

## AVOIDING FORCED PARENTHOOD: A PRACTICAL LEGAL FRAMEWORK TO RESOLVE DISPUTES INVOLVING THE DISPOSITION OF EMBRYOS

Melanie M. Lupsa\*

### I. INTRODUCTION

Creation of binding law as a means of regulating new technology tends to follow behind the invention and utilization of such technology.<sup>1</sup> Assisted reproductive technology (ART) is no exception<sup>2</sup> given its recent surge in popularity.<sup>3</sup> In fact, the lack of related legislation has had a profound effect.<sup>4</sup> This is especially true given that the fertility industry regulates itself with the help of independent associations.<sup>5</sup> The judiciary specifically is having an

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\* J.D. Candidate, 2019, Seton Hall University School of Law; B.S., Muhlenberg College. I would like to thank Professor Carl Coleman for his guidance and insight in writing this Comment.

<sup>1</sup> See Tom Gjelten, *Technology Outpacing Policymakers, Needs of NSA*, NAT'L PUB. RADIO: PRIVACY & SECURITY (Nov. 19, 2013, 2:54 AM), <https://www.npr.org/sections/alltechconsidered/2013/11/19/246049281/technology-outpacing-policymakers-needs-of-nsa> (stating technology is advancing too fast for policy writing to keep up with it).

<sup>2</sup> See Marina Merjan, *Rethinking the "Force" Behind "Forced Procreation": The Case for Giving Women Exclusive Decisional Authority over Their Cryopreserved Pre-Embryos*, 64 DEPAUL L. REV. 737, 738 (2015) (arguing law governing embryo use and disposition disputes has not kept pace with the increased use of IVF).

<sup>3</sup> See Heidi Anne Duerr, *Use of Assisted Reproductive Technology Continues to Increase in the United States*, OBGYN.NET (May 23, 2011), <https://www.obgyn.net/blog/use-assisted-reproductive-technology-continues-increase-united-states> (predicting IVF procedures will increase 32.7% from 2010 to 2050).

<sup>4</sup> See Michael Ollove, *Lightly Regulated In Vitro Fertilization Yields Thousands of Babies Annually*, WASH. POST: HEALTH & SCI. (Apr. 13, 2015), [https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d\\_story.html?noredirect=on&utm\\_term=.1e93a87e8899](https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d_story.html?noredirect=on&utm_term=.1e93a87e8899) (highlighting that the federal government and the separate states have given the fertility industry much freedom regarding regulatory matters, making the United States unlike the rest of the developed world).

<sup>5</sup> See Alissa Stockage, *Regulating Multiple Birth Pregnancies: Comparing the United Kingdom's Comprehensive Regulatory Scheme with the United States' Progressive, Intimate Decision-Making Approach*, 18 MICH. ST. J. INT'L L. 559, 573 (2010) (explaining fertility

especially difficult time deciding cases that involve disputes following ART treatment given the absence of legal precedent that courts rely on for direction.<sup>6</sup>

In vitro fertilization (IVF) is a type of ART that assists many couples in making an embryo of their own, that when implanted in a uterus, could grow into a human being.<sup>7</sup> The embryo's creation takes place in a laboratory by fertilizing an egg of a female with sperm obtained from a male.<sup>8</sup> Normally, a couple creates multiple embryos at one time regardless of whether the parties intend to use all embryos created.<sup>9</sup> Creation of multiple embryos is attributable to the high cost of the procedure as well as the possibility that the first embryo transfer may be unsuccessful and never implant in the woman's uterus.<sup>10</sup> Those who wish to preserve their embryos have the option to cryopreserve unused embryos for future use.<sup>11</sup>

IVF reached the public sphere in 1978 when scientists successfully created an embryo in vitro, and thus, outside the womb.<sup>12</sup> Since then, in vitro technology has successfully assisted millions of couples who otherwise would not have had the opportunity to reproduce and create families of their own.<sup>13</sup> Couples, however, do not always have a happily ever after and consequently terminate their relationships. Given that the fertility industry has failed to institute proper precautions, the fate of preserved embryos has become complicated, and ultimately courts are called on to resolve

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clinics are self-regulated by professional medical associations).

<sup>6</sup> See *Who's Your Daddy (or Mommy)?? Maryland & Washington, DC Family Law and Assisted Reproductive Technology (ART)*, BRODSKY RENEHAN PEARLSTEIN & BOUQUET, CHARTERED: WHITEPAPERS (Mar. 21, 2013), <https://www.brpfamilylaw.com/art/> (stating that because medical advances have not been accompanied by legal developments, there is little precedent on ART issues; so, courts are forced to resolve issues that few have before considered without precedent).

<sup>7</sup> See Steven P. Calandrillo & Chryssa V. Deliganis, *In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough*, 57 ARIZ. L. REV. 311, 314–15 (2015); Michelle F. Sublett, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 536, 586–87 (1990).

<sup>8</sup> See Peter A. Clark, *Embryo Donation/Adoption: Medical, Legal and Ethical Perspectives*, 5 INTERNET J. L. HEALTHCARE & ETHICS 1, 2 (2008).

<sup>9</sup> See *id.* at 3.

<sup>10</sup> See *id.* (noting the advantages of embryos freezing include decreasing the number of stimulated treatment cycles needed to achieve pregnancy and decreasing the costs of ARTs).

<sup>11</sup> See Sublett, *supra* note 7, at 587; Marisa G. Zizzi, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391, 392 (2012) (noting a couple may choose to freeze embryos not immediately implanted for a later date).

<sup>12</sup> See Merjan, *supra* note 2, at 737–38.

<sup>13</sup> See Clark, *supra* note 8, at 1 (“It is estimated that 2.1 million married couples or 5 million people in the United States are affected by infertility. . . . Approximately 10–15% of infertile couples become candidates for various forms of Assisted Reproductive Technologies (ARTs) to assist them in having their own biological children.”).

disputes.<sup>14</sup>

During the informed consent process before any treatment takes place, couples have the option to decide what to do with the embryos they preserve in the event of certain unfortunate circumstances.<sup>15</sup> Couples may mutually agree that, upon divorce, separation, death, or incapacity, they will donate the embryos, destroy the embryos, or grant one of the two parents, also known as progenitors, sole control over the embryos.<sup>16</sup> Sometimes, however, before ART treatment, couples do not explicitly agree to a certain course of action, or the agreement is ambiguous as to a method of disposition under the circumstances.<sup>17</sup> Even more often, a change of circumstances leads one progenitor to refuse to abide by a prior agreement drafted and signed before the creation of the embryos.<sup>18</sup> Courts have adopted varying approaches to resolving the issue of which partner has the right to use, donate or dispose of surplus frozen embryos when the couple disagrees.<sup>19</sup>

This Comment as a whole will attempt to identify, explain, and resolve issues related to the resolution of embryo dispute litigation. Part II of this Comment will discuss in detail the three divergent approaches courts use to resolve disposition litigation, namely the balancing approach, the contemporaneous mutual consent approach, and the contractual approach. This section will define each approach as well as illustrate how courts have applied them to resolve disagreements. It will then discuss the advantages and disadvantages of adopting each approach. Part III will suggest a uniform legal framework that legislatures may adopt and for courts to apply when resolving disposition cases. This proposed framework will consider the advantages and disadvantages of each of the three divergent approaches discussed in Part II in relation to various situations and will be applied to each approach accordingly. This section will also introduce *Szafranski v. Dunston*,<sup>20</sup> a recent Illinois Appellate Court case that adopted a similar

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<sup>14</sup> See Merjan, *supra* note 2, at 738 (“When the couple that created the pre-embryos no longer agrees as to their disposition . . . the courts have had to decide the ultimate fate of those pre-embryos.”); Michael T. Flannery, “Rethinking” *Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL’Y 233, 233 (2013) (explaining courts are often forced to confront disposition of embryos and construct alternative resolutions when couples fail to expressly state in a contract the disposition method upon divorce or when public policy renders the contract unenforceable).

<sup>15</sup> William G. Beatty, *Szafranski and Beyond: The Continuing Controversy over Custody Rights to Frozen Embryos in Illinois*, 25 ILL. ASS’N DEF. TRIAL COUNS.: IDC Q. 1, 1 (2015).

<sup>16</sup> See *id.*

<sup>17</sup> See Flannery, *supra* note 14, at 233.

<sup>18</sup> See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (denying wife’s suit to enforce signed and valid disposition contract due to significantly changed circumstances despite husband’s objection).

<sup>19</sup> See Beatty, *supra* note 15, at 2.

<sup>20</sup> 993 N.E.2d 502 (Ill. App. Ct. 2013).

method of analysis to that proposed in this Comment.

Part IV will focus largely on *Szafranski v. Dunston*, highlighting relevant facts, party testimony, and the analysis of the court. Afterward, this section will distinguish the *Szafranski* case from the cases in Part II that adopted the contractual approach to disposition litigation as a means of illustrating why the *Szafranski* court erred in adopting the contractual approach. Specifically, this section will assert that it is necessary to refine the definition of contracts used when adopting the contractual approach. Part V will outline a model code to integrate necessary preventative measures as a means of avoiding embryo disposition litigation. Such measures, if taken by fertility clinics, will clearly define the intent of progenitors and avoid the issues that surfaced in *Szafranski*. Finally, Part VI of this Comment will summarize and conclude.

## II. THE THREE APPROACHES COURTS USE TO DECIDE EMBRYO DISPOSITION LITIGATION

### A. *The Balancing Approach Defined and Applied*

Under the balancing approach, the disputing parties relay their distinct interests to the court and those interests alone govern the resolution of the dispute.<sup>21</sup> The approach puts all discretionary power in a judge since the court is the sole entity that will balance the interests of the parties.<sup>22</sup> Adoption of the balancing approach takes place in both the absence of a prior agreement between the parties as well as in the presence of such an agreement.<sup>23</sup>

Adoption of the balancing approach in the absence of a prior agreement took place in the Tennessee Supreme Court case *Davis v. Davis*.<sup>24</sup> In *Davis*, the court faced a dispute between progenitors as to the disposition of embryos following the couple's divorce<sup>25</sup> and subsequently evaluated the couple's conflicting interests.<sup>26</sup> Ultimately, the court held in favor of the party attempting to avoid procreation because the party wishing to procreate

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<sup>21</sup> *Id.* at 512.

<sup>22</sup> *Id.*

<sup>23</sup> See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, PATCH: POL. & GOV'T (Jan. 7, 2013), <https://patch.com/maryland/uppermarlboro/judge-awards-maryland-woman-custody-of-frozen-embryos> (describing *Mbah v. Anong*, CAD11-11394, CAD10-24995 (Md. Circ. Ct., 7th Jud. Dist., Dec. 21, 2012), a case of first impression in the Circuit Court for Prince George's County, Maryland).

<sup>24</sup> *Davis*, 842 S.W.2d at 601.

<sup>25</sup> *Id.* at 590.

<sup>26</sup> *Id.* at 604.

could still attempt to do so through another cycle of IVF.<sup>27</sup> Notably, however, the *Davis* court stressed that if a prior agreement existed between the parties, that agreement would have controlled the dispute's resolution.<sup>28</sup> Because there was no prior agreement, the court suggested that the balancing approach was only a last resort in which case the party wishing to avoid procreation would prevail.<sup>29</sup>

Likewise, a Maryland Circuit Court adopted the balancing approach in considering the disposition of embryos, but unlike *Davis*, the court adopted the approach where a valid contract existed.<sup>30</sup> In this case, the parties originally executed an agreement that granted the wife the embryos in the event of a separation.<sup>31</sup> When that time came, however, the husband wanted the embryos destroyed.<sup>32</sup> Despite the valid contract previously agreed upon by the parties, the court focused solely on balancing the interests of the parties to rule, explicitly ignoring the agreed upon contract between the parties.<sup>33</sup> Given that the wife removed her fallopian tubes to help her conceive, she contended that she could not have children without using the embryos.<sup>34</sup> Considering the wife's permanent inability to bear biologically-related children and the husband's voluntary relinquishment of his right to the embryos, the court held in favor of the wife.<sup>35</sup> It was only a coincidence that the court ruled in such a way that was consistent with the previously made agreement between the parties.

B. *The Contemporaneous Mutual Consent Approach Defined and Applied*

Courts that have adopted the contemporaneous consent approach to disposition disputes held that it is most important to promote the current intentions of the parties involved regardless of any past agreements.<sup>36</sup> Although these courts presume that contracts with terms related to embryo storage are enforceable, they will not uphold such agreements in disputes where one of the parties has had a change of heart.<sup>37</sup> This means that "[i]f one of the partners rescinds an advance disposition decision and the other

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 597.

<sup>29</sup> *Id.* at 597.

<sup>30</sup> See Henneberg, *supra* note 23.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999).

<sup>37</sup> See *In re Marriage of Witten*, 672 N.W.2d 768, 782–83 (Iowa 2003).

does not, the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out.”<sup>38</sup>

In *In re Marriage of Witten*, the Iowa Supreme Court held that there was no remedy regarding disposition when parties disagree about the particular method of disposal.<sup>39</sup> There must be contemporaneous mutual consent of the parties for a disposition method to be lawfully carried out.<sup>40</sup> In this case, the parties signed a generic form that required joint consent for release of the embryos unless a party became deceased.<sup>41</sup> The form, however, did not specify the method of disposition in the event of divorce.<sup>42</sup> Upon divorce, the wife opposed donation of the embryos and wanted to use them to get pregnant.<sup>43</sup> The husband did not oppose donation or storage but did not want to father biologically-related children.<sup>44</sup> The court held that the embryos were to remain in storage, arguably in perpetuity, because there was no mutual consent between the parties.<sup>45</sup>

### C. *The Contractual Approach Defined and Applied*

Most courts have adopted the contractual approach to disposition cases.<sup>46</sup> “Under this approach, courts . . . enforce contracts governing the disposition of pre-embryos which were entered into at the time of [IVF informed consent] so long as they do not violate public policy.”<sup>47</sup>

Consider *Kass v. Kass* where prior to creating the embryos the parties signed a consent form providing that in the event of divorce a property settlement would determine the disposition of the embryos.<sup>48</sup> In spite of this, a provision in that same consent form called for donation to research if the couple could not agree on the method of disposition.<sup>49</sup> When the parties

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<sup>38</sup> *Id.* at 778.

<sup>39</sup> *Id.* at 772.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 773.

<sup>42</sup> *Id.*

<sup>43</sup> *In re Witten*, 672 N.W.2d at 772–73.

<sup>44</sup> *Id.* at 773.

<sup>45</sup> *Id.* at 783.

<sup>46</sup> Carinne Jaeger, *Yours, Mine, or Ours: Resolving Frozen Embryo Disputes Through Genetics*, 40 SEATTLE U. L. REV. 1141, 1146 (2017). See Michele M. Jochner, *Disposition of Frozen Embryos is Governed by Contract*, SCHILLER DUCANTO & FLECK LLP: FAMILY L. TOPICS BLOG (Oct. 2, 2013), <http://www.familylawtopics.com/2013/10/disposition-frozen-embryos-governed-contract/> (the contractual approach is used by five states, the contemporaneous mutual assent approach is used by one state, and the balancing approach is used by three states).

<sup>47</sup> *Szafranski v. Dunston*, 993 N.E.2d 502, 506 (Ill. App. Ct. 2013) (citing *In re Witten* 672 N.W.2d at 776); see Merjan, *supra* note 2, at 753.

<sup>48</sup> 696 N.E.2d 174, 176 (N.Y. 1998).

<sup>49</sup> *Id.* at 181.

divorced and could not agree on the means of disposition, the New York Court of Appeals deemed the cryopreservation agreement valid and upheld the donation provision.<sup>50</sup>

In *In Re Marriage of Dahl*, the parties signed an Embryology Laboratory Specimen Storage Agreement that set forth the terms between the couple and the clinic before they underwent the IVF procedure.<sup>51</sup> The agreement did not address the disposal of frozen embryos following the dissolution of the couple's marriage.<sup>52</sup> The agreement did, however, provide that the wife, who at the time of the case wanted to destroy or donate the embryos, would have the final say over the embryos if the parties disagreed as to their fate in the event of divorce.<sup>53</sup> At the time of separation, the wife opposed both the usage of the embryos herself and by another couple.<sup>54</sup> The husband on the other hand strongly opposed the destruction of the embryos and requested that the court mandate their donation to another couple.<sup>55</sup> The Oregon court upheld the provision in the agreement and ruled in favor of the wife, despite the husband having denied reading or signing the agreement stipulating that his ex-wife have ultimate decision-making authority.<sup>56</sup>

In *Roman v. Roman*, a Texas court upheld a provision in a clinic consent form to discard unused embryos in the event of divorce.<sup>57</sup> The court determined that the form was enforceable and thus, controlled the resolution of the disposition of all embryos.<sup>58</sup> As such, the court ruled in favor of the husband seeking to discard the embryos, although his former wife wanted to implant them.<sup>59</sup> Likewise, in *Litowitz v. Litowitz*, the Washington Supreme Court upheld a provision in a cryopreservation contract that provided the clinic thaw and discard any embryos still in storage five years after the first day of cryopreservation.<sup>60</sup> When the couple divorced, the wife sought to implant the embryos in a surrogate and the husband sought to put them up for adoption.<sup>61</sup> Irrespective of the progenitors' desires, the court decided to uphold the contract's thawing provision because more than five years had passed by the time of the court's decision.<sup>62</sup>

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<sup>50</sup> *Id.* at 182.

<sup>51</sup> 194 P.3d 834, 836 (Or. Ct. App. 2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 837.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 837, 841.

<sup>57</sup> 193 S.W.3d 40, 54–55 (Tex. App. 2006).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 43, 54.

<sup>60</sup> 48 P.3d 261, 263–64, 269 (Wash. 2002).

<sup>61</sup> *Id.* at 264.

<sup>62</sup> *Id.* at 268–69.

D. *A Discussion of the Advantages and Disadvantages of Each Approach*

Many of the advantages of one approach act as the disadvantages of another and vice versa. As such, it is important to balance the advantages and disadvantages of each approach to disposition litigation to determine which approach best promotes justice in a given scenario.

The major controversial aspect of the balancing approach is that courts act as “decision makers in [a] highly emotional and personal area.”<sup>63</sup> Normally, the justice system avoids involving itself in such personal situations, especially when parties have contracted privately as to the issues in question.<sup>64</sup> In cryopreservation disputes, however, courts have sometimes found it appropriate to intervene.<sup>65</sup> As the court in *Davis* mentioned, when there is no contract to refer to, the balancing approach is the best hope in bringing justice to the situation.<sup>66</sup> Even in cases where there is a contract, more careful consideration of the situation may be necessary if a certain outcome severely burdens one of the parties. This was evident in the Maryland Circuit Court decision where the court felt the need to balance the desire to avoid parenthood against the desire to be a mother.<sup>67</sup> The balancing approach evaluates all relevant evidence including testimony from the parties involved as well as the significance of related public policy concerns.<sup>68</sup>

Unlike the balancing approach, the contemporaneous mutual consent approach acknowledges that “decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed [of].”<sup>69</sup> Moreover, the contemporaneous mutual consent approach addresses the biggest concern of the contractual approach by allowing a party to change his or her mind.<sup>70</sup> In adopting this approach, Courts express the belief that

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<sup>63</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 779 (Iowa 2003).

<sup>64</sup> *See id.* at 781; *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[T]he right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties . . . to escape from their obligation on the pretext of public policy. . .”); Sublett, *supra* note 7, at 605 (“The right of privacy in the United States . . . has developed through case law applying various principles of the Constitution. The right of privacy has come to encompass basic decisions concerning the family unit such as procreation and . . . the right not to create life.”).

<sup>65</sup> *See Davis v. Davis*, 842 S.W.2d 588, 598 (Tenn. 1992).

<sup>66</sup> *Id.* at 604.

<sup>67</sup> Henneberg, *supra* note 23.

<sup>68</sup> *Szafranski v. Dunston*, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013).

<sup>69</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (quoting Coleman, *supra* note 36, at 81).

<sup>70</sup> *Szafranski*, 993 N.E.2d at 511; *see In re Witten*, 672 N.W.2d at 777–78.



when a couple is unable to agree to the method of disposition, the most rational solution is to keep embryos as they are, which generally means frozen in storage.<sup>71</sup> According to proponents of the contemporaneous mutual consent approach, other possible disposition decisions apart from continued preservation are final and irrevocable, and so delaying a hastened decision “makes it possible for the partners to reach an agreement at a later time.”<sup>72</sup> This notion, however, rests on the assumption that keeping embryos frozen when couples cannot agree does, in fact, promote the possibility that the individuals will eventually reach a more favorable agreement.<sup>73</sup> On the other hand, critics argue that “[i]f the parties could reach an agreement, they would not be in court.”<sup>74</sup> The main rationale for adopting the contemporaneous mutual consent approach is that agreements that in practice eliminate one’s right to decide whether or not to become a biological parent violate public policy.<sup>75</sup>

Unlike the balancing and contemporaneous mutual consent approaches, the advance agreements of the contractual approach, if drafted correctly with the proper guidance, can help ensure that individuals who decide to undergo IVF treatment do so only after full contemplation of all repercussions and the making of a reasoned decision.<sup>76</sup> If agreed to beforehand, couples can “determine the fate of their frozen embryos in a manner that coincides with their beliefs, morals, and feelings.”<sup>77</sup> Prior agreements “leave a clear record memorializing [the] parties’ intent, which . . . allow[s] the parties to rely on them; [thus promoting fairness].”<sup>78</sup> This is especially true when the contract concerns family planning.<sup>79</sup> Lastly, previously thought out and agreed upon contracts ensure that no party must unwillingly embark on parenthood. If a party knows he or she would not like to be a biological parent in the event of separation, that party can proactively choose not to sign away his or her right to avoid parenthood.

Naturally, there are several arguments against using the contractual approach to resolve disposition litigation. A large concern in promoting the

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<sup>71</sup> *In re Witten*, 672 N.W.2d at 778 (quoting Coleman, *supra* note 36, at 110–12).

<sup>72</sup> *Id.* (quoting Coleman, *supra* note 36, at 110–12).

<sup>73</sup> *Reber v. Reiss*, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012).

<sup>74</sup> *Id.* at 1135 n.5.

<sup>75</sup> *See In re Witten*, 672 N.W.2d. at 777.

<sup>76</sup> *See* American Medical Association, AMA Code of Medical Ethics, *Opinion 4.2.5 – Storage & Use of Human Embryos* (adopted June 2016) [hereinafter AMA].

<sup>77</sup> Zizzi, *supra* note 11, at 413.

<sup>78</sup> Amanda West, Note, *Reproductive Freedom or Forced Reproduction: An Analysis of Minnesota Statutory Law Dealing with Parentage of Frozen Embryos After Divorce*, 34 HAMLINE J. PUB. L. & POL’Y 259, 263 (2012).

<sup>79</sup> *See Szafranski v. Dunston*, 993 N.E.2d 502, 515 (Ill. App. Ct. 2013) (where the wife sought treatment to make sure she could have biologically related children given that the chemotherapy would likely render her infertile).

contractual approach is the length, content, and number of informed consent documents that patients must sign.<sup>80</sup> Embryo disposition terms are sometimes in various documents<sup>81</sup> and “present . . . information using highly technical language in densely packed, single-spaced documents, that may not even clearly delineate the different topics.”<sup>82</sup> The nature of such informed consent forms can impede an individual’s ability to make a thought-out and informed decision,<sup>83</sup> especially when couples are emotional.<sup>84</sup> Moreover, disposition forms demand that couples imagine worst-case scenarios.<sup>85</sup> These scenarios focus on future mortality and divorce.<sup>86</sup> As a result, accomplishing serious and careful drafting becomes difficult given that “[i]t puts people . . . in a really awkward position.”<sup>87</sup> Though this should not matter, it is a factor that many critics believe ultimately prevents parties from contracting in a way that would justify adopting the contractual approach in all disputes.<sup>88</sup>

Lastly, a major disadvantage of the contractual approach is that even if couples can fully contemplate every possible future scenario far in advance, their current views of those scenarios should not automatically take precedence over future views of those same scenarios. Critics assert that “individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs.”<sup>89</sup> As such, “‘treating couples’ decisions about the future use of their frozen embryos as binding

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<sup>80</sup> See generally Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57 (2011).

<sup>81</sup> *Id.* at 67 (mentioning documents include those that cover risks and benefits, egg retrieval, etc.).

<sup>82</sup> *Id.* (citing Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 931 (2000) (discusses problems of consent forms and argues for a change in the way consent forms are presented)).

<sup>83</sup> See S. Michael Sharp, *Common Problems with Informed Consent in Clinical Trials*, 5 RES. PRAC. 133, 135 (2004) (identifying poor readability and excessive length as barriers to obtaining informed consent).

<sup>84</sup> See Beatty, *supra* note 15, at 11 (“Despite the existence of a presumptively valid and enforceable agreement as to the custodial and dispositional rights regarding frozen embryos, it may be argued by one of the parties to the agreement that the emotional pressure that the party was under at the time of signing vitiated genuine informed consent.”); *Roman v. Roman*, 193 S.W.3d 40, 52–53 (Tex. App. 2006) (considering whether the wife was “too emotionally upset to give consent”).

<sup>85</sup> See Anne Drapkin Lyerly et al., *Factors That Affect Infertility Patients’ Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623, 1628 (2006).

<sup>86</sup> *Id.*

<sup>87</sup> Roy Strom, *SCOTUS Ends Long Illinois Embryo Battle*, CHI. DAILY L. BULL. (Mar. 2, 2016, 2:25 PM), <https://www.chicagolawbulletin.com/archives/2016/03/02/embryo-03-02-16>.

<sup>88</sup> See Sharp, *supra* note 83, at 135.

<sup>89</sup> *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003) (quoting Coleman, *supra* note 36, at 88–89).

contracts undermines important values about families, reproduction, and the strength of genetic ties.”<sup>90</sup> The “possible lack of true informed consent to support the contract” is also an issue when parties do not contemplate the possibility of certain circumstances but those circumstances come to fruition and the prior agreement still governs.<sup>91</sup>

Irrespective of the above criticisms, on balance, the contractual approach is the soundest means of resolving embryo disposition disputes. Unlike the balancing and contemporaneous mutual consent approaches, the contractual approach attempts to help parties resolve the disposition issue both efficiently and effectively. It not only avoids costly and timely litigation but also preserves resources used to freeze embryos for the right reasons only, not simply because a couple cannot agree.<sup>92</sup> Furthermore, courts have continuously promoted the freedom to privately contract unless the matter is against public policy.<sup>93</sup> The contractual approach is in line with this principle given that it precludes judicial involvement in private family decisions.<sup>94</sup> “[B]y honoring the contract that the parties entered into, the parties are given the power in making these personal decisions while keeping the state from interfering in the matter.”<sup>95</sup>

### III. A PROPOSED LEGAL FRAMEWORK

To reiterate, this Comment will propose model legislation that all courts should adopt in embryos disposition cases. As such, the following discussion articulates a uniform legal framework by considering the advantages and disadvantages of each disposition method in relation to various situations.

#### A. *Situations in Which Adoption of Each Approach is Appropriate*

When parties disagree as to disposition and there is no contract in existence to apply the contractual approach, the balancing of interests approach is the best hope for an appropriate resolution.<sup>96</sup> As such, the

<sup>90</sup> *Id.*

<sup>91</sup> Beatty, *supra* note 15, at 8.

<sup>92</sup> See Zizzi, *supra* note 11, at 400 (“The contractual approach is appealing due to its simplicity . . .”).

<sup>93</sup> See *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[T]he . . . most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties . . . to escape from their obligation on the pretext of public policy, unless it clearly appear[s] that they contravene public right or the public welfare.”).

<sup>94</sup> *Szafranski v. Dunston*, 993 N.E.2d 502, 506 (Ill. App. Ct. 2013); *Kass v. Kass*, 696 N.E.2d 174, 176 (N.Y. 1998).

<sup>95</sup> Zizzi, *supra* note 11, at 400.

<sup>96</sup> See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); see also *infra* Part IV discussing the *Szafranski* holding.

balancing approach should act only as a supplement to the contractual approach, not an approach used on its own. For instance, it should not be the sole approach used by the court in making a judgment, as it was in the Maryland Circuit Court case when a valid contract clearly stated what the parties willingly agreed to previously.<sup>97</sup>

The contractual approach is the only approach appropriately adopted when a contract is in existence and the parties disagree.<sup>98</sup> Though it requires courts to adhere to and strictly uphold an agreed upon contract despite extenuating circumstances, courts should not shy away from applying the contractual approach. It is the only approach that promotes both efficient resolutions of disputes and effective use of embryo preservation resources.

In practice, the adoption of the contemporaneous mutual assent approach should never occur. If a contract between the parties exists and the parties disagree, the contract should govern the dispute and adoption of the contractual approach should take place. On the other hand, if a contract does not exist and the parties disagree, the balancing approach should govern the dispute and a court should weight the compelling interests of both parties. Realistically, if both parties are going to be able to contemporaneously assent in court before a judge, they should be able to do so outside the court. Therefore, adopting the contemporaneous mutual assent approach is neither effective nor efficient. It not only results in costly and timely litigation but also depletes resources used to freeze embryos.<sup>99</sup>

#### B. Szafranski Resolved Using the Proposed Legal Framework

The Illinois Appellate Court's basic approach used to resolve *Szafranski v. Dunston*<sup>100</sup> is consistent with the proposed framework, and, therefore, serves as an example of the efficient and effective nature of the proposed legal framework above. The *Szafranski* court held that when parties disagree in the presence of a contract, the contractual approach governs.<sup>101</sup> As such the court found that the oral agreement between the parties—providing that the plaintiff, Szafranski, would unconditionally donate his sperm for the defendant's unconditional use of the resulting embryos—was valid and completely binding.<sup>102</sup> This resulted in the defendant, Dunston, entitled to sole custody.<sup>103</sup>

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<sup>97</sup> See generally Sublett, *supra* note 7.

<sup>98</sup> See Zizzi, *supra* note 11, at 400 (“The contractual approach is appealing due to its simplicity . . .”).

<sup>99</sup> See *id.*

<sup>100</sup> 34 N.E.3d 1132 (Ill. App. Ct. 2015).

<sup>101</sup> *Id.* at 1162.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1161.

Anticipating an appeal of the decision, the court added that when parties disagree in the absence of a contract, the balancing approach governs.<sup>104</sup> In this case, the court believed that Dunston's desire to have a biological child and the fact she could not without using the embryos (due to infertility), outweighed Szafranski's desire to avoid parenthood.<sup>105</sup> Note, given the above, the court implicitly suggested that the contemporaneous mutual consent approach has no place in the debate when parties disagree and want a final resolution to their dispute.

#### IV. SZAFRANSKI GOT IT WRONG: DEFINING CONTRACTS USED IN THE CONTRACTUAL APPROACH

Dependence on an appropriate contract is vital to the justified use of the contractual approach. As such, refining of what constitutes an appropriate contract in embryo disposition litigation must take place.

##### A. *Relevant Case Facts that Illustrate the Court's Error*

In 2009, Szafranski and Dunston began dating and shortly thereafter in 2010, the doctor diagnosed Dunston with lymphoma.<sup>106</sup> The doctor informed Dunston that her course of treatment could result in infertility.<sup>107</sup> Given her desire to have biological children, she met with a fertility specialist at the Northwestern Medical Faculty Foundation ("Northwestern"), who informed her of the option to create and freeze embryos.<sup>108</sup> After her meeting with the Northwestern specialist, Dunston called Szafranski and told him her options.<sup>109</sup> She was nervous about using an anonymous sperm donor and so asked Szafranski if he would "be willing to provide sperm to make pre-embryos with her."<sup>110</sup> Szafranski agreed to Dunston's request over the phone.<sup>111</sup>

The next day, Szafranski and Dunston met with Northwestern staff.<sup>112</sup> Both parties signed and dated the "Informed Consent for Assisted Reproduction" ("Informed Consent") that explained Northwestern's legal rights and obligations.<sup>113</sup> Along with providing the clinic's legal rights and obligations, it contained a provision applicable to the disposing of preserved

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Szafranski*, 34 N.E.3d at 1137.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1137–38.

<sup>109</sup> *Id.* at 1138.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Szafranski*, 34 N.E.3d at 1138.

<sup>113</sup> *Id.*

embryos:

Because of the possibility of you and/or your partner's separation, divorce, death, or mental incapacitation, it is important, if you choose to cryopreserve your embryos, for you to decide what should be done with any of your cryopreserved embryos that remain in the laboratory in such an eventuality. Since this is a rapidly evolving field, both medically and legally, the clinic cannot guarantee what the available or acceptable avenues for disposition will be at any future date. At the present time, the options are: (1) discarding the cryopreserved embryos, (2) donating the cryopreserved embryos for approved research studies, [or] (3) donating the cryopreserved embryos to another couple in order to attempt pregnancy . . . . No use can be made of these embryos without the consent of both partners (if applicable).<sup>114</sup>

Dunston and Szafranski initialed next to the option to donate the embryos to another couple.<sup>115</sup> After their appointment at Northwestern, Szafranski and Dunston met with an attorney at the recommendation of the clinic.<sup>116</sup> With the attorney, they discussed two possible arrangements: a co-parenting agreement where Szafranski would be, in the very least, financially involved in the child's life, and a sperm donor agreement, where Szafranski would have no obligations and waive his parental rights.<sup>117</sup> Following the meeting, Dunston sent an email to the attorney stating that the couple had decided to go forward with the co-parenting agreement.<sup>118</sup> The attorney prepared this agreement and emailed it to Dunston. Neither party ever signed the emailed agreement.<sup>119</sup>

Shortly after Dunston began chemotherapy, Szafranski ended their relationship.<sup>120</sup> They did not speak in the interim.<sup>121</sup> A couple months later, Szafranski sent Dunston an email expressing his concern in having created the embryos with Dunston and in a second email announced, "that he could not let her use the pre-embryos and that he wanted them to be donated to science or research."<sup>122</sup> At first, Szafranski agreed to sign over the embryos to Dunston but then changed his mind and filed a lawsuit against Dunston to enjoin her from using the embryos.<sup>123</sup> Dunston filed a counterclaim seeking

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1139.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Szafranski*, 34 N.E.3d at 1139.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1140.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1141.

<sup>123</sup> *Id.*

sole custody and control over the pre-embryos.<sup>124</sup>

B. *Relevant Testimony by the Parties Involved*

Szafranski testified that he “understood the Informed Consent as requiring both his and [Dunston]’s approval prior to any use of the pre-embryos.”<sup>125</sup> He also testified that during their meeting with Northwestern, the clinic told him that any use of the pre-embryos would require the consent of both individuals because no marriage bound the parties.<sup>126</sup> He acknowledged that the clinic encouraged he seek an attorney to determine the fate of the embryos in the event of a separation.<sup>127</sup> In spite of the above, he relentlessly asserted that he never agreed to any term that would give Dunston sole control over the disposition of the pre-embryos in the event of their separation.<sup>128</sup> As a matter of fact, he believed that any such term contradicted what the attorney told him his rights would be as a co-parent and what he and Dunston both agreed to in the clinic’s Informed Consent document.<sup>129</sup>

By contrast, Dunston testified that it was her understanding that she and Szafranski “always agreed that he was doing this to help [her] create embryos to have a biological child with no other attachment.”<sup>130</sup> Moreover, “it was her understanding that she and Szafranski would be documenting their wishes through an attorney as opposed to in the Informed Consent.”<sup>131</sup> Furthermore, she asserted that she and Szafranski “agreed that he was donating the sperm for one reason and one reason only, for [her] to have biological children after [her] cancer treatment.”<sup>132</sup> She claimed that “there was really no need to ask for that term to be put into a form” given the nature of their oral agreement and mutual understanding of why she was undergoing IVF.<sup>133</sup> Regarding the email she sent the attorney requesting the co-parenting agreement as opposed to the sperm donation agreement, Dunston testified that she was going through a very stressful time and did not thoroughly review the draft.<sup>134</sup>

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<sup>124</sup> *Szafranski*, 34 N.E.3d at 1136.

<sup>125</sup> *Id.* at 1142.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1142–43.

<sup>130</sup> *Szafranski*, 34 N.E.3d at 1143.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

*C. Appellate Court's Ruling*

Szafranski conceded that he formed an oral contract with Dunston to create embryos.<sup>135</sup> Thus, the court only needed to determine the scope of the agreement between the parties— whether the oral contract was to create embryos or to create babies.<sup>136</sup> “At trial, both [Szafranski] and [Dunston] testified that they never discussed whether [Szafranski’s] consent would be needed to use the pre-embryos” to create offspring.<sup>137</sup> Nonetheless, because Szafranski admitted that it “‘never crossed [his] mind’” to place limitations on Dunston’s use of the pre-embryos,<sup>138</sup> the court determined it was reasonable to infer that he never desired to limit Dunston’s use of the pre-embryos in any way.<sup>139</sup>

Szafranski argued that because the oral agreement was ambiguous and “silent on the issue of whether [Dunston] has an unlimited and unqualified right to use the pre-embryos,” it could not “reflect the parties’ mutual assent or intent to grant [Dunston] such a right.”<sup>140</sup> He argued that “the court should honor the parties’ silence” with respect to creating limitations.<sup>141</sup> The court addressed Szafranski’s arguments by reiterating that the consent form contemplated “‘another agreement between the parties may govern the future disposition of the embryos’” and that “‘Northwestern will abide by any agreement reached between the parties.’”<sup>142</sup> To that end, the court held that “[Dunston and Szafranski’s] previous oral agreement [which took place over the phone,] [was] not contradicted or modified by any language in the Informed Consent” and so was valid and binding.<sup>143</sup>

According to the court, “[t]he Informed Consent merely advised the parties that Northwestern had no legal right to use or dispose of the pre-embryos in any manner that either [Szafranski] or [Dunston] would find objectionable.”<sup>144</sup> Furthermore, “the informed consent agreement was primarily a contract between the couple and the clinic, rather than between the donors themselves.”<sup>145</sup> Since there was no subsequent signed contract following the couple’s execution of the Informed Consent, the oral agreement unconditionally bound Szafranski in the absolute, and so Dunston

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<sup>135</sup> *Id.* at 1148.

<sup>136</sup> *Szafranski*, 34 N.E.3d at 1148.

<sup>137</sup> *Id.* at 1152.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1150.

<sup>141</sup> *Id.*

<sup>142</sup> *Szafranski*, 34 N.E.3d at 1153.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1155.

<sup>145</sup> Beatty, *supra* note 15, at 5.



had sole custody.<sup>146</sup>

D. *Criticism of the Court's Analysis in Szafranski*

1. The Danger in Inferring a Contract Existed

A court must not infer the existence of an agreement without sufficient evidence. By remaining silent on the issue of the embryos' use, Szafranski did not negotiate a contract that gave him the right to later object to their use."<sup>147</sup> In other words, under the facts of the case, which involved a man who provided sperm outside a committed relationship, expressly to help a woman preserve her ability to have children in the future, it was reasonable to assume the man consented to the embryos' future use by that woman.<sup>148</sup> One critic, however, has gone so far as to say "[i]t appears that in the absence of a written contract between the couple, Illinois courts will assume that creating an embryo is the same as agreeing to the birth of a child."<sup>149</sup> Despite the actual extent to which the court's inference applies, such assumptions in this context are exceedingly dangerous because parenthood is at stake.<sup>150</sup>

At the heart of this discussion is the idea of an oral agreement. "An oral agreement is binding where there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement."<sup>151</sup> While there was an oral contract between the *Szafranski* parties in regard to creating the embryos for preservation,<sup>152</sup> there was no concrete evidence that suggested Szafranski gave up his right to consent to implantation of the embryos.<sup>153</sup> Szafranski explicitly stated that he would provide Dunston with his sperm so that she could create the embryos and have the option, not the right, to use the embryos to have biological children.<sup>154</sup> It was unclear, at the time that he agreed to the oral contract whether Dunston would, in fact, be infertile after chemotherapy treatment.<sup>155</sup> Creating the embryos was merely a precaution in case the chemotherapy treatment had, in fact, rendered Dunston infertile.<sup>156</sup> For that reason, while it is true that Szafranski and Dunston had

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<sup>146</sup> *Id.*

<sup>147</sup> Strom, *supra* note 87.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Szafranski v. Dunston*, 34 N.E.3d 1132, 1147 (Ill. App. Ct. 2015) (citing *Bruzas v. Richardson*, 945 N.E.2d 1208 (Ill. App. Ct. 2011)).

<sup>152</sup> *Id.* at 1148.

<sup>153</sup> *See id.* at 1138, 1150.

<sup>154</sup> *Id.* at 1138 (stating he would be willing to make pre-embryos with her); *see also id.* at 1142.

<sup>155</sup> *Id.* at 1137–38.

<sup>156</sup> *Id.*

a meeting of the minds as to the creation of embryos, there was no meeting of the minds over the eventual implantation of embryos.<sup>157</sup> Though Szafranski himself admitted that placing limitations on Dunston's "use of the pre-embryos 'never crossed [his] mind,'" that does not mean there was a meeting of the minds as to that issue.<sup>158</sup> The silence and ambiguity surrounding any limitations should have encouraged the court, like others before it, to lean in favor of the individual attempting to avoid parenthood.<sup>159</sup>

## 2. The Danger in Relying on an Oral Agreement as a Contract

An additional criticism of *Szafranski* involves the court's reliance on an oral agreement.<sup>160</sup> The contract the court relied upon was the oral agreement made between the parties over the phone, not the contract made via the Informed Consent.<sup>161</sup> In fact, the *Szafranski* court was the first to use an oral contract as a means of adopting the contractual approach in a disposition suit.<sup>162</sup> The majority of cases that adopted the contractual approach upheld written contracts—specifically informed consent documents—and considered those to be the disposition agreements that bound the parties in dispute.<sup>163</sup> By contrast, the *Szafranski* court stated that the Informed Consent was "a contract between the couple and the clinic, rather than between the donors themselves."<sup>164</sup> There was no rational reason for the *Szafranski* court to rely on the ambiguous oral contract between the parties when no other court had done so in the presence of an informed consent document.<sup>165</sup>

Moreover, it appears that what the court believed were the terms of the oral contract directly contradicted not only the signed Informed Consent that required both parties to consent to usage of the embryos but also the later actions of both parties.<sup>166</sup> For instance, if "Northwestern had no legal right

<sup>157</sup> See *Szafranski*, 34 N.E.3d at 1138, 1150.

<sup>158</sup> *Id.* at 1152.

<sup>159</sup> See *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

<sup>160</sup> Beatty, *supra* note 15, at 5.

<sup>161</sup> *Id.*; *Szafranski*, 34 N.E.3d at 1153.

<sup>162</sup> See *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998); *Dahl v. Angle*, 194 P.3d 834, 836 (Or. Ct. App. 2008); *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261, 268 (Wash. 2002).

<sup>163</sup> See *Kass*, 696 N.E.2d at 182 (upholding a provision in a cryopreservation agreement within the informed consent documents); *Dahl*, 194 P.3d at 836 (upholding a provision in an Embryology Laboratory Specimen Storage Agreement which the parties signed); *Roman*, 193 S.W.3d at 54 (upholding a provision in a clinic consent form); *Litowitz*, 48 P.3d at 268 (upholding a provision in a cryopreservation contract).

<sup>164</sup> Beatty, *supra* note 15, at 5; *Szafranski*, 34 N.E.3d at 1153.

<sup>165</sup> See *Kass*, 696 N.E.2d at 182; *Dahl*, 194 P.3d at 836; *Roman*, 193 S.W.3d at 54; *Litowitz*, 48 P.3d at 268.

<sup>166</sup> See *Szafranski*, 34 N.E.3d at 1139, 1142 (Dunston sent an email to the attorney stating the couple decided to proceed with the co-parenting agreement. Szafranski testified, to which

to use or dispose of the pre-embryos in any manner that either [Szafranski] or [Dunston] would find objectionable,”<sup>167</sup> one party cannot decide to use the embryos without the other’s consent. Northwestern is the entity that would have to implant the embryos, and the above suggests the clinic cannot legally do so without the consent of both parties. As such, the court erred in not considering the consent form as part of the contract between Dunston and Szafranski. Moreover, the drafting of the co-parenting agreement by an attorney also sheds light on the fact that Szafranski intended to retain the opportunity to have input in the embryo’s possible fruition.<sup>168</sup> Though neither party signed the contract, it is of the utmost importance that Dunston, who knew it would give Szafranski authority over the disposition of the embryos, requested it.<sup>169</sup>

### 3. The Danger in Uncertainty as to Binding Agreements

*Szafranski* single-handedly “creat[ed] uncertainty about what types of agreements between couples themselves and between couples and their fertility providers will be recognized as binding.”<sup>170</sup> Dunston and Szafranski signed a medical consent form provided by the fertility clinic which stated, “No use can be made of these embryos without the consent of both partners (if applicable).”<sup>171</sup> The court ruled that the consent form did not modify the oral contract, which explicitly included a provision requiring both parties’ consent.<sup>172</sup> This is ““very dangerous for fertility clinics because it’s no longer clear that the contracts [the clinic requires] people [to] sign are meaningful at all.””<sup>173</sup> It was not appropriate for the *Szafranski* court to use the oral contract as its basis for adopting the contractual approach. The court should holistically consider any agreement between the parties considering all the evidence available and not simply based on a single oral contract made over the phone. Doing so would have made it clear that Szafranski did, in fact, preserve his right to consent to the fate of the embryos in the Informed Consent.

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the clinic confirmed, that the Informed Consent required both his and Dunston’s approval before use of the pre-embryos.).

<sup>167</sup> *Id.* at 1155.

<sup>168</sup> *Id.* at 1139.

<sup>169</sup> *Id.*

<sup>170</sup> *Supreme Court Refuses to Hear Illinois Disputed Embryos Case*, ALLIANCE FOR FERTILITY PRESERVATION: ALLIANCE BLOG (Mar. 8, 2016), <http://www.allianceforfertilitypreservation.org/blog/supreme-court-refuses-to-hear-illinois-disputed-embryos-case>.

<sup>171</sup> *Szafranski*, 34 N.E.3d at 1135.

<sup>172</sup> *See id.* at 1142, 1154, 1156.

<sup>173</sup> Strom, *supra* note 87.

V. PROACTIVE MEASURES ARE KEY AS A MEANS OF PREVENTING  
OUTCOMES LIKE *SZAFRANSKI*

Avoiding cases like *Szafranski* is easy, but it is the fertility clinic's responsibility to better prepare patients for the potential consequences of its services. The best way to approach this issue is to take the problem out of the court's hands. This involves being "proactive and resolv[ing] this issue by enacting legislation."<sup>174</sup> Advance directives via written agreements that anticipate "possible contingencies and . . . specify [patient] wishes in writing"<sup>175</sup> not only "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision [but] also provide the certainty needed for effective operation of [IVF] programs."<sup>176</sup> As a matter of public policy, states should enact legislation that requires fertility clinics to be proactive. Some states have already taken it upon themselves to do just that.

A. *Examples of Enacted Legislative Approaches to Disposition  
Agreements*

In Florida, IVF legislation states that:

all of the decision-making authority concerning the disposition of the frozen embryos in the hands of the couple donating the sperm and eggs by stating that a "commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."<sup>177</sup>

The Florida statute also notes that "[a]bsent a written agreement, decision-making authority regarding the disposition of the preembryos reside jointly with the commissioning couple."<sup>178</sup> As such, when there is a contract present and the parties disagree, Florida requires courts to abide by the terms of the contract.<sup>179</sup> On the other hand, when there is no contract to depend on, Florida adopts the contemporaneous mutual assent approach.<sup>180</sup> The statute, however, stops there.

California law requires that the "health care provider delivering fertility treatment . . . provide his or her patient with timely, relevant, and appropriate

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<sup>174</sup> See Zizzi, *supra* note 11, at 412.

<sup>175</sup> Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) (citations omitted).

<sup>176</sup> *Id.*

<sup>177</sup> See Zizzi, *supra* note 11, at 410 (quoting FLA. STAT. § 742.17 (2005)).

<sup>178</sup> FLA. STAT. § 742.17(2).

<sup>179</sup> See generally *id.*

<sup>180</sup> See *id.*

information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.”<sup>181</sup> Moreover, the statute mandates that the “health care provider . . . provide a form to . . . [the party or parties involved] that sets forth advanced written directives regarding the disposition of embryos.”<sup>182</sup> Finally, California law provides that all involved parties in disposition decisions must agree upon one of the directives for the disposition.<sup>183</sup> If the party or parties involved would like to choose another option for disposition that is not on the enumerated list, the couple or patient must “clearly state” the alternative option for disposition.<sup>184</sup>

While Florida’s statute is effective in implementing a uniform legal framework for courts to follow, any legislation, if it is to in fact make a difference, should be more similar to California’s statute.

B. *Proposed Model Code: Elements Defined and Implications Considered*

The purpose of this model code is to ensure that patients of IVF go into treatment with properly drafted contracts to effectively keep disposition litigation out of the courts. As a preliminary matter, the contract should include a signature, date, and plain language.<sup>185</sup>

1. Thorough Review of Agreement Terms and Stressing Their Binding Nature

To begin, fertility clinics must go over each and every element of the agreement with the couple seeking in vitro fertilization. The length and number of consent forms completed before IVF treatment, as well as the substance and technicality of the language in those forms, should not be a reason to dismiss terms in a contract. “Patients may regard these forms as little more than a ritual to access treatment . . . [or] perceive that these forms exist to protect doctors rather than to contribute to a meaningful, patient-protective educational interaction.”<sup>186</sup> To counter this, clinical personnel must ensure parties thoroughly read all documents presented and ask questions if they do not understand the technical language read.<sup>187</sup> Clinical

<sup>181</sup> CAL. HEALTH & SAFETY CODE § 125315(a) (2003).

<sup>182</sup> *Id.* § 125315(b).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> Jody L. Madeira & Barbara Andraka-Christou, *Paper Trails, Trailing Behind: Improving Informed Consent to IVF Through Multimedia Applications*, 3 J. L. & BIOSCIENCES 2, 3 (2016).

<sup>187</sup> *Id.* at 22–24 (discussing informed consent interaction and finding personal conversations are more helpful to patients in understanding and clarifying the terms of the

personnel must sign off on thoroughly reviewing the terms with the patients. This will also make clinical personnel liable when essential terms of an embryo disposition contract are missing or patients claim they did not know of or did not understand a term they agreed to according to the contract. Requiring such a signature will make the thorough review of the contract a fundamental requirement taken seriously rather than it being considered a trivial formality.

If patients intentionally choose to leave a document unexamined, it should not be up to the court to remedy the situation and determine ambiguous or absent terms.<sup>188</sup> Though informed consent documents provide fertility clinics with legal protection,<sup>189</sup> such consent forms are also for the benefit of the patients themselves.<sup>190</sup> In sum, these forms act as a precautionary and preventative tool so courts do not have to involve themselves in every and all IVF disputes.

## 2. Agreeing to Disposition Terms Prior to IVF Procedure

Participants in IVF treatment must execute a binding agreement prior to embryo creation that covers the use and disposition of the embryos in case of divorce, illness, incapacity or death of one or both parents, or other change of circumstances including but not limited to separation or estrangement.<sup>191</sup> The agreement ought to state explicitly whether an intended parent may use the embryos in the event of divorce or other circumstances.<sup>192</sup> Also, the agreement ought to contain a statement identifying which of the disposition methods are impermissible under applicable law.<sup>193</sup> For example, some laws prohibit embryo donation for certain types of research, and progenitors must know this.<sup>194</sup> If all parties correctly execute these precautionary steps, a party to an embryo disposition agreement cannot be permitted to later withdraw consent to the terms and prohibit the use of the embryos to initiate a pregnancy. Allowing revocation by either party down the line would render

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consent than simply providing patients with written documents).

<sup>188</sup> See Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1267 (1993) (citations omitted) (“[T]raditionally, there has been a so-called duty to read, which binds those who sign or accept a contract to the written terms even if they did not read or understand its content.”).

<sup>189</sup> See Steven B. Dowd, *The Legal, Ethical and Therapeutic Advantage of Informed Consent*, 24 J. NUCLEAR MED. TECH. 129, 129 (1996) (“Obtaining consent from patients . . . provide[s] legal protection in . . . malpractice cases.”).

<sup>190</sup> See *id.* (discussing that in consent forms patients are educated about risks, benefits, and treatment alternatives).

<sup>191</sup> See, e.g., AMA, *supra* note 76.

<sup>192</sup> See, e.g., *id.*

<sup>193</sup> See, e.g., *id.*

<sup>194</sup> Anne Drapkin Lyerly & Ruth R. Faden, *Willingness to Donate Frozen Embryos for Stem Cell Research*, 317 SCI. 46–47 (2007).

any signed agreement meaningless.

In fact, requiring detailed and complete agreements made prior to IVF treatment would work a benefit to society. Taking the production of embryos more seriously may indirectly limit the rapidly increasing number of embryos created and frozen.<sup>195</sup> “It has been estimated that there are 500,000 spare embryos frozen with an additional 20,000 embryos added yearly.”<sup>196</sup> Some remain frozen indefinitely.<sup>197</sup> Agreements specifically delineating methods of disposition will ensure embryos kept in cryopreservation are not there for eternity.

### 3. Imagining Worst-Case Scenarios and an Effective Way of Doing So

Participants are more likely to take the production of embryos more seriously once they know the contracts they are signing are complete and binding. For example, imagining worst-case scenarios together and making decisions as to proper disposition if they occur fosters mutual and peaceful agreement. An agreement as to disposition should not be an issue for individuals prepared to bring life into the world. If individuals believe that imagining worst-case scenarios puts them in an awkward position,<sup>198</sup> courts should not remedy the situation and parties should deal with the consequences themselves.

Correctly drafting advance agreements is only possible through assistance by attorneys who have dealt with couples in similar situations and have experience managing the concerns and desires of couples engaged in IVF. Though it may be a radical requisite, fertility clinics should require couples to consult with an experienced reproduction law attorney before the clinics can sign off on informed consent documents. The attorney can be one of the participants’ choosing or one on staff at the clinic. Either way, before a clinic can go forward with treatment, the attorney must make sure all contracts are as encompassing as they can be in the situation. Patients must fully contemplate all possible scenarios that may arise after treatment. An attorney can assist the couple in considering potential scenarios and how to contract for the mutual benefit of the parties. More likely than not, this will result in the contractual realization of the couple’s present and future desires, wishes, values, and beliefs. If fertility clinics simply advise patients

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<sup>195</sup> Colleen M. Browne & Brian J. Hynes, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. LEGIS. 97 (1991) (citations omitted) (“As of 1987, there were roughly 4,000 frozen human embryos in existence as compared to only 300 in 1985.”).

<sup>196</sup> Clark, *supra* note 8, at 1.

<sup>197</sup> Beatty, *supra* note 15, at 1.

<sup>198</sup> Strom, *supra* note 87.

to consult with an attorney, many will not and, therefore, they will not obtain the expert analysis that would allow them to truly consider all possible scenarios and create a properly drafted contract.

Critics may find it inappropriate to require attorneys to advise patients, specifically because the clinic or the patient would bear the cost of doing so. These critics, however, must understand that this requirement is a necessary means to an end. IVF procedure is a privilege with heightened responsibility. Moreover, some may find it inefficient to require an attorney because of the potential for conflicting interests between the parties. In those cases, the parties must use separate attorneys to represent their interests in the final contract. As such, fertility clinics should have multiple experienced reproductive attorneys on site or at their disposal.

#### 4. Using Standardized Forms Correctly and Restricting Supplemental Contracts

Another important practice in IVF clinics is the modification of standardized informed consent forms. Though standardized forms are the best way to ensure the inclusion and clear explanation of all the major options, parties should be free to modify the standardized form. Doing so largely eliminates the possibility of clinics not properly communicating the parties' intentions with respect to disposition decision. There are many other possibilities couples can consider not typically mentioned in standardized forms.<sup>199</sup> Such possibilities include "dividing the remaining embryos between the parties; allowing for one party to use the embryos, but specifying that the ex-spouse not be considered a legal parent under that situation, or specifying that parental rights would flow from post-dissolution use of any embryos."<sup>200</sup> Many couples would be unaware of their possible options if not properly advised. Thus, the entire contract presented to the couple by the clinic should be largely individualized even if it initially begins as a standardized contract. Its creation should imitate the creation of a deposition or affidavit as opposed to how an employee fills out a job application or a patient fills out a medical form.

Additionally, any other contracts, regardless of nature, should not be able to supplement informed consent forms as in *Szafranski*. Supplemental contracts, even if drafted by attorneys, only complicate the fertility clinic's ability to properly set forth the agreed upon terms of the contract. Further, if the proper drafting of the original agreement between the parties takes place, there should be no need for supplemental agreements. As such, embedding all disposition agreements in the clinic's informed consent form

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<sup>199</sup> Forman, *supra* note 80, at 78.

<sup>200</sup> *Id.*



both increases efficiency and eliminates questions regarding the types of agreements recognized as binding. It seems most practical to give the clinic the sole responsibility of finalizing a valid and binding disposition contract. After all, the clinic is the first to sit with the patients, conducts the IVF procedure, and later stores the embryos. Having a single source of concrete guidance as to the disposal of the embryos will also save the clinics, as well as patients, time and money when it comes to disputes.

#### 5. The Overall Benefit

A model code will not always create a perfect contract; however, mandating the creation of complete and integrated binding agreements before any procedure takes place is a large step in the right direction. In the end, the goal is to better prepare couples for what may lie ahead if they chose to undergo IVF treatment. Thus, even if a model code avoids a small amount of costly litigation for couples, it is a great victory for the regulation of the IVF industry. There will be no need for a court to decide ambiguities like in *Szafranski*.<sup>201</sup> The use of seasoned reproductive and family law attorneys early on will likely guarantee that no couple will ever enter into an agreement that contains determinative ambiguities detrimental to the parties. For the most part, this framework will also do away with the need to balance competing interests. Parties must know from the first instance that their agreement will govern regardless of changing desires and should add any provisions they feel necessary to protect themselves.

### VI. CONCLUSION

Complete contractual agreements made before the commencement of IVF procedures truly capture the intentions of the parties at the time of embryo creation. Ultimately, courts should uphold already contemplated terms, rather than trying to decipher parties' changed intentions. In emotional situations, there must be some concrete guidance as to appropriate action without judicial intervention. Furthermore, if there is no incentive for patients to truly consider the risks and benefits of undergoing IVF treatment at the onset or if parties can freely change their mind and file lawsuits to enforce their new wishes, couples will certainly take less care in making these important initial decisions. A legal framework is necessary to address disposition disputes in the fertility industry because it is the only hope in giving more structure to the disposition of embryos and provide courts with an ability to approach issues systematically. This, in turn, will benefit all IVF patients, as it would have in *Szafranski*, by helping society avoid forced parenthood and other issues that emerge.

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<sup>201</sup> See *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015).