the opportunity for life, then implantation of the embryo as soon as possible would be "in the best interest" of the embryo. This view, however, would mean sacrificing the rights of the biological parents (i.e., the actual living persons) in order to promote the interests of the potential life.

3. *Duties Of The Custodian To The Embryo*

In general, parents are under an obligation to support their minor children.⁹⁸ If these principles of law are applied to frozen embryos, crucial and unprecedented issues arise regarding custodial obligations to the frozen embryo. Since the embryo is outside the body, it cannot be forcibly placed in the woman who provided the egg, because if a woman may remove an implanted embryo by abortion, it would follow that she could refuse transfer of the embryo to her womb.⁹⁹ However, if the ex-wife has custody and she changes her mind about implantation or becomes incapable of carrying an embryo to term, then a repercussion of existing laws might be that the ex-wife must have the embryo implanted in a third party. Similarly, an ex-husband

98. See, e.g., *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42 (1917). The obligation of a parent to support his or her child is an absolute one. See, e.g., *Department of Mental Hygiene v. McGilveray*, 50 Cal. 2d 742, 329 P.2d 689 (1958). The parent who is entitled to the custody of a child is required by law to give the child support and education suitable to the circumstances. See CAL. CIV. CODE § 196 (Deering Supp. 1991). Where the financial ability of the parents is not an issue, the child is entitled to the common necessities of life, including food, clothing, shelter, education, and medical attention. See, e.g., *Simoneau v. Pacific Elec. Ry.*, 159 Cal. 494, 115 P. 320 (1911) (father required to supply proper medical attention to his crippled children). A parent's duty continues regardless of whether the parent is subsequently deprived of custody by judicial decree. See, e.g., *Armstrong v. Armstrong*, 15 Cal. 3d 942, 544 P.2d 941, 126 Cal. Rptr. 805 (1976).

99. *New Reproduction*, *supra* note 2, at 979 (interference of right to procreate).

with custody of the frozen embryo could also have an obligation to see that the embryo is implanted. However, such an obligation would mean that the interests of the biological parent would be sacrificed for those of the potential life. This would be inconsistent with the policy choice of treating the embryo as property and the actual living person as life.

Current custody laws provide that the parent's obligation to support his or her child terminates: (1) when the child attains majority;¹⁰⁰ (2) upon the minor child's emancipation through lawful marriage;¹⁰¹ or (3) upon death of the parent.¹⁰² On their face these laws suggest that the biological parents have an obligation to support the embryo until the embryo becomes a child of majority, unless the child marries while a minor or the parent dies. An immediate repercussion of existing law here might be that if one partner wishes to procreate and the other partner wishes to avoid biological offspring, the unwilling partner would be obligated to support the embryo during pregnancy and while it is a minor child. For instance, the obligations of the biological parents of the frozen embryo seem unchanged if one or both of the biological parents remarry. This result is also inconsistent with the policy choice of treating the embryo as property so that the interests of the actual living persons can be promoted.

III. PROPERTY ANALYSIS

A. WHETHER THERE ARE PROPERTY RIGHTS TO FROZEN EMBRYOS

Under *Roe*, an embryo is not potential life let alone a full-fledged life.¹⁰³ Arguably, then, an embryo could be considered

100. *See, e.g.*, *Levy v. Levy*, 245 Cal. App. 2d 341, 53 Cal. Rptr. 790 (1966) (generally the obligation of the parent to provide support for the child terminates when the child attains majority, but where an adult child is incapable of self support the duty may continue or arise); *Wilkins v. Wilkins*, 95 Cal. App. 2d 605, 213 P.2d 748 (1950) (father's duty to support terminated when children became of age).

101. *See, e.g.*, *Kamper v. Waldon*, 17 Cal. 2d 718, 112 P.2d 1 (1941) (relief from father's legal duty to support daughter upon daughter's marriage was not recognized where agreement had been made to the contrary).

102. However, when the parent dies leaving the minor child chargeable to the county or in a state institution, the estate of the parent is liable to the county or state for its support. CAL. CIV. CODE § 205 (Deering 1990).

103. *See supra* notes 58-67 and accompanying text.

property. However, no case or legislative act has as yet declared that a frozen embryo is "property." But one reported case, *York v. Jones*,¹⁰⁴ has addressed whether a frozen embryo can be subject to the rules of property rights.

In *York*, a husband and wife brought an action against a reproduction facility to obtain possession of the couple's frozen embryo. The Yorks were unable to achieve pregnancy through normal coital reproduction.¹⁰⁵ They joined the IVF program at Jones Institute in Virginia,¹⁰⁶ whereupon six of Mrs. York's eggs were fertilized with Mr. York's sperm.¹⁰⁷ Five of the resulting embryos were transferred to Mrs. York's uterus and the remaining embryo, which was the subject of the litigation, was cryogenically preserved.¹⁰⁸

The Yorks moved to California and decided to have their frozen embryo implanted in a California clinic.¹⁰⁹ The couple, therefore, needed to transfer their embryo from the institute in Virginia to the clinic in California.¹¹⁰ The Virginia facility, however, refused to consent to an interinstitutional transfer of the frozen embryo.¹¹¹ The Yorks instituted an action against the institute. In denying the institute's motion to dismiss for failure to state a claim, the United States District Court held that the Yorks had a valid property interest in the frozen embryo under a breach of contract cause of action and a detinue claim.¹¹²

The *York* court based the breach of contract claim on a bailor-bailee relationship created by the Cryopreservation Agreement between the Yorks and the Jones Institute.¹¹³ The

104. 717 F. Supp. 421 (E.D.Va. 1989).

105. *Id.* at 423.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. The issues, however, were never decided by the court as the case was settled. Plaintiffs accepted defendant's offer to return the embryo and pay damages. Andrews, *Birth of a Motion*, *STUDENT LAW*, April 1990, at 30. Because this action involves a motion to dismiss the complaint for failure to state a claim upon which relief may be granted, the complaint is viewed in the light most favorable to the plaintiff. *York*, 717 F. Supp. at 423.

113. *York*, 717 F. Supp. at 425.

York court found that the requisite elements of a bailment were present.¹¹⁴ In finding that a bailment could have been created, the *York* court acknowledged that the embryo was the “property” of the Yorks.¹¹⁵ Furthermore, in holding that a cause of action in detinue was properly alleged, the *York* court again advanced the idea that embryos are property.¹¹⁶ The decision in *York* is consistent with the policy choice of treating embryos as property so that actual living persons, i.e., women, can be treated as life.¹¹⁷

The analysis of whether frozen embryos can constitute “property” involves an examination of what “property” is. “Property” is a generic term¹¹⁸ and includes that which is subject to ownership by one to the exclusion of others.¹¹⁹ Property can be used to designate the exclusive right to possess, enjoy, and dispose of a thing.¹²⁰ It may also refer to a thing of which there may be ownership.¹²¹ “Property” is a term with very broad meaning and, when used without qualification, may reasonably be interpreted to include obligations, rights, and other in-

114. *Id.* A bailment relationship requires “the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment.” *Id.* The *York* court found that the “property” element of the bailment relationship was fulfilled by the reference to the embryo as the “property” of the Yorks in the Cryopreservation Agreement. *Id.*

115. *Id.* at 425-27. Furthermore, the Cryopreservation Agreement provided that upon divorce, the legal ownership of the embryo “must be determined in a property settlement.” *Id.* at 426.

116. The requisite elements of a detinue action in Virginia are as follows: (1) plaintiff must have a property interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property is capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time prior to the institution of the act.

Id. at 427.

117. *See supra* notes 18-22 and accompanying text.

118. *See, e.g.,* *Bady v. Detwiler*, 127 Cal. App. 2d 325, 273 P.2d 941 (1954); *Ponsonby v. Sacramento Suburban Fruit Lands Co.*, 210 Cal. 229, 291 P. 167 (1930) (the meaning of the term must be determined by ascertaining the sense in which it was used).

119. *See, e.g.,* *Adrian v. Guyette*, 14 Cal. App. 2d 493, 58 P.2d 988 (1936).

120. *See, e.g.,* *McKeon v. Bisbee*, 9 Cal. 137 (1858); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935) (in its strict legal sense, property represents the indefinite right of use, control, and disposition that one may lawfully exercise over particular things or objects).

121. CAL. CIV. CODE § 654 (Deering 1990); *Bady v. Detwiler*, 127 Cal. App. 2d 321, 273 P.2d 941 (1954). *See, e.g.,* *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788 (1935) (property is frequently used to signify or describe the subject of property, such as chattel or a tract of land).

tangibles, as well as physical things.¹²²

But the meaning given to the word depends on the context in which it is used and the nature of things it is intended to include.¹²³ Hence, the definition of "property" may be restricted by the particular statute or writing in which it is used.¹²⁴ Accordingly, without qualification, frozen embryos could conceivably fall within the broad definition of "property."

Assuming that embryos could be considered property and that the existing property laws could apply to frozen embryos, the next issue is what type of property are embryos. The California Civil Code has divided property into two categories: real or immovable property; and personal or movable property.¹²⁵ Real property consists of land, anything affixed, incidental, or appurtenant to land, and anything immovable by law.¹²⁶ Personal property encompasses any kind of property that does not fall within the statutory definition of real property.¹²⁷ Frozen em-

122. See, e.g., *United States v. Graham*, 96 F. Supp. 318 (S. D. Cal. 1951), *aff'd*, 195 F.2d 530 (9th Cir. 1952), *cert. denied*, 344 U.S. 831 (1952).

123. See, e.g., *Bogan v. Wiley*, 90 Cal. App. 2d 288, 202 P.2d 824 (1949); *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945); *Los Angeles Pacific Co. v. Hubbard*, 17 Cal. App. 646, 121 P. 306 (1911).

124. See, e.g., *Bogan v. Wiley*, 90 Cal. App. 2d 288, 202 P.2d 824 (1949) (a chose in action was not included within the meaning of the property of the decedent as used in the probate code); *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945) (The word property as used in the code sections relating to community property do not encompass every property right acquired by either husband or wife during the marriage, other than by gift, bequest, devise or descent. The right to practice medicine and similar professions, for instance, is a property right but is not one which could be classed as community property.); *City of Los Angeles v. Los Angeles Independent Gas Co.*, 152 Cal. 765, 93 P. 1006 (1908) (a license tax on an occupation or business is not a tax on property although by constitutional or statutory definition franchises are included in the meaning of property); *People v. Coleman*, 4 Cal. 46 (1854) (overruled on another point by *People v. McCreery*, 34 Cal. 432 (1868)) ("property," as used by the constitution in connection with equal and uniform taxation of all property, does not include a profession or occupation).

125. CAL. CIV. CODE § 657 (Deering 1990).

126. CAL. CIV. CODE § 658 (Deering 1990). Furthermore, CAL. CIV. CODE § 14 (Deering 1990) states that "[t]he words 'real property' are coextensive with lands, tenements, and hereditaments."

127. CAL. CIV. CODE § 663 (Deering 1990). In the ordinary and popular sense, personal property includes only goods and chattels. See, e.g., *Estate of Dodge*, 6 Cal. 3d 311, 9491 P.2d 385, 98 Cal. Rptr. 801 (1971); *Marin Estate*, 69 Cal. App. 2d 147, 158 P.2d 412 (1945). However, property is not always tangible. CAL. CIV. CODE § 655 (Deering 1990). See also *John M. C. Marble Co. v. Merchants' Nat. Bank*, 15 Cal. App. 347, 115 P. 59 (1911) (an interest in a contract is personal property). Personal property also includes inanimate things such as evidences of debt and things in action. CAL. CIV. CODE § 14

bryos do not constitute land or anything that is affixed, incidental, or appurtenant to land. Accordingly, if frozen embryos were to be considered "property," then they could possibly be classified as personal, movable property.

The California Civil Code enumerates five modes by which property may be acquired.¹²⁸ The five modes are occupancy,¹²⁹ accession,¹³⁰ transfer,¹³¹ will, and succession. Accession to personal property occurs when things belonging to different owners have been joined to create a single thing that cannot be separated without injury.¹³² The sperm and the egg belong to different owners. Hence, the modes of acquiring property further support the argument that frozen embryos, the result of the union of egg and sperm, should be treated as personal property.

B. PROPERTY RIGHTS UNDER EXISTING PROPERTY LAWS

The California Civil Code defines ownership as the right to possess and use a thing to the exclusion of others.¹³³ The ownership of property may be either absolute or qualified.¹³⁴ It is absolute when only one person has dominion over the property and may use it or dispose of it in any manner not contrary to law.¹³⁵ It is qualified when the property is shared by more than one person, when the time of enjoyment is deferred or limited, or

(Deering 1990).

128. CAL. CIV. CODE § 1000 (Deering 1990). Property may be acquired in two ways: (1) by operation of law, that is, by descent, which is title whereby on death of an ancestor, one acquires the estate by right of representation as the heir at law; and (2) by purchase, which includes all other modes of acquisition. *See Larrabee v. Tracy*, 39 Cal. App. 2d 593, 104 P.2d 61 (1940).

129. CAL. CIV. CODE § 1006 (Deering 1990). Occupancy as used in this section means actual possession as distinguished from constructive possession. *See Hart v. Allersons*, 26 Cal. App. 664, 148 P. 236 (1915). *See also Hanson v. Stinehoff*, 139 Cal. 169, 72 P. 913 (1914) (acts of possession).

130. CAL. CIV. CODE §§ 1013, 1025 (Deering 1990).

131. "Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another." CAL. CIV. CODE § 1039 (Deering 1990).

132. CAL. CIV. CODE § 1025 (Deering 1990).

133. CAL. CIV. CODE § 654 (Deering 1990). *See, e.g., Lane v. Whitaker*, 50 Cal. App. 2d 327, 123 P.2d 53 (1942).

134. CAL. CIV. CODE § 678 (Deering 1990).

135. CAL. CIV. CODE § 679 (Deering 1990). *See, e.g., Directors of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355, 39 P. 794 (1895) ("owner" in its general and unrestricted meaning, when used alone, means one who has full proprietorship in and dominion over property and imports an absolute owner).

when its use is restricted.¹³⁶ Accordingly, ownership in a frozen embryo would be qualified since dominion over the embryo would arguably be shared by both the sperm provider and the egg provider.

Ownership of property entitles the owner to certain incidents of ownership. Owners have absolute dominion over their property¹³⁷ and may do as they choose with it.¹³⁸ Thus, it is reasonable to assume that the egg and sperm providers have decision-making authority and that they are free to transfer their control to others. Arguably, then, the egg and sperm providers could do whatever they want with the frozen embryo. As owners, it would seem that they could implant the embryo, give the embryo away, dispose of the embryo, and possibly even sell the embryo. The embryo might also be left frozen indefinitely.

Although the egg and sperm providers are arguably the "owners" of the embryo as against others seeking to exercise control, the question remains as to whether there would be limits on their ownership. Proprietary rights are generally limited to reasonable uses.¹³⁹ Yet, the state may regulate the acquisition, enjoyment, and disposition of property.¹⁴⁰ However, in the ab-

136. CAL. CIV. CODE § 680 (Deering 1990).

137. *See, e.g., Inyo Consol. Water Co. v. Jess*, 161 Cal. 516, 119 P. 934 (1911).

138. *See, e.g., Bree v. Wheeler*, 129 Cal. 145, 61 P. 782 (1900).

Ownership of property carries with it the right to its use, the right to exclude others from enjoying it, and the right to its products and accessions. *See, e.g., Blaustein v. Burton*, 9 Cal. App. 3d 161, 88 Cal. Rptr. 319 (1970); *Story v. Gateway Chevrolet Co.*, 237 Cal. App. 2d 705, 47 Cal. Rptr. 267 (1965); *Winchester v. Winchester*, 175 Cal. 391, 165 P. 965 (1917)(ordinarily, the owner of property is entitled to the income therefrom).

Additionally, one may dispose of one's property in any manner not contrary to law. CAL. CIVIL CODE § 679 (Deering's 1990). *See, e.g., Dana v. Stanford*, 10 Cal. 269 (1858); *Abelein v. Pepper*, 8 Cal. 2d 25, 63 P.2d 817 (1936); *Bias v. Ohio Farmers Indem. Co.*, 28 Cal App. 2d 14, 81 P.2d 1057 (1938).

Furthermore, one who has the absolute ownership of property is entitled to possession, unless the right has been transferred. *See, e.g., Lantz v. Cole*, 172 Cal. 245, 156 P. 45 (1916); *Brown v. Murphy*, 36 Cal. App. 2d 171, 97 P.2d 281 (1939)(a person who has title and present right of possession may take peaceable possession of what one claims to be one's own).

Finally, ownership of a thing entitles the owner to the use of a reasonable amount of force for its protection. *See, e.g., Fawkes v. Reynolds*, 190 Cal. 204, 211 P. 449 (1922).

139. *See, e.g., Rupp v. Hiveley*, 94 Cal. App. 667, 271 P. 768 (1928) (no one has the right to interfere with or control the right of the owner of property to use his property as he or she sees fit, so long as such use in no way impinges on the property or personal rights of another).

140. *See, e.g., Security Sav. Bank v. California*, 263 U.S. 282 (1923).

sence of state regulation and as long as the use is reasonable, the egg and sperm providers would have unlimited rights of ownership in the frozen embryo.

However, if they were to transfer those rights, perhaps to another infertile couple or to a clinic, then they would no longer be the owners and their rights of ownership would cease. Also, policies concerning the options of transfer, donation, embryo research, storage, and discard can be made by the individual physicians, programs, and institutions offering IVF services, thus limiting the options actually available to the egg and sperm providers.¹⁴¹

Finally, possession may exist entirely apart from ownership, and one may own a thing not in the owner's possession.¹⁴² One in possession of property, however, has rights superior to those who have no better title.¹⁴³ Thus, if the egg and sperm providers grant possessory rights to a clinic, the clinic generally could not have rights superior to those of the egg and sperm providers. The clinic could have limited rights of possession.

C. DISSOLUTION OF MARRIAGE

Still assuming that embryos are property, the analysis in a divorce situation would involve determining each spouse's right, if any, to this particular type of property. In a marriage dissolution proceeding, there are two steps in the process of division of property: determining the property subject to division and making the division itself.¹⁴⁴ The property subject to division is referred to as marital property or the marital estate. Therefore, embryos would have to be characterized as marital property and capable of distribution, in order to qualify as property in a divorce.

141. See *New Reproduction*, *supra* note 2, text accompanying notes 329-38.

142. See, e.g., *People v. McKinney*, 9 Cal. App. 2d 523, 50 P.2d 827 (1935).

143. See, e.g., *King v. Gotz*, 70 Cal. 236, 11 P. 656 (1886); *Kimball v. Lohmas*, 31 Cal. 154 (1866).

144. McKnight, *Defining Property Subject to Division at Divorce*, 23 FAM. L. Q. 193 (1989).

1. *Characterization as marital property*

The property that constitutes the marital estate of spouses upon divorce may vary significantly from state to state depending on how the law of a particular state defines the marital estate.¹⁴⁵ California is one of several community property states.¹⁴⁶ The property to be included in the marital estate of community property states is the community property and the "quasi-community property"¹⁴⁷ of the parties.¹⁴⁸ Property excluded from the marital estate is called separate property.¹⁴⁹ In California,

145. *Id.* at 194.

146. The other community property states are Arizona, Idaho, Louisiana, New Mexico and Texas. Washington is a community property state, but by statute Washington allows all property to be considered in a division upon divorce. Nevada is a community property state, but Nevada allows a portion of one spouse's separate property to be set aside for the other spouse's support. Thus, Nevada is a hybrid state. Wisconsin is a community property state, but Wisconsin applies only to ownership during marriage and distribution upon the death of a spouse, not dissolution of marriage. Thus, Wisconsin is a hybrid state.

147. CAL. CIV. CODE § 4803 (Deering 1984) provides:

"Quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition. (b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

148. CAL. CIV. CODE § 4800 (Deering Supp. 1990).

149. *See, e.g.,* McCall v. McCall, 2 Cal. App. 2d 92, 37 P.2d 496 (1934). The term "separate property" means an estate held, both in its use and in its title, for the exclusive benefit either of the husband or the wife. *See, e.g.,* Kraemer v. Kraemer, 52 Cal. 302 (1877); George v. Ransom, 15 Cal. 322 (1860). As used here, that term is applicable only during the existence of the marriage relation. *See, e.g.,* *In re* Spencer, 82 Cal. 110, 23 P. 37 (1889), later proceeding 83 Cal. 460, 23 P. 395 (1890).

The separate property of the husband or the wife includes: (1) property owned by either before marriage; (2) property acquired by either during marriage by gift or by bequest, devise, or descent; (3) the rents, issues, and profits of separate property; (4) the natural increase of separate property; (5) property purchased with the proceeds of separate property; (6) the earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse; (7) the earnings or accumulations of either the husband or wife after the rendition of a judgment decreeing their legal separation; and (8) all money or other property paid by or on behalf of a married person to his spouse in satisfaction of a judgment for damages for personal injuries to the spouse or pursuant to an agreement for the settlement or compromise of a claim for such damages. *See* CAL. CIV. CODE §§ 5107, 5108,

the property rights of the husband and the wife are governed by relevant provisions of the California Civil Code, unless there is a marriage settlement agreement containing stipulations to the contrary.¹⁵⁰

In California, community property is defined as "property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."¹⁵¹ However, the term "property," as used in the code sections regarding community property, does not include all property rights acquired by either husband or wife during marriage, other than that acquired as separate property.¹⁵² Community property must have certain qualities such as being susceptible of ownership in common or transfer and survival.¹⁵³ Under existing law, frozen embryos could arguably constitute community property if acquired during the marriage and if susceptible of ownership in common or transfer and survival.

As a general rule, the character of property as separate or community is determined at the time it is acquired.¹⁵⁴ This character continues until it is changed in some manner recognized by law, such as by agreement.¹⁵⁵ It would follow that arguably the characterization of frozen embryos could be determined by

5110, 5110.150, 5118, 5119, 5126 (Deering 1984 & Supp. 1991).

150. CAL. CIV. CODE § 5200 (Deering Supp. 1991).

151. CAL. CIV. CODE § 687 (Deering 1990). CAL. CIV. CODE § 5110 (Deering Supp. 1990) generally provides that except for property owned by either a husband or a wife before marriage and property acquired by either during marriage by gift or by bequest, devise, or descent, together with the rents, issues, and profits thereof, and except for personal injury damages paid by a married person to his spouse, all real property situated in this state and all personal property wherever situated acquired during marriage by a married person while domiciled in this state, is community property including that held in trust pursuant to statute.

152. See, e.g., *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945).

153. See, e.g., *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (the value of a law practice at the time of dissolution of the community is community property); *In re Marriage of Fortier*, 34 Cal. App. 3d 384, 109 Cal. Rptr. 915 (1973) (the goodwill of a husband's medical practice is community property); *Franklin v. Franklin*, 67 Cal. App. 2d 717, 155 P.2d 637 (1945) (the right to practice medicine and similar professions is a property right, but it is not one which could be classed as community property).

154. See, e.g., *In re Marriage of Jafeman*, 29 Cal. App. 3d 244, 105 Cal. Rptr. 483 (1972); See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966); *Calloway v. Downie*, 195 Cal. App. 2d 348, 15 Cal. Rptr. 747 (1961).

155. See, e.g., *Belmont v. Belmont*, 188 Cal. App. 2d 33, 10 Cal. Rptr. 227 (1961); *Calloway v. Downie*, 195 Cal. App. 2d 348, 15 Cal. Rptr. 747 (1961).

agreement between the husband and the wife.

2. *Division of marital property*

Assuming that frozen embryos could constitute community property, the existing laws regarding division of marital property would then apply. The property to be divided in proceedings for dissolution of marriage consists of the community and quasi-community property of the parties.¹⁵⁶ California law provides that such a property division must occur except the division based upon the parties' written agreement or upon their oral stipulation.¹⁵⁷ Should frozen embryos be characterized as community property, existing laws suggest that they would be divided upon divorce, unless the husband and wife stipulate or agree otherwise.

In community property states, community property must be divided "equally" between divorcing spouses.¹⁵⁸ Where justified by economic circumstances, the court may award an asset to one party along with any conditions necessary to bring about a substantially equal division of the property.¹⁵⁹ However, the ideal division of property is a mathematically equal division.¹⁶⁰ It would seem to follow that the frozen embryos would be divided equally between the husband and wife.

However, a court may consider the property as one asset consisting of separate parts, and award all of the parts of the property to one party.¹⁶¹ Furthermore, a court can award the community property in kind to one party provided that party compensates the other party for the other's share of the community property.¹⁶² Thus, existing law suggests that if there is only

156. CAL. CIV. CODE § 4800 (Deering Supp. 1990).

157. CAL. CIV. CODE § 4800(a) (Deering Supp. 1991).

158. *Id.* In contrast, equitable distribution requires the apportionment of the marital assets or estate between divorcing parties in an equitable and just manner. The distribution of property need not be an equal division of the marital assets. This is the law in at least forty states. *Rostel v. Rostel*, 622 P.2d 429 (Alaska 1981).

159. CAL. CIV. CODE § 4800(b)(1) (Deering Supp. 1991).

160. *See, e.g., In re Marriage of Juick*, 21 Cal. App. 3d 421, 98 Cal. Rptr. 324 (1971); *Green v. Green*, 27 Cal. App. 2d 99, 80 P.2d 513 (1938); *Thomsen v. Thomsen*, 31 Cal. App. 185, 159 P. 1054 (1916).

161. *See, e.g., Thomsen v. Thomsen*, 31 Cal. App. 185, 159 P. 1054 (1916).

162. *See, e.g., Lipka v. Lipka*, 60 Cal. 2d 472, 386 P.2d 671, 35 Cal. Rptr. 71 (1963)

one frozen embryo or an extra frozen embryo because the total is an odd number, then the court might decide to award the frozen embryo to one party while compensating the other party monetarily for that party's share of the frozen embryo.

Once a party has been awarded a frozen embryo, that party would be the owner of the property and all the existing property laws, including the incidents of ownership, would then apply. Thus, the other party would no longer have duties, rights, or obligations to that particular property. The owner would have the absolute right of use, enjoyment, and disposition of the frozen embryo.

IV. CONCLUSION

Given the likelihood of legal controversy arising from the increased use of IVF and embryo freezing procedures, the need for legislation at the state level concerning the legal status of the frozen embryo has become essential. Clarification of the legal status of the embryo is particularly significant, especially to the divorcing couple in a marriage dissolution proceeding. The embryo must either be classified as human life and, therefore, be subject to a custody suit, or as property whereupon ownership will be determined in a property settlement.

Such a determination involves a policy choice between the actual living person and the potential life. If a woman is treated as property and the embryo as life, then the woman's interests will be sacrificed for those of the potential life. However, by treating the embryo as property and the woman as life, the interests of the actual living person would be promoted. Support for this position is reflected in the scientific and legal domains. Biologically, the embryo is not considered a human life, and current case law would deem the embryo to be, at most, potential

(where the award to the respective parties of varying items of community property creates an imbalance in equitable division, the use of monetary award from the person receiving the greater value to the person receiving the smaller value is an acceptable and practicable method of adjusting the inequalities in the property values); *Pope v. Pope*, 102 Cal. App. 2d 353, 227 P.2d 867 (1951) (a finding that separate and community properties have been commingled and consist of money in the bank, real property, trust funds, stocks, bonds, and other securities and other personal property, the community interest in which exceeds a certain value, is sufficiently definitive to support a money award in lieu of an award of specific community property).

and not actual life.

Treatment of the embryo as human life brings into play the fundamental principle of the “in the best interest of the child” doctrine. This could lead to complications since the embryo could conceivably be entitled to more legal protection than is accorded a fetus under *Roe* and *Webster*. Furthermore, the decisions of one party can impose heavy obligations on the other party. Indeed, such obligations placed upon the egg and sperm donors may require that the egg and sperm donors sacrifice their own rights for those of the embryo. The alternate possibility, treating the embryo as property, seems to eliminate many of the problems that are inherent if the embryo is viewed as life.

As mentioned before, there is an urgent need for state legislation as to the legal status to be accorded to the embryo. For all the reasons discussed in this article, that status should be one of property rather than human life.