Deciding Custody of Frozen Embryos: Many Eggs Are Frozen but Who Is Chosen?

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DECIDING CUSTODY OF FROZEN EMBRYOS:  
MANY EGGS ARE FROZEN  
BUT WHO IS CHOSEN?

Peter E. Malo*

INTRODUCTION

Utopias seem more realizable than we ever before believed. And we find before us a most anguishing question: How can we avoid their actual realization?...Utopias are realizable. Life marches toward utopias. And perhaps, as a new century begins, intellectuals and the cultured class will dream of the means to avoid utopias and to return to a non-utopian society, less "perfect" and more free.¹

A continuing interplay exists today between societal values and technological advancements in biology and medicine, with each

¹See ALDOUS HUXLEY, BRAVE NEW WORLD & BRAVE NEW WORLD REVISITED (1960) (quoting Nicholas Berdiaeff "Les utopies apparaissent comme bien plus réalisables qu'on ne le croyait autrefois. Et nous trouvons actuellement devant une question bien autrement angoissante: Comment éviter leur réalisation définitive?...Les utopies sont réalisables La vie marche vers les utopies. Et peut-être un siècle nouveau commence-t-il, un siècle où les intellectuels et la classe cultivée reveront aux moyens d'éviter les utopies et de retourner à une société non utopique, moins 'parfaite' et plus libre." English translation provided by Monica Smith Gelinas).
constantly influencing the other. But as technology continues to gain momentum, it threatens to outstrip any remaining societal or ethical control, this is like the biological equivalent to the Manhattan Project.² Nowhere is this more apparent than in genetic or reproductive technologies. The first successful birth of a child by in vitro fertilization (IVF) was Louise Brown in Great Britain, on July 25, 1978.³ As a result of that birth, IVF, as part of a field of assisted reproductive technologies (ARTs), is now a billion-dollar industry.⁴

IVF provides a procreative opportunity to couples experiencing infertility due to a variety of medical problems. IVF is typically used when a pathologic Fallopian tube cannot transport eggs to the uterus where fertilization by the sperm and implantation into the uterine wall must occur.⁵ In an effort to solve the problem of infertility, the field of IVF has undergone continual scientific refinement. Consequently, IVF is now capable of providing such procedures as gamete⁶ intrafallopian transfer, zygote intrafallopian transfer, superovulation and transvaginal ultrasound-directed oocyte recovery.⁷ ARTs now exist for the five million three hundred thousand Americans who are reproductively infertile.⁸

Given these advances, complex issues have arisen. In 1995, 70 percent of the ARTs performed utilized IVF, resulting in only a twenty-

²See THE NEW YORK PUBLIC LIBRARY SCIENCE DESK REFERENCE 305 (1995) (describing the Manhattan Project as the American effort directed by Julius Oppenheimer to build the first atomic bomb).
⁴See id. at 520.
⁶A gamete is a mature male or female reproductive cell, spermatozoon or ovum. See TABER'S CYCLOPEDIC MEDICAL DICTIONARY G-4 (1997).
⁷See Lal, supra note 3, at 518.
CUSTODY OF FROZEN EMBRYOS

two percent live birth rate. IVF is extremely expensive. The typical costs associated with IVF range between $8,000 and $10,000 per completed procedure (which includes medical consultations, laboratory tests, drugs and egg retrieval, culturing, and transfer.) The process of IVF is also very comprehensive, as it is usually carried out in five steps.11

Additionally, since women undergoing IVF are faced with significant medical risks, doctors now retrieve, fertilize and then cryogenically freeze excess eggs for possible future implantation, should the initial attempt fail. Freezing fertilized eggs for future implantation minimizes the physiological manipulation of the woman’s

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10 See id. (citing Peter J. Neumann, Should Health Insurance Cover IVF? Issues and Options, 22 J. HEALTH POL., POL’Y & L. 1215, 1226, 1221 (1997)).

11 See Lal, supra note 3, at 520-22 (explaining that the first step is patient screening. Previous medical histories of both partners are extensively reviewed to determine applicability of IVF as a solution for their infertility problem. Ovulation induction and monitoring follows. After a patient has been accepted into an IVF program, the process begins with a sequence of chemical and hormonal injections into the woman’s ovaries to stimulate ovulation and the release of multiple eggs (a process known as “superovulation”). All cycles are stimulated by clomiphene citrate and human menopausal gonadotropin followed by human chorionic gonadotropin (HCG). The third phase is ova aspiration. Once a patient’s estrogen has increased, eggs are released following an injection of HCG. Eggs are removed by laparoscopic retrieval. A laparoscopy is a procedure performed under anesthesia, in which the physician places two tubes in the woman’s abdomen near the naval; the doctor then observes the ovary through a scope attached to one of the tubes. A hollow needle is then passed through the other tube and the eggs are gently vacuumed out of the body cavity. In vitro fertilization is the fourth step. Eggs are placed into a dish to which the donor’s sperm is added. Two to four days after fertilization and once cell division has progressed to the four to eight cell stage, the physician performs the fifth part, embryonic transfer back into either the genetic mother or to a non-genetic surrogate mother, by injecting several fertilized pre-embryos into the woman’s cervical canal with a syringe-like catheter. Implantation will occur, if at all, within 2 weeks after this transfer).

12 See Katz, supra note 8, at 629 (“including ovarian hyperstimulation syndrome, bleeding, infection, cysts, anesthesia-related complications, and possibly an increased risk of thromboembolism, stroke myocardial infarction and ovarian cancer, as well as difficult pregnancies and deliveries,” citing Neumann, Should Health Insurance Cover IVF? Issues and Options, 22 J. HEALTH POL., POL’Y & L. 1215, 1226 (1997)).

13 See id. (citing Monica Shah, Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception, 17 J. LEGAL MED. 547, 550 (1996)).
reproductive system because the hormonal preparation for egg retrieval is only implemented once.\textsuperscript{14} Hormonal preparation for implantation, then, will be the only physiological manipulation left to endure.\textsuperscript{15}

While such a practice provides medical benefit, it also exposes the couple to a potential legal dilemma. Specifically, what happens when, or if, the frozen genetic material from two individuals is no longer needed? This problem involves the volatile mixing of cutting edge IVF with an age-old problem of parental custody. Strewn upon this legal "no-man's" land like proverbial land mines are countless emotionally charged issues: Should control of pre-zygote material automatically vest in the woman when she desires implantation? Or should disposition of the genetic material go to the party wishing to avoid procreation? Should both genetic donors have rights to the pre-zygotes that may be contractually negotiated?

Courts are increasingly being forced to deal with this issue of frozen embryo custody. An Illinois court recently issued a temporary restraining order to prevent a woman "from implanting two frozen embryos against the wishes of her estranged husband."\textsuperscript{16} In February 1999, Margaret Hale and Todd Ginestra signed a contract with Highland Park Hospital's \textit{In vitro} Fertilization Center. Margaret subsequently had eggs removed, fertilized with Todd's sperm and frozen for future use.\textsuperscript{17} Shortly afterward, the couple initiated divorce proceedings.\textsuperscript{18} Currently, both husband and wife contend the contract they signed contains contradictory information: "one part stat[ing] that the couple agreed to have the embryos frozen, but a handwritten note in the contract states the opposite."\textsuperscript{19} "The court likely will consider first

\textsuperscript{14}See id. at 629-30 (citing Monica Shah, Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception, 17 J. LEGAL MED. 547, 550 (1996) and Jennifer Maigliano Dehmel, To Have or Have Not: Whose Procreative Rights Prevail in Disputes Over Disposition of Frozen Embryos? 27 CONN. L. REV. 1377, 1380 (1995)).

\textsuperscript{15}See id.

\textsuperscript{16}Jeremy Manier, Order on Embryos Still in Effect, CHI. TRIB., Aug. 17, 1999, Sec. 2 at 15.

\textsuperscript{17}See id.

\textsuperscript{18}See id.

\textsuperscript{19}Id.
the issue of whether the embryos can be implanted—and, if not; [sic] whether they should be destroyed." This will be the first case in Illinois involving parental rights to frozen embryos to be decided.

This article will examine public policy, statutory and Illinois common law pertinent to this issue. The background will examine policy, statutes and other state court decisions on custody of cryopreserved embryos following divorce of the gamete providers. The analysis and impact section will analyze appropriate case decisions under relevant Illinois law and consider how those cases, as well as policy and other state’s statutes, will affect similar future situations in Illinois.

BACKGROUND

"For of course," said Mr. Foster, "in the vast majority of cases, fertility is merely a nuisance. One fertile ovary in twelve hundred - that would really be quiet sufficient for our purposes. But we want to have a good choice. And of course one must always leave an enormous margin of safety." "

Statutes and Policy Pertaining to IVF

Fertility Clinic Success Rate & Certification Act of 1992

IVF is only minimally regulated on the federal level. The Fertility Clinic Success Rate and Certification Act of 1992 (the Act) required the CDC to develop a certification procedure for IVF clinics and laboratories, and to compile IVF clinic pregnancy success statistics. In addition to standardizing the reporting of pregnancy success rates, the Act also sought to "assure consistent performance of ART procedures, quality assurance, and adequate recordkeeping at each certified embryo laboratory." However, clinic certification and reporting are voluntary under the Act, with the only penalty for

20Id.
21Aldous Huxley, Brave New World & Brave New World Revisited 8 (1960).
23See id.
24See Katz, supra note 8, at 632 (citing Judith F. Daar, Regulating Reproductive Technologies: Panacea or Paper Tiger?, 34 Hous. L. Rev. 609, 642-43 (1997)).
noncompliance being public identification as a program that has failed to do so.25

American Fertility Society Guidelines
In 1986, the Ethics Committee of the American Fertility Society published a report establishing ethical guidelines for IVF.26 While deciding that IVF is "ethically acceptable,"27 the Committee chose to differentiate the earliest stages of embryonic development from those later stages, where major organs begin to form.28 In comparing legal and moral viewpoints, the Committee referred to embryos in the early developmental stage as pre-embryos; however, the definition was free of any intention to "imply a moral evaluation of the pre-embryo."29 Furthermore, while an embryo deserves greater respect than accorded other human tissue, since it has the potential to become a human person, it is not accorded the respect of an actual human being. 30 However, this human potential limits "the circumstances in which a pre-embryo may be discarded or used in research"31 and the statute makes clear that embryos should not be treated as a person because of a lack of features of personhood, individual development, and the possibility of never reaching the full biological potential.32 Therefore,

27Id. at 33S.
28Sylvia S. Mader, BIOLOGY, 914 (6th ed. 1998). ("Following fertilization, the zygote undergoes cleavage, which is cell division without growth. DNA replication and mitotic cell division occur repeatedly, and the cells get smaller with each cell division. Fertilization occurs in the upper third of an oviduct,...and cleavage begins as the embryo passes down this tube to the uterus." Id. at 923. "Gastrulation occurs during the second week. The inner cell mass now has flattened into the embryonic disk, composed of two layers of cells: ectoderm above and endoderm below. Once the embryonic disk elongates to form the primitive streak, similar to that found in birds, the third germ layer, mesoderm, forms by invagination of cells along the streak...It is possible to relate the development of future organs to these germ layers." Id. at 924.).
29FERTILITY AND STERILITY, supra note 26, at vii.
30See id. at 29S-30S.
31Id. at 77S.
32See id. at 29S-30S.
while preembryos are entitled to "profound respect," such respect does not entitle the embryo to full moral and legal rights accorded to full persons. Similar to the Act, compliance with the American Fertility Society's guidelines is purely voluntary.

**Louisiana Statutes**

Comparing various state laws regarding IVF, Louisiana has the most comprehensive and restrictive law. A viable embryo is a "judicial person which shall not be intentionally destroyed." A non-viable in vitro fertilized human ovum is one that "fails to develop further over a thirty-six hour period, except when the embryo is in a state of cryopreservation." Such an ovum then, is not property of the physician, IVF clinic, or the gamete donors, and can sue or be sued, although the state does not award inheritance rights unless the embryo develops into a child born in a live birth. A guardian may be appointed to safeguard a fertilized ovum's legal rights in the event of the following:

[T]he in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be the temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A court...may appoint a curator, upon motion of the in vitro fertilization patients, their heirs or physicians who cause in vitro fertilization to be performed, to protect the in vitro fertilized human ovum's rights.

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33See id. at 30S.

34See LA. REV. STAT. ANN. §§ 9:121-33 (West 1991) (deeming an IVF embryo "a biological human being" which is not property of the physician who acts as the agent of fertilization, or the facility which employs him, or the donors of the sperm and ovum).


36See LA. REV. STAT. ANN. § 9:124 (West 1991) (deeming an IVF-created human ovum a "judicial person" who is entitled[d] to sue or be sued).

37See LA. REV. STAT. ANN. § 9:133 (West 1991) (explaining that although a human embryo is a "judicial person," it does not have inheritance rights until born).

The statute requires all pre-embryos be transferred to a uterus, and "[i]f the in vitro fertilization parents remove by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation." The biological parents may choose between their own implantation or allow their embryos to be "adopted," thereby eliminating the ability to avoid genetic parenthood.

**Other States' Statutes**

Missouri's abortion statute contains a preamble that states "the life of each human being begins at conception," with "unborn children hav[ing] protectable interests in life, health, and well-being." The United States Supreme Court held this language, at least with regards to tort law, as a constitutional protection offered to unborn children.

No other state has such extensive statutory protection of human embryos. However, the death of a fetus in a nonabortion procedure may be punished as a homicide in some states. For example, Minnesota defines an unborn child as "the unborn offspring of a human being conceived, but not yet born," and provides for a maximum punishment of life imprisonment for the first-degree murder of the unborn.

In Virginia, pre-embryos are considered the property of the gamete-donors, and the IVF clinic's legal rights and duties with respect to the gamete-donors are those of a bailee. In Florida, parties undergoing IVF must provide for, as part of a written agreement, the disposition of all pre-zygote material in the event of the parties' deaths,

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41MO. ANN. STAT. § 1.205.1 (West Supp. 1993) (It has been argued that this statement conflicts with Roe v. Wade, 410 U.S. 179 (1973), holding that a state could not adopt its own theory of when life began in order to regulate abortions).
43See Commonwealth v. Cass, 467 N.E.2d 1324, 1329 (Mass. 1984) (holding a viable fetus will fall within the definition of a "person" as used in the state's vehicular homicide statute).
44MINN. STAT. ANN. § 609.266(a) (West 1987).
45See MINN. STAT. ANN. § 609.266(1) (West 1987).
divorce or other unforeseen circumstance.\textsuperscript{47} In New Hampshire, both gamete providers must undergo medical exams and counseling. In addition, there is a fourteen-day limit for the \textit{ex utero} maintenance of pre-zygotes.\textsuperscript{48}

**Illinois Statutes**

The Illinois statute reads as follows:

[N]o person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of \textit{in vitro} fertilization.\textsuperscript{49}

In addition, the Illinois statute makes it a crime to kill an unborn child other than by a lawful abortion, defining an unborn child as "any individual of the human species from fertilization until birth."\textsuperscript{50} Finally, while the Illinois statute allows for the harvesting and implantation related to IVF, the overall language provides dubious direction as to what to do with remaining pre-embryonic material. Courts, then, are forced to define the word "fetus" when faced with a custody issue pertaining to frozen embryos.

**Case Law**

\textit{Davis v. Davis} \textsuperscript{51}

After five ectopic pregnancies, Mrs. Davis had her remaining fallopian tube ligated\textsuperscript{52} and began the process of IVF. However, after seven

\textsuperscript{47}See FLA. STAT. ANN. § 742.17 (West 1997).
\textsuperscript{49}720 ILCS 510/6(7) (West 1993).
\textsuperscript{50}720 ILCS 5/19-1.2(3)(b) (West 1993).
\textsuperscript{51}See Davis v. Davis, 842 S.W.2d 588 (Tenn.1992), \textit{cert. denied}, 113 S. Ct. 1259 (1993).
failed IVF attempts, which cost over $35,000, the Davis' sought to obtain a child through adoption. When adoption failed, the Davis' attempted IVF once again, using cryopreservation to treat extra ova removed during the procedure. Doctors implanted two of the embryos into Mrs. Davis's uterus, but neither resulted in a pregnancy. The clinic froze the remaining seven embryos for future implantation attempts. However, prior to subsequent implantation Mrs. Davis's husband changed his mind and filed for divorce. The single contested issue in the divorce was disposition of the seven remaining pre-embryos. Mr. Davis sought to leave the pre-embryos in their frozen state, while Mrs. Davis wanted to become pregnant with the embryos. The trial court utilized the doctrine of parens patriae in the decision, and awarded "custody" of the embryos to Mrs. Davis. The court rejected the guidelines of the American Fertility Society as legally nonbinding and only appropriate for intra-professional use. The trial court took special issue with the Society's term for "pre-embryo," and

52 See id. at 591. See also STEDMAN'S MEDICAL DICTIONARY 876 (25th ed. 1990) (defining ligation as a procedure whereby the fallopian tubes are constricted by means of a tightly tied thread in order to prevent conception).

53 See Davis, 842 S.W.2d at 591.

54 See id.

55 See id. at 592.

56 See id.

57 See id.

58 See Davis, 842 S.W.2d at 592 (noting that Mr. Davis filed for divorce in February, 1989; the aspiration and implantation were performed in December, 1988).


60 See Davis, 842 S.W.2d at 592.

61 See BARRON'S LAW DICTIONARY 360 (1996) (defining parens patriae. Literally, "parent of the country," and entails the state must care for those who cannot take care of themselves. Applying such to child custody determinations, requires the state to assume the role of the guardian, acting to protect the best interests of the child).

62 See Davis, 842 S.W.2d at 589

63 See FERTILITY AND STERILITY, supra note 26, at iii.

64 See Davis, 1989 WL 140495, at *6-7 (contrasting the American Fertility Society definition of a "pre-embryo," a zygote up to 14 days after fertilization, with the trial court's definition, a pre-embryo consists of largely undifferentiated cells having no organs or nervous system. Under the court's definition, a pre-embryo would become an embryo when it attaches itself to the uterine wall and begins to develop. Therefore, the Davis' frozen embryos
instead chose a more tenuous position, ascertaining that a human embryo's cells are unique from the moment of fertilization, and that human life begins at conception. This controversial position provided the basis for parens patriae control for the pre-embryos. Since the Davis' had produced human children in vitro, the court reasoned the human embryos could not be property. Therefore, the court held the Davis' embryos should be permitted the opportunity to come to term through implantation in their mother.

The Court of Appeals of Tennessee reversed on the basis that "[t]he trial court ignored the public policy implicit in the Tennessee statutes, the holdings of the Tennessee Supreme Court, and the teachings of the U.S. Supreme Court." Rather, the appellate court, relying on York v. Jones, vested Mr. and Mrs. Davis with "joint control" of the embryos, each with an "equal voice" over their disposition. The case was appealed to the Tennessee Supreme Court.

(technically were pre-embryos, having no organ or nervous system development and unattached to any uterine wall).

65 See id. at *9.
66 See id.
67 See id. at *1, *11.
68 Davis v. Davis, 59 U.S.L.W. 2205, 2206 (Tenn. Ct. App. Sept. 13, 1990) (explaining that the first ground for reversal was the violation of Mr. Davis' constitutional right to control his reproduction. The trial court's grant to Mrs. Davis of complete control over the embryos would force Mr. Davis to become a parent against his will. Such was deemed an "impermissible state action in violation of [a] constitutionally protected right not to beget a child where no pregnancy has taken place." Id. citing Skinner v. Oklahoma, 316 U.S. 535 (1942); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972). The second ground for reversal, found after review of state statutes, was no legal foundation for the trial court's decision that human life began at conception. State wrongful death statutes do not allow for a wrongful death action for an unborn fetus, and Tennessee murder and assault statutes, while providing for an attack or homicide of a viable fetus as a crime, held that abortion of nonviable fetus was not. In fact, abortions of nonviable fetuses were legal during the first trimester of pregnancy in Tennessee. See Davis, 1990 WL 13037, at *2.

69 See York v. Jones, 117 F. Supp. 421, 421 (E.D. Va. 1939) (involving a disagreement between the progenitors of a frozen pre-zygote and a Virginia IVF facility that refused to transfer the pre-zygote to a California IVF center. The court enforced the "parents'" rights using the theory of bailment).

70 See Davis, 59 U.S.L.W. at 2206.
71 See Davis v. Davis, 842 S.W.2d 588, 588 (Tenn. 1992).
The Tennessee Supreme Court addressed two factors of the case. First, when the Davis' first enrolled in the IVF program, the informed consent contained no written agreement concerning the deposition of any unused embryos. Second, no Tennessee statute addressed this issue. The Tennessee Supreme Court concluded the decision should be determined by "weighing the relative interests of each party to the dispute." Using the American Fertility Society guidelines, the court declared that "preembryos are not, strictly speaking, either 'persons' or 'property' but occupy an interim category that entitles them special respect because of their potential for human life." This meant that while Mr. Davis and Mrs. Davis did not have a "true property interest," their shared interest was somewhat in "the nature of ownership," providing for a "decision-making authority concerning the disposition of embryos." In this context, the court decided that contingency agreements concerning the disposition of unused embryos, executed prior to undergoing IVF procedures, should be presumed valid and strictly enforced. The court also noted such "informed consent" contracts failed to be truly informed because of the impossibility to anticipate all possible emotional and psychological events related to IVF. Therefore, such agreements should contain provisions for modification. The court decided that, since the record failed to declare an agreement regarding the disposition of any unused embryos, Mr. Davis intended to pursue reproduction outside the confines of a martial relationship with Mrs. Davis, and Mrs. Davis no longer wished

\[\text{References}\]

\[72\] See id. at 590.
\[73\] See id.
\[74\] Id. at 591.
\[75\] See FERTILITY AND STERILITY, supra note 26 at vii.
\[76\] Davis, 842 S.W.2d at 597.
\[77\] Id.
\[78\] See id.
\[79\] See id.
\[80\] See id. at 597 (suggesting that modifications, in the event of an unforeseen circumstance or unexpected reaction, should be agreed to by both members of the couple and not become a unilateral decision of one person).
to implant the embryos in her own uterus, the reliance doctrine on contract law was inappropriate.\(^{31}\)

The court answered the question of procreational autonomy by using the Tennessee State constitution, the Tennessee Declaration of Rights, and the parties' constitutional right to privacy.\(^{32}\) A right to procreational autonomy is actually composed of two rights of equal significance: the right to procreate and the right to avoid procreation.\(^{33}\) Therefore, "Mrs. Davis and Mr. Davis must be seen as entirely equivalent [contributors of genetic material]."\(^{34}\) The court balanced Mrs. Davis' right to procreate or donate the embryos to another couple for implantation against the impact of unwanted parenthood upon Mr. Davis.\(^{35}\) Usually the party wishing to avoid procreation prevails, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question.\(^{36}\) While Mrs. Davis had endured a significant amount of physical and mental strain associated with the IVF procedure, the court decided that Mrs. Davis' privacy interest was more compelling.\(^{37}\) The absence of a preliminary agreement and Mrs. Davis' intention not to use the embryos herself tipped the scale.\(^{38}\) Based on this reasoning the appellate court's decision was affirmed.\(^{39}\)

**Kass v. Kass**

Maureen Kass (plaintiff) married Steven Kass on July 4, 1988, and they immediately began to plan for a family.\(^{41}\) Mrs. Kass had difficulty conceiving, and after eighteen months of unsuccessful natural and artificial insemination, Mr. and Mrs. Kass enrolled in the Long Island

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\(^{31}\) See Davis, 842 S.W.2d at 598.

\(^{32}\) See id. at 598-600.

\(^{33}\) See id. at 601.

\(^{34}\) Id.

\(^{35}\) See id. at 604.

\(^{36}\) See Davis, 842 SW.2d at 604.

\(^{37}\) See id.

\(^{38}\) See id.

\(^{39}\) See id. at 604-05.


\(^{41}\) See id. at 175.
IVF program at John Mather Memorial Hospital. In March 1990, Mrs. Kass underwent the process of egg retrieval five separate times and had fertilized eggs implanted on nine different occasions. She became pregnant twice. The first pregnancy ended in a miscarriage and the other was surgically terminated due to an ectopic pregnancy.

After ten unsuccessful attempts at IVF, costing over $75,000, and encompassing more than three years, the Kass' decided on one final attempt. This final attempt included, for the first time, cryopreservation of the surplus embryos. On May 12, 1993, the couple signed four consent forms drafted by the hospital. Shortly afterwards, doctors

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92See id.
93See id. at 175-76.
94See id. at 176.
95See Kass, 696 N.E. 2d at 176.
96See id.
97See id. at 176-77 ("Each form begins on a new page, with its own caption and 'Patient Name.' The first two forms, 'GENERAL INFORMED CONSENT FORM NO. 1: IN VITRO FERTILIZATION AND EMBRYO TRANSFER' and 'ADDENDUM NO. 1-1,' consist of 12 single-spaced typewritten pages explaining the procedure, its risks and benefits, at several points indicating that, before egg retrieval could begin, it was necessary for the parties to make informed decisions regarding disposition of the fertilized eggs. ADDENDUM NO. 1-1 concludes as follows:

'We understand that it is general IVF Program Policy, as medically determined by our IVF physician, to retrieve as many eggs as possible and to inseminate and transfer 4 of those mature eggs in this IVF cycle, unless our IVF physician determines otherwise. It is necessary that we decide...[now] how excess eggs are to be handled by the IVF Program and how many embryos to transfer. We are to indicate our choices by signing out initials where noted below.

1. We consent to the retrieval of as many eggs as medically determined by our IVF physician. If more eggs are retrieved than can be transferred during this IVF cycle, we direct the IVF Program to take the following action (choose one):

(a) The excess eggs are to be inseminated and cryopreserved for possible use by us during a later IVF cycle. We understand that our choice of this option requires us to complete an additional Consent Form for Cryopreservation.' The 'additional Consent Form for Cyropreservation,' a seven page, single-spaced typewritten document, is also in two parts. The first, "INFORMED CONSENT FORM NO. 2: CRYOPRESERVATION OF HUMAN PRE-ZYGOTES," provides:

'III. Disposition of Pre-Zygotes.

'We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage
retrieved sixteen eggs from Mrs. Kass.\textsuperscript{93} Nine of these eggs became pre-zygotes, four of which were transferred to Mrs. Kass’ sister who volunteered to be a surrogate mother, and the rest were frozen.\textsuperscript{53} Unfortunately, the surrogacy transfer failed.\textsuperscript{103} After learning that Mrs. Kass’ sister no longer was willing to be a surrogate mother, the Kass’ decided to dissolve their marriage.\textsuperscript{101} Less than a month after signing the IVF consent forms, Mr. and Mrs. Kass executed an uncontested

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\textsuperscript{93}See id. at 177.

\textsuperscript{99}See id.

\textsuperscript{103}See Kass, 696 N.E.2d at 177.

\textsuperscript{101}See id.
divorce agreement, stating that "the disposition of the five frozen pre-
zygotes at Mather Hospital is that they should be disposed of [in] the
manner outlined in our consent form." Neither Mr. Kass nor Mrs.
Kass would state any claim to the material.103

Three weeks after this divorce agreement, Mrs. Kass requested
that neither the hospital nor the physician destroy or release the
remaining pre-embryos.104 She further requested that she be awarded
sole custody of the frozen fertilized eggs.105 This request was prompted
by renewed interest of Mrs. Kass to attempt another implantation.106
Mrs. Kass moved for a temporary restraining order enjoining Mr. Kass
from destroying the pre-zygotes, and Mr. Kass moved to enjoin Mrs.
Kass from implanting the fertilized eggs.107

The lower court enjoined both parties from gaining access to the
embryos and awarded Mrs. Kass custody of the five pre-embryos.108
The court reasoned that disposition of this material was a matter
exclusively within the woman's discretion according to Roe v. Wade.109
In granting her custody, the court directed Mrs. Kass to implant the pre-
zygotes within a medically reasonable time.110 Mr. Kass appealed.111

The New York Court of Appeals reversed the trial court ruling and
granted Mr. Kass' motion for specific performance of an informed
consent previously signed by both Mr. and Mrs. Kass.112 This informed
consent agreement stipulated that, in the event of a divorce and unless
previously specified by both parties, all remaining pre-embryos would
be used for scientific research and discarded by the IVF program.113

102 Id.
103 See id.
104 See id.
105 See Kass, 696 N.E.2d at 177.
106 See id.
107 See id.
108 See id.
109 See id.
110 See Kass, 696 N.E.2d at 177.
112 See id. at 182-83.
113 See id. at 152.
In his concurring opinion, Judge Friedman, argued that certain paragraphs were phrased ambiguously. For example he pointed to the following sections: "[I]n the event of a divorce, we [the undersigned parties] understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction," and "[t]he possibility of death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes." Judge Friedman found the only specific dispositional language in the entire informed consent document was where the parties jointly state their intention to permit the IVF program to retain the pre-zygotes for approved research and investigation, in the event the couple was unable to decide.

Interpretation of these phrases according to Roe and Planned Parenthood would weigh in favor of women’s constitutional right to bodily integrity. Another interpretation would recognize a proprietary interest in the five pre-embryos. However, the Appeals Court held the parties prior statement of intent with regard to the pre-embryos was unencumbered by any preceding or broad right. Such a signed document should be given a clear and unambiguous reading related to the disposition of this pre-embryonic material.

ANALYSIS AND IMPACT

Several interrelated issues require discussion when dealing with a question of custody of frozen embryos in Illinois. Currently no case law exists that specifically addresses this issue, therefore only loosely analogous Illinois law is available to shed light on the problem. The 1999 case involving Margaret Hale and Todd Ginestra will be the first to decide the custody status of frozen embryos in Illinois. The Cook County Circuit Court will most likely utilize the analysis in the Davis and Kass decisions when applying relevant Illinois statutory law. No

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114 See id. at 163.
115 Id. at 164.
116 Kass, 235 A.2d at 164.
117 See id. at 165.
Illinois statute deals directly with the issue of determining custody of frozen embryos. However, the Illinois Abortion Law of 1975 (the Abortion Act)\textsuperscript{118} defines fertilization and conception as meaning "the fertilization of a human ovum by a human sperm, which shall be deemed to have occurred at the time when it is known a spermatozoon has penetrated the cell membrane of the ovum."\textsuperscript{119} Such a definition is descriptive of the fourth phase of IVF.\textsuperscript{120} In addition, the Abortion Act broadly defines a fetus as "an individual organism of the species homo [sic] sapiens [at] fertilization,"\textsuperscript{121} while viability is "that stage of fetal development when...there is reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support."\textsuperscript{122} The definition of viability could arguably extend to IVF, since the fertilized embryo may theoretically have infinite survivability sustained by the artificial means of the cryogenic freezer.\textsuperscript{123}

However, a more troublesome definition is the one chosen by the Illinois legislature to define fetus. The Illinois legislature defines a fetus as a human being from the point of conception, which is in opposition to Roe.\textsuperscript{124} This definition, however, is clearly similar to that used in Louisiana.\textsuperscript{125} Under Louisiana law, an IVF embryo is defined as "a biological human being", a "judicial person" who can sue or be sued.\textsuperscript{126} A fetus, therefore, could not be considered property of the gamete providers in either Louisiana or Illinois. Illinois law also fails to consider application of the American Fertility Society guidelines

\begin{itemize}
\item \textsuperscript{118}See 720 ILCS 510 (West 1993).
\item \textsuperscript{119}720 ILCS 510 § 2(5) (West 1993).
\item \textsuperscript{120}See Lal, supra note 3 at 520-22 and text accompanying note 11.
\item \textsuperscript{121}720 ILCS 510 § 2(6) (West 1993).
\item \textsuperscript{122}Id. at § 2(1).
\item \textsuperscript{123}See Kass v Kass, 696 N.E.2d 174, 175 (N.Y. 1998).
\item \textsuperscript{124}See Roe v. Wade, 410 U.S. 113, 159-62 (1973) and Geoffery Stone, CONSTITUTIONAL LAW at 958 (3d ed. 1996) ("Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer").
\item \textsuperscript{125}See LA REV. STAT. ANN. § 9:121-133 (West 1991) and text accompanying note 37.
\item \textsuperscript{126}See id.; LA REV. STAT. ANN. § 9:124 (West 1991).
\end{itemize}
definition of a fetus. Under these guidelines, to avoid implying "a moral evaluation of the [embryo]," an embryo, while accorded greater respect than human tissue, was not given the respect of an actual human being. By forsaking the safety of Roe and the logical middle ground of the American Fertility Society guidelines, Illinois' definition of a fetus creates an unforgiving judicial tightrope for a court to walk, balancing the issues associated with custody of frozen embryos. In Charles v. Carey, the constitutionality of this definition of a fetus was indeed questioned. The court held that a fetus as defined by the Illinois Abortion Act was not "impermissibly vague" and that the "plain meaning of [the provision] containing [that term was] manifest."

Smith v. Hartigan provided a second challenge to the constitutionality of the Abortion Act. The Smiths wished to participate in IVF but were told that under the Illinois Abortion Act "[a]ny person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of [that] child." Mrs. Smith's treating physician was concerned that after successfully performing an IVF procedure on Mrs. Smith, he and not the Smiths would have parental responsibility for the child under the Illinois Abortion Act. The Smiths brought both injunctory and summary judgment motions on the basis that the Act prohibited IVF and therefore was unconstitutional. The State contended that Section 6(7) "both permits [IVF] and preserves the constitutional rights of women who become pregnant either naturally or through [IVF] to terminate their pregnancies," while "protect[ing] the

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127 See FERTILITY AND STERILITY, supra note 26, at vii.
128 See id. at 29S-30S.
130 See id. at 380.
132 See 720 ILCS 510/6(7)(West 1993).
133 Smith, 566 F. Supp. at 159.
134 See id.
135 See id. at 160.
136 Id. at 161.
State’s interest in human life by prohibiting willful exposure of embryos to harm, [such] as by destructive laboratory experimentation.” The Illinois Supreme Court decided the State’s construction of the Abortion Act pertaining to the scope of IVF was significantly limited. In addition, the court held, based on the State’s position, no constitutional controversy existed under Article III of the Illinois constitution, since the IVF procedure the “plaintiffs wish[ed] to follow did not violate the statute.” Therefore, the statute neither prohibited IVF nor would the Smiths be prosecuted for participating in IVF.

The final issue before the court in Smith was whether statutory construction of the Abortion Act prevented an IVF procedure called “superovulation.” However, due to the scientific and medical complexity of this technique, the court chose not to “render any decision on the constitutionality of the [IVF] provision at [that] time.” As a result, the plaintiff’s motions for injunctive relief and summary judgment were denied, with the cause being dismissed for lack of subject matter jurisdiction. The court also conveniently avoided the constitutional nature of the phrase “experimental research to improve IVF procedures, such as cryopreservation.”

A similar challenge was raised in Lifchez v. Hartigan. In Lifchez, several physicians who performed IVF in Illinois brought a class action suit challenging the constitutionality of the Illinois Abortion Law applicable to IVF. The plaintiffs contended that use of the terms “experimentation” and “therapeutic” violated due process rights of the Fourteenth Amendment by making the statute so vague that a physician could not be sure whether he was criminally liable.

137 Id.
139 Id.
140 See id.
141 Id.
142 See id.
143 Smith, 566 F. Supp. at 163.
145 See id. at 1363.
146 See id. at 1364.
In addition, the plaintiffs contended the statute unduly restricted a woman’s fundamental right of privacy to make reproductive choices as established under Roe. The court in Lifchez affirmed both of the plaintiff’s claims.

Therefore, in spite of strict statutory construction of the Illinois Abortion Law, the courts have consistently chosen to interpret IVF procedures with a decided pro-Roe consideration. An Illinois court could now face the question whether a prospective mother’s decision to undergo additional implantation of her own previously harvested but now fertilized eggs represents a valid extension of a woman’s right to personal autonomy under Roe. In addition, a court could also be asked whether, in the event of a divorce, an informed consent agreement to undergo IVF will allow for residual property rights, executable by either parent, over harvested but unused embryos.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, a woman’s right to personal autonomy, initially set down in Roe, was described as “a rule of personal autonomy and bodily integrity...[that] recognizes limits on governmental power to mandate medical treatment or to bar its rejection.” However, it would be a mistake for the Illinois courts to extend this argument as a justification for custody of frozen embryos. A woman’s right to exercise virtually exclusive control over her own body is not implicated in the IVF process, until such a time as implantation actually occurs, for then it will become her bodily integrity that will be at risk. The existence of such a right would be tantamount to one person “compelling procreational assistance from another...[T]he right is an illusion even if enforced because the person who implants the [embryo] will always be a woman who will have an automatic veto over the pregnancy as part of her right to an abortion.” Rather, in determining custody of frozen embryos, the Illinois courts should balance the parties’ interests in seeking and avoiding procreation as recognized originally in Davis and extended in Kass.

147 See id. at 1363.
149 Id. at 833.
This "interest balancing test" would "include appellant's independent ability to support the child and the sincerity of her emotional investment...as well as the burdens attendant upon a respondent's unwanted fatherhood and his motivations for objecting to parenthood." 151

However, the interest balancing test utilized in both _Davis_ and _Kass_ provided greater support to the party wishing to avoid procreation when the other party has a reasonable possibility of achieving parenthood by other means outside the use of the embryos to achieve pregnancy. 152 In fact, in _Kass_, the exclusion criteria for the interest balancing test was broadened so "that no person or entity should be allowed to interfere with another person's decision not to have offspring before the point of viability." 153 This language removed the only exception of the _Davis_ court's balancing test. For example, in a divorce proceeding, the wife would take the position of wanting the embryos implanted in her own body instead of a surrogate. It would seem then, when the fundamental right to procreate clashes with the right to avoid procreation:

[T]he party seeking to implant the pre-zygotes [usually the wife] should be required to establish as a threshold matter that she cannot undergo IVF with a new partner or a sperm donor because she has lost her ability to ovulate or has some other major medical contraindication to egg retrieval...[M]ere discomfort, expense, or other potentially surmountable difficulties should not suffice to defeat the...fundamental right to avoid biological fatherhood in a case of this sort. 154

Therefore, prior to implantation, an Illinois court should hold that no relevant or appropriate consideration under a woman's right to personal autonomy forms a basis to determine custody of frozen embryos.

152 See Davis v. Davis, 842 S.W.2d 591, 604 (Tenn. 1992).
153 Kass, 235 A.2d at 167.
154 Id.
In Kass, one of the dissenting opinions urged the legislature to implement guidelines to facilitate resolution of custody conflicts over frozen embryos in subsequent cases. The Illinois legislature should strongly consider such action, thereby effectively removing decisional capacity from the Illinois courts. In writing guidelines for Illinois, the legislature must decide if in vitro embryos are accorded greater rights than in vivo embryos naturally conceived in the womb. Since Roe accords a woman the fundamental right to terminate an in vivo pregnancy, it would make sense to provide the right for termination of an in vitro embryo. In addition, the legislature should also provide a means of resolving disputes between the gamete providers. Some may reason that the woman should generally be granted custody by virtue of the tremendous physiological burden placed on her by the IVF procedures. Others may reach similar conclusions by recognizing that embryo disposition may be legally based upon one party's desire for implantation and physiological capability of doing so. However, a statute should not restrict the disposition of embryos based on a claim of protecting embryos as a viable human life. If one extends a constitutional right to avoid procreation to IVF procedures, then statutes which regulate IVF procedures could not restrict the disposition of embryos by creating an undue burden on the choice of an individual to dispose of his or her reproductive material.

In the absence of legislative guidance, custody determinations of frozen embryos in Illinois may also draw upon possible concepts of property. However, this argument may again be problematic under the Illinois Abortion Act and its definition of a fetus. Due to the embryo's potential for personhood, a "special respect status" of the embryo would be more appropriate definition. A special respect status for the embryo would also be in accord with the American Fertility Society Guidelines and provide the constitutional foundation to build a property rights argument in Illinois. Using this revised "special respect status"

155 See id. at 179.
157 Id. at 442.
definition for a fetus, an Illinois court should, when considering embryos as property, utilize the *Davis* decision when considering embryos as property. Specifically, following *Davis* the court should affirm the rights of both gamete providers as equivalent, but provide that property rights may also be relinquished either intentionally or accidentally in a contract.  

In addition, when a contract dispute arises, the court often tries to determine the parties' intent. In the event of such a contingency, an Illinois court should take direction from the *Kass* decision. The *Kass* twice unequivocally stated, in both the informed consent and in the uncontested divorce, their intent concerning the manner of disposition of the five embryos. In fact, the court found on page six of the informed consent, dispositional language whereby "the parties jointly state their intention to permit the IVF program to retain the pre-zygotes for approved research and investigation in the event they are unable to make a decision regarding [such a] disposition." However, the court found based on the language on page six that since "they were no longer able to render the single, joint decision regarding the disposition of the pre-zygotes" the pre-zygote material "must be retained and used by the IVF Program for scientific purposes, [which was] a result consistent with the parties expressed wishes." Therefore, where contractual language can clearly state the intent of all the parties to an IVF procedure, such language will be deemed controlling unless appropriately modified.

Such a clean approach was also utilized in the appellate decision in *Kass*. In the appeal, dispositional authority was decided according to

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158 *See Kass*, 235 A.2d at 152 (illustrating that, as a general rule, for a preceding condition to operate, it must be clearly intended by specific, clear language in the agreement. In a situation with ambiguous language, (e.g., the phrase "other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes"), the law will not allow construction of the phrase to create a condition precedent).


160 *Kass*, 235 A.2d at 158.

161 *Id.*

162 *Id.*

163 *See Kass*, 696 N.E.2d at 180.
the original consent agreement, which was valid and binding on all parties. The court in *Kass* stated:

"[I]t [is] particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' overall direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process; advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree."

Neither party in *Kass* disputed the intent of the original consent form, nor the document's ultimate legality. In addition, the Kass' agreed they had freely and knowingly entered into the informed consent. The only argument advanced by Mrs. Kass was ambiguity of the language in the paragraph pertaining to disposition of the embryos in event of divorce. However, using a "four corners" approach to interpret contracts, the court held the Kass' clearly expressed their intent and under the circumstances pertaining to a divorce "the pre-zygotes would be donated to the IVF program for research purposes." The *Kass* court stated that "[a]mbiguity is determined by looking within the four corners of the document, not to outside sources." Here the parties' intent must be determined from the face of the agreement itself and courts, in looking for ambiguity,

[S]hould examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in light of the obligation as a

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164 See id.
165 Id.
166 See id.
167 See id.
168 See *Kass*, 696 N.E.2d at 180.
169 Id. at 181.
170 Id. at 180.
whole...[f]orm should not prevail over substance and a sensible meaning of words should be sought.\textsuperscript{171}

Therefore, to deal with the problem of custody of frozen embryos following divorce, new Illinois legislation should make pre-agreements mandatory, requiring signatures of the couple before any embryos are frozen. Essentially, the embryo disposition agreements are contracts that allow gamete providers to specify their intent for resolving possible future disputes over their frozen embryos. All courts have been reluctant to enter judgment in this type of dispute, viewing a decision to undergo an IVF procedure and determination of any remaining embryos as intensely private and personal matters best resolved by the perspective parents. In such a context, when all parties have made careful decisions, all retrospective and prospective choices should be given the careful, yet deliberate, clothing of the written word. Such agreements should be valid and enforceable prior to the creation and cryopreservation of the embryos. An agreement should contain a waiting period in order for the couple to reflect on the contract and allow for the possibility of a party changing their mind prior to the IVF procedure. Both Davis and Kass hold that once embryos have been created and the gamete providers have expressly agreed such embryos will be used to reproduce, no party should be allowed to unilaterally revoke the promise to transfer that embryonic material. However, any party to the contract wishing to modify the terms of the contract may legally do so, providing the modified terms are jointly agreed upon. Also, to avoid undue restriction on contract rights, the power to modify contract terms should not be limited to occurrence of a contingency. The agreement should determine the fate of any frozen embryos for a variety of contingencies, including divorce and embryo destruction. Sale of embryos should be prohibited and the number of embryos actually frozen should be limited. The statute should absolve the gamete donors of all parental responsibilities in the event the embryos are transferred to another couple. In addition, there should be a statutory limit to the length of time embryos may remain frozen.

Finally, in the event of death of both donors or the onset of menopause of the female donor, the statute should require disposal or donation of the embryos. Such statutory criteria provide the much-needed direction the courts have requested, as well as satisfying the Davis court's concept of embryos being hybrids of person and property.  

One disadvantage of embryo disposition agreements is the inherent monopoly power residing with IVF providers. Couples seeking IVF are in a position of being psychologically disadvantaged, since they are desperate to have a child. As originators or authors of the contract providing the IVF procedure, IVF clinics hold significant power over these couples. Under such circumstances, couples may have few alternatives regarding embryo disposition, therefore such contracts may actually constitute an adhesion contract. IVF clinics retain power to determine their institutional policies because they are private institutions. A clinic that is normally opposed to embryo destruction has no obligation to make this option available to the gamete providers. Free market dynamics are at the heart of such an institutional policy. The IVF provider knows if the couple wishes to have options outside IVF center policy, the couple will have to go elsewhere. Unfortunately, such a choice may not be realistically viable for the gamete providers. Therefore, unequal bargaining power only highlights the need for effective legal guidance for the gamete providers. Each partner must be fully and completely aware of exactly what they will each be signing away in regards to their immediate reproductive future and the future of their potential offspring. Each
gamete provider should view this agreement as requiring legal representation on his or her behalf.

CONCLUSION

Medical technology of today has made the science fiction of A BRAVE NEW WORLD science fact. Currently, IVF provides a means for many infertile couples to attain biological parenthood. The problem with IVF is the ability of the procedure to extend the time period between conception and implantation in the womb from hours to years. Such a delay creates situations that are not applicable to natural fertilization. One situation appearing with increasing frequency is the impact of divorce on custody of fertilization eggs that have been frozen for future IVF attempts. Most likely, in the near future, the Illinois courts or legislature will be required to deal with this issue. Several states have made attempts to deal with this problem in statutory law. These attempts have ranged from a direct challenge to Roe v. Wade to vaguely worded state laws that poorly address the entire process. The courts, as evidenced in the few rulings dealing with this issue, are extremely reticent to decide custody of these frozen embryos. Increasingly, the courts are looking back to the legislature for statutory direction.

Therefore, new legislation in Illinois should require mandatory pre-IVF agreements as a means to resolve the problem of embryo disposition. Signing of an agreement should be required prior to cryopreserving embryos and should contain a mandatory waiting period to allow couples to change their decision prior to proceeding with IVF. The agreement should be dispositive of the embryos for a variety of contingencies, including divorce and destruction of the embryos. Ultimately, a defining policy will emerge in Illinois concerning these rights and liabilities of in vitro fertilization.