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A New Era of Family Planning: The Legal Concern with Frozen Embryo Disposition

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INTRODUCTION

Couples starting a family often do not contemplate the possibility of separation or divorce. For couples who use assisted reproductive technology (“ART”), separation and divorce impose additional challenges related to the fate of their frozen gametes. Separation and divorce present a particularly difficult issue in circumstances where a couple has produced embryos. When a couple creates embryos together, thus intertwining their genetic material, questions arise regarding the disposition of the frozen embryos if or when a couple’s relationship dissolves.

If a couple achieves pregnancy through ART and has remaining embryos following the pregnancy, the couple must engage in “the disposition decision” to determine what to do with the embryos that were not used.¹ Generally, couples who must make decisions regarding the disposition of their unused embryos can choose from discarding the embryos, donating the embryos for research, or donating the embryos to another couple undergoing fertility treatment.² Couples can even decide whether each party will jointly have authority to choose what happens to the remaining embryos or whether control will be given to only one party to determine the disposition of the unused embryos.³ A couple may reach a mutual agreement as to the disposition of embryos when they are initially undergoing ART treatment. However, if the couple decides to separate or divorce after stressful or unsuccessful fertility treatments,⁴ the former couple may no

¹ *Frozen Embryos and the “Disposition Decision,”* CHARLOTTE LOZIER INST., July 16, 2018, <https://lozierinstitute.org/frozen-embryos-and-the-disposition-decision/>.

² A.D. Lyerly et al., *Decisional conflict and the disposition of frozen embryos: implications for informed consent*, 26 HUM. REPROD. 646 (2011), <https://doi.org/10.1093/humrep/deq368>.

³ Yifat Shaltiel, *What happens to frozen embryos if I get a divorce?*, CNY FERTILITY, May 17, 2020, <https://www.cnyfertility.com/do-you-want-to-have-children-with-your-ex/>.

⁴ Trille Kjaer et al., *Divorce or end of cohabitation among Danish women for fertility problems*, 93 ACTA OBSTETRICAE ET GYNECOLOGICA SCANDINAVICA 269, 269-72 (2014), <https://doi.org/10.1111/aogs.12317>. In this Danish study, researchers acknowledged that fertility issues present multidimensional stressors that impose physical, psychological, and social strains on a couple. When fertility treatment is unsuccessful, a couple may experience lower quality of life in addition to high levels of stress, anxiety, and depressive symptoms. Couples who have

longer agree on a disposition decision and consequently bring their dispute to court for adjudication.⁵

Currently, laws governing the disposition of frozen embryos vary from state to state.⁶ Overall, in embryo disposition cases, courts have applied one of the following three approaches: (1) they enforce a contract between the parties; (2) they use a “balance test” to balance the right to procreate versus the right not to procreate; or (3) they require a mutual consent by both parties for the disposition of the embryos.⁷ There are also occasions where a hybrid method that combines elements of the various approaches have been adopted in order to deal with the issue of embryo disposition.⁸ Courts that have adopted this hybrid method have done so after finding that the three traditional, separate approaches can yield inequitable and unworkable results.⁹

Given the flaws that some courts have recognized in the three traditional approaches, perhaps a hybrid approach should be considered by more jurisdictions when addressing how to handle frozen embryos when the relationship ends between the embryos’ progenitors. To support this position, Part I of this paper will discuss the technology of embryo cryopreservation as this is the impetus for frozen embryo disputes. Part II will examine the dilemma with embryo

fertility issues may also experience sexual and marital distress. The study followed nearly fifty thousand women undergoing fertility treatment with the primary outcome of interest being whether at the end of treatment, the women were divorced, separated, or bore a child. The results of the study showed that while stress of fertility treatments did not specifically increase the rate of divorce, nearly thirty percent of the women in the study were either separated or divorced by the end of their follow-up period.

⁵ See Maura Dolan, *Divorced couple’s frozen embryos must be ‘thawed and discarded,’ judge rules*, L.A. TIMES, Nov. 18, 2015, <https://www.latimes.com/local/lanow/la-me-ln-frozen-embryos-20151118-story.html>. Dr. Mimi C. Lee and her ex-husband, Stephen Findley, signed a consent form provided by their fertility clinic which stated that the then-couple’s embryos should be destroyed if they divorced. After the former couple divorced, Findley wanted the embryos destroyed because he did not want a child to tie him to Lee. Meanwhile, Lee changed her mind and wanted to keep the embryos, stating that they were her only chance to have a child because of her age and prior treatment for breast cancer. The former couple brought their dispute to the San Francisco County Superior Court where a judge ruled that the frozen embryos must be thawed and discarded per the signed consent form.

⁶ *Frozen Embryos: The Law at a Crossroads*, WALTHER BENNETT MAYO HONEYCUTT, P.C. BLOG, <https://www.wbmhlaw.com/2020/02/25/frozen-embryos-the-law-at-a-crossroads/> (last visited Oct. 24, 2021).

⁷ Shaltiel, *supra* note 3.

⁸ Derek M. Stikeleather, *Modern Family Law: Who Gets the Frozen Pre-Embryos?*, MD. APP. BLOG, May 13, 2021, <https://mdappblog.com/2021/05/13/modern-family-law-who-gets-the-frozen-pre-embryos/>.

⁹ *Id.*

cryopreservation and the reason this ART practice has resulted in such tenuous disputes throughout the years. Part III will explore the current legal approaches to frozen embryo disposition, with Part IV tackling why one approach – the hybrid approach – should be adopted by jurisdictions when handling these disputes.

I. EMBRYO CRYOPRESERVATION TECHNOLOGY

The first successful pregnancy resulting from freezing a healthy embryo took place in the 1980s.¹⁰ Since then, many people have gone on to freeze embryos and use them later in their journey to build a family.¹¹ Creating a suitable embryo that might later be frozen demands an involved process on the part of the individuals who contribute gametes to create the embryo.

A. *Egg Retrieval Process*

The process of creating a suitable embryo for freezing or implantation begins with harvesting eggs to be fertilized. A woman who plans to use her own eggs to conceive or a woman who seeks to donate eggs begins this process by taking synthetic hormones to stimulate her ovaries to produce multiple eggs, rather than the single egg that is typically developed every month.¹² During this phase, women are routinely monitored to measure their response to ovarian-stimulation medications and the development of follicles, which are fluid-filled sacs where eggs mature.¹³ When the follicles are ready for egg retrieval, a woman undergoes a procedure performed under sedation to remove the egg from the follicle for harvesting.¹⁴ Once the egg harvesting process is

¹⁰ *First Baby Born of Frozen Embryo*, N.Y. TIMES, Apr. 11, 1984, <https://www.nytimes.com/1984/04/11/us/first-baby-born-of-frozen-embryo.html>. Zoe Leyland was the world's first baby produced from a frozen embryo. Zoe's birth resulted after her biological mother's egg was fertilized with her biological father's sperm in a laboratory. The fertilized embryo was frozen for two months before being implanted in Zoe's mother's uterus where the embryo developed normally throughout gestation.

¹¹ Jon Johnson, *Embryo freezing: What you need to know*, MED. NEWS TODAY, Mar. 13, 2019, <https://www.medicalnewstoday.com/articles/314662>.

¹² *Egg Freezing*, MAYO CLINIC, Apr. 23, 2021, <https://www.mayoclinic.org/tests-procedures/egg-freezing/about/pac-20384556>.

¹³ *Id.*

¹⁴ *Id.*

completed, some hopeful mothers will choose to freeze their eggs while others will choose to fertilize the egg in order to create a suitable embryo.

B. Egg Fertilization

For individuals and couples who choose to use harvested eggs immediately to create embryos, fertilization of the eggs can be accomplished in several ways: through in vitro fertilization (“IVF”), intracytoplasmic sperm injection (“ICSI”), gamete intrafallopian transfer (“GIFT”), or zygote intrafallopian transfer (“ZIFT”).¹⁵ IVF is the most effective form of ART and thus, most commonly used by individuals and couples trying to become pregnant.¹⁶ During IVF, shortly before egg retrieval, a semen sample is collected.¹⁷ A man’s sperm and a woman’s eggs are combined outside of the body in a laboratory dish for fertilization to take place.¹⁸ The fertilized eggs are allowed to develop for three to five days in the laboratory dish within a controlled environment before one or more of the fertilized eggs, now called embryos, are transferred into a woman’s uterus.¹⁹

C. Embryo Freezing

¹⁵ *Egg Fertilization and Embryo Transfer*, STAN. HEALTH CARE, <https://stanfordhealthcare.org/medical-treatments/a/assisted-reproductive-technologies/procedures/fertilization-transfer.html> (last visited Oct. 24, 2021). ICSI involves a single live sperm being injected directly into the center of a woman’s egg for fertilization to occur. Typically, this technique is used for couples with severe male factor infertility or for couples who have already had unsuccessful attempts at fertilization through IVF. The GIFT process has fertilization take place inside a woman’s body by having eggs and sperm mixed together and transferred into the women’s fallopian tube. This procedure therefore does not lend itself to producing embryos in the laboratory that can later be frozen. In the ZIFT method, egg and sperm are mixed in a laboratory dish for fertilization to occur. Twenty-four hours after this has taken place, the fertilized eggs, now called zygotes, are transferred into a woman’s fallopian tube to continue development into an embryo.

¹⁶ *In Vitro Fertilization (IVF)*, MAYO CLINIC, Sept. 10, 2021, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

¹⁷ *Egg Fertilization and Embryo Transfer*, *supra* note 15.

¹⁸ *In Vitro Fertilization (IVF): What Are the Risks?*, AM. SOC’Y REPROD. MED., <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/in-vitro-fertilization-ivf-what-are-the-risks/> (last visited Sept. 29, 2021).

¹⁹ *Egg Fertilization and Embryo Transfer*, *supra* note 15.

If fertilization is successful, an embryo is formed.²⁰ At this point, a couple may choose a suitable embryo to be implanted and result in a pregnancy or choose a suitable embryo to be frozen and preserved for later use.²¹ When couples decide to freeze embryos that they have created, the embryos are monitored in a laboratory dish for five to seven days.²² During this monitoring process, the embryos are graded to determine the ones most likely to grow successfully when implanted later.²³ Embryos that are highly graded may undergo cryopreservation through a process called vitrification.²⁴

There has been a shift to vitrification from the slow freezing process that was previously used to preserve embryos.²⁵ In vitrification, embryos are exposed to cryoprotectants at high concentrations in order to allow for rapid dehydration of the cells.²⁶ The embryos are then loaded into small storage devices that facilitate the rapid cooling of the embryos with liquid nitrogen.²⁷ This rapid cooling rate in combination with the use of high concentrations of cryoprotectants allows the embryos placed into their small storage devices to turn into glass-like substances rather than ice.²⁸ By avoiding ice formation, the cryopreserved embryo is protected from damage and may be warmed or “thawed” later when a couple decides that they are ready to use the embryo for

²⁰ *Track the development of a human being from embryo to fetus to newborn*, ENCYC. BRITANNICA, <https://www.britannica.com/video/192622/Human-embryonic-development-birth-fertilization> (last visited Oct. 29, 2021).

²¹ Johnson, *supra* note 11.

²² Mindy Christianson, M.D., *Freezing Embryos*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos> (last visited Sept. 29, 2021).

²³ *Id.*

²⁴ *Id.*

²⁵ *Vitrification*, PAC. FERTILITY CTR., <https://www.pacificfertilitycenter.com/egg-freezing/vitrification> (last visited Oct. 24, 2021).

²⁶ *Id.*

²⁷ Christianson, *supra* note 22.

²⁸ *Vitrification*, *supra* note 25.

uterine implantation.^{29,30} Vitrification technology allows frozen embryos to be stored indefinitely without compromising the quality of the embryo if and when it is used in the future.³¹ This advance in ART technology has the benefit of enabling couples to freeze remaining embryos for later use. It has also resulted in a large number of frozen embryos sitting in storage facilities when there are issues with disposition decisions.³²

II. THE FROZEN EMBRYO DILEMMA

A. *Motivations for Freezing Embryos*

There are a variety of reasons why couples choose to freeze embryos. For some couples, freezing embryos is a means of preserving fertility.³³ Fertility preservation comes up in situations where a couple wishes to delay pregnancy to focus on their respective careers, to experience major life events before settling down with children, or for other personal reasons.³⁴ Frozen embryos also help to preserve fertility when either partner is diagnosed with cancer or otherwise must be subjected to fertility-damaging treatment that will likely decrease the success of future natural pregnancy after treatment is completed.³⁵ For these couples, pregnancy through implantation of a

²⁹ *Vitrification*, *supra* note 25.

³⁰ Mojtaba Rezazadeh Valojerdi et al., *Vitrification versus slow freezing gives excellent survival, post warming embryo morphology and pregnancy outcomes for human cleaved embryos*, 26 J. ASSIST. REPROD. GENET. 347, 350-51 (2009), <https://doi.org/10.1007/s10815-009-9318-6>. In this Iranian study, researchers evaluated the efficacy of vitrification and slow freezing for the cryopreservation of embryos with respect to the post-warming survival rate of the embryos, post-warming embryo morphology, and clinical outcomes. Embryos that were cryopreserved by vitrification had a greater rate of post-warming survival, had better retention of intact morphology, and had a greater success rate at clinical implantation and pregnancy in comparison to embryos that were cryopreserved by slow freezing.

³¹ *All about Vitrification*, FERTILITY ASSOC. MEMPHIS, <https://www.fertilitymemphis.com/vitrification/> (last visited Dec. 3, 2021).

³² *See Grants and Funding*, U.S. DEP'T OF HEALTH AND HUM. SERV., Sept. 27, 2019, <https://perma.cc/V2MW-35VE>. The conservative estimate is that there are approximately 620,000 cryopreserved embryos in the United States, which are stored due to the advances of fertility treatments and vitrification technology. In response to this large number of cryopreserved embryos, the Office of Population Affairs under the Department for Health and Human Services developed a program to promote the use of embryo donation as a family building option.

³³ *What is embryo freezing?*, WOMEN & INFANTS HOSP., <https://fertility.womenandinfants.org/treatment/fertility-preservation/embryo-freezing> (last visited Oct. 29, 2021).

³⁴ *Embryo Freezing*, REPROD. SCI. CTR N.J., <https://fertilitynj.com/services/fertility-preservation/embryo-freezing/> (last visited Oct. 29, 2021).

³⁵ *Id.*

frozen embryo may be the only chance they have to become parents to a biological child. Therefore, embryo freezing is an option for many couples who seek to preserve their childbearing opportunity for a future time.

Freezing embryos can also serve an economic benefit to couples. IVF is an expensive process such that undergoing another IVF cycle can be financially burdensome for some couples.³⁶ If a couple freezes embryos, the couple has the option of using one of those frozen embryos for another attempt at pregnancy if a prior IVF cycle was unsuccessful or if the couple would like to have another child.³⁷ All this could be done without having to repeat another full, expensive cycle of IVF if the couple has prepared and saved frozen embryos. Thus, the driving force for freezing embryos can range from the practical to the emotional. These are often the same forces that make disputes especially difficult when a couple separates but still has frozen embryos stored away.

B. Disputes Surrounding Frozen Embryo Disposition

Typically, couples who choose to create embryos and freeze them have high hopes of creating a family together using those embryos. However, as ART rates are on the rise, so are disputes about what to do with remaining frozen embryos if or when couples separate.³⁸ These disputes are neither uncommon nor are they unheard of. Perhaps the most high-profile frozen embryo dispute is that of actress Sofia Vergara and her former fiancé, Nick Loeb.³⁹ Vergara sued

³⁶ Amy Klein, *I.V.F. is Expensive. Here's How to Bring Down the Cost*, N.Y. TIMES, Apr. 18, 2020, <https://www.nytimes.com/article/ivf-treatment-costs-guide.html>. One IVF cycle is considered one egg retrieval and all the embryo transfers that result from that retrieval. Usually, the cost of an IVF cycle averages between \$12,000 to \$17,000. This price does not include the medication needed to stimulate a woman's ovaries to produce multiple eggs. With the medication included, the price tag for an IVF treatment can rise to approximately \$25,000. Additional services such as genetic testing of the embryos and surgical procedures associated with the IVF treatment can further increase the cost of treatment by thousands of dollars.

³⁷ *Embryo Cryopreservation*, CLEVELANDCLINIC, <https://my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation> (last visited Oct. 29, 2021).

³⁸ Jenny Gross & Maria Cramer, *The Latest Issue in Divorces: Who Gets the Embryos?* N.Y. TIMES, Apr. 3, 2021, <https://www.nytimes.com/2021/04/03/health/IVF-frozen-embryo-disputes.html>.

³⁹ *Judge Rules in Sofia Vergara's Favor in Frozen Pre-Embryo Lawsuit*, NBC L.A., Feb. 5, 2021, <https://www.nbclosangeles.com/news/local/sofia-vergara-s-favor-frozen-embryo-lawsuit/2519380/>.

Loeb in February 2016 to prevent him from bringing any of their two frozen embryos to term via surrogate after the couple separated in May 2014.⁴⁰ When a relationship ends between the progenitors of frozen embryos, this is usually the nature of the resulting dispute – one member of the couple wishes to keep the embryos to eventually conceive children while the other does not.⁴¹ The party who does not want to keep the frozen embryos either wants the embryos destroyed or donated.⁴²

In order for an embryo to be frozen, an egg must be fertilized through IVF since this process has fertilization occur outside of a woman's body and allows fertilized eggs to develop in a laboratory-controlled environment for several days.^{43, 44} Before IVF takes place, couples at fertility clinics usually sign a clinic form that specifies what will happen with any embryos in the event of a contingency – such as if the couple separates, divorces, or if one or both of the parties die.⁴⁵ The clinic form options that are available to couples regarding the disposition of embryos are to destroy the embryos, to donate the embryos, or to decide that each party will jointly have authority as to what happens to the embryos or that only one of them will have sole authority as to their disposition.⁴⁶ When a couple signs these forms at the fertility clinic, usually without consulting an attorney, the primary focus of the couple at that moment is to take the next steps to expand their

⁴⁰ *Id.* On January 28, 2021, a Los Angeles Superior Court Judge concluded that the form directive that Vergara and Loeb signed to create their frozen embryos at the ART Reproductive Center in Beverly Hills constituted a valid contract. This agreement provided that one party could not use the “cryopreserved material” to create a child without the written consent of the other person. Therefore, having found that the reproductive center’s form directive was a valid contract, the judge ruled that Vergara and Loeb must each have the written consent of the other if they want to bring either of the embryos to term.

⁴¹ Mark F. Walsh, *Arizona Law Determines Fate of Frozen Embryos in Divorce Cases*, A.B.A. J., Dec. 1, 2018, https://www.abajournal.com/magazine/article/arizona_law_frozen_embryos_divorce.

⁴² *Id.*

⁴³ *Egg Fertilization and Embryo Transfer*, *supra* note 15.

⁴⁴ Christianson, *supra* note 22.

⁴⁵ Shaltiel, *supra* note 3.

⁴⁶ *Id.*

family.⁴⁷ As such, at the point of signing, couples often do not consider the possibility of separation or divorce.⁴⁸

However, if a couple is no longer together after initially signing the clinic forms, the former couple may have changed their minds and no longer have the same intentions regarding the disposition of their frozen embryos as declared in the forms.⁴⁹ As one instructor of reproductive technology law framed it, “No matter how the consent forms are executed, until those embryos are implanted, you have a right to change your mind.”⁵⁰ This is a complication because while one would think the signed fertility clinic forms would be decisive on the outcome of frozen embryo disposition, jurisdictions disagree on whether these documents are enforceable contracts.⁵¹ Some jurisdictions that favor enforcement of signed fertility clinic forms as contracts believe that these signed forms should be presumed valid and enforced between the embryos’ progenitors since this reserves the authority of reproductive choice to the parties who created the embryos.⁵² Conversely, jurisdictions that have refused to enforce signed clinic forms do so if there is ambiguity in the language or execution of the consent form such that the wishes of the progenitors are unclear or cannot be identified.⁵³ This disagreement between jurisdictions has resulted in a number of cases that have troubled courts regarding how to decide embryo disposition when separated or divorced couples have changed their minds about what should happen to their frozen embryos.

III. LEGAL APPROACHES TO FROZEN EMBRYO DISPOSITION

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ K. Aleisha Fetters, *For Couples Doing IVF, Who Owns the Frozen Embryos in the Event of a Breakup?*, WOMEN’S HEALTH, Apr. 22, 2015, <https://www.womenshealthmag.com/life/a19914046/your-rights-to-your-ivf-embryos/>.

⁵¹ *Id.*

⁵² Stacie L. Provencher, *Family Law – States Should Create a Heightened Standard of Review for Contracts that Determine the Disposition of Frozen Embryos in Contested Divorce Cases*, 42 W. New Eng. L. Rev. 295, 301 (2020), https://digitalcommons.law.wne.edu/la_wreview/vol42/iss2/6.

⁵³ Tim Schlesinger, *Embryo Disposition upon Separation or Divorce*, 12 SciTech Law. 22, 24 (2016).

Throughout the years, state courts have wrestled with how to settle disputes over frozen embryos when couples separate or divorce. There is a lack of clarity and cohesion on this issue within the United States such that the rights of progenitors and their frozen embryos depend largely on the state where the suit is filed and that particular state's view of the legal status of frozen embryos.⁵⁴ Traditionally, courts have resolved these disputes by applying one of the following approaches: (1) they enforce a contract between the parties; (2) they use a "balance test" to balance the right to procreate versus the right not to procreate; or (3) they require a mutual consent by both parties for the disposition of the embryos.⁵⁵ In addition to these three strict approaches, other courts have implemented a hybrid method that combines elements of the traditional approaches in order to resolve frozen embryo disposition disputes.⁵⁶

A. Contract Enforcement

When a couple visits a fertility clinic to begin IVF treatment, couples usually sign clinic forms that, in part, are meant to specify what happens to any embryos in the event that a couple is no longer together or if one or both parties die.⁵⁷ In frozen embryo disputes, when couples separate or divorce and subsequently take a different position than what was captured in the signed clinic forms, some jurisdictions will find that the form represents a valid contract and will enforce the form between the feuding parties.

In *Kass v. Kass*, Maureen Kass and Steven Kass underwent several unsuccessful attempts to have a child through IVF.⁵⁸ Prior to their last procedure, Maureen and Steven executed a single, seven-page informed consent document at the John T. Mather Memorial Hospital where the then-

⁵⁴ Shaltiel, *supra* note 3.

⁵⁵ *Id.*

⁵⁶ Stikeleather, *supra* note 8.

⁵⁷ Shaltiel, *supra* note 3.

⁵⁸ *Kass v. Kass*, 663 N.Y.S.2d 581, 583 (N.Y. App. Div. 1997).

couple was enrolled in the Long Island IVF program (“the Program”).⁵⁹ The informed consent document dealt with cryopreservation of any embryos not transferred in Maureen’s sister, who agreed to act as a surrogate for that particular IVF cycle.⁶⁰ The provisions regarding cryopreservation stated that in the event that Maureen and Steven no longer wished to initiate a pregnancy or were unable to make a decision regarding the disposition of the frozen embryos, then the IVF program could examine the frozen embryos for studies and be disposed by the Program for approved research.⁶¹ After another unsuccessful attempt at pregnancy, Maureen and Steven dissolved their marriage.⁶² Maureen went on to renege on the signed informed consent document and indicated that she had changed her mind. Maureen wanted to have sole custody of the five frozen embryos for her own use rather than release the embryos to the Program for research or destruction as stipulated in the informed consent document.⁶³ Meanwhile, Steven opposed the removal of the frozen embryos from cryopreservation and any further attempt by Maureen to achieve pregnancy through the use of the embryos they created together.⁶⁴ The Supreme Court of New York concluded that when there is an agreement regarding disposition of any frozen embryos, that agreement should be presumed valid and should be enforced between the progenitors of the embryos.⁶⁵ Applying this rationale to Maureen and Steven, the Supreme Court of New York held that the execution of the informed consent document and the language used in the document were evidence that the two had indicated a mutual intent regarding the disposition of the frozen embryos, which must be enforced.⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.* at 584.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 584-585.

⁶⁴ *Id.* at 585.

⁶⁵ *Id.* at 587.

⁶⁶ *Id.* at 590.

In scenarios like Maureen’s and Steven’s where a signed fertility informed consent document appears to express the progenitors’ mutual intentions for frozen embryo disposition in the event of some contingency, courts are inclined to enforce those agreements. In fact, enforcing clinic forms as contracts is the prevailing approach and has taken the lead amongst courts that consider frozen embryo disposition.^{67,68,69}

B. Balancing Progenitors’ Interests

Courts that have chosen not to proceed with the contractual approach to frozen embryo disposition have instead turned to a balancing test. In the scenario where the progenitors of embryos have separated or divorced, typically one member of the former couple would like to keep the frozen embryos in order to bear biological children in the future while the other party would like to have the frozen embryos discarded.⁷⁰ In these scenarios, the balancing test is employed as a method to decide between conflicting individual freedoms – particularly, the right to procreate and the right not to procreate.⁷¹

Davis v. Davis first introduced the balancing test approach. Junior Davis and Mary Davis experienced numerous unsuccessful attempts at natural conception and a failed adoption process such that IVF became the then-couple’s only opportunity to have children.⁷² Junior and Mary

⁶⁷ Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms are Not the Answer*, 24 J. AM. ACAD. MATRIMONIAL LAW 57, 66 (2011).

⁶⁸ See also *Roman v. Roman*, 193 S.W.3d 40, 42-55 (Tex. App. 2006) (holding that an embryo agreement in a fertility clinic’s consent form that stated the then-couple’s embryos should be discarded in case of divorce was unambiguous and indicative of a meeting of the minds, and therefore enforced as a valid agreement between the former couple).

⁶⁹ See also *Dahl v. Angle*, 194 P.3d 834, 836-841 (Or. Ct. App. 2008) (finding that a fertility clinic’s “Embryology Laboratory Specimen Agreement” which provided that the then-wife would decide the disposition of the embryos, evidenced the parties’ intent and should be enforced per the ex-wife’s decision upon the couple’s divorce)..

⁷⁰ Walsh, *supra* note 41.

⁷¹ Thomas Kenney, *Unanswered Questions: The Disposition of Frozen Embryos in California*, HANSON CRAWFORD CRUM FAM. LAW GRP. BLOG, 2016, <https://www.hansonflg.com/blog/unanswered-questions-the-disposition-of-frozen-embryos-in-california>.

⁷² *Davis v. Davis*, 842 S.W.2d 588, 592 (Tenn. 1992).

underwent multiple IVF cycles, but none of those cycles resulted in a pregnancy.⁷³ On their last IVF attempt, Junior and Mary decided to freeze the seven embryos they would not be implanting into Mary's uterus because they found this process could offer them a better chance at parenthood – Mary could attempt to become pregnant through later implantation without having to undergo additional rounds of hormone therapy and surgery to harvest eggs as part of IVF.⁷⁴ When Junior and Mary signed up for this process at their fertility clinic, they did not execute a written agreement that specified what would happen to any of the unused frozen embryos in the event of separation or divorce.⁷⁵ After another unsuccessful pregnancy, Junior and Mary divorced and disputed over the disposition of their remaining frozen embryos. Junior wanted the embryos discarded while Mary wanted to have them donated to another couple looking to bear a child.⁷⁶

Since Junior and Mary did not have an agreement regarding the disposition of their frozen embryos in the event of their divorce, the Tennessee Supreme Court looked at each party's individual freedoms in the right to procreate and the right to avoid procreation.⁷⁷ To resolve the parties' conflicting freedoms, the court balanced Junior's and Mary's positions, the significance of their interests, and the relative burdens that would be imposed upon them by different resolutions.⁷⁸ Ultimately, the Supreme Court of Tennessee found that Junior's burden of unwanted parenthood and his opposition to fathering a child that would not live with both parents, outweighed Mary's burden of knowing that her IVF procedures were futile and that the frozen embryos she helped to create would never become children if they were discarded rather than

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 590.

⁷⁶ *Id.*

⁷⁷ *Id.* at 601.

⁷⁸ *Id.* at 603.

donated to another couple.⁷⁹ Thus, the court held that when no prior agreement exists, then the relative interests of the parties in using or not using the frozen embryos must be weighed.⁸⁰

Courts have resorted to the balancing test in scenarios where no cryopreservation provision or agreement was signed or where an agreement could not be determined.⁸¹ The *Davis* decision highlighted three factors to consider when balancing the interests of feuding parties: (1) the positions of the progenitors, (2) the significance of their interests, and (3) the relative burdens that would be imposed by a resolution against each party's wishes.⁸² Although the *Davis* court framed the weighing of these factors as a balancing test, the court in *Davis* and other courts using this method have typically awarded decisional authority over the frozen embryos to the progenitor who does not favor implantation or preservation of the embryos.⁸³ Usually, courts reason that the interest in not becoming a parent outweigh an interest in becoming a parent through implantation of the embryos.⁸⁴ The only recognized exception is if the progenitor who is interested in implantation wishes to use the embryos for himself or herself, and is unable to become a parent

⁷⁹ *Id.* at 603-604. The Tennessee Supreme Court did acknowledge that the balances would have resulted in a closer case if Mary sought to use the frozen embryos herself if she could not achieve motherhood by any other reasonable means. However, the court found that Mary would still have a reasonable opportunity to become a mother through another cycle of IVF or even through adoption.

⁸⁰ *Id.* at 604.

⁸¹ See *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012). Bret Reber and Andrea Reiss underwent IVF to preserve Reiss' ability to conceive a child after she was diagnosed with breast cancer. *Id.* at 1132. Reber and Reiss were able to produce thirteen embryos which were then frozen for Reiss to begin her breast cancer treatments. *Id.* at 1133. Reber and Reiss did not sign a portion of their fertility clinic's consent form that related to frozen embryo disposition in the event of a contingency. *Id.* at 1136. Following Reiss' breast cancer treatment, she and Reber divorced, with Reber developing a relationship with a new woman with whom he had a biological son and with whom he intended to have more children. *Id.* Reiss, however, was childless after the divorce and sought to have all thirteen of the frozen embryos she had created with Reber. *Id.* at 1133. The Pennsylvania Superior Court held that without a frozen embryo disposition agreement, the balancing approach was the most suitable test. *Id.* at 1136. Upon applying the balancing test, the court concluded that since the frozen embryos were Reiss' only opportunity for a chance at genetic parenthood, the balancing of the interests were in favor of Reiss. *Id.* at 1142.

⁸² *Davis*, 842 S.W.2d at 603.

⁸³ Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 413-414 (2005).

⁸⁴ *Id.* at 414.

through any other means.^{85,86,87} Later courts have since incorporated this exception into an expanded, non-exhaustive list of factors to weigh, including: (1) the intended use of the party seeking to preserve the frozen embryos; (2) the physical ability or inability of a party seeking to implant the frozen embryos to have biological children through other methods; (3) the parties' original reasons for pursuing IVF; (4) hardship for the party looking to avoid becoming a genetic parent; (5) either party's bad faith or attempt to use the frozen embryos as leverage in the divorce; and (6) other relevant case-by-case factors.⁸⁸ Given this expansion and additional guidance in the balancing test, this remains a significant approach that courts use when determining frozen embryo disposition cases.⁸⁹

C. Contemporaneous Mutual Consent by Both Parties

Some courts that do not enforce clinic consent forms addressing embryo disposition and do not apply a balancing test, instead require a contemporaneous mutual consent by both parties for the disposition of the embryos. The issue with frozen embryo disposition is that one party's desire as to the fate of the frozen embryos often changes upon separation or divorce such that a clinic consent form may no longer capture their wishes.⁹⁰ Courts that require contemporaneous mutual consent of both parties will usually find that cryopreservation contracts should be presumed

⁸⁵ *Id.*

⁸⁶ *See also Davis*, 842 S.W.2d at 603-604 (acknowledging that the balances would have resulted in a closer case if Mary sought to use the frozen embryos herself if she could not achieve motherhood by any other reasonable means. However, the court found that Mary would still have a reasonable opportunity to become a mother through another cycle of IVF or even through adoption).

⁸⁷ *See also In re Marriage of Rooks*, 429 P.3d 579, 594 (Colo. 2018) (concluding that the relevant interest at stake is the interest in achieving or avoiding genetic parenthood, therefore courts should not consider whether a spouse seeking to use the frozen embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children. The ability to have a biological child and/or be pregnant is a distinct experience from adoption, thus adoption or foster parenting, while available options, does not mean that these options should be given equal weight in a balancing test).

⁸⁸ *Id.* at 593-94.

⁸⁹ Upchurch, *supra* note 83 at 411.

⁹⁰ *See Fetters*, *supra* note 50.

enforceable but will not enforce those agreements in disputes where one of the progenitors has changed their mind.⁹¹

In re Marriage of Witten applied the contemporaneous mutual consent approach. Arthur Witten and Tamera Witten tried to achieve parenthood through IVF when the couple discovered that Tamera was unable to conceive children naturally.⁹² Before beginning the IVF process, Arthur and Tamera signed an informed consent document which included an “Embryo Storage Agreement.”⁹³ The agreement provided that the frozen embryos would be used for transfer, release, or disposition only with the signed approval of both Arthur and Tamera.⁹⁴ When Arthur and Tamera dissolved their marriage, Tamera asked to be awarded custody of their seventeen frozen embryos so that she could eventually bear a biological child.⁹⁵ Meanwhile, Arthur neither wanted Tamera to use their frozen embryos nor did he want them destroyed. Instead, he was willing to have the embryos donated to a couple battling infertility.⁹⁶

The Supreme Court of Iowa found that the agreement’s provision regarding the “release of embryos” only with the signed approval of Arthur and Tamera was broad enough to encompass the decision-making protocol when the parties were no longer married.⁹⁷ The issue became whether this agreement was enforceable when one of the parties changed their mind about the disposition of the frozen embryos.⁹⁸ The Supreme Court of Iowa held that agreements entered into at the time IVF is commenced are enforceable subject to the right of either party to charge their

⁹¹ See Michael T. Flannery, “Rethinking” Embryo Disposition upon Divorce, 29 J. CONTEMP. HEALTHLAW & POL’Y 233, 254-55 (2013).

⁹² *In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 773.

⁹⁷ *Id.*

⁹⁸ *Id.* at 773-74.

mind about embryo disposition up to the point of use or destruction of any frozen embryo.⁹⁹ Therefore, if one or both of the parties change their minds about embryo disposition, the court concluded that contemporaneous mutual consent should be applied resulting in no transfer, release, disposition, or use of frozen embryos unless both donors have agreed and signed an authorization.¹⁰⁰ For Arthur and Tamera, this meant that there could be no use or disposition of the embryos they created together unless the two could reach a new agreement.¹⁰¹

When courts apply the contemporaneous mutual consent approach to frozen embryo disposition cases, it is done with the underlying premise that the decision about the fate of frozen embryos belongs to the couple who contributed gametes to create the embryos.¹⁰² Therefore, “each party [is] entitled to an equal say in how the embryos should be disposed.”¹⁰³ First proposed in 1999, only a few states have since implemented the contemporaneous mutual consent model.¹⁰⁴ In these states, when a former couple is unable to arrive at a new agreement, then the frozen embryos are to be left as they are – in storage.¹⁰⁵

D. Hybrid Approach Implementation

Since the first frozen embryo disposition case of *Davis v. Davis*, the contractual approach, the balancing test, and the contemporaneous mutual consent approach have been the three approaches that courts traditionally turned to when resolving these disputes. As early as 2000, a fourth approach that combined elements of the strict, traditional approaches emerged as another

⁹⁹ *Id.* at 782.

¹⁰⁰ *Id.* at 783.

¹⁰¹ *Id.*

¹⁰² Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN.L. REV. 55, 81 (1999).

¹⁰³ *Id.*

¹⁰⁴ Sarah B. Kirschbaum, *Who Gets the Frozen Embryos During a Divorce? A Case for the Contemporaneous Consent Approach*, 21 N.C. J.L. & Tech. 113, 130-139 (2019). The contemporaneous mutual consent approach has come to fruition in three states: Massachusetts in 2000, Iowa in 2003, and Missouri in 2016.

¹⁰⁵ Coleman, *supra* note 102 at 112.

method to deal with the issue of frozen embryo disposition.¹⁰⁶ The few courts that have adopted a hybrid method have either combined the balancing test with the contemporaneous mutual consent framework¹⁰⁷ or combined the contractual approach with the balancing test.¹⁰⁸

Most recently, the Maryland Court of Special Appeals applied a hybrid contractual-balancing approach to the frozen embryo dispute in *Jocelyn P. v. Joshua P.* Jocelyn, who was diagnosed with primary infertility, underwent IVF with her then-husband, Joshua, to have a child.¹⁰⁹ Before Jocelyn and Joshua began the IVF process, they signed an “Agreement and Informed Consent for In Vitro Fertilization, Intracytoplasmic Sperm Injection, Assisted Hatching and Embryo” form at their fertility clinic.¹¹⁰ The relevant portion of the agreement that addressed the frozen embryos stated:

...the joining of eggs and sperm are subject to disposition in a manner mutually agreed upon by the partners...In the event of a divorce if one of the partners produced the gametes (sperm or eggs) then the producer shall have the sole decision-making authority over the disposition of the embryos.

[...]

I/we (The Couple) understand and agree that if any dispute arises between the two of us regarding disposition of the embryos, [the fertility clinic] is authorized...to refrain from taking any action unless and until otherwise directed by a final judgment of a court of competent jurisdiction or by another agreement signed by both partners.¹¹¹

¹⁰⁶ Stikeleather, *supra* note 8.

¹⁰⁷ Nathan J. Chan, *Don't Put All Your Eggs in One Basket Revisited: How Exactly Does the Infertility Exception Apply to Embryo Disposition Upon Divorce after Reber v. Reiss*, 20 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 49, 60 n. 49 (2018). The court in *J.B. v. M.B.*, decided in 2000, adopted a hybrid of the contemporaneous-agreement and balancing approaches.

¹⁰⁸ 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, 751-767 (2015). In 2013, *Szafanski v. Dunston* emerged as another case employing the hybrid approach to address a frozen embryo disposition dispute. This court followed a hybrid contract and balancing-of-interests approach when it found that the former couple had a valid oral contract and also declared that a contractual analysis in conjunction with a balance-of-interests approach, should be used in circumstances where no contract exists and there is a special interest because the disputed frozen embryos are a party's last chance to procreate.

¹⁰⁹ *Jocelyn P. v. Joshua P.*, 250 A.3d 373, 379 (Md. App. 2021).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 382.

Jocelyn and Joshua produced three embryos through their IVF treatment. The first was implanted but resulted in a miscarriage, the second was implanted and successfully resulted in a pregnancy, and the third was frozen.¹¹² Jocelyn's and Joshua's marriage deteriorated and culminated in divorce proceedings where the two could not reach a settlement on what to do with the frozen embryo they preserved. Jocelyn wanted the frozen embryo to be released to her for potential implantation while Joshua wanted the frozen embryo destroyed or donated to another family.¹¹³

The Maryland Court of Special Appeals held that blending the contractual and balancing approaches would most appropriately protect the interests of the parties involved in a frozen embryo dispute.¹¹⁴ Therefore, a court should first look to the progenitors' preferences. If their wishes cannot be determined, or if there is a dispute, then the prior agreement should be enforced.¹¹⁵ The agreement must manifest the progenitors' actual preferences. Thus, boilerplate language in a form may not qualify as an express agreement between the progenitors as to the disposition of any of their frozen embryos.¹¹⁶ When a contract does not manifest the progenitors' intent, then the balancing test must be employed to determine the progenitors' procreative rights¹¹⁷ and weigh certain non-exhaustive factors including: (1) the intended use of the party seeking to preserve the frozen embryos; (2) the physical ability or inability of a party seeking to implant the frozen embryos to have biological children through other avenues; (3) the parties' original reasons for pursuing IVF; (4) hardship for the party looking to avoid becoming a genetic parent; (5) either party's bad faith or attempt to use the frozen embryos as leverage in the divorce; and (6) other relevant case-by-case factors.¹¹⁸

¹¹² *Id.* at 383.

¹¹³ *Id.* at 383-88.

¹¹⁴ *Id.* at 397-98.

¹¹⁵ *Id.* at 404.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 405.

¹¹⁸ *Id.* at 403.

For Jocelyn and Joshua, this meant that the standard language in their clinic agreement resulted in an ambiguous provision. The agreement stipulated what would happen if the couple divorced and only one of them contributed gametes to the embryo, not what would happen in the event that both partners contributed gametes and later divorced.¹¹⁹ Apart from this language, the court determined that the agreement did not express Jocelyn's and Joshua's actual preferences since the agreement was drafted unilaterally by the clinic and reflected the clinic's policy rather than the then-couple's wishes.¹²⁰ Since the Maryland Court of Special Appeals concluded that the agreement did not express Jocelyn's and Joshua's preferences concerning frozen embryo disposition, the court turned to the balancing test and the six non-exhaustive factors before ultimately vacating the lower court's decision to deny Jocelyn possession of the frozen embryo.¹²¹

Proponents of the hybrid contractual-balancing approach believe that courts should strive to honor both parties' interests in procreational autonomy as evidenced by any existing agreement that expresses the former couple's intent regarding frozen embryo disposition.¹²² This effectively places the fate of the frozen embryos, first and foremost, in "the hands of the[ir] progenitors."¹²³ Then, only if intent cannot be ascertained, are the fate of the frozen embryos left "in the hands of the court" through the balancing of an expanded, non-exhaustive list of the progenitors' interests.¹²⁴

IV. WORKABLE AND EQUITABLE DISPOSITION DECISIONS WITH A HYBRID APPROACH

¹¹⁹ *Id.* at 407.

¹²⁰ *Id.* at 408.

¹²¹ *Id.* at 409.

¹²² *In re Marriage of Rooks*, 429 P.3d at 592 (holding that courts presiding over frozen embryo disposition proceedings should first look to any existing agreement expressing the spouses' intent and honor both parties' interests in procreational autonomy, before balancing the parties' interests in the absence of such an agreement).

¹²³ *Jocelyn P.*, 250 A.3d at 403.

¹²⁴ *Id.*

Frozen embryo disposition cases are challenging for courts since these disputes tend to muddy the areas of traditional divorce, property law, contract law, and individual procreative rights.¹²⁵ While the three traditional methods – the contractual approach, the balancing test, and the contemporaneous mutual consent approach – have been exercised by some courts to resolve these disputes, other courts have recognized that strict adherence to one approach can yield inequitable and unworkable results.¹²⁶ For this reason, those courts have turned to applying a hybrid approach, which is the approach more jurisdictions should adopt to handle frozen embryo disposition cases.

A. *Flaws with the Strict Contractual Approach*

For some, fertility cryopreservation consent forms might appear to be a clear way to settle the matter of frozen embryo disposition. However, opponents of applying a strict contractual approach to these consent forms argue that the circumstances surrounding their execution and the content of the fertility clinic cryopreservation consent forms create uncertainty over their validity, and thus question their value when it comes to resolving frozen embryo disputes.¹²⁷ A strict contractual approach is problematic in the context of frozen embryo disposition because this approach “binds individuals to previous obligations, even if their priorities or values change,”¹²⁸ which is unsurprising for a practice area where patients tend to be emotionally charged.

Fertility patients usually first encounter the issue of embryo disposition when they are given a packet of consent forms to review and sign before beginning IVF treatment.¹²⁹ Usually, the provisions addressing embryo cryopreservation and disposition in the event of contingencies

¹²⁵ Stikeleather, *supra* note 8.

¹²⁶ *Id.*

¹²⁷ Forman, *supra* note 67 at 59.

¹²⁸ *In re Marriage of Witten*, 672 N.W.2d at 777.

¹²⁹ Forman, *supra* note 67 at 67.

are embedded in a larger document that couples are asked to review and sign.¹³⁰ Fertility patients often do this without consulting or without being in the presence of an attorney.¹³¹ Being presented with these dense consent forms can result in information overload, which can compromise patients' ability to make a thoughtful, informed decision in the emotionally charged area of fertility treatment and embryo disposition.¹³²

Apart from the circumstances surrounding a couple signing the fertility clinic cryopreservation consent forms, concerns over the content of the consent forms have also raised questions about this approach's effectiveness in bringing about an equitable result. Commentators who argue that a strict contractual approach is inappropriate to determine frozen embryo disposition find that dispositional agreements embedded in informed consent documents bear both substantive and procedural unconscionability problems.¹³³ With respect to substantive unconscionability, the clinic consent forms addressing frozen embryo disposition tend to be more constraining for women who may no longer be able to have a biological child post-cryopreservation and post-divorce, yet are typically prohibited from post-separation implantation of the embryos.¹³⁴ Therefore, where fertility clinic dispositional agreements unilaterally prevent the use of frozen embryos in the event of separation or divorce, critics of the contractual approach find that those agreements should survive only if generated through an open and fair process, rather than boilerplate recitations.¹³⁵ With respect to procedural unconscionability, the cryopreservation forms that are embedded in larger informed consent documents are usually drafted by the fertility clinic, which offer couples a constricted set of disposition options and presents those options on a

¹³⁰ *Id.*

¹³¹ Shaltiel, *supra* note 3.

¹³² Forman, *supra* note 67 at 67.

¹³³ Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 926-27 (2000).

¹³⁴ *Id.* at 928.

¹³⁵ *Id.*

take-it-or-leave it basis.¹³⁶ As such, the agreements pertaining to frozen embryo dispositions are primarily contracts between the fertility clinic and the couple, rather than an agreement between the couple.¹³⁷ In this way, the consent forms do not necessarily reflect the progenitors' true preferences when a disposition dispute arises after the couple's separation or divorce and courts seek to enforce the signed form under the strict contractual approach.¹³⁸

B. The Concern Using Balancing Tests

Performing a balancing test can be a useful tool for courts to consider the individual interests of progenitors when they cannot reach an agreement on the disposition of their frozen embryos. However, some scholars worry that using a balancing test may yield inconsistent results.¹³⁹ Commentators who oppose the balancing test find that without more guidance, this approach invites courts to make decisions based on the relative weight of one party's interest in seeking procreation against the other party's interest in avoiding procreation.¹⁴⁰ Along those lines, additional concerns regarding the possible inconsistency of the balancing test is that this approach invites judges to impose their own views about a progenitor's desire to become, or to not become, a genetic parent.¹⁴¹ Nevertheless, in the absence of an adequate, valid agreement between the progenitors regarding their frozen embryos' disposition, the balancing test remains as an equitable

¹³⁶ *Id.* at 929.

¹³⁷ *Id.* at 928.

¹³⁸ See *Jocelyn P.*, 250 A.3d at 408 (determining that the fertility clinic form signed by Jocelyn and Joshua did not express their actual preferences since the agreement was drafted unilaterally by the clinic and reflected the clinic's policy rather than the couple's actual wishes).

¹³⁹ Flannery, *supra* note 91 at 266.

¹⁴⁰ Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 558 (2018).

¹⁴¹ *Id.*

method to arrive at a result by taking account of each party's current interests, intentions, and preferences.¹⁴²

C. The Standstill with Contemporaneous Mutual Agreement

There is an understanding that it is reasonable for progenitors to change their minds about frozen embryos upon separation or divorce. These disagreements regarding the disposition of frozen embryos would most easily be settled if the former couple could arrive at a contemporaneous mutual agreement about disposition. However, courts and scholars have argued that this approach is unworkable in frozen embryo disputes, especially in circumstances of divorce since divorce issues that reach courts are precisely because a mutual agreement cannot be reached.¹⁴³ In fact, those who criticize the contemporaneous mutual consent approach point out that the party who wishes to avoid procreation inherently has more power than the party who wishes to procreate using the frozen embryo.¹⁴⁴ This would effectively give one party de facto veto power while the other party's interests go ignored.¹⁴⁵ In practice, the contemporaneous mutual consent approach results in a stalemate with the frozen embryos essentially remaining cryopreserved in storage indefinitely.¹⁴⁶

D. A Hybrid Contractual-Balancing Test Can Achieve More Equitable Outcomes

Courts that have already adopted a hybrid method by combining the contractual approach and balancing test, have done so after determining that each approach on its own is imperfect when

¹⁴² See *Reber*, 42 A.3d at 1133-34 (holding that where there is no agreement governing the disposition of frozen embryos and where there is no chance that the feuding parties would come to a contemporaneous mutual agreement regarding the embryos' disposition, the balancing approach is the most suitable test).

¹⁴³ Stikeleather, *supra* note 8.

¹⁴⁴ Tim Schlesinger, *Disputes Over Frozen Embryos in Family Law Cases – A Defense of Counsel or Contemporaneous Mutual Consent*, 59 FAM. CT. REV. 83, 96 (2021).

¹⁴⁵ See *Jocelyn P.*, 250 A.3d at 408 (rejecting the contemporaneous mutual consent approach as unrealistic and finding that it creates a de facto veto power over the other party by avoiding any resolution until the issue is eventually mooted).

¹⁴⁶ Schlesinger, *supra* note 144.

resolving frozen embryo disputes. When combined, however, the hybrid approach can more closely achieve an equitable outcome. By first engaging in a contractual analysis, the hybrid approach prioritizes the actual preferences of the progenitors if they were appropriately captured in a fertility clinic consent form or through some other agreement. During this step, the hybrid approach demands that courts should take special care to ensure that a document manifests the progenitors' intent. This means that progenitors, and not fertility centers, expressly and affirmatively indicated their choices as to frozen embryo disposition.¹⁴⁷ This stipulation attempts to avoid the contractual flaws concerned with the strict application of the contractual approach. By requiring a finding that the progenitors expressly and affirmatively indicated their disposition decision, this can help support a finding that the progenitors had the opportunity to understand the gravity of their selection and support a finding that there was true informed consent despite the circumstances being one where emotions run high. Furthermore, requiring the progenitors to designate their preferences expressly and affirmatively as to disposition combats concerns inherent in boilerplate clinic forms, and instead provides reassurance that the indicated preferences are truly that of the progenitors.

By reserving the balancing test for scenarios where the parties' intentions were not indicated or were unclear, the hybrid approach endeavors to achieve equity by balancing each party's present interests. Current applications of the hybrid approach have expanded the factors which courts may balance to include: (1) the intended use of the party seeking to preserve the frozen embryos; (2) the physical ability or inability of a party seeking to implant the frozen embryos to have biological children through other avenues; (3) the parties' original reasons for pursuing IVF; (4) hardship for the party looking to avoid becoming a genetic parent; (5) either

¹⁴⁷ *Jocelyn P. v. Joshua P.*, 250 A.3d at 404.

party's bad faith or attempt to use the frozen embryos as leverage in the divorce; and (6) other relevant case-by-case factors.¹⁴⁸ While opponents of the balancing test on its own worry that the approach will result in inconsistent outcomes without more guidance, the hybrid approach does elaborate and provide direction regarding the weighing of factors. For instance, as to the first factor, courts that have adopted the hybrid approach declared that a party whose interest is to become a genetic parent through implantation of the frozen embryos outweighs a party whose interest is to donate the embryos to another couple.¹⁴⁹ Furthermore, as to the second factor, courts are instructed that ordinarily the party wishing to avoid procreation has a weightier interest assuming the other party still has a reasonable possibility of achieving biological parenthood through different means.¹⁵⁰ Otherwise, if a party has no reasonable alternative to bearing a biological child other than using the frozen embryos, this may outweigh the other party's interest.¹⁵¹ Therefore, by engaging in this directed, systematic balancing, courts can determine the fate of frozen embryos while taking into account each party's preferences and motivations.

The hybrid approach is able to structure a workable method to determining frozen embryo disposition by implementing this mix of prioritizing the progenitors' wishes through conducting a contractual analysis and then turning to a study of each progenitor's interest. Not only does a hybrid approach by its nature, harmonize the elements of the earlier, traditional approaches, but it also creates an equitable method to resolving disposition disputes by seeking to award individuals who are unable to have biological children with a greater interest in their frozen embryos when balancing considerations.¹⁵² Therefore, given the hybrid approach's workable and equitable

¹⁴⁸ *Id.* at 403.

¹⁴⁹ *In re Marriage of Rooks*, 429 P.3d at 593.

¹⁵⁰ *Davis*, 842 S.W.2d at 604.

¹⁵¹ *Id.*

¹⁵² Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 198 (2014).

method in deciding frozen embryo disposition cases, it should be considered by more jurisdictions faced with the task of resolving these disputes.

V. CONCLUSION

The majority of courts have been applying one of the three traditional approaches in order to resolve the increasing number of frozen embryo disposition cases,¹⁵³ with the strict contractual approach taking the lead.¹⁵⁴ However, some jurisdictions have adopted a hybrid approach to embryo disposition where they first engage in a contractual analysis to determine if an agreement captures the actual intent and preferences of each party. If not, they then engage in an expanded balancing test to weigh each progenitor's interest. Given this hybrid framework that honors one's contractual intentions as well as one's personal rights,¹⁵⁵ the hybrid contractual-balancing approach should be considered by more jurisdictions as these disputes continue to rise.

In the meantime, there is still currently and may continue to be, lack of clarity and cohesion regarding frozen embryo disputes. Given the current state of affairs in this area of ART and cryopreservation, couples should plan carefully and make a concerted effort to understand their fertility treatment center's consent form regarding any unused embryos.¹⁵⁶ Alternatively, given the weight being placed on agreements made, a couple should consult a reproductive lawyer to draft a tailored contract addressing frozen embryo disposition rather than relying on boilerplate fertility clinic forms.¹⁵⁷ Finally, in addition to creating and freezing embryos that a couple has made together, each party should consider freezing additional gametes separately to independently preserve their fertility in the event the relationship dissolves or issues arise as to the disposition of

¹⁵³ Flannery, *supra* note 91.

¹⁵⁴ Forman, *supra* note 67 at 59.

¹⁵⁵ Marold, *supra* note 152 at 200.

¹⁵⁶ Naomi Cahn, *Who Gets the Frozen Embryos?*, FORBES, Feb. 4, 2020, <https://www.forbes.com/sites/naomicahn/2020/02/04/who-gets-the-frozen-embryos/?sh=7ad9cba06cfd>.

¹⁵⁷ *Id.*

the frozen embryos.¹⁵⁸ These considerations that couples can incorporate into their family planning discussions will best help hopeful parents protect their individual and joint interests when pursuing parenthood through this ART method as well as navigating the evolving legal landscape which it occupies.

¹⁵⁸ *Id.*