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WHAT HAPPENS TO EMBRYOS WHEN A MARRIAGE DISSOLVES? EMBRYO DISPOSITION AND DIVORCE

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I. INTRODUCTION

We live in a world where infertility is no longer the problem of a miniscule part of our population. Infertility now affects more than 7.3 million people in the United States alone and approximately one in eight United States couples.[1] With new scientific breakthroughs, however, more and more people are turning to assisted reproductive technologies to aid them in their quest to have children. From this increase in infertility and the resulting use of assisted reproduction technologies ("ART"), the legal landscape is now forced to reassess areas of law that have been set in stone for decades, including the theories of contract law,

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1. ABMA J., CHANDRA A., MOSHER W., PETERSON L., FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL HEALTH STAT. 23(19) (1997), http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf.

property law, tort law, constitutional law, criminal law, and family law. Along with it, these new and often controversial technologies bring with them new legal obligations and issues for the parties involved—and the resulting children.

One of the principal legal issues of ART, at the moment, regards the disposition of embryos[2] and whether a couple that uses assisted reproductive technologies should be governed by the laws of contract *or* by the right to procreate. More specifically, when the couple decides to divorce and cannot agree on the disposition of the embryos that they created through ART, the following questions must be asked: who should have the right to procreate and who should not? Should the couple's informed consent contract, which was signed before the creation of the embryos, trump the rights of the parties individually after the embryos are already in existence?

It is through the debate of constitutional rights versus contract law, the debate over personhood versus property issues, and the use of the denial of the writ of certiorari in the case of *Roman v. Roman*[3] that we can finally develop an enhanced legal landscape upon which the ART community and its patients can turn to without worrying about the legal implications of their actions in a world where having children is often their most important goal and desire.

II. BACKGROUND

The medical field of ART was developed in order to combat the increasing rates of infertility around the world. ART, however, is not only a way for medicine to combat the physical aspects of infertility—there are also the psychological, cultural, and societal aspects of infertility that allow people to create what once seemed like the impossible: the families of which they have always dreamed. The American Society for Reproductive Medicine ("ASRM")

2. *See, e.g.*, JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 8 (2006). (For the purpose of this article "embryo" is not the most medically accurate term but is the most easily understood term. Additionally, for the purpose of this article "embryo" will come to mean the same as the medically accurate term of "pre-embryo," which means: "[t]he developing human organism during early cleaving stages, which immediately follow fertilization, until development of the embryo. The preembryonic period immediately follows the zygote stage and ends at approximately 14 days after fertilization with the development of the primitive streak"). *Id.*

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

defines infertility as:

> [A] disease of the reproductive system that impairs one of the body's most basic functions: the conception of children. Conception is a complicated process that depends upon many factors: on the production of healthy sperm by the man and healthy eggs by the woman; unblocked fallopian tubes that allow the sperm to reach the egg; the sperm's ability to fertilize the egg when they meet; the ability of the fertilized egg (embryo) to become implanted in the woman's uterus; and sufficient embryo quality.[4]

As stated above, infertility affects more than 7.3 million people in the United States for various reasons, and those struggling with this problem are usually run through a battery of tests to determine the specific cause of their infertility.[5] Out of those tested, nearly 44% of cases are attributed to male factor infertility, 33% are attributed to female tubal factors, 25% attribute infertility to problems with female ovulation, and approximately 5 to 10% will have no readily apparent cause for their infertility even after they have completed the recommended testing.[6]

No matter what the cause, for the majority of these approximately 7.3 million people, the resulting diagnosis of infertility and its effects are ultimately devastating to the couple and their relationship. While support and advocacy organizations like RESOLVE,[7] AFA,[8] and INCIID[9] believe infertility should be treated as a medical condition and a disability that has a cure and not a "death sentence," the Americans with Disabilities Act[10] ("ADA") does not consider infertility to be a disability because it is not "a physical or mental impairment that substantially limits one

4. American Society for Reproductive Medicine, Frequently Asked Questions About Fertility, http://www.asrm.org/Patients/faqs.html (last visited Nov. 25, 2008).

5. *See* ABMA J., ET AL. *supra* note 1.

6. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, INFERTILITY: AN OVERVIEW 12 (2003), http://www.asrm.org/Patients/patientbooklets/infertility_overview.pdf (last visited on Nov. 25, 2008) [hereinafter AN OVERVIEW].

7. Resolve: The National Infertility Association, www.resolve.org (last visited Nov. 25, 2008).

8. American Fertility Association, www.theafa.org (last visited Nov. 25, 2008).

9. The International Council on Infertility Information Dissemination, Inc., www.inciid.org (last visited on Nov. 25, 2008).

10. Americans with Disabilities Act of 1990, 104 Stat. 327 (codified at 42 U.S.C. § 12101 (2000)).

or more of the major life activities of"[11] an individual. No matter how one chooses to look at the devastation of infertility, ART remains a viable solution to infertile couples.

ART is defined as "the various medical techniques used to achieve a pregnancy by means other than sexual intercourse . . . [it] is used when an individual [or couple] is unable to have a child through the age-old process that combines egg and sperm inside a woman's body."[12] Some of the most common examples of ART are in vitro fertilization ("IVF"),[13] gamete intrafallopian transfer ("GIFT"),[14] intracytoplasmic sperm injection ("ICSI"),[15] intrauterine insemination ("IUI"),[16] and zygote intrafallopian transfer ("ZIFT").[17]

Although ART initially focused on bypassing non-functioning reproductive organs, it has become more complex. It moved from merely involving the infertile couple and their doctor, to involving

11. 42 U.S.C. § 12102(2) (2000); s*ee, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 633 (1998).

12. DAAR, *supra* note 2, at 1.

13. In vitro fertilization ("IVF") is defined as: "a method of assisted reproduction that involves surgically removing eggs from the woman's ovaries, combining them with sperm in the laboratory and, if fertilized, replacing the resulting embryo into the woman's uterus." The Midwest Center of Reproductive Health, P.A., Glossary of Terms (2006), http://www.mcrh.com/resources.glossary.php.

14. Gamete Intrafallopian Transfer ("GIFT") is defined as: "[a] medical procedure in which a woman's eggs are retrieved following ovarian stimulation, mixed in the laboratory with sperm, and reintroduced into the fallopian tube using a fiber-optic instrument called a laparoscope which is inserted through small incisions in the woman's abdomen. . . . [I]n order to use GIFT, a woman must have at least one healthy fallopian tube." DAAR, *supra* note 2, at 41.

15. Intracytoplasmic sperm injection ("ICSI") is defined as: "a micromanipulation technique used in conjunction with IVF that involves injecting a sperm directly into an egg in order to facilitate fertilization. The fertilized egg is then transferred to the uterus." AN OVERVIEW, *supra* note 6, at 15.

16. Intrauterine insemination ("IUI") is defined as: "the process whereby sperm are injected directly into the uterine cavity in order to bypass the cervix and place the sperm closer to the egg. The sperm are usually washed first in order to remove chemicals that can irritate the uterine lining and to increase sperm motility and concentration." *Id.*

17. Zygote intrafallopian transfer ("ZIFT") is defined as: "[a] medical procedure in which a woman's eggs are retrieved following ovarian stimulation, mixed in the laboratory with sperm, and allowed to develop into early embryos (also called zygotes, usually seen approximately one day after fertilization). The zygotes are transferred into a woman's fallopian tubes using a laparoscope, placed through the woman's abdomen, to guide placement of the early embryos. ZIFT combines some of the laboratory elements of IVF and the tubal transfer of GIFT." DAAR, *supra* note 2, at 41.

ovum donors, sperm donors, and/or surrogates, which only further increases the complexity of not only the social and cultural issues, but most importantly the legal issues associated with ART. Moreover, most states do not have laws regarding ART and the use of third-party participants, which generates additional legal issues when determining what technologies are permitted in which states. Regardless of the parties, the creation of the embryos through ART involves legal issues such as what to do with those embryos once a patient or patients have decided that they no longer have any use for their excess embryos. It is estimated that there are more than 400,000 embryos in cryopreserved[18] storage in the United States alone;[19] that number grows with each passing year. There are many options for these patients who have already completed their fertility treatments successfully or have decided not to continue with fertility treatments. Some of the alternatives for their excess embryos include: donation to research or another couple, discarding/destroying the embryos, or maintaining the embryos in a cryopreserved state—although the longer an embryo is cryopreserved, the less chance it has of "surviving" the thawing process.[20]

With all of these options, reputable fertility clinics ensure that each patient signs an embryo disposition document, which, along with his or her informed consent, clarifies how the patient would like to handle the disposition of his or her embryos once the patient has decided to cease treatment (albeit most often without legal representation). Yet, not all of the options listed above are available in every state. For example, donating embryos to research is illegal in states such as Louisiana and Kentucky, which have laws prohibiting the destruction of viable embryos. Louisiana Revised Statute section 129 states: "[A] viable in vitro fertilized human ovum is a juridical[21] person,[22] which shall not be intentionally,

18. Cryopreservation: the maintenance of viability of excised tissues [and/or] organs at extremely low temperatures. STEDMAN'S MEDICAL DICTIONARY 416 (26th ed. 1995).

19. David I. Hoffman, et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063 (2003).

20. *Id.* Approximately 35% of cryopreserved embryos do not survive the freezing and thawing process of cryopreservation and of those that do survive these processes, only approximately 25% will survive to reach the day-5-blastocyst stage. *Id.*

21. Juridical: relating to administration of justice, or office of a judge. BLACK'S LAW DICTIONARY 867 (8th ed. 2008).

22. Even though a Louisiana Statute describes viable embryos as a "person" in

destroyed by any natural or other juridical person or through the actions of another such person."[23]

In states that do allow performing research on embryos, there are also laws to ensure that the patient is fully aware and consents to a *specific* type of research for which his or her excess embryos will be used. One such state that has a law of this type is California,[24] which ensures that a fertility clinic will only be able to use those specific embryos for a specific type of research and not for any research for which it feels the embryos will be effective.[25]

Some state legislatures have responded by drafting these laws (specified above or not) in record time to ensure that the disposition of each embryo is legally accounted for and that the wishes of each patient are taken into account. The law, however, continues to be bombarded with new and complex issues of law and public policy due to the increasing rates of diagnosed infertility and the rapid advancement of ART around the world, especially since the first "test tube" baby was born in the late 1970s.[26] It is because of the advancement of these technologies that the laws in the state and federal judicial systems have been fundamentally unable to keep up with their development. This lack of legal development has created a black hole in the area of ART and the law. Many legal questions have been only partially answered, or not answered at all, leaving doctors, patients, and legal practitioners with an incomplete path to follow.

III. ANALYSIS

A. Constitutional Law v. Contract Law

The legal landscape of ART becomes all the more complex when a couple divorces and cannot agree on who should be able to make the decisions regarding the disposition of their frozen embryos. Although the law itself has attempted to make these

the judicial sense, most states do not give the status of personhood to embryos, especially those that are existing in cryopreserved space outside of a woman's womb. LA. REV. STAT. ANN. § 129 (2008).

23. *Id.*

24. CAL. HEALTH & SAFETY CODE § 125315 (2008).

25. *See generally id.* (discussing the process for obtaining a donor's consent).

26. The world's first "test tube" baby was Louise Brown, born in 1978. BBC HOME, *1978: First 'Test Tube Baby' Born*, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid_2499000/2499411.stm (last visited Nov. 25, 2008).

decisions, there are only a handful of cases (often with no binding precedent) that are available to aid the judicial system in determining whether the disposition of embryos should be analyzed under contract law or as a constitutional right to have or not to have children, which is defined as procreative liberty. Professor John Robertson described procreative liberty as follows:

> [As] a matter of constitutional law, procreative liberty is a negative right against state interference with choices to procreate or to avoid procreation. It is not a right against private interference, though other laws might provide that protection. Nor is it a positive right to have the state or particular persons provide the means or resources necessary to have or avoid having children.[27]

If Robertson is correct in this assumption, however, which one of the divorcing parties' rights supersedes that of the other? By focusing on a constitutional right to procreative liberty, the judicial system would be proactively creating a selective bias that favors one party's constitutional rights over the other's. With that in mind, the end result would ultimately negate the actual purpose of these "rights" in the first place.

In her article *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, Ellen Waldman asserts that the constitutional right to have children is the only *right* that should be upheld.[28] She states that "[w]hen considering the burdens of forced paternity . . . [l]egislators could relieve objecting spouses of their concern over financial liability by simply treating objecting spouses as nothing more than sperm donors."[29] However, this would take years because one currently does not have the legal right to contract out of any potential financial obligations to a child.[30]

Yet, *simply* legislating out of parental rights does not always wrap everything up into a tidy gift-wrapped package. It actually completely bypasses many parties' beliefs (those who want to avoid

27. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 23 (Princeton University Press 1994).

28. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1060 (2004).

29. *Id.* at 1037.

30. *Id.*; *see also* Grijalva v. Grijalva, 310 S.E.2d 193, 197 (W. Va. 1983) (The court ruled that parents are not able to contract away the rights of their children because the aspect of financial support of a child is not for the other parent, but instead the right of the child to have both parents financially obligated to support him or her). *Id.*

procreation) that they will be psychologically impacted by the knowledge that they have a child somewhere in the world. Waldman goes on in her article to use a balancing test to make her argument against this premise by stating that in order to decide which right should be favored, the judicial system needs to determine the burdens as follows: "[w]hether the burdens of unwanted paternity to the 'would-not-be-father' exceed the deprivation of a possibly last opportunity for maternity to the 'would-be-mother.'"[31]

Waldman uses this balancing test to assert that there would be no psychological burden on the party attempting to avoid procreation because parenthood—"or at least fatherhood—is, in large part, socially constructed rather than biologically pre-determined."[32] Waldman argues that there should not be a constitutional right to avoid procreation because there are no undue burdens upon the party needing to be protected from unwarranted governmental intrusions.[33]

Waldman's point of view, however, is not supported by the majority of rulings decided in this area. Instead, when the judiciary has used the concepts of constitutional law as a way to decide these cases, they have, for the most part, decided in favor of the party attempting to avoid procreation. One example of such a decision was *Davis v. Davis*.[34] In *Davis*, the Tennessee Supreme Court was the first state supreme court to be confronted with the issue of embryo disposition.[35]

In *Davis*, both parties had participated in the creation of embryos together during their marriage; but, after multiple attempts to achieve a viable pregnancy, the couple divorced and was left with seven cryopreserved—frozen—embryos.[36]

While going through their infertility treatments, the couple did not enter into any agreement as to how the excess embryos would be disposed of if they divorced.[37] Following their divorce, Junior Davis sought to have the seven embryos discarded, while his ex-wife Mary Sue Davis wanted the remaining embryos to be

31. Waldman, *supra* note 28, at 1060.
32. *Id.* at 1028.
33. *Id.*
34. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
35. *Id.*
36. *Id.* at 592.
37. *Id.*

donated to another infertile couple.[38] Since they did not have a prearranged contract regarding the disposition of the embryos, the court looked to the balancing of each party's interests regarding the disposition.[39] The Supreme Court of Tennessee stated that the central issue to the case was:

> [T]he two aspects of procreational autonomy—the right to procreate and the right to avoid procreation . . .[from which they would begin looking at] by considering the burdens imposed on the parties by solutions that would have the effect of disallowing the exercise of individual procreational autonomy with respect to these particular preembryos.[40]

The court ultimately held that Junior Davis was allowed full control over the seven remaining embryos because Mary Sue Davis had other means of achieving parenthood *and* she was attempting to donate the embryos to another childless couple for the purpose of their conceiving a child.[41] This result would essentially cause Junior to have the greater interest, as he would still have the psychological burden of knowing that he possibly has a child or children out in the world.[42]

On the other end of the spectrum, the New York Court of Appeals in 1998 came to their decision in *Kass v. Kass*[43] by relying on contract law and the enforceability of disposition agreements, instead of using a constitutional analysis as in *Davis*. Maureen Kass (appellant) and Steven Kass (respondent) had signed four informed consent forms which provided a "statement of disposition" should they get divorced.[44] They were left with five frozen, stored embryos.[45] Their informed consent forms stated that their excess embryos should be disposed of and used for research by the IVF program.[46] Once the parties divorced, they also created an "uncontested divorce" agreement that they both signed stating that the "[t]he disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner

38. *Id.* at 590.
39. *Id.* at 603–04.
40. *Id.* at 603.
41. *Id.* at 604.
42. *Id.*
43. Kass v. Kass, 696 N.E.2d (N.Y. 1998).
44. *Id.* at 176.
45. *See id.* at 177.
46. *See id.* at 176–77.

outlined in our consent form and that neither Maureen Kass[,] Steve Kass[,] or anyone else will lay claim to custody of these pre-zygotes."[47]

Barely one month after signing this additional agreement, the appellant (Mrs. Kass) commenced an action in New York to receive full *custody* of the embryos.[48] The trial court in the original case decided that the appellant had full rights to the embryos, yet the New York Supreme Court Appellate Division reversed this decision stating that their prior agreements should control the outcome of this decision.[49] The New York Court of Appeals ultimately determined after its review of the case that the Appellate Division decision should be affirmed because both parties had clearly expressed their intentions for the disposition of their embryos prior to their divorce and subsequently with their uncontested divorce agreement.[50] The Court decided that procreation avoidance outweighed the woman's right to engage in reproduction with the frozen embryos by interpreting the contract to support that result.[51]

That same year the Supreme Judicial Court of Massachusetts decided the convoluted case of *A.Z. v. B.Z.*[52] on the basis of enforceability of contracts and dismissed the argument that the respondent (B.Z.) had a greater constitutional right than the appellant (A.Z.) to the disposition of their remaining embryos.[53] The appellant appealed from the issuance of a permanent injunction against her from using the remaining embryos that were created while she and the respondent were married.[54] As in *Kass*, the parties had signed informed consents from their fertility clinic

47. *Id.* at 177.

48. *Id.*

49. *See id.* (stating that "when parties to an IVF procedure have themselves determined the disposition of any unused fertilized egg, their agreement should control.").

50. *See id.* at 182 (stating that "[t]hese parties have clearly manifested their intention, the law will honor it.").

51. *See* Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 470–71 (1999) (stating that "Maureen Kass probably did not intend that her husband would be able to override her desire to implant the embryos; therefore, a finding that this was her clearly expressed intent seems highly suspect.").

52. A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

53. *See id.*

54. *Id.* at 1055.

regarding the disposition of their remaining embryos.[55] These forms were preprinted with choices regarding the disposition if the parties were to become separated, as well as having an additional blank line permitting the parties to select an option not listed.[56] The consent also listed that "[t]he consent form also informs the donors that they may change their minds as to any disposition, provided that *both* donors convey that fact in writing to the clinic."[57]

Although the parties signed a total of seven consent forms, the court found that only the form signed over the course of their infertility treatments in August 1991 governed the remaining frozen embryos.[58] Apparently, the respondent had signed the blank consent forms prior to the fertility treatments and gave them back to the appellant to prepare and sign.[59] The appellant then signed all of the forms and filled in the blank space for the disposition granting all remaining embryos to her (the appellant) if they were to separate.[60] The lower probate court ruled in favor of the respondent, stating that there was no evidence that the respondent agreed at the time of *his* signing of the agreements that if they were to become separated that the embryos would automatically go to the appellant.[61]

These cases indicate that there needs to be uniformity among courts as to how clinics can ensure that their patients sign valid and enforceable disposition forms. These cases further indicate that any result should not be made on the selective basis of whose procreational rights outweigh the other or by choosing whose procreational right was more important than the other's. If this line of reasoning is followed, it would completely negate what United States Supreme Court Justice Brennan stated in *Eisenstadt v. Baird*: "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[62]

Under this viewpoint, if the courts were to use constitutional rights to decide whether one should have a child (in the sense of

55. *Id.* at 1053.
56. *Id.* at 1054.
57. *Id.* (emphasis added).
58. *See id.* at n.10.
59. *Id.* at 1054.
60. *Id.*
61. *See id.* at 1054–55.
62. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

ART only), it would be purely unconstitutional. It is only with a compelling state interest that the government can interfere, as decided in *Carey v. Population Services International*.[63] In *Carey*, the United States Supreme Court ruled that for the government to step in and decide cases such as these, there would need to be a *compelling* state interest: "[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[64]

Furthermore, in embryo disposition cases, using a constitutional basis to decide disputes where a valid and enforceable disposition contract is present would not constitute a compelling state interest under the law because unlike fetuses, embryos are not viable children that the state needs to protect.[65] Instead, we need to remember that embryos in a petri dish or frozen in a tank are actually "pre-embryos."[66]

Ultimately, courts in the United States should base their decisions on the enforceability of these contracts of disposition if the contracts indeed exist. In order for the courts to be able to use this as an option for their decisions, the legal community and the fertility clinics need to create and make available contracts for disposition that are separate and *not* simply part of their informed consent documents. Each fertility clinic should require all of their patients to sign disposition of embryos agreements that have been drafted and reviewed by attorneys with the patients prior to the treatment commencing, and possibly after the treatment has concluded. If this procedure were followed, it is more likely that the majority of these agreements would hold up in court as binding, legal agreements that would follow the rules of other enforceable contracts.

B. Personhood Versus Property Issues Related to Embryo Disposition

Another aspect of embryos and their disposition that makes the legal landscape much more complicated is the debate over

63. Carey v. Population Services International, 431 U.S. 678 (1977). In *Carey*, the United States Supreme Court declared the New York statute criminalizing the sale or distribution of contraceptives to minors under the age of sixteen unconstitutional. *Id.*

64. *Id.* at 686 (citing Roe v. Wade, 410 U.S. 113, 155–56 (1973)).

65. LA. REV. STAT. ANN. § 9:129 (2008).

66. *See* DAAR, *supra* note 2.

whether embryos should be considered legal persons or property. *Black's Law Dictionary* defines person as:

> a human being (i.e. natural person) . . . [the] scope and delineation of [the] term is necessary for determining those to whom [the] Fourteenth Amendment of the Constitution affords protection since this Amendment expressly applies to 'person' . . . [the] word 'person' as used in the Fourteenth Amendment does not include the unborn.[67]

Under this strict legal definition of a person, an embryo (or pre-embryo as discussed earlier and which is not yet a viable fetus) would not be considered a person under the law. Property, however, is defined as:

> that which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of right which are guaranteed and protected by the government. . . . More specifically, ownership; the unrestricted and exclusive right to a thing the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it.[68]

Embryos, however, do not neatly fit under this definition of property, either, because they cannot be disposed of in every state and no one party holds exclusive rights to them. This conclusion illustrates that when it comes to embryos, the legal rights are not exact. Rather, they are somewhere in between both definitions.

The article *Individuals, Humans, and Persons: The Issue of Moral Status,* by Helga Kuhse and Peter Singer, rejects the idea that human embryos should be considered distinct human individuals that are afforded the full rights of personhood.[69] Instead, they argue that an embryo should be considered to be "the potential to become one or more different individuals,"[70] which would mean that the embryo should have a special status under the law while not being considered a full person with all of the rights afforded under "personhood."

In *Davis,* the Supreme Court of Tennessee analyzed this exact issue in determining the legal status of the Davis' embryos (and embryos in general). The court determined that under Tennessee

67. BLACK'S LAW DICTIONARY 1382 (4th ed. 1968).
68. *Id.* at 845.
69. *See* Helga Kuhse & Peter Singer, *Individuals, Humans, and Persons: The Issue of Moral Status,* EMBRYO EXPERIMENTATION 65–75 (1990).
70. *Id.* at 75.

law, as "embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for [human] life."[71] The court, however, did not believe that embryos should be afforded the full rights and respects of personhood because they *only* had the *potential* to become human life, while the embryos were not yet at the stage in which they could be considered human life—legally.[72] The court also went on to say that a person's embryo could not be afforded the full rights of personhood simply because of its potential. Unlike a fetus, it had yet to reach the developmental stage of individuality.[73] Using these arguments, the court in *Davis* held that "[embryos] are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[74] Yet, they also held that the parties did have an interest in the *ownership* of the embryos because they were allowed to make the decisions based upon the disposition of these embryos.[75]

Another case that explores the arguments of personhood versus property is *Litowitz v. Litowitz*[76] in which the petitioner sought ownership over two cryopreserved embryos that were the product of donor egg and her ex-husband's (the respondent) sperm. The respondent wished to donate their remaining embryos to another couple, while the petitioner wished to implant the remaining embryos into a surrogate[77] and to bring the embryos to term.[78] The Superior Court of Pierce County awarded full custody to the respondent, and the Court of Appeals affirmed that decision reasoning that the embryos were not biologically related to the petitioner.[79]

On further appeal, the court determined that when the parties

71. Davis v. Davis, 842 S.W.2d 588, 595 (Tenn. 1992).

72. *Id.* at 596. The *Davis* court also explained that embryos could not be considered the same as a human because "the 'tissue' involved here does have the potential for developing into independent human life, even if it is not yet legally recognizable as human life itself." *Id.* at 595.

73. *Id.* at 595.

74. *Id.* at 597.

75. *Id.*

76. Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

77. The surrogate or surrogate mother is also the gestational carrier. A third party that is not either of the parties in this case and not biologically connected in any way to the embryos or resulting child (if there were one). *See generally id.*

78. *Litowitz*, 48 P.3d at 264.

79. *Id.* at 265–68.

commenced the egg donation process, they signed a contract that stated that the donated eggs belonged to *both* parties with the petitioner being considered the "intended mother" of any child produced from the resulting embryos.[80] In the petitioner's Writ of Certiorari to the Supreme Court of Washington, she argued that the state of California ruled that human byproducts (including sperm) cannot be deemed property per se[81] because "one could not have a right in one's own genetic material."[82] Ultimately, the court held that the couple was required to follow the terms of their embryo disposition agreement with the clinic.[83]

When applying all of the definitions and rulings of the various cases above, it is evident that the status of embryos remains a gray area within the legal field. If a case such as *Litowitz* came before a court in Louisiana, a different result would likely follow as the party requesting destruction would certainly fail due to the statutory restrictions in that state.

While a ruling by the United States Supreme Court regarding the status of embryos would likely give the legal community a bright line precedent as to what the exact status of embryos are under the law, this could also backfire for the assisted reproductive community, especially if the Court ruled that embryos should be considered full persons—making many aspects of ART illegal throughout the country. Nevertheless, there needs to be a guiding principle regarding embryo disposition that can be used throughout the fertility community to allow ART to continue with its many needed breakthroughs. This needs to be accomplished while providing a roadmap for doctors, patients, and legal practitioners, especially since interstate travel is often a common necessity for many couples turning to ART.

IV. EMBRYO DISPOSITION TODAY: ENHANCED LEGAL LANDSCAPE THROUGH *ROMAN v. ROMAN*

One case that illustrates how the United States Supreme Court would likely rule in a case of embryo disposition is *Roman v. Roman,*[84] which was denied certiorari in March of 2008. *Roman* is a

80. *Id.* at 268.
81. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Wash. 1990).
82. *Id.* at 490.
83. *Litowitz*, 48 P.3d at 271.
84. Roman v. Roman, 193 S.W.3d 40 (Tex. Civ. App. 2006), *cert. denied*, 128 S.Ct. 2469 (2008).

Texas case that was initiated after Augusta Roman (petitioner/wife) and Randy Roman (respondent/husband) divorced and the petitioner attempted to use the embryos that they had created to become pregnant on her own.[85]

The disagreement between the parties actually began the night before the parties had planned the implantation of their created embryos. Instead of implanting the embryos the next day, they had the remaining three cryopreserved in the interim until they could both agree on what would be the best course of action.[86] Unfortunately, they were unable to agree on the disposition of these cryopreserved embryos and subsequently divorced.[87] This dispute over their cryopreserved embryos arose from that divorce,[88] even though they had both signed an informed consent form at their fertility clinic stating how the embryos would be used if they were to divorce.[89]

Although writ was denied, the legal field may be able to deduce what the Supreme Court's opinion would be in such cases of embryo disposition by looking to both parties' petitions to the Supreme Court of the United States and the Supreme Court's subsequent denial.

In the Petition for a Writ of Certiorari the petitioner, Augusta Roman, presented three questions for the Justices to decide:

1. Is the fundamental right to procreate violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means?

2. Does the constitutional liberty interest in deciding whether to bear or beget a child encompass a right to deny implantation of embryos in a genetic parent who desires the implantation?

3. Is the fundamental right to enter into familial relationships violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a child by other

85. *Id.* at 43.

86. Brief for Randy M. Roman in Opposition No. 07-926 at 8, Roman v. Roman, 128 S.Ct. 2469 (2008).

87. *Roman*, 193 S.W.3d at 43.

88. The Texas trial court awarded custody of the embryos to Augusta as "property," to which Randy hastily appealed. *Id.* The Texas Court of Appeals reversed the trial court's ruling, granting the embryos to Randy by enforcing the contract that the parties signed at the fertility clinic. *Id.* at 55.

89. *Id.* at 44.

means?[90]

Each of these questions presented by the petitioner dealt directly with the Constitutional right to have children in opposition to the Constitutional right to avoid procreation, which is the most argued issue in embryo disposition cases. The petitioner also argued that this was her last chance to have biological children because at the age of 46 she was too old to successfully complete another cycle of IVF.[91] The respondent revealed (outside of court documents), however, that he offered to pay for another IVF cycle for the petitioner with the use of donor sperm immediately following their divorce.[92]

In opposition, the respondent presented the following questions to the Court:

1. Can prospective parents, by signing a standard contract required by almost all fertility clinics before they begin the in vitro fertilization process, waive whatever constitutional rights to procreate they may have in the event of divorce?

2. Can the procreation right of a woman who has less than a 1% chance of successfully using frozen pre-embryos to create a child and who has other much more likely options for having children outweigh the right of a man who does not want to be forced by the government or his ex-wife to have a child against his will?

3. Does the United States Constitution even recognize an absolute right to procreate that justifies overruling the decisions of all state courts that have addressed disputes over frozen pre-embryos, not to mention the European Court of Human Rights?

4. Should the in vitro fertilization industry be fundamentally changed by ruling unenforceable the almost universally used agreements between clinics and prospective parents concerning disposition of frozen pre-embryos?[93]

The respondent also argued that "[i]f there [were] a constitutional right at issue in this case, it [would be] the right to

90. Petition for Writ of Certiorari, Roman v. Roman, 128 S.Ct. 2469 (No. 07-926) at i.

91. *Id.* at 5 n.1.

92. *Id.*

93. Brief for Randy M. Roman in Opposition No. 07-926 at i, *Roman*, 128 S.Ct. 2469 (2008).

decide whether or not to beget a child, a right"[94] that he had as well and with which the European Court of Human Rights and six state supreme courts all agree. Therefore, deciding this case based on one's constitutional rights would effectively mean denying the constitutional rights of another.

Furthering the arguments against using a constitutional right approach in these cases, the respondent argued in his Brief in Opposition to the granting of the Writ of Certiorari whether:

> [T]he in vitro fertilization industry [should] be fundamentally changed by ruling unenforceable the almost universally used agreements between clinics and prospective parents concerning disposition of frozen [embryos].[95]

This proposition begs the question of whether contract or constitutional law should be the guiding area of law for all embryo disposition disputes so that couples can continue to use ART to create their families. The respondent additionally asserted that the petitioner had "waived [her constitutional] right by signing the contract with the clinic that clearly [stated that] any frozen pre-embryos [would] be discarded in the event of divorce."[96] According to United States law a person may waive his or her constitutional rights in civil court just as he or she can in criminal court.[97] In essence, by signing that binding and enforceable contract with the fertility clinic, the petitioner had lost all of her constitutional rights to procreate using those *particular* embryos, although she still had the constitutional right to procreate by other means.

In denying this Writ of Certiorari, the legal and medical field can deduce that if the Supreme Court were to grant the hearing of such a case, the court would most likely rule based on contract law if a binding and enforceable contract existed between the parties that contracted away their constitutional rights to procreate or to avoid procreation.[98] This is why the ART community needs to ensure that patients are signing valid, enforceable disposition agreements under the guidance of an attorney.

94. *Id.* at 12.
95. *Id.* at i.
96. *Id.* at 18.
97. Overmyer Co. v. Frick, 405 U.S. 174, 185 (1972).
98. *See id.*

In fact, *Dahl v. Angle,*[99] the Oregon Court of Appeals recently determined that the fate of the couple's remaining embryos would be handled according to the embryo disposition form the couple had agreed upon and signed at the time of the creation of the embryos. Interestingly enough, the majority, also citing *Davis* in its argument, stated that the embryos did constitute a matter of private property, although the justices narrowly avoided calling them "property."[100]

V. CONCLUSION

Despite the minimal case law that exists and the unlikely intervention by the United States Supreme Court, the law regarding embryo disposition currently rests in a gray area with no truly consistent or binding rulings, creating legal turmoil and uncertainties for lawyers, doctors, and parties alike. As practitioners, however, we need to focus on whether a contract (if one exists) between the parties is enforceable. We also need to realize that "if these agreements mean nothing and are rendered useless,"[101] the fertility industry has the potential to remain at a standstill with each case being litigated to determine the parties' true intentions simply because one party decided that he or she did not want to follow his or her specified intent from his or her signed contract with the fertility clinic. As we have seen in the preceding matters, the lack of contracts regarding disposition leaves parties with the constitutional balancing test of *Kass,* which ultimately will be affected by the state in which the embryos reside.

The legal and medical communities can lessen this chance for confusion and resulting litigation, however, by working together to draft binding and enforceable embryo disposition agreements for each patient to sign. Each patient should review this agreement with an attorney prior to signing it with the fertility clinic. By following these procedures, it is likely that these agreements will be held enforceable.

Even if they result in litigation, the courts will likely rule in favor of the intention(s) expressed in the embryo disposition agreement as each party should have reviewed the agreement with

99. Dahl v. Angle, 194 P.3d 834 (Or. App. 2008).
100. *See id.* at 840–41.
101. Brief for Randy M. Roman in Opposition No. 07-926 at 19, Roman v. Roman, 128 S.Ct. 2469 (2008).

an attorney who would have further revised the agreement to meet the full intentions of each party. With that in mind, the parties and their medical practitioner(s) can insure that what is actually intended at the signing of this agreement will, in fact, be the end result. Creating enforceable, binding agreements is the least that can be done by the courts, medical practitioners and legal professionals, considering that the law does not classify embryos as persons or as property. It is clear, however, that embryos hold a special and unique status in the law.