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Uneggspected: Louisiana's Scrambled Approach to Ownership of Frozen Embryos After Dissolution of Marriage

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Uneggspected: Louisiana’s Scrambled Approach to Ownership of Frozen Embryos After Dissolution of Marriage

A. Brooke Reedy*

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INTRODUCTION

In a recent court case involving famous actress and model Sofia Vergara, her former husband, Nick Loeb, sought custody over the embryos¹ the couple had created using assisted reproductive technology.² During their marriage, Vergara and Loeb underwent in vitro fertilization (IVF) at a California clinic with the intent of producing biological children carried through gestational surrogacy.³ During their second round of IVF, the couple signed a general informed consent agreement on how the partners would proceed regarding the storage and disposition of the cryopreserved embryos.⁴ The spouses contracted that in the event of divorce or the death of one of the parties, they would thaw the embryos with no further action.⁵ After several failed treatments, there were two viable embryos.⁶ Unfortunately, Loeb and Vergara were unable to use the viable embryos during their marriage, as they ended their relationship shortly after concluding the IVF process.⁷ Loeb asserted that during and after the divorce, he repeatedly attempted to communicate with Vergara about the embryos and his desire to have them transferred to a surrogate

1. For the purposes of this Comment, *embryos* and *preembryos* are interchangeable terms that refer to pre-implanted embryos created through IVF procedures.

2. Loeb v. Vergara, 313 So. 3d 346, 353 (La. Ct. App. 4th Cir. 2021).

3. *Id.*

4. *Id.* at 354.

5. *Id.*

6. *Id.*

7. *Id.* at 354–55.

for further development.⁸ However, Vergara would not consent.⁹ As a result, Loeb filed a petition for custody in the Eastern District of Louisiana on behalf of himself and the embryos.¹⁰ In his petition, Loeb asserted that the embryos were living children of which Loeb should be granted full custody.¹¹ Loeb argued that the original contractual provision to thaw the embryos was unenforceable and that their agreement did not govern decisions regarding future disposition of the embryos.¹² He further asserted that Vergara violated her “high duty of care and prudent administration” owed to the embryos by disallowing their use.¹³

While the spouses were domiciled in California and began their IVF process there, Loeb filed suit in Louisiana because of a two-month period that the spouses lived in Louisiana while Vergara was filming and, presumably, also due to Louisiana’s unconventional laws governing frozen embryos.¹⁴ *Vergara* went through the Louisiana court system, up to the Louisiana Fourth Circuit Court of Appeal; however, the Fourth Circuit dismissed the case on jurisdictional grounds.¹⁵ As a result, Louisiana courts have failed to provide guidance on how to determine the rightful owner of an embryo when spouses and former partners are in a dispute.

Courts across the nation have attempted to answer the questions that arise in embryo disputes as IVF has risen in popularity over the decades.¹⁶ For many states, the first step in determining how to resolve embryo disputes lies in how states should classify embryos.¹⁷ Some states classify embryos as persons, others classify embryos as property, while other states fall somewhere in between.¹⁸ In Louisiana, an embryo is considered a juridical person.¹⁹ Louisiana law classifies all persons as either natural persons or juridical persons.²⁰ Human beings are considered natural

8. *Id.*

9. *Id.* at 355.

10. *Loeb v. Vergara*, No. 18-3165, 2018 WL 2985319, at *1 (E.D. La. June 13, 2018).

11. *Vergara*, 313 So. 3d at 357.

12. *Id.* at 356.

13. *Id.* at 357.

14. *Id.* at 355; see LA. REV. STAT. §§ 9:121–133 (2022).

15. *Vergara*, 313 So. 3d at 346.

16. See generally Hannah Catchings, *A “Modern Family” Issue: Recategorizing Embryos in the 21st Century*, 80 LA. L. REV. 1521 (2020).

17. See generally *id.*

18. *Id.* at 1533–34.

19. LA. REV. STAT. § 9:123 (2022).

20. LA. CIV. CODE art. 24 (2022).

persons.²¹ A juridical person, by contrast, is a legal entity to whom the law attributes personality.²² However, the Louisiana legislature also suggests that an embryo is a biological human being.²³ Because of this, Louisiana courts must toggle with two inconsistent provisions of law: one that treats a frozen embryo as a juridical person and another that treats a frozen embryo as a natural person.²⁴ Confusing legislation regarding the rights of embryos and the political, moral, and religious climate of the state also complicate this issue.²⁵

Moreover, Louisiana law recognizes that embryos have certain protections.²⁶ These protections are not those of a natural person but of a legal entity.²⁷ The juridical person classification most notably includes corporations and partnerships.²⁸ Yet, IVF patients cannot own embryos.²⁹ Since embryos are classified as juridical persons with their own rights and are incapable of being owned, courts are left with minimal guidance when determining the rights of progenitors in the use or disposal of their embryos, particularly in divorce or death.

Although certain states have benefitted from defining embryos as property, the Louisiana legislature would likely find this classification inadequate. To truly resolve the disputes that arise from embryo disposition, the legislature should clarify what it means to be a juridical person regarding embryos and how former spouses and other individuals seeking rights and usage of the embryos should proceed. A juridical person cannot act on its own behalf.³⁰ Rather, a juridical person requires representation.³¹ Representation arises either from the law or from acts

21. *Id.*

22. *Id.*; LA. REV. STAT. § 9:123 (2022).

23. *See* LA. REV. STAT. § 9:126 (2022).

24. *See generally* Loeb v. Vergara, 313 So. 3d 346 (La. Ct. App. 4th Cir. 2021).

25. *See* Rosemary Westwood, *Louisiana Passes Three New Anti-abortion Bills Needing Only The Governor's Signature To Become Law*, WWNO – NEW ORLEANS PUB. RADIO (June 10, 2021, 1:46 PM CDT), <https://www.wwno.org/public-health/2021-06-10/louisiana-passes-three-new-anti-abortion-bills-needing-only-the-governors-signature-to-become-law> [<https://perma.cc/8QWH-P4QH>].

26. *See* LA. REV. STAT. § 9:125 (2022).

27. LA. CIV. CODE art. 24 (2022).

28. LA. CIV. CODE ANN. art. 24 cmt. b (2021); Monica Hof Wallace, *A Primer on Natural and Juridical Persons in Louisiana*, 64 LOY. L. REV. 407, 418 (2018).

29. LA. REV. STAT. § 9:126 (2022).

30. *See* BORIS STARCK, DROIT CIVIL: INTRODUCTION 74 (J.R. Trahan trans., 2d ed. 1997) (1976).

31. *Id.*

that have given birth to the juridical person.³² Progenitors are given representative rights, but these rights should provide more expansive options for disposition.³³

Further, the legislature should revise the language of Louisiana Revised Statutes § 9:131 to better instruct courts on how to resolve embryo disputes. Louisiana Revised Statutes § 9:131 states that courts should determine embryo disposition in the best interest of the embryos.³⁴ However, the legislature does not describe what this *best interest* standard is and how courts are to apply it. To remedy this, the legislature should adopt specific language providing first, that party intent governs the resolution of embryo disputes. Second, when there is no contract, courts must conduct a fact-intensive balancing test of the interests of the progenitors, as demonstrated in *Davis v. Davis*,³⁵ a foundational Tennessee case on the resolution of embryo disputes. Adopting this language would emphasize the importance of contracts between progenitors and IVF clinics, as well as provide courts with actionable steps on how to resolve these disputes.

Part I of this Comment will discuss the basics of IVF and how assisted reproductive technology interacts within Louisiana law of property and personhood. Part II will dissect the importance of *Loeb v. Vergara* and demonstrate why the Human Embryo Statutes are not meeting the needs of progenitors. Part III will consider how different states opt to classify embryos and resolve disputes between former spouses. Part IV will suggest legislative changes in making embryo disposition more efficient and less burdensome on the parties, clinics, and courts. To do so, this part will suggest that the legislature broaden the Human Embryo Statutes to grant disposition rights to progenitors and create clear language for courts to resolve future embryo disputes through contractual enforcement and a balancing test.

I. IVF, LOUISIANA'S CLASSIFICATIONS OF PERSONS AND PROPERTY, AND HOW THAT IMPACTS THE CLASSIFICATION OF EMBRYOS

Louisiana's current statutory provisions for persons and property illustrate potential resolutions for classification of embryos. Louisiana

32. *Id.* "These powers [of representation] arise either from the law or from the acts that have given birth to the moral person [i.e., juridical person] (the constitution and by-laws of an association, a society, etc.)." *Id.*

33. For the purposes of this Comment, the term *progenitors* refers to the intended users of the embryo. See Wallace, *supra* note 28, at 417–18.

34. See LA. REV. STAT. § 9:131 (2022).

35. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

classifies embryos as neither natural persons nor property; instead, embryos exist somewhere in between.³⁶ In determining the optimal classification of embryos, it is valuable to perform an analysis of how both a personhood and property classification would impact embryo disputes. Addressing how embryos would operate as property illustrates the gaps within the Human Embryo Statutes and how legislators can revise the juridical personhood language to better prepare courts to resolve embryo disputes.

A. *The Basics of IVF*

In natural or unassisted conception, the fertilization of eggs occurs inside of a fallopian tube.³⁷ Then, the fertilized egg attaches to the lining of the uterus and continues to grow into a fetus over a nine-month period.³⁸ However, couples may use special medical techniques called assisted reproductive technology (ART) to help an individual become pregnant.³⁹ In vitro fertilization (IVF) is a form of ART that widely increases reproductive opportunities for spouses, partners, and individuals.⁴⁰ IVF is the joining of gametes—an egg and sperm—in a laboratory dish.⁴¹ In the early stages of IVF, the biological female will take medication that will increase egg production.⁴² A doctor will then perform a minor surgery to remove the eggs.⁴³ Then, the doctor mixes the best quality eggs with sperm, known as insemination of the eggs.⁴⁴ After insemination, the gametes stay in an environmentally controlled chamber.⁴⁵ When the egg is fertilized, it becomes a zygote.⁴⁶ Once the zygote divides, it becomes an

36. See LA. REV. STAT. § 9:125 (2022). Like natural persons, juridical persons have rights and duties. Yet, juridical persons are subject to the control of the natural persons that preside over it, much like property. See LA. CIV. CODE art. 76 (2022); Wallace, *supra* note 28, at 418; STARCK, *supra* note 30, at 74.

37. Sian Ferguson, *10 Things to Know About Fertilization*, HEALTHLINE (Dec. 3, 2018), <https://www.healthline.com/health/where-does-fertilization-occur> [<https://perma.cc/9A4G-UGDP>].

38. *In Vitro Fertilization (IVF)*, MEDLINEPLUS, <https://medlineplus.gov/ency/article/007279.htm> [<https://perma.cc/45XM-PLV5>] (last visited Oct. 7, 2022).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

embryo.⁴⁷ Physicians generally place embryos into the biological female's uterus three to five days after egg retrieval and fertilization.⁴⁸ However, as demonstrated in *Vergara*, one can decide to freeze unused embryos to implant at a later date.⁴⁹

B. Louisiana Property

Certain jurisdictions have found benefits in classifying embryos as property.⁵⁰ In Louisiana, property generally refers to objects that have a pecuniary value as well as the rights that persons have with respect to property including ownership, servitudes, and leases.⁵¹ The legal concept of property is thought to include ownership as an exclusive right to control an economic good, whether corporeal or incorporeal.⁵²

Classifying a thing as corporeal or incorporeal is valuable, especially when determining the division of things into movables and immovables.⁵³ Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched.⁵⁴ Inherent to disputes over the ownership of embryos, most cases will involve two parties seeking rights and usage of the embryo. Under Louisiana law, ownership of the same thing by two or more persons is ownership in indivision.⁵⁵

Regarding the division of things, Louisiana distinguishes divisibles from indivisibles.⁵⁶ A thing is divisible if one can divide it into several parts of equal kind without reduction of its value.⁵⁷ Generally, land is divisible, as it can be divided equally in a way that does not reduce the value of the property.⁵⁸ Conversely, movables are generally indivisible.⁵⁹

47. *Id.*

48. *Id.*

49. *Id.*

50. See *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).

51. A.N. YIANNOPOULOS & RONALD J. SCALISE, PROPERTY, in 2 LOUISIANA CIVIL LAW TREATISE § 1:1 (5th ed. 2021).

52. *Id.*

53. *Id.* § 2.15.

54. LA. CIV. CODE art. 461 (2022).

55. *Id.* art. 797.

56. YIANNOPOULOS & SCALISE, *supra* note 51, § 2.19.

57. *Id.*

58. See *id.* "Lands may be susceptible of judicial partition in kind depending on their nature, the character of improvements thereon, adaptability to farming or other uses, accessibility of each lot to a public road, and several other considerations." *Id.*

59. *Id.*

Movables, such as a car or a boat, cannot be divided into equal parts without a reduction in its value.⁶⁰ When individuals share ownership of an indivisible thing, the portion of each co-owner is distinct, certain, and presumed to be equal.⁶¹ When deciding upon the usage or management of a thing held in indivision, all co-owners must agree.⁶² A co-owner is entitled to use the thing held in indivision but may not prevent another co-owner from making such use of it.⁶³ At any point, a co-owner has the right to demand partition of the thing held in indivision.⁶⁴ All co-owners can agree on the mode of partition, or in the absence of such agreement, a co-owner may demand judicial partition.⁶⁵ Further, if co-owners cannot agree on the use and management of a thing and partition is unavailable, such as in the case of a movable, which cannot be partitioned, a court may determine the use and management when petitioned by a co-owner.⁶⁶ Partition becomes more complicated with embryos, particularly in regard to partition of embryos within the community property regime.

1. The Community Property Regime

If embryos are classified as property, it follows that embryos created during marriage could be subject to the community property regime. Louisiana is a community property state that distinguishes property acquired prior to the marriage from property acquired during the marriage.⁶⁷ Property a spouse acquires prior to the marriage or with separate funds is separate property.⁶⁸ Under the community property regime, married spouses each own a one-half interest in the property they acquire during the marriage.⁶⁹ However, separate property acquired prior to marriage belongs exclusively to that spouse.⁷⁰ Additionally, inheritance and individual donations are all classified as separate property.⁷¹ Louisiana law presumes that things acquired during a marriage are community

60. *See id.* § 7.46. “Corporeal movables are things, whether animate or inanimate, that normally move or can be moved from one place to another.” *Id.*

61. *Id.* § 2.19; LA. CIV. CODE art. 797 (2022).

62. LA. CIV. CODE art. 801 (2022).

63. *Id.* art. 802.

64. *See id.* art. 807.

65. *Id.* art. 809.

66. *Id.* art. 803.

67. *Id.* art. 2338.

68. *Id.* art. 2341.

69. *See generally id.* art. 2338.

70. *Id.* art. 2341.

71. *Id.*

property; however, either spouse may prove that the property is separate property.⁷² Applying the laws of the community property regime to embryos illustrates further difficulties in resolving embryo disputes. When married couples within the community property regime undergo IVF, there is the possibility that if the embryo is property, the embryo would be community property. Instead of classifying embryos as property, Louisiana classifies embryos as persons.

C. Louisiana's Classification of Persons

In Louisiana, two kinds of persons are defined within the Louisiana Civil Code: natural persons and juridical persons.⁷³ A natural person is a human being.⁷⁴ Natural persons hold the general legal capacity to have rights and duties.⁷⁵ Natural personality commences from the moment of live birth and terminates at death.⁷⁶

A juridical person is an entity to which the law attributes personality, such as a corporation, a partnership, or a ship.⁷⁷ While juridical personhood generally does not encompass things with the potential for life, at its core, juridical personhood is a thing that requires representation.⁷⁸ Civilian doctrine acknowledges that certain persons, despite having the enjoyment of rights, cannot exercise those rights themselves.⁷⁹ This is particularly true with juridical persons.⁸⁰ By being abstract persons, juridical entities by their nature are “stricken with an incapacity of exercise.”⁸¹ As a result, a juridical person can only act through the intervention of a natural person who has the power to represent it.⁸² For example, limited liability companies exist as beings separate from their owners.⁸³ However, one or several managers act on behalf of the LLC, controlling its daily operations.⁸⁴ Powers of representation arise either

72. *Id.* art. 2340.

73. *Id.* art. 24.

74. *Id.* art. 25.

75. *Id.* art. 27.

76. *Id.* art. 24.

77. Wallace, *supra* note 28, at 418.

78. *See id.*

79. STARCK, *supra* note 30, at 74.

80. *Id.*

81. *Id.*

82. *Id.*

83. SUSAN KALINKA ET AL., LIMITED LIABILITY COMPANIES & PARTNERSHIPS: A GUIDE TO BUSINESS & TAX PLANNING, *in* 9 LOUISIANA CIVIL LAW TREATISE § 1:24 (4th ed. 2021).

84. *Id.*

from the law or from the acts that have given birth to the juridical person.⁸⁵ Therefore, for a juridical person, unable to act on its own behalf, to have its rights properly advocated for, there must be a legal representative. The parties best suited to be the embryo representatives are the progenitors who have control over the usage and disposition of the embryos. The existence of frozen embryos created through IVF further illustrates the importance of representation.

D. Louisiana's Classification of Embryos

In Louisiana, a human embryo is defined as an “in vitro fertilized human ovum . . . composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child.”⁸⁶ Human embryos are considered juridical persons and have certain rights granted by law.⁸⁷ Existence of the juridical person is based on the law, which gives the embryo its personality.⁸⁸ Thus, the existence of such personality is governed by the Human Embryo Statutes, specifically Louisiana Revised Statutes § 9:123.⁸⁹

Though embryos are not classified as natural persons, Louisiana's definitions of birth and death of natural persons conflict with the Human Embryo Statutes. Pursuant to Louisiana Civil Code article 26, an unborn child is considered a natural person for whatever interests it has from the moment of conception.⁹⁰ For example, an unborn child may be a plaintiff in an action for the protection of its property rights, or if the child is born dead, it is considered a person for the purpose of the parent's wrongful death action.⁹¹ Comment b to article 26 provides that an unborn child may be a person even if it is in a test tube rather than a mother's womb.⁹² Under this provision, it would appear that an embryo that is created “in a test tube” is a natural person under Louisiana law.⁹³ However, this is not the

85. STARCK, *supra* note 30, at 74.

86. LA. REV. STAT. § 9:121 (2022).

87. *Id.*

88. LA. CIV. CODE art. 24 (2022).

89. LA. REV. STAT. § 9:123 (2022) (“An 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.”).

90. LA. CIV. CODE art. 26 (2022).

91. LA. CIV. CODE ANN. art. 26 cmt. c (2021); *id.* art. 26 cmt. d.

92. *Id.* art. 26 cmt. b.

93. LA. CIV. CODE art. 26 (2022).

case.⁹⁴ In 1986, the Louisiana legislature enacted the Human Embryo Statutes, which establishes that an embryo is a juridical person until implantation *or* at any other time when rights attach to an unborn child.⁹⁵ The Human Embryo Statutes attempt to meet the needs of couples who wish to take advantage of IVF services, encourage the use of those services, and provide legal recognition for embryos as juridical persons.⁹⁶

While juridical persons are generally capable of being owned, this is not the case for embryos.⁹⁷ The progenitors, the treating physician, and the facility that employs the treating physician cannot own the embryos.⁹⁸ Under Louisiana law, it would appear that no one owns embryos.⁹⁹ However, the IVF patients do owe a high duty of care and prudent administration to the embryos.¹⁰⁰ This duty suggests that the progenitors are the embryos' representatives.¹⁰¹ Representative rights are particularly important because IVF procedures often result in left-over, unused embryos.¹⁰² The IVF process may require multiple cycles to have a successful pregnancy.¹⁰³ As a method of minimizing invasive and costly surgeries, IVF clinics often allow couples to cryopreserve embryos.¹⁰⁴ This means that the clinics will freeze the embryos until a later date.¹⁰⁵ Clinics generally enter into formal written agreements with couples prior to beginning the IVF process to determine what will happen to the resulting embryos.¹⁰⁶ The agreements often contain four options: (1) reserving the embryos for future use; (2) disposing of the embryos; (3) donating the embryos to a different couple or individual; or (4) donating the embryos to research.¹⁰⁷ These contracts may also include a specific option for death of a party, divorce, refusal to continue the IVF program,

94. LA. CIV. CODE ANN. art. 26 cmt. g (2021).

95. LA. REV. STAT. § 9:123 (2022).

96. *Loeb v. Vergara*, 313 So. 3d 346, 391 (La. Ct. App. 4th Cir. 2021).

97. LA. CIV. CODE art. 26 (2022).

98. LA. REV. STAT. § 9:126 (2022).

99. *See generally id.* § 9:130.

100. *Id.* § 9:126.

101. *Id.*

102. *See* Olivia Lin, *Bioethics and the Disposition of Cryopreserved Preembryos: Why Autonomy-Based Contract Theory Does Not Work*, 34 FAM. ADVOC. 38, 38 (2011).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 39.

107. *Id.*

or termination of the agreement.¹⁰⁸ However, in Louisiana, these options are even more limited due to the Human Embryo Statutes.¹⁰⁹

While this representation establishes certain rights for embryos, these rights are limited. As representatives, progenitors may only implant, donate, or freeze the embryo indefinitely.¹¹⁰ Progenitors have the strongest interest in the embryos, as the embryos are their genetic material and, for many, their last hope at having biological children.¹¹¹ The decisions surrounding IVF procedures are incredibly personal to the progenitors. The Human Embryo Statutes attempt to ease the concerns of the progenitors, but in practice, the statutes are severely lacking.

II. NOT ALL IT'S CRACKED UP TO BE: THE HUMAN EMBRYO STATUTES IN APPLICATION

Although the legislature enacted the Human Embryo Statutes in 1986, the first and only case addressing its inadequacies was *Loeb v. Vergara*, which first came before the Louisiana 24th Judicial District located in Jefferson Parish in 2018.¹¹² The *Vergara* court demonstrated the struggle between the intent of the Human Embryo Statutes and the difficulty in applying it.¹¹³ The law's ambiguity creates a sequence of problems that result in courts being unable to adequately rule on embryo disputes.

A. *Loeb v. Vergara*

During *Vergara* and *Loeb*'s marriage, the couple created embryos through IVF with the intent to have the embryos implanted into a gestational surrogate.¹¹⁴ Despite their original agreement stating that the spouses would thaw the embryos in the case of divorce, *Loeb* sought usage of the embryos to continue with the couple's plan for surrogacy after the dissolution of their marriage.¹¹⁵ While the Louisiana Fourth Circuit was unable to definitively determine who had the right to use embryos amidst

108. *Id.*

109. LA. REV. STAT. § 9:129 (2022).

110. *Id.* §§ 9:129–130.

111. See Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KPLC NEWS (Mar. 27, 2009, 7:57 AM CDT), <https://www.kplctv.com/story/10081861/the-fertility-dilemma-frozen-embryos/> [<https://perma.cc/S77A-NREB>].

112. *Loeb v. Vergara*, 313 So. 3d 346, 386 (La. Ct. App. 4th Cir. 2021); see LA. REV. STAT. §§ 9:121–133 (2022).

113. See generally *Vergara*, 313 So. 3d 346.

114. *Id.* at 353.

115. *Id.* at 355.

divorce disputes due to jurisdictional issues, the court conducted an analysis of the Human Embryo Statutes *in pari materia* with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a uniform act adopted by most U.S. states that specifies which court should have jurisdiction to decide cases involving child custody.¹¹⁶ Loeb sued for child custody over the embryos, asserting the embryos are children under Louisiana law.¹¹⁷ In order for the Louisiana court to grant custody to Loeb, he needed to prove first, that the embryos were children and second, that the embryos were domiciled in Louisiana.¹¹⁸

Under Louisiana law, a *child* is defined as “an individual who has not attained eighteen years of age.”¹¹⁹ Children, as human beings, are natural persons.¹²⁰ While the Human Embryo Statutes classify embryos as juridical persons, the statutes also state that “[a]n [IVF] ovum is a biological human being.”¹²¹ Therefore, the court noted that the statutes define embryos as both a juridical and natural person.¹²²

To resolve this ambiguity, the court examined the legislative intent behind the Human Embryo Statutes.¹²³ During the Senate Judiciary A Committee Meeting, committee members stated that the goal of the statutes was to “meet the needs of couples who wish to take advantage of fertilization clinic services . . . and provide legal recognition for the [embryo] under a conceptual frame-work of a juridical person.”¹²⁴ This legislative history indicates that embryos are to be classified as a *third juridical person*. However, the court also noted, “there is no clear definition as [to] what this ‘*third juridical person*’ category explicitly means” in comparison to other traditional types of juridical persons.¹²⁵ At the end of its analysis, the court was still unsure as to whether the legislature intended to classify embryos as exclusively juridical persons or as natural persons.¹²⁶ What the court was sure of, however, was that a

116. *Id.*

117. *Id.*

118. *Id.* at 386.

119. LA. REV. STAT. § 13:1802.2 (2022).

120. LA. CIV. CODE art. 24 (2022).

121. *Vergara*, 313 So. 3d at 387 (alteration in original) (citing LA. REV. STAT. § 9:126 (2021)).

122. *Id.* at 387.

123. *Id.* at 388–89.

124. *Id.* at 389 (citing Louisiana State Judiciary A Committee Minutes, May 13, 1986).

125. *Id.* at 391 (emphasis added).

126. *Id.*

human embryo is not a child.¹²⁷ Specifically, the court stated, “While the Human Embryo Statutes clearly carve out the embryos as human, they stop short of referring to the embryos as ‘*children*’”¹²⁸ The Human Embryo Statutes do not refer to embryos as *children* until after the embryo is implanted into the womb, which was not at issue in *Vergara*.¹²⁹ Nonetheless, it is evident that embryos, under the Human Embryo Statutes, are not children.¹³⁰ The court found that its analysis of the Human Embryo Statutes alongside UCCJEA jurisprudence, which demonstrates that parents cannot be granted custody of the unborn, was enough to find that embryos are not children and, thus, not subject to child custody disputes.¹³¹ Since embryos are not children, the UCCJEA was inapplicable, and the court found that Louisiana did not have jurisdiction to make a ruling based on child custody.¹³² Therefore, even though Louisiana law deems embryos as persons, it does not deem embryos as children.¹³³

B. The Difficulties of Applying the Human Embryo Statutes in Vergara

The *Vergara* court was unable to apply the Human Embryo Statutes to determine the rightful owner of the embryos; however, even in the absence of jurisdictional issues, the court would have likely struggled with how to resolve this dispute. Louisiana Revised Statutes § 9:131 states, “In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.”¹³⁴ However, the statute does not explain or list factors for considering what is in the best interest of the embryo.¹³⁵ The best interest standard is used throughout the Louisiana Civil Code, perhaps most notably used and defined in family law.¹³⁶ However, the best

127. *Id.*

128. *Id.* (emphasis added).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 392.

133. *Id.*

134. LA. REV. STAT. § 9:131 (2022).

135. *See generally id.*

136. *See* LA. CIV. CODE arts. 131, 134 (2022). Louisiana Civil Code article 134 lists 14 illustrative factors for courts to consider in family law cases. The factors weigh the guardian’s ability to care for the child and provide a stable environment, amongst other similar considerations. Article 134 requires courts to consider all relevant factors in determining the best interest of the child, including:

(1) The potential for the child to be abused, as defined by Children’s Code Article 603, which shall be the primary consideration.

interest standard used for child custody cases would not be appropriate for determining usage of the embryo. Throughout the Human Embryo Statutes, the legislature references the future, parent-child relationship between the embryo and the progenitors.¹³⁷ Louisiana Revised Statutes § 9:126 states that when progenitors express their identity, they retain their parental rights over the embryo.¹³⁸ When crafting Louisiana Revised Statutes § 9:131, the legislature was likely referring to the best interest of the child factors that courts reference and weigh in family law disputes, particularly in child custody proceedings.¹³⁹ However, since there are no

(2) The love, affection, and other emotional ties between each party and the child.

(3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

(4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

(5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

(6) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(7) The moral fitness of each party, insofar as it affects the welfare of the child.

(8) The history of substance abuse, violence, or criminal activity of any party.

(9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.

(10) The home, school, and community history of the child.

(11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party.

(13) The distance between the respective residences of the parties.

(14) The responsibility for the care and rearing of the child previously exercised by each party.

Id. art. 134.

137. *See* LA. REV. STAT. §§ 9:126–130 (2022).

138. *Id.* § 9:126.

139. LA. CIV. CODE arts. 131, 134 (2022).

further comments for the statute, it is unknown what the legislature truly intended. Regardless, as the *Vergara* court demonstrated, Louisiana law does not establish that embryos are children.¹⁴⁰ Therefore, an application of the best interest of the child factors would be misplaced. As a result of this, courts are left with an ambiguous standard of the best interest of the embryo.

Additionally, *Vergara* illustrates the limited disposition options available for progenitors in Louisiana. In Louisiana, if parties no longer want to or are unable to use the embryos for themselves, they have only two options: to donate the embryos to another couple or to freeze the embryos indefinitely.¹⁴¹ Louisiana law does not allow progenitors to donate their embryos to science or dispose of the embryos.¹⁴² These two existing options are insufficient. Most couples who go through IVF procedures do not want to donate their remaining embryos to another couple because IVF couples do not want someone else raising their biological children.¹⁴³ Additionally, IVF couples do not want their existing children worrying about encountering an unknown sibling someday.¹⁴⁴ While donation is sufficient and some progenitors utilize donation, the limited disposition options put progenitors in an unfortunate position.

Not being able to dispose of one's own genetic material creates challenges for parties involved in IVF procedures.¹⁴⁵ Having to keep embryos frozen indefinitely instead of disposing of them creates an increased burden on the parties involved in IVF procedures.¹⁴⁶ Because of the special circumstances necessary for cryopreserved embryos, having to store thousands of unused embryos creates an excessive burden on IVF clinics and storage facilities.¹⁴⁷ In Louisiana, there are embryos that have been in cryopreservation since the late 1980s; doctors know that most of the original progenitors will not claim or use these embryos.¹⁴⁸ Louisiana Revised Statutes § 9:127 holds any physician or medical facility that participates in the IVF process responsible for the safekeeping of the embryos, which means that while these embryos are stored for decades,

140. *Loeb v. Vergara*, 313 So. 3d 346, 392 (La. Ct. App. 4th Cir. 2021).

141. LA. REV. STAT. § 9:129–130 (2022).

142. *Id.*

143. Denise Grady, *Parents Torn Over Fate of Frozen Embryos*, N.Y. TIMES (Dec. 4, 2008), <https://www.nytimes.com/2008/12/04/us/04embryo.html> [<https://perma.cc/BES6-LK7D>].

144. *Id.*

145. Glaser, *supra* note 111.

146. *Id.*

147. *See id.*; Grady, *supra* note 143.

148. Glaser, *supra* note 111.

the primary liability rests on clinics and doctors.¹⁴⁹ Further, clinics that currently offer the option to store embryos indefinitely require payment to store the embryos.¹⁵⁰ These fees for storage can range from hundreds to thousands of dollars annually.¹⁵¹ If spouses contract to dispose of their embryos yet are restricted by current laws, they could be paying these yearly fees for the rest of their lives.

Although IVF is a procedure that increases opportunity for pregnancy, it does have risks.¹⁵² A biological female taking fertility medication will often have various adverse side effects throughout the process.¹⁵³ Additionally, IVF is a costly procedure.¹⁵⁴ Some health insurance companies offer coverage, but many do not.¹⁵⁵ The total costs for IVF in Louisiana is between \$12,000 to \$17,000 excluding medication and testing.¹⁵⁶ In the United States, only 17 states offer IVF treatments, with Louisiana being one of them.¹⁵⁷ Currently, there are five fertility clinics in Louisiana with several offices located in major metropolitan areas such as New Orleans, Baton Rouge, Shreveport, and Lafayette.¹⁵⁸ IVF treatment requires a significant financial investment and may cause physical, mental, and emotional burdens.¹⁵⁹ Due to the unique and sensitive nature of IVF embryos, the Louisiana legislature sought to provide guidelines for progenitors and protection for embryos through the Human Embryo Statutes.¹⁶⁰ However, the statutes are not meeting the needs of the progenitors. In resolving the issues that arise within the Human Embryo Statutes, Louisiana should look to how other states resolve disputes in

149. LA. REV. STAT. § 9:127 (2022).

150. Rachel Gurevich, *Options for What to Do With Extra Frozen Embryos After IVF*, VERYWELLFAMILY (Feb. 19, 2021), <https://www.verywellfamily.com/extra-embryos-after-ivf-what-are-your-options-1960215> [<https://perma.cc/6Z5R-F7Y9>].

151. *Id.*

152. *See In Vitro Fertilization (IVF)*, *supra* note 38.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*; *How Much Does IVF Cost in Louisiana? Average IVF Cost, Insurance and Financing Options*, IVF AUTHORITY, <https://www.ivfauthority.com/ivf-cost-in-louisiana/> [<https://perma.cc/BCF7-5MQS>] (last visited June 5, 2022).

157. *How Much Does IVF Cost in Louisiana?*, *supra* note 156.

158. *Fertility Clinics in Louisiana*, IVF AUTHORITY, <https://www.ivfauthority.com/ivf-clinics/usa/louisiana/> [<https://perma.cc/UL3L-XN3W>] (last visited July 16, 2022).

159. *In Vitro Fertilization (IVF)*, *supra* note 38.

160. *See* LA. REV. STAT. § 9:123 (2022).

creating an actionable judicial procedure in Louisiana Revised Statutes § 9:131.

III. THE HISTORY OF EMBRYO DISPUTES AND OTHER STATES' SOLUTIONS

Embryo disposition overlaps with multiple areas within the law and, as a result, state legislatures and courts have had to create innovative solutions.¹⁶¹ Certain courts adopt a property approach when categorizing embryos; however, pro-life advocates argue that embryos should not be classified as property due to the embryos' potential for life.¹⁶² Throughout the decades, other states have attempted to resolve embryo disputes with varying classification schemes and approaches.¹⁶³ The following sections illustrate the options that Louisiana can adopt to better resolve future embryo disputes.

When courts resolve disputes over the disposition of embryos, courts generally employ one of three approaches: (1) a contractual approach; (2) a contemporaneous-mutual-consent approach; or (3) a balancing approach.¹⁶⁴ In the contractual approach, a court will focus on what the parties contracted regarding the usage of the embryos.¹⁶⁵ Courts typically enforce the parties' agreement unless it violates the state's public policy.¹⁶⁶ One criticism of the contract approach is its rigidity to unforeseen events.¹⁶⁷ A party unwilling to use the embryos may be forced into parenthood against his or her wishes merely because the contractual agreement stated to do so, which may have been arranged while the spouses were married and likely not anticipating divorce.¹⁶⁸ In these cases

161. See Andrea Fischer, *Solomon and in Vitro Fertilization: Characterization and Division of Embryos in the Case of Divorce*, 11 J. CONTEMP. LEGAL ISSUES 262, 262 (2000).

162. Derek Mergele-Rust, *Splitting the Baby: The Implications of Classifying Pre-Embryos as Community Property in Divorce Proceedings and Its Impacts on Gestational Surrogacy Agreements*, 8 EST. PLAN. & CMTY. PROP. L.J. 505, 522 (2016).

163. See generally *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. App. Ct. 2013); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

164. See *Szafranski*, 993 N.E.2d at 506.

165. *Id.*

166. *Id.* (citing *In re Marriage of Witten*, 672 N.W.2d at 776).

167. Mergele-Rust, *supra* note 162, at 523 (citing *Szafranski*, 993 N.E.2d at 507).

168. *Szafranski*, 993 N.E.2d at 507.

where the parties' interests have changed, the court may not be willing to create a new ruling.¹⁶⁹ Instead, the contract controls.¹⁷⁰

Under the contemporaneous-mutual-consent approach, neither party is permitted to use the existing embryo without the mutual consent of both parties who created the embryo.¹⁷¹ With this approach, a contract the parties drafted prior to the divorce would not be binding.¹⁷² However, many believe this approach is unrealistic because if the parties agreed on an alternate remedy, they would not be in court.¹⁷³

Finally, the balancing approach attempts to enforce the pre-existing contract between the parties, but in the absence of a pre-existing contract, the court weighs the parties' interests.¹⁷⁴ Under this approach, the court considers specific facts and circumstances in reaching its conclusion, such as whether the remaining embryos are one party's last remaining opportunity for reproduction.¹⁷⁵ However, unless the legislature intervenes, this approach gives courts no concrete guidelines to follow.¹⁷⁶

As stated, Louisiana has no jurisprudence that addresses how to resolve embryo disputes. However, many other states have had the opportunity to resolve this issue.¹⁷⁷ Since the contract approach and the contemporaneous-mutual-consent approach present significant obstacles, Louisiana should look to states that have adopted the balancing approach to remedy its statutory shortfalls in resolving embryo disputes.

A. The Balancing Approach—The Right to Life vs. The Right (Not) to Procreate

The Tennessee Supreme Court 1992 decision of *Davis v. Davis* was one of the first cases to address disposition of embryos after divorce.¹⁷⁸ In *Davis*, two spouses began the IVF process early in their marriage.¹⁷⁹ Unlike typical, modern protocol for IVF procedures, the parties did not

169. *Id.* at 512.

170. *Id.*

171. *Id.* at 510.

172. *Id.* at 510–11.

173. *Id.* at 511.

174. *Id.* at 512.

175. *Id.*

176. *Id.*

177. See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).

178. *Davis*, 842 S.W.2d at 589.

179. *Id.* at 591.

have an agreement governing the disposition of embryos.¹⁸⁰ Additionally, Tennessee had no legislation regarding the disposition of embryos.¹⁸¹ After their divorce, the wife sought to use the embryos for herself while the husband wanted to either freeze until a later date or discard of the embryos.¹⁸² The trial court found that the embryos were human beings and thus, children at the time of fertilization.¹⁸³ Since the wife wanted to bring the embryos to term, the court granted her custody.¹⁸⁴ The Tennessee appellate court promptly reversed this decision and stated that there was no state interest to justify allowing implantation without the approval of either party.¹⁸⁵ The court of appeals held that the parties had a shared interest in the embryos and, thus, were entitled to joint control and an “equal voice over their disposition.”¹⁸⁶

The Tennessee Supreme Court relied heavily on legal journals and legislative comments in its proposed method that parties’ interests must be weighed to resolve embryo disputes “in a fair and responsible manner.”¹⁸⁷ However, the Court first considered whether embryos fit within a personhood or property classification.¹⁸⁸ The Court agreed with the court of appeals in finding that embryos are not persons under Tennessee law.¹⁸⁹ Under Tennessee’s Wrongful Death Statute, there is no recovery for a fetus unless it is born alive because “[w]ithout live birth . . . a fetus is not a ‘person’ within the meaning of the statute.”¹⁹⁰ Further, “the United States Supreme Court explicitly refused to hold that the fetus possesses independent rights under law ‘[T]he unborn have never been recognized in the law as persons in the whole sense.’”¹⁹¹ Even under the recent U.S. Supreme Court decision of *Dobbs v. Jackson Women’s Health Organization*, which struck down the precedent of *Roe v. Wade*, embryos

180. *Id.* at 588, 590; Lin, *supra* note 102, at 39.

181. *Davis*, 842 S.W.2d at 590.

182. *Id.*

183. *Id.* at 589.

184. *Id.*

185. *Id.* (citing *Davis v. Davis*, No. 180, 1990 WL 130807, at *2 (Tenn. Ct. App. Sept. 13, 1990)).

186. *Id.* (quoting *Davis*, 1990 WL 130807, at *3).

187. *Id.* at 591.

188. *Id.* at 593.

189. *Id.* at 594.

190. *Id.* (citing *Davis*, 1990 WL 130807, at *2).

191. *Id.* at 595 (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

are not granted federal independent rights.¹⁹² Rather, states are tasked with determining rights surrounding the unborn.¹⁹³

The Tennessee trial court reached its finding by relying on the fact that classifying embryos as persons would potentially lead to an outlaw of IVF programs.¹⁹⁴ Conversely, the court struggled to classify embryos as property.¹⁹⁵ Rather, embryos “occupy an interim category that entitles them to special respect because of their potential for human life.”¹⁹⁶ Similarly to Louisiana, Tennessee recognized the unique difficulties in categorizing embryos as merely property or merely persons.

Instead of resolving the classification argument, the Court came to its conclusion on the basis of a constitutional analysis of bodily autonomy and the right of procreation.¹⁹⁷ Within both the Tennessee and U.S. Constitutions, the right to procreate “is a vital part of an individual’s right to privacy . . . inherent in our most basic concepts of liberty”¹⁹⁸ Further, the U.S. Supreme Court has stated that “parental autonomy is basic to the structure of our society because the family is ‘the institution by which we inculcate and pass down many of our most cherished values, morals and cultural.’”¹⁹⁹ However, this right is not only limited to the right to procreate but also the right to avoid procreation, of which both are equally significant.²⁰⁰ Although women generally experience greater physical and emotional hardship during the IVF process, the Court perceived both progenitors as equivalent.²⁰¹ The Court stated that “the existence of the right itself dictates that decisional authority rests in the [progenitors] alone”²⁰² While state involvement was not pertinent to this case, the Court noted that the state may argue that because of embryos’ potential for life, the state had an interest in classifying embryos as persons.²⁰³ The *Davis* Court denied this argument because of the

192. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

193. *Id.* at 2284.

194. *Davis*, 842 S.W.2d at 595.

195. See *id.* at 597.

196. *Id.*

197. *Id.* at 600–03.

198. *Id.* at 600–01. See *Griswold v. Conn.*, 381 U.S. 479 (1965); *Wis. v. Yoder*, 406 U.S. 205 (1972); *Prince v. Mass.*, 321 U.S. 158 (1944); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Bellotti v. Baird*, 443 U.S. 622 (1979).

199. *Davis*, 842 S.W.2d at 601 (citing *Bellotti*, 443 U.S. at 634).

200. *Id.* at 590, 601.

201. *Id.*

202. *Id.* at 602.

203. *Id.*

developmental stage of embryos.²⁰⁴ Tennessee precedent solidified that a “state’s interests do not become sufficiently compelling in the abortion context until the end of the first trimester”²⁰⁵ Therefore, because the embryos are both pre-implantation and pre-development, the Tennessee Supreme Court held that no state interest overcomes that of the progenitors.²⁰⁶ Any interest the state may have does not warrant infringement upon the freedom of individuals “to make their own decisions as to whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents.”²⁰⁷ Because parentage is deeply personal and impactful, individuals have a greater interest in determining what to do with their embryos.

For more efficient resolution in determining which spouse, if either, has a right to use the embryos, *Davis* held that the contractual agreement of the progenitors shall govern.²⁰⁸ If the progenitors are seeking a different method of disposition not listed in their prior agreement, courts shall first look to the progenitor’s preferences.²⁰⁹ For example, if the parties originally contracted to thaw unused embryos in the event of divorce but during divorce proceedings agree to donate the embryos, the Court would honor the parties’ preference to donate. If there is no consensus between the progenitors, the Court would hold that the established agreement concerning disposition shall be carried out.²¹⁰ Alternatively, if there is no agreement, the relative interests of the parties would be weighed. The Court in *Davis* held that, generally, “the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”²¹¹ *Reasonable means* refers not only to achieving parenthood by means of biological children, such as through IVF, but also to achieving parenthood through adoption.²¹² If there is no other reasonable method of procreation, the circumstances surrounding the individual seeking usage of the embryos shall be considered in determining whether a progenitor should be granted usage of the embryo.²¹³

204. *Id.*

205. *Id.* (citing TENN. CODE ANN. § 39-15-201 (1992)).

206. *Id.*

207. *Id.*

208. *Id.* at 603–04.

209. *Id.* at 604.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

Since the spouses in *Davis* failed to create an agreement regarding the disposition of the embryos, the Court began its analysis by evaluating the relative interest of the parties.²¹⁴ Usage of the embryos against the former husband's consent would "impose unwanted parenthood on him, with all of its possible financial and psychological consequences."²¹⁵ Conversely, the decision not to use the embryos would "impose on [the former wife] the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the [embryos] to which she contributed genetic material would never become children."²¹⁶ Between the initial filing of the case and the Tennessee Supreme Court decision, the ex-wife instead wanted to donate the embryos to another couple rather than use the embryos for herself.²¹⁷ The Court found that because of this shift, her interest was not as significant as her former husband's interest in avoiding parenthood.²¹⁸ The Court noted, however, that determining usage of the embryo would be more difficult to decide if she could not achieve parenthood by any other reasonable means.²¹⁹ As a result, the parties never used the embryos.²²⁰

Although the *Davis* opinion is 30 years old, it remains an important and frequently referenced opinion in embryo dispute cases across the country.²²¹ However, the holding of *Davis* was not immediately accepted by all.²²² In *Kass v. Kass*, a New York trial court reasoned against the burden of consideration of *Davis*.²²³ While *Davis* held that the biological female does not have a greater interest in the embryo due to the increased risks and difficulties,²²⁴ *Kass* held that the female progenitor should have the final say.²²⁵ The New York trial court supported this choice by giving credence to the argument that when the male progenitor enrolls in the IVF

214. *Id.*

215. *Id.* at 603.

216. *Id.* at 604.

217. *Id.* at 590.

218. *Id.*

219. *Id.*

220. *See id.* at 605. The Tennessee Supreme Court ordered the fertility clinic to follow its normal procedure for disposing of unused embryos, which was usually discarding or donating to research.

221. *See* McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2016); Roman v. Roman, 193 S.W.3d. 40 (Tex. App. 2006).

222. *See generally* Kass v. Kass, 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

223. *See* Kass, 1995 WL 110368, at *4.

224. *Davis*, 842 S.W.2d at 601.

225. *See* Kass, 1995 WL 110368, at *5.

program, he is aware of the potential outcome.²²⁶ As a result, he waived his right to avoid procreation, which the court analogized to the waiver that occurs after natural intercourse.²²⁷ The trial court in *Kass* argued that the male progenitor should have known of the possibility of delayed implantation.²²⁸ The trial court reasoned that this approach not only creates a streamlined solution for future courts but will also require parties to consider more seriously their decision in going forward with IVF.²²⁹

In *Kass* and its subsequent history, New York courts found the lower court's decision to be highly controversial, which ultimately resulted in the New York Court of Appeals reversing the lower court's ruling.²³⁰ New York's highest court established that, like *Davis*, if there is a contract governing the disposition of embryos, the contract controls.²³¹ The New York Court of Appeals relied heavily on *Davis* in its finding that agreements between progenitors should be "presumed valid and binding, and enforced in any dispute between them."²³² Enforcement of IVF agreements is valuable to both the parties and the courts—namely that enforcement greatly reduces litigation costs.²³³ The Court encouraged parties to think deeply about their agreement before beginning IVF yet also acknowledged that contracting around such forward thinking issues can be difficult.²³⁴ However, the Court found that the benefit of a streamlined approach is greater than the initial difficulty that arises from contracting.²³⁵ As science progresses, the lifespan of cryopreserved embryos is unknown, perhaps indefinite.²³⁶ *Kass* echoed *Davis* in its position that "[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice."²³⁷ Creating a contract that is true to the parties' intent allows for courts to apply the ruling that is most consistent to the preference of the progenitors, which the Court stated is the primary goal

226. *Id.* at *3–5.

227. *Id.* at *3.

228. *Id.*

229. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

230. *See id.*

231. *See Kass*, 1995 WL 110368, at *3.

232. *Kass*, 696 N.E.2d at 180 (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

for courts dissolving these disputes.²³⁸ Though the nature of the dispute was novel to courts, *Kass* held that the well-established, common-law principles governing contract interpretation should be the basis of its analysis on this issue.²³⁹ The Court found that the parties clearly manifested their intent in the IVF contract; therefore, the agreement was valid and enforced.²⁴⁰ By following the agreement, the embryos would be donated for research purposes.²⁴¹ The ruling of *Kass* reinforces *Davis* as an influential and foundational case for embryo disputes. This is also evidenced by more recent cases such as *In re Marriage of Rooks*, *In re Marriage of Dahl and Angle*, and *McQueen v. Gadberry*.²⁴²

B. Embryos as Property of a Special Nature

McQueen v. Gadberry demonstrates how courts in recent years have adopted the *Davis* test.²⁴³ *McQueen* is insightful, as its special designation for embryos operates similarly to Louisiana's desire to protect and create rights for the unborn.²⁴⁴ Further, its classification scheme of embryos as marital property of a special character operates similarly to Louisiana's juridical personhood classification. In *McQueen*, the Eastern District of the Missouri Court of Appeals considered the same policy goals to create rights for the unborn alongside the parties' right to privacy and procreational autonomy.²⁴⁵ The court not only acknowledged these goals, but also emphasized the importance of progenitor control.²⁴⁶ The court adopted the unique classification of embryos as marital property of a special nature as a means for progenitors, not the state, to have control over their personalized family plans.²⁴⁷

238. *Id.*

239. *Id.*

240. *Id.* at 182.

241. *Id.*

242. *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018) (following *Davis*'s balancing test yet not agreeing that adoption is a reasonable method of parenthood); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) (citing *Davis* as persuasive by stating, "[I]t is just and proper to dispose of the embryos in the manner that the parties chose at the time that they underwent the IVF process"); *McQueen v. Gadberry*, 507 S.W.3d 127, 144–45 (Mo. Ct. App. 2016) (relying upon the balancing test set forth in *Davis* to weigh each party's rights of procreational autonomy).

243. *See generally McQueen*, 507 S.W.3d 127.

244. *See id.*

245. *Id.* at 142.

246. *See id.* at 144.

247. *See id.*

The court in *McQueen* contemplated a similar question to that of *Vergara*: whether embryos are children under the applicable state law.²⁴⁸ McQueen and Gadberry married in 2005, and shortly after their nuptials, Gadberry was deployed to Iraq.²⁴⁹ Though the couple did not have fertility issues, they discussed using IVF as a way to have children while the husband was deployed.²⁵⁰ When the spouses created embryos in 2007, they had not contracted an agreement regarding the number of embryos to be created, the time implantation would occur, or what the spouses would do with excess or unused embryos.²⁵¹ After IVF, the couple had four embryos, and two were successfully implanted.²⁵² As a result, McQueen became pregnant and gave birth to twin boys in November 2007.²⁵³ The parties separated in September 2010.²⁵⁴ In the divorce proceedings, McQueen and Gadberry contested the appropriate manner of disposition for the two remaining, unused embryos.²⁵⁵

McQueen sought usage of the embryos to have more biological children.²⁵⁶ McQueen argued that because life begins at the moment of conception under Missouri law, the moment the sperm and egg fertilized into an embryo constituted conception, and, thus, the two remaining embryos should be classified as children.²⁵⁷ Conversely, Gadberry wished to donate or destroy the embryos, as he did not want additional children with McQueen.²⁵⁸ Usage of the embryos against his consent would force him into procreation, allegedly violating his constitutional rights to privacy and equal protection.²⁵⁹ The trial court classified the remaining embryos as marital property of a *special* character and awarded the embryos jointly to McQueen and Gadberry.²⁶⁰ In doing so, the trial court applied a contemporaneous-mutual-consent approach—neither party could dispose, donate, or use the embryos without the consent of the other party.²⁶¹ On appeal, the Missouri Court of Appeals considered whether,

248. *Id.* at 137–38.

249. *Id.* at 133.

250. *Id.*

251. *Id.* at 134.

252. *Id.*

253. *Id.*

254. *Id.* at 133.

255. *Id.* at 134.

256. *Id.* at 135–36.

257. *Id.* at 136.

258. *Id.* at 136–37.

259. *Id.* See discussion *infra* note 267.

260. *McQueen*, 507 S.W.3d at 137.

261. *Id.*

under Missouri law, embryos pre-implantation were persons and whether this classification imposes on one's constitutional rights of the right to privacy.²⁶²

Gadberry argued that classifying an *in vitro* embryo as a person would deny him of "his constitutional right to privacy, right to be free from governmental interference, and right not to procreate," to which the court agreed.²⁶³ In coming to this conclusion, the court referenced years of established precedent in which the U.S. Supreme Court had recognized a constitutional right to personal privacy.²⁶⁴ This privacy extends to "intimate activities and decisions relating to marriage, procreation, contraception, and family relationships."²⁶⁵ The right to procreational autonomy is "inherent in the U.S. Constitution's concept of personal liberty . . . [as] a citizen has the right to be free from governmental interference with his or her procreational decisions."²⁶⁶ Within this procreational autonomy, individuals have the right to procreate or not procreate.²⁶⁷ The court clarified that because the embryo was *in vitro* and had not yet been implanted, McQueen was not pregnant.²⁶⁸ Therefore, the parties were seen as equivalent gamete providers.²⁶⁹

The court conducted a balancing analysis of each parties' respective rights as it pertains to the embryos.²⁷⁰ While McQueen had the right to procreate, this "does not mean [McQueen] ha[d] a right to procreate *with Gadberry* by implanting the frozen pre-embryos which contain[ed] his genetic material."²⁷¹ Not granting the embryos to McQueen would not

262. *Id.*

263. *Id.* at 143.

264. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Though *Dobbs v. Jackson Women's Health Organization* struck down *Roe v. Wade*, the individual right to personal privacy remains embedded in Supreme Court precedent, which the *Davis* court also relied upon in making its ruling. See *Griswold v. Conn.*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

265. *McQueen*, 507 S.W.3d at 143.

266. *Id.*

267. *Id.* at 144.

268. *Id.* at 145. In its balancing test, the court noted that McQueen's reproductive rights under *Roe* are not greater than Gadberry's interest to avoid fatherhood. Though *Roe* and *Casey* have been struck down, the point remains that prior to implantation, progenitors are equal, and each have their own fundamental rights to procreational autonomy.

269. *Id.* at 144 (citing *Davis v. Davis*, 842 S.W.2d 588, 600–03 (Tenn. 1992)).

270. See generally *id.* at 145.

271. *Id.* 145–46 (emphasis added).

irrevocably extinguish her right to procreate.²⁷² Conversely, granting McQueen usage of the embryos “would impose unwanted parenthood on Gadberry, with all of its possible life-long emotional, psychological, and financial responsibilities.”²⁷³ In doing so, Gadberry’s right not to procreate *would* be irrevocably extinguished if he is forced into parenthood against his will.²⁷⁴

In commencing its analysis of whether embryos are children under Missouri law, the Missouri Court of Appeals acknowledged that the unborn are considered persons for purposes of criminal and civil liability.²⁷⁵ However, this interpretation has been limited to an embryo *in utero*, meaning when an embryo is inside of the womb.²⁷⁶ In this case, the embryos were not *in utero* but *in vitro*, as the embryos were still cryogenically stored and not yet implanted into McQueen’s uterus.²⁷⁷ Therefore, since the relevant statutes did not imply an extension to *in vitro* embryos, the court concluded that embryos are not children.²⁷⁸

While the court quickly dispelled McQueen’s argument of *in vitro* embryos as children, it supported the trial court’s classification of embryos as marital property of a special character.²⁷⁹ In Missouri, marital property is “all property acquired by either spouse subsequent to the marriage.”²⁸⁰ Further, property is “[a]ny *external* thing over which the rights of . . . use . . . are exercised.”²⁸¹ As demonstrated, the distinction between *in vitro* and *in utero* was pivotal for the court’s understanding that embryos pre-implantation are not persons.²⁸² This distinction remained important in finding that *in vitro* embryos being an external thing acquired during marriage subjects embryos to a property classification.²⁸³ However, because of the embryos’ potential for human life, the appellate court supported the trial court’s finding that embryos should be treated with additional care.²⁸⁴ The court reasoned, “Though frozen pre-embryos may

272. *Id.* at 146.

273. *Id.* at 147.

274. *Id.*

275. *Id.* at 140–41.

276. *Id.* at 144.

277. *Id.* at 141.

278. *Id.* at 147–48.

279. *Id.* at 142.

280. *Id.* at 148 (citations omitted) (citing MO. REV. STAT. § 452.330 (2022)).

281. *Id.* 148–49 (alteration in original) (citing BLACK’S LAW DICTIONARY 1232 (7th ed. 1999)).

282. *Id.* at 137.

283. *Id.* at 148.

284. *See id.* at 149.

never realize their biologic[al] potential, even if implanted, they are unlike traditional forms of property . . . because they are comprised of . . . genetic material, are human tissue, and have the potential to become born children.”²⁸⁵ Ultimately, the court affirmed the ruling of the trial court that embryos were aptly classified as property of a special character and any action regarding its disposition or usage must be consented to by both parties.²⁸⁶ The rationale of *McQueen* is valuable to Louisiana. In resolving embryo disputes, the *McQueen* court gave special treatment to embryos due to an embryo’s potential for life while also acknowledging the importance of the progenitors’ intent.²⁸⁷ To remedy Louisiana’s current application, the legislature should follow this framework.

C. The Louisiana Property Classification in Application and Why It Would Not Work

An assessment of how a property classification would operate in Louisiana illustrates existing gaps in the current Human Embryo Statutes. Namely, glaring issues exist regarding the rights of progenitors and dispute resolution. However, a property classification would still require substantial efforts to resolve these issues. Further, it would be inadequate given the intent and purpose of the Louisiana Human Embryo Statutes.

1. The Difficulties of Classifying Embryos as Property in Louisiana

In classifying embryos as property, embryos would be corporeal movables. Embryos will likely fall into this category because there is a physical and visual component to an embryo’s existence.²⁸⁸ While embryos are much smaller than the typical corporeal movable, embryos can be seen and moved.²⁸⁹ The progenitors or donees of an embryo would be co-owners of the embryos in indivision.²⁹⁰ An embryo is comprised of one-half sperm and one-half ova; therefore, the progenitors’ co-ownership follows the standard presumption of an equal half-interest.²⁹¹

Co-owners determine the use and management of the embryo if both parties agree.²⁹² Therefore, the co-owners can legally contract how they

285. *Id.* at 149 (citing *Davis v. Davis*, 842 S.W.2d 588, 596–97 (Tenn. 1992)).

286. *Id.* at 149.

287. *Id.* at 145–46.

288. See YIANNPOULOS & SCALISE, *supra* note 51, § 2:15.

289. *Id.*; LA. CIV. CODE art. 471 (2022).

290. See LA. CIV. CODE art. 797 (2022).

291. *Id.*; *Mergele-Rust*, *supra* note 162, at 524.

292. LA. CIV. CODE art. 801 (2022).

intend to use the embryo.²⁹³ If embryos are classified as property rather than a juridical person, there would be fewer concerns about whether contracting around embryos is viable per public policy. The human body and its parts are generally not categorized within a property regime; these are objects of a comprehensive right of personality.²⁹⁴ Nevertheless, blood, plasma, hair, and organs separated from the human body are things and objects of property rights.²⁹⁵ This would likely eliminate many of the public policy concerns of contracting around a person.

Additionally, property is subject to Louisiana's successions laws.²⁹⁶ Co-owners can contract around their property, and as a result, the owner or co-owner of embryos can explicitly state in their wills who the embryos would secede to in the event of death.²⁹⁷ If the co-owners do not have a will at the time of death, the succession of the embryo would follow the standard rules of intestate successions.²⁹⁸ The embryos would be succeeded to the heirs of one's descendants, ascendants, or collaterals by blood or by adoption.²⁹⁹

However, IVF often occurs between married spouses.³⁰⁰ Under a property classification, embryos may be subject to the community property regime. This would create further issues for embryo disputes. Some scholars have already contemplated how division would operate under a community property regime.³⁰¹ Valuation issues emerge with this analysis because the value of frozen embryos exists solely to those who have contributed to its creation.³⁰² To suggest that after divorce existing embryos may be sold for cash would be met with shock and serious public policy concerns.³⁰³ Therefore, courts would inevitably adopt a division strategy to give the embryos to one or both spouses.³⁰⁴ If the number of

293. *Id.*

294. YIANNOPOULOS AND SCALISE, *supra* note 51, § 1.2.

295. *Id.*

296. *See* LA. CIV. CODE art. 807 (2022).

297. *Id.* art. 801.

298. *Id.* art. 807.

299. *Id.* art. 880.

300. *New figures show how different people are using IVF*, HUMAN FERTILISATION & EMBRYOLOGY AUTH., <https://www.hfea.gov.uk/about-us/news-and-press-releases/2020-news-and-press-releases/new-figures-show-how-different-people-are-using-ivf/> [<https://perma.cc/HYU3-GP75>] (last visited Sept. 10, 2022). Though most patients freezing eggs had no partner (55%), heterosexual couples account for 88% of patients thawing their frozen eggs for treatment. *Id.*

301. *See generally* Fischer, *supra* note 161, at 262.

302. *Id.* at 266.

303. *Id.*

304. *Id.* at 267.

remaining embryos is even, the embryos may be divided equally since equal status is the ideal division of property.³⁰⁵ However, if the number of embryos is odd, courts could reserve jurisdiction over all of the embryos and then dispose of the embryos one at a time to one or both ex-spouses in equal numbers until a pregnancy occurs.³⁰⁶

Other scholars believe that if ovum are considered property, the biological female will have a greater interest in the embryo.³⁰⁷ An embryo consists of one-part egg and one-part sperm.³⁰⁸ At the time of birth, biological females are born with all of the eggs they will have for their entire life.³⁰⁹ Eggs may be considered separate property, as a woman acquired the eggs prior to marriage.³¹⁰ The egg a female provides constitutes 50% of the genetic information.³¹¹ If eggs are considered separate property, courts could reason that the biological female owns a 50% property interest in each embryo.³¹² Conversely, male sperm are continually produced throughout his life.³¹³ Since sperm are created during the marriage, sperm may be considered community property under the statutory definition.³¹⁴ As a result, the 50% interest that the sperm has in the pre-embryo would be divided in half, with 25% awarded to the female and 25% awarded to the male.³¹⁵ Therefore, the female would have a 75% property interest and the male could have a 25% property interest.³¹⁶

2. The Challenges of Embryos Within the Community Property Regime

While classifying embryos within the community property regime may resolve certain components of embryo disputes, it ultimately creates more questions than answers. Importantly, a community property approach would be limited to married spouses. IVF as a procedure is not limited to married spouses but extends to other partners and individuals as

305. Natalie K. Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 588 (1991).

306. Fischer, *supra* note 161, at 267.

307. See Mergele-Rust, *supra* note 162, at 524–25.

308. *Id.* at 524.

309. *Id.*

310. *Id.* at 525.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

well.³¹⁷ Classifying embryos as community property would create glaring inconsistencies within the law, as courts would find that formerly married spouses follow a different analysis than unmarried parties. Further, distributing embryos to each party illustrates the issue of procreational autonomy. If one spouse seeks to use their allotted embryos to have children while the other spouse does not, the non-using spouse must deal with the consequences of having children against their express consent.

If embryos were to operate as property, courts would need to treat embryos as an extra-patrimonial asset that is not governed by the community property regime.³¹⁸ However, within a property classification, courts would be in the same position as they are with Louisiana's current approach. As the law stands, there is no clear guidance on how to resolve embryo disputes. Embryos cannot be partitioned like traditional, incorporeal movables. Further, the Human Embryo Statutes exist to provide protection and rights for embryos.³¹⁹ A property application undercuts this purpose. For the Human Embryo Statutes to meet these expectations, there must be more thorough answers within the provisions.

IV. RESOLVING LOUISIANA'S SCRAMBLED APPROACH

Rather than providing clarity, the current laws on disposition and resolution of embryo disputes leave progenitors with unanswered questions. Applying the laws as stated would lead to inconsistent applications across the state. The legislature can remedy this ambiguity by codifying a judicial standard for embryo disputes. First, the Louisiana legislature should revise the Human Embryo Statutes to grant rights to the progenitors and, in doing so, provide more expansive options for disposition. Second, the legislature needs to act and revise specific language in Louisiana Revised Statutes § 9:131 to instruct courts to enforce the agreement between progenitors and, in the absence of such, to conduct a balancing test based on each party's interest in the embryo. In doing so, Louisiana courts should apply a combined contractual-balancing approach as demonstrated in *Davis* and *Kass*.³²⁰

317. Grady, *supra* note 143.

318. See A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161, 161–62 (1963). Patrimonial rights are those subject to pecuniary evaluation. All rights that are not subject to pecuniary evaluation, such as “rights of personality” and “family rights” are extra-patrimonial.

319. LA. REV. STAT. § 9:123 (2022); *Loeb v. Vergara*, 313 So. 3d 346, 391 (La. Ct. App. 4th Cir 2021).

320. *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

A. One of These Things Is Not Like the Other: Clarifying What Juridical Personhood Means in the Human Embryo Statutes and How Courts Should Respond

While re-classifying embryos as property might remedy some of the issues that arise with disposition of embryos, such as concerns involving contracts and ownership, the Louisiana legislature deliberately avoided this classification.³²¹ On its face, classifying embryos as juridical persons with the likes of corporations and associations would appear to be a misplacement.³²² However, an assessment of the purpose of the Human Embryo Statutes indicates the legislature's intent in enacting the statutes was to create rights for the unborn.³²³ In *McQueen*, the court held that embryos are property of a special character.³²⁴ Embryos within the juridical personhood classification operate similar to this, as embryos are given special rights and care due to their potential for life. *McQueen* emphasized the importance of progenitor intent and utilized the balancing approach in coming to its conclusion.³²⁵ The same approach would work in Louisiana as well.

A closer look at the intent of juridical personhood classification demonstrates the value of classifying embryos as juridical persons. As discussed above, civilian doctrine acknowledges that there are certain persons with rights who are unable to exercise those rights themselves.³²⁶ In classifying embryos as juridical persons, the legislature intended to create protections for embryos due to their potential for life.³²⁷ While there is some justification behind this classification, there are still several issues. First, progenitors are not given sufficient rights to control what happens to their genetic material. Second, when disputes arise over usage and disposition of the embryo, the language intended to resolve these disputes is unclear and would likely result in inconsistent applications. To remedy this, the legislature should make two adjustments: first, giving progenitors full disposition rights and opportunities; and second, clarifying the language of Louisiana Revised Statutes § 9:131 to adopt the balancing approach in resolving embryo disputes.

321. See generally LA. REV. STAT. §§ 9:121–133 (2022).

322. See generally *id.* § 9:126.

323. See generally *id.*; *Vergara*, 313 So. 3d at 392; see also Louisiana State Judiciary A Committee Minutes, May 13, 1986.

324. *McQueen v. Gadberry*, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016).

325. See *id.*

326. STARCK, *supra* note 30, at 165–66.

327. LA. REV. STAT. § 9:123 (2022); *Vergara*, 313 So. 3d at 391; see also Louisiana State Judiciary A Committee Minutes, May 13, 1986.

The best suited parties for representation of embryos are the progenitors. The value of an embryo is much more significant to the parties who plan to use it rather than an IVF clinic or the state. Louisiana currently recognizes this, as Louisiana law gives progenitors the right of representation.³²⁸ Usage of embryos is not a significant difficulty when the progenitors, or intended parties, are able to carry the embryo to term. However, if the progenitors no longer seek usage of their embryos, there currently are significant limitations on the opportunities for disposition.

1. The Need for Disposition: Repealing Louisiana Revised Statutes § 9:129

The limited options for disposition create an increased burden on all parties involved in the IVF process.³²⁹ While the legislative intent behind the statutes was to meet the needs of progenitors and create protections for embryos, these goals are not being achieved by the current legislation. Section 9:129 states that no viable embryos may be disposed of by the progenitors.³³⁰ To lessen costs and liabilities, the legislature should repeal Louisiana Revised Statutes § 9:129. Instead, progenitors should have access to the four most common methods of disposal via contract: (1) reserving the embryos for future use; (2) thawing the embryos with no further action; (3) donating the embryos to a different couple or individual; or (4) donating the embryos for research.³³¹

How progenitors dispose of their genetic material should be determined by their say and control, not the interests of the state. Providing a broader array of options for progenitors allows for medical disposal of embryos that progenitors have no intent of using. Further, progenitor control of the embryo ensures that the progenitors, as well as IVF clinics, are no longer responsible for the safekeeping of an embryo that will never be used. This will likely reduce long-term storage expenses for progenitors and lessen the burden on IVF facilities. Progenitors may still choose to store their embryos or donate to another couple, but instead of being forced into one of these options, they will have a greater say in what happens to their genetic material. For progenitors to have control, Louisiana should find embryo agreements containing any of the four primary options above viable and enforceable in embryo disputes.

328. LA. REV. STAT. § 9:130 (2022).

329. Glaser, *supra* note 111.

330. LA. REV. STAT. § 9:129 (2022).

331. *See* Lin, *supra* note 102, at 39.

2. *Codifying the Balancing Approach in Louisiana Revised Statutes § 9:131*

While Louisiana has established its intention to classify embryos as juridical persons, it has not made clear how it intends for courts to resolve these disputes. In embryo disputes, the judicial standard is in the best interest of the embryo.³³² However, there is no further language or instruction on what the legislature meant or intended by this best interest standard.³³³ As discussed above, the Human Embryo Statutes reference the potential parent-child relationship between the progenitors and their embryos.³³⁴ As a result, when the legislature stated that courts should determine disputes in the best interest of the ovum, it was likely referring to the best interest of the child factors used in traditional Louisiana family law. In family law, the best interest of the child delineates several factors for courts to consider with child support and custody.³³⁵ However, as the *Vergara* court also demonstrated, it does not appear that the legislature intended for embryos to be classified or categorized as children.³³⁶ Further, scholars believe that an extension of the best interest of the child factors may be persuasive but largely irrelevant.³³⁷ The intent of the best interest of the child factors listed in Louisiana Civil Code article 134 is “rooted in maintaining the status quo [of children] and focus[ed] on providing the child with a sense of stability.”³³⁸ There is no status quo to maintain for embryos, as embryos do not have a home, school, community, or emotional ties.³³⁹

If the best interest of the embryo automatically means the embryo should be implanted, substantial issues arise. After divorce, if a biological female seeks to implant the embryo created during marriage, she is physically capable of doing so. However, if a biological male seeks to implant the embryo, he cannot implant the embryo himself nor can he force the former spouse into implantation. If neither of the progenitors are physically able to implant the embryo themselves, there are additional hurdles with Louisiana’s current laws on surrogacy. Gestational surrogacy, where individuals implant an embryo into a surrogate, is only permissible when married, heterosexual couples who both provide their

332. LA. REV. STAT. § 9:131 (2022).

333. *See id.*

334. *See id.* §§ 9:126, 9:130.

335. LA. CIV. CODE art. 134 (2022); *see supra* note 136.

336. *Loeb v. Vergara*, 313 So. 3d 346, 392 (La. Ct. App. 4th Cir. 2021).

337. *See Catchings*, *supra* note 16, at 1544.

338. *Id.*

339. *Id.*

own gametes for creation of the embryo intend to use a surrogate.³⁴⁰ Since embryo dispute cases often occur after the marriage has ended, any progenitor that cannot carry the embryo would not be permitted to use a surrogate. This result would lead to inequitable application of the statute if only the biological female is able to implant.

Due to the lack of direction in Louisiana Revised Statutes § 9:131, courts are left without any specific instruction on how to resolve embryo disputes. To remedy this, the legislature should revise Louisiana Revised Statutes § 9:131 to adopt the following language:

In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to (a) *make a determination based on the common intent of the parties, and when this is unavailable, (b) perform a fact-intensive balancing test of each party's interest.*

Courts across varying jurisdictions resoundingly agree that contracts for the usage and disposition of IVF embryos are valid and essential to ongoing IVF procedures, even amongst differing classifications of embryos.³⁴¹ To disallow this remedy would create an excessive burden on the courts in evaluating the intent and interest of the parties, creating further liabilities on IVF clinics. In *McQueen*, the court stated that “no other third party or entity, including a legislature or court, has an interest sufficient to permit interference with the gamete providers’ decision to continue, terminate, or suspend the IVF process, ‘because no one bears the consequences of these decisions in the way that the gamete providers do.’”³⁴² As demonstrated through much of the precedent regarding embryo disputes, decisions as personal and intimate as creating a family are unique to the individuals involved.³⁴³ The outcomes of such procedures fall squarely on the progenitors; therefore, it is well within their rights to contract accordingly.

While contracts are widely acknowledged as an effective solution to embryo disputes, the fact remains that contracting around an embryo is significantly different than a typical contractual obligation. Parties endure a substantial financial burden, physical pains, and emotional labor during

340. See LA. REV. STAT. § 9:2718 (2022).

341. See generally *Roman v. Roman*, 193 S.W.3d 40, 42 (Tex. App. 2006); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

342. *McQueen*, 507 S.W.3d at 144 (quoting *Davis*, 842 S.W.2d at 602).

343. *Davis*, 842 S.W.2d at 599.

IVF.³⁴⁴ Many individuals participating in IVF begin the procedure as a last resort to having biological children.³⁴⁵ One cannot predict what he or she may want in the event of divorce.³⁴⁶ The *Davis* approach acknowledges this difficulty by allowing parties whose intentions have changed to amend their original agreement and have those intentions honored by the court.³⁴⁷ Otherwise, the court shall conduct a balancing test to determine which party has a stronger interest in the usage or disposition of the embryo.

To promote judicial efficiency and lessen burdens on parties of disputes, the Louisiana legislature should adopt specific language deeming that these contracts should control. In application, this rule should follow the *Davis* approach.³⁴⁸ First, Louisiana courts should allow for the parties' preferences to control. This approach requires that parties agree on a result; however, it permits progenitors to change the outcome of their original agreement. Otherwise, the original agreement controls. This rule requires progenitors and IVF clinics to seriously weigh their options. Though one cannot predict the future, progenitors should openly express their intentions in the event of separation or death of either party.

In cases where there is no contract for the usage of the embryo or where parties may demonstrate a substantial interest in usage of the embryo, Louisiana courts should apply *Davis*'s balancing approach.³⁴⁹ In doing so, Louisiana courts weigh the right to procreate against the right not to procreate.³⁵⁰ If there are options for a progenitor to have children, whether through additional IVF procedures or other methods of reproduction, those opportunities will be weighed accordingly.³⁵¹ In the event there are other viable opportunities, the right not to procreate will outweigh the right to procreate. As seen in *McQueen*, a person does have a right to procreate, but one does not have a right to procreate with an individual who seeks to avoid parenthood.³⁵²

However, as demonstrated in *Davis*, there is the possibility that one party may have a stronger interest in procreation than the other's right not to procreate.³⁵³ In these cases, the party that seeks to use the embryo for procreation should bear the burden of proving they have an interest in the

344. *In Vitro Fertilization (IVF)*, *supra* note 38.

345. *See Roman*, 193 S.W.3d. at 42.

346. *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003).

347. *Davis*, 842 S.W.2d at 604.

348. *Id.*

349. *Id.* at 601.

350. *Id.*

351. *Id.*

352. *McQueen v. Gadberry*, 507 S.W.3d 127, 145–46 (Mo. Ct. App. 2016).

353. *See Davis*, 842 S.W.2d at 601.

embryo that outweighs the right not to procreate, as this right is fairly settled in the law.³⁵⁴ In cases in which one party wants to procreate and one does not, if a court awards the embryo to the party who seeks procreation, then the party against procreation should be able to forfeit all duties and rights of parenthood if the party so chooses. This would avoid the scenario in which the party who wants to use the embryo seeks child support after the opposite party is expressly against usage of the embryo.

As the law stands, the Louisiana Human Embryo Statutes are not adequately meeting the needs of progenitors, clinics, and courts for resolving embryo disputes. Instead of making clear solutions, the current Human Embryo Statutes raise several questions and concerns. By eliminating the best interest of the embryo standard in favor of the *Davis* test emphasizing progenitor intent, the legislature would ensure that parties are in control of their genetic material. Further, this ensures that clinics and courts are not weighed down by needless embryo disputes. Amending the Human Embryo Statutes creates a clear test for courts to apply and parties to rely upon.

CONCLUSION

To adequately rule on future cases like *Vergara*, the Louisiana legislature must act to create clear, actionable language in Louisiana Revised Statutes § 9:131 to resolve future disputes, remedy disposition, and grant progenitors with greater opportunities and rights. If these proposed changes applied to *Vergara*, the court would find first that, as the progenitors, Loeb and Vergara have the sole rights of representation, usage, and disposal for their embryos. Thus, since both parties agreed to dispose of the embryo, the contract is valid due to their rights as representatives. Second, had the disposition agreement not existed, a Louisiana court would apply the balancing approach in Louisiana Revised Statutes § 9:131. Because there is an existing and valid contract, the original intent of the parties will control. Under these proposed solutions, *Vergara* would result in the embryos being thawed with no further action per the original intent of the parties. With IVF treatments becoming more accessible, Louisiana needs a solution to ensure progenitors are given the rights and control over their genetic material and that the state does not impede with the individuals' right to procreate—or choice not to.³⁵⁵ By changing the Human Embryo Statutes to allow parties to contractually govern the usage and disposal of embryos, Louisiana solves this problem.

354. *Id.*

355. *Id.*