Comment

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Of Property and Procreation: Oregon's Place in the National Debate over Frozen Embryo Disputes

On October 8, 2008, Oregon entered the national debate over the status of a divorcing couple's cryogenically frozen embryos.[1] In *In re Marriage of Dahl* (*Dahl*), the Oregon Court of Appeals granted a wife the right to decide to destroy her and her husband's frozen embryos.[2] While married, Dr. Laura Dahl and Dr. Darrell Angle unsuccessfully attempted to conceive a child by in vitro fertilization (IVF), which left six of their frozen embryos at the Oregon Health & Science University (OHSU).[3] Before undergoing the initial

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[1] This Comment generally refers to the frozen cells as embryos, although the cells are scientifically classified as preembryos or zygotes. *See generally* CLIFFORD GROBSTEIN, SCIENCE AND THE UNBORN: CHOOSING HUMAN FUTURES 58–59 (1988). Preembryo is the term for a zygote, or fertilized egg, that has not been implanted into the uterus; the preembryo is the category for the first cell stage at which zygotes may be cryopreserved during in vitro fertilization. *See* Susan L. Crockin, Commentary, *"What Is an Embryo?": A Legal Perspective*, 36 CONN. L. REV. 1177, 1178–80 (2004).

[2] *In re* Marriage of Dahl, 222 Or. App. 572, 580, 194 P.3d 834, 839 (2008); *see* Anna Lamut, *Oregon State Appeals Court Finds Frozen Embryos "Personal Property" in Divorce Proceeding*, HARV. J.L. & TECH. DIG., Oct. 8, 2008, http://jolt.law.harvard.edu/digest/bioethics/dahl-v-angle (describing the case as a "novel" decision).

[3] *In re Dahl*, 222 Or. App. at 574, 194 P.3d at 836.

procedure, Dr. Dahl and Dr. Angle entered into a contract with OHSU giving Dr. Dahl the power to determine the fate of the frozen embryos.[4] When the couple divorced, Dr. Dahl exercised her power to choose either to donate the embryos for research or destroy them.[5] Her husband, however, vehemently opposed this disposition; he believed the embryos should be donated to a couple trying to conceive.[6]

Frozen embryo disputes are novel in American courts. In fact, only ten disputes concerning frozen embryos have been tried.[7] While these few cases have led to a large amount of scholarly debate, no legal consensus has formed.

With such little guidance, the Oregon Court of Appeals approached the *Dahl* case by first defining "embryo."[8] Giving the term embryo a legal definition was a challenging task; embryos have historically escaped a hard and fast definition in our courts in the arenas of abortion and stem cell research.[9] Therefore, the Oregon Court of Appeals was tasked with defining the term frozen embryo in a way that would not interfere with an embryo's legal status in other—most notably political—contexts.[10]

The Oregon Court of Appeals bypassed a land mine of constitutional and ethical questions, defining embryos as marital property—the first court to do so.[11] After establishing that the

[4] *Id.* at 574–76, 194 P.3d at 836–37 (stating Dr. Laura Dahl had the option of destroying the embryos or donating them to science).

[5] *Id.* at 576–77, 194 P.3d at 837.

[6] *Id.* at 577, 194 P.3d at 837.

[7] *See In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); *In re Dahl*, 222 Or. App. 572, 194 P.3d 834, *appeal denied*, 346 Or. 65, 204 P.3d 95 (2009); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002), *amended by*, *In re* Marriage of Litowitz, 53 P.3d 516 (Wash. 2002). The last of this line of cases was tried after *Dahl*. *In re* Marriage of Nash, 150 Wash. App. 1029 (2009).

[8] *In re Dahl*, 222 Or. App. at 579–80, 194 P.3d at 838–39; *see also* Davis, 842 S.W.2d at 594 ("One of the fundamental issues . . . is whether the preembyos . . . should be considered 'persons' or 'property' in the contemplation of the law."). For a chart breaking down the elements involved in each of these cases, see Teresa Stanton Collett, *Whose Life Is It Anyway? Texas Public Policy and Contracts to Kill Embryonic Children*, 50 S. TEX. L. REV. 371, 398 add. (2009).

[9] Lars Noah, Commentary, *A Postmodernist Take on the Human Embryo Research Debate*, 36 CONN. L. REV. 1133, 1138–44 (2004) (characterizing the definition as not static, but rather differing amongst different institutions, including medicine and law).

[10] *See id.*

[11] Lamut, *supra* note 2.

embryos were marital property, the court used its authority under Oregon Revised Statute (ORS) 107.105(1)(f)—Oregon's statute governing the distribution of property in a divorce—to determine a just and equitable distribution of the embryos.[12] In a unanimous decision, the court held that there is a contractual right to determine the fate of embryos as marital property.[13]

As this Comment presents, the definition of embryos used by the Oregon Court of Appeals is unsatisfactory. By defining embryos as property subject to Oregon's marital property laws, the court has not only denied the embryos their true status, but also left open much room for future disputes. An analysis of the difficulties that may arise by applying this property definition in the future shows that the optimal way to protect the parties' rights and contractual agreements in these disputes is for the legislature to regulate IVF clinics, thus removing embryos from the ambit of Oregon's inapposite marital property statute.

This Comment proceeds as follows. Part I establishes the history and background of IVF, the case law in this area, and the analysis found therein. Part II explores the factual and procedural history of *Dahl* and explains the holding of the Oregon Court of Appeals in the case. Part III expounds upon the court's reasoning and the problems that this reasoning presents upon application. Part IV discusses alternative approaches and issues to be analyzed, ultimately concluding that the Oregon legislature is better suited than the courts to establish the rights of the parties in these disputes. Part V concludes by offering suggestions for legislation that would solve many of the issues presented by *Dahl*.

[12] *In re Dahl*, 222 Or. App. at 578–79, 194 P.3d at 838.

[13] *Id.* at 585, 194 P.3d at 842.

I
BACKGROUND

A. In Vitro Fertilization: A Brief History

According to statistical data, many couples battle infertility.[14] For these couples, IVF is a popular means of achieving pregnancy because the procedure provides the opportunity to create a child with their genetic makeup.[15] With over 400,000 embryos in storage and more created daily,[16] debates surrounding the legal status of embryos are inescapable. Although the procedure is very common, the United States has virtually no federal law governing the practice of IVF or IVF clinics.[17] Very few states have attempted to legislate the issue.[18] Not surprisingly, the struggle to define the embryos frozen for IVF attracts attention from many groups, including infertile couples, religious groups, and activists on both sides of the abortion dispute.[19]

While IVF may be popular, it is still a painful and invasive procedure.[20] During IVF, a doctor combines a woman's eggs and a

[14] Approximately fifteen percent of women and ten to fifteen percent of men are infertile. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 31 fig.19 (2007), *available at* http://www.cdc.gov/art/ART2005/508PDF/2005ART508.pdf (describing different causes of infertility among people using reproductive technologies); *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 2 (2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (reporting that in 2002, about fifteen percent of married women had impaired fecundity and about 7.4% were infertile).

[15] Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 113 (1997) (citing HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 13 (1994)) ("[T]wo to three million couples [in America] . . . suffer from infertility.").

[16] Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 161–62 (2005).

[17] *See* Kellie LaGatta, Comment, *The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation*, 4 FLA. COASTAL L.J. 99, 100 (2002).

[18] LA. REV. STAT. ANN. § 9:2713 (2005); MASS. ANN. LAWS ch. 111L, § 4(a)(1) (LexisNexis Supp. 2009); N.J. STAT. ANN. § 26:2Z-2(b)(1)–(2) (2007).

[19] *E.g.*, Pope Paul VI, *Humanae Vitae: Encyclical of Pope Paul VI on the Regulation of Birth* (July 25, 1968), *in* 13 POPE SPEAKS 329–46 (1969), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html; *cf.* Carrie Dowling, *Vatican Suggests "Adoption" of Frozen Embryos*, USA TODAY, July 24, 1996, at 1A (suggesting that embryos should be released for adoption rather than destroyed).

[20] Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L.J. 315, 317 (1997) (explaining that

man's sperm extracorporeal in a petri dish.[21] Because the process of harvesting a woman's eggs is invasive and expensive, and repeated attempts at implantation are often required, doctors prefer to harvest multiple eggs at once.[22] The eggs are then fertilized simultaneously, creating viable embryos.[23] Of these embryos, several will be selected for implantation into the woman's uterus using a transfer catheter,[24] while the others will be frozen in the event that the first implantation is unsuccessful.[25]

Should a couple separate, divorce, or disagree about how to use the embryos during the IVF process, they may turn to the judicial system to help them resolve their conflict. Courts have generally resolved the disputes by looking at a number of factual and legal issues.

B. Factual Elements Considered in Embryo Disputes

Certain factual elements must be considered in embryo disputes. For instance, courts may look at whether the parties entered into a contract (either with each other or with the clinic), which party was infertile, and whether state statutory guidance exists. Much of the difficulty in resolving embryo disputes can be attributed to the varied facts among the cases—rarely has the exact same scenario presented itself twice.[26] For instance, in some conflicts a woman prefers to use the embryos herself.[27] In others, the man may conceivably want to implant the embryos into another woman's uterus. There is also the possibility, as was the case in *Dahl*, that one of the progenitors wants to donate any leftover embryos to other infertile individuals or couples.[28] In some instances, the disputed embryos represent the last

many doctors describe IVF as an invasive and traumatic experience for the woman seeking implantation).

[21] *See* Kerian, *supra* note 15, at 114.

[22] Jennifer P. Brown, Comment, *"Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy*, 28 U.S.F. L. REV. 183, 188 (1993).

[23] *Id.* at 187.

[24] *Id.*

[25] *Id.* at 188.

[26] April J. Walker, *His, Hers or Ours?—Who Has the Right to Determine the Disposition of Frozen Embryos After Separation or Divorce?*, 16 BUFF. WOMEN'S L.J. 39, 39 (2008).

[27] *Id.* at 50.

[28] *See In re* Marriage of Dahl, 222 Or. App. 572, 577, 194 P.3d 834, 837 (2008).

chance at reproduction for one or both of the progenitors, further complicating the issue emotionally.[29]

Because of these factual variations, no bright lines have been drawn. Further, policy, contract law, and marital property law vary immensely by state.[30] Because all of these areas of law come into play in embryo dispute cases, discrepant outcomes are inevitable. The last several decades have produced a number of well-publicized cases, each with varying facts and legal analyses.

C. Case Law Background: Defining the Embryo and Applying a Legal Framework

Although abortion and stem cell research both engender significant case law, frozen embryo case law is comparatively sparse. The first instance of such a lawsuit occurred in Tennessee in 1992.[31] In *Davis v. Davis*, the Tennessee Supreme Court considered who should receive a divorcing couple's frozen embryos held in an IVF program.[32] The following two decades saw nine cases on the issue, two of which were decided in 2008 and one decided in 2009. In each instance, the court began by attempting to define the embryo and, subsequently, attempting to apply an existing legal framework to the dispute to resolve who should be given the decision-making power.

The three categories widely used to define the embryo are life, property, or an amalgamation of the two.[33] When analyzing these cases, it is immediately apparent that the definition applied to the embryo is rarely of great consequence. In fact, most courts shy away from a static definition. Occasionally, courts either define the embryo in the negative by declaring what the embryos *are not* or adopt a definition under the caveat that there is simply no proper legal category for embryos.

The first method of defining the embryo is to define it as life. Few courts have defined a frozen embryo as life, but in 2005, an Illinois trial court allowed a wrongful death claim to go forward against an

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[29] *See, e.g.*, Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002).

[30] For charts outlining the ways in which family law varies state by state, see Am. Bar. Ass'n, Family Law Quarterly: Law in the 50 States Charts, http://www.abanet.org/family/familylaw/tables.html (last visited Apr. 5, 2010).

[31] *See generally* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[32] *Id.* at 589.

[33] *See* Donna A. Katz, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL'Y & L. 623, 635–36 (1998).

IVF clinic that failed to freeze a couple's embryo properly.[34] This definition has met resistance. For instance, many scientists correctly assert that biologically a frozen embryo has no chance of survival without implantation.[35] Therefore, they contend, the embryo should be looked at not as a life, but rather as a *potential* for life. They may instead prefer embryos be classified under the amalgamated category.[36] This seems to be the stance taken by the U.S. Supreme Court as well in abortion decisions.[37] In other areas of the law, legal personhood is acquired at birth, when the child is separated physically from his or her mother.[38] Until that point, the fetus is considered part of the mother's body, and her control over the embryo is the by-product of her personal corporeal autonomy.[39] In the fetal homicide context, on the other hand, many state statutes include the unborn child as "human," although there is still incongruity among the statutes as to when criminal liability for killing a fetus attaches.[40] It is unlikely that a preembryo would fall under any state's fetal homicide statute.[41]

[34] In *Miller v. American Infertility Group*, an Illinois trial court judge ruled that a frozen embryo is a human being and refused to dismiss a "wrongful death" suit filed on its behalf after an IVF program accidentally failed to freeze the embryo. Miller v. Am. Infertility Group, No. 02 L 7394 (Cook County, Ill., Cir. Ct. 2005). However, when the question of whether the embryo falls within the ambit of Illinois's wrongful death statute was certified to the Illinois Court of Appeals, the answer came back in the negative. Miller v. Am. Infertility Group, 897 N.E.2d 837, 846 (Ill. App. Ct. 2008) (answering the trial court's certified questions on interlocutory appeal). In the abortion context, the country seems to be predominantly pro-choice. Rita Healy, *Should Fertilized Eggs Have Rights?*, TIME, Nov. 21, 2007, http://www.time.com/time/nation/article/0,8599,1686729,00.html.

[35] *See generally* Howard W. Jones, Jr. & Susan L. Crockin, *On Assisted Reproduction, Religion, and Civil Law*, 73 FERTILITY & STERILITY 447 (2000).

[36] *See generally* Ethics Comm., Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 895 (Supp. 1986), *reprinted in* SOURCE BOOK IN BIOETHICS: A DOCUMENTARY HISTORY 358 (Albert R. Jonsen et al. eds., 1998); Jimmy L. Verner, Jr., *Family Law from Around the Nation: Winter 2008*, 2009 ST. B. TEX. FAM. L. SEC. REP., *available at* http://www.northtexasfamilylawblog.com/2009/02/articles/across-the-nation/family-law-from-around-the-nation-winter-2008/.

[37] Roe v. Wade, 410 U.S. 113, 163–66 (1973) (discussing the right to abort previable fetuses).

[38] *Id.* at 162.

[39] *Id.* at 163.

[40] *See* TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon Supp. 2008) (defining an individual as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth").

[41] Bridget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. C.L. & C.R. 143, 157–58 (2009).

The second approach, referred to as the property definition, strives to give the progenitors the right to decide the disposition of the embryos at their sole discretion.[42] In this way, the courts have intended that the donators of the embryos should merely be able to exercise control over their embryos, and the use of "property" in this sense does not indicate that embryos should be treated as other forms of personal property.[43]

In one of the first cases discussing frozen embryos, a federal district court in Virginia defined embryos as property, subject to state property law. In *York v. Jones*,[44] the court was asked to decide who had dispositional authority over a frozen embryo when the couple agreed on its use, but the IVF clinic had actual physical control over the embryos.[45] The Yorks had entered an IVF program in Virginia and later moved to California.[46] When they asked to move their embryos to a California IVF clinic, the Virginia clinic refused their request, contending that the embryos had to be transplanted in Mrs. York's uterus at the Virginia clinic.[47] The court held that the Virginia IVF clinic was required to surrender control of the embryos to the Yorks, likening the Yorks' relationship to the Virginia clinic to a bailor/bailee relationship.[48] This relationship, the court elaborated, exists right up until the point of viability.[49]

Many people find the concept that an embryo is mere personal property of the progenitors to be offensive.[50] These critics argue instead that, while some facets of property law might be applicable, to define the embryo as mere property undermines its true nature. Thus, there exists a middle ground commonly referred to as the amalgamated life-property model. Under this model, the embryo is

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[42] *See generally* Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73 (1995) (advocating that disputes over gametic and embryonic tissues should be resolved using a property rights scheme).

[43] *See generally* Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79 (1998) (proposing a framework for parental rights based on property theory).

[44] York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

[45] *Id.* at 424.

[46] *Id.* at 423.

[47] *Id.* at 424.

[48] *Id.* at 425.

[49] Walker, *supra* note 26, at 61 (citing *York*, 717 F.Supp. at 424–25).

[50] Robert J. Muller, Note, Davis v. Davis*: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763, 795 (1993).

still perceived as property, but property that triggers special respect and constitutional protection.[51] Courts that have adopted this definition acquire the leeway to pick and choose which rights they want to offer the embryo or the "owner" of the embryo. It is an attractive definition because of its vagueness—it allows the courts to use property law, while not stripping away the deference and respect that many believe embryos warrant. Further, courts can avoid having to reconcile different bodies of law that may govern the embryo depending on its definition.

The Ethics Advisory Board of the U.S. Department of Health and Human Services supports this view.[52] Unfortunately, this definition has drawbacks as well.[53] Though flexible, it both provides the least guidance and does not put the public on notice as to how a court will handle disputes. This standard has been applied in Massachusetts, where the court in the *A.Z. v. B.Z.* case consequently avoided having to address two inconsistent, and arguably inapplicable, areas of the law: child custody and personal property. Furthermore, several legal scholars have observed that the interim standard set forth in *Davis* and followed in *A.Z. v. B.Z.* will "insulate abortion rights from legal attack on the basis that embryos are persons."[54]

The definition of the frozen embryo appears to be largely a semantic dispute. Although every court starts by analyzing the legal status of the embryo, the difference it actually makes on the outcome of the case is questionable.[55] The objective, however, is to determine which type of law the court should apply to resolve the dispute. No matter which definition the court adopts, the court may blend legal analysis until it believes an equitable solution has been reached.

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[51] *Id.* at 781.

[52] *See* Protection of Human Subjects; HEW Support of Human In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35,033, 35,056 (June 18, 1979).

[53] *Id.*; *see also* Davis v. Davis, 842 S.W.2d 588, 596–97 (Tenn. 1992).

[54] *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 189 (2004). "In *A.Z. v. B.Z.*, a Massachusetts court agreed with the *Davis* analysis, at least with respect to the classification of cryopreserved embryos in an interim category between personhood and property . . . ." *Id.* at 188 (citation omitted).

[55] *See Davis*, 842 S.W.2d at 598 ("Although an understanding of the legal status of preembryos is necessary in order to determine the enforceability of agreements about their disposition, asking whether or not they constitute 'property' is not an altogether helpful question.").

D. Applying a Legal Framework

Arguably more important than how the courts have defined the embryos is the courts' choices of which legal framework to use in proceeding. Regardless of how a court defines the preembryo, disputes have proceeded historically under three legal frameworks. In 2002, the Iowa Supreme Court in *In re Marriage of Witten* summarized these three frameworks, which are a contractual agreement, contemporaneous written consent, and a balance of the right against the desire to procreate.[56] These principles were borrowed from contract, property, family, and constitutional law.[57]

1. Contract

To begin, couples and the IVF clinic commonly enter into a contract that establishes how the couple would like to dispose of any unused embryos.[58] These contracts are used primarily to protect the clinic from liability. Florida is the only state that imposes a mandatory, binding contract for all couples using IVF.[59] In other states, contracts are not always formed, and when they are, they are not always considered binding. In fact, many courts have found that when couples entered into the contract, they did not fully contemplate the extent of their agreement.[60] Thus, although these contractual constructs appear relatively transparent, substantial legal confusion remains.[61]

The contractual approach is favored for its simplicity—it allows the court to follow the letter of the contract that the parties agreed to

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[56] *In re* Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003).

[57] *See generally* Kansas R. Gooden, *King Solomon's Solution to the Disposition of Embryos: Recognizing a Property Interest and Using Equitable Division*, 30 U. LA VERNE L. REV. 66 (2008).

[58] *See* Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 312 (2005).

[59] FLA. STAT. ANN. § 742.17 (West 2005); *see also* Robyn Shapiro, *Who Owns Your Frozen Embryo? Promises and Pitfalls of Emerging Reproductive Options*, 25 HUM. RTS. MAG. 12 (1998), *available at* http://www.abanet.org/irr/hr/spring98/sp98shapiro.html.

[60] *See* Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253, 253 (2001).

[61] *See* Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 172 (2003) ("Courts have consistently refused to enforce contracts . . . that would result in one party becoming a parent against his or her will.").

at the time of the IVF, insofar as "they do not violate public policy."[62] By honoring these contracts, some advocates argue individuals are endowed with the power to make personal decisions shielded from the reach of the state.[63] The contractual framework also brings traditional contract defenses and interpretation tools with it, such as intent, ambiguity, and gap-filling.[64]

In 1995, a New York court applied the contractual framework to resolve an embryo dispute case.[65] *Kass v. Kass* concerned a disagreement regarding which spouse should receive the frozen embryos.[66] The parties had signed various consent forms, which stated that, in the event of a disagreement, the parties would relinquish control of the preembryos to the hospital for research.[67] A two-justice plurality of the appellate court believed that the couple's prior agreement controlled the embryos' disposition.[68] Two justices concluded that the prior agreement was not controlling but disagreed as to how the parties' interests should be balanced.[69] One justice held that in future disputes, if there is no prior agreement, the objecting party should be able to veto a former spouse's implantation of the embryos except in "the most exceptional circumstances."[70]

The Washington Supreme Court also resolved an embryo dispute by turning to the parties' contractual agreement.[71] Shortly before Becky Litowitz's marriage to David Litowitz, she had a hysterectomy, rendering her unable to achieve pregnancy.[72] The couple chose to pursue reproduction with IVF, using another woman as a surrogate.[73] The implantation was successful, but, before the

62 *In re* Marriage of Witten, 672 N.W.2d 768, 776 (citing Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261, 271 (Wash. 2002)).

63 Melissa Boatman, Comment, *Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce*, 37 U. BALT. L. REV. 285, 288 (2008).

64 *See generally* E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004).

65 Kass v. Kass, No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

66 *Kass*, 696 N.E.2d at 177.

67 *Id.* at 176–77.

68 *Id.* at 178.

69 *Id.* at 177–78.

70 *Id.* at 177.

71 Litowitz v. Litowitz, 48 P.3d 261, 270–71 (Wash. 2002).

72 *Id.* at 262.

73 *Id.*

baby came to term, the couple separated.[74] Mr. Litowitz wanted to donate the remaining embryos to an infertile couple, while Ms. Litowitz preferred that she be granted control so that she could use the embryos herself with another surrogate.[75] The court ultimately relied upon the couple's prior directive.[76] Despite the protests of both Mr. and Ms. Litowitz, the court strictly interpreted a cryopreservation contract signed by the couple when they first began IVF treatment and concluded that the embryos were to be thawed and discarded.[77]

The *Litowitz* case is distinguishable from the other embryo dispute cases on two grounds. First, only one of the parties fighting for the preembryos was a donor. The eggs had been donated from a third party and combined with the husband's sperm to produce the preembryos. Therefore, the court observed that Ms. Litowitz's relationship to the embryos was purely contractual. Second, the couple's cryopreservation contract provided that the fertility center would obtain control of the embryos after five years, unless the parties requested an extension. When making its decision, the court observed that it did not know if the preembryos even still existed.[78]

In the early 2000s, two state courts rejected similar contracts to those relied on in *Litowitz* and *Kass*. In *A.Z. v. B.Z.*,[79] the Supreme Court of Massachusetts refused to enforce a couple's agreement that the wife could implant the embryos if they divorced.[80] The court specifically found that the circumstances between the parties had changed too drastically from the time the consent form was signed—in the intervening four years, they had successfully conceived and given birth to twins, the wife had obtained a stalking order against the husband, the wife had secretly thawed more of the embryos in the hopes of having more children, and the husband had filed for divorce.[81] The court found that the consent form was intended to define the relationship between the couple and the clinic and did not contemplate these types of changes in the couple's relationship.[82]

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74 *Id.* at 264. The opinion does not discuss who was awarded custody of the child.

75 *Id.*

76 *Id.* at 267–69.

77 *Id.* at 271.

78 *Id.* at 269.

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

80 *Id.* at 1057–59.

81 *Id.* at 1053, 1057.

82 *Id.* at 1056.

In *J.B. v. M.B.*, the Supreme Court of New Jersey also rejected a couple's contractual agreement.[83] The couple signed a consent form with the clinic that granted control to the patient, her partner, and, in certain circumstances, the IVF clinic. In both *A.Z.* and *J.B.*, the courts refused to allow one party to use the embryos against the other's wishes when the couples' situations had changed from the time they entered into the contract. There is a strong possibility that had the contracts prevented the parties in question from using the preembryos, as opposed to allowing them to use the preembryos, the contracts would have been enforced.

2. Contemporaneous Written Consent

Contemporaneous written consent allows courts to order clinics to store the embryos until an agreement is reached between the parties and memorialized in writing.[84] The court will enforce the parties' specific, express agreement, but the parties retain the right to change their minds until the decision is carried out.[85] The contract model and the contemporaneous consent model share the same underlying premise: decisions about the disposition of preembryos belong to the couple that created them. Yet the contemporaneous consent model is also rooted in the belief that the parties' consent matters at the time of implantation, not at the time they create the preembryos.[86] In this way, contemporaneous consent differs from contractual theory—it acknowledges people are likely to change their minds.[87]

In 2003, the Iowa Supreme Court in *In re Marriage of Witten* (*Witten*) adopted the contemporaneous written consent model[88] and held, as King Solomon might have, that neither party was allowed access to the embryo without the consent of the other.[89] The couple had signed an "Embryo Storage Agreement" stating that neither party was to remove the preembryo from the IVF clinic without express consent from the other.[90] Nonetheless, the court also rejected the contractual approach used in *Kass*, noting that "any contract which

83 783 A.2d 707, 711–12 (N.J. 2001).

84 *See In re* Marriage of Witten, 672 N.W.2d 768, 777, 783 (Iowa 2003).

85 *Id.* at 777; Roman v. Roman, 193 S.W.3d 40, 54 (Tex. App. 2006).

86 Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999).

87 *In re Witten*, 672 N.W.2d at 777–78.

88 *See* Coleman, *supra* note 86, at 81.

89 *In re Witten*, 672 N.W.2d at 777–79.

90 *Id.* at 772.

conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy."[91] The court enjoined both parties from transferring or disposing of the embryos without the other's consent.[92]

As *Witten* illustrates, the main drawback to the contemporaneous written approach is that it can result in an interminable deadlock; if the parties are unable to reach an agreement, then the embryos will eventually lose viability in a sort of de facto destruction.[93] Meanwhile, the individuals are left without conclusion or resolution. Additionally, no consideration is taken regarding the individual circumstances of the parties, which the best interest test accounts for.

3. The Balancing/Best Interest Test

The "balancing" or "best interest" test weighs the interests of both parties, while rejecting the necessity of mutual consent and contractual enforcement.[94] This approach asserts that where parties are in disagreement over the disposition of frozen embryos, courts should look at the parties individually and evaluate each party's own interest in either the preservation or destruction of the embryos.[95] This framework provides room for considering the parties' constitutional rights to procreation, gender, and fertility.

In *J.B. v. M.B.*, the Supreme Court of New Jersey applied the best interest test to determine which partner should have decisional authority over the couple's frozen preembryos.[96] The wife struggled with infertility for several years, but through the help of a fertility center, the couple successfully conceived a child with IVF.[97] The facility that conducted the procedure required the husband and wife to sign a consent form before treatment.[98] The form stated that, in the event of divorce, "all control, direction, and ownership" of the resulting embryos would belong to the fertility clinic unless otherwise determined by a court order.[99]

91 *Id.* at 779–80 (citing Liggett v. Shriver, 164 N.W. 611, 612–13 (1917)).

92 *Id.* at 783.

93 Katz, *supra* note 33, at 631.

94 *In re Witten*, 672 N.W.2d at 779.

95 *Id.*

96 J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).

97 *Id.* at 709–10.

98 *Id.* at 709.

99 *Id.* at 710.

Upon separation, the couple had seven embryos in storage at the clinic.[100] Consequently, the wife sought a court order requiring that the embryos be destroyed, arguing that she had "endured the in vitro [fertilization] process" in order to use them "in the context of an intact family."[101] The husband filed a counterclaim, requesting the court to allow the embryos to be donated to other infertile couples.[102]

The parties offered very different bases for their claims, each urging that his or her interest was stronger.[103] The husband asserted that the destruction of the embryos "violated his constitutional rights to procreation and the care and companionship of his children."[104] He argued that these constitutional rights outweighed his wife's "right not to procreate because her right to bodily integrity [was] not implicated."[105] Conversely, the wife argued that New Jersey public policy prevented forcing individuals into familial relationships.[106] After balancing all the issues, the court concluded that, while there were strong arguments to enforce the contract, the "better rule" was to allow the parties to change their minds.[107] In this instance, that meant that the wife's right not to have a child was stronger than the contract the couple signed.

Although *Davis v. Davis* is frequently cited as the seminal case in support of the contract approach, it also provides an illustration of a state appellate court that used a balancing test to form its opinion.[108] In *Davis*, the parties never executed a contract.[109] Thus, the Tennessee Supreme Court, while holding that such contracts should "be considered binding,"[110] ultimately used the best interest test.[111] Prior to the Tennessee Supreme Court, the court of appeals reversed on the grounds that the unwilling progenitor had the right not to reproduce.[112] The Tennessee Supreme Court affirmed the

100 *Id.*

101 *Id.*

102 *Id.*

103 *See id.* at 712.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 719.

108 Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

109 *Id.* at 592.

110 *Id.* at 597.

111 *Id.* at 604–05.

112 *Id.* at 603–04.

decision.[113] The court reasoned that in the absence of a prior agreement regarding what was to be done when one party no longer wished to participate, the parties' interests were to be balanced.[114] The court found that the party wishing to avoid procreation should normally prevail.[115] The court went on to state that only if the party seeking control of the preembryos has no other reasonable option to achieve parenthood, then "the argument in favor of using the preembryos to achieve pregnancy should be considered."[116] The court specifically mentioned that adoption is a reasonable means of achieving parenthood.[117]

In a more recent dispute, a Texas appellate court also balanced the interests of the parties, relying heavily on constitutional principles to bolster its holding.[118] On appeal to the First District Houston Court of Appeals, the court in *Roman v. Roman* began by reviewing other states' case law and questioning whether the parties had a constitutionally protected right to reproduce.[119] The court admitted that this was an instance in which science had outpaced the law and the courts had been unable to keep up.[120] Given the lack of legislation or case law on point, the court looked to Texas's laws regarding gestational agreements and children of assisted reproduction.[121] In light of its findings, the court decided in favor of the husband and, hence, for the destruction of the embryos.[122] In support of its decision, the court stated that "allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy" of Texas.[123]

Unlike the contract approach or the contemporaneous written consent approach, the balancing test provides little structure to courts. Instead, the test leaves the courts to decide each case on an ad hoc

113 *Id.* at 604.

114 *Id.* at 603–04

115 *Id.* at 604.

116 *Id.*

117 *Id.*

118 Roman v. Roman, 193 S.W.3d 40, 43–44 (Tex. App. 2006).

119 *Id.* at 45–46.

120 *Id.* at 49.

121 *Id.* at 48–50.

122 *Id.* at 55.

123 *Id.* at 50.

basis and ultimately avoids a land mine of uncomfortable and difficult questions answered by a bright-line rule.

II

THE OREGON CASE: *IN RE MARRIAGE OF DAHL*

In October 2008, the Oregon Court of Appeals grappled with the issue of frozen embryos as a matter of first impression. The case drew significant attention, and many commentators eagerly anticipated the court's analysis of the issue.[124]

A. In re Marriage of Dahl*: The Factual and Procedural Background*

Dr. Dahl and Dr. Angle married in March 2000.[125] During their marriage, the couple had a son by traditional means.[126] The couple was not able to become pregnant again[127] and, in May 2004, enrolled in the Fertilization Clinic at OHSU.[128] The OHSU staff harvested Dr. Dahl's eggs and combined them with Dr. Angle's sperm, creating the preembryos.[129] After several failed attempts at implantation, the couple abandoned the pursuit and, shortly thereafter, dissolved their marriage.[130] When sorting through the terms of the dissolution, they agreed on all matters except for one: the disposition of the six remaining frozen embryos at OHSU.[131]

During the IVF procedure, OHSU and the parties entered into an Embryology Laboratory Specimen Storage Agreement (Agreement) that contained the terms of the storage and detailed the parties' ability to transfer the embryos and dispose of them.[132] As is relevant, a section of the Agreement provides:

> "In connection with requests for transfer . . . or upon termination of this Agreement, UNIVERSITY is hereby irrevocably authorized and directed to transfer or dispose of the Embryos as follows:

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124 *See, e.g.*, Kathleen Gilbert, *Oregon Court Orders Frozen Embryos Destroyed, Considered "Property Rights" Issue*, LIFESITENEWS.COM, Oct. 10, 2008, http://www.lifesitenews.com/ldn/2008/oct/08101008.html.

125 *In re* Marriage of Dahl, 222 Or. App. 572, 574, 194 P.3d 834, 836 (2008).

126 *Id.* at 574, 194 P.3d at 836.

127 *See id.* at 574, 194 P.3d at 836.

128 *See id.* at 574, 194 P.3d at 836.

129 *Id.* at 574, 194 P.3d at 836.

130 *Id.* at 574, 194 P.3d at 836.

131 *Id.* at 574, 194 P.3d at 836.

132 *Id.* at 574–75, 194 P.3d at 836.

> A. In accordance with the written joint authorization of CLIENTS pursuant to the terms of this Agreement . . . or;
>
> B. If the CLIENTS are unable or unwilling to execute a joint authorization, the CLIENTS hereby designate the following CLIENT . . . to have the sole and exclusive right to authorize and direct UNIVERSITY to transfer or dispose of the Embryos, pursuant to the terms of this Agreement[.]"[133]

Directly below this paragraph, Dr. Laura Dahl's name and initials are printed next to her husband's initials stating his approval.[134] The next paragraph asserted that if, prior to any thaw or transfer, a court awarded either of the clients the rights with respect to the embryos by a decree or an order that is binding and final, then OHSU has the right to exclusively deal with the client being awarded such rights without liability to the other client.[135]

Also in the Agreement, one possible final disposition of the embryos was for OHSU to use them in its own laboratory for research.[136] The Agreement was signed and notarized by the parties on May 14, 2004.[137]

1. Trial Court

At the hearing, the parties adamantly disagreed over what their intentions had been when they entered into the contract.[138] Dr. Dahl asserted that she and her ex-husband had agreed that the embryos were to be used for their own procreation; if they decided not to use them, then the embryos were to be donated to science.[139] Dr. Angle, on the other hand, contended that he did not initial that section of the Agreement and only remembered signing the last page without knowing the rest of the contract's contents.[140] The parties brought their dispute to a circuit court in Clackamas County, Oregon.[141]

133 *Id.* at 575, 194 P.3d at 836 (emphasis omitted) (last alteration in original).

134 *Id.* at 575, 194 P.3d at 836.

135 *Id.* at 575, 194 P.3d at 836.

136 *Id.* at 576, 194 P.3d at 836.

137 *Id.* at 576, 194 P.3d at 837.

138 *Id.* at 576, 194 P.3d at 837.

139 *Id.* at 576, 194 P.3d at 837. Dr. Dahl was primarily concerned that if the embryos were given to another couple, any resulting children may try to contact her son. *Id.* at 576, 194 P.3d at 837. She also suggested that "if she were to produce more children genetically, she would not want someone [else] to raise them." *Id.* at 577, 194 P.3d at 837.

140 *Id.* at 577, 194 P.3d at 837.

141 *Id.* at 572, 194 P.3d at 834.

After hearing the parties' testimony, the trial court found the OHSU Agreement to be "[']the agreement of the parties,' that both parties had signed the agreement with a notary present, and that it did not believe that husband was being untruthful but, rather, that husband had an inaccurate recollection of signing the consent form."[142] The trial court then ordered the embryos destroyed.[143] "However, [the trial court] further stated that, if the parties jointly agreed that the embryos should be donated to medical research, then the court would honor that decision for the embryos' disposition."[144]

2. Oregon Court of Appeals

Dr. Angle appealed the trial court's order that the embryos be destroyed.[145] He urged the appellate court to award the embryos to him under the court's authority to make a proper and just distribution of the parties' property.[146]

The position the parties took regarding the legal definition of the embryos warrants some discussion. Interestingly, although Dr. Dahl wanted the embryos destroyed or used for research, her argument rested heavily on the proposition that the preembryos were not property and, therefore, not subject to Oregon's marital property statute.[147] Dr. Angle, on the other hand, wanted the embryos to be defined as marital property, even though he adamantly opined that the embryos were, in fact, his children.[148] The logic behind this position is as follows: in a dissolution proceeding, Oregon courts only have the authority to distribute marital property.[149] Accordingly, if the embryos were defined as marital property, then the court could distribute them. Dr. Angle argued that the most just and proper action would be to award the embryos to him because preserving the embryos as living things trumps his wife's desire to avoid parenthood.[150]

142 *Id.* at 577, 194 P.3d at 837.

143 *Id.* at 577, 194 P.3d at 837.

144 *Id.* at 577, 194 P.3d at 837.

145 *Id.* at 578, 194 P.3d at 837.

146 *Id.* at 577, 194 P.3d at 837.

147 *Id.* at 578, 194 P.3d at 837.

148 *Id.* at 577–78, 194 P.3d at 837.

149 *See In re* Marriage of Massee, 328 Or. 195, 206, 970 P.2d 1203, 1211 (1999) (defining marital property).

150 *See In re Dahl*, 222 Or. App. at 577–78, 194 P.3d at 837.

In addition to arguing that the embryos were not property, Dr. Dahl reasoned that the parties had an unambiguous contract expressly vesting her with control of the embryos.[151] She asked the court "to affirm the trial court's order to have the embryos destroyed or, provided husband agree[d], donated for research purposes."[152] In the alternative, Dr. Laura Dahl argued that, even if the embryos were marital property, any decision that forces her to be a genetic parent was simply not within the court's power.[153]

B. Holding and Rationale

The court held that: (1) the embryos fit within the very broad category of marital property and, as such, were subject to a just and proper disposition in a dissolution proceeding; (2) an order that the embryos be destroyed, as preferred by Dr. Dahl, constituted a just and proper distribution of that property; and (3) courts should generally recognize valid agreements evidencing the parties' intent regarding disposition of their embryos.[154]

1. Defining the Embryos: Observation of Case Law Precedent

The court stated that it could not identify any express source of public policy in either the state's constitution, statutes, or administrative rules or elsewhere that could inform the distribution of property of this nature.[155] Thus, the court looked to the sparse Oregon case law on the subject of defining marital property.[156] In 1999, the Oregon Supreme Court adopted a definition from *Webster's Third New International Dictionary*, stating that "'property' means something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing."[157] The *Dahl* court then observed that this definition closely paralleled the language in the couple's contract.[158] Although the contract would not control

151 *Id.* at 578, 194 P.3d at 837–38.

152 *Id.* at 578, 194 P.3d at 838.

153 *Id.* at 578, 194 P.3d at 838.

154 *Id.* at 579–80, 583, 194 P.3d at 838–39, 840–41.

155 *Id.* at 578–79, 579 n.3, 194 P.3d at 838, 838 n.3.

156 *Id.* at 579, 194 P.3d at 838.

157 *In re* Marriage of Massee, 328 Or. 195, 206, 970 P.2d 1203, 1212 (1999) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (1993)).

158 *In re Dahl*, 222 Or. App at 579–80, 194 P.3d at 838–39 ("'CLIENTS represent and warrant that they have *lawful possession of and the legal right and authority to store* the Embryos under the terms of this Agreement.'").

what constitutes personal property, it did serve to indicate that the parties understood their rights toward the embryos to be possessory.[159]

In sum, the appellate court adopted the property definition, but not without reservation. It acknowledged that "there is some inherent awkwardness in describing those contractual rights [over the embryos] as 'personal property.'"[160] The definition of the embryos as marital property merely allowed the court to reach an analysis of the contract at hand.

To determine the enforceability of the couple's contract, the court looked to *Kass v. Kass*.[161] The *Kass* court had concluded that the parties' contract was a clear manifestation of their intent that the embryos be donated to science in the event of divorce.[162] The court in *Kass* also noted that, in some instances, these contractual agreements might be unenforceable in light of a particular public policy or a drastic change in circumstance.[163] Because the Oregon Court of Appeals found no such public policy issues, it concluded the contract between Dr. Dahl and her husband should be upheld.[164] Although the language of the agreement was not specific to this particular circumstance, the court found it to be unambiguous and conclusive that Dr. Dahl should have control.[165]

2. Oregon's Marital Property Statute

Oregon is a common-law property state, which means "that each spouse owns the property he or she earns in the marketplace or is given" during the marriage.[166] While spouses can own property jointly, doing so requires an affirmative act.[167] However, most common-law property states, including Oregon, have evolved to function like community property states.[168] Community property states emphasize the economic union of the spouses by providing that

159 *Id.* at 579–80, 194 P.3d at 838–39.

160 *Id.* at 580, 194 P.3d at 839.

161 *Id.* at 581, 194 P.3d at 839; *see also* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

162 *Kass*, 696 N.E.2d at 181.

163 *Id.* at 179 n.4.

164 *In re Dahl*, 222 Or. App. at 583, 194 P.3d at 840.

165 *Id.* at 583–85, 194 P.3d at 840–42.

166 Leslie Joan Harris, *Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Distribution Law*, 83 OR. L. REV. 1291, 1292 (2004).

167 *Id.*

168 *Id.*

the parties equally own all the other party earns during the marriage.[169]

Under Oregon's marital property statute, ORS 107.105, there is a rebuttable presumption that each party contributed jointly to property acquired during the marriage.[170] This is true regardless of the name attached to the property.[171] The Oregon Supreme Court has interpreted this statute as expressly creating two categories of property: "marital property," meaning property belonging to either spouse, or "marital assets," meaning all the property acquired during the marriage.[172] Marital assets, absent a showing to the contrary, must be equally divided.[173]

Of course, these definitions and cases had defined property in the context of real property or financial affairs.[174] The *Dahl* court acknowledged that the property right to the embryos was fundamentally unique and distinct from property that has a monetary value.[175] Yet, the court found that an analogy could be drawn: although the embryos did not have title, there were rights associated with their possession.[176] Thus, a more compelling analogy could potentially be drawn between marital property with emotional value, as opposed to market value. Instead of meddling with the emotional element of the property in question, the *Dahl* court examined the just and fair distribution of embryos as property pursuant to ORS 107.105(1)(f).[177]

3. What Constitutes "Just And Proper" Distribution of Embryos?

Having defined embryos as marital property, the court then proceeded to analyze what would constitute a just and proper distribution as mandated by ORS 107.105, which provides:

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169 *Id.*

170 OR. REV. STAT. § 107.105(1)(f) (2009).

171 *Id.*

172 *See In re* Marriage of Kunze, 337 Or. 122, 133, 92 P.3d 100, 108 (2004). There is also a third category of property—property that the parties owned at the time they entered into the marriage. Depending on the jurisdiction, this property may or may not be divisible upon divorce.

173 *Id.* at 134, 92 P.3d at 108.

174 *See, e.g.*, *id.* at 133, 92 P.3d at 108; *In re* Marriage of Pierson, 294 Or. 117, 653 P.2d 1258 (1982).

175 *In re* Marriage of Dahl, 222 Or. App. 572, 580, 194 P.3d 834, 839 (2008).

176 *Id.* at 580, 194 P.3d at 839.

177 *Id.* at 579, 194 P.3d at 838.

> For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. . . . The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held.[178]

This issue presented a significantly more difficult question for the court. The division of property rarely gives rise to this level of deeply emotional conflict and, notwithstanding the idea that some properties are unique and personally meaningful, a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value.

The trial court concluded that the contract between Drs. Dahl and Angle clearly showed their intent.[179] Thus, the appellate court held that disposing of the embryos in a manner that the parties chose at the time they underwent IVF was a just and proper distribution of the embryos.[180] Had Dr. Angle advanced any affirmative, countervailing state policy that would have imposed an unwanted parenthood on Dr. Dahl, the court may have found the prior directive to be improper.[181] But as that was not the case, such an analysis did not have to be made.

III

LEGAL SCHOLARS SUGGEST ALTERNATIVE APPROACHES

The subject of embryo disposition has resulted in an astounding amount of legal writing. Legal scholars have suggested that courts should end embryo disputes by either focusing on the constitutional rights of the parties, the gender of the particular party vying for control, or the fertility of that party. While judicial avenues present interesting solutions, the suggestions primarily end in litigation. As described below, the best resolution will be one that keeps the majority of disputes out of courts entirely.

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178 OR. REV. STAT. § 107.105(1)(f) (2009).

179 *In re Dahl*, 222 Or. App. at 583, 194 P.3d at 840.

180 *Id.* at 585, 194 P.3d at 841.

181 *Id.* at 578, 194 P.3d at 842.

A. Constitutional Protection: Upholding the Rights of the Progenitor

The first proposed solution attempts to balance the constitutional right to reproduce with the right not to reproduce.[182] This concept borrows legal analysis from abortion and contraceptive case law. Many courts and scholars question whether the law should recognize an individual's right to procreate or not to procreate.[183] In a recent article titled *The Right Not to Be a Genetic Parent*, Glenn Cohen argued, as the title indicates, for the recognition of the right not to have genetic childr8en.[184] Mr. Cohen maintains that the legal system should consider the right not to procreate as a bundle of rights instead of a monolithic right.[185] This bundle consists of the "right not to be a gestational, legal, and genetic parent."[186] Yet others argue that "[n]othing in the constitution or elaborating case law states that the right to avoid procreation attaches with greater heft than the right to procreate."[187]

This argument aside, courts generally conclude that the right not to procreate should be stronger.[188] These courts reason that the law should not impose parenthood on those who do not desire it, as parenthood brings with it emotional and financial burdens. Although biological parents can put their children up for adoption, they cannot do so until after the child has been born.[189] Historically, the courts have favored this type of approach; no U.S. court has ever upheld an award of implantation.[190]

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182 J.B. v. M.B., 783 A.2d 707, 715–17 (N.J. 2001); *see also* A.Z. v. B.Z., 725 N.E.2d 1051, 1052–53 (Mass. 2000).

183 *See* I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1196 (2008) (arguing that when examining these cases "it is essential to unbundle the possible rights not to be a genetic, gestational, and legal parent, and to recognize that the three rights . . . do not stand and fall together").

184 *Id.* at 1116.

185 *Id.* at 1121.

186 *Id.*

187 Waldman & Herald, *supra* note 58, at 312.

188 *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

189 *See id.* at 591. *See generally* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004).

190 Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2128 (2007).

Lastly, the court may determine that the progenitor who will grant life to the embryo should prevail.[191] While these courts are few in number, many believe that embryos are living beings. Louisiana is one such state, and as of 1986, its state law declares that an embryo is a "juridical person" that may only be used for implantation.[192] If the potential parents decide not to use the embryo, the IVF clinic is considered the embryo's temporary guardian until an adoptive implantation can occur.[193] The other possibilities of donation for research or destruction are prohibited.[194] However, given federal abortion common law, this state law may exist only in theory, as it gives rise to the bizarre scenario of a woman impregnating herself with the embryos simply to gain the authority to destroy them.[195]

B. Recognizing Gender Differences

A large constituency of legal scholars believes women should have more control over embryos because women contribute more physically to their creation than men.[196] It is undeniable that the woman has a higher physical burden in creating the embryo for IVF use. Women have to undergo hormone treatment, which poses serious possible side effects such as breast cancer and ovarian hyperstimulation syndrome.[197] The method of extracting the eggs is invasive, requiring a doctor to insert a needle into the vagina.[198] This

191 *See generally* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (discussing one party's argument for implantation but ultimately deciding against it).

192 LA. REV. STAT. ANN. § 9:123 (2008).

193 § 9:126.

194 *See generally* Shapiro, *supra* note 59.

195 This concept was explored in *Davis*. The Tennessee Supreme Court observed that it was unlikely that a husband could force transfer of the preembryos to his wife without her consent because she had the absolute right to terminate any resulting pregnancy. Davis v. Davis, 842 S.W.2d 588, 598 n.21 (Tenn. 1992). Therefore, ordering a woman to undergo a uterine transfer is an act in futility. *Id.* For an article exploring this concept in more depth, see Christina L. Misner, *What If Mary Sue Wanted an Abortion Instead? The Effect of* Davis v. Davis *on Abortion Rights*, 3 AM. U. J. GENDER & L. 265 (1995).

196 *See* Waldman & Herald, *supra* note 58, at 311.

197 *See id.* at 321; *see also* Ronald T. Burkman et al., *Infertility Drugs and the Risk of Breast Cancer: Findings from the National Institute of Child Health and Human Development Women's Contraceptive and Reproductive Experiences Study*, 79 FERTILITY & STERILITY 844, 848 (2003); Annick Delvigne & Serge Rozenberg, *Epidemiology and Prevention of Ovarian Hyperstimulation Syndrome (OHSS): A Review*, 8 HUM. REPROD. UPDATE 559, 559–61 (2002) (noting incidents of OHSS during IVF).

198 *See* Salem A. El-Shawarby et al., *A Review of Complications Following Transvaginal Oocyte Retrieval for In-Vitro Fertilization*, 7 HUM. FERTILITY 127, 127

procedure is both painful and dangerous, as it can lead to punctured organs, hemorrhage, or infection.[199] Without elaborating, men's contribution to the procedure is much less onerous. Thus, these scholars argue that women should possess the power to control the disposition of the embryo because the sex contributes more to its creation.[200]

In the traditional pregnancy context, a woman can bring the pregnancy to term or terminate the pregnancy single-handedly because of the legal control she has over her body.[201] Because embryos exist outside of the woman in IVF, the reasons to give her the decision-making power are not present.[202] Therefore, using IVF provides both progenitors the opportunity to have a say in the fate of the embryo. Of course, different factors remain; should the man wish to bring the embryos to term, he will have to find a willing uterus.[203]

This theory is often challenged by drawing an analogy to disputes between parents over the custody of their children;[204] in a custody decision, the woman is not granted more decision-making power because she physically carried the child to term. Thus, scholars posit, when deciding embryo disputes the woman should not be granted more power because her contribution was more significant.[205]

C. Considering the Parties' Individual Fertility

Scholars have also presented the theory that the infertile partner should have more authority to decide the disposition of the embryos.[206] This argument arises from the fact that the situation is infinitely more complex for the partner who cannot simply turn around and create more embryos. IVF is painful, expensive, and requires both an egg and sperm, and the option to reproduce in

(2004) (describing procedure and potential of aspiration needle injuring adjacent pelvic organs, which may lead to complications).

199 Nan B. Hildebrandt et al., *Pain Experience During Transvaginal Aspiration of Immature Oocytes*, 80 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 1043, 1044–45 (2001).

200 Waldman & Herald, *supra* note 58, at 321–22.

201 Emily Jackson, *Degendering Reproduction?*, 16 MED. L. REV. 346, 349 (2008).

202 *Id.* at 350.

203 *Id.*

204 *Id.*

205 *Id.*

206 Katz, *supra* note 33, at 667–73.

another context may not exist.[207] For that reason, some have suggested that the infertile partner should have first priority to the embryos, as this could be his or her last chance at procreation.

As previously mentioned, women are disproportionately the partner who is infertile.[208] In this way, *Dahl* is the factual exception to the majority of embryo dispute cases. Many argue, therefore, that ordering embryo destruction disadvantages women, who both have invested more physically and have a more limited time to have children than men, who may remain fertile well into old age.[209]

IV
AFTER *DAHL*: A SOUNDER APPROACH

A. Keeping Embryo Disputes out of Court

Our justice system is ill-equipped to resolve this type of legal issue. In an adversarial system, disputes are oversimplified and the binary focus in which one party wins and one party loses results in polarization of the parties.[210] The method of discovery discourages the open sharing of information and creates hostility between the parties.[211] Furthermore, our judicial system demands that we classify and attribute legal status to the embryo. As mentioned above, embryos generally are classified in three categories: property, life, and an amalgamation of the two. Each of these categories has disadvantages. For example, defining the embryo as a living being becomes infinitely more complicated once it is implanted and can be aborted. Similarly, to consider the embryo as property is to ignore its potential for human life, subjecting it to sale or conversion.[212] The question of the embryo's viability, however, is distinct. While these embryos are hypothetically viable, if left alone they will die—but in utero they will live.

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[207] *Id.* at 645–66 (examining case law on the disposition of frozen embryos and proposing a framework for resolving such issues based on "fertility status").

[208] *Id.* at 670.

[209] *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (considering the various burdens imposed on the relevant parties when confronted with a constraint on parental autonomy); Waldman & Herald, *supra* note 58, at 310; *see also* MAURA A. RYAN, ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION: THE COST OF LONGING 71–75 (2001).

[210] Upchurch, *supra* note 190, at 2113–14.

[211] *Id.* at 2116.

[212] *Id.* at 2132.

Further, the selection of the appropriate legal framework in any case is shaped by the need to remain consistent with prior legal precedent. Courts interpret or define the nature of the dispute by relying on the foundation of the law previously articulated in similar contexts—the constraint of precedent forms the foundation for the parties' arguments.

1. A Workable Solution: Mandating IVF Contracts and Precontractual Counseling

It is incumbent on the Oregon legislature to regulate embryo disposition from the side of the clinics. In this way, embryo disputes can be kept out of court by ensuring that the donors are informed of their positions and rights. Previous contracts and consent forms have failed because they violate public policy, are vague, or have expired, in the sense that they force a resolution that no longer represents the positions of the parties. Thus, any mandatory consent form must not contain these problems. The following section takes a careful look at critiques of contractual preconsent, including the reasons that contracts have failed in the past. Proposed legislation will draw upon the strengths of each existing legal framework.

2. Arguments Against Contractual Preconsent

Several legal scholars and courts have critiqued the contract approach.[213] They argue that this method ultimately fails for several reasons. First, they observe that at the time the parties enter into the contracts the possibility of divorce is far from their minds—they are, after all, about to create a child. Similarly, they contend that the parties rarely appreciate the terms of the contract they are signing.[214] Second, courts have noted that the environment in which the parties are signing is coercive—dispositional agreements that are embedded in informed consent documents smack of unconscionability.[215] In fact, in the case of *Dahl*, Dr. Angle asserted that he signed the

[213] Coleman, *supra* note 86, at 88–89 (criticizing the widespread view that a partner's interest in a frozen embryo may be waived by private contract, and instead advocating an "inalienable right to mutual consent" over decisions involving such embryos, which may not be waived by a preexisting contract).

[214] *Id.* at 89. In 2000, the only state that dictated contractual ordering for the disposition of embryos was Florida. *See* FLA. STAT. ANN. § 742.17 (West 2005).

[215] Jessica L. Lambert, Note, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 559 (2008).

contract without the presence of a notary and without seeing the entire document.[216] Third, constitutional loopholes provide a means for a court to come to any conclusion it sees fit, rendering most preconsent contracts null. While each of these concerns is legitimate, they are avoidable.

3. Proposed State-Based Legislation

Regulating the contractual agreements of the parties is an issue best left for the state legislature.[217] Because family law and property law are both primarily creations of statute, it follows that this is where the regulation of frozen embryo issues belongs. Such state-based legislation should establish the definition of frozen embryos and clearly lay out the requirements of IVF contracts.

The most effective way of implementing these changes is by imposing them on the fertility clinics. These clinics and their administrating doctors should be required to administer consent forms that not only establish the liability of the clinic, but also establish the available (and unavailable) options for leftover embryos.

Finally, the legislation should provide a clear framework for how a court should address frozen embryo disputes when they inevitably arise. Such a framework could better inform IVF clinicians, who in turn will better inform their patients. This could ultimately lead to fewer disputes entering the courts, which, as described below, is a desirable outcome.

a. Contents of the Consent Contract

For these consent contracts to be enforceable, they must not allow parties to agree on an outcome that violates public policy. Previous case law provides an invaluable source of agreements that have been found unenforceable. Specifically, the contract cannot provide an option allowing one of the parties to use the embryos against the other's wishes. Thus, the consent contract should simply inform the parties that neither of them will be able to access the embryos without the other's contemporaneous consent. The only options that parties can agree to in advance are (1) donate the unused embryos to science or (2) donate them to an embryo donation program, such as the

216 *In re* Marriage of Dahl, 222 Or. App. 572, 577, 194 P.3d 834, 837 (2008).

217 *See id.* at 585 n.6, 194 P.3d at 841 n.6.

Snowflake Frozen Embryo Adoption Program.[218] Both of these options have consistently been enforced by courts when they were the couples' prior directive.

The contracts should also require language about the binding nature of the agreement and the gravity of the issues. The administering facility should be required to debrief and counsel the parties fully as to what they are agreeing to before they sign. The parties should be provided information regarding other parties' experiences with embryo disputes. A waiting period allowing time for reflection is also encouraged. In this way, couples will be operating under informed consent to the rights they are creating or signing away.

It is important that the terms of the agreement of the parties vis-à-vis one another not get lost in the liability waiver with the clinic. This means that the contract must separate the parties' agreement with the clinic from the agreement they make with each other. Their decisions regarding disposition must be carefully distinguished so as to avoid any ambiguities of the contract's purpose.

b. Administering the Consent Contract

A possible way to reduce the likelihood of a later dispute is to go one step further and require counseling or mandatory mediation for parties who are undergoing IVF. IVF clinics would provide the couple with a counselor to discuss and emphasize the nature of the agreement and its implications. Surprisingly, New Hampshire is the only state that requires judicial preauthorization for the approval of disposition agreements.[219] Nonetheless, it is not alone in observing the potential benefits of requiring counseling. In 1999, the American Bar Association published its proposed Assisted Reproductive Technologies Model Act.[220] The Act expounded upon the psychological effects of assisted reproductive technology and

[218] Snowflake Frozen Embryo Adoption Program, http://www.nightlight.org/adoption-services/snowflakes-embryo/default.aspx (last visited Apr. 3, 2010).

[219] N.H. REV. STAT. ANN. § 168-B:13 (2002) (requiring counseling, written certification of the counseling, and the health care provider's evaluation that the person participating in the IVF procedure is qualified); *see also* Lisa McLennan Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL'Y & L. 87, 103–05 (2005).

[220] *See generally* AMI S. JAEGER, CO-CHAIR, ASSISTED REPROD. & GENETIC TECHS. COMM., AM. BAR ASS'N, ASSISTED REPRODUCTIVE TECHNOLOGIES MODEL ACT (1999), *available at* http://www.abanet.org/family/committees/ART_modelact1299.pdf.

addressed the need for substantial counseling before beginning the process.[221] The Act, however, was never adopted.

Because Oregon has swept frozen embryos under the purview of its marital property statute, the state should take precaution to inform progenitors as to what they are binding themselves to. The facts of *Dahl* are straightforward; it is easy to empathize with a woman who does not wish her embryo to be carried by a stranger against her will. But the situation and the relationship between the parties are not always so clear-cut. Therefore, Oregon should ensure that people using IVFs are aware of how the court will view their embryos should the parties ultimately disagree on their usage.

CONCLUSION

With the development of assisted reproductive technologies such as IVF, human inventiveness has opened a Pandora's box of ethical and legal issues. Profound uncertainty exists when parties using IVF subsequently disagree about the disposition of their cryopreserved embryos. Perhaps because these technologies implicate some of the most intimate human concerns—reproduction, parenting, and marriage—both legislatures and the courts have been reluctant to speak explicitly about any resolution of the present confusion. The few courts, including Oregon's, to address the issue of remaining embryos have considered the problem within the typical legal framework of property and contract interpretation. But such legal construction reduces the embryo to an object and ignores possible solutions that would keep many embryo disputes out of court.

Oregon should look to the IVF contract for resolution, requiring parties to agree in advance to the disposition of their embryos and preventing them from coming to an agreement that no court will enforce. The legislature should take measures to ensure that would-be parents understand the gravity of their agreement. Mandating counseling before entering into the contract with the IVF clinic may be one such measure. Ultimately, enactment of such a statute will both create a foundation for a more uniform and consistent legal setting and ensure a more rational basis for resolving embryo disputes.

[221] *Id.* at 6–7.