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HIS, HERS OR OURS? – WHO HAS THE RIGHT TO DETERMINE THE DISPOSITION OF FROZEN EMBRYOS AFTER SEPARATION OR DIVORCE?

BY APRIL J. WALKER*

I. INTRODUCTION

The issue of ownership of embryos after divorce was recently raised again during the Texas divorce trial in the case *Roman v. Roman* when Mr. and Mrs. Roman's mediated settlement agreement failed to cover the couple's embryos.¹ Although there have been a few cases in varying state jurisdictions across the United States dealing with the general issue of the disposition of frozen embryos at the time of divorce or separation of a couple, all of these cases have varying facts; and as such, do not provide a bright line basis to assist the decision in *Roman* as it proceeds to the Texas Supreme Court. Certainly, when a couple is in love and experiencing hopes of becoming new parents together, they are not thinking of written agreements and the disposition of frozen embryos when the couple splits and go their own separate ways. The *Roman* case has, once again, brought attention to the issue of whose right is greater – an individual's right not to be a parent, an individual's right to be a parent or an embryo's right to life. If the individual who no longer desires to become a parent has a greater right, does this right outweigh the right of the individual who desires to become a parent when that individual has no other options? If the individual who no longer desires to become a parent has a greater right, does this right outweigh the right of the embryo to have a chance at life? From a viability standpoint, the answer to this question may change due to recent changes in the

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¹ *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. App. 2006).

composition of the Supreme Court; and may impact the issue of whether the Roman embryos may be destroyed.²

As such, in this Article the Author will address these issues and conduct a comparative analysis of how various international states establish ownership of embryos after separation and divorce of the parties.

II. EMBRYOS AND THE IN VITRO FERTILIZATION PROCESS

Many couples, married and unmarried, suffer the problem of an inability to conceive a child. These problems stem from various sources such as problems with a woman's fallopian tubes contributing to an inability to fertilize or an inability to allow fertilized ova to travel to the uterus; problems with the uterus contributing to an inability to carry the embryo throughout the entire gestational period; endometriosis, cervical problems; infertility and low sperm count.³ Although the success rate is low,⁴ couples avoid these problems by using the process of in vitro fertilization ("IVF"), which bypasses the natural place of fertilization – the fallopian tube.⁵ Louise Brown, the first child successfully conceived through IVF was born in the United Kingdom in 1978.⁶ The first IVF center opened in the United States in 1981.⁷ Since that time, it is estimated that approximately 80,000 women are artificially inseminated each year.⁸

² See Jayne A. Major, Ph.D., *Parents Who Have Successfully Fought Parental Alienation Syndrome*, <http://www.breakthroughparenting.com/PAS.htm> (last visited Jan. 14, 2006).

³ BARRY R. FURROW, ET AL., *BIOETHICS: HEALTHCARE LAW AND ETHICS* (4th ed. 2001).

⁴ LAWRENCE J. KAPLAN & ROSEMARIE TONG, *CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE* 265 (1996) (noting that the IVF process has a successful birth rate of approximately 20 percent).

⁵ JOHN A. ROBERTSON, *CHILDREN OF CHOICE* 97-98 (1994).

⁶ SIR ZELMAN COWEN, *REFLECTIONS ON MEDICINE, BIOTECHNOLOGY AND THE LAW* 32, 34 (1986).

⁷ Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 *CASE W. RES.* 543, 546 (1991).

⁸ MARTIN GUGGENHEIM, ET AL., *THE RIGHT OF FAMILIES* 304 (1996).

During the IVF process, ova or oocytes are removed from the follicles of a woman's ovaries and fertilized in a laboratory using the husband's or donor's sperm. After the ova or oocytes are fertilized with the sperm, they are transformed into embryos. Then the embryos may be transferred to the uterus of the potential mother and a viable pregnancy may occur.⁹ The IVF procedure frequently produces more embryos than may be safely transferred to a woman's uterus at one time.

As such, an enhanced method of IVF was developed allowing the extra embryos to be frozen for future use.¹⁰ This process is called cryopreservation.¹¹ Because of the invasive, physically difficult¹² and costly nature of the process of removal of the eggs, cryopreservation is preferred because it allows doctors to remove a larger amount of eggs at one time than are realistically contemplated in an effort to reduce the need to repeat the process again in the future.¹³ The first child born from this enhanced cryopreservation IVF process was Zoe, born in Australia in 1984.¹⁴

Because the modern divorce rates are high, sometimes couples divorce before the embryos can be implanted.¹⁵ Even if the

⁹ See Panitch, *supra* note 7, at 547

¹⁰ *Id.*

¹¹ *Id.*

¹² See Georgia Reproductive Specialists, *Risks of Therapy*, available at <http://www.ivf.com/overview.html>. (noting that the IVF process may cause women to suffer allergic reactions, hyperstimulation of the ovaries, bruising, swelling tenderness or infections of the injection site, temporary cessation of kidney function arterial and venous thrombosis, excessive fluid retention, stroke, embolism, ovary eruption, reactions from anesthesia, bleeding, internal scarring and death.)

¹³ National Legal Research Group, Inc., *Recent Case Law on Division of Frozen Embryos in Divorce Proceedings* available at <http://www.divorcesource.com/research/dl/children/03mar54.shtml> (last visited July 28, 2007). See also, Gwen Mayes, J.D., "Wait a Minute, I've Changed My Mind" – Finding the Right Time to Determine the Disposition of Frozen Embryos, *Medscape from WebMD: Ob/Gyn & Women's Health* (July 25, 2005), available at http://www.medscape.com/viewarticle/50855_print (last visited July 28, 2007).

¹⁴ *First Baby Born of Frozen Embryo*, N.Y. TIMES, Apr. 11, 1984 at A16.

¹⁵ See e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn.); *Kass v. Kass*, 91 N.Y.2d 554, 673 N.Y.S.2d 350 (1998); *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000); and *Cahill v. Cahill*, 757 So.2d 465 (Ala. Civ. App. 2000).

parties agreed on the disposition of their frozen embryos at the time they began the IVF process, those intentions often change during the separation or divorce process.¹⁶ As such, the parties face very complex legal, ethical and moral decisions.¹⁷ Many of these decisions were exponentially more complex because the parties failed to put their future intentions in writing. However, in recent years, cryopreservation facilities often require the parties to sign agreements setting forth the disposition of the embryos if the parties decide they are no longer willing to go through with the process or in the event of death or divorce.¹⁸ The problem occurs when the parties' agreement is not recognized, i.e., due to public policy concerns, in community property states where the embryos are considered community property or when the parties have no agreement at all.¹⁹ Courts have ultimately resolved these problems by determining who has a greater right to be protected – the party who desires to become a parent; the parent who does not wish to parent or the embryo/potential child.

III. HOW INTERNATIONAL STATES ESTABLISH OWNERSHIP IN FROZEN EMBRYOS

Not many states in the United States have enacted statutes providing the applicable law to use to determine the ownership and/or disposition of frozen embryos.²⁰ However, IVF is regulated

¹⁶ See Mayes, *supra* note 13.

¹⁷ *Id.*

¹⁸ Marysol Rosado, *Sign on the Dotted Line: Enforceability of Signed Agreements, upon Divorce of the Married Couple, Concerning the Disposition of Their Frozen Embryos*, 36 NEW ENG. L. REV. 1041, 1050, 1052, 1055 (2002) (pointing out that IVF clinics are now requiring couples to sign agreements that outline the couples' wishes regarding disposition of the preembryos in the event of separation, divorce or death).

¹⁹ See *A.Z. v. B.Z.*, 725 N.E.2d at 1057-1058; and *Davis v. Davis*, 842 S.W.2d at 604.

²⁰ Only three states have enacted statutes that deal with the disposition of frozen embryos. (1) The Florida legislature enacted FLA. STAT. ANN. § 742.17 (West 1997) that mandates couples to execute written agreements to set forth the disposition of frozen embryos in the event of death, separation or divorce. These agreements must be executed prior to going through the IVF process. If the couple fails to execute a written agreement, each party is awarded joint

by legislation in Austria, Azerbaijan, Bulgaria, Croatia, Denmark, Estonia, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, the Netherlands, Norway, the Russian Federation, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom.²¹ Storage of embryos is allowed in all of these international states except Germany and Switzerland.²² In Germany and Switzerland, no more than three embryos may be created in one cycle and must be implanted together immediately.²³ In Italy, freezing embryos is permitted, however, only in exceptional cases.²⁴ In most of these countries there is primary legislation mandating that either party may freely withdraw his or her consent at any stage of the process up to the moment that the embryos are implanted.²⁵ In Hungary however, if there is no specific agreement to the contrary, the woman is entitled to proceed with implantation even in the event of death of her partner or divorce.²⁶ In Austria and Estonia the man may withdraw his consent only up to the point of fertilization, after which, the woman alone decides if and when implantation will occur.²⁷ In Spain, the man's right to withdraw his consent is recognized only if he is married to and living with the woman.²⁸ In Germany and Italy, neither party may withdraw consent after the eggs have been fertilized.²⁹ In Iceland, in the event of separation or divorce, the embryos must be destroyed.³⁰

authority regarding the disposition of the frozen embryos. (2) LA. REV. STAT. ANN. §§ 9.122-23, 9.126, 9.133 (West 1991) states that an embryo is categorized as a juridical person that may only be implanted. As such, the parties' agreement may only provide for implantation and no other disposition is allowed. (3) N. H. Rev. Stat. Ann. §§ 168-B-13 - 15 and 168-B-18 (2001) requires couples to receive counseling and only allows the embryos to be stored outside of the body for 14 days.

²¹ *Evans v. United Kingdom*, 22 BHRC 190, ¶ 39 (Eur. Ct. H.R. 2007).

²² *Id.* at ¶ 40.

²³ *Id.* at ¶ 41.

²⁴ *Id.* at ¶ 42.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

More specifically, in 1990, the U.K. enacted the Human Fertilisation and Embryology Act ("HFEA").³¹ Under the HFEA, the donors must consent in writing to the disposition of frozen embryos.³² If one party does not consent to implantation, the embryos will be destroyed after the statutory 5-year minimum storage period without the consent of either party.³³ A similar statute, the Human Reproductive Technology Act, has been enacted in Western Australia.³⁴ The Ontario legislature has also enacted similar legislation, which requires the donors to agree in advance about the future disposition of the embryos in the event of a dispute or death.³⁵

Because of the lack of legislation in the United States governing the disposition of frozen embryos, courts have been left with the job of deciding for the parties.³⁶ These decisions ultimately boil down to balancing "the right to procreate and the right not to procreate."³⁷ These two rights conflict one with the other. In many instances, courts reveal that the questions presented by these cases are questions of first impression.³⁸

³¹ Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.), ("HEFA").

³² *Id.*

³³ *Id.*

³⁴ See HUMAN REPRODUCTIVE TECHNOLOGY ACT, 1991, §§ 22(4) AND 26(1)(A)(I) (W. Austl.).

³⁵ See B. Dickens, *Canada: The Ontario Law Reform Commission's Project on Human Artificial Reproduction*, in LAW REFORM AND HUMAN REPRODUCTION 47, 69 recommendation 27 (Shelia A. M. McLean ed., 1992); see also LAW REFORM COMM'N OF CANADA, MEDICALLY ASSISTED PROCREATION 167 recommendation 5(1) (1992).

³⁶ Evans, 22 BHRC 190 at ¶ 43.

³⁷ Joseph Russell Falasco, *Frozen Embryos and Gamete Provider's Rights: A Suggested Model for Embryo Disposition*, JURIMETRICS JOURNAL, Spring 2005, at 276.

³⁸ *A. Z. v. B. Z.*, 725 N.E.2d at 1055 (noting that there is a small amount of law dealing with the enforceability of agreements concerning the disposition of frozen embryos. At the time of the *A.Z. v. B.Z.* decision, only two state courts of last resort had dealt with the enforceability of agreements regarding the disposition of frozen embryos).

A. CASES FAVORING THE RIGHT NOT TO PROCREATE

Some scholars believe that the right not to procreate should receive a higher degree of protection than the right to procreate.³⁹ Support for this position has been provided by most of the courts that have handed down decisions regarding the disposition of frozen embryos.

1. UNITED STATES

a. **A.Z. v. B.Z. – Decided March 31, 2000** **Contract Favoring Right to Procreate Held Unenforceable**

The Massachusetts supremecourt dealt with the first impression issue of the effect of a consent form executed by A.Z. and B.Z. concerning the disposition of their frozen embryos.⁴⁰ Husband, A.Z. and wife, B.Z. were married in 1977.⁴¹ Both parties were in the military at the time of their marriage and resided in Virginia for the first two years.⁴² While in Virginia, the parties discovered that they would encounter difficulties conceiving a child.⁴³ The wife received fertility testing and did, in fact, become pregnant.⁴⁴ However, the pregnancy resulted in an ectopic eruption requiring the wife's fallopian tube to be surgically removed.⁴⁵ In 1980, the husband and wife moved to Maryland where they received additional fertility treatments.⁴⁶ In 1988, the wife's military unit transferred her to Massachusetts.⁴⁷ The husband remained in Maryland.⁴⁸ The wife began to receive Gamete Inter-

³⁹ Falasco, *supra* note 37, at 278 (noting that an individual who desires not to procreate incurs irredressible harm if implantation results in a birth.).

⁴⁰ A. Z. v. B. Z., 725 N.E.2d at 1052.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Fallopian Transfer (GIFT) treatments at a clinic in Massachusetts.⁴⁹ At this time, the husband traveled back and forth from Maryland to Massachusetts for these procedures.⁵⁰ In 1988, the wife again became pregnant and again suffered an ectopic eruption requiring surgical removal of her remaining fallopian tube.⁵¹ Between 1988 and 1991, the wife received IVF treatment.⁵² The clinic required patients (both the egg and sperm donors) to execute consent forms prior to receiving treatment.⁵³ Each time prior to removal of eggs from the wife, the clinic required the husband and wife to sign pre-printed consent forms concerning the future disposition of the frozen embryos if, among other contingencies, the parties "separated" or died.⁵⁴ Under the contingencies, the consent form provided the following options: donation or destruction.⁵⁵ A blank line was inserted beneath these two options permitting the donor to write in additional choices for the ultimate disposition of the embryos.⁵⁶ *Because the parties lived in different states, the husband always signed a blank consent form.*⁵⁷ The wife would then complete her portion of the form and fill in the information on the blank line regarding the future disposition of the frozen embryos.⁵⁸ *Regarding the disposition, the pre-printed form provided the option "should we become separated." The wife then crossed out the options for donation or destruction and indicated on the blank line that the embryos were to be returned to the wife for implantation.*⁵⁹ As a result of IVF treatment the wife received

⁴⁹ *Id.* The GIFT process requires eggs to be removed from the women, which are then transferred into the fallopian tube simultaneously with sperm. Fertilization occurs in the fallopian tube before the embryo is implanted in the uterus.

⁵⁰ *Id.* at 1053.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1053-54.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

in 1991, she conceived.⁶⁰ In 1991, the husband moved to Massachusetts and in 1992, the wife gave birth to twin daughters.⁶¹

The 1991 IVF treatment produced more embryos than were necessary for implantation.⁶² As such, two vials of embryos were frozen to be used for possible future implantation. In the Spring of 1995, the wife expressed her desire to have more children.⁶³ Without informing her husband, the wife had one of the vials of embryos thawed and one of the embryos was implanted.⁶⁴ The husband was notified of the wife's actions when he received a notice from his health insurance company.⁶⁵ This caused strife in the relationship.⁶⁶ The wife received a protective order against the husband.⁶⁷ The husband and wife separated and the husband filed for divorce.⁶⁸ There was one vial containing four frozen embryos remaining at the clinic at the time of the divorce proceedings.⁶⁹ Of course, the court had to determine which party had the right to determine the future of the embryos.

The trial court determined that the consent agreement was unenforceable because the parties' circumstances changed during the four years after the husband and wife signed the 1991 consent agreement.⁷⁰ In this regard, the court noted that the parties gave birth to twin daughters, the wife obtained a protective order against the husband and the husband filed for divorce.⁷¹ In the absence of a "binding agreement," the trial judge determined that it was best to balance the wife's interest in procreation against the husband's interest in not being forced to procreate.⁷² The trial judge held that the husband's interest in not being forced to procreate outweighed

⁶⁰ *Id.* at 1053.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1054.

⁷¹ *Id.* at 1054-55.

⁷² *Id.* at 1055.

the wife's interest in having additional children and granted a permanent injunction forbidding the wife from using the embryos for implantation.⁷³

On appeal, the Massachusetts Supreme Court determined that the consent form should not be enforced for four reasons: (1) the primary purpose of the consent form was to inform the patients and to define the parties' relationship rather than to act as the husband and wife's binding agreement; (2) the consent form did not contain a duration of time during which the agreement was to be enforceable; (3) the consent form only directed the disposition of the embryos in the event of the "separation" of the husband and wife and made no disposition in the event of "divorce"; (4) the consent form was not a separation agreement that would be binding on the couple during the divorce proceedings because there were no provisions for custody, support or maintenance.⁷⁴ The Massachusetts supreme court went on to state that even if the husband and wife had entered into an unambiguous agreement, it still would not enforce it because, as a matter of public policy, the court could not compel an individual into procreation.⁷⁵

Prior to the *A.Z. v. B.Z.* case, two other cases in the United States with similar facts ended in upholding the right to avoid procreation. After *A.Z. v. B.Z.*, in *Roman v. Roman*, the trial court awarded frozen embryos to the wife.⁷⁶ The court of appeals reversed this decision.⁷⁷

b. Roman v. Roman – Decided February 9, 2006 – Texas Court of Appeals Enforcing Contract to Destroy Embryos after Divorce

Augusta and Randy Roman were married on July 5, 1997.⁷⁸ Augusta and Randy had trouble conceiving a child.⁷⁹ In August of

⁷³ *Id.*

⁷⁴ *Id.* at 1056-57.

⁷⁵ *Id.* at 1058.

⁷⁶ *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. App. 2006).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

2001, the Roman's met with a doctor at a reproductive medicine clinic.⁸⁰ The doctor recommended that the Roman's try IVF. On March 27, 2002, the Roman's signed many documents including a document entitled "Informed Consent for Cryopreservation of Embryos."⁸¹ This document authorized the clinic to freeze and store the embryos until the appropriate time arrived to implant the embryos.⁸² *In addition, this agreement set forth that the parties would discard the embryos in the event of divorce.*⁸³ The agreement also allowed either party to withdraw their consent to proceed with the process at any time.⁸⁴ On April 17, 2002, the doctor took thirteen eggs from Augusta's ovaries.⁸⁵ From this process, six embryos were formed.⁸⁶ Three of the six embryos reached a successful stage of development.⁸⁷ Augusta was scheduled for implantation on April 20, 2002.⁸⁸ However, the night before the scheduled implantation process, Randy notified Augusta that he wished to withdraw his consent to proceed with the April 20 implantation and the Roman's decided to wait.⁸⁹ One month later the parties signed an agreement to unfreeze and implant the three embryos.⁹⁰ The agreement required the Roman's to undergo counseling prior to implantation, however the Roman's never completed the required counseling and the implantation never took place.⁹¹

On December 10, 2002, Randy filed a divorce petition in the 310th Judicial District Court of Harris County, Texas in Houston.⁹² The Roman's entered into a mediated settlement agreement that disposed of their marital property, however, they

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 43.

⁹² *Id.*

failed to include the disposition of the frozen embryos.⁹³ It is not clear if the parties forgot to include the frozen embryos or if they believed the disposition of the frozen embryos was covered by the prior consent agreement.⁹⁴ During the divorce trial, Randy requested that the court enforce the prior consent agreement allowing the frozen embryos to be discarded.⁹⁵ Augusta, on the other hand, requested the court award the frozen embryos to her so that she could have an opportunity to have a biological child.⁹⁶ In this regard, Augusta asserted that she would release Randy from any parental rights or obligations.⁹⁷ The trial court awarded the frozen embryos to Augusta.⁹⁸ Trial court found that (1) the frozen embryos were created as a result of eggs from August and sperm from Randy; (2) the parties entered into a mediated settlement agreement that disposed of all of the parties' community property except the frozen embryos (3) the frozen embryos were community property (4) the court considered all evidence in balancing the constitutional rights of both parties.⁹⁹ The trial court concluded that it has jurisdiction to divide the parties' community property and awarding the frozen embryos to Augusta was a fair and equitable division of the parties' community property.¹⁰⁰

On appeal, the Texas Court of Appeals noted that this was a case of first impression that would be resolved by answering the issue as narrowly as possible anticipating future legislative involvement.¹⁰¹ The Court of Appeals noted that no other Texas courts have decided whether IVF clinic consent agreements are enforceable.¹⁰² Randy argued that other state courts have held such agreements valid and enforceable while Augusta argued that other state courts have held such agreements to be invalid.¹⁰³ After

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 44.

¹⁰² *Id.* at 45.

¹⁰³ *Id.* at 43.

reviewing the small amount of case law available in this country, the court determined that the majority view is that written embryo consent agreements are valid and enforceable as long as the parties have an opportunity to withdraw consent.¹⁰⁴ Then the court looked to Texas public policy and found that the Texas Uniform Parentage Act covers assisted reproduction agreements.¹⁰⁵ This statute provides that both the husband and the wife must consent to assisted reproduction, however, a child may be born without the husband's consent.¹⁰⁶ The statute further provides that if a marriage is dissolved before the embryos are implanted, the former spouse will not be deemed the parent of the child.¹⁰⁷ However, the statute is silent as to the determination of the disposition of the embryos in the event of divorce.¹⁰⁸ All-in-all, the court determined that Texas public policy would allow a husband and wife to voluntarily enter into an agreement prior to implantation of frozen embryos that would deal with the disposition of the embryos in the event of divorce or separation.¹⁰⁹ With that said, the court used regular contract law to determine the validity of the consent agreement entered into by Augusta and Randy Roman.¹¹⁰ The court determined that the agreement clearly provided that the embryos should be destroyed if the parties divorced prior to implantation.¹¹¹ Interestingly, Augusta testified that she understood the embryo agreement to apply to remaining embryos only after the implantation process.¹¹²

¹⁰⁴ *Id.* at 48.

¹⁰⁵ *See id.* at 48-49, citing TEX. FAM. CODE §§ 160.701—160.707 (Vernon 2002) and §§ 160.751 – 160.763.

¹⁰⁶ *Id.* at 48.

¹⁰⁷ *Id.* at 49.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 49 – 50.

¹¹⁰ *Id.* at 50.

¹¹¹ *Id.* 52.

¹¹² *Id.* at 52.

2. UNITED KINGDOM –

a. The Human Fertilisation and Embryology Act of 1990

In July of 1982, the government of the United Kingdom appointed a Committee of Inquiry to consider ethical, scientific, medical and legal issues surrounding the area of fertilization and embryology.¹¹³ The Chairman of the Committee was philosopher, Dame Mary Warnock, DBE.¹¹⁴ The Warnock Committee recognized that many problems could arise as a result of prolonged storage of embryos and recommended that couples should be allowed to store embryos for their own future use for a maximum of ten years and after that time, the right of use or disposal would pass to the storage clinic.¹¹⁵ The Warnock Committee further recommended that, in the event of marital or relationship breakdown when a couple fails to agree on the disposition of the frozen embryos, the right to determine the disposition of the frozen embryos would pass to the storage clinic.¹¹⁶ The Warnock Report recommended that embryos could only be harvested and stored after the clinic obtained written consent from the donors giving the donors the right to withdraw their consent prior to use.¹¹⁷ After further study of the Warnock Committee, “the Human Fertilisation and Embryology” Bill of 1989 was published and passed into law as the “Human Fertilisation and Embryology Act of 1990.”¹¹⁸ The Act allowed storage of frozen embryos for a period not to exceed five years.¹¹⁹ “This provision was amended by the Human Fertilisation and Embryology (Statutory Storage Period for Embryos) Regulations of 1996,” which was enacted on May 1, 1996 to extend the storage period until the woman reaches the age of 55 with the consent in writing of both donors.¹²⁰ Furthermore,

¹¹³ Evans, 22 BHRC 190 at ¶ 29.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at ¶ 30.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at ¶ 31.

¹¹⁸ *Id.* at ¶ 33.

¹¹⁹ *Id.* at ¶ 36.

¹²⁰ *Id.*

the Act required storage clinics to be licensed and licensing was conditioned on the clinic's use of the consent agreements.¹²¹ The consent must be given in writing and must specify the maximum period of storage.¹²² Prior to giving consent, the donor must be given an opportunity to receive suitable counseling and must be advised of the effect of variation or withdrawal of consent.¹²³

b. *Evans v. United Kingdom* – Enforcing Agreement Allowing Withdrawal of Consent

Approximately at or slightly before the year 1995, Natalie Evans was married and learned that she had difficulty conceiving a child.¹²⁴ At that time, she was referred to the Bath Assisted Conception Clinic in England.¹²⁵ However, because of the breakup of her marriage, Natalie did not pursue the clinic's services at that time.¹²⁶ On July 12, 2000, Natalie Evans and her boyfriend, Howard Johnson initiated at the Bath Assisted Conception Clinic in England.¹²⁷ On October 10, 2000, medical staff at the clinic informed Natalie that preliminary tests indicated that she had pre-cancerous tumors on both of her ovaries.¹²⁸ At the time of the visit, Natalie was advised that because the tumors were growing slowly, it would be possible for her to have some of her eggs extracted to be used for IVF.¹²⁹ Pursuant to the "Human Fertilisation and Embryology Act of 1990," the clinic was required to have patients sign consent forms prior to harvesting eggs for the IVF process.¹³⁰ With only moments to think, Natalie and Howard signed the consent forms, in which they agreed that either party could

¹²¹ *Id.* at ¶37.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at ¶ 13.

¹²⁵ *Id.* at ¶ 13.

¹²⁶ *Id.* at ¶ 13.

¹²⁷ *Id.* at ¶ 13; *see also, Woman Loses Frozen Embryo Battle*, CNN.com, March 7, 2006, <http://www.cnn.com/2006/LAW/03/07/embryos.ruling/index.html>, (Last visited May 21, 2007).

¹²⁸ *Evans*, 22 BHRC 190. at ¶ 14.

¹²⁹ *Id.*

¹³⁰ *Id.* at ¶ 15.

withdraw his or her consent at any time prior to implantation of the embryos.¹³¹ Natalie asked about freezing her unfertilized eggs (and in the event that Howard changed his mind, she could possibly have her eggs fertilized by another sperm donor); however, this procedure was not performed at the clinic.¹³² At this time, Howard reassured Natalie that she did not have to worry about freezing her eggs because they were not going to split up and he wanted to be the father of her child.¹³³ Both Natalie and Howard signed the consent forms.¹³⁴ On November 12, 2001, eleven eggs were harvested resulting in six embryos.¹³⁵ On November 26, 2001, Natalie underwent surgery to remove her ovaries. Natalie was advised that she should wait two years before attempting to implant the embryos.¹³⁶ In May of 2002, Natalie and Howard's relationship broke down and on July 4, 2002, Howard wrote to clinic and advised of his desire to withdraw consent to allowing the embryos to be implanted and requested that the embryos be destroyed.¹³⁷ The clinic notified Natalie that based on Howard's position, it had a legal obligation to destroy the embryos.¹³⁸

Natalie filed suit seeking an injunction requiring Howard to restore his consent and a declaration that Howard could not vary his consent pursuant to the October 10, 2001 consent agreement.¹³⁹ Natalie also sought a declaration that §§ 8, 12 and 14 of the Human Fertilisation and Embryology Act of 1990 breached her rights.¹⁴⁰ The trial judge held that public policy did not require Howard to "give an unequivocal consent" allowing Natalie to use the embryos even if they were no longer together because Howard "only ever consented to his treatment 'together'" with Natalie.¹⁴¹ The trial judge further held that "an embryo was not a person with rights

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at ¶ 16.

¹³⁵ *Id.* at ¶ 17.

¹³⁶ *Id.*

¹³⁷ *Id.* at ¶ 19.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at ¶ 21.

protected under the Convention, and Natalie's right to respect for family life was not engaged."¹⁴² Natalie appealed the trial judge's decision, however, the "Court of Appeal" agreed with the trial court and dismissed Natalie's appeal.¹⁴³ The Court of Appeal also denied Natalie's request for leave to appeal the trial judge's finding that the embryos did not have any independent rights.¹⁴⁴ Natalie again appealed to the Grand Chamber of the European Court of Human Rights.

The Grand Chamber reviewed the history of the Fertilisation and Embryology Act of 1990 and the laws of other international states including the United States. In this regard, the Grand Chamber noted that Article 5 of the Council of Europe Convention on Human Rights and Biomedicine states that "an intervention in the health field may only be carried out after the person concerned has given free and informed consent" and "the person concerned may freely withdraw consent at any time."¹⁴⁵ The Grand Chamber further noted that "Principle 4 of the principles adopted by the ad hoc committee of experts on progress in the biomedical sciences . . . stated 'the techniques of artificial procreation may be used only if the persons concerned have given their free, informed consent, explicitly and in writing, in accordance with national requirements.'"¹⁴⁶ Finally, the Grand Chamber noted that "Article 6 of the Universal Declaration of Bioethics and Human Rights provides that 'medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information . . . and the consent should be express and may be withdrawn by the person concerned at any time and for any reason with disadvantage or prejudice.'"¹⁴⁷ The Grand Chamber determined that issue was "whether there exists a positive obligation on the State to ensure that a woman who has embarked on treatment for the specific

¹⁴² *Id.* at ¶ 22.

¹⁴³ *Id.* at ¶ 24; *Evans v. Amicus Health Ltd.* [2004] EWCA Civ 727, 78 BMLR 181.

¹⁴⁴ *Id.* at ¶ 27.

¹⁴⁵ *Id.* at ¶ 50.

¹⁴⁶ *Id.* at ¶ 51.

¹⁴⁷ *Id.* at ¶ 52.

purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male" sperm donor.¹⁴⁸ The Grand Chamber held that a positive obligation does not exist because even though Natalie's circumstances were exceptional, they did not override a genetic parent's withdrawal of consent.¹⁴⁹

B. CASES FAVORING PUBLIC POLICY AGAINST DENYING AN INDIVIDUAL A RIGHT TO ACHIEVE GENETIC PARENTHOOD

The United States Supreme Court has held that a person has a right to procreate and to be free from governmental intrusion when making such decisions.¹⁵⁰ However, there are no current cases from courts of last resort in the United States between husband and wife dealing with the issue of the disposition of frozen embryos where a party's right to achieve genetic parenthood has been upheld. However, a court in Israel held that a woman's right to give birth to a biological child outweighs the sperm donor's right not to become a parent.¹⁵¹

1. ISRAEL – NAHMANI V. NAHMANI – ENFORCING AGREEMENT ALLOWING WITHDRAWAL OF CONSENT

Ruth and Daniel Nahmani married in March of 1984.¹⁵² Three years after their marriage, Ruth required a surgical procedure that resulted in her loss of the ability to experience a normal pregnancy.¹⁵³ The last eggs that Ruthie could ever produce were extracted.¹⁵⁴ Eleven eggs were fertilized with Danni Nahmani's sperm.¹⁵⁵ The embryos were frozen for future use.¹⁵⁶

¹⁴⁸ *Id.* at ¶ 58.

¹⁴⁹ *Id.* at ¶ 60.

¹⁵⁰ *See Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁵¹ *See* CA 5587/93, *Nahmani v. Nahmani* [1995] IsrLR I.

¹⁵² *Nahmani*, IsrLR I at 8.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Ruth Nahmani could not gestate or carry a fetus to term.¹⁵⁷ As such, Ruth would have to undergo IVF with the assistance of a surrogate mother. Mr. and Mrs. Nahmani sought the services of an IVF clinic in California, U.S.A.¹⁵⁸ The Nahmani's determined that they could not afford the cost of IVF in the United States so they decided to complete the IVF process in Israel and the surrogacy process in the United States.¹⁵⁹ According to Israel law at the time, a fertilized embryo could only be implanted in the woman who would be the mother of the child.¹⁶⁰ As such, the Nahmani's petitioned the Israel High Court of Justice, which resulted in a consent judgment on May 6, 1991 which would allow the IVF procedure to be done notwithstanding the fact that the embryo(s) would not be implanted in Ruth.¹⁶¹ The Nahmani's executed a surrogacy agreement with a clinic in the United States.¹⁶² The Nahmanis contemplated that an embryo transfer agreement would be signed in the future after the surrogate mother was found. However, Ruth and Daniel separated.¹⁶³ Thereafter, Danni lived with another woman, with which he had two children.¹⁶⁴ Ruth requested that the embryos be released to her so that she could arrange to have them implanted in a surrogate mother.¹⁶⁵ However, Daniel notified the IVF storage clinic in Israel and the surrogacy clinic in the United States that he refused to agree to have the embryos released to Ruth.¹⁶⁶ Ruth filed a lawsuit to obtain the embryos.¹⁶⁷

The trial judge held that Daniel breached his agreement with his wife reasoning that this situation was no different than situations when a husband's wife becomes pregnant from

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, citing Public Health (In-vitro Fertilization) Regulations, 5747-1987, rr.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 9.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

intercourse.¹⁶⁸ The judge held that because Daniel had already fertilized Ruth's eggs, he could not withdraw his agreement to have a child with Ruth.¹⁶⁹

A five-judge panel of the Supreme Court of Israel reversed the decision of the trial court holding that Daniel had a fundamental right not to be forced to be a parent and that the agreement was unenforceable because the originally-contemplated performance was now impossible.¹⁷⁰ The five-judge panel further held that until the embryos were implanted, both Daniel and Ruth's consent was required at every stage of the IVF process.¹⁷¹

An eleven-judge panel of the Supreme Court reheard the appeal and reversed the decision of the five-judge panel awarding the embryos to Ruth.¹⁷² The eleven-judge panel found that no statutes or precedents applied to this case.¹⁷³ The court looked to laws giving value to life rather than contract law.¹⁷⁴ The court was influenced by the fact that Ruth's only chance to become a biological mother was if the embryos were successfully implanted.¹⁷⁵ The court quoted the Bible, Genesis 30, 1 where Rachel said: "give me children or else I die."¹⁷⁶ The court opined:

Parenthood is a status that involves many rights and duties which can change the personal status of a person and significantly influence his life from psychological, emotional and economic viewpoints.¹⁷⁷

The court also noted that in most countries informed consent of both donors is required at every stage of the IVF process.¹⁷⁸ The court decided that the harm to Ruth outweighed the harm to Daniel.¹⁷⁹

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ H CJ 2401/95 Nahmani v. Nahmani [1995-6] Isr LR 1, 33.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 11.

¹⁷⁷ *Id.* at 12.

¹⁷⁸ *Id.* at 19.

¹⁷⁹ *Id.*

C. RIGHTS OF THE EMBRYO – ARE EMBRYOS PROPERTY OR PERSONS?

There are three major theories for classification of embryos: (1) the theory that an embryo is not a life – merely human tissue; (2) the theory that an embryo is a human life that should be given a chance to develop through implantation and (3) the majority theory, which favors the position that an embryo should be given greater respect than mere human tissue because it has the potential for life, however, its classification does not rise to the level of human life.¹⁸⁰

1. EMBRYO IS NOT A LIFE

In the case *Mme. P. c. La Grave Hospital*, a wife and husband's embryos were stored at La Grave Hospital.¹⁸¹ The agreement between the couple and La Grave Hospital included fertilization and implantation and had a specific provision that required the consent of both the husband and wife prior to implantation.¹⁸² Prior to implantation, the husband died and La Grave Hospital refused to implant the embryos without his consent.¹⁸³ The wife brought suit claiming that the agreement should be ignored asserting that the embryos were not mere property because life begins at the moment of conception, i.e. fertilization of the eggs.¹⁸⁴ The Court of Appeals at Toulouse held that French law does not provide frozen embryos with rights and ordered the embryos destroyed.¹⁸⁵

¹⁸⁰ Falasco, *supra* note 37, at 280.

¹⁸¹ CA Toulouse, Aug. 18, 1994, J.C.P. 1995, II, 224072, 301.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

2. EMBRYO IS A LIFE

Alison Miller and Todd Parrish stored embryos at a fertility clinic in Chicago, Illinois.¹⁸⁶ Alison and Todd alleged that fertility clinic destroyed their nine embryos without their consent.¹⁸⁷ Alison and Todd sued the fertility clinic alleging that the fertility clinic ended the lives of the nine embryos.¹⁸⁸ The fertility clinic moved to dismiss the suit.¹⁸⁹ In February of 2005, the Illinois trial judge denied the motion to dismiss the wrongful death suit explaining that a fetus qualifies as deceased person for the purposes of Illinois' Wrongful Death Act.¹⁹⁰ The judge stated further that "a preembryo is a 'human being' . . . whether or not it is implanted in its mother's womb."¹⁹¹ To support this holding the Illinois judge cited an Illinois law that specifically provides that "an unborn child is a human being from the time of conception and is, therefore, a legal person."¹⁹² Critics of this decision fear the implications this decision could have on the right to abortion.¹⁹³

In addition, the State of Louisiana recognizes the right of an embryo to develop. According to Louisiana statute, disputes regarding the disposition of embryos are decided based on the best interest of the embryos.¹⁹⁴ As such, it would follow that the rights to the embryos are awarded to the donor who will allow them to develop.

¹⁸⁶ Sherry Colb, *Judge Rules Frozen Embryos are People*, CNN.Com, Feb. 23, 2005, <http://www.cnn.com/2005/LAW/02/23/colb.embryos/Index.html>, (Last visited May 24, 2007).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See LA. REV. STAT. ANN. § 9:131 (1986).

3. EMBRYO DOES NOT RISE TO LEVEL OF HUMAN LIFE BUT HAS POTENTIAL FOR LIFE

One can draw an inference that the United States Supreme Court favors the majority theory due to its holdings allowing a woman to abort a fetus at any time up until the fetus becomes viable.¹⁹⁵ Due to modern technology, in recent times, the question of when viability occurs is becoming earlier and earlier in the pregnancy.¹⁹⁶ On October 24, 2006, Amillia Sonia Taylor was born 21 weeks and 6 days after conception.¹⁹⁷ This is a record in the field of neonatology.¹⁹⁸

Although courts in the United States have held that frozen embryos have the potential for life, frozen embryos have been classified as property and have even held that the owner of the embryos and storage facility have a bailor/bailee relationship.¹⁹⁹ Tennessee law specifically indicates that frozen embryos are not persons, however, the Tennessee supreme court has held that embryos are not property but have the characteristics of property.²⁰⁰ Under United States federal law, an embryo is not a person and at least one federal district court has held that frozen embryos are property.²⁰¹ It seems to be clear that the rights of the egg and sperm donors trump any rights that the embryo may have.²⁰²

¹⁹⁵ *Roe v. Wade*, 410 U.S. 113, 164 (1973)

¹⁹⁶ *See 21-Week Old Miracle Baby Survives at Baptist Hospital*, NBC6.net, Feb. 19, 2007, <http://www.nbc6.net/hea/11056409/detail.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See York v. Jones*, 717 F.Supp. 421, 424-25 (E.D. Va. 1989).

²⁰⁰ *See Davis v. Davis*, 842 S.W.2d 588, 594, 597 (Tenn. 1992).

²⁰¹ *See Roe v. Wade*, 410 U.S. at 162; *see also York v. Jones*, 717 F.Supp. at 425.

²⁰² JOHN A. ROBERTSON, *CHILDREN OF CHOICE* 97-98 (1994); *see also*, Donna M. Sheinbach, Comment, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV. 989 (1999).

VI. CONCLUSION: HOW DOES THE STATE OF THE LAW AMONG INTERNATIONAL STATES AFFECT THE LIKELY OUTCOME OF THE *ROMAN* CASE?

It is true that the cases in the United States tend to fall on the side of protecting an individual's right not to be forced to become a parent. However, the facts of the *Roman* case are distinguished from the other cases because Augusta Roman has never been able to achieve conception and she is aging.

In addition, the composition of the United States Supreme Court has changed and the determination of viability is occurring earlier and earlier with modern technology. One can draw an inference that the United States Supreme Court favors the majority theory due to its holdings allowing a woman to abort a fetus at any time up until the fetus becomes viable.²⁰³ In addition, as stated above, critics of the Illinois decision defining an embryo as human life fear the implications this decision could have on the right to abortion. The United States Supreme Court's decision in *Roe v. Wade* afforded a woman a right to an abortion in the first trimester of pregnancy when the abortion is performed by medically competent personnel.²⁰⁴ In other words, until viability occurs, the fetus is not a person and is not entitled to legal protection.²⁰⁵ Viability is defined as the point when a fetus can exist on its own.²⁰⁶ In the *Roe* decision, Justice Blackmun defined viability to be the critical point when the state is permitted to protect the fetal life.²⁰⁷ The point of viability is constantly occurring earlier with the assistance of technological developments. The idea of an artificial womb will make it possible for an embryo to survive in vitro from the point of its conception.²⁰⁸ Furthermore, the favored

²⁰³ *Roe v. Wade*, 410 U.S. at 113.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 164.

²⁰⁷ *Id.* at 113.

²⁰⁸ *Defining a New Ethical Standard for Human In Vitro Embryos in the Context of Stem Cell Research*, 2002 DUKE L. & TECH REV. 0026.

classification of embryos is that they have the potential for human.²⁰⁹

However, the Texas court of appeals in *Roman* felt that it would have to impute words into the Romans' contract that were not present.²¹⁰ The court found that the plain language of the agreement stated "if [the Romans] divorced or either [. . .] files for divorce while any of [their] frozen embryos are still in the program, [both] hereby authorize . . . the frozen embryo(s) shall be discarded."²¹¹ As such, the court held that the agreement was valid and enforceable and the trial court should have enforced the agreement rather than awarding the frozen embryos to Augusta.²¹² On July 5, 2006, Augusta Roman appealed the decision of the Texas Court of Appeals to the Texas Supreme Court.²¹³ An amicus curia brief in support of Augusta Roman was filed by Texas Physicians Council.²¹⁴ However, on August 24, 2007, without issuing an opinion, the Texas Supreme Court denied Augusta Roman's petition for review.²¹⁵ Augusta will have until September 10, 2007 to file a motion for rehearing.²¹⁶ Texas Physicians Council argued that Texas statutes establish a long-standing policy of protecting human life; and for this reason, the agreement between Randy and Augusta Roman should be declared void as against public policy.²¹⁷ However, the 2007 Texas legislature amended Section 160.706 of the Texas Family Code to provide:

²⁰⁹ Falasco, *supra* note 37, at 280.

²¹⁰ Roman, 193 S.W.3d at 52.

²¹¹ *Id.*

²¹² *Id.* at 55.

²¹³ See Texas Courts Online – Texas Supreme Court, *available at* <http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=27351>.

²¹⁴ *Id.*

²¹⁵ *Court Won't Hear Battle Over Embryos*, The New York Times, Aug. 25, 2007, *available at* <http://www.nytimes.com/2007/08/26/us/26embryos.html>, (Last visited Aug. 27, 2007).

²¹⁶ Texas Courts Online, *supra* note 213.

²¹⁷ See Amicus Curia Brief, Texas Courts Online – Texas Supreme Court, *available at* <http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=27351>.

That if a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after divorce, the former spouse would be a parent of the child. Furthermore, the consent of the former spouse to assist in reproduction may be withdrawn at any time before placement of the eggs, sperm, or embryos.²¹⁸

These amendments seem to be a clear response to the *Roman* case. Nevertheless, although it seems that most of the case law in this country seems to be stacked against August Roman, the Roman case can be distinguished from these cases because August Roman has never been able to have any children of her own. In this regard, Augusta Roman's case is more similar to Ruth Nahmani's.

In light of the new Texas legislation, this writer does not expect the Texas Supreme Court to change its mind and grant Augusta Roman's petition for review. On appeal to the United States Supreme Court, this writer expects Augusta Roman to test the newly composed United States Court's definition of viability and assert the rights of her frozen embryos. In addition, this writer expects Augusta Roman to argue some of the well-researched analysis of the Israel Supreme Court in the *Nahmani* case.

²¹⁸ TEX. FAM. CODE ANN. § 160.706 (2007)