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Rethinking Canadian Legal Approaches to Frozen Embryo Disputes

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RETHINKING CANADIAN LEGAL RESPONSES TO FROZEN EMBRYO DISPUTES

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Abstract: *This article examines and critiques Canadian legal responses to disputes over frozen in vitro embryos. It argues that current laws that provide spouses or partners with joint control over the use and disposition of embryos created from their genetic materials and that mandate the creation of agreements setting out these parties' intentions in the event of a disagreement or divorce overlook the experiences of women who undergo in vitro fertilization treatment. It also maintains that these laws do not accord with how Canadian law and*

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public policy has responded to similar conflicts between spouses, or to agreements that seek to control or restrict women's reproductive choices. This article considers how legislatures and courts in other jurisdictions have sought to respond to embryo disposition disputes, but argues that their respective approaches raise similar issues and would pose additional problems within the Canadian context. It ultimately provides recommendations for how Canadian laws might better support the express objectives of the Assisted Human Reproduction Act and Quebec's Act Respecting Clinical and Research Activities Relating to Assisted Procreation to protect the health and well-being of women, to promote the principle of free and informed consent and to recognize that women are more directly affected than men by the use of assisted reproductive technologies.

INTRODUCTION

In December 2012, the British Columbia Supreme Court was faced with the first Canadian "custody" dispute over frozen embryos. Like many Canadians who have difficulty conceiving, Gregory and Juanita Nott turned to *in vitro* fertilization (IVF) treatment in the hope of building their family. They created embryos using their own ova and sperm and Mrs. Nott successfully gave birth to two children. Following treatment in 2004, the couple was left with four embryos, which they jointly consented to freeze and store for future reproductive use. Since then, however, Mr. and Mrs. Nott's relationship has become strained; they separated in 2011 and then sought to obtain a divorce. In July 2012, they received notice that their fertility clinic was closing down and a request that they jointly consent to their embryos being transferred to another clinic for future storage. The couple had signed a consent form, at the time of the embryos' creation, saying that should either party refuse to consent to the embryos being transferred, the clinic would have authority to destroy them.

Mrs. Nott readily agreed to the transfer as she wishes to use the embryos in an attempt to have more children. Mr. Nott refused to authorize the transfer, as he wants the embryos to be destroyed. In December 2012, Mrs. Nott successfully obtained an injunction to prevent the embryos' destruction, until their divorce trial can be heard and they can seek a judicial determination regarding what should happen to their embryos.[1] Media reports suggest that the case was to be heard in June 2013,[2] but it is unclear whether it proceeded to trial. As of June 2014, a decision had yet to be released.[3]

This dispute arose in part as a result of section 8 of the federal *Assisted Human Reproduction Act*[4] (*AHRA*) and its associated *AHR Consent Regulations*.[5] This legislation requires that spouses or common-law partners provide joint consent to use or donate *in vitro* embryos created for their reproductive use,[6] and also allows one spouse or partner to unilaterally

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1 See Keith Fraser, "Woman wins Round 1 in embryo fight; Judge says they should be saved at least until couple's divorce trial", *The Province* [Vancouver, B.C.] (6 December 2012) A6; Christopher Reynolds & Pamela Fayerman, "B.C. woman wins some time in 'custody' battle over frozen embryos", *The Vancouver Sun* (6 December 2012), online: The Vancouver Sun <http://www.vancouver sun.com/>.

2 *Ibid*.

3 The British Columbia Supreme Court's recorded entries for this file are not available to the public, but as of June 8 2014 they continued to indicate that the file was last modified on May 28 2013.

4 *Assisted Human Reproduction Act,* SC 2004, c 2 [*AHRA*].

5 *Assisted Human Reproduction (Section 8 Consent) Regulations,* SOR/2007-137 [*AHR Consent Regulations*].

6 See *AHRA, supra* note 4, s 8(3) (which explains that embryos may not be used without the donor's consent); *AHR Consent Regulations*, *supra* note 5, s 10(1) (which explain that a "donor" is the "individual or individuals for whose reproductive use an *in vitro* embryo is

withdraw his or her previously given consent, in writing,[7] prior to the embryos being used, thawed or designated for a specific purpose.[8] One effect of these laws is that where a couple, like Mr. and Mrs. Nott, have created embryos from their own ova and sperm in order to build their family,[9] one party may change

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created" and includes "the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo"), s 10(2) (which requires compatible consent from a couple for their consent to comply with the regulations) and s 13 (which requires that prior to making use of an *in vitro* embryo, an individual will have the written consent of the donor stating that the embryo may be used for the donor's own reproductive use, or may be donated for third-party reproduction, for research or for instruction.)

7 See *AHR Consent Regulations*, *supra* note 5, s 14(3) (which allows either spouse or partner to withdraw the donor's consent) and s 14(1) (which clearly stipulates that this withdrawal must be in writing).

8 The timing for revocation differs depending on whether consent was given to use the embryos, or to donate them for third party reproduction, for research or for instruction. In the case of consent given to use the embryos for their own reproductive use, revocation can only happen before implantation. In the case of donation for third party reproductive use, withdrawal is only possible "before the third party acknowledges in writing that the embryos have been designated for their reproductive use." In the case of donation for research or instruction, withdrawal must happen before the embryos are thawed, or a person acknowledges in writing that the embryos have been designated for that purpose, or before the creation of a stem line, whichever of these occurrences happens the latest. See *AHR Consent Regulations, supra* note 5, s 14.

9 Where a same-sex or opposite-sex couple uses donated sperm or ova to create embryos, this couple will similarly be considered the "donor" and will be required to provide joint consent to their embryos being used or donated while they are in a relationship. However, the law also stipulates that if their relationship or marriage breaks down, only the genetic contributor will be considered the "donor" under the law and will have exclusive control over the embryos' use or disposition. *AHR Consent Regulations*, *supra* note 5, s 10(3).

his or her mind and prevent the other from using these embryos to have more children.[10]

This case has also come about because of uncertainty under the law as to whether embryo disposition agreements or consent forms are legally enforceable. While the *AHRA* states that embryos cannot be used or donated without the consent of both spouses,[11] it does not clarify what will happen to a couple's surplus embryos in the event the parties cannot come to an agreement and provide compatible consent. In other words, it does not say whether the embryos would have to remain in storage or could be destroyed. Quebec has sought to address this issue through its *Regulation Respecting Clinical Activities Related to Assisted Procreation*[12] (*Regulation Respecting Assisted Procreation*), which stipulates that where embryos have been created but not used, spouses must express their intentions in writing regarding what should happen to their embryos in the event they disagree, one dies, their relationship or marriage ends, or the woman for whom the embryos were created is no longer of childbearing age or

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10 This would mean, for instance, that a woman could not use the embryos for her own IVF cycle, and that a man could not use them with a new partner. It would also mean that neither spouse/partner could use the embryos with a surrogate. According to her lawyers' website, Mrs. Nott reportedly intended to argue that section 8 of the *AHRA* is unconstitutional as it violates her right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* and is *ultra vires* federal jurisdiction. See Family Law Blog, "BC and Frozen Embryo Dispute Lawyers", online: Maclean Law, < http://www.bcfamilylaw.ca/2012/12/05/bc-and-canadian-frozen-embryo-family-dispute-lawyers/>

11 For the sake of simplicity, the remainder of this article will use the language of "spouse" to denote both spouses and partners.

12 *Regulation Respecting Clinical Activities Related to Assisted Procreation*, OC 644-2010, 7 July 2010, (2010) GOQ II, 2253, ss 19-20 [*Regulation Respecting Assisted Procreation*].

physically able to use them.[13] While not legally required elsewhere in Canada, Canadian fertility clinics also ask their

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13 *Ibid,* s 21; Assisted reproductive technologies are currently regulated through federal and provincial legislation because this is an area of divided jurisdiction. For instance, prohibitions on payment for gametes, embryos and surrogacy fall within federal criminal law power and are therefore regulated through the federal *Assisted Human Reproduction Ac*t. See *AHRA*, *supra* note 4, ss 6-7; Other issues relating to the regulation of assisted reproduction, such as the collection and disclosure of donor information or determinations of parentage, fall within provincial jurisdiction over hospitals, property and civil rights and matters of a merely local nature. In 2007, the Quebec government brought a reference before the Quebec Court of Appeal arguing that the original version of the *Assisted Human Reproduction Act* was unconstitutional as it impinged upon provincial jurisdiction. See *Procureur Général du Québec c Procureur Général du Canada* (Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, L.R.Q. ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, L.C. 2004, ch.2) 2008 QCCA 1167, [2008] JQ no 5489. The Quebec government was successful and the decision was appealed to the Supreme Court of Canada. However, before the SCC could render its decision, Quebec went ahead and introduced its own legislation and regulations pertaining to assisted procreation. On June 18 2009, the Quebec National Assembly passed Bill 26, *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, 1st Sess, 39th Leg, and then in July 2010 adopted its associated Regulations. See *An Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, RSQ 2009, c A-5.01 [*Act Respecting Assisted Procreation*] and *Regulation Respecting Assisted Procreation*, *supra* note 12. In a split decision, the Supreme Court of Canada struck down parts of the *AHRA* as being *ultra vires* federal jurisdiction but maintained those provisions that it deemed to fall within the ambit of federal criminal law power. Section 8 of the *AHRA* and its *AHR Consent Regulations* were preserved and thus laws relating to disposition decisions between spouses remained the same. See *Reference Re Assisted Human Reproduction Act,* 2010 SCC 61. The effect of the SCC's decision is that currently there exists partial legislation regulating assisted

clients to sign consent forms – prior to embryos being created or frozen – indicating what should happen to embryos if the parties can no longer provide compatible consent. If these agreements are legally enforceable then they may enable parties to contract around the right to revoke consent and allow for embryos to be used for reproduction or be donated, even in the event one spouse changes his or her mind. They may also, however, provide that embryos will be destroyed, even if one spouse, like Mrs. Nott, wishes to use them to have more children.

This article examines these approaches towards resolving disputes over surplus embryos and considers whether they support the express objectives of the *AHRA* and Quebec's *Act Respecting Clinical and Research Activities Relating to Assisted Procreation* (*Act Respecting Assisted Procreation*) to protect the health and well-being of women, to promote the principle of free and informed consent and to recognize that women are more directly affected than men by the use of assisted reproductive technologies (ARTs).[14] It suggests that while Canadian governments and lawmakers have paid lip service to these objectives, current laws seeking to regulate embryo disposition disputes do not fully support these statutes' expressed intentions in practice. Adopting a contract model or allowing one individual to prevent his or her spouse or partner from using embryos for procreation overlooks the experiences of women who undergo *in vitro* fertilization treatment and also does not accord with how Canadian law and public policy has responded to similar conflicts between spouses, or to agreements that seek to control or restrict women's reproductive choices. This article thus considers alternative

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procreation in Canada and Canadian provinces are poised to follow Quebec's lead and introduce their own legislation.

14 *AHRA*, *supra* note 4 at ss 2(c), 2(d); *Act Respecting Assisted Procreation*, *supra* note 13, s 1.

means of responding to these disputes and ultimately provides suggestions for law reform.

This piece focuses specifically on how Canadian laws seek to regulate disputes where both spouses have used their *own* ova and sperm to create embryos. Where same-sex or opposite-sex couples use *donated* sperm or ova to conceive, the law is quite different; should their relationship dissolve, the spouse who was a genetic contributor will be given exclusive control over these embryos.[15] Although the latter situation raises significant issues and is similarly vulnerable to criticism,[16] a thorough exploration of the problems associated with this approach goes beyond the scope of this paper.[17]

This article's analysis contributes to longstanding debates within Canada regarding the merits and problems with

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15 *AHR Consent Regulations*, *supra* note 5, s 10(3); For instance, suppose Amy and Mary created embryos using Amy's eggs and a donor's sperm with the intention that the embryos be used for Mary to undergo IVF. In this case, should they divorce or separate prior to the embryos being used, Amy will have control over the embryos' use or disposition and may prevent Mary from using them.

16 For instance, these laws do not recognize that where a lesbian couple creates embryos for their own reproductive use, they may agree that one spouse will use her eggs while the other will undergo embryo implantation. It is questionable whether in such a scenario it is fair to allow the genetic contributor to have exclusive control. The spouse who did not harvest her eggs may have decided not to do so on the understanding that she would have children using her partner's ova. It is also possible that by the time of a dispute, the spouse who did not use her eggs may no longer have viable ova. In turn, one might argue that such an approach also ignores the financial contribution that spouses may have jointly made to the embryos' creation by paying for IVF treatments or potentially paying for sperm outside of Canada.

17 It should be noted that in choosing this narrow focus, this paper does not intend to suggest that it is important to reproduce biologically, or that genetics ought to be privileged in determining who ought to be considered a parent under Canadian law.

allowing spouses to jointly control embryo disposition and sign consent forms indicating their intentions.[18] In doing so, it takes into account the current state of Canadian law and public policy, the growth of empirical research on IVF and the development of increased case law relating to the disposition of reproductive materials. It also builds upon Canadian scholarship that has debated the benefits and risks of applying a contract model in family law contexts,[19] and which has

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18 See Jennifer Nedelsky, "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6:2 Can JL & Jur 343; Michael Trebilcock et al, "Testing the Limits of Freedom of Contract: The Commercialization of Reproductive Materials and Services" (1994) 32 Osgoode Hall LJ 613; Roxanne Mykitiuk & Albert Wallrap, "Regulating Reproductive Technologies in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen M Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Markham, Ont.: Butterworths, 2002) 367; Christine Overall, "Frozen Embryos and 'Fathers' Rights': Parenthood and Decision-Making in the Cryopreservation of Embryos" in Joan C Callahan, ed, *Reproduction, Ethics and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 178. With the exception of Overall, none of this scholarship considers the merits or problems with these approaches in any detail but rather mentions them in passing. In addition, with the exception of Mykitiuk's piece from 2002, the rest of this literature dates back to the early 1990s. There does not exist any recent published scholarship on this topic; however, this article cites to unpublished conference proceedings, recently prepared by Angela Campbell for the National Judicial Institute, on section 8 of the *Assisted Human Reproduction Act* and the different ways in which Canadian courts might seek to resolve disputes between spouses over surplus embryos. Her piece does not, however, discuss Quebec's legislation. See Angela Campbell, "Averting Misconceptions: Judicial Analyses of Family Disputes over Stored Embryos" in National Judicial Institute, *Proceedings of the National Judicial Institute Family Law Seminar* (February 2012) at 4 [unpublished, on file with author].

19 See e.g. Michael J Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective

advocated for a more "women-centered" legal approach towards the regulation of assisted procreation.[20]

Part I argues that enforcing agreements or consent forms does not take into account studies and jurisprudence that call into question whether parties are in a position to make autonomous, informed decisions regarding embryo disposition prior to undergoing IVF treatment. In addition, Canadian law pertaining to domestic contracts, surrogacy and child adoption resists treating agreements in these contexts the same as binding commercial contracts because of similar concerns about whether such agreements reflect free and informed decision-making.

Part II argues that allowing one individual to prevent his or her spouse from using their embryos for reproduction ignores the ways in which women are especially affected by the creation of embryos and disregards the costs of IVF. These laws seem to provide Canadians with the equivalent of a right not to procreate or parent, even though Canadian law relating to abortion, adoption and parentage or filiation do not provide similar rights, thus calling into question whether such rights ought to exist in relation to IVF embryos.

(1991) 41 UTLJ 533; Wanda A Wiegers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992) 42 UTLJ 170; Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 UTLJ 97.

20 See e.g. Rosemarie Tong, "Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus" in Joan C Callahan, ed, *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington: Indiana University Press, 1995) 55; Diana Majury, "Pre-conception Contracts: Giving the Mother the Option" in Simon Rosenblum, Peter Findlay & Ed Broadbent, eds, *Debating Canada's Future: Views from the Left* (Toronto: James Lorimer & Co, 1991) 197.

Part III then explores alternative means of resolving disputes over frozen embryos. It considers how legislatures and courts in other jurisdictions[21] have responded to conflicts between spouses over embryo disposition and, in turn, how Canadian courts have dealt with analogous situations involving control over genetic material. These varied approaches raise similar issues to the Canadian contractual or joint consent models, and would also conflict with Canadian law and public policy relating to reproductive rights and the non-commodification of reproductive materials.

This article concludes by providing recommendations for how Canadian legislatures and courts might resolve disputes between spouses over their surplus embryos, in a manner that recognizes the experiences of individuals who undergo IVF treatment and the ways in which women are uniquely affected by assisted reproductive technologies. Genetic contributors should be unable to prevent their spouses from using embryos they have created for procreative purposes, and in the event that the parties divorce or separate and both wish to use them, a female spouse should be given priority in light of the greater health risks and complications associated with IVF for women than for men. Agreements between spouses signed prior to a woman undergoing IVF ought to be legally unenforceable. Moreover, some of the issues that arise in relation to embryo disposition could be resolved by providing for increased and mandatory counselling and by clarifying the parental rights and obligations of men or women who no longer wish for their spouse to use their frozen embryos for procreation.[22]

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21 The majority of existing case law dealing with disputes between spouses over embryos is from the United States, but there have also been cases in Israel and the United Kingdom.

22 One might argue that an additional means of resolving these disposition issues would be to freeze a woman's eggs rather than embryos for future reproductive use and to thus avoid issues of joint

EMBRYO DISPOSITION AGREEMENTS AND CONSENT FORMS

While Canadian courts have yet to clarify whether agreements between spouses or clinic consent forms are legally binding, it is worth exploring the implications of adopting a contract model in this context. On this approach, the decision parties made prior to creating embryos would be binding, unless spouses jointly agreed to update their consent form or agreement at a later point in time. Thus if spouses had elected, for instance, to donate their embryos for reproduction in the event of a disagreement, they would be bound by this decision even if, at a later date, one of the parties no longer finds this option palatable. Importantly, their original choice would also be enforced if one party still wishes to use the embryos for reproduction. These agreements might also, however, allow spouses or partners to potentially circumvent the *AHRA* and *AHR Consent Regulations*, which require joint consent to use or donate embryos.[23] For instance, parties might have stipulated in their agreement that if they disagree or divorce, one spouse will be uniquely given control over the embryos, or a third party, such as a judge or clinic, will be given authority to make a decision. The only decisions that could not be binding would

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control in the first place. In the future this may provide a viable way to prevent these issues from arising. At the moment, however, while egg freezing techniques are becoming increasingly sophisticated, this procedure is still in its infancy. Embryo freezing remains common practice because embryos are more resistant to freezing techniques and are able to be thawed and implanted with a greater chance of successful pregnancy than frozen eggs. See e.g. Alison Motluk, "Growth of Egg Freezing Blurs 'Experimental' Label" (2011) 46 Nature 382; Karey Harwood, "Egg Freezing: A Breakthrough for Reproductive Autonomy?" (2009) 23 Bioethics 39.

23 See Part II for a detailed discussion of these provisions regarding joint consent.

be those that would clearly violate Canadian law and public policy.[24]

This contractual approach has long received support from Canadian scholars, ethicists and physicians. Twenty years ago, when Canadians were first debating how best to address potential conflicts over frozen embryos, the government-appointed Royal Commission on New Reproductive Technologies recommended that gamete providers be jointly required to make decisions regarding the disposition of their embryos prior to gametes being retrieved or embryos created, and to indicate their preferences in consent forms that would be binding for the clinic involved.[25] Some Canadian scholars similarly proposed that while it might be appropriate for the Canadian government to establish a default for what would happen to embryos in the event that the genetic contributors divorce or die, Canadians ought to be able to contract around this default using consent forms.[26]

Support for a clear-cut contractual approach is not surprising. It was thought that enforcing agreements would prevent disputes between spouses and litigation over embryo

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[24] For instance, parties could not agree that in the event they divorce, the remaining embryos could be sold for reproductive use or research and the proceeds be divided amongst the spouses; such an arrangement would directly contravene the *AHRA*'s prohibitions on buying and selling gametes. See *AHRA, supra* note 4, s 7. They also clearly could not sign a binding agreement that in the event of a disagreement between spouses, the female spouse would nonetheless be forced to use the embryos for procreation as this too would violate Canadian public policy relating to women's reproductive autonomy.

[25] Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) at 598.

[26] See Trebilcock, *supra* note 18 at 691.

disposition.[27] In theory, using agreements to resolve disputes would also mean that neither party would be forced to dispose of their embryos in a manner that they had not previously contemplated; spouses would have been aware precisely of what would happen to their embryos should certain events arise and couples would have been in a position to negotiate at that time what they felt would be the most appropriate manner to resolve any future disputes. The parties would be informed as to their options, and would be free to refuse to consent to treatment should they be unable to come to an agreement.

It is far from clear, however, that Canadians are in a position to provide free and informed consent regarding embryo disposition at the time these agreements and consent forms are signed. As the number of individuals undergoing IVF has grown over the last three decades, so has the social science research available on the experiences of individuals undergoing treatment and the decisions they make regarding their frozen embryos. This literature demonstrates that many individuals change their minds about whether they would like to use, donate or destroy their surplus embryos following IVF treatment and especially following the birth of a child. The lack of mandatory counselling and legal advice for individuals undergoing IVF in Canada may mean that spouses make decisions without fully understanding the legal implications of their choices. In turn, judicial decisions from Canada and abroad also suggest that individuals, and especially women, who make decisions regarding their embryos may be so eager to begin the IVF process that they may not contemplate the potential consequences of the agreements they are signing, or may agree to a disposition option in order to appease their spouse. The following section will consider each of these concerns in turn.

Free and Informed Consent

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27 See *Proceed with Care*, *supra* note 25 at 598.

Change of Heart

Empirical research demonstrates that many patients change their minds regarding what should happen to their extra embryos following IVF and especially after successfully giving birth to a child through these methods.[28] A number of studies have shown that while a substantial number of individuals or couples indicated initially – pre-IVF treatment – that they would be interested in donating their surplus embryos for third-party reproduction or research, the vast majority did not follow through when asked again to make a decision following treatment.[29] For instance, in one American study 71% of couples changed their preference regarding disposition between the time the embryos were created and when they were asked to make a final decision.[30] A Canadian study demonstrates that while most patients preferred to donate their embryos to research prior to undergoing IVF, and indicated this preference on their consent forms, many had a change of heart after completing IVF and decided to discard them.[31]

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28 See Eric Blyth et al, "Embryo Relinquishment for Family Building: How Should it be Conceptualised?" (2011) 25:2 Int'l JL Pol'y & Fam 260 at 266.

29 See e.g. Sheryl De Lacey, "Parent Identity and "Virtual" Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20:6 Human Reproduction 1661 at 1661-1662 [De Lacey, "Parent Identity"]; CR Newton et al, "Changes in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 22:12 Human Reproduction 3124 [Newton, "Changes"].

30 See Susan C Klock, Sandra Sheinin & Ralph R Kazer, "The Disposition of Unused Frozen Embryos" (2001) 345 N Engl J Med 69.

31 See Newton, "Changes", *supra* note 29 at 3127.

Some scholars have hypothesized that this change of heart may be linked to individuals' changing perceptions of their embryos.[32] Qualitative and quantitative research on IVF and embryo donation suggests that patients' perceptions of their frozen embryos often shifts over time and is particularly liable to change following IVF treatment.[33] These studies reveal that many women who successfully conceived using IVF began to see their embryos as their potential children.[34] For instance, one study recounted that of 75 women interviewed who had undergone IVF, 90% viewed their embryos as potential persons and as potential brothers or sisters to their own children.[35] Other research explains that couples with *in vitro* embryos began to describe them as their "virtual children."[36]

Once individuals successfully conceived through IVF, many expressed reluctance to donate what they perceived as

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32 See Blyth, *supra* note 28 at 267.

33 See e.g. Robert D Nachtigall et al, "How Couples Who have Undergone In Vitro Fertilization Decide what to do with Surplus Embryos" (2009) 92 Fertility and Sterility 2094; Newton, "Changes", *supra* note 29.

34 See e.g. Robert D Nachtigall et al, "Parents' Conceptualizations of their Frozen Embryos Complicates the Disposition Decision" (2005) 84 Fertility and Sterility 431 at 433 [Nachtigall, "Parents' Conceptualizations"]; Catherine A McMahon et al, "Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks and Embryo Dilemmas After Five Years" (2000) 10 Repro Tech 131 at 133 [McMahon, "Mothers Conceiving"].

35 See McMahon, "Mothers Conceiving", *supra* note 34 at 133.

36 See De Lacey, "Parent Identity", *supra* note 29; Nachtigall, "Parents' Conceptualizations" *supra* note 34 at 433; De Lacey clarifies, however, that this view is distinct from the perception that embryos are "unborn children" or are already lives from the moment of conception. See De Lacey, "Parent Identity", *supra* note 29 at 1667.

their biological offspring or "children."[37] Some drew an analogy to adoption, and explained that they could not bear the thought of giving away their genetic kin.[38] For instance, one woman who changed her mind explained: "And I felt good about that whole thing until the time came when I had to make that decision and I found that [began weeping] … I couldn't donate them. I never thought about that [someone else having my child] really."[39] Several respondents in other studies explained that they could not conceive of their genetic offspring living elsewhere and being raised by other parents.[40] As one pointed out: "I feel guilty that I have five embryos in storage and that I am unwilling to donate them. But I see the embryos as my children, and them being raised by someone else would be something I would never get over. I see it as like adopting out one of my twins."[41] Another explained: "Having my child living somewhere else is not acceptable. It's not like

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37 See De Lacey, "Parent Identity" *supra* note 29 at 1665; McMahon, "Mothers Conceiving", *supra* note 34 at 133.

38 See e.g. Maggie Kirkman, "Egg and Embryo Donation and the Meaning of Motherhood" (2003) 38:2 Women and Health 1 at 10; De Lacey, "Parent Identity", *supra* note 29 at 1666; Sheryl De Lacey, "Decisions For the Fate of Frozen Embryos: Fresh Insights into Patients' Thinking and Their Rationales for Donating or Discarding Embryos" (2007) 22 Human Reproduction 1751 at 1754.

39 See De Lacey, "Parent Identity", *supra* note 29 at 1664.

40 See e.g. Catherine A McMahon & Douglas M Saunders, "Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation" (2009) 91:1 Fertility and Sterility 140 at 144; Julianne Zweifel et al, "Needs Assessment for those donating to stem cell research" 88:3 (2007) Fertility and Sterility 560 at 562; Karin Hammarberg & Leesa Tinney, "Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples' Decisions and the Factors Influencing their Choice" (2006) 86 Fertility and Sterility 86 at 90.

41 See McMahon & Saunders, *supra* note 40 at 144.

I'm donating an egg. I've thought of this as well. It's not like my egg or P's sperm. It's our child."[42]

As a result of these findings, researchers have questioned whether individuals who are planning to use IVF in attempt to build their families are in a position to make informed decisions prior to undergoing treatment,[43] and whether such agreements ought to be legally binding.[44] This research, like all empirical studies, has some methodological limitations and may not reflect the experiences of all individuals who undergo IVF.[45] However, this change in decision-making following IVF treatment has been identified in studies across different jurisdictions[46] and, importantly for the

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42 See McMahon, "Mothers Conceiving", *supra* note 34 at 133.

43 See e.g. Brandon J Bankowski et al, "The Social Implications of Embryo Cryopreservation" (2005) 84:4 Fertility and Sterility 823 at 827-828; AD Lyerly, "Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent" (2011) 26 Human Reproduction 646 at 650.

44 For a critique of using these consent forms in the United States see Deborah L Forman, "Embryo Disposition and Divorce: Why Clinic Consent Forms are not the Answer" (2011) 24 J Am Acad Matrimonial Law 57.

45 For instance, as is common with social science literature, these studies acknowledge their limitations with respect to sample size, potential biases, and other factors that might have influenced their results. These limitations may be particularly prevalent with respect to empirical research on assisted reproductive technologies; given the secrecy that traditionally surrounded the use of ARTs, as well as the criminalization of payment in return for reproductive materials in Canada, many people may be unwilling to discuss their experiences, and those who are keen to have their voices be heard might be those who are predisposed to hold certain views.

46 See e.g. Blyth, *supra* note 28 (which summarizes findings across different jurisdictions).

purposes of this article, this trend has been studied and identified in Canada as well.[47]

Counselling and Legal Advice

Canadians also may not be currently receiving adequate information about the potential consequences of the consent forms or agreements they are signing. Under the *AHR Consent Regulations*, donors must be informed in writing about how their embryos will be used, and the manner and period of time in which they may withdraw their consent.[48] In turn, Quebec's *Regulation Respecting Assisted Procreation* specifies that a physician or health professional must inform IVF patients about the possibility that the number of embryos produced will exceed their reproductive needs and the need to plan, along with their spouse, as to how they should be disposed of.[49] However, it is unclear how much time clinics or hospitals take to explain their consent forms to patients, and also whether patients are being provided with sufficient information about these consent forms' potential legal implications.

Counselling and legal advice for individuals who create or donate embryos is not legally required, despite being highly encouraged or required by some clinics, and will increase the substantial costs already associated with IVF.[50] Prior provisions of the *AHRA* had required that counselling

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47 See Newton, "Changes", *supra* note 29.

48 *AHR Consent Regulations*, *supra* note 5, s 12.

49 *Regulation Respecting Assisted Procreation*, *supra* note 12, s 20(8).

50 With the exception of Quebec where IVF is covered. However, even in the case of Quebec, while some clinics provide a complementary counselling session this is not required. See Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy" (2012) 20:3 Health Law Review 15 at 24.

services be made available to individuals donating reproductive materials or *in vitro* embryos and that licensees ensure that donors receive these services. However, in the Supreme Court of Canada's 2010 decision in *Reference Re Assisted Human Reproduction Act* the Court struck down these provisions, having found that they were *ultra vires* federal jurisdiction.[51] Quebec's *Regulation Respecting Assisted Procreation* currently states that physicians must inform patients about "the availability of psychological support at the centre."[52] However, in many cases patients will need to pay to receive this counselling, which might discourage them from receiving needed support.[53]

While clinics may purport to provide patients with information about their legal rights and obligations with regard to any surplus embryos, this information may be inadequate. For instance, an Ottawa fertility clinic's information pamphlet indicates that the woman for whom the embryos were created and any partner must "provide for disposition of any embryos that are not used for the purpose of attempting to initiate a pregnancy, in case of any subsequent change to [their] health or marital status" and explains that donors have the right to modify this choice at any point in the future by withdrawing their consent in writing.[54] However, this pamphlet does not clarify that spouses would need to *jointly* decide to change their decision. Thus, for instance, a woman who indicates on the consent form that the embryos may be donated to a third-party in the event that she and her spouse separate may not, in fact,

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51 *AHRA*, *supra* note 4, s 14; *Reference Re AHRA, supra* note 13.

52 See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 20(12).

53 See Carsley, *supra* note 50 at 24.

54 Ottawa Fertility Centre, "Patient Information Kit: Freezing Human Embryos After In Vitro Fertilization" online: <http://www.conceive.ca>.

ever have the ability to change her mind, should her spouse refuse to modify his consent. This clinic also explains that "legal principles and requirements around embryo freezing have not been firmly established" and that it is the "couple's responsibility to seek legal advice where legal ownership [of the embryos] may be in question."[55]

Pressure to Begin Treatment

Women who are eager to start the IVF process may also not be in a position to fully contemplate the outcomes of signing these agreements. Usually IVF represents a last attempt for opposite-sex couples to have a genetic child. They turn to IVF after they have already unsuccessfully attempted to conceive through intercourse for over a year and often after they have already tried other less invasive methods of assisted procreation, such as artificial insemination. In addition, because a woman's chances of conceiving continue to decrease as she ages,[56] women may feel pressure to undergo IVF as quickly as possible, and may not be willing or feel able to take the time to consider the implications of an embryo disposition agreement.

The case of *Roman v. Roman* demonstrates this potential issue. The Court of Appeals of Texas upheld a clinic consent form that allowed for a couple's embryos to be destroyed in the event of a disagreement. Mrs. Roman wished to use them for reproduction, and had not yet had a chance to undergo a first round of IVF, as her husband withdrew his consent following the extraction and fertilization of her eggs, on the night prior to her scheduled implantation. Mrs. Roman testified that while she signed the agreement, "she would have signed anything to move forward because her goal was to have

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55 *Ibid*.

56 See e.g. James P Toner, "Age = Egg Quality, FSH Level = Egg Quantity" (2003) 79:3 Fertility and Sterility 491.

a child" and that she and her ex-husband never discussed the prospect of divorce or what would happen to their embryos in the event they should disagree.[57]

Donors might also understand the legal implications of these consent forms but give in to their spouse or partner's requests or demands simply because they wish to begin the IVF process. For instance, the decision of the British Columbia Supreme Court in *K.D. v. N.D.* demonstrates that one spouse may decide to sign an embryo disposition agreement that does not reflect his or her wishes. In this case, a couple signed an agreement prior to undergoing IVF that clarified that in the event they should disagree or divorce, "custody" over the embryos would be decided in court. While their clinic's standard consent form would have given Mrs. K.D. control over the embryos, Mr. N.D. had revised the agreement without consulting her and then asked for her signature. She complied, even though she claimed that she was unhappy about the modification.[58] Their marriage deteriorated, and at the time of divorce she initially sought an order that she be given control over the embryos. However, by the time of the divorce trial the parties had agreed that the embryos would be destroyed. Thus the Court was not asked to determine the validity of their prior agreement, but rather simply granted the order that Mr. N.D. requested: that the embryos "be destroyed in a manner acceptable to K.D." and that she be required to provide proof that the embryos have been destroyed.[59] The Judge did not inquire into the circumstances under which Mrs. K.D. signed the original agreement, or question what caused her to change her mind and give in to her ex-husband's request to have the embryos destroyed.

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57 *Roman v Roman*, 193 SW 3d 40 (2006) at 15 [*Roman*].

58 *KD v ND*, 2009 BCSC 995 at para 17.

59 *Ibid* at para 180.

The experiences of individuals and couples who undergo *in vitro* fertilization combined with the potential lack of counselling and legal advice for couples making embryo disposition decisions, thus raises questions about whether contracts signed prior to a woman undergoing IVF should be given legal weight. If donors were unable to contemplate the effects of these agreements or how they might later feel about their decision, then they were not in a position to make enlightened, informed choices regarding embryo disposition. It is also not clear to what extent these consent forms or agreements reflect the autonomous wishes of spouses. Given that spouses need to decide, from the outset, as to how embryos should be disposed of at a later date, if they disagree at the time of the contract's creation one spouse is likely to bend to the wishes of the other in order to proceed with treatment. In light of these circumstances, enforcing agreements may run directly counter to the intentions of the *AHRA* and Quebec's *Regulation Respecting Assisted Procreation* to ensure that embryos are only used or donated in circumstances where donors have provided free and informed consent.[60]

Legally Enforceable Agreements

Canadian law and public policy resists applying a traditional contract model to a variety of family law agreements, in part because of concerns about whether parties are in a position, at the time of these agreements' creation, to provide free and informed consent. For instance, while Canadian courts have emphasized the importance of upholding domestic contracts between spouses, these agreements may be potentially set-aside in circumstances where an arm's length commercial contract would not be subject to judicial interference.[61]

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60 *AHRA*, *supra* note 4, s 2(d); *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19.

61 For instance, in *Miglin v Miglin*, the Supreme Court of Canada made clear that in assessing the weight to be given to an agreement that

Canadian legislation and jurisprudence also demonstrates that surrogacy contracts are not to be treated the same as commercial agreements.[62] For instance, Quebec, Alberta and British Columbia's family law legislation makes clear that these agreements are not legally enforceable and do not constitute valid consent to relinquish a child.[63] In order for

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limits spousal support under the *Divorce Act*, a court need not look for "unconscionability" to set aside the agreement or modify its intended outcome. See *Miglin v Miglin*, 2003 SCC 24, [2003] 1 SCR 303 [*Miglin*]; See also Campbell, "Averting Misconceptions", *supra* note 18 at 17-18. Note, however, that in *Miglin* the Court decided to uphold the agreement that was at issue and set quite a high threshold for judicial intervention in domestic contracts. For commentary on this case, see e.g. Carol J Rogerson, "They are Agreements Nonetheless: Case Comment on *Miglin v. Miglin*" (2003) 20 Can J Fam L 197.

62 Under a surrogacy agreement, a woman agrees – prior to conception – to carry a baby for another couple and if the pregnancy is successful to give up the child following the birth. Some of these agreements may also set out the surrogate and intending parents' mutual expectations and aspirations with regard to the surrogate's lifestyle choices during pregnancy, doctors visits and the reimbursement of her expenses. See e.g. Shireen Kashmeri, *Unravelling Surrogacy in Ontario, Canada: An Ethnographic Inquiry on the Influence of Canada's Assisted Human Reproduction Act (2004) on Surrogacy Contracts, Parentage Laws, and Gay Fatherhood* (MA Thesis, Concordia University, 2008) at 68 [unpublished].

63 Surrogacy agreements are "absolutely null" under article 541 of the *Civil Code of Québec*. This reflects the view, unique to Quebec, that even altruistic surrogate motherhood violates public order. See Angela Campbell, "Law's Suppositions about Surrogacy against the Backdrop of Social Science" (2012) 43:1 Ottawa L Rev 29 at 50; *Civil Code of Québec*, SQ 1991, c 64, art 541 [CCQ]; Alberta's *Family Law Act* similarly states that an agreement in which a surrogate consents to relinquish a child to intending parents is not enforceable, but may potentially provide evidence of intending parents' consent to parent a child born through surrogacy. *Family*

intending parents to acquire parental rights to the exclusion of a surrogate mother, a surrogate must consent to give up the child, and her parental rights, *following* the child's birth.[64] Prior jurisprudence also suggests that Canadian courts would be unwilling to force a surrogate to give up a child against her wishes, even in those provinces that do not have explicit legislative provisions declaring that that surrogacy contracts are unenforceable. Canadian courts have not yet needed to contend with a custodial contest between a surrogate and intending parents as the only Canadian surrogacy dispute was never reported as going to trial.[65] However, in cases where surrogates

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Law Act, SA 2003, c F-4.5, s 8.2(8) [Alberta *FLA*]; British Columbia's *Family Law Act* also states that an agreement "to act as a surrogate or to surrender a child" does not constitute consent to give up a child, but "may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth." *Family Law Act*, SBC 2011, c 25, s 29(6) [BC *FLA*]; It should also be noted, however, that some scholars have suggested that surrogacy agreements ought to be enforceable, despite these laws. See e.g. Louise Langevin, "Réponse Jurisprudentielle à la Pratique des Mères Porteuses au Québec; Une Difficile Réconciliation" (2010) 26 Can J Fam L 171.

64 Note however that in Quebec, a surrogate's consent may not even be sufficient. Intending parents are only able to receive legal recognition by obtaining a special consent adoption under article 555 CCQ, and case law has demonstrated that while some judges have been willing to allow for these adoptions, others have not because this has been viewed as circumventing article 541 CCQ which states that surrogacy agreements are null and void. See CCQ *supra* note 63, arts 541, 555; *Adoption –091*, 2009 QCCQ 628, [2009] RJQ 445 (where a judge refused to allow for a special consent adoption, even where the birth mother consented); But see *Adoption — 09184*, 2009 QCCQ 9058, [2009] RJQ 2694, *Adoption — 09367*, 2009 QCCQ 16815, [2010] RDF 387, and most recently, *Adoption —1445*, 2014 QCCA 1162 (where Quebec judges have been willing to allow intending parents to adopt a child born through surrogacy).

65 *W(HL) v T(JC)*, 2005 BCSC 1679.

and intending parents agreed that the intending parents would have sole custody, Canadian judges have nonetheless noted that they were able to transfer parental rights to intending parents in part because the surrogate consented, following the birth, to not be considered the child's legal parent.[66]

Canadian adoption law statutes also do not permit women to provide binding consent to an adoption prior to giving birth and also provide birth parents with a period of time in which they may revoke their consent. Provincial statutes across Canada make very clear that consent to adoption is only valid if it is given in writing,[67] following the birth of the child, and often following a specific number of days stipulated in each province's adoption legislation. For example, British Columbia's *Adoption Act* clarifies that a birth mother's consent will only be valid if it is given at least ten days after the child's birth,[68] whereas in Ontario birth parents' consent may only be given once the child is seven days old.[69] A birth mother is also given the opportunity to revoke her consent up to a certain point after the child's birth. For instance, in British Columbia

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66 See e.g. *R(J) v H(L)*, [2002] OJ No 3998 (where the court granted the intending parents' application to declare the gestational carrier not to be the mother of the twins she carried, but where Justice Kiteley noted that had the surrogate opposed this application, this could have posed a problem); See *WJQM v AMA,* 2011 SKQB 317, 339 DLR (4th) 759 (where the court noted that Mary, the surrogate mother, "does not view herself as Sarah's mother and supports the petitioners' application to remove her name from that designation on Sarah's registration of live birth").

67 Different provinces have different formalities for providing written consent. For instance, British Columbia requires birth parents to fill out certain forms. *Adoption Regulation,* BC Reg 291/96, s 9; Quebec requires that consent be given in writing before two witnesses. CCQ, *supra* note 63, art 548.

68 *Adoption Act*, RSBC 1996, c 5, s 14 [BC *Adoption Act*].

69 *Child and Family Services Act*, RSO 1990, c C11, s 137(3) [*CFSA*].

and Quebec the period of time for revocation is 30 days after consent was given.[70] In Ontario it is 21 days.[71] If consent is withdrawn during the revocation period, then the child must be returned; however, if the period of time has elapsed, then the child is to remain with his adoptive family, subject to some exceptions.[72] Any agreements, verbal or written, that were created prior to these statutory time periods are not legally binding.

In each of these contexts, the law recognizes that agreements between spouses or between a pregnant woman and third parties ought not to be treated the same as other contracts, because of the nature of these agreements and the circumstances in which they were created. The lower threshold for judicial intervention in the context of domestic agreements, as compared to commercial contracts, reflects the law's recognition that these agreements may be negotiated in emotional circumstances and may reflect power imbalances between spouses or partners.[73] In the context of adoption and surrogacy, Canadian laws recognize that a surrogate or a birth mother may change her mind and wish to keep the child she has carried following pregnancy and childbirth, and that where a woman does give up a child, it should be in circumstances where she has been given the time to reflect upon this decision and is given the opportunity to make an informed and autonomous decision. Laws relating to adoption and surrogate motherhood also arguably reflect a desire under Canadian public policy to protect women's reproductive autonomy and to

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70 CCQ, *supra* note 63, art 557; BC *Adoption Act*, *supra* note 68, s 19.

71 See *CFSA*, *supra* note 69, s 137(8).

72 For example, the *Civil Code of Québec* explains that if a birth parent fails to revoke consent within 30 days he or she may nonetheless apply to a court to have the child returned before the order of placement. CCQ, *supra* note 63, art 558.

73 See e.g. *Miglin*, *supra* note 61 at paras 74-75.

prevent the commercialization of reproduction.[74] They seek to preclude third parties from making decisions that will determine whether a woman may raise the child she has carried and to prevent children from being treated as commodities than can be exchanged on the market.[75] These laws also demonstrate an intention to ensure that a child's interests are given priority; Canadian courts consider the best interest of the child in determining who ought to be a child's legal parents, regardless of any existing agreements.[76]

These agreements are not entirely analogous to embryo disposition agreements. Unlike marriage, cohabitation or separation agreements, embryo disposition contracts or consent forms do not deal with financial obligations, the distribution of property or custody and access with regard to children.[77] Canadian law makes clear that embryos are not "persons" and thus are not children,[78] and it would be inconsistent with the

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74 See e.g. *AHRA, supra* note 4, s 6 (which prohibits commercial surrogacy); BC *Adoption Act*, *supra* note 68, s 84 (which prohibits giving or receiving payment for an adoption). See also Campbell, "Law's Suppositions", *supra* note 63 at 48-51 (which explains that some of the concerns driving the *AHRA* and the *Civil Code of Québec*'s responses to surrogacy were related to the commodification of human life, concerns about women's reproductive autonomy and informed consent).

75 The issues associated with treating embryos as property are discussed in more detail later on in this article.

76 See e.g. *Adoption —1445*, *supra* note 64; *WRL v CDG*, [1994] MJ No 152; *WW v XX*, [2013] OJ No 600; *MAC v MK*, 2009 ONCJ 18, [2009] OJ No 368.

77 Note that marriage contracts and cohabitation agreements, however, may not deal with custody and access. See e.g. *Family Law Act*, RSO 1990, c F3, s 52-53.

78 See e.g. *Daigle v Tremblay*, [1989] 2 SCR 530 [*Daigle*] (where the Supreme Court held that a fetus is not a human being and thus does not enjoy a "right to life" under Quebec's *Charter of Human Rights*

Assisted Human Reproduction Act, which prohibits the commercialization of reproductive material,[79] to treat embryos the same as other property that may be negotiated for, contracted over and bought and sold. Domestic agreements also do not seek to make decisions that may ultimately determine whether one party may be able to reproduce and raise a child. In turn, unlike a surrogate or birth mother, a woman who donates or destroys her embryos in accordance with a clinic consent form or spousal agreement does not give up a child she has carried and birthed.

However, embryo disposition agreements nonetheless raise similar issues as domestic contracts, surrogacy contracts, and adoption agreements. Agreements or consent forms setting out spouses' intentions regarding their embryos may also be signed in emotional circumstances, and may not reflect both parties' wishes. Embryo donors, much like surrogates or birth mothers, may change their minds regarding whether they would like to donate their embryos – and thus give up an opportunity to have and raise a child – after they experience pregnancy and childbirth. In turn, embryo disposition agreements, much like surrogacy contracts or adoption

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and Freedoms); *Winnipeg Child and Family Services (Northwest Area) v G(DF),* [1997] 3 SCR 925 (which confirmed that a fetus or unborn child is not a person who possesses legal rights under common law). A fetus is defined as "a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation, excluding any time during which its development has been suspended, and ending at birth." *AHRA*, *supra* note 4, s 3. An *in vitro* embryo is less developed as it is not permitted to remain outside of a human body for longer than fourteen days following fertilization or creation unless its development is suspended through cryopreservation or vitrification. See *AHRA*, *supra* note 4, s 5(d). Thus if a fetus is not a person, then by extension an embryo also does not have legal personhood status.

79 *AHRA*, *supra* note 4, s 7.

agreements, seek to restrict or control a woman's ability to reproduce or her choice to carry and/or raise her genetic children, and thus are arguably problematic on grounds of public policy.

This article contends that given these similarities, embryo disposition agreements ought not to be treated the same as binding contracts and should be legally unenforceable. The threshold for judicial interference in relation to domestic contracts seems too high for embryo disposition agreements given that they involve decisions regarding women's reproduction. Moreover, much like surrogacy contracts or pre-birth agreements to relinquish a child for adoption, these contracts may be executed at a time when women do not have sufficient information in order to make free and informed decisions regarding the disposition of their embryos.

THE IMPLICATIONS OF JOINT CONSENT AND CONTROL

Even if embryo disposition agreements are not treated as legally binding, federal and Quebec provincial laws and regulations would still apply to mandate that spouses have joint control over these embryos and that one party may revoke his or her consent prior to embryo implantation. Under section 8 of the *AHRA* and its *AHR Consent Regulations*, if spouses used their own genetic material in order to create embryos for reproduction, these spouses are jointly considered the embryo "donor" and their embryos cannot be used and cannot be donated without their mutual consent, even if they divorce or separate.[80] If one spouse is unwilling to consent to use or donate the couple's surplus embryos, the embryos will either have to remain in storage or can potentially be destroyed.

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80 *AHRA, supra* note 4, s 8(3); *AHR Consent Regulations*, *supra* note 5, ss 10(1), 10(2).

What happens to these embryos if one spouse withdraws his or her consent might depend upon whether spouses are within or outside of Quebec. Quebec's *Regulation Respecting Assisted Procreation* has the added requirement that spouses mutually consent to embryos being destroyed,[81] and also states that if both parties fail to make contact with a fertility centre for over five years to re-express their intentions regarding their embryos, the centre may dispose of them as it wishes.[82] Thus Quebec's *Regulation* provides a default that appears to contradict the *AHRA*'s provisions: Quebec clinics are authorized to donate or destroy embryos even without parties consenting to dispose of them in that manner.

What is most important for the purposes of this article, however, is that in Quebec and across Canada, the *AHRA*'s provisions regarding joint consent and unilateral revocation may have the effect of preventing one spouse from using embryos they have created for reproductive purposes. In the *Nott* case discussed in the introduction to this paper, even if Mr. and Mrs. Nott had not signed an agreement stating that their embryos may be destroyed, Mrs. Nott would still be unable to use the embryos to reproduce without her former husband's consent.

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81 See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19(3). It should be noted that the regulations do not use the term "destroy", but rather "dispose of" which might be thought to connote donation as well as destruction; however, the French version uses the language "élimination" suggesting that what they intended was destruction.

82 *Regulation Respecting Assisted Procreation, supra* note 12, s 24; Quebec's *Regulation* also requires that spouses must jointly contact a centre once a year to re-express their intentions regarding the freezing and storage of their embryos. See *Regulation Respecting Assisted Procreation, supra* note 12, s 23.

In addition, the *AHRA* also seems to enable a male spouse, like Mr. Nott, to not only revoke his consent years after the embryos' creation, but also immediately after, providing he withdraws his consent prior to the embryos being implanted. Embryo implantation occurs 2-5 days after embryos are created.[83] It is thus possible – as is evidenced in jurisprudence from the United States[84] – for a male spouse to revoke his consent midway through the first IVF cycle, after his spouse has already undergone fertility treatment and ova extraction, but just prior to implantation.

These laws providing spouses with joint control seem to be based on the idea that as co-genetic contributors, men and women ought to have an equal say in what becomes of their embryos. It seems that in allowing one party to withdraw his or her consent, these provisions also reflect the view that one spouse should not be forced to procreate or be a parent against his or her wishes.

This approach, much like the contractual approach discussed in Part I, has received support as well as criticism from Canadian scholars. For instance, Jennifer Nedelsky has pointed out that allowing both partners to make decisions regarding their embryos might be desirable because "we think a sense of attachment and concern about the potential life one shared in creating is appropriate" and because "we might well judge that this sense of attachment should be honoured even in the form of permitting one partner to refuse to allow the potential life to develop into a child under circumstances over

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83 See e.g. Manon Ceelen et al, "Growth and Development of Children Born After In Vitro Fertilization" (2008) 90:5 Fertility and Sterility 1662 at 1662; Charles P Kindregan Jr & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science*, 2nd ed (Chicago: ABA Publishing, 2011) at 92-93.

84 See *Roman, supra* note 57.

which he or she could have no control."[85] Christine Overall, Roxanne Mykitiuk and Albert Wallrap, however, have pointed out that an approach which privileges joint control over embryos does not recognize the potential power imbalances between men and women and the fact that women undergo invasive treatment in order to create their embryos.[86]

The following section takes up the latter position and suggests that an approach that requires joint consent and which allows for unilateral revocation does not adequately account for the health effects of IVF, the biological differences between men and women and the high costs of *in vitro* fertilization treatment. These factors call into question the idea that men and women ought to have joint control. While both parties may have contributed genetically to the creation of embryos, their contribution to the process of IVF is not equal and these laws disproportionately disadvantage women.

Equitable Contribution and Effects?

Health Effects of IVF

Allowing a man to prevent a woman from using embryos for reproduction ignores the health risks and effects women endure as part of the IVF process. Women who undergo IVF subject themselves to an invasive and risky procedure in order to cultivate their limited number of ova to create embryos.[87] They

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85 See Nedelsky, *supra* note 18 at 361. She also points out: "A sense of concern and responsibility for the future of the children one has participated in bringing into the world may, however, be thought to be grounds for granting even a 'vetopower' of joint control."

86 See Overall, *supra* note 18 at 187-191; Mykitiuk & Wallrap, *supra* note 18 at 415.

87 See Mykitiuk & Wallrap, *supra* note 18 at 415; Overall, *supra* note 18 at 187-191.

are typically required to take hormone medication in order to stimulate their ovaries to produce multiple oocytes. When the ova are ready to be retrieved, a physician uses an ultrasound probe to remove them, by directing a needle through the vaginal wall into the ovarian follicles. The eggs that are successfully retrieved are then fertilized in a Petri dish in order to create embryos for implantation.[88]

Studies are mixed on the adverse health risks of IVF for women, with some indicating that women undergoing IVF treatment have an increased risk of blood clots, ectopic pregnancies, preeclampsia and placental separation.[89] It is clear, however, that the fertility drugs used to stimulate women's ovaries may result in ovarian hyperstimulation syndrome, which is estimated to affect between 1-10% of women undergoing IVF treatment.[90] This condition, in which fertility medications cause patients to produce too many eggs, is potentially life threatening.[91]

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88 See e.g. Ceelen, *supra* note 83 at 1662; Kindregan, *supra* note 83 at 92-93.

89 See e.g. Tarek A Gelbaya, "Short and Long-Term Risks to Women who Conceive Through In Vitro Fertilization" (2010) 13:1 Human Fertility 19 at 19.

90 See Margarida Avo Santos, Ewart W Kuijk & Nick S Macklon, "The Impact of Ovarian Stimulation for IVF on the Developing Embryo" (2010) 139 Reproduction 23 at 25; William M Buckett et al, "Obstetric Outcomes and Congenital Abnormalities After In Vitro Maturation, In Vitro Fertilization, and Intracytoplasmic Sperm Injection" (2007) 110:4 Obstetrics & Gynecology 885 at 885; See Justin J Madill, Neil B Mullen & Benjamin P Harrison, "Ovarian Hyperstimulation Syndrome: A Potentially Fatal Complication of Early Pregnancy" (2008) 35:3 The Journal of Emergency Medicine 283 at 283.

91 Common side effects include rapid weight gain, difficulty breathing, abdominal pain and vomiting, but this may also result in more serious complications such as kidney failure, blood clots and death. See e.g.

The purpose of creating and freezing surplus embryos is to reduce the number of times a woman will need to undergo ovarian stimulation and egg cultivation procedures because of the risks and discomfort associated with this process. Denying a woman the ability to use these embryos frustrates these intentions, as it would compel her to undergo an additional round of unnecessary medical treatment, providing she is able to physically or financially afford to undertake an additional IVF cycle.

Biological Differences

Laws mandating that spouses provide joint consent to use their embryos also do not recognize that because of biological differences between men and women, a couple's frozen embryos may represent a woman's best or only chance of conceiving. In the absence of a medical condition, men can continue to produce viable sperm at a much older age than women can produce ova. Women's eggs become less viable as they age and thus women may be less likely to conceive using newly created embryos, than ones that had been frozen previously. Women also may be at higher risk of complications if they retrieve their eggs at a later age, as they will be required to take increased hormone medication to stimulate their ovaries.[92] Thus even if a woman is willing to undergo further

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The Practice Committee of the American Society for Reproductive Medicine, "Ovarian Hyperstimulation Syndrome" (2008) 90 Fertility and Sterility S188 at S189; Gelbaya, *supra* note 89 at 20; Madill, *supra* note 90 at 285. See also Alison Motluk, "'I thought I just had to sleep it off': Egg donor sues Toronto fertility doctor after suffering stroke", *National Post* (March 28 2013) A5.

92 See e.g. Toner, *supra* note 56; See also Sharon Kirkey, "Freezing the tick tick tock of the biological clock", *The Ottawa Citizen* (17 January 2011) A1; Sarah Boseley, "High Doses of IVF Drugs May

rounds of IVF because she is unable to use the embryos she has in storage, she may no longer be able to use her own eggs successfully in order to conceive. She would also, of course, need to find a new partner or use donated sperm in order to create new embryos for IVF.

While allowing either spouse to withdraw his or her consent may affect both male and female spouses, overall these laws are likely to have disproportionate effects on women. Given the fact that men do not undergo invasive treatment to create embryos and may also have a greater chance of conceiving at an older age, it seems that they will be more likely willing to revoke their consent than women. Jurisprudence from within and outside of Canada supports this theory. Among fourteen judicial decisions involving disputes between spouses in Canada, the United States, the United Kingdom and Israel, only one involved a case where a woman withdrew her consent to use the embryos while her former husband wanted to use them with a surrogate.[93] This potential power imbalance between male and female spouses thus challenges potential justifications for joint consent grounded in the idea that men and women equally contribute to the creation of these embryos and thus should have an equal say in whether they are used for procreative purposes.

Costs of IVF

Allowing one party to revoke his or her consent and requiring that the embryos either remain in storage or be destroyed also ignores the costs of IVF. Only Quebec currently provides

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Cause Harm to Eggs", *The Guardian* (4 July 2011) online: The Guardian <http://www.theguardian.com/>.

93 *In Re Marriage of Nash*, 150 Wash App 1029, 2009 WL 1514842 (2009) [*Nash*] (citing to unpublished lower court decision).

publicly funded *in vitro* fertilization;[94] in the remaining provinces these services are a significant investment for many couples and beyond the means of many Canadians. For instance, one basic cycle costs approximately $6,000 plus anywhere between $2,500-7,000 for medications.[95] Given the relatively low success rate of IVF,[96] many couples will also need to undergo more than one cycle in order to potentially conceive. As a result, if one spouse withdraws his or her consent and the other spouse still wishes to have more children, that spouse may be unable to afford further rounds of *in vitro* treatment.

In addition, where one spouse withdraws his or her consent, this may also result in added costs and expenses. For instance, if a woman is required to use donated eggs and/or sperm because her partner has revoked his consent, this will

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94 See Carsley, *supra* note 50; The Ontario government announced in April 2014 that it would fund one cycle of in-vitro fertilization; however, it has yet to be seen whether it will deliver on this promise. See e.g. Tom Blackwell, "Ontario to fund in-vitro fertilization with a caveat – one embryo at a time to cut risky multiple births" *National Post* (9 April 2014), online: The National Post <http://news.nationalpost.com/>. It should also be noted that at the time of editing this article in 2014, the Quebec government was discussing abolishing or restricting its funding for IVF. See e.g. Amélie Daoust-Boisvert, "Inquiétudes devant la fin possible de la gratuité" *Le Devoir* (25 Juin 2014), online: <http://m.ledevoir.com/>.

95 Ovo Consulting, *In-Vitro Fertilisation in Canada: Cost Structure Analysis* (Montreal: Ovo Consulting, 2009) at 11, 14-15, online: Canadian Fertility and Andrology Society <http://www.cfas.ca >.

96 In 2010, live birth rates ranged on average between 27% to 31% depending on the type of cycle performed (e.g. started IVF cycle or frozen embryo transfer). They also differed dramatically depending on the patient's age, for instance with only 11% of women 40 or over having given birth to a live baby through IVF. See "Assisted Human Reproduction Live Birth Rates for Canada", online: Canadian Fertility and Andrology Society <http://www.cfas.ca>.

increase the costs associated with these treatments. IVF clinics charge increased fees for using donated genetic material,[97] and while Canada has banned payment for sperm and eggs, individuals who need to use donations often turn to the United States to purchase gametes, as the restrictions on payment in Canada has resulted in a shortage of donors.[98] In turn, storing *in vitro* embryos also costs several hundred dollars per year.[99] Thus if the *AHRA* mandates that embryos remain in storage until a couple can come to a decision, this too can lead to further costs, as well as conflicts between spouses regarding who ought to be paying for these storage fees.

Revoking Consent to Procreate or Parent

In other contexts where there may be conflicts between spouses with regard to one party's desire to procreate or be a parent, Canadian law has acknowledged power imbalances between men and women and has refused to recognize a right not to procreate or parent. Currently under Canadian law a man does not have a legal right to revoke his consent to procreate where a child is conceived through intercourse. In other words, he cannot legally prevent a woman from giving birth to a child conceived from his genetic material, even should he not wish, or have never intended, to have genetic offspring. Canadian jurisprudence makes explicit that a woman's decision to have

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97 See e.g. Ottawa Fertility Centre, online: <http://www.conceive.ca/>.

98 See e.g. Nicholas Bala & Christine Ashbourne, "The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners & Parents by ART" (2012) 20:3 Journal of Gender, Social Policy & the Law 525 at 547; Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy and (In)Action in Canada" (2013) 41:1 Journal of Medicine, Law and Ethics 224.

99 For example, at an Ottawa fertility clinic annual freezing costs 300 dollars per year. See Ottawa Fertility Centre, online: <http://www.conceive.ca>.

an abortion is hers alone to make and that she cannot be compelled by the potential child's father to abort a fetus or, conversely, to carry the child to term,[100] because to do so would interfere with her bodily integrity and reproductive choices.

In addition, once a child is born, a man typically does not have a right to avoid legal parenthood where he has a genetic connection to the child, even if he did not intend to be a parent. An exception may exist if he can prove that he and the child's parent(s) had intended for him to be considered a donor under the law,[101] or that he had not consented to his spouse or partner using assisted procreation to conceive a child.[102] This ability to potentially avoid being considered a parent under the law, however, is only set out in some provincial family law legislation.[103]

A man also cannot avoid these parental obligations by forcing a birth mother to give up a child for adoption. Birth parents are required to jointly consent to an adoption, unless a birth parent is not found to have parental status or the capacity to consent.[104] However, where birth parents disagree and one does not provide consent, the effect will be that the dissenting parent will be able to keep the child. In other words, should the birth father want to relinquish the child for adoption and the

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100 *Daigle, supra* note 78; *R v Morgentaler*, [1988] 1 SCR 30.

101 See e.g. CCQ, *supra* note 63, art 538.2; BC *FLA*, *supra* note 63, s 24; Alberta *FLA*, *supra* note 63, s 7(4).

102 BC *FLA*, *supra* note 63, s 27(3).

103 See Alberta *FLA*, *supra* note 63, s 7(4); BC *FLA*, *supra* note 63, s 24; CCQ, *supra* note 63, art 538.2; *Birth Registration Regulations*, NS Reg 390/2007, s 3; *Child and Family Services Act*, RSY 2002, c 31, s 13(6); *Children's Law Act*, RSNL 1990, c C-13, s 12(6).

104 See e.g. BC *Adoption Act*, *supra* note 68, s 13; CCQ, *supra* note 63, art 551-552.

birth mother would like to keep the child, he will not be able to override her wishes – and he will also be liable to pay child support. The same would be true in the reverse situation where the birth mother wishes to give up the child and the birth father does not; he too will not be denied the ability to be a parent.[105]

These laws relating to abortion, adoption and parentage recognize and seek to address the potential power imbalances between men and women in relation to reproduction. Laws that support a woman's right to choose whether or not to have a baby once pregnant, and which deny a man a say in whether a child is born through his genetic material, recognize that women should have control over their bodies and should not be forced to undergo medical interventions against their wishes. Provincial legislation relating to parentage and adoption is intended to serve the best interests of the child,[106] but also to protect birth mothers from being pressured to give up a child against their wishes, or from raising a child alone where this was not their intention.

There are important legal and social differences between the status of an *in vitro* embryo, an implanted embryo or fetus and a child once born. An *in vitro* embryo does not have personhood status,[107] and has not yet been implanted in a woman's womb. Thus an embryo does not have legal rights

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105 While it is beyond the scope of this paper to critique these adoption laws, it should be noted that Lori Chambers has argued that the ability for birth fathers to override a woman's ability to give up a child for adoption infringes women's reproductive autonomy. She argues that this decision should be a woman's decision alone to make and that joint consent should not be required. See Lori Chambers, "Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy" (2010) 26 Can J Fam L 339.

106 See e.g. BC *Adoption Act*, *supra* note 68, s 3; CCQ, *supra* note 63, arts 33, 543.

107 See discussion accompanying note 78, *supra*.

and also does not present legal responsibilities for a child's mother, unlike a child who is born alive and viable.[108] Because *in vitro* embryos have not yet been implanted, should a man revoke his consent to use an embryo, a woman will not be required to undergo an abortion. Moreover, currently in Canada, frozen embryos may remain in storage indefinitely, and may be used years and even decades after they were originally frozen.[109] Embryos may also – unlike a baby – be destroyed or donated to research. As a result, one might argue that, within the context of embryo disposition decisions, it makes sense for a man to be able to revoke his consent to

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[108] While Canadian civil and common law jurisdictions have adopted legal fictions, which permit an unborn child to be accorded certain legal rights, the law also makes clear that these rights can only be enjoyed if the fetus develops into a child and is born alive and viable. For instance, in *Montreal Tramways v Léveillé* the Supreme Court of Canada held that a child, once born, has a right to sue a third party for injuries caused to it while *in utero*. *Montreal Tramways Co v Léveillé,* [1933] SCR 456; Similarly, in *Duval v Seguin*, the Ontario Supreme Court held that a third party owes a duty of care to a child *en ventre sa mère* and can be held liable, following the child's birth, for prenatal injuries caused to the fetus while in the womb. *Duval v Seguin*, [1972] 2 OR 686, 26 DLR (3d) 418, aff'd in (1973), 1 OR (2d) 482, 40 DLR (3d) 666; Moreover, in *Dobson v Dobson* the Supreme Court held that a pregnant woman does not owe a duty of care to her fetus or subsequently born child and thus that she cannot be held liable for injuries caused to her fetus while in utero, because of policy concerns with regard to the autonomy and privacy of pregnant women and the problems associated with "articulating a judicial standard of conduct for pregnant women." See *Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753, 174 DLR (4th) 1 at para 21.

[109] For instance, it was recently reported that a baby was born in the United States using embryos that had been in storage for 19 years. See Sarah Elizabeth Richards, "Get used to embryo adoption", *Time* (24 August 2013), online: Time <http://ideas.time.com/>.

procreate and for the law to recognize an interest in not being forced to procreate against one's will.[110]

Yet, despite these differences, similar power dynamics exist in the context of embryo disposition, and are exacerbated by Canadian laws allowing a man to revoke his consent for embryos to be used for reproduction. While an embryo donor is not pregnant, she has already undergone invasive and risky medical interventions to create these embryos. As discussed previously, she will also be required to undergo further rounds of treatment should she want to create more embryos in an attempt to conceive. It is thus questionable whether the fact that the embryos are not yet implanted should justify a man's ability to override his spouse's desire to use the embryos for reproduction. Allowing a man to revoke his consent is nonetheless enabling him to interfere with a woman's body and reproductive choices.

In addition, it also seems fair to question whether the fact that embryos are frozen in time should make a difference with regard to whether an individual will be found to have parental obligations. Both individuals did, at one time, consent to their genetic material being used in attempt to reproduce and both intended to be parents. If they had not, the embryos would never have been created, and if the embryos had been implanted and resulted in childbirth, both would have been parents under the law. It seems problematic that a man can revoke his consent where he had previously expressed a clear

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110 For some examples of scholarship discussing whether United States laws support, or ought to support a right not to procreate or parent see e.g. I Glenn Cohen, "The Right Not to be a Genetic Parent" (2008) 81 S Cal L Rev 1115; I Glenn Cohen, "The Constitution and the Rights Not to Procreate" (2008) 60 Stan L Rev 135.

intention to be a parent and where a woman elected to undergo IVF based on the understanding that her spouse or partner would be equally responsible for supporting any children produced. Given that laws in relation to abortion, adoption and parentage recognize the power imbalances between men and women with regard to reproduction, arguably the law should not be ignoring the ways in which women might be similarly vulnerable where they have created embryos for IVF, and also should not be serving to exacerbate this vulnerability by allowing a man to revoke his previously given consent to procreate and to be a parent under the law.

ALTERNATIVE APPROACHES TO EMBRYO DISPOSITION

In light of the weaknesses identified with current Canadian legal approaches to disputes over frozen embryos, this article contends that these laws ought to be modified to better account for the experiences of individuals who undergo *in vitro* fertilization. This Part considers other existing approaches for dealing with disputes between spouses. It explores how judges and legislators in other jurisdictions have sought to respond to these disputes. It also examines how Canadian courts have previously responded to related conflicts between spouses over donated sperm, or between an embryo's genetic contributors where the parties were *not* spouses. It suggests, however, that each of these models fails to adequately address the issues discussed in Parts I and II of this article and that each of these alternative approaches would also conflict with Canadian law and public policy relating to assisted procreation.

Right Not to Procreate

A major trend in judicial decisions in the United States has been to enforce consent forms or contracts between spouses, unless these agreements would force one party to procreate

against their wishes. In other words, courts have been willing to uphold agreements mandating that embryos be destroyed in the event the parties disagree or divorce. However, they have been generally unwilling to enforce agreements that will allow for an embryo to be used for procreative purposes in the event one party changes his or her mind, on the grounds that this "forced procreation" would violate public policy. For example, in *Kass v. Kass,* the Supreme Court of New York upheld an agreement that a couple's surplus embryos would be donated to research, despite Mrs. Kass' wish, at the time of the divorce, to use the embryos to have more children.[111] In *Litowitz v. Litowitz*, the Supreme Court of Washington similarly enforced an agreement that allowed a clinic to destroy a couple's unused embryos despite Mrs. Litowitz's desire to use the embryos for reproduction using a surrogate.[112] However, in *A.Z. v. B.Z.* the Massachusetts Supreme Court refused to enforce an agreement that said that if the couple separated, the embryos would be given to one spouse for implantation. It found that doing so would run counter to public policy, as it would mean forcing one individual to procreate against his or her wishes.[113] *J.B. v. M.B*. involved an alleged oral agreement, corroborated by the husband's family, that surplus embryos would be donated to third-parties for reproductive use, as well as a written agreement allowing a court to make a determination as to who should have control over the embryos in the event the parties divorce. The husband wanted the embryos to be donated to infertile couples, while the wife did not want them to be used

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111 *Kass v Kass*, 696 NE 2d 174 (1998).

112 *Litowitz v Litowitz,* 48 P 3d 261 (2002); See also *Roman*, *supra* note 57 (where the Court of Appeals of Texas similarly upheld an agreement that stipulated that in the event of a divorce the couples' embryos would be destroyed. It did so even though Mrs. Roman wished to use them for reproduction).

113 *AZ v BZ,* 725 NE 2d 1051 (2000).

by anyone for procreative purposes.[114] The Supreme Court of New Jersey held that the wife's right not to procreate outweighed the husband's right to procreate and that a contract to reproduce is unenforceable on grounds of public policy.[115] *In re Marriage of Dahl and Angle*, the Court of Appeals of Oregon enforced an agreement, which stipulated that in the event the parties divorced the wife would be given control over the embryos. The wife wanted the embryos to be destroyed, while the husband wanted to donate them for third-party reproductive use. In deciding that they could be destroyed, the court was privileging the wife's right not to procreate, and thus not to have genetic offspring out in the world, even if they were to be born to another couple.[116]

This trend in United States jurisprudence is effectively a combination of the contractual approach and the joint consent approach discussed in the first two parts of this article and is vulnerable to the same criticisms developed there. It allows for contracts to be recognized and enforced providing they allow for embryos to be destroyed, donated to research or kept in storage. However, it does not allow for parties to contract around the requirement that both spouses agree to use the embryos for procreation or donate them for third-party reproduction. This approach fails to take account of the power imbalances that can arise within spousal relationships and women's unique contribution to the creation of the embryos.

The Supreme Court of Iowa has taken a slightly different approach towards supporting a right not to procreate. In *Re Marriage of Witten*, a couple had signed an agreement stating that their embryos will only be used with their mutual

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114 *JB v MB*, 751 A 2d 613 (2000) at 615-616.

115 *Ibid* at 619.

116 *In Re Marriage of Dahl and Angle,* 222 194 P 3d 834, 222 Or App 572 (2009).

consent. Upon divorce, Mrs. Witten asked that she be given control over the embryos and expressed that she did not want them to be destroyed or given to another couple. Mr. Witten was opposed to them being used by Mrs. Witten for reproduction and requested an injunction preventing them from being transferred, released or used without his consent. The Court adopted what has been referred to as the "contemporaneous mutual consent approach" and found that the embryos would have to remain in storage unless the couple could come to an agreement as to how they would be used or disposed of.[117] This approach is thus very similar to the "joint consent" approach set out in section 8 of the *AHRA*, except that in Canada it is still unclear whether parties may contract around this approach, and whether embryos may be legally destroyed where parties disagree.

Some courts have, in turn, tempered the right not to procreate by making an exception where the party who wishes to use the embryos would not otherwise be able to conceive. For instance in *Davis v. Davis*, the Supreme Court of Tennessee explained that in the absence of an agreement between spouses, courts should give priority to the party who does not wish to procreate, unless the other spouse will not otherwise have a reasonable means of becoming a parent.[118] In

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117 *In Re Marriage of Witten*, 672 NW 2d 768 (2003).

118 *Davis v Davis*, 842 SW 2d 588 (1992) at 21-22. In this case, there was no agreement between the parties and by the time it reached the Supreme Court Mrs. Davis no longer wanted to use the embryos for her own reproductive use and instead wanted to donate them for third-party reproductive use. Mr. Davis wanted them to be destroyed. The court noted that if Mrs. Davis wanted to use them for her own reproduction then it would have been a more difficult decision. However, it maintained that she could still undergo another round of IVF or adopt, and thus it would not have necessarily privileged her desire to use the embryos to have her biological children, or recognized the difficulties of undergoing further rounds of IVF.

Nahmani v. Nahmani the Supreme Court of Israel relied upon public policy to support a woman's "right to reproduce." It found that in this case using the embryos represented Mrs. Nahmani's only chance to achieve biological parenthood and that her claim should supersede that of her former husband not to reproduce.[119] In *Re Marriage of Nash*, the Court of Appeals of Washington upheld the trial judge's decision to award control over the embryos to Mr. Nash who wished to use the embryos with a surrogate to have more children. The trial judge had been granted authority to decide who would control the embryos in the event of a disagreement, and decided in favour of Mr. Nash as it found that the "husband's alternatives to achieve parenthood are not reasonable as it would require him to restart the expensive process [of IVF] and the success of the process is questionable due to his age."[120] Most recently in *Reber v. Reiss*, the Superior Court of Pennsylvania awarded embryos to Ms. Reiss because she and Mr. Reber had not signed an agreement prior to undergoing IVF, and because using the embryos likely represented her only or best means of procreating, given her treatment for breast cancer.[121]

This approach towards resolving disputes is certainly preferable to the aforementioned contractual, joint consent or strict "right not to procreate" models. It acknowledges the potential unjust outcomes of allowing one party to unilaterally revoke his or her consent, such as the particular effects this may have on women, the costs of IVF, and the fact that without using the embryos some individuals will be unable to otherwise have children because of biological factors that are beyond their control. However, this approach does not seem to go far enough. Just because a man or woman might have the *ability* to

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119 CFH 2401/95 *Nahmani v Nahmani* [1995-96] IsrLR 320 [1996] (Isr.) [*Nahmani*].

120 *Nash*, *supra* note 93.

121 *Reber v. Reiss*, 42 A 3d 1131 (2012).

create new embryos on account of their age, physical or financial situation, does not justify allowing existing embryos to be destroyed. The standard for "unreasonableness" in jurisprudence from the United States seems too high; it does not recognize that a woman will still be required to undergo further rounds of invasive and risky egg retrieval procedures should she wish to use IVF to have more children. In addition, the *Nahmani* decision is based on the idea that in certain circumstances a woman has a legal "right to reproduce." This judicial decision was based upon Jewish law as well as the idea that public policy in Israel supports encouraging reproduction and parenthood as beneficial for Israeli society.[122] It has been suggested that a similar "right to reproduce" might exist in other jurisdictions;[123] however, to date this right has yet to be recognized under Canadian law, and at least one Canadian scholar has pointed out the problems associated with recognizing such a right in the Canadian context.[124]

Automatic Destruction if Revocation

In the United Kingdom, the *Human Fertilisation and Embryology Act of 1990* (*HFEA*) mandates that in the event one spouse revokes his or her consent, embryos must be destroyed.[125] Thus even if one spouse has no alternative means of reproducing for physical or other reasons, the other spouse

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122 See Campbell, "Averting Misconceptions", *supra* note 18 at 13; *Nahmani, supra* note 119; Janie Chen, "The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and its Impact on Israeli In Vitro Fertilization Law" (1999) Cardozo J Int'l & Comp L 325 at 355.

123 See Campbell, "Averting Misconceptions", *supra* note 18 at 13.

124 See Laura Shanner, "The Right to Procreate: When Rights Claims Have Gone Wrong" (1995) 40 McGill LJ 823.

125 *Human Fertilisation and Embryology Act of 1990* (UK), 1990 c 37, Schedule 3, s 8(2).

may veto his or her ability to use embryos for reproduction as the parties are given joint control over these embryos' disposition. This approach is similar to the Canadian model under the *AHRA* and Quebec's *Regulation Respecting Assisted Procreation*, except that it makes clear that embryos must be destroyed, even if one party seeks to use them for procreation. Recall that under Canadian law it is not entirely clear what should happen to the embryos in the event of a dispute and if agreements are not enforceable. They may need to remain in storage until the parties can agree, and this seems to necessarily be the case in Quebec where its regulations indicate that both parties must consent for embryos to be destroyed.[126]

Having a "default" of destruction might be a desirable solution in the event spouses cannot agree on how their embryos should be disposed of and *neither* wants to use them for reproduction. However, allowing for this default even where one individual still wishes to use the embryos for procreation is problematic for the same reasons outlined in Part II of this article.

The potential injustice of this approach is perhaps best illustrated by *Evans v. United Kingdom*.[127] In this case, Evans and her spouse discovered that she had pre-cancerous tumors on her ovaries during preliminary IVF testing. Her eggs were then harvested, and fertilized using her husband's sperm and she subsequently had her ovaries removed. However, prior to using the embryos for implantation, the couple's relationship deteriorated and her spouse withdrew his consent to store the embryos. Under the *HFEA* their clinic was required to destroy the embryos, thus Evans sought an injunction to prevent their

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126 See *Regulation Respecting Assisted Procreation*, *supra* note 12, s 19(3).

127 *Evans v United Kingdom*, [2006] ECHR 200, [2006] 43 EHRR 21 [*Evans*].

destruction. The trial court and Court of Appeal dismissed her claim,[128] the House of Lords refused her leave to appeal; therefore, she appealed to the European Court of Human Rights (ECHR). The ECHR ultimately upheld the validity of the *HFEA* and found that there was no violation of her rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms*.[129] She was thus unable to use the embryos she had created even though it was clear that she would have no other way of conceiving. She had already decided to have her ovaries removed, based on the understanding that she would be able to use the embryos in an attempt to build her family.[130]

Property Approach

An additional approach, which derives inspiration from some recent judicial decisions in Canada, would be to treat the embryos as property. Under this model, a court could divide the embryos among divorcing spouses for them to do with them as they wish or give them to one spouse to the exclusion of the other. A court's determination could be based on the financial value of these embryos and whether one or both parties had borne the costs of creating them. Thus for instance, if a man had paid for IVF treatments as well as for the embryos' storage, his female spouse would be able to use them even if he disagrees, but in return the division of their property and assets would reflect the fact that he had paid for these treatments. In other words, she would be required to compensate him for the costs IVF and storage.

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128 *Evans v Amicus Healthcare Ltd and others,* [2003] EWHC 2161 (Fam); *Evans v Amicus Healthcare Ltd,* [2004] EWCA Civ 727.

129 *Evans, supra* note 127.

130 *Ibid* at para 11.

While Canadian courts have yet to make a determination as to what should happen to embryos in the event of a dispute between spouses, they have seen one dispute between partners over frozen sperm vials[131] and one dispute between genetic contributors – who were not spouses – over the control of frozen embryos.[132] These cases took a similar approach in characterizing reproductive materials as property and basing their analysis, in part, on the financial value of this genetic material.

In *C.C. v. A.W.,* the Alberta Court of Queen's Bench was asked to determine whether a woman could have access to embryos without the consent of the male genetic contributor. Mr. A.W., a friend and former boyfriend of Ms. C.C., provided her with sperm to use for *in vitro* fertilization. C.C. underwent IVF, successfully became pregnant and gave birth to twins. Four embryos were frozen and placed in storage, for which C.C. paid an annual storage fee. C.C. later sought to use the embryos for further IVF cycles but A.W. refused to consent to their release.[133] The court held that A.W.'s sperm was "an unqualified gift given in order to conceive children" and that "the remaining fertilized embryos remain *her property* [and] are chattels that can be used as she sees fit."[134] It emphasized the fact that A.W. knew that his sperm would be used for reproductive purposes, and that C.C. had paid for the embryos' storage.[135]

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131 *JCM v ANA,* 2012 BCSC 584 [*JCM*].

132 *CC v AW*, 2005 ABQB 290, [2005] AWLD 2498.

133 *Ibid*. He refused to consent on the grounds that he had difficulty gaining access to the twins. The case does not make clear whether Ms. CC's intention was for Mr. AW to be a parent under the law, but suggests that over time their relationship became increasingly strained.

134 *Ibid* at para 21 [emphasis added].

135 *Ibid* at paras 20-21.

Some commentators have suggested that the *C.C. v. A.W.* decision may be of limited authoritative value as it was decided in 2004 and thus before the *AHRA* came into force.[136] Others have pointed out that it was nonetheless decided following the introduction of the *AHRA* in 2004, and may run counter to it, given that this decision permits the use of embryos despite one of the "donors" revoking his consent.[137] These scholars have neglected to mention, however, that if this case had been decided today the *AHR Consent Regulations*, which came into force in 2007, would apply and it would have been unnecessary to determine that the embryos were C.C.'s property.[138] Under these *Regulations* she would have been considered the sole donor of the embryos, as A.W. was not her spouse or partner at the time of the embryos' creation. Thus, only *her* consent would have been required in order for her to use or dispose of the embryos.[139] This case is thus only of limited authority in determining whether one spouse or partner should be able to override the other's desire to use embryos for reproductive use. However, it indicates one court's willingness to characterize embryos as "property" and thus to potentially enable them to be divided among divorcing spouses.

Similarly, while *J.C.M. v. A.N.A*. dealt with a dispute over gametes rather than embryos, it demonstrates that Canadian courts have been willing to treat reproductive material as property. The British Columbia Supreme Court held that frozen sperm vials that had been purchased in the United States could be treated as property, and thus could be divided

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136 See Clare E Burns & Anastasija Sumakova, "Mission Impossible: Estate Planning and Assisted Human Reproduction" (2010) 60 ETR (3d) 59 at 3.

137 See Campbell, "Averting Misconceptions", *supra* note 18 at 4.

138 *AHR Consent Regulation*s, *supra* note 5.

139 See *AHR Consent Regulations*, *supra* note 5, s 10(1)(a).

among lesbian partners who had decided to separate.[140] The court also decided that since there was an uneven number of sperm straws, J.C.M. should pay A.N.A. for the additional sperm straw she received, and that A.N.A. could sell the remaining straws to J.C.M. if she wished to do so.[141]

Intuitively, this approach might seem like a better solution than the aforementioned models. It provides women with the possibility of using embryos even without their spouse's consent and even where it is not the case that using these embryos would be their only chance of conceiving. However, this approach would contravene the express provisions and spirit of the *AHRA*. Section 7 of the *AHRA* criminalizes buying and selling gametes and embryos as it seeks to ensure that individuals who donate their reproductive material are doing so voluntarily and are not induced to donate simply because of the prospect of financial gain.[142] While under this model embryos would not necessarily be sold to third parties, they could nonetheless be exchanged between spouses in return for financial compensation, which would still contravene the *AHRA*'s intentions to prevent the commodification of reproductive materials and services.[143]

Treating embryos as property – whether as true property which may be exchanged for commercial value, or as quasi property that may be controlled by spouses but not traded on the market[144] – also objectifies women's bodies,

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140 *JCM*, *supra* note 131.

141 *Ibid* at para 96. Note that this case provides a helpful and detailed review of scholarship and jurisprudence from Canada and other jurisdictions on whether gametes ought to be treated as property. See paras 19-75.

142 *AHRA*, *supra* note 4, s 7.

143 *Ibid*, s 2(f).

144 See Mykitiuk & Wallrap, *supra* note 18 at 401.

reproductive capacities, and genetic material.[145] The *AHRA* makes clear that embryos and gametes are not to be treated like other property, and the research restrictions it places upon embryos are also based on the idea that as potential human life these embryos ought to be accorded a certain measure of respect.[146] A property model would serve to undermine these intentions.

In addition, endorsing a property approach could result in these embryos being used as a negotiation tool in acrimonious divorces. It is not difficult to imagine a situation in which one individual uses his or her spouse's desire to have more children as a means of getting more than their equitable share of their property and assets. Most case law that has involved disputes over gametes or embryos has occurred upon divorce. It is not clear whether disagreements over genetic material led to these divorces, or whether divorces led to these conflicts, but it does not seem far-fetched to suggest that treating embryos as property may allow these embryos to be an additional "commodity" that spouses compete over. Treating embryos as property might also spark disputes upon marital dissolution where otherwise there would have been no discord, precisely because these embryos may be viewed as invaluable to a spouse who seeks to have more children and thus potentially more important than their financial assets.

RECOMMENDATIONS FOR LAW REFORM

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145 See Nedelsky, *supra* note 18 at 347 (who similarly argues that treating embryos as property would exacerbate the exploitation, objectification and commodification of women's bodies and would alienate women from their own bodies).

146 See e.g. Maneesha Deckha, "Legislating Respect: A Pro-Choice Feminist Analysis of Embryo Research Restrictions in Canada" (2012) 58:1 McGill LJ 199.

This article has demonstrated that current Canadian legal responses to embryo disposition disputes do not adequately support the objectives of the *AHRA* and Quebec's *Act Respecting Assisted Procreation.* Enforcing embryo disposition agreements or consent forms would not take account of the fact that individuals may not be in a position at the time of these agreements' creation and signing to make free and informed decisions regarding the disposition of any surplus embryos. This approach would also have the effect of treating embryo disposition agreements as binding contracts, even though Canadian law and policy refuses to treat domestic agreements between spouses, or contracts relating to adoption or surrogacy the same as commercial contracts. Allowing one genetic contributor to prevent his or her spouse from using embryos for procreation ignores the costs of IVF and the ways in which women are disproportionately affected by ART treatment and by laws preventing them from using their frozen embryos. This response also enables a man to revoke his consent to procreate and to be a parent, even though Canadian law in relation to abortion, adoption and the parentage of children conceived through intercourse and assisted procreation, deny men these rights in response to the fact that women are more affected than men by reproduction and may be vulnerable to men revoking their consent to parent.

Other existing methods for dealing with embryo disputes raise similar issues and pose additional problems. Allowing for a right not to procreate, even with an exception for individuals who cannot otherwise conceive, and providing for automatic destruction in the event of a disagreement raise the same issues as current Canadian responses. Adopting a property approach conflicts with Canadian public policy, which seeks to counter the commodification of reproductive materials. It seems therefore that a novel approach is warranted for dealing with these disputes within the Canadian context.

One suggestion for law reform is that an individual who wishes to use embryos for procreative purposes ought to be able to do so, even if his or her spouse or partner disagrees. In other words, a male donor should be unable to prevent a female donor from using embryos for reproductive purposes and a woman should not be permitted to prevent her male spouse from using embryos with a surrogate or new partner. This mutual inability to block the use of embryos for procreation would recognize the considerable costs associated with creating and freezing embryos for IVF, as well as the fact that men and women might be otherwise unable to reproduce without the use of these embryos. However, where male and female donors each wish to use their embryos for reproductive purposes, the woman should be given preference to use them, in recognition of the greater physical contribution that she made in harvesting her eggs, and the biological reality that women's ova become less viable as they age. This approach would also be preferable to dividing them equally between spouses, as allowing for this division could communicate a message that embryos can be treated like property.

Although it has been argued in some foreign jurisprudence that it is contrary to public policy to force one spouse to procreate against his or her will, this argument is exaggerated. The stronger argument is that forcing individuals to destroy their embryos or donate them against their wishes runs counter to Canadian law and public policy. As was discussed in Part II of this article, while men and women may bear the costs of ART treatment and may need to use IVF in order to conceive, women are affected more than men by the IVF process and because of biological differences may have more difficulty conceiving at an older age than men. Canadian law and public policy has recognized women's disproportionate contribution in the context of laws relating to abortion. Moreover, the *AHRA* and Quebec's *Act Respecting Assisted Procreation* make clear that their provisions are intended to recognize the power imbalance between men and

women who make use of assisted procreation, and the particular health risks for women undergoing ART treatment. In light of this, it seems that law and public policy in the context of embryo donation ought to support women's potential desire to have more children ahead of men's potential wish to procreate and also ought to favour the spouse who seeks to procreate over a spouse who wants for the embryos to remain in storage, be donated or destroyed.

Patients should, however, be clearly informed prior to providing their genetic material for IVF that they will be unable to revoke their consent to procreate. In other words, their spouse or partner will still be able to use the embryos for reproduction even if they change their minds. Patients should be able to make a free and informed decision as to whether they feel comfortable with this option; the empirical research which calls into question individuals' abilities to make informed decisions prior to IVF suggests that where individuals changed their minds it was with regard to their previously expressed intentions regarding donation or destruction.[147]

It might also be argued that this approach problematically forces individuals to be parents against their wishes even if a substantial period of time has passed since they gave their consent to use their reproductive material for assisted procreation. For instance, in the *Nott* case discussed in the introduction to this article, the embryos have now been in storage for 9 years. Currently in Canada, unlike other jurisdictions,[148] there are no limitations on how long embryos can remain in storage. Moreover, a woman may be able to use

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147 See e.g. De Lacey, "Parent Identity", *supra* note 29 at 1661-1662; Newton, "Changes" *supra* note 29.

148 Restrictions on the number of years embryos may remain in storage differs among countries and jurisdictions. For instance, in New South Wales embryos may only be stored for 5 years. See McMahon & Saunders, *supra* note 40 at 141.

embryos for implantation up until menopause and potentially until she reaches the age of 55.[149] This means that it would be possible for embryos to be used thirty or more years after spouses had consented to use their genetic material for procreation.

This issue could, however, be addressed without preventing one spouse from using embryos for procreative purposes. Rather, should spouses divorce and one no longer wishes for the embryos to be used for procreation, that spouse could be absolved of parental obligations and denied parental rights. A number of provinces have now made clear that a sperm donor is not a parent simply by virtue of his donation.[150] A smaller number have also stipulated that egg donors and embryo donors are similarly not to be considered legal parents, unless this was the donors' and the child's parents' intentions.[151] Spouse who change their minds and do not wish for embryos created from their sperm or ova to be used for reproduction could be legally considered donors under the law. In turn, British Columbia's *Family Law Act* now provides that if a child was conceived[152] through the use of assisted procreation while a couple was married or in a marriage-like

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149 See e.g. Sharon Kirkey, "A shift in the stance on pregnancy after 50", *The Edmonton Journal* (18 March 2013), online: The Edmonton Journal <http://www.edmontonjournal.com/>; Susan Drummond, "A principled limit to assisted reproduction and parental age", *The Toronto Star* (23 May 2013) A13.

150 See Alberta *FLA*, *supra* note 63, s 7(4); BC *FLA*, *supra* note 63, s 24; CCQ, *supra* note 63, art 538.2; *Birth Registration Regulations*, NS Reg 390/2007, s 3; *Child and Family Services Act*, RSY 2002, c 31, s 13(6); *Children's Law Act*, RSNL 1990, c C-13, s 12(6).

151 CCQ, *supra* note 63, art 538.2; BC *FLA*, *supra* note 63, s 24; Alberta *FLA*, *supra* note 63, s 7(4).

152 Conception is defined as implantation in the case of embryos. See BC *FLA*, *supra* note 63, s 20(2).

relationship, the birth mother's spouse or partner will not be considered the child's parent where there is evidence that he or she did not consent to be a parent or withdrew his or her consent prior to implantation.[153] This provision similarly demonstrates that is possible to find that a spouse should not be held to be a legal parent despite his or her relationship with the child's mother and potentially despite this spouse having a genetic connection to the child.

However, a spouse should only be absolved of parental obligations where a substantial period of time has elapsed between the time of the embryos' creation and implantation. Allowing one spouse to revoke his or her consent to be a parent immediately or shortly after the embryos' creation would be troubling in light of Canadian family law legislation; where a woman becomes pregnant and a couple divorces or separates, the male spouse or partner will not be off the hook for child support simply because he changed his mind. This limitation period could be set, for instance, at 3 years or some other length of time that is deemed appropriate to reflect the period of time in which a couple might have attempted and reattempted to have children using frozen embryos. And once again, patients should be informed prior to undergoing IVF that regardless of whether they separate, they will be held to have parental rights and obligations with regard to any children conceived during that time period.

Freeing unwilling parents from having parental obligations does not stop them from having children produced from their genes against their wishes. However, this situation is comparable to one in which individuals decide to donate their embryos to a third-party and then only decide to revoke their consent after the revocation period has elapsed. It may result in children being produced contrary to their present intentions, but public policy and respect for women's reproductive choices

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153 BC *FLA*, *supra* note 63, s 27.

necessitates that the donors be prohibited from revoking their consent in these instances.

In addition, agreements between spouses and fertility clinics as to how to dispose of surplus embryos ought to be legally unenforceable, especially if they are created prior to successfully giving birth, or unsuccessfully completing a round of IVF. This would recognize that spouses might not be in a position to make free and informed decisions as to how to dispose of their surplus embryos prior to undergoing even a first cycle of IVF. Spouses ought to be encouraged, following completion of their first round of IVF, to discuss and stipulate in writing what they would like to do with their surplus embryos and what they think should happen in the event they divorce or disagree. But these agreements should be viewed – similar to surrogacy agreements – as non-binding contracts that set out the parties' wishes, aspirations and expectations. Consent provided by either spouse to donate or destroy their embryos prior to undergoing IVF treatment should be considered invalid, in the same way that a birth mother or surrogate cannot consent to relinquish her parental rights, prior to giving birth.

Should a disagreement arise between spouses, and neither wishes to use the embryos for their own procreation, it seems reasonable to create a default that the embryos should be destroyed. Allowing for the embryos potentially to be donated against one spouse's wishes would be problematic in light of the empirical research, discussed in Part I of this article, indicating that most of the time when individuals change their minds regarding their disposition decisions they opt to destroy their embryos rather than donate them. Dividing them equally among spouses could amount to treating the embryos as property. In turn, keeping them in storage would require parties to continue to pay annual storage fees and would also, over time, potentially create problems for fertility clinics with regard

to storage space.[154] Moreover, destruction is the most commonly selected option for individuals with surplus embryos and thus is arguably a more appropriate default than donation.[155]

Establishing a default of destruction would not please everyone. Some might criticize this approach as wasting embryos that might otherwise be used for research or which might help a childless couple conceive. In turn, the act of destroying embryos might be unthinkable to some donors on account of their personal or religious beliefs. However, this default would only come into effect should a disagreement arise between spouses. Should they not wish for the embryos to be destroyed they would be given the option to use them for their own reproductive purposes.

Finally, fertility clinics should seek to mitigate potential conflicts and power imbalances between spouses through increased education and counselling. It would undoubtedly be beneficial for provincial regulations to mandate that all clinics and hospitals provide at least one counselling session to individuals who undergo IVF, embryo implantation and other forms of treatment involving reproductive technologies. These clinics should also ensure that individuals undergoing IVF are not only aware of the health risks

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154 The precise number of embryos in storage is unknown, as the last count was 15,615 stored in 13 clinics in 2003. Françoise Baylis et al, "Cryopreserved Human Embryos in Canada and their Availability for Research" (2003) 25:12 Journal of Obstetrics and Gynaecology Canada 1026. It has been estimated that the current number may be three times that amount. See Sharon Kirkey, "Abandoned embryos: Clinics ethically free to dispose of thousands of embryos frozen in time, doctors' group says" *Postmedia News* (September 3 2013) online: <http://www.canada.com/health>.

155 See e.g. Newton, "Changes", *supra* note 29 at 3127.

associated with the procedure, but also of the laws that apply to them with regard to embryo disposition.

This overall approach would better account for the experiences of individuals who undergo IVF and who need to make decisions regarding the disposition of their embryos. It would also accord with how Canadian legislatures and courts have responded to similar agreements or disputes between spouses. Finally, it would better support the objectives of the *AHRA* and Quebec's *Act Respecting Assisted Procreation* to promote the health and well-being of Canadians – and especially women – who use ARTs and to ensure that individuals who undergo treatment or who donate their genetic materials provide free and informed consent.