FOURTEENTH AMENDMENT - PROCREATIONAL AUTONOMY AS A FUNDAMENTAL ATTRIBUTE OF THE PRIVACY RIGHTS- WHERE THE RIGHT TO PROCREATE AND THE RIGHT NOT TO PROCREATE ARE IN DIRECT CONFLICT OVER THE DISPOSITION OF FROZEN EMBRYOS, ORDINARILY, THE PARTY WISHING TO AVOID PROCREATION SHOULD PREVAIL. *J.B. v. M.B.*, 2001 N.J. LEXIS 955, at *1 (N.J. Aug. 14, 2001).

Lauren N. Makar

I. INTRODUCTION

The concept of liberty protects those personal rights that are fundamental, and it is not confined to the specific terms of the Bill of Rights.[1]

Current reproductive technologies provide couples that wish to exercise their fundamental right to procreate, but encounter difficulty conceiving, with several alternatives. *In vitro* fertilization (IVF), a technique that hormonally stimulates a woman's ovaries to produce multiple eggs, is one option that a couple may choose.[2] Since this hormonal stimulation usually results in multiple eggs, IVF often results in more embryos[3] than can be implanted at once.[4] Additional embryos created through the *in vitro* process may be cryopreserved in liquid nitrogen for future use.[5]

---

[1] Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

[2] Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Diputes*, 84 MINN. L. REV. 55, 58 (1999) (citations omitted). During the IVF procedure, the eggs are removed by laparoscopy or ultrasound-directed needle aspiration and placed in a petri dish where sperm are introduced in an attempt to fertilize the eggs. Paula Walter, Article: *His, Hers, or Theirs - Custody, Control, and Contracts: Allocating Decisional Authority Over Frozen Embryos*. 29 SETON HALL L. REV. 937, 938 (1999). Once an egg is fertilized, the pre-zygote divides until it reaches the four-to-eight cell stage. J.B. v. M.B., 2001 LEXIS 955, at * 12 (N.J. Aug. 14, 2001). Several of such four-to-eight cell embryos may be transferred to the woman's uterus for implantation. Coleman, at 59. The remainder are filled with a cryoprotectant fluid and frozen for later use. *Id.* at 60.

[3] For the purposes of this note, the term "embryo" will be used interchangeably with "pre-embryo." Although commentators who advocate the use of one term would argue the biological differences between the terms, such differences are irrelevant for this discussion.

[4] Coleman, *supra* note 2, at 59-60.

[5] *Id.* at 60. Specialists have suggested that embryos may remain frozen safely for up to fifty years. (citing R.G. Edwards & Helen K. Beard, *Destruction of Cryopreserved Embryos:*

In August 2001, the New Jersey Supreme Court became the fourth state court to decide an issue concerning a disagreement as to the disposition of frozen embryos.[6] In *J.B. v. M.B*[7], a divorced couple unable to agree on the disposition of seven frozen embryos created through IVF efforts during the course of their marriage sought a judicial resolution.[8] The wife argued to have the embryos destroyed while her husband sought to preserve the embryos for future use.[9] In resolving the issue, the court analyzed the case in two steps. First, the court considered whether the contract entered into between the husband and wife at the start of the IVF program revealed a clear intent by the parties regarding the disposition of the preembryos.[10] Second, the court considered the means by which courts should resolve a disagreement concerning the disposition of frozen embryos in the absence of any clear intent or agreement.[11] Once the court had determined that the contract entered into at the start of the IVF program did not indicate the couple's intent regarding the disposition of the embryos in the event of divorce or separation,[12] the court addressed whether an IVF contract, had it provided for the donation of unused embryos to infertile couples in the event of the dissolution of a marriage, should be enforced despite the fact that one of the progenitors no longer wishes to donate the embryos.[13]

UK Law Dictated the Destruction of 3000 Cryopreserved Human Embryos, 12 HUM. REPROD. 3, 3 (1997)).

[6] J.B. v. M.B., 2001 N.J. LEXIS 955, at *1 (N.J. Aug. 14, 2001). *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (holding consent form that provided for frozen embryos to be given to wife for implantation unenforceable); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (concluding that consent forms signed by gamete providers at the start of IVF should be presumed valid and binding); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding, in the absence of a prior agreement regarding the disposition of frozen embryos, the party wishing to avoid procreation should generally prevail where the other party has other reasonable means of achieving parenthood).

[7] 2001 N.J. LEXIS 955, at *1.

[8] *Id.* at *11.

[9] *Id.* at *16.

[10] *Id.* at *29.

[11] *Id.* at *31.

[12] *Id.* at *29.

[13] *J.B.*, 2001 N.J. LEXIS 955, at *40-45.

The novel question presented in *J.B. v. M.B.* extended beyond basic contract law, asking the court to determine which constitutionally protected right is more persuasive: the person seeking to exercise her right to avoid procreation or the person seeking to exercise her right to procreate.[14] This note addresses the New Jersey Supreme Court's decision in *J.B. v. M.B.*, holding that agreements entered into at the start of IVF treatments regarding the disposition of frozen embryos shall be enforced, subject to the right of either party to change his or her mind.[15] Where one party eventually does change his or her mind, upon balancing the interests between the parties the court held the constitutional right to avoid procreation, thereby avoiding parenthood, is a stronger position than that of the party seeking to exercise his or her right to procreate.[16]

II. THE STATEMENT OF THE CASE

FACTS

J.B. and M.B. married in 1992.[17] J.B. suffered a miscarriage early in their marriage and the couple had subsequent trouble conceiving a child.[18] The couple learned that J.B. had a condition that prevented her from getting pregnant, and the couple sought medical alternatives, including IVF.[19] Before undergoing the IVF procedure, however, the couple signed a consent form with an attached agreement that described the procedure and discussed the control and disposition of the embryos.[20]

---

[14] *Id.* at *35-36.

[15] *Id.* at *43.

[16] *Id.* at *44.

[17] *Id.* at *12.

[18] *Id.*

[19] *J.B.*, 2001 N.J. LEXIS 955, at *12. M.B. did not have any infertility problems. *Id.*

[20] *Id.* at *14, *15. The consent form itself did not provide direction for the disposition of the embryos, rather stated simply, "The control and disposition of the embryos belongs to the Patient and her Partner. You will be asked to execute the attached legal statement regarding control and disposition of cryopreserved embryos." *Id.* at *15. The attachment was more specific:

I, J.B. (patient), and M.B. (partner) agree that all control, direction, and ownership of

In May 1995, the couple underwent the IVF procedure, from which eleven embryos resulted.[21] Four embryos were implanted in J.B., and the remaining seven were cryopreserved.[22] Shortly thereafter, J.B. became pregnant and gave birth to a daughter in March of 1996.[23] In September of that same year, the couple separated.[24] At that time, J.B. informed M.B. that she wished to have the remaining embryos discarded.[25] M.B. was opposed to having the embryos discarded, and sought to keep the embryos frozen until they were used or donated to other infertile couples.[26]

PROCEDURAL HISTORY

The New Jersey Superior Court, in a post-divorce proceeding, concluded that J.B. and M.B. attempted "IVF to create a child within the context of their marriage."[27] Since they were no longer married, the judge determined that this reason no longer existed.[28] Additionally, the judge relied on the fact that M.B. was fertile and could achieve parenthood in the future through natural means.[29] Thus, the court found in favor of J.B. who sought to have the embryos de-

---

our tissues will be relinquished to the IVF Program under the following circumstances:

> A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues.

Id.

[21] *Id.* at *15.

[22] *Id.*

[23] *Id.* at *15, *16.

[24] *Id.* at *16.

[25] *J.B.*, 2001 N.J. LEXIS 955, at *16.

[26] *Id.* at *16. M.B. asserted that J.B. had agreed prior to undergoing the IVF procedure that any unused embryos would be used by his wife or donated to infertile couples. *Id.* at *17.

[27] J.B. v. M.B., 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000). The trial judge pointed out that the couple had already achieved their goal of creating a child. *Id.*

[28] *Id.*

[29] *Id.*

stroyed.[30]

M.B.'s principal argument on appeal was "that a trial was necessary to establish a record" to determine the couple's understanding of the disposition of the stored embryos in the event of divorce.[31] M.B. further asserted that the superior court's decision violated his constitutional rights, including the right to procreate, the right to due process, and the right to equal protection of the law.[32]

The appellate division affirmed the decision of the trial court.[33] The appellate court, while refusing to decide the case on constitutional grounds,[34] nonetheless noted that the destruction of the embryos did not inhibit M.B.'s constitutional right to procreate since he was still able to father children.[35] However, the court noted, if the embryos in dispute were donated, J.B. could potentially become the parent of an unwanted biological child.[36] Reasoning that a biological child living in an environment controlled by strangers may be "understandably unacceptable" to J.B., regardless of any discharge from psychological or financial obligations, the court found that enforcing the alleged contract to create a child would impair J.B.'s constitutional right not to procreate.[37] Therefore, even if the Fourteenth Amendment applied, assuming *arguendo* that judicial enforcement of private conduct constituted state action, the court rejected M.B.'s argument that his constitutional rights would be violated by the destruction of the embryos since he retained the ability to procreate.[38]

---

[30] *Id.* at 614.

[31] *Id.* at 616. On appeal, M.B. asserted that J.B. consented to donate any unused embryos at the beginning of IVF. However, the trial court failed to address the couple's understanding of their agreement on the record, and appears to have made a finding of fact to the contrary, in favor of J.B.'s desire to prevent donation of the couple's embryos, without discussion of the issue. *Id.*

[32] *Id.*

[33] *J.B.*, 751 A.2d at 620.

[34] *Id.* at 619.

[35] *Id.* at 618.

[36] *Id.* at 619.

[37] *Id.*

[38] *Id.* Since it was not clear to the Appellate Division whether or not judicial enforcement of the alleged private contract would constitute state action under the Fourteenth Amendment, the court did not resolve the case on constitutional grounds. *Id.*

Relying on a Massachusetts case, *A.Z. v. B.Z.*,[39] the appellate division "conclude[d] that a contract to procreate is contrary to New Jersey public policy and is unenforceable."[40] The court therefore affirmed the superior court's judgment in favor of the wife, ordering the destruction of the embryos.[41] The New Jersey Supreme Court granted certification[42] to decide whether there was an enforceable contract that determined the future of the frozen embryos, and if not, how courts should resolve similar conflicts.[43]

III. PRIOR CASE LAW

A. PROCREATION AS A CONSTITUTIONAL MATTER

The concept of liberty under the Fourteenth Amendment protects those personal rights that are fundamental and is not confined to specific terms of the Bill of Rights.[44] United States Supreme Court decisions have held that an individual's right to privacy in procreative choices is a fundamental right. In 1942, the Supreme Court held that there is a fundamental right in an individual's freedom of choice in procreation.[45] In 1965, the Court ruled that states may not restrict the right of married persons to use contraceptive devices.[46] In 1972, the Court recognized that the decision "whether to bear or beget a child" was so fundamen-

---

[39] 725 N.E.2d 1051 (Mass. 2000). In *A.Z. v. B.Z.*, the Supreme Judicial Court of Massachusetts held that forced procreation is not an area amenable to judicial enforcement; agreements compelling a person to become a parent against his or her will are against public policy and therefore unenforceable. *Id.* at 1057-58.

[40] *J.B.*, 751 A.2d at 619.

[41] *Id.* at 620.

[42] J.B. v. M.B, 760 A.2d 783 (N.J. Super. Ct. App. Div. 2000).

[43] *J.B.*, 2001 N.J. LEXIS 955, at *11.

[44] U.S. CONST. amend. XIV, § 1.

[45] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing marriage and procreation as the most "basic libert[ies]" when rejecting an Oklahoma statute that required sterilization of certain repeat criminal offenders).

[46] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (stating that prohibitions on the use of contraceptives unconstitutionally infringe on the sanctity and privacy of the marital relationship).

tal that states could not restrict the right of non-married persons to use contraceptive devices.[47] In 1973, the Supreme Court held that a woman's right to privacy is a "fundamental" right under the Fourteenth Amendment and encompasses her decision whether or not to terminate a pregnancy.[48] Finally, in 1976 the Court ruled that an individual's constitutional right to privacy is so broad that states may not require consent of a spouse to an abortion.[49]

Two fundamental rights of constitutional dimension are the right to procreate and the right not to procreate.[50] In *Davis v. Davis*,[51] Tennessee was the first state to recognize that, in the absence of an advanced agreement, the parties' procreative autonomy should be the basis of the Court's consideration in disputes involving frozen embryos.[52] "Procreative autonomy" includes both "the right to procreate and the right to avoid procreation."[53] The Tennessee Supreme Court found that under both the Tennessee and United States Constitutions, the right of procreation is a vital part of the right to privacy.[54] The parties' constitutional rights to privacy in dispute in *Davis* hinged on whether the parties would be able to execute such procreative autonomy.[55]

Under a traditional analysis of the right to "personal autonomy," a court must determine whether a state action impairing the fundamental right to procreate or

---

[47] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (acknowledging "if the right of privacy means anything, it is the right of the individual . . . to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

[48] Roe v. Wade, 410 U.S. 113, 155 (1973) (articulating that an individual's right to control their reproductive capabilities is a "fundamental" right).

[49] Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (holding that a state cannot constitutionally condition an abortion on the spouse's consent).

[50] *See* Coleman, *supra* note 2, at 84 n.152. Most commentators agree that there is an implied affirmative right to procreate though such a right has never been explicitly recognized by the Supreme Court. Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992), *cert. denied sub nom*, Stowe v. Davis, 507 U.S. 911 (1993) (recognizing that the right to procreate and the right not to procreate are both constitutional rights).

[51] 842 S.W.2d 588 (Tenn. 1992).

[52] *Id.* at 598.

[53] *Id.* at 601.

[54] *Id.* at 600.

[55] *Id.* at 598.

to avoid procreation was premised on a compelling state objective, and whether there was a necessary relation between the objective and the means to achieve that end.[56] In balancing the interests between the constitutional rights of two gamete providers to the same embryo regarding each individual right to procreative autonomy, the traditional due process/ "right to privacy" analysis is inadequate.[57] As noted by the appellate court in *J.B. v. M.B.*, "it is not clear that judicial enforcement of the alleged private contract would constitute state action under the Fourteenth Amendment."[58]

Nonetheless, constitutional rights must be taken into account in the dispute over frozen embryos because constitutional rights are at the center of the conflict.[59] One scholar has argued that the constitutional right to privacy in the context of personal autonomy protects the underlying relationships in which procreative decisions are made, not one person's right to make decisions without regard to the other donor's views in these protected relationships. [60] If such a

---

[56] *Roe*, 410 U.S. at 153 (holding that a woman's fundamental interest in deciding whether or not to have an abortion could only be outweighed if there was "a compelling state interest" in barring or restricting abortion and if the state statute was "narrowly drawn" so that it fulfilled only that legitimate state interest).

[57] *Davis*, 842 S.W.2d at 601. The inherent tension between the right to procreate and the right not to procreate is "nowhere more evident then in the context of *in vitro* fertilization." *Id.* The right to decisional authority belongs to the gamete-providers alone. *Id.* at 602. Since the *Davis* court found that the state's interest in potential human life insufficient to justify an infringement on procreational autonomy in the *in vitro* context, the court reasoned that it is appropriate to balance the burdens on the gamete providers to resolve this dispute of constitutional dimension. *Id.* at 602-03.

Additionally, it has been argued that due process and equal guarantees do not apply to embryos. Marcia Joy Wumbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1089 (1986). Since the prevailing legal view is that fetuses are not persons within the meaning of the Fourteenth Amendment, if a fetus is not a person, then neither is an embryo. *Id.* (citing Roe v. Wade, 410 U.S. 113, 158 (1973)).

[58] J.B. v. M.B., 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000).

[59] *Id.* at 620. The appellate division reasoned "two fundamental rights of constitutional dimension are the right to procreate and the right not to procreate," although the United States Supreme Court has never explicitly recognized such rights. *Id.* at 618 (citing *Skinner*, 316 U.S. at 541; *Roe*, 410 U.S. at 152-53; *Griswold*, 381 U.S. at 485-86; Santosky v Kramer, 455 U.S. 745, at 753 (1982); Right to Choose v. Byrne, 450 A.2d 925 (N.J. Sup. Ct. (1982)). The New Jersey appellate division reasoned that constitutional grounds are a source of public policy. *Id.* at 620 (citing Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992)). As such, reproductive rights of constitutional dimension are to be considered in the Court's decision. *Id.*

[60] Radhika Rao, Article, *Reconceiving Privacy: Relationships and Reproductive Tech-*

relationship deteriorates, courts must balance the constitutional rights of the parties individually.[61]

B. PROCREATION AS A CONTRACTUAL MATTER

In an attempt to prevent future disputes, many IVF clinics require couples to provide directions regarding the disposition of their frozen embryos by signing consent forms at the start of IVF treatments.[62] The law is sparse regarding the enforceability of these contracts, despite the fact that IVF has been available for more than 20 years.[63] The contractual approach taken by courts to resolve conflicts regarding frozen embryos rests on the premise that decisions regarding their disposition belong to the couple that created the embryos.[64] One commentator notes that the benefit to enforceable contracts in this context is the ability of the donors to unambiguously express their intent at the onset of treatment.[65] This approach requires a couple to enter into a binding agreement at the initiation of IVF about the future disposition of their frozen embryos in an attempt to prevent future disputes.[66] Holding couples to the decisions they sign their name to when beginning IVF assumes that the couple is able to agree, at least at that point, on decisions about the disposition of any frozen embryos under the circumstances the couple enumerates. Enforcing advanced agreements regarding

---

nology, 45 UCLA L. REV. 1077, 1103 (1998) ("Privacy does not simply guarantee individuals the right to sexual, reproductive, and parental autonomy. It protects the relationships between people that develop in the course of these activities . . . .").

[61] *Davis*, 842 S.W.2d at 603. The *Davis* court reasoned that one way to resolve disputes over conflicting interest of constitutional import, such as procreational autonomy is to "consider the positions of the parties, the significance of their interests and the relative burdens that will be imposed by differing resolutions." *Id.*

[62] Elizabeth A. Trainor, Annotation, *Right of Husband, Wife or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstance*, 87 A.L.R. 5th 253, *2a (2001).

[63] *Id.* at *2b.

[64] Coleman, *supra* note 2, at 71.

[65] Mario J. Trespalacious, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 828 (1992) (arguing that explicit directions for the disposition of frozen embryos upon the occurrence of certain events permits gamete donors to anticipate exactly the fate of their embryos).

[66] Coleman, *supra* note 2, at 71.

the disposition of frozen embryos, Professor Robertson argues, is the only way to protect the couple's interest in procreative autonomy.[67]

Enforcing advanced agreements, however, is not always the best solution.[68] For example, couples who participate in IVF programs, sign consent forms, and subsequently quarrel about the disposition of their embryos obviously no longer agree as to the disposition of their frozen embryos.[69] The New Jersey Supreme Court holds, and I agree, that a party who subsequently changes her mind about this very intimate decision should not be bound by decisions to become a parent made under circumstances that were different from those they find themselves in at the time the contract must be enforced.[70]

When a person decides to conceive a child through IVF in the context of a marriage, that individual most likely foresees a future with their partner as a family.[71] When that image of family is destroyed through divorce, that same desire

---

[67] John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 415 (1990).

[68] *Id.* Professor Robertson recognizes that the downside to enforcing agreements regarding the future disposition of frozen embryos is binding a party to an agreement they no longer would choose. *Id.*

[69] *See, e.g., J.B.*, 2001 N.J. LEXIS 955, at *1 (wife challenges consent form regarding the disposition of frozen embryos when wife wanted unused embryos to be destroyed, but husband wanted them donated to infertile couples); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (contesting a consent form which dictated that unused embryos be returned to the wife for implantation if the couple separated because husband never acquiesced to original consent form where he signed in blank); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (concerning dispute over the disposition of frozen embryos where wife no longer wished to donate her embryos for research purpose, contrary to consent form signed at the commencement of IVF treatment).

[70] *See J.B.*, 2001 N.J. LEXIS 955, at *41 (finding a contract to compel procreation over the subsequent objection of one of the progenitors is against public policy). *See also Davis*, 842 S.W.2d at 597 (concluding "initial 'informed consent' will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds").

[71] *See e.g., J.B.*, 2001 N.J. LEXIS 955, at *16. The wife testified:

> Defendant and I made the decision to attempt conception through *in vitro* fertilization treatment. Those decisions were made during a time when defendant and I were married and intended to remain married. Defendant and I planned to raise a family together as a married couple. I endured the *in vitro* process and agreed to preserve the preembryos for our use in the context of an intact family.

Id.

to share a child with that ex-spouse is likely shattered.[72] Just as it is improbable that a divorced couple would attempt to conceive a child naturally after their marriage ends, it is equally unlikely that this same divorced couple would seek to start a family together through technological advances but for the genetic material frozen in a petri dish. Unjust and unreasonable results may arise from the enforcement of a contract that was entered into under different circumstances and that dictates the fate of these embryos.[73] It is not appropriate for a court to bind a party to unwanted parenthood merely by virtue of a contract he or she signed under vastly different conditions. In fact, several courts have held that agreements to enter into a familial relationship are against public policy and therefore unenforceable.[74] As such, courts must develop other mechanisms for resolving these disputes.

C. THE CASE LAW

Davis v. Davis

In 1992, the Tennessee Supreme Court decided the landmark case *Davis v. Davis*,[75] the first judicial decision regarding a dispute over the disposition of frozen embryos.[76] *Davis* involved a conflict over the disposition of frozen embryos created during marriage upon divorce where there had been no written agreement regarding the disposition of the embryos in the event of divorce.[77] In the absence of an agreement, the court balanced the equitable interests of the two parties and determined that the husband's interest in avoiding parenthood outweighed the wife's interest in donating the preembryos to another couple.[78]

---

[72] Coleman, *supra* note 2, at 70 (noting that couples that create embryos in the context of a committed relationship may disagree about the disposition of those embryos when the relationship dissolves).

[73] Robertson, *supra* note 67, at 411.

[74] *See, e.g.*, *A.Z.*, 724 N.E.2d at 1059 (holding that judicial enforcement is not an appropriate instrument to enforce contracts compelling unwanted parenthood as a matter of public policy); *J.B.*, 2001 N.J. LEXIS 955, at *37 ("the laws of New Jersey . . . evince a policy against enforcing private contracts to enter into or terminate familial contracts").

[75] 842 S.W.2d 588 (Tenn. 1992).

[76] *Id.*

[77] *Id.* at 590.

[78] *Id.* at 603. The husband in Davis was raised in a home for boys run by the Lutheran

Nevertheless, the court concluded that "an agreement regarding disposition of any untransferred [embryos] in the event of contingencies. . . . should be presumed valid and should be enforced as between the progenitors."[79] The court recognized, however, that given the "near impossibility" of anticipating all of the emotional and psychological turns the IVF process may stir, allowing for the modification of initial agreements might protect some of the uncertain and unpredictable interests of the parties.[80]

Kass v. Kass

In a New York case, *Kass v. Kass,*[81] a married couple entered into an IVF program in an effort to become parents.[82] At the commencement of IVF treatments they signed a consent form that directed that in the event of a dispute any remaining frozen embryos be used for research purposes.[83] By the time the couple decided to divorce, however, the wife had changed her mind and no longer wished to donate the embryos created during her marriage. Instead she wanted to use them in an attempt to become pregnant after the divorce.[84]

Church after his parents separated and his mother suffered from a nervous breakdown. *Id.* He saw his mother monthly, but his father only three times more before he died. *Id.* As a result, the husband testified that he suffered sever problems caused by separation from his parents due to the lack of opportunity to establish a relationship with his parents. *Id.* at 603-04. For these reasons, he vehemently was opposed to fathering a child that would not live with both parents. *Id.* at 604.

[79] *Id.* at 597.

[80] *Id.*

[81] 696 N.E.2d 174 (N.Y. 1998).

[82] *Id.* at 175.

[83] *Id.* at 176-77. The contract provided:

> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition or our pre-zygotes and direct the IVF program to (chose one):. . . (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.

Id. at 176.

[84] *Id.* at 177.

The court reasoned that enforcing advanced contracts that determined the disposition of frozen embryos serves four policy goals.[85] First, as express agreements avoid costly litigation in business deals, express contracts are even more desirable in personal matters of reproductive choice, since the cost of potential litigation is immeasurable.[86] Second, advance contracts lessen confusion and stress procreative liberty by allowing progenitors to make this incredibly personal and private decision before commencing any reproductive program.[87] Third, advance agreements provide the assurance needed from patients and partners for the proficient administration of IVF programs.[88] Fourth and finally, the court reasoned that believing advanced agreements will be enforced compels participants in IVF programs to consider their decisions thoughtfully.[89] The New York Court of Appeals concluded that the consent form signed at the beginning of the IVF program indicated the couple's intent to donate any excess embryos for research purposes in the event of dispute, and held that the agreement should be enforced.[90]

A.Z. v. B.Z.

In *A.Z. v. B.Z.*,[91] the Massachusetts Supreme Judicial Court held that a consent form signed by a couple and a fertilization clinic, which provided that in the event of the parties' separation the couple's frozen embryos were to be given to the wife for implantation, was unenforceable.[92] The consent forms, which were signed by the ex-husband before the provisions of the forms were filled in, stated that if the couple "[s]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant."[93] The court determined that

---

[85] *Id.* at 180.

[86] *Id.*

[87] *Kass*, 696 N.E.2d at 180.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 181.

[91] 725 N.E.2d 1051, 1051 (Mass. 2000).

[92] *Id.* at 1057.

[93] *Id.* at 1054. While there were several forms the wife signed herself, the signatures of both the husband and wife were only required on the forms labeled "Consent Form for Freezing (Cryopreservation) of Embryos." *Id.* at 1053. The forms described "the general nature of

the consent form was not binding in light of "the purpose of the form. . . and the circumstances of the execution."[94] Specifically, the ex-husband never acquiesced to the original consent form with his signature, he merely signed blank forms that the wife later filled in.[95] The probate court noted that subsequent to signing the consent agreements, there were significant changes in circumstances that warranted determining the original agreement to be unenforceable.[96] The significant changes since the original consent included the birth of twin girls as a product of an IVF treatment, one vial of frozen embryos unsuccessfully implanted secretly without the knowledge of her husband, and the couple's divorce resulting from deteriorated relations.[97]

The Massachusetts Supreme Judicial Court reasoned that the contract was unenforceable for five reasons. First, the court reasoned the consent form was not intended to create a binding agreement between the couple in the event that they should disagree about the disposition of the embryos at a later date, but rather simply to disclose the benefits and risks of freezing embryos.[98] The court concluded that the consent was "intended only to define the donors' relationship as a unit with the clinic."[99] Second, the court refused to assume that the couple intended for the consent form to control the fate of the embryos.[100] Third, the court found that the consent form inadequately defined "separated" in its context "[s]hould we become separated," because this dispute arose in divorce, not in

---

the IVF procedure and outlined the freezing process, including the financial cost and the potential benefits and risks of that process." *Id.* at 1054. The consent form, as filled out by the wife, stated that should the couple become separated, they both agreed to have the pre-embryos returned to the wife for implantation. *Id.* This was signed in blank by the husband, before the wife filled in the language indicating that she would use the pre-embryos for implantation on separation. *Id.*

[94] *Id.* at 1056.

[95] *Id.* at 1057.

[96] *A. Z.*, 725 N.E.2d at 1054-55.

[97] *Id.*

[98] *Id.* at 1056.

[99] *Id.* at 1056.

[100] *Id.* at 1057. The court reasoned that because four years had passed since the agreement was signed and since no time frame was established to use or dispose of the embryos, given that there had been a fundamental change in the couple's relationship, the consent form was not meant to dictate the future of the embryos. *Id.*

separation.[101] Fourth, the court reasoned that the manner in which the couple executed the consent forms created doubt as to whether the forms sufficiently indicated the intentions of each donor.[102] Finally, pursuant to state law, the court found that the consent form did not constitute a separation agreement that bound the couple in a divorce proceeding.[103] The court declined to enforce a contract that would force parenthood on a person where the contract relied upon was unable to sufficiently predict a donor's situation four years after its execution.[104]

Additionally, the court concluded that it would not enforce an agreement compelling parenthood against the will of a donor, even had the contract been an "unambiguous agreement. . . regarding the disposition of the frozen embryos."[105] The court reasoned that "courts will not enforce contracts that violate public policy," concluding "forced procreation is not an area amenable to judicial enforcement," therefore the court declined to enforce the contract.[106] The Massachusetts Supreme Judicial Court ruled in favor of the husband, affirming a permanent injunction against the wife "from utilizing" the couple's frozen embryos.[107]

Litowitz v. Litowitz

Most recently, the Washington Court of Appeals held that an ex-husband was not bound by contract to become a parent.[108] In *Litowitz v. Litowitz*, a married couple contracted with an egg donor and an IVF clinic.[109] The husband's sperm fertilized five donated eggs, and two embryos were cyropreserved.[110] The hus-

---

[101] *Id.* The court reasoned that in referring to "separated," the couple did not indicate what should be done in the event of divorce, since "separated" and "divorce" have different legal meanings. *Id.*

[102] *A.Z.*, 725 N.E.2d at 1057.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 1057.

[106] *Id.* at 1058.

[107] *Id.* at 1052.

[108] Litowitz v. Litowitz, 10 P.3d 1086 (Wash. App. 2000).

[109] *Id.* at 1087.

[110] *Id.* at 1087-88.

band and wife subsequently separated, and the wife sought ownership of the embryos for implantation in a surrogate, while her husband, no longer wanting to use the surrogate, sought to place the embryos with an out of state infertile couple.[111]

The court looked at the specific terms of the egg donor contract, and narrowly read it to give the intended parents, the now divorced couple, the "sole right to determine the disposition of the eggs."[112] The contract contained provisions regarding the ownership and disposition of the eggs, but did not specify what should be done with fertilized eggs, now technically preembryos, in the event the parties could not agree or if they dissolved their marriage.[113] The court reasoned that since the eggs no longer existed, and since there was no express agreement regarding the embryos, there was no enforceable contract.[114]

Also important in the *Litowitz* decision is the fact that the wife was not a gamete provider herself.[115] Because she did not contribute any gametes, the court reasoned she did not have a protected constitutional right to procreate inherent in the disputed embryos.[116] However, the husband, as a gamete donor,

---

[111] *Id.* at 1088.

[112] *Id.* at 1091.

[113] *Id.* The contract read:

> All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of the said egg(s). In no event may the Intended Parents allow any other party the use of said eggs without express written permission of the Egg Donor.

Id. at 1093.

The court maintained that this provision expressly stated what was to be done regarding the disposition of the eggs, but noted that since the donated eggs were fertilized, they were preembryos, and no longer eggs. *Id.* The consent did not dictate what should be done with the preembryos if the couple was unable to agree or if their marriage is dissolved. *Id.* at 1091. Therefore, there was no express agreement to enforce. *Id.* There was the direction, however, to thaw frozen any unused embryos to prevent them from developing under certain circumstances, specifically death of both parties. *Id.* at 1089.

[114] *Litowitz*, 10 P.3d at 1093.

[115] *Id.* at 1092.

[116] *Id.*

did have a recognizable and protected constitutional right not to procreate.[117] The court refused to force the husband to become a parent when he no longer wanted to become one, and awarded the preembryos to the husband to dispose of as he desired.[118]

D. LEGAL SCHOLARS

When considering whether a party should be able to implant the embryos, a law student scholar, Jennifer Medenwald has suggested that courts have considered whether reasonable alternatives exist for achieving parenthood by means other than the use of the embryos in question.[119] If there is some reasonable alternative available to allow the donor seeking to use the embryo to achieve parenthood, then the party seeking to avoid procreation will normally prevail.[120] This so-called "reasonable alternatives" exception is premised on an assumption that any alternative for parenthood is a reasonable alternative for want-to-be parents.[121] Medenwald argues that such an exception is futile.[122] Potentially, if all reproductive alternatives are deemed to be "*reasonable* alternatives regardless of the pain, trauma, and expense suffered by the party prior" to the custody dispute, then no court will find in favor of the party seeking to use the embryos.[123] Such a view lacks "sympathy for the specific medical, physical, emotional, psychological, and financial conditions" that parties endure while attempting parenthood through IVF, albeit under circumstances different from where these parties find themselves at the time of dispute.[124] Therefore, Mendenwald suggests,

---

[117] *Id.*

[118] *Id.* at 1093.

[119] Jennifer L. Medenwald, Note, *A "Frozen Exception" for the Frozen Embryo: The Davis "Reasonable Alternatives Exception,"* 76 IND. L.J. 507, 519 (2001) (citing Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)).

[120] *Id.* (quoting *Davis*, 842 S.W.2d at 604).

[121] *Id.* at 519 (citing Kass v. Kass, 633 N.Y.S.2d 581, 600 (N.Y. App. Div. 1997) (Miller, J., dissenting)).

[122] *Id.* at 516.

[123] *Id.* (emphasis added).

[124] *Id.* at 521. Medenwald refers specifically to the "medical, physical, emotional, psychological, and financial conditions" the women endure during the egg retrieval process of IVF. *Id.*

courts should abandon this exception since it may not be justly applied in balancing the competing interests between the party who wishes to procreate against the party who wishes to avoid procreation.[125]

Regarding the need for advanced assent between parties regarding the future of their frozen embryos, Professor Robertson from the University of Texas at Austin argues that courts should enforce prior agreements directing the disposition of frozen embryos.[126] Robertson maintains that enforceable contracts maximize procreative freedom, provide certainty, and minimize disputes.[127] The competing constitutional issues, Robertson contends, do not outweigh the benefits of enforcing contracts.[128] Further, Robertson says, equating the disputes surrounding frozen embryos to disputes involved in other reproductive situations is misplaced.[129] Although contracts concerning preconception agreements, adoption and surrogate motherhood have been held unenforceable, agreements involving embryos are quite distinguishable.[130] The contracts that direct the future of frozen embryos "involve choices about whether opportunities for reproduction will or will not exist when a certain specified future event occurs," whereas most other reproductive agreements involve advancing or avoiding pregnancy, or involve preconception agreements about child raising.[131] Thus, Robertson asserts, the physical demands and implications of the latter are significantly more taxing than merely deciding the fate of the genetic material being stored outside a body.[132]

---

[125] Mendenwald, *supra* note 119, at 523.

[126] Robertson, *supra* note 67, at 413.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 421.

[130] *Id.* (citing In re Baby M., 109 N.J. 396, 421-22 (1988) (refusing to enforce a contract for adoption and rearing)).

[131] *Id.* at 422. Professor Robertson distinguishes IVF contracts from other reproductive agreements by the physical burdens inherent in each. *Id.* at 421-22. Childbirth is a changed circumstance that warrants holding a prior contract unenforceable because it is near impossible for one to reasonably foresee the emotions associated with having a child until after birth. *Id.* at 421. Embryos, however, require decisions much less physically burdensome because all that is required to be decided in a dispute regarding their disposition is "whether gametic material fused into an embryo will or will not be used to attempt to initiate pregnancy in a willing party." *Id.* at 422.

[132] Robertson, *supra* note 67, at 421-22.

Professor Coleman, from Seton Hall Law School, also argues that decisions regarding the disposition of a frozen embryo should be executed only when there is mutual consent between the donors, but does not limit the timing of mutual assent to the time prior to IVF treatments.[133] While traditional contract law would seem to support this proposition, Coleman asserts that strict application of contract theory in the context of disputes over frozen embryos misses the mark.[134] First, persons are entitled to make decisions so fundamentally personal in accordance with their current wishes and values.[135] Second, enforcing contracts that were entered without the full appreciation of the future effects of "life-altering events such as parenthood" ignores the trouble with planning for the effects of such events.[136] Third, Coleman asserts that the legitimacy of any directive that was conditioned on the ability to receive infertility treatment is compromised when such a strict condition is required (forcing couples to make a decision before allowing them to receive IVF).[137] Fourth, enforcing contracts that would force procreation undermines "the important values about families, reproduction, and the strength of genetic ties."[138] Thus, requiring mutual consent at the time a dispute arises, regardless of any prior agreements, would protect each donor's inalienable right to procreative liberty.[139]

IV. NEW JERSEY'S CURRENT ANALYSIS OF A CONFLICT OVER THE DISPOSITION OF FROZEN EMBRYOS: *J.B. v. M.B.*

A. CHIEF JUSTICE REHNQUIST'S MAJORITY OPINION

In *J.B. v. M.B.*, the New Jersey Supreme Court addressed how conflicts regarding the disposition of frozen embryos should be resolved by the courts.[140]

---

[133] Coleman, *supra* note 2, at 80-81.

[134] *Id.* at 88.

[135] *Id.*

[136] *Id.* at 89.

[137] *Id.*

[138] *Id.*

[139] Coleman, *supra* note 2, at 126.

[140] *J.B.*, 2001 N.J. LEXIS 955, at *1.

Writing for the majority, Chief Justice Poritz made several findings.[141] After making the preliminary finding that J.B. and M.B. did not enter into an enforceable contract with respect to the disposition of the frozen embryos resulting from IVF treatments, the Chief Justice explained the manner in which courts must resolve disputes regarding the disposition of frozen embryos.[142]

Following an analysis of the competing constitutional right to procreate versus the right not to procreate, the court determined that generally, courts favor the party seeking to avoid procreation.[143] Additionally, the court affirmed the proposition that it is against New Jersey public policy to create a contract to procreate and therefore such a contract was unenforceable.[144] Finally, the court adopted the rule to "enforce agreements entered into at the time *in vitro* fertilization is begun, subject to the right of either party to change his or her mind about the disposition up to the point of use or destruction of any stored preembryos."[145]

In the first part of the opinion, Chief Justice Poritz looked to the consent form and attachment provided to J.B. and M.B. by the fertility clinic for guidance in determining whether or not J.B. and M.B. had made their intentions clear.[146] The court concluded that the attachment supplied a somewhat more detailed direction in respect to the "control and disposition" of the frozen embryos than the consent form.[147] Scrutinizing the terms of the agreement, the Chief Justice determined that the attachment, specifically, did not indicate an explicit intent with respect to the disposition of the frozen embryos contingent upon the ending of the couple's marriage.[148] The court read the attachment to direct that the embryos be "relinquished" to the clinic in the event of divorce, or in the alternative, provided an exception permitting a court to direct the disposition of the frozen

---

[141] *Id.* Justices Stein, Coleman, Long and LaVecchia joined in the majority opinion. *Id.*

[142] *Id.* at *29.

[143] *Id.* at *35.

[144] *Id.* at *38 (citing *J.B.*, 331 N.J. Super. at 234-35).

[145] *Id.* at *43.

[146] *J.B.*, 2001 N.J. LEXIS 955, at *23 (citing Garfinkel v. Morristown Obstetrics and Gynecology, 168 N.J. 124, 125, 773 A.2d 665 (2001) (explaining interpretation of contract controlled by any writing expressing intent)).

[147] *J.B.*, 2001 N.J. LEXIS 955, at *24. *See supra* note 20 and accompanying text.

[148] *Id.* at *25.

embryos.[149] However, the court observed, in the event that there is no such court order, the consent form did not specify what J.B. or M.B. would have otherwise preferred regarding the disposition of the embryos.[150] The court noted that the attachment in fact ordered that the clinic obtain control over the embryos in the absence of a writing by the parties or a court order to the contrary.[151]

The court distinguished the consent form in dispute in this situation from the contract disputed in *Kass v. Kass*.[152] Chief Justice Portiz explained that the *Kass* consent form differed from the one J.B. and M.B. signed in that the Kass' intent was unambiguous regarding relinquishing control of their frozen embryos for research purposes in the event of a disagreement.[153] Additionally, the Chief Justice observed that the couple in *Kass* signed an "uncontested divorce agreement" which dictated that the frozen embryos "should be disposed of [in] the manner outlined in [their] consent form and [neither party] will lay claim to custody of these pre-zygotes."[154] The court found that J.B. and M.B. had no such unambiguous writing indicating their intent with respect to the future of their frozen embryos, whereas the couple in *Kass* manifested a clear intent regarding the disposition of their embryos in their initially executed consent forms.[155] Thus, the

---

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* (citing Kass v. Kass, 696 N.E.2d 174, 174 (N.Y. 1988)).

[153] *J.B.*, 2001 N.J. LEXIS 955, at *26 (discussing *Kass*, 696 N.E.2d at 176-77, 181, 182). The consent form in *Kass* stated "[i]n the event of divorce, we 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." *Kass*, 696 N.E.2d at 176. The consent form further specified:

> In the event that we. . . are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to (choose one): Our frozen pre-zygotes may be examined by the IVF program for biological studies and may be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.

Id. at 176-77.

[154] *J.B.*, 2001 N.J. LEXIS 955, at *27 (citing *Kass*, 696 N.E.2d at 177).

[155] *Id.* at *28. The dispute in *Kass* arose when the wife wished to use the embryos in an attempt to become pregnant herself rather than donate the embryos for research. *Kass*, 696 N.E.2d at 175. Here, J.B. wished to have the embryos disposed of rather than use them herself

court found no separate binding contract providing for the disposition of the frozen embryos stored at the IVF clinic.[156]

Chief Justice Poritz next considered the means by which courts should review the issues surrounding an unanticipated dispute, such as disputes that arise when a couple does not adequately instruct for contingency provisions in the event of divorce or disagreements over the disposition of the frozen embryos.[157] First, the court discussed the direct conflict between competing constitutional interests in the right to procreate versus the right not to procreate under the notion of procreational autonomy.[158] Relying on both federal and New Jersey case law, the court reaffirmed the position that "'the rights of personal intimacy, of marriage, of sex, of family, and of procreation. . . . are fundamental rights of both the federal and state constitutions.'"[159] The Chief Justice relied on established precedence by *Skinner v. Oklahoma,*[160] *Griswold v. Connecticut,*[161] *Eisenstadt v. Baird,*[162] and *In Re Baby M.*[163] These decisions, Chief Justice Poritz reasoned, create a framework that guides courts in the approach to settling disputes arising over the disposition of frozen embryos.[164]

---

or permit them to be used by someone else. *J.B.*, 2001 N.J. LEXIS 955, at *16.

[156] *Id.* at *29.

[157] *Id.* at *30-31.

[158] *Id.* at *31.

[159] *Id.* at *33 (quoting In re Baby M., 109 N.J. 396, 447 (1998)).

[160] 316 U.S. 535 (1942) (holding that marriage and procreation are fundamental to the very existence and survival of the race).

[161] 381 U.S. 479 (1965) (finding that prohibitions on the use of contraceptives unconstitutionally infringe on the sanctity and privacy of the marital relationship).

[162] 405 U.S. 438 (1972) (holding that the right to privacy includes the right of an individual to be free from unwarranted governmental intrusion into the fundamental decision whether to bear or beget a child).

[163] 537 A.2d 1227 (N.J. 1988) (holding that the rights of procreation are fundamental rights protected by both the federal and state Constitutions).

[164] *J.B.*, 2001 N.J. LEXIS 955, at *34. The Court concluded that these cases, *Skinner v. Oklahoma, Griswold v. Connecticut, Eisenstadt v. Baird,* and *In Re Baby M.*, support the proposition that courts ought to balance the interests between the parties, the right to procreate versus the right to avoid procreation, where the disposition of frozen embryos is in controversy. *Id.*

Next, the Chief Justice looked to the framework utilized in the Tennessee decision in *Davis v. Davis* to settle such a debate.[165] The Chief Justice explained that in *Davis*, "the Tennessee Supreme Court balanced the right to procreate of the party [who is] seeking to donate the [couples' embryos] against the right not to procreate of the party seeking [the] destruction of the [embryos]."[166] The court noted that the *Davis* decision relied heavily on the fact that Mr. Davis had been separated from his parents as a child "after they divorced and his mother suffered a nervous breakdown."[167] The Tennessee Supreme Court concluded that the burden of unwanted parenthood weighed heavier on Mr. Davis than the "burden [on his wife] of knowing that the lengthy IVF procedures she underwent were futile."[168] Following the Tennessee Supreme Court, Chief Justice Poritz stated that "'ordinarily, the party wishing to avoid procreation should prevail.'"[169]

Relying heavily on the fact that M.B. retained the capacity to father children, the court reasoned that his right to procreate was not lost if he was denied the opportunity to use or donate the couple's frozen embryos.[170] However, the court noted that J.B.'s right not to procreate may be compromised by attempted use or the donation of the embryos to another couple.[171] Recognizing that the potential birth of a biological child through the use or donation of the embryos could result in permanent emotional and psychological repercussions, the New Jersey Supreme Court refused to "force J.B. to become a biological parent against her

---

[165] *Id.* at *34 (citing Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992), *cert. denied sub nom*, Stowe v. Davis, 507 U.S. 911 (1993)).

[166] *Id.* at *34 (citing *Davis*, 842 S.W.2d at 603-04).

[167] *Id.* at *34 (citing *Davis*, 842 S.W.2d at 603-04).

[168] *Id.* at *35 (quoting *Davis*, 842 S.W.2d at 603-04). Mr. Davis was "vehemently opposed to fathering a child that would not live with both parents" as a result of his own experiences. *Id.* at *34-35 (quoting *Davis*, 842 S.W.2d at 604).

[169] *Id.* at *35 (quoting *Davis*, 842 S.W.2d at 604). The court in *Davis* found the wife's "'burden of knowing that the lengthy IVF procedures she underwent were futile, and the preembryos to which she contributed genetic material would never become children'" did not outweigh the father's interest in avoiding procreation. *Id.* (quoting *Davis*, 842 S.W.2d at 604). Such a balance would "ordinarily" favor the party seeking to avoid procreation if the opposing party had other reasonable means of becoming a parent. *Id.* (citing *Davis*, 842 S.W.2d at 603-04).

[170] *J.B.*, 2001 N.J. LEXIS 955, at *36.

[171] *Id.*

will."[172]

Finally, Chief Justice Poritz considered the public policy implications of enforcing contracts to procreate, as well as contracts to enter into or to terminate familial relationships.[173] Relying on the New Jersey Supreme Court's decision in *In re Baby M*,[174] the court reasoned that enforcement of a contract, allowing the implantation of embryos at some future date where one party has reconsidered her earlier choice, raised similar issues as those raised in the enforcement of a surrogacy contract.[175] The court explained that such contracts conflict with

> (1) laws prohibiting the use of money in connection with the use of adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.[176]

Chief Justice Poritz disagreed with the New York Court of Appeals decision in *Kass*, which held that contracts agreements between progenitors regarding disposition of their prezygotes "should generally be presumed valid and binding, and enforced in a dispute between them."[177] Rather, the Chief Justice affirmed that it is against public policy to enforce agreements that compel procreation over the subsequent objection of one of the progenitors.[178] Despite the benefits of enforcing agreements between the parties, as pointed out by the New York Court of Appeals and the Tennessee Supreme Court,[179] and despite an increased need for agreements between participants and clinics performing IVF as the pro-

---

[172] *Id.*

[173] *Id.* at *37-38.

[174] 537 A.2d 1227 (1988) (holding surrogacy contract unenforceable).

[175] *J.B*, 2001 N.J. LEXIS 955, at *40.

[176] *Id.* at *39 (citing In re Baby M., 109 N.J. 396, 423 (1988)).

[177] *Id.* at *40 (quoting Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998)).

[178] *Id.* at *41 (citations omitted).

[179] *Kass*, 696 N.E.2d at 180 (finding that advanced agreements minimize misunderstandings and maximize procreative liberty); *Davis*, 842 S.W.2d at 597 (concluding that an agreement regarding the disposition of frozen embryos should be presumed valid and should be enforced between progenitors).

cedure becomes more prevalent, the New Jersey Supreme Court adopted a "better rule."[180] The court determined that it will "enforce agreements entered into at the time *in vitro* fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos."[181]

In the event that one of the parties reconsiders his or her initial choice regarding the disposition of the frozen embryos, the court determined that the interest of both parties must be evaluated and balanced.[182] The Chief Justice contended that since, ordinarily, the party choosing to assert their fundamental right not to procreate will prevail, the court did not anticipate increased litigation as a result of this decision.[183] Since M.B. is a father, and is capable of fathering more children, the court affirmed J.B.'s right to prevent the implantation or donation of the couple's frozen embryos.[184]

B. JUSTICE VERNIERO'S CONCURRENCE

In a separate concurrence, Justice Verniero, joined by Justice Zazzali, specifically disagreed with the court's suggestion that the right to procreate may depend on adoption as a consideration.[185] In the case of an infertile party, Justice Verniero argued that the balance might weigh in favor of the infertile participant absent some countervailing factor asserted by the opposing party.[186] Justice Verniero explained that such countervailing factors might include where an infertile party has no other means of procreation then the frozen embryos.[187] Nevertheless, the Justice refused to answer the profound question of what countervailing factors the Court might consider in favor of an opposing party in this

---

[180] *J.B.*, 2001 N.J. LEXIS 955, at *43.

[181] *Id.*

[182] *Id.* at *44.

[183] *Id.*

[184] *Id.* The court carefully expressed no opinion regarding a case where an infertile party seeks to use the frozen embryos against the petition of his or her partner. *Id.* Under such circumstances, adoption may be a consideration in the court's assessment. *Id.*

[185] *Id.* at *45 (Verniero, J., concurring).

[186] *J.B.*, 2001 N.J. LEXIS 955, at *45 (Verniero, J., concurring).

[187] *Id.*

opinion.[188]

C. JUSTICE ZAZZALI'S CONCURRENCE

Justice Zazzali stressed, in his own separate, concurrence, that there is a need for judicial "caution, compassion, and common sense" as the jurisprudence develops surrounding the controversies that nascent reproductive technologies give rise to.[189] The Justice noted that these difficult controversies frequently result in hasty dire predictions that do not take into consideration the significance of the competing interests at stake.[190]

V. DISCUSSION: THE "BETTER RULE"

The developing trend in resolving disputes arising over the control and disposition of frozen embryos is a constitutional analysis that weighs the fundamental right to procreate against the equally protected right not to procreate.[191] The New Jersey decision in *J.B. v. M.B.* has implications on how the jurisprudence regarding disputes pertaining to the disposition of frozen embryos will continue to develop. As Chief Judge Kaye in *Kass* noted that while "[i]n the past two decades, thousands of children have been born through IVF... [and] tens of thousands of frozen embryos are routinely stored in liquid canisters,... the law... has been evolving more slowly and cautiously."[192] The case law is currently sparse, with state courts looking toward other states for guidance.

The New York Court of Appeals and the Tennessee Supreme Court advocate enforcing contracts that are agreed upon at the start of IVF.[193] While ideal in theory, perhaps, this approach to resolving disputes regarding the disposition of frozen embryos is myopic. First, there are potentially hundreds of thousands of frozen embryos in the United States that exist without instructions for their future.[194] Clearly, there must be a framework for resolving disputes for the situa-

---

[188] *Id.*

[189] *Id.* at *46 (Zazzali, J., concurring).

[190] *Id.*

[191] Trainor, *supra* note 62, at *2b (citing *Davis*, 842 S.W.2d 588 (holding embryos are neither persons nor property, but a unique category requiring special treatment)).

[192] Kass v. Kass, 696 N.E.2d 174, 178 (N.Y. 1998).

[193] Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992); *Kass*, 696 N.E.2d at 180.

[194] *Kass*, 696 N.E.2d at 178. Chief Justice Kaye pointed out that there are tens of thou-

tions that will inevitably arise where there are no contracts. Second, enforcing agreements that were entered into when circumstances were completely different than when a court is required to intervene is inappropriate. Professor Robertson argues that enforcing contracts entered into at the start of IVF maximize procreative freedom, provide certainty, and minimize disputes.[195] However, contract enforcement does not provide an adequate solution when circumstances at the time of enforcement are radically different from when the agreement was reached. For example, what if a contract requires a woman to have an embryo implanted and to carry it to term, but she has changed her mind and no longer wishes to? Since courts refuse to enforce contracts that force parties to enter into familial relationships,[196] it would be impossible for a court to reconcile demanding that a woman bear a child simply because an IVF contract dictated her to do so.

Likewise, forcing a man to become a biological parent against his will is equally as unreasonable. Professor Coleman asserts that courts required to settle disputes between potential parents over the disposition of their embryos should not be influenced by the gender of the donor who wishes to use the embryos.[197] Any pain or discomfort a woman suffers during IVF treatments is the "result of her own voluntary choice."[198] When a dispute between donors reaches a court, the primary issue for each party is whether or not his or her prior decision will result in parenthood.[199] At the time of dispute, the embryos are still *in vitro,* in a laboratory dish, and the implications of pregnancy and childbirth are not yet existent.[200] Simply because a woman endures more discomfort in the egg retrieval

---

sands of frozen embryos in New York alone lacking instruction as to their future use. *Id.* (citing New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, at 289 (April 1998)). If there are so many embryos in New York without guidance as to their future, the number of similar cases in the United States is almost incomprehensible.

[195] Robertson, *supra* note 67, at 413. *See supra* notes 126-31 and accompanying text.

[196] *See J.B.,* 2001 N.J. LEXIS 955, *37; A.Z. v. B.Z. 725 B.E.2d 1051, 1057-58 (Mass. 2000) (refusing to enforce a contract compelling a person to become a parent as against public policy).

[197] Coleman, *supra* note 2, at 85.

[198] *Id.*

[199] *Id.*

[200] *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52, 67-71 (1976) (invalidating a state statute requiring spousal consent to abortion because the law infringed on the woman's

process, it does not follow that her future interest in becoming a parent is greater than her partner's, who may seek to avoid parenthood. While "it is true that the woman's physical investment in IVF is usually greater than that of the man," at the time of judicial resolution, she has already invested in the embryo and her future stake in its disposition is equal to that of her partner's.[201]

Since both gamete providers have strong and equal interests in either achieving or avoiding parenthood, contract enforcement is not sufficient for protecting each of their fundamental rights. As such, a balancing of the interests is the most equitable way to determine which donor is entitled to determine the fate of their embryos. New Jersey's "better rule," to "enforce agreements entered into at the time of *in vitro* fertilization is begun, subject to the right of either party to change his or her mind about the disposition up to the point of use or destruction of any stored preembryos,"[202] is flexible enough to ensure more just and equitable outcomes. This rule honors traditional contract law to the extent that it is still representative of the donor's intent, while allowing for parties to change their minds about life altering decisions, such as parenthood, without the concern of narrow judicial interpretation.

The New Jersey Supreme Court carefully left unanswered how the infertility of a party would weigh in the balancing of interests.[203] Mendenwald suggests that the interest of an infertile donor seeking to use the frozen embryos should prevail over the interest of a fertile donor seeking to avoid parenthood.[204] Justice Verniero would find the same.[205] However, the infertility of a party should not,

---

right to bodily integrity by potentially compelling unwanted pregnancy). Professor Coleman distinguishes the situation in IVF from that in terminating a pregnancy, since the embryos exist outside of a woman's body, her interest stemming from bodily integrity is not implicated. Coleman, *supra* note 2, at 85-86.

[201] Coleman, *supra* note 2, at 86.

[202] *J.B.*, 2001 N.J. LEXIS 955, at *43.

[203] *Id.* at * 44.

[204] Mendenwald, *supra* note 119, at 520-21. *See supra* notes 117-23 and accompanying text.

[205] *J.B.*, 2001 N.J. LEXIS 955, at *45 (Verniero, J., concurring). Justice Verniero asserted:

> I also write to express my view that the same principles that compel the outcome in this case would permit an infertile party to assert his or his right to use a preembryo against the objections of the other party, if such use were the only means of procreation.

as a matter of law, tip the scale so much as to permit that party to use the embryos over the objection of the party seeking to avoid procreation, whether or not he or she is also infertile. The case law surrounding the issue of the disposition of frozen embryos is still in the developing stages. The New Jersey rule provides a reasonable and suitable framework for other courts to analyze such disputes. What is left to be determined is how certain factors will weigh in the balancing of the interests.

VI. CONCLUSION

The case law in the United States regarding the disposition of frozen embryos in the absence of an express agreement, or in the event of changed circumstances since the parties entered into an agreement is evolving. The legislation guiding the issue is limited.[206] When the issue was presented to the New Jersey Supreme Court, the court had few options other than to balance the interests of the two progenitors. In maintaining the state's public policy against enforcing agreements that compel procreation over the subsequent objection of one of the progenitors, the court reasonably and fairly declared a new state policy: contracts entered into at the beginning of IVF that direct the disposition of frozen embryos shall be enforced, provided that each party has the right to change his or her decision up to the point of use or destruction of any embryos.[207]

Id.

[206] The court in *J.B.* noted that currently only five states have passed legislation addressing *in vitro* fertilization. *J.B.*, 2001 N.J. LEXIS 955, at *39, n. 8. *See e.g.* CAL. PENAL CODE § 367g (West 2001) (permitting use of preembryos only pursuant to written consent form); FLA. STAT. Ch. 742.17 (2000) (establishing joint decision-making authority regarding disposition of preembryos); LA. REV. STAT. ANN. §§ 9:121 to 9:133 (West 2001) (establishing fertilized human ovum as biological human being that cannot be intentionally destroyed); OKLA. STAT. ANN. Tit. 10, § 556 (West 2001) (requiring written consent for embryo transfer); TEX FAM. CODE ANN. § 151.103 (West 2000) (establishing parental rights over child resulting from preembryo).

[207] *J.B.*, 2001 N.J. LEXIS 955, at *43.