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RETHINKING THE "FORCE" BEHIND "FORCED PROCREATION": THE CASE FOR GIVING WOMEN EXCLUSIVE DECISIONAL AUTHORITY OVER THEIR CRYOPRESERVED PRE-EMBRYOS

INTRODUCTION

In March 2010, 39-year-old emergency room physician Karla Dunston received news that everybody dreads—she was diagnosed with cancer, specifically non-Hodgkin's lymphoma.[1] Upon learning from her doctors that chemotherapy would render her infertile, Karla took steps to ensure she would be able to biologically reproduce after her cancer had been treated.[2] She asked her then-boyfriend of five months, Jacob Szafranski, whom she had known for nine years, if he would donate his sperm so that it could be combined with her eggs to create embryos.[3] Jacob agreed, and on April 6, 2010, three pre-embryos were created from Jacob's sperm and Karla's eggs and cryopreserved, or frozen, for later implantation.[4] After Karla began her chemotherapy treatments, Jacob sent Karla a text message ending their relationship. On August 22, 2011, he filed a complaint seeking to permanently enjoin Karla from using the pre-embryos.[5]

Karla and Jacob's situation may seem like a storyline from the future, but the data suggest that there are currently more than 600,000 cryopreserved pre-embryos in the United States alone.[6] The first successful birth to result from in vitro fertilization (IVF)[7] occurred in

1. Bonnie Miller Rubin & Angie Leventis Lourgos, *High-Tech Reproduction Gives Birth to Court Case*, CHI. TRIB., Sept. 18, 2013, at 1, *available at* http://articles.chicagotribune.com/2013-09-18/health/ct-met-embryo-battle-20130918_1_frozen-embryos-high-tech-reproduction-court-case.

2. Szafranski v. Dunston, 993 N.E.2d 502, 503 (Ill. App. Ct. 2013).

3. Rubin & Lourgos, *supra* note 1, at 1. "Embryo and pre-embryo are both terms that are used broadly to refer to all the early stages of development of a fertilized egg." *Embryo Facts*, MIRACLES WAITING, http://www.miracleswaiting.org/factsembryos.html#q1 (last visited Oct. 15, 2013). "Embryo" is specifically used to refer to the stage of development between implantation in the uterus and the eighth week of gestation. *Id.* "Pre-embryo" is, therefore, usually used to describe pre-implantation embryos. *Id.*

4. *Szafranski*, 993 N.E.2d at 503–04.

5. *Id.* at 504–05.

6. *Embryo Adoption*, U.S. DEP'T HEALTH & HUM. SERVICES, http://www.hhs.gov/opa/about-opa-and-initiatives/embryo-adoption/ (last visited Oct. 15, 2013).

7. The IVF procedure involves harvesting a woman's eggs from her ovaries after priming their growth with specific hormone medications. *The Science of Egg Freezing*, FROZEN EGG BANK, INC., http://www.eggfreezing.com/egg-freezing.html (last visited Oct. 15, 2013). The harvested eggs are inseminated and become pre-embryos in the lab within three days. *Id.* A number of

1978,[8] and since then, the popularity of the reproductive technology has skyrocketed.[9] The law, however, has not kept pace with the increased popularity of IVF technology, particularly with regard to how stored pre-embryos will be used or disposed of when parties disagree.[10] When the couple that created the pre-embryos no longer agrees as to their disposition, as in Karla and Jacob's circumstance, the courts have had to decide the ultimate fate of those pre-embryos.[11]

The first state high court to consider this type of pre-embryo "custody battle" is Tennessee, in its seminal decision *Davis v. Davis*.[12] The *Davis* decision is critical to the historical evolution of case law concerning disputes over frozen pre-embryos for two reasons: first, it pro-

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pre-embryos are then transferred or frozen for later transfer. *Id.* Even when the pre-embryos are transferred immediately, however, surplus pre-embryos are usually created and also frozen. *Id.*

8. Louise Brown, born in 1978, was the first person to be conceived in a laboratory. *Id.*

9. *See Assisted Reproductive Technology*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/art/ (last visited Oct. 15, 2013).

10. Anna Stolley Persky, *Reproductive Technology and the Law*, WASH. LAW., July/Aug. 2012, at 22, 23, 29, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/august_2012/fertility.cfm. Furthermore, federal laws addressing embryonic disposition are largely nonexistent because the issue is viewed as being within the purview of the states. *See* Theresa M. Erickson, *Fertility Law*, GPSOLO, Jan./Feb. 2010, at 56, 57–58, *available at* https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/erickson.html. The federal laws that do exist on the topic of embryos emerge primarily in the context of stem cell and cloning research, and even then, the focus is largely on the question of federal funding, not regulation of embryo research as such. THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 127–31 (2004). Though state legislatures are more capable of addressing issues and policies involving embryos, most of the state statutes that currently exist address the issue of parentage rather than disposition. Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 278 (2013); s*ee, e.g.*, N.H. REV. STAT. ANN. §§ 168-B:13–B:15, 168-B:18 (LexisNexis 2010) (requiring couples to undergo medical examinations and counseling, and imposing a fourteen-day limit for maintenance of *ex-utero* pre-embryos). *But see* FLA. STAT. § 742.17 (2014) (requiring couples to execute written agreements for disposition in event of death, divorce, or other unforeseen circumstances).

11. A potential *ex ante* solution to the dilemma of cryopreserved pre-embryo disposition is for a woman to simply harvest and freeze her unfertilized eggs until they are needed in the future. *The Science of Egg Freezing*, *supra* note 7. Unlike an embryo, the egg is a single unfertilized egg, belonging solely to the woman who produced it. *Id.* Because the eggs belong to only one person, as opposed to being the product of two progenitors, only one person will have ownership and decisional authority over the eggs, making disposition significantly less complicated. *See* Joke I. De Witte & Henk Ten Have, *Ownership of Genetic Material and Information*, 45 SOC. SCI. MED. 51, 58 (1997) ("Assuming the right of self-ownership of the body, genetic material is the property of the person from whom the material was taken."); *see also* Seth Axlerad, *Survey of State DNA Database Statutes*, AM. SOC'Y OF LAW, MED. & ETHICS (Nov. 2, 2010), https://www.aslme.org/dna_04/reports/axelrad4.pdf (noting that four states—Alaska, Colorado, Florida, and Georgia—statutorily declare genetic information to be the personal property of the individual to which it pertains).

12. 842 S.W.2d 588 (Tenn. 1992).

vides for two of the three dominant approaches[13] to resolving pre-embryo disposition cases, the contract approach and the balancing of interests approach;[14] and second, it introduces the often-quoted concept that pre-embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[15]

Since the Tennessee Supreme Court decided *Davis*, only five other state supreme courts have confronted the issue of how to deal with disputes over the disposition of frozen pre-embryos.[16] From these six state supreme court decisions, three analytical frameworks to resolving pre-embryo disposition disputes have emerged: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach.[17] Underpinning the latter two approaches is the principle that courts will not "force" a party to procreate if he changes his mind regarding use of the pre-embryos.[18]

Disputes in the field of reproductive technologies and services are not amenable to neat judicial resolution due to the complexity of IVF technology and the transactions governing embryonic disposition.[19] A first complicating factor is that the legal status of the embryo is uncertain.[20] The pre-embryo is neither "person nor property," but rather occupies an indeterminate "interim category."[21] Second, the processes of IVF and disposition of embryos are not wholly commercial, though they contain commercial elements. For instance, the IVF clinics provide a commercial service for couples; for the couples them-

13. The third approach is contemporaneous mutual consent, discussed *infra* notes 156–172 and accompanying text.

14. *Davis*, 842 S.W.2d at 598, 603.

15. *Id.* at 597.

16. Rubin & Lourgos, *supra* note 1.

17. Flannery, *supra* note 10, at 233.

18. *See infra* notes 79–107 and accompanying text. The decision to use male pronouns to reference a party wishing to withdraw use of pre-embryos comports with the general trend in the case law that the man is typically the party wishing to withdraw. Roy Strom, *Who Do They Belong To?*, CHI. LAW., Sept. 2014, at 36, 38, *available at* http://www.sdflaw.com/files/who_do_they_belong_to.pdf. However, it can, and has in fact gone, in the opposite direction in the past—with the woman wishing to withdraw use of the pre-embryos and the man seeking to have the pre-embryos develop. *Id.*

19. *See generally* ERIK PARENS & LORI P. KNOWLES, HASTINGS CTR., REPROGENETICS AND PUBLIC POLICY: REFLECTIONS AND RECOMMENDATIONS (2003), *available at* http://www.thehastingscenter.org/uploadedFiles/Publications/Special_Reports/reprogenetics_and_public_policy.pdf.

20. Cynthia S. Marietta, *Frozen Embryo Litigation Spotlights Pressing Questions: What Is the Legal Status of an Embryo and Can It Be Adopted?*, HEALTH L. PERSP., Apr. 2010, at 1, 4–5, *available at* http://www.law.uh.edu/healthlaw/perspectives/2010/marietta-embryolegal.pdf.

21. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

selves, the process is primarily personal.[22] Commercial and noncommercial relationships are necessarily different and are often treated differently by the courts. Third, reproduction implicates fundamental aspects of an individual's personality; whether or not to have a child goes directly to the core of a person's being.[23] Thus, when parties disagree over the use of embryos, the interests at stake are primarily deeply personal, emotional interests, which are intangible and impossible to quantify.

The current jurisprudence on embryonic disposition illustrates the tensions in the issues discussed above. Although developed in only a handful of states so far, the law that has emerged is disjointed and inconsistent, reflecting the legal system's failure to grapple with these issues coherently.[24] Furthermore, none of the three approaches offer an ideal solution because all three have serious problems. However, of the three approaches, the contract approach works best because it provides predictability to the parties, fosters consistency in the law, and encourages party autonomy.[25] This Comment, which will use Illinois as its jurisdictional focus, contends that although the contract approach is the best of the three analytical frameworks, the better and simpler solution is to treat the creation of IVF pre-embryos the same as "naturally" conceived pre-embryos by giving full and exclusive decision-making powers to the mother.[26]

This Comment additionally seeks to problematize the public policy argument against "forced procreation," which would likely stand as a conceptual barrier to broad judicial acceptance of treating "IVF mothers"[27] the same as "natural" mothers. First, it suggests that the argument that "forced procreation is not an area amenable to judicial enforcement,"[28] which tips the scale in favor of the party wishing to avoid use of the pre-embryos, has a faulty premise—namely that courts will not compel an individual to become a parent.[29] The asser-

22. *See* Kasey Edwards, *Is Low Cost IVF Worth the Price?*, DAILYLIFE (June 14, 2013, 7:54 AM), http://www.dailylife.com.au/life-and-love/parenting-and-families/is-low-cost-ivf-worth-the-price-20130613-2o5q8.html.

23. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 30 (1994).

24. *See* Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, HUM. LIFE REV. (Apr. 18, 2013), http://www.humanlifereview.com/the-frozen-embryo-scholarly-theories-case-law-and-proposed-state-regulation/.

25. Flannery, *supra* note 10, at 275.

26. *See infra* notes 130–219 and accompanying text.

27. The term "IVF mother" refers to a woman who has conceived a pre-embryo through IVF. The term "natural" mother refers to a woman who has conceived through sexual intercourse.

28. A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000).

29. *See* Roe v. Wade, 410 U.S. 113, 166 (1973).

tion breaks down when analyzed against the backdrop of abortion jurisprudence, which gives complete and independent decisional authority to the woman.

Second, because the jurisprudence on abortion, *Roe v. Wade*,[30] *Planned Parenthood v. Casey*,[31] and *Planned Parenthood v. Danforth*,[32] has defined the rights and interests involved in natural pregnancies and has deemed it appropriate to give full decisional authority to the woman, this Comment suggests that this is a good starting point from which to begin defining the rights and interests within the IVF context as well. This Comment suggests that exclusive decisional authority over IVF pre-embryos should likewise rest with the woman.[33]

Part II of this Comment gives an overview of the three dominant approaches to resolving pre-embryo custody disputes.[34] It describes the decisions and reasoning of the six state supreme courts that have considered the issue of cryopreserved pre-embryo disposition.[35] Part III engages in a critical analysis of the three approaches: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach.[36] Then, it engages in an analysis of the argument against "forced procreation," and argues that giving the mother full decisional authority over the pre-embryos is the simplest, fairest, and most logical way to deal with pre-embryo custody disputes.[37] Part IV analyzes the impact of disregarding the three judicially created pre-embryo disposition doctrines for the simpler model suggested in this Comment.[38]

II. Background

In 1992, the Supreme Court of Tennessee became the first high court to address the issue of cryopreserved pre-embryo disposition in the event that the progenitors could not agree.[39] In *Davis*, a then-married couple stored seven pre-embryos in a fertility clinic.[40] After

30. 410 U.S. 113.

31. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

32. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

33. Although contracts will undoubtedly be useful and necessary in particular situations (e.g., when a third-party egg donor is involved or to govern disputes between the parents and the IVF clinic), that discussion is outside the scope of this article.

34. *See infra* notes 39–135 and accompanying text.

35. *See infra* notes 41–109 and accompanying text.

36. *See infra* notes 136–196 and accompanying test.

37. *See infra* notes 197–237 and accompanying text.

38. *See infra* notes 220–232 and accompanying text.

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

40. *Id.*

their divorce, the couple could not agree about who would retain control of the frozen pre-embryos.[41] The wife sought control of the pre-embryos for potential implantation in the future, but the husband argued that he did not want to father a child "outside the bounds of marriage."[42] The Davises did not previously enter into a written agreement specifying a course of action relating to the unused frozen pre-embryos in the event of a dispute, nor was there a state statute governing the issue.[43]

The trial court concluded that the pre-embryos were "children in vitro" and invoked the doctrine of *parens patriae*,[44] reasoning that it was in the best interest of the "child" to be born rather than destroyed. However, the Tennessee Supreme Court concluded that pre-embryos did not have the legal status of "person" or "property," but rather occupied an "interim category."[45] The court held that an agreement regarding the disposition of frozen pre-embryos in the event of contingencies should be presumed valid and should be enforced between the progenitors.[46] In the *Davis* case, however, because the parties did not have a prior agreement governing the fate of the pre-embryos, the court balanced the their respective constitutional interests—the right to procreate versus the right to avoid procreation.[47]

The court held that the interests of the party wishing to avoid procreation should ordinarily prevail, assuming that the other party has a

41. *Id.*

42. *Id.*

43. *Id.* at 590.

44. *Id.* at 594. *Parens patriae* is Latin for "parent of his or her country." *Parens patriae*, BLACK'S LAW DICTIONARY 306 (10th ed. 2014). The doctrine refers to the power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals. *Id.* For example, a judge may change custody, child support, or other rulings affecting a child's well-being, regardless of what the parents may have agreed to. *Id.*

45. *Davis*, 842 S.W.2d at 597. Although courts' approaches to resolving embryo disputes do not specifically focus on defining the legal status of the pre-embryo, the parties to the disputes frequently make arguments concerning how courts ought to perceive the legal status of the pre-embryo. Kimberly Berg, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 511 (2006). Furthermore, a state's understanding and treatment of frozen pre-embryos is likely to affect how it approaches the disputes. *Id.* There are three generally acknowledged approaches to define the legal status of frozen pre-embryos: (1) treating the pre-embryo as a person; (2) treating the pre-embryo as property; and (3) treating pre-embryos as occupying an "interim" position, as the Tennessee Court first established in *Davis*, the most common approach. *Id.* Louisiana is the only state to formally adopt the position that a pre-embryo is a person, characterizing it as a "juridical person" and a "biological human being." *Id.* It is argued, however, that this approach is inconsistent with the Supreme Court's statements in *Roe* that "the unborn have never been recognized in the law as persons in the whole sense." *Id.* An Alabama court, in *Cahill v. Cahill*, referred to the progenitor as an "owner" and the embryos as "property." *Id.* (citing Cahill v. Cahill, 757 So. 2d 465, 467 (Ala. Civ. App. 2000)).

46. *Davis*, 842 S.W.2d at 597.

47. *Id.* at 603.

reasonable possibility of achieving parenthood by other means.[48] If no reasonable alternatives exist, then the argument to use the pre-embryos to achieve parenthood should be considered.[49] The court affirmed the appellate court's reversal of the trial court's decision to award the pre-embryos to the wife, and instructed that the fertility treatment facility was free to follow its normal procedures in disposing the unused pre-embryos.[50]

The Tennessee Supreme Court introduced two out of the three approaches to resolving pre-embryo custody disputes: the contract approach and the balancing of interests approach. This Part details the case law developed after *Davis*, explaining the contract, balancing of interests, and contemporaneous mutual consent approaches to resolving pre-embryo custody disputes. This Part ends with an in-depth look at how the pre-embryo disposition dispute has resurfaced in Illinois in *Szanfranski*.

A. The Contract Approach

Under the contract approach, a court enforces, subject to evaluation against well-settled principles of contract law, any prior agreement between the parties.[51] However, some courts following the contract approach have adopted a "change of mind" exception, in which the court will follow a contract approach generally but refuse, out of considerations for public policy, to enforce an otherwise valid contract when one party has changed his mind regarding his desire to become a parent.[52]

Six years after the *Davis* decision, the New York Court of Appeals, in *Kass v. Kass*,[53] became the second state high court to consider the pre-embryo disposition issue.[54] The facts in *Kass* are very similar to those in *Davis*—a couple created and preserved five pre-embryos during their marriage, which were to assist the couple in having a child.[55] The couple later divorced and disagreed over the disposition of the frozen pre-embryos.[56] The wife wanted to have the pre-embryos im-

48. *Id.* at 604.
49. *Id.*
50. *Id.* at 604–05.
51. Kass v. Kass, 696 N.E.2d 174, 179–80 (N.Y. 1998); *see also* Litowitz v. Litowitz (*In re* Marriage of Litowitz), 48 P.3d 261, 267 (Wash. 2002).
52. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001); *see also In re* Marriage of Witten, 672 N.W.2d 782 (Iowa 2003).
53. 696 N.E.2d 174.
54. *Id.* at 178.
55. *Id.* at 175.
56. *Id.* at 177.

planted, claiming it was her only chance for genetic motherhood.[57] The husband, opposed to the burdens of unwanted fatherhood, desired to donate the pre-embryos to the IVF clinic for research in accordance with the informed consent agreement the couple had signed at the hospital.[58]

The trial court awarded control of the pre-embryos to the wife, holding that a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over her nonviable fetus.[59] The appellate court reversed, finding (1) that a woman's right to privacy and bodily integrity are not implicated before implantation occurs; and (2) that when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.[60] The court split, however, on the issue of whether the hospital consent agreements were sufficiently clear to control the disposition of the pre-embryos and remanded the case back to the trial court.[61]

Applying a strict contract approach, the high court of New York found that the parties had clearly expressed their intent to donate their eggs to the clinic in the event of their inability to agree, and that such prior agreements between progenitors should be presumed valid and binding.[62] The court reasoned that parties should be encouraged in advance to think through the possible contingencies and carefully specify their wishes in writing because explicit agreements avoid costly litigation, minimize misunderstandings, maximize procreative liberty, and provide the certainty needed for effective operation of IVF programs.[63]

Washington also favors a strict contract approach. *In re Litowitz*,[64] which came before the Washington Supreme Court in 2002, concerned the disposition of two cryopreserved pre-embryos made from the husband's sperm and a donor's eggs, upon dissolution of the couple's marriage.[65] The couple had entered into a written agreement with the egg donor, which gave the wife the legal status of intended parent of

57. *Id.* at 175.
58. *Id.*
59. *Kass*, 696 N.E.2d at 177.
60. *Id.*
61. *Id.*
62. *Id.* at 180.
63. *Id.*
64. Litowitz v. Litowitz (*In re* Marriage of Litowitz), 48 P.3d 261 (Wash. 2002).
65. *Id.* at 262–64.

the pre-embryos.[66] The Supreme Court of Washington held that under this contract, the wife has the same contractual rights to the eggs as the husband, who was the biological father.[67] The couple had also entered into two written agreements with the fertility clinic.[68] The first was a consent and authorization contract for pre-embryo cryopreservation following in vitro fertilization, which provided for the freezing of the pre-embryos.[69] The second was an agreement and consent for cryogenic preservation.[70]

The consent and authorization for pre-embryo cryopreservation contract stated in pertinent part that

> any decision regarding the disposition of our pre-embryos will be made by mutual consent. In the event we are unable to reach a mutual decision regarding the disposition of our pre-embryos, we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our pre-embryos.[71]

This same contract also indicated that the couple's desired method of disposition was to allow their pre-embryos to be thawed out but prevented from undergoing further development, and they instructed the clinic to pursue this method of disposition if the pre-embryos were not used within five years after the date of freezing.[72]

After the couple's divorce, they were unable to reach an agreement regarding the pre-embryos—the husband desired to put the pre-embryos up for adoption, whereas the wife desired to have the remaining pre-embryos implanted in a surrogate mother and brought to term.[73] The trial court awarded custody of the two frozen pre-embryos to the husband based upon "the best interest of the child," and the court of appeals affirmed.[74] The court of appeals further reasoned that the husband's right not to procreate compelled the court to award the pre-embryos to him.[75]

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66. *Id.* at 268.

67. *Id.*

68. *Id.* at 263.

69. *Id.*

70. *Litowitz*, 48 P.3d at 263.

71. *Id.*

72. *Id.* at 264.

73. *Id.* Although the egg donor contract provided that "[i]n no event may the Intended Parents allow any other party the use of said eggs without express *written* permission of the Egg Donor," the court did not find this clause applicable to the husband's desire to put the pre-embryos up for adoption, because the egg donor agreement referred only to the donor's eggs, not the fertilized pre-embryo, which the court considered transformed and distinct from her unfertilized eggs. *Id.* at 267.

74. *Id.* at 264–65.

75. *Id.* at 265.

The Supreme Court of Washington, relying solely on the contractual rights of the parties under the pre-embryo cryopreservation contract with the clinic, found that the couple had agreed to submit to the court the question of disposition of the remaining pre-embryos in the event they could not reach a mutual decision.[76] The court then held that under this agreement, the pre-embryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation, which had already passed by the time the case was brought to the court.[77] The court noted that the record did not indicate whether the pre-embryos were still in existence at that time, but it nonetheless reversed the decision of the court of appeals.[78]

B. The Balancing of Interests Approach

In instances when a court has found that no contract exists, rendered the contract unenforceable, or has rejected the contract approach altogether, some courts adopt the balancing of interests approach. Under this approach, courts consider the viewpoints and arguments of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.[79] Courts that have employed this approach have primarily favored the interest of the party desiring to withdraw consent to use the pre-embryos, reasoning that strong public policy and constitutional considerations implicating liberty and privacy come out in favor against forced, or compelled, procreation.[80]

A.Z. v. B.Z.,[81] decided by the Massachusetts Supreme Court in 2000, also involves the disposition of frozen pre-embryos after a couple's divorce and subsequent disagreement over their use.[82] Here, the couple had signed a series of consent forms that specified that control of the frozen pre-embryos would go to the wife in the event of a divorce or disagreement.[83] However, each time the couple was required to submit a consent form to the hospital, the husband merely signed a blank form and the wife filled in the details afterwards.[84]

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76. *Litowitz*, 48 P.3d at 271.
77. *Id.*
78. *Id.*
79. Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992); *see also* A.Z. v. B.Z., 725 N.E.2d 1051, 1058–59 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 716–17 (N.J. 2001).
80. *Davis*, 842 S.W.2d at 603; *see also A.Z.*, 725 N.E.2d at 1059; *J.B.*, 783 A.2d at 716.
81. 725 N.E.2d 1051.
82. *Id.* at 1052.
83. *Id.* at 1053–54.
84. *Id.* at 1054.

The probate and family court entered a permanent injunction in favor of the husband, prohibiting the wife from utilizing the pre-embryos.[85] The Supreme Court of Massachusetts affirmed, finding that the consent forms were insufficient to act as a binding agreement.[86] Furthermore, the court held that even if the consent agreements were unambiguous, it would nonetheless refuse to enforce an agreement that would compel one donor to become a parent against his or her will.[87] The court reasoned that, as a matter of public policy, forced procreation is not an area amenable to judicial enforcement, and that courts will not enforce contracts that violate public policy.[88]

In its 2001 decision *J.B. v. M.B*,[89] the New Jersey Supreme Court opted for a contract approach subject to the "change of mind" exception.[90] In this post-divorce control battle over cryopreserved pre-embryos, the wife sought the destruction of the pre-embryos, while the husband sought to donate the pre-embryos to another couple for implantation.[91] The New Jersey Supreme Court held that it would enforce agreements entered into at the time IVF began, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction.[92] When one party reconsidered his or her earlier decision to become a parent, the court concluded it would

85. *Id.* at 1052.

86. *Id.* at 1057–58. Among the reasons the court found the consent forms insufficient were (1) the consent form's primary purpose was to explain to the donors the benefits and risks of freezing, and to record the donors' desires for disposition of the frozen pre-embryos at the time the form is executed in order to provide the clinic with guidance if the donors (as a unit) no longer wish to use the frozen pre-embryos; (2) the consent form did not contain a duration provision, and that absent any evidence that the donors agreed on a time period during which the consent form was to govern, the court would not assume that time period; (3) the form uses the term "become separated" without defining it; and (4) the consent form was not a separation agreement that is binding on the couple in a court proceeding pursuant to state statute. *Id.* at 1056–57.

87. *A.Z.*, 725 N.E.2d at 1057.

88. *Id.* at 1057–58. The court here analyzed both the state legislature's intent and past judicial decisions that concerned prior agreements to enter into familial relationships to conclude that compelling an individual to enter into intimate family relationships violated public policy. *Id.* at 1058. The court looked at a state statute that abolished a cause of action for breach of a promise to marry. *Id.* (citing MASS. GEN. LAWS ch. 207, § 47A (2000)). It also looked at a statute in which "the Legislature provided that no mother may agree to surrender her child 'sooner than the fourth calendar day after the date of birth of the child to be adopted' regardless of any prior agreement." *Id.* (quoting MASS. GEN. LAWS ch. 207, § 47A (2000)). The court then cited its own precedent that it would "not order either a husband or wife to do what is necessary to conceive a child or prevent conception, any more than [it] would order either party to do what is necessary to make the other happy." *Id.* (quoting Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974)) (internal quotation marks omitted).

89. 783 A.2d 707 (N.J. 2001).

90. *Id.* at 718–21.

91. *Id.* at 710.

92. *Id.* at 719.

then employ a balancing of interests approach, weighing the respective interests and burdens of the parties against one another.[93]

The court noted that ordinarily, the party desiring not to become a biological parent would prevail.[94] However, it expressed no opinion with respect to a situation in which a party who has become infertile seeks use of stored pre-embryos against the wishes of his or her partner, though it noted that the possibility for adoption may be considered by a court.[95] Here, the court found that the husband was already a father, was capable of fathering additional children, and that his interest in donating the pre-embryos did not outweigh the wife's interest against forced genetic parenthood.[96]

C. The Contemporaneous Mutual Consent Approach

Finally, under the contemporaneous mutual consent approach, a court enforces the status quo[97] until the parties mutually agree on a course of disposition.[98] If the donors are unable to reach a mutual decision on the disposition of the pre-embryos, then no transfer, release, destruction, or use of the pre-embryos can occur.[99] As in the balancing of interests approach, the conclusion that "forced procrea-

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93. *Id.* at 719–20.

94. *Id.* at 716.

95. *J.B.*, 783 A.2d at 720.

96. *Id.*

> [The husband's] right to procreate is not lost if he is denied an opportunity to use or donate the pre-embryos. . . . [However, the wife's] right not to procreate may be lost through attempted use or through donation of the preembryos. Implantation if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions.

Id. at 717. Reports suggest that even children born from anonymous sperm donors are now able to easily track down their birth fathers through DNA testing technology. *See, e.g.*, Rachel Lehmann-Haupt, *Are Sperm Donors Really Anonymous Anymore?*, SLATE (Mar. 1, 2010), http://www.slate.com/articles/double_x/doublex/2010/02/are_sperm_donors_really_anonymous_anymore.html. In fact, a fifteen-year-old boy was able to track down his genetic father using nothing but a swab test and the internet. *Boy Tracks His Sperm Donor Father*, BBC NEWS (Nov. 2, 2005), http://news.bbc.co.uk/2/hi/health/4400778.stm. *See generally* Craig Malisow, *Donor Babies Search for Their Anonymous Fathers*, HOUS. PRESS (Nov. 5, 2008), http://www.houstonpress.com/2008-11-06/news/donor-babies-search-for-their-anonymous-fathers/2/. The ease with which a genetic parent might be tracked down in the future by their biological children may lend support to the court's proposition that allowing pre-embryos to be used against a parent's wishes could lead to "life-long emotional and psychological repercussions." *J.B.*, 783 N.E.2d at 717.

97. *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) ("The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs.").

98. *Id.* at 778.

99. *Id.* at 783.

tion is not an area amenable to judicial enforcement" underlies the contemporaneous mutual consent model.[100]

In 2003, the Supreme Court of Iowa considered the issue of how to deal with the disposition of a couple's frozen pre-embryos after the dissolution of their marriage and their subsequent inability to reach an accord.[101] The court found that it was bad public policy[102] to enforce a prior agreement between the parties if one of the parties had changed his or her mind concerning the use of the pre-embryos.[103] The court here concluded that in the event of a party's change of mind, a contemporaneous mutual consent model would be best because it shares an underlying premise with the contract model.[104] This underlying premise is that decisions about the disposition of frozen pre-embryos belong to the couple that created them, with each partner entitled to an equal say in how the pre-embryos should be disposed.[105] Therefore, if donors are unable to reach a mutual decision on disposition, then no transfer, release, disposition, or use of the pre-embryos can occur without the signed authorization of both donors, and the party who opposes destruction is responsible for any storage fees.[106] The court was interested in preserving party autonomy on issues that implicate deeply personal and private matters, such as family planning.[107]

D. The Pre-Embryo Disposition Issue Surfaces in Illinois

This Part explores the pre-embryo disposition issue as developed in Illinois through the *Szafranski* case. This Part gives the relevant facts of *Szafranski*, discusses the procedural posture of the case, and summarizes the rule of law in Illinois as decided by the Illinois appellate court in 2013.

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100. *Id.* at 778 (quoting A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000)).

101. *Id.* at 771–72.

102. "The term 'public policy' is of indefinite and uncertain definition . . . . [H]owever, it may be said that any contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy." *Id.* at 779–80 (quoting Liggett v. Shriver, 164 N.W. 611, 612 (Iowa 1917)) (internal quotation marks omitted).

103. *In re Witten*, 672 N.W.2d at 781.

104. *Id.* at 777.

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

106. *Id.* at 783.

107. *Id.* at 781.

> Proponents of the mutual-consent approach suggest that, with respect to "decisions about intensely emotional matters, where people act more on the basis of feeling and instinct than rational deliberation," it may "be impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised."

Id. at 777 (quoting Coleman, *supra* note 105, at 98).

In March 2010, Karla and Jacob signed a document entitled "Informed Consent for Assisted Reproduction."[108] The consent form stated in pertinent part that

> no use can be made of the embryos without the consent of both partners (if applicable). . . . In the event of . . . dissolution of the . . . partnership, [Northwestern Medical Faculty Foundation's Division of Reproductive Endocrinology and Infertility] will abide by the terms of the court decree or settlement agreement regarding the ownership and/or other rights to the embryos.[109]

The couple also met with an attorney that day to discuss the legal implications of creating pre-embryos; the attorney presented them with two possible agreements: a sperm donor agreement and a coparenting agreement.[110]

The couple opted for the coparenting agreement, and on March 29, 2010, the attorney sent the couple a draft, the stated purpose of which was to "memorialize the Parties' intent and agreement that they shall both be established as the legal coparents of the Child."[111] The coparent agreement also provided that any cryopreserved pre-embryos shall be "under Karla's sole control," and that "Jacob acknowledges and agrees that Karla is likely to be unable to create new healthy embryos subsequent to the chemotherapy regiment [sic] she will undergo, and Jacob specifically agrees that Karla should have the opportunity to use such embryos to have a child."[112] The couple never signed the coparenting agreement.[113] Yet on April 6, 2010, Szafranski deposited sperm, and eight eggs were retrieved from Dunston.[114] The couple agreed to fertilize all eight eggs, but only three of the pre-embryos ultimately survived to viability.[115] On April 7, Dunston began her chemotherapy treatment, which did ultimately render her infertile.[116] In May 2010, Szafranski ended his relationship with Dunston.[117]

On August 22, 2011, Szafranski filed a complaint in the Circuit Court of Cook County seeking to permanently enjoin Dunston from

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108. Szafranski v. Dunston, 993 N.E.2d 502, 503–04 (Ill. App. Ct. 2013).

109. *Id.* at 504.

110. *Szafranski*, 993 N.E.2d at 504.

111. *Id.* By statute in Illinois, a donor who provides sperm to a licensed physician for use in artificial insemination of a woman other than the donor's wife will be treated by law "as if he were not the natural father of a child thereby conceived." 750 ILL. COMP. STAT. 40/3 (2012).

112. *Szfranski*, 993 N.E.2d at 504.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; *see also* Strom, *supra* note 18, at 36.

117. *Szfranski*, 993 N.E.2d at 504.

using the pre-embryos in order to "preserve his right not to forcibly father a child against his will."[118] Dunston responded on September 1, 2011, with a three-count counterclaim (1) seeking a declaratory judgment granting her sole custody; (2) alleging breach of contract and requesting specific performance of the parties' agreement; and (3) seeking relief under the theory of promissory estoppel.[119] At the close of discovery, the parties filed cross-motions for summary judgment.[120] On September 17, 2012, the trial court granted Dunston's motion for summary judgment, relying on the balancing of interests approach.[121] The appellate court of Illinois, however, decided that the appropriate test to apply is the contract approach and vacated the entry of summary judgment.[122] However, the court also held that the lower court should employ the balance-of-interests approach in cases where no contract exists and noted that a special interest exists when the embryos in dispute represent the last chance to procreate for one of the parties.[123]

Because the parties were unable to present evidence in support of their respective viewpoints and arguments in light of the contract, the appellate court remanded the matter back to the trial court to apply the contract approach to any facts previously presented and to any facts the parties wanted to present on remand.[124] The parties appealed to the Illinois Supreme Court, but that court denied a petition to hear arguments on the case.[125] On remand, the trial court ruled again in Karla's favor, holding that she and Jacob created an oral contract in March when Karla asked Jacob to donate his sperm, which

118. *Id.* at 504–05.

119. *Id.* at 505.

120. *Id.*

121. *Id.* The court was persuaded by the legal arguments made in Dunston's brief. *Id.* at 506. The arguments in Dunston's brief were that (1) Szafranski was bound by the coparent agreement because, although he did not sign it, he fully performed the critical obligation under the agreement and provided sperm to create the pre-embryos; (2) he induced her to rely on his representation that he would help her have her own children, and she was harmed by that reliance because she cannot go back and use a random sperm donor to fertilize her eggs; and (3) even if the court found that Szafranski was not bound by the coparent agreement or estopped from preventing use of the pre-embryos, the court should follow precedent and balance the interests of the parties, finding that Dunston's interest in having her own biological children outweighs Szafranksi's interest in not fathering a child. *Id.* at 505.

122. *Id.* at 517.

123. Strom, *supra* note 18, at 38.

124. *Szafranski*, 993 N.E.2d at 517–18.

125. Andrew Maloney, *Pre-Embryo Case Denied by Top Court*, CHI. DAILY L. BULL., Oct. 4, 2013, at 1, 22. Because the Illinois Supreme Court declined to weigh in on the pre-embryo disposition issue, the decision of the Illinois appellate court to apply the contract approach, and the balancing of interests approach in the absence of a contract, stands as the applicable law on pre-embryo disposition disputes in the state.

Jacob later followed by providing.[126] Jacob appealed this second ruling, and the Illinois appellate court heard oral arguments for the case, though no decision has yet been handed down.[127] If the appellate court affirms the trial court, Jacob's attorney will appeal to the Illinois Supreme Court, asking it to address his constitutional argument that he should not be forced into fatherhood.[128] Eventually, that question could also be posed to the U.S. Supreme Court.[129] Therefore, as it stands in Illinois, the rule is that a court should apply the contract approach if an agreement between the parties exists and should balance the parties' interests in the absence of an agreement.

II. ANALYSIS

This Part (1) analyzes the pros and cons of the contract, balancing of interests, and contemporaneous mutual consent approaches; (2) concludes that none of the approaches are viable because each approach is prohibitively complex; and (3) suggests that the proper solution is to give women who conceive pre-embryos through IVF the same rights afforded to women who conceive through intercourse (i.e., "naturally").

A. The Pros and Cons of the Three Approaches

A majority of the state supreme courts to decide pre-embryo custody disputes have endorsed some variation of the contract approach.[130] However, the method for resolving these disputes is far from settled.[131] The balancing of interests and contemporaneous mutual consent approaches survive as seemingly legitimate options as well. However, when teasing out the pros and cons of the three ap-

126. Strom, *supra* note 18, at 41. On remand, Judge Hall held,

> The agreement represents the intent of the parties, at the time, that Karla need not obtain Jacob's consent to attempt to have a child. . . .
>
> The judge noted that neither Dunston nor Szafranski intended the relationship to last, and that Szafranski did not place any conditions on future use at the time Dunston's eggs were harvested and fertilized. The informed consent was not a legal agreement between the couple, [the judge] held. The co-parent agreement, never signed, didn't carry enough weight.

Id. (internal quotation marks omitted).

127. Kim Bellware, *Her Last Chance for a Baby. His Fight Against Forced Fatherhood. The Court Must Decide*, HUFFINGTON POST (Jan. 22, 2015), http://www.huffingtonpost.com/2015/01/22/illinois-frozen-embryo_n_6348920.html.

128. Strom, *supra* note 18, at 42.

129. *Id.*

130. *See* discussion *supra* notes 39–107 and accompanying text.

131. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 392, 442 (2013).

proaches, it becomes obvious that the best approach is actually to disregard these complicated analytical frameworks for a simpler solution.

1. The Contract Approach

Under a contract model to pre-embryo custody dispute resolution, a court enforces any prior agreements between the parties, subject to evaluation against well-settled principles of contract law.[132] The likely benefits of following a contract approach are more numerous than the balancing of interests or contemporaneous mutual consent models.[133] For one, it provides predictability and encourages party autonomy.[134] Parties mutually agree to the terms that will govern their rights and responsibilities.[135] This is inherently fairer than a judicially imposed determination because the parties are free to decide the terms based on an understanding of their own interests.[136] Because agreed-upon terms exist to govern the process, parties will be more certain of the outcome should the disagreement reach the courts.

Following a contract approach also promotes judicial efficiency.[137] First, parties are less likely to choose costly litigation when the outcome of the dispute is clear.[138] Second, because many of the principles of contract law are well settled, the courts have the necessary experience to expeditiously resolve disputes that are brought to

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132. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

133. Although this Comment advocates giving the woman full decisional authority over IVF pre-embryos in a manner that is consistent with natural pregnancies, contracts still have a role to play in certain IVF situations. For instance, an agreement with the clinic governing disposition may still be necessary so that the clinic knows how long to keep the pre-embryos in storage and how to dispose of them when that time period has passed. Furthermore, a situation in which a third party donates eggs or sperm, an agreement is likely necessary to define the rights (or lack thereof) of the third party in relation to the intended parent or parents.

134. Flannery, *supra* note 10, at 275.

135. "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance."); Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 358–59 (2007).

136. Oliver Hart, Making the Case for Contract Theory (2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889201.

137. *See, e.g.*, Robertson, *supra* note 23, at 418 ("Surely enforcement of prior agreements for disposition of embryos is less likely to generate litigation and more likely to resolve it efficiently when it does arise.").

138. Patrick D. Keating, Sec. of Litig. Comm. on Corp. Counsel, A.B.A., Seminar: Minimizing the Risks of Litigation by Contract (Feb. 12–15, 2009), *available at* http://www.haynesboone.com/files/Publication/6a85cbf1-bf98-42e4-a5bf-c388d3c42a8b/Presentation/PublicationAttachment/00b015ab-f4a6-4c17-a5a3-293e31abf30a/Minimizing_Risks-Litigation_by_Contract.pdf.

court.[139] Finally, requiring parties undergoing IVF to contract for their interests could encourage them to think more carefully through contingencies and therefore to plan for these contingencies through the terms of their agreement.[140]

However, the contract approach is not without its problems. One negative aspect of the contract approach is that that there are less opportunities for the parties to make autonomous decisions on contingencies not contemplated in the agreement.[141] A second problem is that a court may create "moral harm" when it compels an individual to abide by a contract that requires him to become a parent after he has changed his mind.[142] This is a difficult criticism to contend with. Legal scholar Anthony Kronman notes, "When the promisor's own values have changed dramatically, the compulsory performance of a contract requiring his personal cooperation with the other party may pose a special threat to his integrity or self-respect."[143] Finally, contracts can be costly because parties have to hire attorneys and spend time constructing and negotiating the terms of the agreement.

2. The Balancing of Interests Approach

Under the balancing of interests approach, a court will consider the position of the parties, the significance of their interests, and the relative burdens that would be imposed by differing resolutions.[144] The greatest advantage of this approach is that it allows the courts to effectively integrate public policy into their decisions.[145] Another advan-

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139. *See* Marisa G. Zizzi, Comment, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach To Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391, 414 (2002) ("[A]dvanced dispositional agreements . . . set forth a sound legal framework under which disputes between donors can be analyzed—a contractual framework.").

140. Diane K. Yang, Comment, *What's Mine Is Mine, but What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 627 (2002) ("Divorce, death of the participants, and the possibility of future infertility are all conceivable situations, and the effect of these events can be provided for in a written agreement. Contracting encourages potential parents to consider these possibilities and decide disposition issues prior to creating preembryos or dissolving the relationship."); *see also* Noel A. Fleming, Comment, *Navigating the Slippery Slope of Frozen Embryo Disputes: The Case for a Contractual Approach*, 75 TEMP. L. REV. 345, 372 (2002) ("The process of executing a contractual agreement to regulate future control of frozen embryos may also have the added benefit of causing the parties to pause, think, and recognize the importance of the commitment into which they are about to enter.").

141. *See* Anthony Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 780–82 (1983).

142. *See id.* at 783.

143. *Id.*

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

145. Flannery, *supra* note 10, at 276.

tage of the general theory is that cost–benefit analyses produces optimal results.[146] This is because after the benefits and costs associated with particular outcomes are weighed against one another, the outcome with more benefits wins, resulting in a general minimization of costs and a maximization of benefits.[147]

However, cost–benefit analyses are arguably more appropriate where the factors to be weighed are tangible and objectively quantifiable, as when the issue to be considered is wholly economic.[148] Within the context of pre-embryo custody disputes, a court must weigh intangible personal interests, which requires a court to subjectively quantify the costs and benefits of its decision on each of the parties.[149] Quantifying the emotional harm associated with the inability of carrying a child to term versus the emotional harm of unwanted genetic parenthood is not only an impossible task, but also one not prudently undertaken by a purportedly neutral judicial system.[150] The balancing of interests approach leaves far too much room for a judge's own normative values to color her decision making.[151]

Furthermore, this approach would require burdensome ad hoc litigation.[152] Every new dispute would need to be litigated based on the specific facts of each case, and then the facts of each case weighed using a subjective analysis.[153] This approach is therefore the most susceptible of the three to producing widely inconsistent and unpredict-

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146. Paul R. Portney, *Benefit–Cost Analysis*, LIBR. ECON. & LIBERTY (2008), http://www.econlib.org/library/Enc/BenefitCostAnalysis.html.

147. Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 515 (2006) (arguing that a balancing test yields outcomes best tailored to the circumstances).

148. *See* Portney, *supra* note 146 ("To ascertain the net effect of a proposed policy change on social well-being, we must first have a way of measuring the gains to the gainers and the losses to the losers.").

149. *Cf.* Fleming, *supra* note 140, at 372 ("[I]n the absence of such an agreement, decision-making authority will often be placed in the hands of a third party such as a court or the legislature."); *see also* Yang, *supra* note 140, at 627 (discussing the risk that, when forced to grapple with parties' beliefs and values, courts may impose an outcome neither party ever contemplated); Zizzi, *supra* note 139, at 414.

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> We are also committed to the idea that the legal order should remain neutral among these conceptions [of the good], not favoring some or disfavoring others on the grounds of their intrinsic merit. Whenever the law invalidates a class of agreements for reasons of this sort, it runs counter to the liberal ideal of a legal order that does not discriminate among conceptions of the good.

Kronman, *supra* note 141, at 795.

151. *See* Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 310–11 (2005).

152. Flannery, *supra* note 10, at 276.

153. *Id.* at 266.

able outcomes.[154] The balancing of interests approach also significantly deprives parties of their autonomy in reaching decisions relating to parenthood, a fundamental aspect of their lives and personalities, and therefore runs the risk of being overly paternalistic.[155] The inefficiency, subjectivity, and paternalism of the balancing of interests approach are anathema to the American court system.

3. The Contemporaneous Mutual Consent Approach

Courts employing the contemporaneous mutual consent model uphold the status quo in the face of a party disagreement.[156] This means that they will not permit any transfer, release, disposition, or use of the pre-embryos without signed authorization from both donors.[157] The pre-embryos remain frozen, and the party opposing destruction is responsible for any storage fees.[158] This is the approach chosen by Iowa, which is the only state supreme court to endorse this approach.[159]

The Iowa Supreme Court elaborated on the benefits of this approach, noting that it "share[s] an underlying premise" with the contract model.[160] The shared premise is that the fate of the pre-embryos is a decision that equally belongs to the parties who created them and not to the courts.[161] Based on this premise, the contemporaneous mutual assent approach is seemingly ideal—parties have the autonomy to decide the terms of disposition as agreeable to them in the present without being restricted by inflexible contracts, which may not have even contemplated the changed circumstances at hand.[162] Further-

154. As the Court in *Casey* said, "Liberty finds no refuge in a jurisprudence of doubt." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

155. *See* Waldman & Herald, *supra* note 151, at 310–23.

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

157. *Id.*

158. Maggie Davis, *Indefinite Freeze?: The Obligations a Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006*, 15 J. HEALTH CARE L. & POL'Y 379, 396–97 (2012); *see also* Charla M. Burill, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals an Indefinite Solution*, 54 WAYNE L. REV. 1365, 1386 (2008) (explaining that the contemporaneous mutual consent model allows one parent full control to effectively destroy the embryo).

159. *In re Witten*, 672 N.W.2d at 783.

160. *Id.* at 777.

161. *Id.*

162. Coleman, *supra* note 105, at 102.

> The difficulty of predicting one's future feelings about cryopreserved embryos is compounded by the fact that disposition decisions may not be implemented for decades after the embryos are created. There is simply not enough societal experience with the practice of embryo cryopreservation to presume that most people's decisions about the disposition of their frozen embryos will remain stable over such long periods of time.

more, preserving the status quo is not an irreversible decision. It is a type of "time-out" that the parties can use to think about and negotiate for their present interests.[163] On the other hand, the consequences of a judicial determination or contract requiring either the destruction or development of the pre-embryos into a child are both permanent and have serious outcomes, likely resulting in emotional or financial harm (or both) to at least one party.[164] This approach also legitimizes the role of the judicial system; by giving the parties autonomy and equal say in arriving at their decision, it would be difficult to argue that the decision was arbitrary, unfair, or biased.[165]

Although the benefits of this approach are described in terms of mutual agreement, negotiation, and equality, its actual application may prove to be oppressive. For instance, if a party changes his mind about wanting to be a parent, under this approach, all he has to do is hold steadfast in his refusal.[166] In this sense, the decision does become permanent. Viable reproduction has only a small window of opportunity in terms of the age of the progenitors; for example, as the woman becomes older, she is less likely to successfully carry a child to term, and as both parties get older, they may be less physically capable of raising a child.[167] Thus, the party who has changed his mind regarding

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> In the absence of such experience, the law should err on the side of greater flexibility, given the profoundly emotional nature of the issues.

Id.

163. *Id.* at 112 ("By preserving the status quo, it makes it possible for the partners to reach an agreement at a later time.").

164. Olivia Lin, *Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization Outside Contractual Autonomy*, 54 DUKE L.J. 485, 505–06 (2004) (criticizing the contract approach to IVF for failing to account for the "realities of the relationships among the effected parties").

165. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 415, 416 & n.30 (1990).

> That decisionmaker might order dispositions different than would the gamete provider, thus interfering more with procreative interests than would holding one to a freely chosen future disposition. The parties are left with less control over their procreative interests than if they have the ability to make advance binding agreements for disposition of embryos.

Id. at 415–16; *see also* Waldman & Herald, *supra* note 151, at 289 (examining "how cognitive biases and distortions taint medical and legal understandings of women" in the context of frozen embryo custody disputes).

166. *See* Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 822 (1992) ("[T]he courts' rationales work a hardship upon the party who wants to implant the pre-embryo.").

167. *See* Victoria C. Wright et al., *Assisted Reproductive Technology Surveillance—United States, 2000*, CENTERS FOR DISEASE CONTROL & PREVENTION (Aug. 29, 2003), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5209a1.htm; *see also* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1055 (2004) (noting that the passage of time impairs a woman's procreative capacity on a number of levels and at every stage of the ART process).

the desire to become a parent may be in a more advantageous position to secure his desired outcome.[168]

Not only does the refusing party have an upper hand in negotiations due to the natural time limit on reproduction and parenting, but also because the party seeking to prevent destruction is responsible for all storage fees.[169] Depending on this party's financial circumstances, it may be unduly burdensome for her to pay storage fees indefinitely. There is also the potential for emotional or financial blackmail under this approach, because the party that has changed his mind, as noted above, enjoys a great bargaining advantage.[170] For example, a party may consent to use of the pre-embryos only under the condition that the couple get back together.

Finally, this approach may produce situations that contradict the internal policies of the IVF clinic, which would create another level of disagreement, this time between the clinic and the parties.[171] For example, it may be a clinic's policy to dispose of stored pre-embryos after a set number of years. If this set number of years has passed and the clinic is unable to reach the progenitors, the clinic might go ahead and dispose of the pre-embryos, which would foreclose the opportunity for the progenitors to reach a decision themselves.[172]

Based on the considerations highlighted above, the purported benefits of this theory are too easily susceptible to compulsion in practice to be a workable model for pre-embryo disposition.

Despite the benefits of the three approaches described above, this Comment posits that the drawbacks render each approach unviable and instead suggests that the Illinois Supreme Court, and eventually the U.S. Supreme Court, should elect to give women who conceive through IVF the same rights over their pre-embryos as women who conceive naturally have over their embryos.

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168. Trespalacios, *supra* note 166, at 823.

169. *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003). For instance, one particular fertility clinic's storage fee is about $500 per year. *Egg Freezing FAQs*, USC FERTILITY (2013), http://www.uscfertility.org/fertility-options/egg-freezing-faqs.

170. Helene S. Shapo, *Frozen Pre-Embryos and the Right To Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 103 (2002) ("One party's holdout 'right' not to be a parent and to dispose of pre-embryos becomes a veto—and perhaps a bargaining chip in divorce—over the other party's 'right' to be a parent.").

171. Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 918–926 (2000) (discussing the disconnect between clinic practices and parties' actual desires).

172. Andrea D. Gurmankin et al., *Embryo Disposal Practices in IVF Clinics in the United States*, POL. & LIFE SCI., Sept. 2003, at 4, 6. Disposal policies are not standardized between clinics, and there is no law specifically mandating informed consent of both progenitors for disposal. *Id.* at 4–6. Thus, even if a court requires the parties to mutually agree, a clinic may allow one party to dispose of the pre-embryos without the consent or knowledge of the other. *Id.* at 6.

B. The Myth of "Forced Procreation" Has Unnecessarily Complicated the Debate

The following Part analyzes and uses the U.S. Supreme Court's abortion jurisprudence to dismantle the logic behind the "forced procreation"[173] argument as it is used to justify prohibiting a woman's use of pre-embryos when the man has changed his mind. Second, this Part draws parallels between the medical risk associated with natural pregnancies and the egg extraction process in IVF, and argues that a woman's bodily integrity is implicated under both circumstances. Third, this Part argues that giving a woman authority over her pre-embryos makes the most sense because, generally, no third party surrogacy issues will be implicated. Finally, this Part argues that giving women full decisional authority over their pre-embryos will give parties notice of their respective rights upon creation of the pre-embryos, thereby allowing the parties to make an informed decision about whether or not to undergo IVF.

1. The Faulty Logic Behind the Argument Against "Forced Procreation"

IVF has revolutionized the process of reproduction by extracting the moment of fertilization from inside the woman's body and bringing it outside.[174] When a man and woman conceive naturally, the moment of fertilization occurs inside the woman's body after a man ejaculates during vaginal intercourse.[175] From the very moment that a

173. The term "forced procreation" was first used by Massachusetts when it held in *A.Z. v. B.Z* that "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement." A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000). Other pre-embryo disposition cases have adopted *A.Z.*'s reasoning even if not explicitly using the phrase "forced procreation." *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001) ("We will not force J.B. to become a biological parent against her will."). Therefore, as used in this Comment, the term "forced procreation" refers to the situation that arises when a woman exercises her exclusive, court-sanctioned right to determine either whether (1) to continue a natural pregnancy against the desires of the father; or (2) if conceiving through IVF, to implant her pre-embryos and allow them to develop into a child against the desires of the father.

174. IVF is the joining of a woman's egg and a man's sperm in a laboratory dish. *In Vitro Fertilization (IVF)*, N.Y. TIMES HEALTH GUIDE (Feb. 26, 2012), http://health.nytimes.com/health/guides/surgery/in-vitro-fertilization-ivf/overview.html. The term *in vitro* is Latin for the phrase "in glass," which refers to the laboratory, or petri, dish where the genetic material is combined; though the term is used to connote "outside of the body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (2002).

175. *Pregnancy: Fertilization and Implantation*, NYU LANGONE MED. CENTER, http://www.med.nyu.edu/sti/contented35.html (last visited Nov. 11, 2014). During vaginal intercourse, sperm is ejaculated into the female body. *Id.* The sperm makes its way up the through the cervix, continues its way through the uterus into the fallopian tubes, and finds its way towards the egg in approximately twenty minutes. *Id.* The fertilization process is complete about eighteen hours after the sperm has found the egg. *Id.*

man's sperm fertilizes her egg, the woman attains exclusive decisional authority over the fate of her embryo.[176] The man can neither legally force her to continue with the pregnancy nor force her to terminate it.[177] In the context of a natural pregnancy, therefore, the law has specifically sanctioned the possibility of a woman to both "deprive a man of his right to become a parent or force him to become one against his will."[178] Yet within the IVF context, the courts have relied on the public policy argument against "forced procreation" as a justification to side with the party that has changed his mind regarding use of the pre-embryos.[179]

That a woman has absolute discretionary authority to determine the future of her pre-embryo has major implications on the frozen pre-embryo custody analysis. It introduces the question of whether or not and why a woman who is incapable of naturally conceiving should have different constitutional rights regarding the fate of her embryos than a woman who naturally conceives.[180] In the context of natural pregnancies, the Supreme Court has not held that parties must contract with one another prior to conception, or that courts must "balance the interests" of the respective parties in terminating the pregnancy. Nor has it held that "the parties must mutually agree"

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176. Roe v. Wade, 410 U.S. 113, 164–66 (1973) (holding that under the Fourteenth Amendment, the right to privacy encompasses a woman's decision whether to terminate her pregnancy); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898–901 (1992) (holding that the spousal awareness requirement for abortion is unconstitutional because it places an "undue burden" on a woman's ability to obtain an abortion); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67–69 (1976) (holding that a spousal consent requirement is unconstitutional).

177. *See* cases cited *supra* note 176.

178. *See* Anna Smajdor, *Deciding the Fate of Disputed Embryos: Ethical Issues in the Case of Natalie Evans*, J. EXPERIMENTAL & CLINICAL ASSISTED REPRODUCTION (July 4, 2007), http://archive.biomedcentral.com/1743-1050/4/2.

> In fact men's supposed rights not to become genetic parents are routinely overridden. Once a woman is pregnant it is widely accepted that her partner cannot force her to undergo abortion. The unwilling father is simply obliged to accept the woman's choice. The greater weight given to the woman's choice demonstrates the importance we place on deciding what is done to our own bodies.

Id.; *see also* Armin Brott, *Abortion: Not Just a Women's Issue*, ASK MR. DAD (June 6, 2012), http://www.mrdad.com/ask-mr-dad/abortion-womens-issue/.

179. Waldman, *supra* note 167, at 1061–62 (discussing the undue weight given to the interests of the parent who wishes to avoid procreation perpetuated by a judicial misconception regarding the financial and psychological toll on that parent).

180. Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model To Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 466 (1999).

> In the context of [assisted reproductive technologies], however, perhaps in an effort to create gender equality, courts have focused not on the act and intent of the parties, but on the physical location of the embryo. In doing so, the courts have created an inequality for infertile women that is fundamentally unfair.

Id.

whether to terminate the pregnancy.[181] Rather, the Court has authorized the woman to make the decision for herself, a decision that may result in an outcome that is disfavored by the man.[182] If the woman decides to have the child despite the man's wishes not to become a parent—a course of action that the Court has explicitly approved—he has no legal recourse.[183]

The reality that the Supreme Court has taken a strong position by giving women full decisional authority in natural pregnancy cases is demonstrated by the existence of the "Fathers' Rights" movement.[184] Proponents of the Fathers' Rights movement[185] argue that it is a glaring problem that fathers must pay child support even in instances where they did not desire to have the child and yet have no say in the abortion decision when they *do* want to have the child.[186] The movement recognizes that in order for these concerns to change, men (or those supporting the movement) will have to "organize and demand that the laws be changed."[187] This would be no small feat, considering that *Roe*, *Casey*, and *Danforth* would all need to be overturned in order for this type of change in the law to go forward.[188]

Thus, because the Supreme Court has in fact judicially authorized instances of "forced procreation" within the natural pregnancy context, the efficacy of the argument applied to IVF pre-embryo custody disputes is severely diminished. Carving out different rights for women who conceive through IVF, as opposed to women who con-

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181. Daar, *supra* note 180, at 466.

> The decision to continue or terminate a pregnancy in its early stages rests solely with the woman. But *Davis* and its progeny disavow this sacrosanct principle, allowing the fortuity of technology to award a male progenitor an opportunity to override a woman's fundamental right to control her early embryo. With coital reproduction, once a man takes action that could result in a pregnancy, he waives his right to control the fate of his progeny.

Id.

182. In the abortion cases, the Court's analysis focuses almost exclusively on the woman with very little attention paid to the man's interests. *See supra* note 176 and accompanying text.

183. Darr, *supra* note 180, at 465.

184. *See* Nathan Tabor, *The Third Victim of Abortion*, PUBLICEYE.ORG (2009), http://www.publiceye.org/ark/reproductive-justice/articles/the-third-victim-of-abortion.php.

185. Proponents of the movement challenge the assumption that mothers should be afforded more rights as parents (or in the pregnancy context, potential parents) than fathers. Hanna Rosin, *Dad's Day in Court: The Perception That Family Law Is Unfair to Fathers Is Not Exactly True*, SLATE (May 13, 2014), http://www.slate.com/articles/double_x/doublex/2014/05/men_s_rights_recognized_the_pro_father_evolution_of_divorce_and_paternity.html.

186. Tabor, *supra* note 184.

187. *Id.*

188. "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is by definition, indispensable." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992). For a discussion of these cases, see *supra* note 176 and accompanying text.

ceive naturally, fractures the constitutional guarantees of procreative liberty granted to women by the Supreme Court in its abortion jurisprudence.[189]

2. A Woman's Privacy and Bodily Integrity Are Implicated in IVF

In the natural pregnancy context, part of the justification for giving women full decisional authority is that pregnancy implicates her bodily integrity.[190] A woman's bodily integrity is similarly implicated in the IVF process and the bodily integrity justification should also be used to give women who conceive through IVF full decisional authority over their pre-embryos. Although the IVF procedure brings the moment of fertilization outside of the woman's body, thereby temporarily disconnecting the woman's body from the pregnancy, the medical evidence suggests that the IVF procedure does implicate a woman's privacy and bodily integrity pre-implantation.[191] The distinction between the risks associated with egg extraction and the risks associated with natural conception is that a woman who has undergone the IVF procedure to produce eggs for fertilization has willingly exposed herself to the risks involved.[192] However, if she is not given

189. While beyond the scope of this analysis, it is interesting to note that granting different constitutional rights to infertile women might violate the Equal Protection Clause. The Fourteenth Amendment provides that no state shall deny to any person "within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. In order to bring an equal protection claim, an individual must show that the laws of a state treat an individual arbitrarily and in a different manner than others in similar conditions and circumstances. *See Equal Protection: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/equal_protection (last visited Sept. 4, 2014). Generally, the question of whether the Equal Protection Clause has been violated arises when a state grants a particular class of individuals the right to engage in an activity but denies other individuals the same right. *Id.* There is no clear rule for deciding when a classification is unconstitutional. *Id.*

190.

> State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.

Casey, 505 U.S. at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

191. *See* Marcia Joy Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1082–83 (1986) (detailing the surgical procedure necessary to remove a woman's egg); *see also* Trespalacios, *supra* note 166, at 825 (detailing how the female gamete is extracted compared to how the male gamete is extracted and concluding "[t]he woman makes a greater investment in creating the pre-embryo"); Waldman, *supra* note 167, at 1053.

192. *See* Daar, *supra* note 180, at 462.

decisional authority over her pre-embryos and is denied the ability to use them, then her bodily integrity is implicated again.[193] Thus, apart from the proposition that consistent, nondiscriminatory application of the law is generally desired, the fact that the egg extraction process in IVF implicates a woman's bodily integrity, just as a natural pregnancy does, justifies consistent application.[194]

At the first stage of the IVF process, a woman has to take hormone-stimulating fertility drugs.[195] Many of these fertility drugs are given by injection, some several times a day.[196] Repeated injections can cause bruising, and the woman may also experience bloating, abdominal pain, mood swings, headaches, and other side effects in response to the fertility medicine.[197] In some instances, the drugs may lead to a serious condition known as ovarian hyperstimulation syndrome.[198]

Furthermore, during this stage in the process, the woman will have regular transvaginal ultrasounds to examine the ovaries and blood tests to check hormone levels.[199] A transvaginal ultrasound is a type of pelvic ultrasound used to look at a woman's reproductive organs, including the uterus, ovaries, cervix, and vagina.[200] To perform the

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> With in vitro conception, a woman clearly intends that her actions result in procreation. She often endures weeks of injections, hormone therapy and invasive treatments for egg retrieval with the ultimate purpose of having a child. Thus, if the law recognizes that parties to an in vivo conception are within the realm of reproductive liberties, it should follow that parties to an in vitro conception, who intend to procreate, also implicate the realm of reproductive liberties.

Id. (footnotes omitted); *see also* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1072 (1996) (discussing the physical, mental, and emotional trauma associated with reproductive technology procedures). Women willingly undergo this pain on the understanding that it will result in a child. *See* Colker, *supra*, at 1072 ("She experienced considerable mental and physical pain due to the IVF process, which she would not have undergone but for her mutual understanding with [her partner] that they would jointly beget a child.").

193. *See* Waldman, *supra* note 167, at 1029, 1061 (arguing that the significant emotional and physical investment women have in existing embryos weighs heavily in favor of implantation).

194. "[T]he crucial distinction is not between discrimination based upon gender; rather, they argue that the law discriminates against women who must undergo IVF to have a genetic child, while granting protected status to women who conceive through intercourse." Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 427–28 (2013).

195. The fertility drugs increase egg production. *In Vitro Fertilization*, *supra* note 174. Normally, a woman produces one egg every month, but the fertility drugs cause the ovaries to produce several eggs at a time. *Id.*

196. *Id.*

197. *Id.*

198. *Fact Sheet: Risks of In Vitro Fertilization (IVF)*, AM. SOC'Y FOR REPRO. MED., http://www.asrm.org/FACTSHEET_Risks_of_In_Vitro_Fertilization/ (last visited Nov. 10, 2014).

199. *In Vitro Fertilization (IVF)*, *supra* note 174.

200. *Transvaginal Ultrasound*, N.Y. TIMES HEALTH GUIDE (July 11, 2012), http://health.nytimes.com/health/guides/test/transvaginal-ultrasound/overview.html.

procedure, the woman must lie down on a table with her knees bent and her feet in holders.[201] A healthcare provider then uses an instrument called a transducer, or probe, which will generate computer images of her reproductive organs.[202] Before inserting the probe into the patient's vagina, the healthcare provider covers the probe in a condom and lubricant gel.[203] After inserting the probe, the healthcare provider will move the probe within the area to see the pelvic organs.[204]

The next stage of the process is egg removal, which involves surgery.[205] The surgery presents risks both from the administration of anesthesia and from the procedure itself. The short-term risks from the procedure include bleeding, infection, inflammation, and injury to the surrounding structures, including the bowel and bladder.[206] Furthermore, there is a disconcerting absence of quality studies on the long-term risks of the IVF process on women who undergo the procedure.[207]

Thus, a woman undoubtedly exposes herself both in terms of privacy and medical risk in the pre-implantation IVF process.[208] This becomes especially clear when contrasted against the pre-implantation obligation of the sperm donor in the IVF process—ejaculating into a cup, an activity that involves no medical risk and that takes place in complete privacy.[209] Because the process of undergoing IVF is significantly riskier and more complicated for a woman than a man, she should, absent an agreement providing otherwise, retain decisional authority over the pre-embryos.[210]

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *In Vitro Fertilization (IVF)*, *supra* note 174.

206. Cynthia McFadden et al., *Inside the Lucrative Life of an Egg Donor*, ABC NEWS (Nov. 4, 2013, 7:28 PM), http://abcnews.go.com/blogs/health/2013/11/04/inside-the-lucrative-life-of-an-egg-donor/.

207. At this point, the evidence is inconclusive regarding the safety of the procedure on a woman's long-term health. Susan B. Apel, *Disposition of Frozen Embryos: Are Contracts the Solution?*, VT. B.J., Mar. 2001, at 29, 31 ("While [IVF procedures] are believed to be safe, the large doses of necessary hormones have effects that are unknown.").

208. Trespalacios, *supra* note 166, at 822 n.133 ("The woman has a greater physical investment in the pre-embryo because the process that culminates in the harvesting of ova is far more physically arduous than the donation of sperm.").

209. *See* Waldman, *supra* note 167, at 1052–53 ("Men's donation may be achieved relatively easily and without high-tech interventions. All that is required is a private room, an empty jar and, perhaps, a Playboy magazine or video. For women, the process is more arduous.").

210. *See, e.g.*, Colker, *supra* note 192, at 1075 ("[R]egardless of the initial reason why a couple chose IVF, in most cases the woman suffers more significantly from the denial of custody of the frozen embryos than the man."); Trespalacios, *supra* note 166, at 828–29 ("Their mutual intent at

3. Third Party Legal Issues Will Not Necessarily Be Implicated

Another factor weighing in favor of granting the woman decisional authority over the pre-embryos is that she can use or dispose of them without implicating a third party, which would further obfuscate the already murky landscape of rights in the pre-embryo custody issue. An individual's genetic material is considered his or her personal property;[211] separately, an egg belongs to the woman and sperm belongs to the man.[212] Custodial issues over the pre-embryo, which is the product of the progenitors' reproductive materials, arise because there is no way to separate the combined materials back into their respective parts—the pre-embryo is irrevocably and inseparably a unified sum of genetic parts and property rights.[213]

Were a man to use the pre-embryos against the wishes of the woman who provided the eggs, he would necessarily require a surrogate to carry the embryos to term.[214] This means that the woman's genetic property would be implanted into a third party who has no distinct right to the pre-embryos without the woman's consent.[215] Alternatively, if the woman were to use the pre-embryos against the man's desire, she would likely be able to carry the embryos to term on her own, meaning that the pre-embryos would be developed by one of the original progenitors.[216] In the latter scenario, there are no third party use issues to consider.[217]

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the time of IVF is demonstrated by the physical, financial, and emotional investment of both parties in committing to IVF."); Daar, *supra* note 180, at 466 ("All women should have equal control over their early embryos and fetuses. Courts have shown a willingness to override the reproductive rights of infertile women whose embryos are conceived in vitro, because such women lack direct physical relationships with their developing or cryopreserved embryos.").

211. *See* Joke & Have, *supra* note 11.

212. *Id.*

213. *See* Theresa M. Erickson & Megan T. Erickson, *What Happens to Embryos When a Marriage Dissolves?: Embryo Disposition and Divorce*, 35 WM. MITCHELL L. REV. 469, 481 (2009).

214. Nicholas Blincoe, *Why Men Decide To Become Single Dads*, GUARDIAN (Nov. 1, 2013), http://www.theguardian.com/lifeandstyle/2013/nov/02/men-single-dad-father-surrogacy-adoption.

215. *See generally* B. Bjorkman & S. O. Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS 209 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2565785/. "Turning to biological material, there is a long tradition of treating the rights that one has to one's bodily parts as inalienable." *Id.* at 212.

216. A woman must have a healthy uterus to have the pre-embryos implanted in her womb. *Having A Baby After Cancer: Fertility Assistance and Other Options*, CANCER.NET (Jan. 2013), http://www.cancer.net/survivorship/life-after-cancer/having-baby-after-cancer-fertility-assistance-and-other-options. However, uterine problems are far less common than ovarian/egg quality problems, and a woman who is only infertile due to egg quality problems does not necessarily require a surrogate. *See id.* Thus, chemotherapy treatment may reduce the number of eggs in a woman's ovary while still allowing her to gestate upon implantation of a pre-embryo. *Id.*

217. Waldman, *supra* note 167, at 1060–61.

4. Parties Will Have Complete Notice of the Consequences of IVF

Finally, giving full decisional authority over the pre-embryos to the woman puts parties contemplating IVF on notice of their respective rights, or lack thereof, in the event of a change of mind.[218] Rather than a natural pregnancy, which can occur unplanned, IVF necessarily requires forethought. With this notice and forethought, parties would be able to consider the implications of a change of mind prior to going through the process of IVF and pre-embryo freezing.[219] Furthermore, arguably, because the parties would know of the consequences of a change of mind prior to intentionally conceiving through IVF, the decision cannot be said to be "forced."

Thus, giving women who conceive through IVF the same rights over their pre-embryos as women who conceive naturally is a simple, legally consistent, and fair solution to the growing pre-embryo dispute problem.

IV. IMPACT

This Part explains how Illinois can give women exclusive decisional authority of their pre-embryos, considering the (1) legal implications; (2) public policy issues; (3) psychological and emotional effects; and (4) financial effects that either congressional legislation or a court ruling giving women exclusive decisional authority over their pre-embryos would have.

A. The Illinois Supreme Court Should Give Women Exclusive Rights to Their Pre-Embryos

Although the Illinois Supreme Court declined to weigh in on *Szafranski*,[220] the attorneys for both parties believe the frozen pre-

> When assigning weight to the myriad of interests that the women and men in frozen embryo cases seek to fulfill in frozen embryo disputes, courts should accord substantial weight only to those interests that lie at the heart of the parent–child bond sheltered by the Constitution. Thus, women who seek to use existing embryos to achieve genetic parenthood should be accorded the greatest judicial deference.

Id.

218. *Cf.* John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1020–21 (2001) (analogizing the rights of a women impregnated by coital conception to those of a women who endures bodily intrusion through IVF procedures in reliance on the promise that she would be able to implant the pre-embryo).

219. *Cf.* Charla M. Burill, Note, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals an Indefinite Solution*, 54 WAYNE L. REV. 1365, 1379 (2008) (discussing the benefits of using default rules in the context of embryo disposition disputes).

220. Szafranski v. Dunston, 993 N.E.2d 502 (Ill. App. Ct. 2013).

embryo custody issue will eventually be taken on by the high court.[221] That the Illinois Supreme Court will eventually hear the issue, whether in *Szafranski* or another pre-embryo dispute case, seems inevitable. If and when the court takes on the issue, it will have the opportunity to either affirm the appellate court's decision to follow a hybrid contract and balancing of interests approach, or overrule this decision and impose another rule. The appropriate resolution would be for the court to overrule the appellate court and hold that, in Illinois, women who conceive using IVF should have the same rights to their pre-embryos as women who conceive naturally.

B. The Illinois Legislature Should Give Women Exclusive Rights to Their Pre-Embryos

Another way for Illinois to ensure that women who conceive through IVF are afforded the same rights as women who conceive naturally is through the passage of legislation specifically mandating so. Illinois currently has some legislation relating to assisted reproduction, including the Gestational Surrogacy Act[222] and the Illinois Parentage Act,[223] which indicates that IVF issues are on the Illinois General Assembly's radar.

Furthermore, the legislature recently amended the Illinois Human Rights Act (IHRA) to add pregnancy to the list of classes protected against discrimination.[224] IHRA defines pregnancy as "pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth."[225] Arguably, infertility is a medical condition related to pregnancy or childbirth. The IHRA's definition of pregnancy parallels the definition in the federal Pregnancy Discrimination Act, which the Seventh Circuit has interpreted to include women undergoing infertility treatments.[226] Thus, the Seventh Circuit has set a precedent to consider that women who conceive through IVF fall under the statutory definition of "pregnancy" and are not to be discriminated against on the basis of their infertility. Therefore, the Illinois legislature should further amend the IHRA to specifically include women who have conceived through IVF as protected under the class of preg-

221. Maloney, *supra* note 125, at 1.

222. 750 ILL. COMP. STAT. 47/1–75 (2015).

223. 750 ILL. COMP. STAT 45/1–28.

224. 775 ILL. COMP. STAT 5/2-102.

225. *Id.*

226. 42 U.S.C. § 2000e(k) (2012); *see also* Katie Kushing, *Facing Reality: The Pregnancy Discrimination Act Falls Short for Women Undergoing Infertility Treatment*, 40 SETON HALL L. REV. 1697, 1697–98 (2010) (discussing the holding in Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008)).

nancy, indicating that these women are not to be afforded separate, inferior rights to women who conceive "naturally."

C. *The Effects of Giving Women Exclusive Decisional Authority*

1. Legal Implications

A positive legal implication of giving women who conceive with IVF exclusive decisional authority over their pre-embryos is that the law in Illinois would be consistent with the national policy, evidenced in the United State Supreme Court's abortion jurisprudence, of allowing women alone to determine whether or not to become a mother and ensure that infertile women are not afforded separate, inferior rights based on their infertility status.[227] However, because real differences do exist between IVF and natural pregnancy, this ruling would also raise a variety of complex legal questions pertaining to the scope of the mother's rights in light of these differences. What are the rights and responsibilities of the sperm donor to the children after the woman makes a decision regarding whether to implant her pre-embryos and allow them to develop? Will he necessarily become the legal father of the child even if he opposed the development of the pre-embryos? Will couples be able to enter into contracts regarding the father's rights and responsibilities to the child? Should the mother's ability to use the pre-embryos depend on how many children the couple initially agreed to have from the frozen pre-embryos? For instance, if the father and mother agreed to have only one child, but froze several pre-embryos to serve as backup in case of failed implantations, should the mother have the right to only one child, based on consent, or should she have the right to have as many children as she wants from the available pre-embryos?

Although these issues will need to be resolved in light of the suggested ruling, establishing the rule concerning custody of pre-embryos is nonetheless critical to ensure consistency and fairness, and should therefore be adopted. The courts or the legislature can later refine the ramifications of the rule.

2. Public Policy

Giving women who conceive through IVF exclusive authority over their pre-embryos also makes sense from a public policy standpoint. First, because rights are explicitly defined from the outset, parties have notice about the consequences of their decision to undergo IVF. This notice also legitimizes the fairness of the rule giving the mother

227. *See* Smajdor, *supra* note 178.

exclusive decisional authority over the pre-embryos because parties know the exact outcome of having a change of mind prior to undergoing IVF and can make the decision whether or not to continue based on this notice. Second, because the outcome of any dispute regarding the development of the pre-embryos is predetermined by the rule, the rule promotes judicial efficiency—parties will not spend time, money, emotional energy, or the courts' limited resources litigating a complex and unpredictable suit.

Overall, judicial efficiency, consistency, and predictability in the application of the law are positive public policy considerations that this rule would promote, justifying its adoption.

3. Psychological and Emotional Effects

The psychological and emotional effects of a rule that may require a man to become a parent against his will are already being played out in the *Szafranski* saga. Jacob fears that "being a genetic father of a child he will not raise, born to a woman he never loved, will 'haunt [him] wherever [he] go[es].'"[228] "He says the prospect alone has already cost him a relationship with another woman, one he said he was in love with."[229] Jacob's reaction to this potential unwanted fatherhood demonstrates the moral harm, discussed earlier, that comes with forcing someone to become a genetic parent against his will.[230] Forced genetic parenthood can cause stress and produce negative consequences, such as loss of a later partner who is upset by the fact of her partner's parenthood.[231]

However, "the stress of the non-fulfillment of a wish for a child has been associated with emotional sequelae such as anger, depression, anxiety, marital problems, sexual dysfunction, and social isolation," with women generally experiencing higher levels of distress than their male partners.[232] Evidence of this particular kind of emotional stress can also be found in *Szafranski*. Court records show that in an e-mail sent to Jacob in 2010, Karla wrote, "Those embryos mean everything to me. . . . And I will fight this to the bitter end."[233] Since the lawsuit began, Karla gave birth to a child using a donor egg and donor

228. Strom, *supra* note 18, at 37.

229. *Id.*

230. *See* Kronman, *supra* note 141, at 783.

231. *See* Strom, *supra* note 18, at 37.

232. *Fertility and Mental Health*, MGH CENTER FOR WOMEN'S MENTAL HEALTH, http://womensmentalhealth.org/specialty-clinics/infertility-and-mental-health/ (last visited Mar. 4, 2015).

233. Bellware, *supra* note 127.

sperm.[234] Here, however, the court distinguished between a child that is biological and "essentially adopted," leading the court to find on remand that Karla's "desire to have a biological child in the face of the impossibility of having one without using the embryos outweighs paternity rights or decision now to not procreate."[235]

A rule that gives women who conceive through IVF exclusive decisional authority over their pre-embryos would therefore mitigate, at least in part, the negative psychological effects associated with infertility for women.

4. Financial Effects

Along with having a direct financial impact on the parties involved in a dispute, the rule would also raise certain legal questions, the resolution of which would have significant financial effects on the parties. First, the rule saves parties money on hiring attorneys to draft agreements and adjudicate change-of-mind disputes because the outcome is clear from the onset—the woman will win. However, this rule may cost parties money if they have already invested in drafting an agreement. Second, the rule raises the questions of whether (1) a man who has changed his mind about becoming a father will be required to pay child support for the unwanted child; and (2) whether the man can be reimbursed for the costs associated with the IVF process if he helped with those payments. Primarily, however, the rule will save the parties money by providing the issue with predictability of outcome and obviating the need for expensive litigation.

V. CONCLUSION

Only six state supreme courts so far have issued a ruling on how frozen pre-embryo custody battles should be resolved.[236] Illinois, however, may be the next state to have the issue heard by its highest court.[237] Because the stakes in pre-embryo custody disputes are often

234. Kaye Wonderhouse, *Cancer Survivor Karla Dunston Wins Custody to Embryos, Boyfriend No Longer Wants Kids*, GLOBAL DISPATCH (May 18, 2014), http://www.theglobaldispatch.com/cancer-survivor-karla-dunston-wins-custody-to-embryos-boyfriend-no-longer-wants-kids-11837/.

235. *Id.* (internal quotation marks omitted).

236. Davis v. Davis, 842 S,W,2d 588 (Tenn. 1992); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Litowitz v. Litowitz (*In re* Marriage of Litowitz), 48 P.3d 261 (Wash. 2002); *In re* Marriage of Witten, 672 N.W.2d 782 (Iowa 2003).

237. *See* Bob Roberts, *Appeals Court Hears Arguments in Custody Dispute over Frozen Embryos*, CBS CHI. (Dec. 2, 2014, 9:19PM), http://chicago.cbslocal.com/2014/12/02/custody-dispute-over-frozen-embryos-lands-in-illinois-appeals-court/.

highly emotional for the parties involved, this area of the law would greatly benefit from a predictable, consistent, and objective solution to the issue—giving mothers full decisional authority over their pre-embryos. The Illinois legislature or the Illinois Supreme Court should act to ensure that women who conceive through IVF are afforded same rights as women who conceive naturally.

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