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Resolving Disputes Over Embryo Allocation Upon Divorce: A Need For a Hybrid Approach by Illinois Courts

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RESOLVING DISPUTES OVER EMBRYO ALLOCATION UPON DIVORCE: A NEED FOR A HYBRID APPROACH BY ILLINOIS COURTS

I. INTRODUCTION

Embryo disposition upon divorce or separation of the parties presents a wealth of legal issues to be addressed by the courts. Embryo cryopreservation,[1] which occurs subsequent to the process of in-vitro fertilization[2] (IVF), has emerged as an extremely popular form of assisted reproductive technology[3] (ART) in recent decades.[4] Embryo cryopreservation was first successfully attempted in 1984 in the case of Zoe Leyland, the first baby to be born from a frozen embryo.[5] In Leyland's case, the embryo was frozen for two months, but since the inception of the practice of cryopreservation after successful IVF, embryos have successfully survived in cryopreservation for extensively longer periods of time, even spanning decades.[6] The implications of freezing embryos are therefore long-term, as demonstrated by the case of Molly Everette Gibson.[7] Gibson was a child born from the viable pregnancy of her mother who used an embryo, which had been stored in a cryogenic freezer for twenty-seven years.[8]

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1. *See* NAT'L CANCER INST., *Embryo Cryopreservation*, https://www.cancer.gov/publications/dictionaries/cancer-terms/def/embryo-cryopreservation (last visited Apr. 14, 2022) (defining "embryo cryopreservation" as "[t]he process of freezing one or more embryos to save them for future use").

2. *See* CLEV. CLINIC, *IVF (In Vitro Fertilization)*, https://my.clevelandclinic.org/health/treatments/22457-ivf (last visited Apr. 16, 2022) ("In vitro fertilization (IVF) is a type of assisted reproductive technology (ART) where sperm and an egg are fertilized outside of the human body.").

3. *See* CDC, *What is Assisted Reproductive Technology?*, https://www.cdc.gov/art/whatis.html, (last visited Apr. 16, 2022) (defining "ART" to include "all fertility treatments in which either eggs or embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman.").

4. Susan L. Crockin & Gary A. Debele, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. L. 55, 55–59 (2018).

5. Sarah Zhang, *A Woman Gave Birth from an Embryo Frozen for 24 Years*, THE ATLANTIC (Dec. 21, 2017), https://www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876/.

6. *Id.*

7. Marisa Iati, *Meet Molly, the Baby Who Came from an Embryo Frozen When Her Mom Was a Year Old*, WASH. POST (Dec. 3, 2020), https://www.washingtonpost.com/lifestyle /2020/12/03/embryo-frozen-27-years-ago-live-birth.

8. *Id.*

This Comment analyzes two of the current approaches taken by Illinois courts in disputes regarding embryo allocation upon divorce or separation of the parties and proposes a new "Hybrid Approach," which better balances the interests of parents and potential children. Under the proposed "Hybrid Approach," Illinois courts ought to treat embryos as a unique or interim form of property when determining their disposition in a legal dispute. This is because embryos are unlike other forms of personal property or marital assets due to their potential to be utilized by either party in order to have a biological child.

Part II provides a brief background on embryo cryopreservation and discusses the two current approaches to embryo allocation taken by Illinois courts.[9] Part II also provides information on approaches taken by other jurisdictions.[10] Part III proposes that Illinois courts adopt a "Hybrid Approach," which incorporates elements of the approaches taken by courts in other jurisdictions along with elements from the multi-factor test currently employed by Illinois courts in child custody disputes.[11] This Part also discusses the relative merits of the current Illinois approaches in comparison to the proposed "Hybrid Approach."[12] Finally, Part IV discusses the impact that employing the proposed "Hybrid Approach" will have on Illinois courts.[13]

II. Background

The practice of embryo cryopreservation has become exceedingly popular, especially in recent years.[14] While the original purpose of freezing embryos was to help heterosexual couples who struggled with infertility, the practice has become an increasingly common avenue to start a family for homosexual couples, single women, and surrogates.[15] Freezing embryos affords individuals flexibility and greater ability to plan their future families. Prior to successful attempts to effectively freeze embryos for later use, individuals were limited in their options to IVF, whereby sperm and egg are combined in a lab to create the embryos, and each embryo is immediately implanted into the mother.[16] In contrast, cryopreservation enables embryos to be stored

9. *See infra* Part I.
10. *See infra* Part I.
11. *See infra* Part II.
12. *See infra* Part II.
13. *See infra* Part III.
14. Elena Berton, *Same-Sex Couples and Singles Use of Fertility Treatment Hits UK Record*, Reuters (May 9, 2019, 9:38 AM), https://www.reuters.com/article/us-britain-fertility-lgbt/same-sex-couples-and-singles-use-of-fertility-treatment-hits-uk-record-idUSKCN1SF1QH.
15. *Id.*
16. Zhang, *supra* note 5.

for an extensive period of time.[17] Individuals may then choose the proper time to use the embryos as well as elect to use only one embryo at a time while saving the others for later use.[18] Doing so reduces the possibility of conceiving twins or triplets, thus allowing parents to exercise greater control over their vision for their families.[19] Additionally, embryos may be tested and manipulated to eliminate genetic diseases.[20]

While embryo cryopreservation has become an increasingly popular form of ART characterized by great scientific developments over the years,[21] how to handle embryo allocation in the event of divorce or separation of couples is a broadening and still less developed area of the law, which continues to present challenges for the courts.[22] Politicians, state legislatures, and courts grapple with a multitude of legal issues surrounding families created using fertility treatments in view of divergent moral, political, and legal discourse throughout the United States.[23]

When it comes to the legal treatment of embryos in the event of divorce or separation of a couple, disputes exist among "professionals working in the assisted reproduction field, policy makers, and the public . . . whether embryos are persons, property, or something in between . . . ."[24] The Supreme Court has never directly answered the question of how to categorize embryos, but in light of its tradition of declining to afford fetuses legal standing as judicial persons,[25] it is very likely that embryos would not receive legal standing as persons either. Moreover, no state court has "declared an ex utero embryo to be a person."[26] However, at least one state legislature enacted legislation declaring embryos to be legal persons.[27] In Louisiana, a statute provides that an embryo is "a biological human being which is not the property of the physician who acts as an agent of fertilization, or the facility which employs him or the donors of the sperm or ovum."[28]

17. *Id.*
18. *Id.*
19. *Id.*
20. Crockin & Debele, *supra* note 4, at 57.
21. *Id.* at 56–59.
22. *See generally id.*
23. *Id.* at 61.
24. *Id.* at 67.
25. *Id.* at 73.
26. *Id.*
27. LA. STAT. ANN. § 9:124 (2021); *see id.* § 9:123 (stating that "[a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law").
28. *Id.* § 9:126.

Moreover, various state courts have characterized embryos as, at the very least, a unique form of property, or "in some cases, *sui generis*, stating they are deserving of special treatment . . . ."[29] Other states, including Illinois, treat embryos strictly as property subject to allocation under principles of contract law.[30]

A. Emergence of the Illinois Approaches

In Illinois, courts generally treat embryos as marital assets for purposes of allocation upon divorce.[31] Illinois is an "equitable distribution state," meaning that courts divide marital property fairly between parties.[32] However, such equitable property division is complicated by marital property which cannot be clearly divided or which lacks monetary value.[33] Embryos constitute a unique form of marital property not clearly subject to equitable distribution, specifically because they lack monetary value.[34] Moreover, in the event of either divorce or separation of unmarried couples, dispositional agreements[35] and informed consent contracts[36] are of paramount importance to the courts in determining the manner in which embryos will be allocated.

Illinois courts employ at least two clear approaches to determine allocation when parties dispute the custody of their embryos upon separation.[37] The courts first seek to enforce any contractual language governing the allocation of the embryos.[38] If no dispositional contract

29. Crockin & Debele, *supra* note 4, at 68.

30. *See generally* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015).

31. L. Office Vincent C. Machroli, P.C., *Who Gets Custody of the Frozen Embryos in an Illinois Divorce?* (July 13, 2017), https://www.machrolilawoffice.com/oak-park-lawyer/ who-gets-custody-frozen-embryos-illinois-divorce [hereinafter *Who Gets Custody?*].

32. L. Office Nicholas W. Richardson, P.C., *How Are Frozen Embryos Handled During an Illinois Divorce Case?* (June 7, 2019), https://www.nickrichardsonlaw.com/palatine -divorce-attorney/how-are-frozen-embryos-handled-during-an-illinois-divorce-case [hereinafter *How Are Frozen Embryos Handled?*].

33. *Id.*

34. Crockin & Debele, *supra* note 4, at 68.

35. Sarah Holman Loy, *Responding to* Reber*: The Disposition of Pre-Embryos Following Divorce in Pennsylvania*, 122 Pa. St. L. Rev., 545, 564 (2018) (by entering into a dispositional agreement, in the event of separation or divorce, couples can generally provide for: "(1) the destruction of cryopreserved pre-embryos; (2) the donation of pre-embryos for research; or (3) the utilization of the pre-embryos, enabling one party to have a child").

36. Mary Beck, *Frozen Pre-embryo Practice in Missouri*, 75 J. Mo. B. 126 (2019) (informed consent contracts are typically provided by fertility treatment centers to inform individuals who intend to cryopreserve embryos of their respective rights and options, which might include "length of storage; thawing with destruction; donation to each other, to other family members, to another family, or to science; and potential triggers for such options, such as length of lime, pregnancy, death, or divorce").

37. Szafranski v. Dunston, 34 N.E.3d 1132, 1136–37 (Ill. App. Ct. 2015).

38. *Id.*

exists, courts instead employ a balancing test weighing the parties' interests.[39] The Illinois Parentage Act of 2015 now mandates that couples enter into dispositional agreements before choosing to cryopreserve their embryos. However, if no such agreement is created, the key Illinois case of *Szafranski v. Dunston* provides the balancing test that courts use to determine embryo disposition.

1. Illinois Parentage Act of 2015

The Illinois Parentage Act of 2015 (Parentage Act) contemplates situations in which parties, represented by independent legal counsel, enter into contractual agreements regarding the allocation of their embryos.[40] However, the Parentage Act does not contemplate situations in which parties failed to enter into a written agreement regarding allocation. As a result, in Illinois, there is no uniform rule to determine the outcome of disputes regarding the allocation of embryos when the parties have not entered into a dispositional agreement. However, one balancing approach has been elucidated from the key decision by the Illinois Appellate Court in *Szafranski v. Dunston*, which was decided prior to the enactment of the Parentage Act.[41] Since the Parentage Act now requires that parties enter into contractual agreements regarding allocation,[42] when possible, Illinois courts still seek to enforce the contractual intent expressed in agreements signed by the parties, either at the medical facilities where the embryos were created, or separately with the assistance of counsel.[43] However, if no agreement was signed, the courts will employ the balancing test proffered in *Szafranski* to determine allocation.[44]

2. Szafranski v. Dunston

Szafranski v. Dunston exemplifies the main approach taken by Illinois courts with respect to embryo allocation.[45] In *Szafranski*, the plaintiff, Jacob Szafranski, and the defendant, Karla Dunston, disputed who would control the disposition of the couple's frozen embryos.[46] The couple was dating at the time they elected to freeze their embryos through cryopreservation.[47] Karla had been diagnosed with

39. *Id.*
40. 750 ILL. COMP. STAT. § 46/703(a) (2017).
41. *Szafranski*, 34 N.E.3d at 1136–37.
42. 750 ILL. COMP. STAT. § 46/703(a).
43. *Szafranski*, 34 N.E.3d at 1136–37.
44. *Id.* at 1147.
45. *Id.*
46. *Id.* at 1136.
47. *Id.* at 1137.

lymphoma, and prior to receiving cancer treatment, she desired to preserve her chances of fertility by going through the IVF process and subsequently freezing the embryos.[48] Karla and Jacob acknowledged that neither expected the relationship to result in marriage, but nonetheless, the couple agreed to complete the process of IVF.[49] Karla was nervous about the prospect of using a sperm donor, and thus, Jacob elected to fertilize her eggs, expressing his desire to help Karla one day have children.[50]

Prior to going through with IVF, the medical facility required the couple to sign an informed consent document (Informed Consent).[51] The medical facility encouraged the couple to either enter into a co-parenting agreement or a sperm donor agreement.[52] The couple then met with an attorney who explained that under a co-parenting agreement, both individuals would be "involved in any resulting child's life as a co-parent, including sharing financial responsibility."[53] On the contrary, "under a sperm donor agreement, Jacob would have no obligations and would be waiving his parental rights."[54] Karla later asked the attorney to prepare a co-parenting agreement, but ultimately, the couple never signed the agreement.[55] Shortly after Karla began chemotherapy, Jacob ended the relationship and proceeded to send a number of emails expressing his desire that Karla not use the embryos.[56] Jacob believed that Karla's use of the embryos would damage his relationship with his long-term girlfriend with whom he had gotten back together and who had given him an ultimatum that she would end the relationship if Karla used the embryos.[57] However, Karla emphasized that if she had known previously that Jacob had concerns regarding her use of the embryos, she would not have fertilized all of her eggs but rather would have frozen some in order to ensure that she had the chance of having a biological child.[58] As a result, Karla's only chance of having a biological child was to use the embryos, which necessarily required Jacob's genetic involvement.[59]

48. *Id.*
49. *Szafranski*, 34 N.E.3d at 1137.
50. *Id.* at 1138.
51. *Id.*
52. *Id.* at 1139.
53. *Id.*
54. *Id*.
55. *Szafranski*, 34 N.E.3d at 1139.
56. *Id*. at 1140–41.
57. *Id*. at 1146.
58. *Id*. at 1143.
59. *Id*. at 1162.

The issue presented for the court was which party was entitled to control the disposition of cryopreserved embryos that were created by the unmarried parties.[60] Ultimately, the court awarded Karla sole custody of the embryos, conducting two separate analyses to arrive at its conclusion.[61] The court reasoned that based on an:

> [E]xtensive survey of Illinois law and that of other jurisdictions involving similar disputes . . . disputes over the disposition of pre-embryos created with one party's sperm and the other party's ova should be settled by: (1) honoring any advance agreement entered into by the parties, and (2) weighing the parties' relative interests in using or not using the pre-embryos in the event there is no such agreement.[62]

Therefore, the court first found that the parties had entered into an oral contract as well as a medical informed consent contract, which made clear that Jacob desired that Karla would be able to use the embryos in the future without requiring Jacob's consent.[63] Jacob argued that his prior approval was required for Karla to use the embryos pursuant to the terms of the Informed Consent signed at the medical facility.[64] The Informed Consent stated "[e]mbryos are understood to be your property, with rights of survivorship. No use can be made of these embryos without the consent of both partners (if applicable)."[65] The relief sought by Jacob was effectively to incorporate a limitation into the oral agreement, which would change the fundamental essence of the oral contract.[66] The court disagreed with Jacob's interpretation of the language contained in the Informed Consent and found that the language did not contradict the oral agreement.[67]

The Informed Consent contemplated that the couple would enter into a separate agreement with respect to disposition of the embryos upon separation.[68] The court interpreted the missing language from the Informed Consent regarding disposition of the embryos upon separation as a purposeful omission, reasoning that "[i]f this provision was intended to be an expression of the parties' dispositional intent, it would contain language more reflective of a choice . . . ."[69] Provided that the parties had not signed the draft co-parenting agreement and

60. *Id*. at 1147, 1157.
61. *Szafranski*, 34 N.E.3d at 1137.
62. *Id.* at 1136–37.
63. *Id.* at 1148, 1153–54, 1161.
64. *Id.* at 1153.
65. *Id.* at 1138.
66. *Id.* at 1151.
67. *Szafranski*, 34 N.E.3d at 1155.
68. *Id.*
69. *Id.* at 1156.

had acknowledged their informed consent, the court pointed primarily to principles of contract law in upholding the original intent of the parties in their oral agreement.[70]

The court ultimately held that Karla was entitled to use the embryos to have a child, without limitation, based on the oral agreement between the parties.[71] Furthermore, the Informed Consent neither contradicted nor modified the parties' oral agreement.[72] The court did not determine the enforceability of the draft co-parenting agreement because the oral agreement was sufficient in demonstrating the parties' agreement that Karla could use the pre-embryos without Jacob's consent.[73] This focus on the oral agreement illustrates the first approach taken by the court: enforcing any contractual language surrounding the allocation of embryos.

Alternatively, the court employed a balancing test and ruled in favor of Karla because Karla's interest in using the embryos prevailed over Jacob's interest in preventing Karla from using the embryos.[74] The court noted that a balancing test would be necessary in absence of a contract expressing the parties' intent.[75] The court considered Jacob's interest in preventing Karla from using the embryos due to the detrimental impact it would have on his future relationships.[76] However, the court reasoned that Karla's interest in using the embryos was more persuasive because she lost her fertility during chemotherapy.[77] Although the court held in Karla's favor based on the couple's intent expressed in the original oral agreement, the court reasoned that in the absence of a prior agreement, Karla's interest in using the embryos would nonetheless have outweighed Jacob's interest to the contrary.[78]

Szafranski remains the key Illinois case in embryo disposition jurisprudence, and in absence of federal or state regulation or any test posited by the Illinois Supreme Court, a variety of issues remain to be addressed by the Illinois courts. Nonetheless, *Szafranski* offers the approach regarding embryo allocation that Illinois courts tend to follow.[79] *Szafranski* is also illustrative of the approaches taken in other

70. *Id.* at 1151.
71. *Id.* at 1157.
72. *Id.*
73. *Szafranski*, 34 N.E.3d at 1161.
74. *Id.* at 1162.
75. *Id.* at 1161.
76. *Id.* at 1162.
77. *Id.*
78. *Id.* at 1157, 1162.
79. *Szafranski*, 34 N.E.3d at 1136–37.

jurisdictions, which tend to use some combination of what this Comment refers to as the "Contractual Approach" and the "Balancing-of-Interests Approach."

B. The Contractual Approach

Under the Contractual Approach, courts look strictly to any existing dispositional contracts entered into by the parties to determine the manner in which embryos will be allocated in the event of a dispute.[80] Principles of contract law govern this line of decision making, and thus, courts enforce contracts as binding when there is an offer, acceptance, and a meeting of the minds between the parties regarding the terms of the agreement.[81] Of paramount importance under the Contractual Approach is the original intent of the parties expressed in their original agreement, whether that agreement is oral or in writing.[82]

The Contractual Approach is exemplified by the decision of the intermediate New York appellate court in *Finkelstein v. Finkelstein*. In *Finkelstein*, a couple froze their embryos prior to divorce.[83] The parties disputed the allocation of those embryos, as the husband no longer wished for the wife to be able to use them.[84] The parties had signed an informed consent document with the fertility clinic, which provided that they "consent[ed] to the cryopreservation of embryos for [their] own use."[85] Further, the document provided that either or both parties could "withdraw [their] consent and discontinue participation at any time . . . ."[86] The court determined that the husband had effectively withdrawn his consent.[87] Despite the wife's plea to use the embryos, which represented her only chance at having a biological child, the court decided to enforce the contract and determined that neither party could use the embryos.[88] The court ordered the fertility clinic to destroy the embryos pursuant to the informed consent agreement.[89]

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80. Loy, *supra* note 35, at 552–53.

81. *Szafranski*, 34 N.E.3d at 1147.

82. Crockin & Debele, *supra* note 4, at 75.

83. Finkelstein v. Finkelstein, 162 A.D.3d 401, 401–02 (N.Y. App. Div. 2018).

84. *Id.* at 402.

85. *Id.* at 401.

86. *Id.* at 402.

87. *Id.* at 403–04.

88. *Id*.

89. *Finkelstein*, 162 A.D.3d at 404.

C. The Balancing-of-Interests Approach

Under the Balancing-of-Interests Approach, courts "look at and weigh each party's interests in either use, preservation, donation, or destruction of the embryos, rejecting the requirements of contractual enforcement and mutual consent."[90] This approach is applied in combination with the Contractual Approach in some jurisdictions or simply as an alternative approach if no dispositional contract was created by the parties.[91]

The Balancing-of-Interests Approach is exemplified by the Tennessee Supreme Court decision *Davis v. Davis.* In *Davis*, the parties elected to freeze their embryos but failed to enter into a dispositional contract regarding their allocation.[92] In absence of such a written agreement, the Tennessee Supreme Court employed a balancing test whereby it decided that the husband's interest in not procreating outweighed the wife's interest in using the embryos to conceive a child.[93] The court stressed that the wife could still have a biological child by some other means, such as adoption or IVF with a donor.[94]

In another case demonstrating the Balancing-of-Interests Approach, *A.Z. v. B.Z.*, a married couple went through several rounds of IVF and created a series of dispositional agreements along with each cycle.[95] The agreements allocated the frozen embryos to the wife if the parties divorced.[96] However, when the parties eventually separated, the court refused to enforce the agreements, reasoning that it would not force procreation upon one party if that party no longer wished to become a parent.[97] The court balanced the parties' interests and determined that the husband's interest in not becoming a parent prevailed over the wife's interest in using the embryos.[98] Thus, the court effectively required that the parties display mutual consent to use or discard the embryos at the time of the dispute rather than simply enforcing the express intent of their original contracts, meaning the court completely disregarded the Contractual Approach.[99]

90. Crockin & Debele, *supra* note 4, at 87.

91. *See* Szafranski v. Dunston, 34 N.E.3d 1132, 1136–37 (Ill. App. Ct. 2015).

92. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

93. *Id.* at 603–04.

94. *Id.* at 604.

95. A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2000).

96. *Id.* at 1054.

97. *Id.* at 1057.

98. *Id.* at 1059.

99. *Id.*

D. Focus on the Rights of Intended Parents

This Comment addresses only those situations in which both parties have contributed sperm and egg to create the embryos, as opposed to those situations in which a donor is used to provide the sperm or egg. Thus, this section addresses the rights of "intended parents," as opposed to "donors," within the meaning of the Parentage Act.[100] The Parentage Act provides that an "intended parent" is "a person who enters into an assisted reproductive technology arrangement . . . under which he or she will be the legal parent of the resulting child."[101] In contrast, the Parentage Act provides that a "donor" is:

> [A]n individual who participates in an assisted reproductive technology arrangement by providing gametes and relinquishes all rights and responsibilities to the gametes so that another individual or individuals may become the legal parent or parents of any resulting child. "Donor" does not include a spouse in any assisted reproductive technology arrangement in which his or her spouse will parent any resulting child.[102]

With married couples, one party may not be considered a donor,[103] but when parties are unmarried, this distinction is often made clear by both parties entering into a dispositional contract regarding embryo allocation in the event of separation.[104] As explained in *Szafranski*, two typical dispositional contracts utilized with respect to frozen embryos are co-parenting agreements and sperm donor agreements.[105] A co-parenting agreement typically provides that both parties are "involved in any resulting child's life as a co-parent, including sharing financial responsibility."[106] On the contrary, a sperm donor agreement typically provides that the donor shares "no obligations and would be waiving his parental rights."[107]

III. Analysis

The predominant approach currently employed by Illinois courts in embryo allocation disputes upon divorce or separation is to enforce the original intent of the contracting parties (the Contractual Approach).[108] However, when no such dispositional agreement or in-

100. 750 Ill. Comp. Stat. § 46/103(i), (m-5) (2015).
101. *Id.* § 46/103(m-5).
102. *Id.* § 46/103(i).
103. *Id.*
104. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1136–37 (Ill. App. Ct. 2015).
105. *Id.* at 1139.
106. *Id.*
107. *Id.*
108. *Id.* at 1136–37.

formed consent contract exists, the courts tend to employ a balancing test (the Balancing-of-Interests Approach).[109] In Illinois, there lacks a clear statutory response to the ambiguities created by situations in which no written dispositional agreements were made by parties. Thus, if the courts employ the Balancing-of-Interests Approach to determine allocation, there is no statutory guidance with respect to parental rights, which creates insufficiencies.

Part III weighs the relative merits of the two approaches employed by Illinois courts and proposes a modified "Hybrid Approach" to remedy these insufficiencies by better accounting for the long-term implications that judicial determinations on embryo allocation have on potential parents and children.[110]

A. Shortcomings of the Contractual Approach

The Contractual Approach employed by Illinois courts suffers from serious shortcomings; embryos "unlike homes and cars – have no monetary value. Further, they can become a financial liability for the other parent, should the 'custodial' party decide to use the embryos to conceive a child."[111] The current approach taken by Illinois courts fails to consider the long-term implications which accompany custody determinations for frozen embryos.[112]

This Comment proposes that Illinois courts ought to treat embryos as a unique or interim form of property when determining their allocation in a legal dispute because of the long-term legal implications for both parties in the event that one party utilizes the embryos to have a biological child.[113] This Comment does not contend that embryos ought to be afforded legal standing as persons. If this were the case, disputes regarding embryo allocation would necessarily be determined solely based on the Illinois "best interests of the child" standard,[114] ultimately preventing any consideration of the original intent of the parties expressed in their dispositional contract.

Determining the proper allocation of embryos touches on a variety of areas of law. For example, affording embryos legal standing as per-

109. *Id.*

110. *See infra* Part II.

111. *Who Gets Custody?*, *supra* note 31.

112. Stacie Provencher, *Family Law—States Should Create a Heightened % Standard of Review for Contracts That Determine the Disposition of Frozen Embryos in Contested Divorce Cases %*, 42 W. NEW ENG. L. REV. 295, 310 (2020).

113. *Id.* at 298.

114. Kimberly Anderson, *Illinois Best Interests of the Child Factors: What Are They Really?*, ANDERSON & BOBACK (Mar. 8, 2017), https://illinoislawforyou.com/illinois-divorce/childs-best-interest-factors-illinois/.

sons would determine whether individuals who do not wish to use their frozen embryos technically "donate" the embryos to scientific causes or give them up for "adoption."[115] In *Davis*, the court adopted the judicial definition of "embryo" articulated by the American Society of Reproductive Medicine, which stated that embryos were "neither persons nor property," but "potential life deserving of special respect and protection . . . ."[116] Similarly, Illinois courts should recognize the unique nature of embryos because of their distinct potential to become human beings. However, this definition should stop short of affording embryos the same status as that of a legal person while still imposing special treatment and additional respect on embryos in the context of custody disputes. For Illinois courts to implement special treatment of embryos, it is necessary to develop a new approach to account for embryos' enhanced or "interim" status in the context of custody disputes.

Moreover, the Contractual Approach is arguably beneficial because it promotes judicial efficiency and predictability for litigants in this area of the law. On the other hand, the Contractual Approach presents challenges for courts when contracts are poorly drafted and when courts must "discern intent from a fill-in-the-blank clinic form."[117] The shortcomings of the Contractual Approach ultimately outweigh any potential benefits. Often, parties fail to enter into any written dispositional agreement with respect to embryo allocation, as was the case in *Szafranski*.[118] Although the Parentage Act now requires that such agreements be made,[119] it is unclear who bears the responsibility of assuring the existence of such an agreement: whether it is the responsibility of the medical facility or of the parties with assistance of independent legal counsel.

Furthermore, the Contractual Approach lacks a strong component of consequentialism. A consequentialist approach to judicial decision making would consist of a "normative evaluation of particular actions or rules depend[ing] on an analysis of consequences . . . ."[120] A strong public policy argument exists that contractual intent should not be the only or even the primary consideration in determining suitable allocation of embryos upon divorce or separation. The court should instead evaluate the long-term impact of the ruling on the physical, emotional,

115. Crockin & Debele, *supra* note 4, at 67.

116. *Id.* at 68.

117. Crockin & Debele, *supra* note 4, at 84.

118. *See generally* Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015).

119. 750 ILL. COMP. STAT. § 46/703(a) (2017).

120. Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1437–38 (2017).

and financial wellbeing of the parties involved as well as of any prospective child.[121]

The shortcomings of the Contractual Approach are exemplified in the *Finkelstein* decision, which demonstrates that, under the Contractual Approach, the interests of the parties are not considered.[122] Rather, the main factor considered by the court is the original intent of the parties at the time they entered into the contract.[123] Further, the Contractual Approach fails to account for the complexities posed by scientific developments in the field of ART. For example, as the field of ART advances, embryos may be stored for decades,[124] and thus, parties' circumstances may dramatically change by the time one or the other party wishes to use the embryos. It is highly plausible that the parties' original intent when they signed a contract will have changed completely, and therefore, this intent should be only a relatively minor consideration or perhaps no longer a consideration at all in determining the suitable allocation of embryos upon divorce or separation.[125]

B. Shortcomings of the Balancing-of-Interest Approach

While the Balancing-of-Interests Approach is a step in the right direction toward ensuring judicially sound embryo allocation determinations, this approach does not yet fully account for the long-term implications of such determinations. As demonstrated in *Szafranski*, when Illinois courts employ the Balancing-of-Interests Approach, only the interests of the parties are weighed in determining embryo allocation.[126] Such a result is insufficient because, while embryos do not have legal standing as persons, the embryos very well may give rise to the existence of a person.[127] Therefore, given the unique nature of embryos in their capacity as property,[128] courts ought to balance the interests not only of the two parties creating the embryos, but also the interests of any prospective child(ren) to be born as a result of one party's use of the embryos.

There are a variety of reasons supporting the claim that a prospective child's interests should be weighed by courts in determining em-

121. Provencher, *supra* note 112, at 310–12, 319.
122. Finkelstein v. Finkelstein, 162 A.D.3d 401, 403–04 (N.Y. App. Div. 2018).
123. *Id.* at 403.
124. Iati, *supra* note 7.
125. Provencher, *supra* note 112, at 309.
126. Szafranski v. Dunston, 34 N.E.3d 1132, 1147 (Ill. App. Ct. 2015).
127. Jon Johnson, *Embryo Freezing: What You Need to Know*, MEDICALNEWSTODAY (Mar. 13, 2019), https://www.medicalnewstoday.com/articles/314662.
128. Provencher, *supra* note 112, at 298.

bryo allocation. For example, if a court fails to consider the best interests of the future child(ren), the court may allocate the embryos to a party who lacks sufficient financial, emotional, or physical capabilities to properly care for a child. Rather, as demonstrated in *Szafranski*, the court might weigh only two interests: (1) a party's interest in procreation, and (2) a party's interest in not being forced to procreate.[129] An allocation determination based only on these two factors is simplistic, and a prospective child may suffer as a result. Therefore, based on the shortcomings of both the Contractual Approach and Balancing-of-Interests Approach, Illinois courts must employ a modified approach to properly determine embryo allocation in the event of divorce or separation.

C. Proposed Hybrid Approach to Mitigate Shortcomings

A proper alternative approach to treating embryos strictly as property is reached by first acknowledging the unique nature of embryos.[130] In the event of divorce, marital assets are subject to equitable distribution in Illinois.[131] Thus, a court considers a variety of factors in deciding how to distribute assets, such as the age, health, and financial resources of the parties.[132] A court's determination regarding the distribution of marital assets entails long-term implications as one or both parties ultimately may lose an asset in which they vested strong personal value. However, when courts are tasked with allocating embryos by either enforcing contractual intent or by balancing the interests of only the parties, a variety of issues unique to the parties in their capacity as biological parents arise. For example, a scenario might arise in which married parties contractually agree to cryopreserve embryos because of the wife's possible infertility. In the event that the parties decide to allocate the embryos to the husband upon divorce and the court opts to simply uphold that original contractual intent, harm may be suffered not only by the parties but also by the prospective child. Specifically, the wife stands to lose the possibility of ever having a biological child, and the child may be placed in the custody of a parent that is less fit to care for his or her needs. An appropriate approach to embryo allocation may be characterized as a hybrid between the two current approaches employed by Illinois

129. *Szafranski*, 34 N.E.3d at 1136–37.

130. Crockin & Debele, *supra* note 4, at 69.

131. *How Are Frozen Embryos Handled?*, *supra* note 32.

132. Illinois Marriage and Dissolution of Marriage Act, 750 ILL. STAT. ANN. § 5/503(d)(8) (2016).

courts combined with certain elements of the Illinois "best interests of the child" test.

Moreover, as previously discussed, this Comment proposes that embryos constitute a unique form of property due to their potential to give rise to life.[133] Thus, when determining how embryos ought to be allocated, it is proper for a court to consider factors affecting the well-being of a prospective child if one or both parents have custody. Against the backdrop of the parties' original contractual intent, Illinois courts ought to weigh the interests of both parties as well as those of the prospective child(ren) when determining how embryos are allocated.

As demonstrated in *Szafranski*, Illinois courts consider at least two factors when balancing the interests of the parties: (1) an infertile party's interest in being able to have a biological child, and (2) a party's interest in not being forced to procreate.[134] Factors found in the Illinois "best interest of the child" test, as set forth in the Illinois Marriage and Dissolution of Marriage Act, are helpful for shaping the proffered Hybrid Approach.[135] The Illinois Marriage and Dissolution of Marriage Act provides various factors, which "weigh heavily in determining parenting time and responsibility allocations when those are in dispute."[136]

While a proper determination of custody of a living child depends on the court's balancing of each of the factors laid out in the Parentage Act, for purposes of establishing the Hybrid Approach for determining embryo allocation, the following factors from the Act are most relevant: (1) the wishes of the parents with respect to parenting time; (2) "the mental and physical health of all individuals involved"; (3) "the child's needs"; (4) the ability of the parents to cooperate in the arrangement; (5) the threat of physical violence by the child's parent; (6) "the willingness and ability of each parent to place the needs of the child ahead of his or her own needs"; (7) "whether one of the parents is a convicted sex offender or lives with a convicted sex offender"; and (8) "any other factor that the court expressly finds to be relevant."[137] By applying the above-mentioned factors from the Illinois Marriage and Dissolution of Marriage Act to the Hybrid Approach, Illinois courts will be obligated to conduct a balancing test with respect to the

133. Catherine Wheatley, *Arizona's* Torres v. Terrell *and Section 318.03: The Wild West of Pre-Embryo Disposition*, 95 IND. L.J. 299, 305–06 (2020).

134. *Szafranski*, 34 N.E.3d at 1162.

135. 750 ILL. STAT. ANN. § 5/602.7.

136. Anderson, *supra* note 114.

137. *Id.*; 750 ILL. STAT. ANN. § 5/602.7.

prospective child(ren)'s interests in addition to balancing the interests of the parties.

Employing a balancing test that considers the future child's interests promotes the likelihood of familial stability and ensures that children will be cared for by capable parents. For example, balancing the factor of "the child's needs"[138] allows the court to assess if one party will be financially able to support a child or if child support from the other party will be necessary. Further, the court will be able to place prospective children in safer living situations by preventing the allocation of embryos to a potentially dangerous party, such as an individual convicted of a sexual crime. The court might also look to the criminal background of one of the parties to assess the "threat of physical violence"[139] by the parent.

The Hybrid Approach ultimately affords courts greater flexibility as they strive to make proper allocation determinations of frozen embryos. While the Contractual Approach to these disputes should not be entirely abandoned, the contractual intent of the parties should be merely one factor for consideration under the balancing test of the Hybrid Approach. The Hybrid Approach emphasizes the importance of balancing the interests of both parties as well as the interests of any prospective child(ren) rather than simplistically enforcing the original intent of the contracting parties to a dispositional agreement. Nonetheless, under the Hybrid Approach, the parties' express original intent is still given weight in determining a proper allocation in the case that a dispositional agreement was validly entered into by both parties.

Overall, the proposed Hybrid Approach to determining the allocation of frozen embryos upon divorce or separation properly takes into consideration the legal implications of treating embryos not merely as property akin to real estate or personal possessions, but rather, as a unique category of property necessitating special treatment.[140] Embryos "occupy an interim category between mere human tissues and persons because of their potential to become persons."[141] As a result, determinations regarding their allocation should be made with an eye toward the long-term implications presented by one party receiving the embryos, the embryos being destroyed, or the embryos being ordered to remain in storage.

138. Anderson, *supra* note 114.

139. *Id.*

140. Crockin & Debele, *supra* note 4, at 68.

141. *Id.*

IV. Impact

The Hybrid Approach to the allocation of frozen embryos presents a variety of benefits as well as challenges for Illinois courts and litigants. The ultimate impact of the Hybrid Approach is to promote equitable outcomes in disputes regarding the allocation of embryos as well as to promote stability among families created through ART. Admittedly, the proposed Hybrid Approach fails to promote judicial efficiency due to the complex, multi-factored considerations that must be addressed by the courts. Additionally, because express contractual intent will no longer remain the predominant factor in Illinois embryo custody determinations, attorneys practicing in this area will be compelled to prepare increasingly complex contracts to promote their clients' interests in the event of future litigation. However, the complexities and associated burdens which accompany application of the Hybrid Approach might encourage legislative response in this area of the law.[142] Overall, the benefits to be enjoyed by those affected families outweigh the administrative difficulties imposed on Illinois courts and litigants because of the importance of preventing judicial decisions based strictly on principles of contract law in this highly personal area of the law.

The Hybrid Approach takes into consideration the effects of scientific developments in the field of ART.[143] Specifically, given that embryos are able to be cryopreserved for decades in some cases,[144] the Hybrid Approach accounts for changes in the ultimate desires of the parties with respect to procreation. The Hybrid Approach makes it more likely that a party who no longer wishes to become a parent may avoid the consequences of any contractual obligations he or she may have entered into decades ago. Further, the interim property status of embryos under the Hybrid Approach does not preclude a determination that the embryos should be thawed and discarded by fertility clinics when such action is deemed appropriate and necessary by the court or the involved parties. Ultimately, the Hybrid Approach tends to prevent the issue of "forced procreation"[145] upon a party who does not desire to be a parent. That party would then be freed from a variety of financial obligations and potential social consequences he or she might have faced if the original dispositional contract was enforced.

142. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 Hastings Ctr. Rep. 13, 16 (2016).

143. Crockin & Debele, *supra* note 4, at 55–59.

144. Zhang, *supra* note 5.

145. Crockin & Debele, *supra* note 4, at 104.

Additionally, the Hybrid Approach promotes equity in disputes between homosexual couples, only one of which may have provided their sperm or egg in creating the embryos. The parental rights of a non-biological homosexual parent is likely to give rise to debate in this area, especially as "the central question of the law of parentage has been when and to what extent determinations of legal parenthood should be based on biological relationship, marriage to a child's biological parent, or functioning as or intending to be a parent."[146] A party who is not genetically related to the embryo but who nonetheless relied on use of the embryo as an avenue to start a family gains a better chance to become a parent under the Hybrid Approach. Thus, the Hybrid Approach would promote more equitable results in disputes over allocation of embryos than if the courts strictly employed the Contractual Approach.

If the court balances the interests of the parties and those of the prospective child and, in fact, the interests of the non-biological "intended parent" and the child would be best served by awarding sole custody to that intended parent, such a determination might override any original contractual language that alone would have prevented a custody award to the non-biological parent. The Hybrid Approach aligns with the Supreme Court's decision in *Obergefell v. Hodges*, wherein the Court "assumed that both members of the same-sex married couple would in fact be parents of the children, even though in all same-sex situations, only one of the spouses can be directly genetically related to the child."[147] Application of the Hybrid Approach to embryo allocation determinations between homosexual couples promotes equitable outcomes against the backdrop of *Obergefell*.

Moreover, by applying the Hybrid Approach, Illinois courts will better address matters which have for too long been improperly decided based primarily on principles of contract law. By incorporating a balance among the parties' original intent, the interests of the parties, as well as the interests of the prospective child(ren), the courts will secure stability for families while preventing the use of embryos as a tool for harassment. The area of law surrounding embryo allocation disputes is one that has been outpaced by medicine,[148] and by applying a more flexible approach to such decisions, the courts will promote the welfare of parties and prospective children, despite the uncertainty posed by litigating these disputes on the basis of a balancing test.

146. *Id.* at 78–79.
147. *Id.* at 79; *see generally* Obergefell v. Hodges, 576 U.S. 644 (2015).
148. Crockin & Debele, *supra* note 4, at 59.

V. Conclusion

Given the highly personal nature of the law surrounding embryo allocation disputes, Illinois courts ought to employ an approach that is sensitive to the facts and circumstances of each individual case. This area of law remains largely unsettled across jurisdictions as fundamental disagreements persist even as to the proper categorization of embryos – human life, property, or an interim category?[149] As previously shown, the allocation of embryos upon divorce or separation has implications that last a lifetime not only for the parties to the arrangement, but also for any prospective children.

Moreover, when parties dispute embryo allocation, Illinois courts determine allocation by first seeking to enforce the contractual agreement with respect to embryo allocation (the Contractual Approach), and then, if no such agreement exists, engaging in a balancing test to determine the interests of the parties (the Balancing-of-Interests Approach).[150] However, the shortcomings of both approaches are elucidated when considering the long-term implications of a custody determination made without regard to the best interests of the child. Thus, it is essential that courts take a consequentialist approach (the Hybrid Approach) for decisions in this area of the law by balancing the interests and welfare of a child that does not yet – and may never – exist. By taking this Hybrid Approach, courts will ensure that children are placed in better positions in the future while clarifying the parental rights and responsibilities of the parties.

As scientific developments in the field of ART progress and the manner in which families are created becomes increasingly complicated, the law must respond with an equally flexible and sensitive approach. Ultimately, the proposed Hybrid Approach in this Comment helps achieve that end by providing a clear, multi-factored test that not only considers the original contractual intent of the parties, but also the best interests of both the parents and the potential child at the time of a dispute.

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149. *Id.* at 75.

150. Szafranski v. Dunston, 34 N.E.3d 1132, 1136–37 (Ill. App. Ct. 2015).