His, Hers, or Theirs — Custody, Control, and Contracts: Allocating Decisional Authority Over Frozen Embryos

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INTRODUCTION

On May 7, 1998, the New York Court of Appeals, in a landmark decision, ruled on the legal status of dispositional authority agreements regarding frozen, stored human embryos.[1] Advances in medical technology, especially with regard to in vitro fertilization (IVF), have created medical facts that have far outstripped the development of legal doctrines to address them. Infertility research and reproductive technology have spawned medical miracles that now permit infertile couples to achieve a genetic, biological connection with their offspring through non-coital reproduction.[2]

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[1] *See* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998). *The New York Times*, recognizing the significance of this decision, immediately reported the case. *See* Raymond Hernandez, *Court Blocks Use of Embryos Without Ex-Husband's Consent*, N.Y. TIMES, May 8, 1998, at B3.

[2] For a discussion of the problems created as a result of the dichotomy between medical facts and its status in the law, see generally Lori B. Andrews, *Legal Status of the Embryo*, 32 LOY. L. REV. 357 (1986); Mark Curriden, *Frozen Embryos: New Frontier*, 75 A.B.A. J. 68 (1989); Elisa K. Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67 (1990); John A. Robertson, *Decisional Authority over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285 (1988) [hereinafter Robertson, *Decisional Authority*]; John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986) [hereinafter Robertson, *Embryos, Families*]; John A. Robertson, *In the Beginning: Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990) [hereinafter Robertson, *In the Beginning*]; John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990) [hereinafter Robertson, *Prior Agreements*]; John A. Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donation*, 59 CASE W. RES. L. REV. 1 (1989); Marcia Joy Wurmbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079 (1986); Tanya Feliciano, Note, Davis v. Davis: *What About Future Disputes?*, 26 CONN. L. REV. 305 (1993); Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803 (1992).

The IVF procedure generally begins with hormonal stimulation of a woman's ovaries to produce multiple eggs or ova.[3] Eggs retrieved in this manner are then combined with sperm in a petri dish.[4] At this point fertilization occurs, resulting in a zygote that then begins to divide.[5] Eventually, the zygote or embryo[6] may be transferred to the uterus through a cervical catheter.[7] A successful procedure entails implantation in the uterine lining and a subsequent pregnancy.[8]

Cryopreservation is a technique that allows eggs, removed by laparoscopy or ultrasound needle aspiration, and zygotes to be preserved indefinitely for later attempts at implantation.[9] This technique permits storage of any "unused" products and allows for not only a reduction of physical stress for the female but a significant savings in medical expenses as well. At the same time, however, cryopreservation of the spare embryos creates a fertile source for later disagreements.

The fate of unused, cryopreserved embryos has created much controversy. The process is not controversial when only the eggs intended for immediate implantation are retrieved. In those instances, thorny issues regarding storage and discard policies of unused eggs are generally avoided. Those IVF clinics that choose, however, to take advantage of medical developments and use stored, excess fertilized eggs for subsequent implantation will typically enter into a formal written agreement with the infertile couple.[10] That document recites the relative rights of the biological donors vis a vis the couple and the IVF program. A couple is offered the opportunity to express their joint decision, as a single entity, with regard to the disposition of any unused embryos. Selection is made from a gamut of choices including discard, donation to a childless couple, or donation to the IVF facility for research purposes upon the future occurrence of stated contingencies. Encompassed within the listed events to trigger

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[3] *See* Feliciano, *supra* note 2, at 307.

[4] *See id.*

[5] *See id.*

[6] The term "embryo" is referred to as the point at which "the inner cell mass [of the zygote] reorganizes into two layers that make up the embryonic disc" and has become "well established in the uterine wall." Robertson, *In the Beginning, supra* note 2, at 442.

[7] *See* Feliciano, *supra* note 2, at 308.

[8] *See id.*

[9] *See id.*

[10] *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 176 (N.Y. 1998). The document in the *Kass* case in New York is a fair prototype of such informed consent agreements between an infertile couple and an in vitro fertilization (IVF) program. *See id.*

a couple's selection are death, divorce, refusal to continue with the program, or termination of the agreement.

How does one assess the respective rights of the biological donors and the IVF program? What happens to the stored embryos when either the couple or one party thereof changes the earlier joint decision as expressed in the agreement? Does the potential delay caused by the time gap between fertilization and implantation create an insoluble legal quandary? Who should exercise authority and/or ownership over the embryo? Which institution — the legislature, the courts, or private agreement — is best suited for the resolution of this seemingly insurmountable legal debate?

The New York Court of Appeals addressed these issues in *Kass v. Kass*.[11] For the first time in the state of New York, and possibly the nation, the court clarified two critical issues.[12] First, the court held that a written contract executed between an infertile couple and an IVF facility, is enforceable in a court of law.[13] Second, the court held that the provisions included in such contracts, although intended as an expression of the couple's wishes vis a vis the IVF program, would also govern the couple inter se.[14] The court of appeals arrived at this conclusion despite evidence that the document had never been intended, either at the time of its drafting or at its execution, to govern the couple's actions between one another.[15] Thus, the contract that originally provided the basis for a legal relationship between the couple and the infertility clinic may now also serve to allocate the scope of decision-making between the partners.

Part I of this Article will discuss both the appellate division and the court of appeals decisions in *Kass*. Part II will compare the New York ruling with the decision rendered in the Tennessee case of *Davis v. Davis*.[16] Part III will examine the policy implications of these rulings. Finally, this Article will consider various models for resolution of this ethical issue and will propose that the reasoning of the court of appeals in *Kass* be adopted as the optimum method for resolving disputes between the biological donors, as well as advancing the most equitable results for all concerned parties.

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[11] 696 N.E.2d 174 (N.Y. 1998).

[12] Prior to the *Kass* decision, no jurisdiction has held a contract dispositive of the parties' rights of control over cryopreserved fertilized eggs.

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

[14] *See id.* at 181

[15] *See id.*

[16] 842 S.W.2d 588 (Tenn. 1992).

I. *KASS V. KASS*

Maureen and Steve Kass turned to an IVF program after their efforts at conception through artificial insemination failed.[17] Five embryos, created during the marriage, were being stored in the IVF bank.[18] The Kasses, now divorced, disputed custody of these frozen, stored embryos.[19] Mrs. Kass claimed sole custody for implantation in the belief that the embryos represented her last remaining opportunity for genetic motherhood.[20] Mr. Kass objected to such a transfer of custody and argued that the burden of unwanted fatherhood should not be imposed on him unilaterally without his consent.[21]

The Kasses had signed an informed consent instrument with the IVF program in which they (1) authorized the retrieval of the eggs and (2) indicated their agreement to cryopreservation of any unused eggs.[22] A signed addendum to the consent form detailed the risks as well as the benefits of the IVF procedure.[23] They further specified that, in the event they were unable to make a decision regarding the disposition of the embryos, they would donate them to the IVF program for research purposes.[24]

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[17] *See* Kass v. Kass, 663 N.Y.S.2d 581, 583 (N.Y. App. Div. 1997).

[18] *See id.* at 584.

[19] *See id.* at 585.

[20] *See id.* at 593 (Friedmann, J., concurring).

[21] *See id.* at 585.

[22] *See id.* at 583-84.

[23] *See Kass*, 663 N.Y.S.2d at 583-84.

[24] *See id.* at 584. The relevant portions of the contract are as follows:

> We understand that our frozen pre-zygotes will be stored for a maximum of 5 years . . . Our frozen pre-zygotes will not be released from storage without the written consent of both of us, consistent with the policies of the IVF Program and applicable law. In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage. *The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes . . .*

Kass v. Kass, 696 N.E.2d 174, 176 (N.Y. 1998) (emphasis added). The second part of the contract, entitled "INFORMED CONSENT FORM NO. 2 — ADDENDUM NO. 2-1: CRYOPRESERVATION-STATEMENT OF DISPOSITION," states:

> We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. *We are to indicate our choices by signing our initials where noted below . . . .*

Although the laparoscopic procedure resulted in the retrieval of sixteen eggs, the procedure resulted in only nine embryos or zygotes.[25] Four of the eggs were transferred to Mrs. Kass's sister, who had initially volunteered to act as a surrogate.[26] The remaining five ova were cryopreserved.[27] Within three weeks of the procedure, having failed to become pregnant, the sister declined to act as a surrogate.[28] Following these unsuccessful attempts at pregnancy, the Kasses decided to divorce, ultimately signing an "uncontested divorce" agreement typed by Mrs. Kass.[29] That agreement referred specifically to the five frozen embryos and directed that the embryos be disposed of in accordance with their previous agreement with the IVF clinic.[30]

Mrs. Kass subsequently informed her IVF doctor and the hospital of her marital problems and asserted her opposition to either the destruction or the release of these embryos.[31] Subsequently, as part of their divorce proceeding, Mrs. Kass requested sole custody of the zygotes.[32] Mr. Kass counterclaimed for specific performance of the parties' executed agreement with the IVF program.[33] Within a few months, the couple had settled all issues in their matrimonial action, with the exception of each party's claim to the five frozen zygotes.[34] A divorce judgment was entered with the proviso that this aspect of custody be left for judicial determination.[35]

> 2. In the event that we no longer wish to initiate a pregnancy, or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one). . . .
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.

Id. at 176-77.

[25] *See Kass*, 696 N.E.2d at 177.

[26] *See id.*

[27] *See id.*

[28] *See id.*

[29] *See id.*

[30] *See id.* The specific language of the document reads: "The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be *disposed of [in] the manner outlined in our consent form and that neither Maureen Kass, Steve Kass or anyone else will lay claim to custody of these pre-zygotes.*" *Id.* (emphasis added).

[31] *See Kass*, 696 N.E.2d at 177.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.*

The trial court awarded sole custody of the frozen embryos to Mrs. Kass and ruled that she be given exclusive decisional authority over them.[36] The appellate division reversed. All five justices were unanimous on two points. First, the justices declared that a woman's right to privacy and bodily integrity are not implicated before the implantation stage.[37] Secondly, the court ruled that, when parties enter into a joint agreement with an IVF program and therein determine the disposition of unused embryos, that agreement is enforceable and governs their behavior.[38] The justices were divided, however, as to whether this particular agreement between the Kasses and the IVF program was sufficiently clear and definitive to bind the parties.[39] The New York Court of Appeals affirmed the appellate division's decision. The court reversed the portion of the earlier ruling that found the consent form to be unclear and rested the decision exclusively on the legal consequences of an enforceable contract and its provisions.[40]

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[36] *See id.*

[37] *See Kass*, 663 N.Y.S.2d 581, 585 (N.Y. App. Div. 1997). After discussing *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the majority stated:

> A woman's established right to exercise virtually exclusive control over her own body is not implicated in the IVF scenario until such time as implantation actually occurs, for it is only then that her bodily integrity is at issue. Prior to implantation that interest is not a relevant and appropriate consideration . . . .

Kass, 663 N.Y.S.2d at 586 (citations omitted).

Similarly, the dissent stated: "My colleagues and I are in unanimous agreement with regard to two major issues. First, that the Supreme Court erred in equating a woman's procreation right to attain pregnancy via in vitro fertilization with her right to bodily autonomy attendant to an in vivo pregnancy." *Id.* at 594 (Miller, J., dissenting).

[38] *See Kass*, 663 N.Y.S.2d at 587. Indeed, the majority stated, "We are in full agreement with the decision in *Davis* to the extent it requires that where a manifestation of mutual intent exists between the parties, that intent must be given effect by the court." *Id.* The dissent agreed, stating that "where the parties have expressed their agreement by contract, their intentions should control and that such agreements should be encouraged if not mandated." *Id.* at 594 (Miller, J., dissenting).

[39] *See id.* at 589 ("[E]ven if one provision of the informed consent document could rationally be perceived as creating an ambiguity . . . any such ambiguity may be resolved by reading that document as a whole to determine its purpose and intent."); *see also id.* at 594 (Miller J., dissenting) ("[A]lthough the parties did enter into an 'informed consent' agreement, it failed to provide an unambiguous statement of their intent.").

[40] *See Kass*, 696 N.E.2d at 178 ("We now affirm, agreeing with the plurality that the parties clearly expressed their intent that in the circumstances presented the pre-zygotes would be donated to the IVF program for research purposes.").

A. Appellate Division Decision

In reversing the decision of the trial court, the appellate division remained sensitive to the magnitude of its mission — deciding for the first time the interplay between a written document purporting to settle dispositional authority over cryopreserved zygotes and the legal effect a divorce may have on the document.[41] The five-justice panel of the appellate division unanimously agreed to overturn the trial court's judgment, which had awarded custody of the five frozen zygotes to Mrs. Kass.[42]

The trial court based its decision upon the notion that a husband's procreative rights terminated immediately upon fertilization.[43] The trial court ruled that the disposition of the zygotes was automatically "a matter exclusively within the wife's unfettered discretion" because a husband could not direct or control his wife's procreative choices after fertilization.[44] Therefore, any consent document signed by the parties could not dispose of the issue.[45] Each of the justices expressed strong disagreement with the trial court's legal characterization of the IVF procedure insofar as it had assimilated the concepts of in vivo fertilization and in vitro fertilization.[46] Implantation, which immediately follows fertilization in the in vivo process, occurs at a very different juncture in the in vitro fertilization procedure. Because fertilization at the ovum stage and its subsequent implantation can be manipulated technologically and delayed in IVF, implantation takes place at a later time, generally chosen by the woman and her physician. The appellate division stated that it was the fact of delayed implantation that distinguished the two procedures.[47]

The five appellate court justices ruled unanimously that the confusion of the two distinct fertilization procedures had led to the trial court's flawed application of the United States Supreme Court's rea-

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[41] *See Kass*, 663 N.Y.S.2d at 585.

[42] *See id.*

[43] *See id.*

[44] *Id.*

[45] *See id.*

[46] The term "in vitro" is defined as "[i]n glass, as in a test tube. An in vitro test is one done in the laboratory, usually involving isolated tissue, organ, or cell preparations." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 870 (15th ed. 1988). On the other hand, the term "in vivo" is defined as: "In the living body or organism. A test performed on a living organism." *Id.* The process of in vitro fertilization thus refers to the process of fertilization outside of the body. *See supra* notes 3 through 8, and accompanying text. The process of in vivo fertilization entails fertilization that takes place in a woman's body. *See* Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1106 (1997).

[47] *See Kass*, 663 N.Y.S.2d at 586; *see also supra* note 37 and accompanying text.

soning in *Roe v. Wade*.[48] In that ruling, the Supreme Court held a woman's right to bodily integrity to be protected by the Constitution.[49] As a corollary of that constitutionally protected right to privacy, a woman's right to personal autonomy and to an abortion could not be challenged by the husband after implantation.[50] Indeed, the appellate court stated: "Prior to implantation, that interest [a woman's right to exercise control over her body] is not a relevant and appropriate consideration, and a court must pursue other analytical avenues in determining whether implantation over the objection of one of the parties should be permitted or precluded."[51] That flawed logic led to the trial court's further mistaken legal conclusion that the husband could never prevent implantation of the cryopreserved zygote because his participation in the IVF program indicated that he consented to subsequent implantation.[52]

Roe teaches that the right to procreate as well as the converse right to avoid procreation is protected by the United States Constitution. Each right is independent of the other and is conferred equally upon females and males. As such, the appellate division ruled that the trial court erred in equating a woman's right to attain pregnancy via IVF with her right to bodily integrity. Moreover, the court held that "[a] woman's established right to exercise virtually exclusive control over her own body is not implicated in the IVF scenario until such time as implantation actually occurs, for it is only then that her bodily integrity is at issue."[53] The issue of integrity regarding implantation of the embryo is quite distinct from the issue of an unwanted pregnancy given that the embryo, prior to implantation is neither physically connected to nor dependent upon the mother. Consequently, the appellate division held that, because *Roe* is concerned only with the unwanted pregnancy, not the pre-implanted embryo, Mrs. Kass did not possess exclusive dispositional control over the zygotes.[54]

The appellate division parted ways, however, as to the ramifications of the underlying contract between the Kasses and the IVF facility. The justices unanimously agreed that, where a manifestation of mutual intent between the parties exists, such intent must be en-

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[48] 410 U.S. 113 (1973).
[49] *See id.* at 154.
[50] *See Kass*, 663 N.Y.S.2d at 586.
[51] *Id.*
[52] *See id.* at 599 (Miller J., dissenting).
[53] *Id.* at 586.
[54] *See id.* at 589.

forced by the courts. Of the five justices, only two among the majority based their decision upon the enforceability of the contractual provisions.[55] Of the three remaining, Justice Friedmann concurred, agreeing with the majority's ruling, but not with its reasoning.[56] The dissent intimated that, as a matter of legal principle, there is no difficulty with the use of the contract model as an appropriate vehicle for resolving conflicts.[57] The dissent further indicated the need for the intervention of the legislature to mandate that IVF clinics require the execution of a standardized, binding agreement that sets forth the parties' specific intentions in the event of a future change in circumstances.[58]

The majority of the appellate division ruled for the husband and reversed the trial court's ruling that had granted custody of the zygotes to the wife. There were, however, disparate reasons for the same legal conclusion. The basis of the concurring justice's opinion rested not on contract interpretation, but rather on constitutional considerations, specifically, a party's fundamental right to avoid parenthood.[59]

> [T]here can be few situations, if any, where the burden upon the party forced to forfeit using particular pre-zygotes to acquire offspring will outweigh the burden upon the party who wishes to avoid reproduction but is compelled by court order to become a parent.
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> Once lost, the right not to procreate can never be regained. It is the irrevocability of parenthood that is most crushing to the unconsenting gamete provider.[60]

Because New York law had not yet evolved to allow waiver of the biological parent's duty to support his child, Justice Friedmann maintained that only the state could legislate the dissolution of parents' otherwise unwaivable duty to support their children.[61] Short of such a statutory mandate, Justice Friedmann concluded that the parties could not, between themselves, allocate dispositional authority. It

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[55] *See id.* at 587-89.

[56] *See Kass*, 663 N.Y.S.2d at 591 (Friedmann, J., concurring).

[57] *See id.* at 594 (Miller, J., dissenting) ("Where the parties have expressed their agreement by contract, their intentions should control . . . such agreements should be encouraged if not mandated.").

[58] *See id.* at 600 (Miller J., dissenting) ("[U]ltimately it is for the Legislature to enact such progressive laws.").

[59] *See id.* at 592 (Friedmann, J., concurring).

[60] *Id.* The term "gamete" refers to either a male sperm or a female ovum, or egg. *See* MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE 1085 (5th ed. 1992).

[61] *See Kass*, 663 N.Y.S.2d at 593 (Friedmann, J., concurring).

was, therefore best that the unwilling spouse be permitted to veto his former spouse's proposed plans for implantation of the frozen zygotes to preserve an unwilling party's constitutional right not to procreate.[62]

The dissent and concurrence agreed that the contract between the Kasses and the IVF program was too ambiguous to reflect the actual intent of the parties.[63] Moreover, in dissent, Justice Miller stated unequivocally that this "legal, emotional, and ethical nightmare . . . demonstrates the clear need for legislation."[64] Notably, although at first glance it appears that a majority of the appellate division found against the contract, both the dissent and concurrence stated only that this particular contract was inadequate with regard to the allocation of decision-making power in the event of subsequent changed circumstances. Moreover, it is instructive that neither the dissent nor concurrence disagreed with employing the contractual model as a framework for determining the status and dispositional authority of the cryopreserved zygotes. In fact, the dissent called for "legislation mandating that [IVF] clinics require the execution of a standardized, binding agreement setting forth the parties' specific intentions in the event of foreseeable changes in circumstances . . . ."[65]

The dissent agreed with the plurality opinion which, after interpreting the contractual provisions, had determined that the ambiguity of the contract was self-created.[66] The language of the contract did not evidence the intention of the divorced litigants. According to Justice Friedmann, the position of the dispositional clause at the end of the informed consent document suggested that it became operative only after the couple's association with the program had ended, either because the wife bore a child or because the couple decided to discontinue their participation in the program.[67] The sentence, which enumerates divorce as a contingency, triggers determination

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[62] *See id.*

[63] *See id.* at 591 (Friedmann, J., concurring) ("I do not believe that the informed consent document relied on here provides real insight into the intentions of these divorced parties."). The dissent agreed, stating that "in the case before us, although the parties did enter into an 'informed consent' document, it failed to provide an unambiguous statement of their intent." *Id.* at 594 (Miller, J., dissenting).

[64] *Id.*

[65] *Id.* at 591.

[66] *See id.* at 594 (Miller, J., dissenting) (stating that the document was clearly ambiguous).

[67] *See Kass*, 663 N.Y.S.2d at 591 (Friedmann, J., concurring) (referring to the portion of the contract with the IVF facility that provided for disposition of the frozen zygotes "in the event that [the Kasses] no longer wish[ed] to initiate a pregnancy or [were] unable to reach a decision" with regard to the stored zygotes).

of the zygotes' legal status as part of a property settlement determined by a court. The concurring justice could not agree that the contract was dispositive of decisional control over the zygotes.[68]

The majority, however, viewed the provision that enumerated death and incapacity as examples of "unforeseen circumstances," as illustrative rather than exhaustive. The majority conceded that even where one portion of the informed consent language might be ambiguous, such "ambiguity may be resolved by reading that document as a whole to determine its purpose and intent."[69]

The majority further insisted upon gleaning the parties' intentions from the document's language as a whole and particularly from its liberal use of the words "we," "us," and "our," wherein the litigants acknowledge their joint right to abide by a single decision as to the disposition of the zygotes.[70] To buttress their argument, the majority pointed to the uncontested divorce document, which not only referenced the IVF program contract but incorporated the IVF contractual provision for dispositional authority over the zygotes.[71] According to the court, the parties' intentions can be inferred not only from the document in its entirety, but from all factual circumstances as well. Indeed, repeated statements of the parties' intent "merit serious consideration and are entitled to great deference."[72]

B. Court of Appeals Decision

Chief Judge Kaye initiated analysis of the issue of dispositional authority by recognizing that "[a]s science races ahead, it leaves in its trail mind-numbing ethical and legal questions . . . . The law, whether statutory or decisional, has been evolving more slowly and cautiously."[73]

Given the paucity of legal precedent in the state, the court was cognizant of its unique duty to fashion clear and uniform principles.

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[68] *See id.*

[69] *See id.* at 589.

[70] *See id.* at 587. Specifically, the plurality stated:

> [I]t is clear from the tenor of its language as well as from its liberal use of the words 'we', 'us' and 'our' that the parties' very participation in the IVF program is premised on their status as a married couple committed to a single joint decision to use IVF in an attempt to achieve parenthood.

Id.

[71] *See id.* at 589 ("While the uncontested divorce instrument never became operative, it constitutes compelling evidence that the parties . . . intended to authorize the use of the pre-zygotes by the IVF program . . . .").

[72] *Id.*

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

The court stated that "[w]hat is plain, however, is the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated."[74]

Against this backdrop, Chief Judge Kaye examined three models developed by legal scholars[75] and case law emanating from a sister state. The court accepted the Tennessee Supreme Court's opinion in *Davis v. Davis*[76] for the proposition that "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."[77]

This statement becomes all the more instructive because it embodies the direction in which the New York Court of Appeals wished to take the law. In fact, before *Kass*, there had been no statement from any court in any jurisdiction that embraced the contractual model for resolving the debate over dispositional authority. Certainly, the *Davis* court cannot be held to have articulated that legal position as part of its analysis. In *Kass*, the New York Court of Appeals, framing the issue of dispositional authority solely in terms of contract enforceability, stated the underlying policy considerations:

> Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable.[78]

Lest the *Kass* decision be critiqued for its economical approach, the court of appeals suggested that it is only through the enforceabil-

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[74] *Id.* at 179.

[75] Chief Judge Kaye quoted the scholarly literature because "[a]lthough statutory and decisional law are sparse, abundant commentary offers a window on the issues." *Id.* at 179. The chief judge cited three approaches from those commentaries: (1) control to the gamete provider, (2) implied contract theory, and (3) the "bundle of rights" theory. *Id.* The fourth approach is an express contract theory which Chief Judge Kaye adopts as precedent in this case. *See id.* at 180. The framework for that analysis has been alluded to in the *Davis* decision and in the academic literature.

[76] 842 S.W.2d 558 (Tenn. 1992).

[77] *Kass*, 696 N.E.2d at 180. It should be noted that, although the *Davis* court articulated this legal postulate and is cited for that principle, such a statement of law constitutes dicta because no written contract was ever executed between the Davises and their IVF program. *See Davis*, 842 S.W.2d at 592 ("There was no discussion, let alone an agreement, concerning disposition in the event of a contingency such as divorce.").

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

ity of contract approach that the constitutionally protected goal of procreational liberty will be reserved exclusively for the people.[79]

The court cited articles by Professor John Robertson,[80] who has argued consistently that the parties — the biological donors — through the formation of a contract, enforceable at law, are best positioned to exercise control over procreative choice.[81] Professor Robertson, one of the most influential commentators in this area, has addressed the issue of who is better suited to control reproduction, the state or the parties themselves.[82] Professor Robertson advocates that the parties' mutual agreement, as evidenced by contract, is the most efficient model for enforcing reproductive liberty, and aggregating personal life choices to those with most at stake.[83] Our legal tradition defers to the parties' voluntary actions rather than accept the state's imposition of normative rulings and statements of principles, unless a compelling state interest is present.

The court of appeals accepted Professor Robertson's assertion that it is the progenitor or the biological donor, and not the state, who ought to be the repository of dispositional authority over the embryo. The court stated, "To the extent possible, it should be the progenitors — not the State and not the courts — who by their prior directive make this deeply personal life choice."[84]

Although the court recognized the primacy of procreative liberty and the biological donor's free choice in this matter, it was not ignorant of the difficulty of enforcing the parties' advance directives as expressed in their contract. This process is problematic in two important ways. First, it must be determined whether an agreement be-

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[79] *See id.* ("Advance directives, subject to mutual change of mind that must be jointly expressed, both 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.").

[80] Professor, University of Texas at Austin, School of Law. For a list of Professor Robertson's articles, see *supra* note 2.

[81] *See Kass*, 696 N.E.2d at 180 (citing Robertson, *Prior Agreements*, *supra* note 2; Robertson, *In the Beginning*, *supra* note 2).

[82] For an in-depth discussion of the interplay between IVF technology, the right to procreate, and legal protection of the rights to privacy and procreation, see Robertson, *Decisional Authority*, *supra* note 2, and Robertson, *Embryos, Families*, *supra* note 2. For a discussion of enforcement of disposition agreements, see Robertson, *In the Beginning*, *supra* note 2.

[83] Professor Robertson's articles argue in favor of the contract model as a framework for resolving control disputes over extra-corporeal eggs. *See* John A. Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CTR. REP., Nov./Dec. 1989, at 7 [hereinafter Robertson, *Resolving Disputes*], and Robertson, *In the Beginning*, *supra* note 2.

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

tween the couple and the IVF facility ought to govern the personal relationship of the couple.[85] Can and should a contract with a third-party facility be viewed as an expression of guidance for that relationship? Second, will this contract between the couple and the IVF program be honored in situations where one member of the couple argues a change in circumstances, such as death or divorce?[86]

Chief Judge Kaye's opinion responded in the affirmative to each question.[87] The *Kass* decision constitutes a seminal ruling as to the first issue. Specifically, the New York Court of Appeals found that the parties addressed this matter and, whether this intent is expressed in an agreement with a third party or in an agreement among the couple themselves, that intent has found a clear expression. Indeed, the court focused its reasoning on the parties' intent itself as opposed to the instrument within which that intent found expression.[88]

The court noted that all agreements that look to a future time deal with the unknown and create difficulty, thus underscoring the need for certainty. Chief Judge Kaye stated that "advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree."[89] In fact, it is precisely because future events are fraught with uncertainty that parties must be encouraged to be cautious in their deliberations. Although not all contingencies can be anticipated, there is no reason to throw out the concept of the advance directive. Along these lines, the court stated that the parties' knowledge of the enforceability of the contract will have achieved the very purpose of emphasizing the seriousness and integrity of the consent process.[90] Knowing that an advance directive will not be easily undone ultimately discourages frivolous decision-making.

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[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.* at 181. The court stated:

> The conclusion that emerges most strikingly from reviewing these consents as a whole is that appellant and respondent intended that disposition of the pre-zygotes was to be their joint decision. The consents manifest that what they above all did not want was a stranger taking that decision out of their hands.

Id.

[89] *Id.* at 180.

[90] *See Kass*, 696 N.E.2d at 180 ("Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process . . . .").

II. *DAVIS V. DAVIS*

Despite the *Kass* court's reference to the *Davis* decision,[91] the reasoning in *Davis* does not apply to the Kasses for two reasons. First, the *Davis* court did not address the contract model because the parties had not executed a contract.[92] Second, Mrs. Davis petitioned the court to permit donation of the frozen zygotes to a childless couple, whereas Mrs. Kass sought custody of the frozen fertilized ova for self-implantation.[93] Mrs. Kass, unlike Mrs. Davis, feared that she would lose her best chance for genetic motherhood unless she were granted sole custody.[94] The Davises, like the Kasses, turned to an IVF program following unsuccessful attempts to achieve parenthood through coital reproduction.[95] Moreover, both couples decided to dissolve their marriages subsequent to unsuccessful efforts at in vitro fertilization.[96]

One major difference, however, is that the Kasses signed an uncontested divorce document that included reference to their signed written contract with the IVF program. That contract detailed their informed consent to commit jointly to a single decision regarding custody and disposition of the cryopreserved zygotes.

Both the Davises and the Kasses had resolved their respective matrimonial actions with the exception of the issue of custody of the embryos, which was left for judicial resolution. In *Davis*, by the time of the hearing before the state supreme court, each party had remarried and neither wanted a child with the other as a parent.[97] The Davises had, prior to their respective remarriages, changed their minds several times with regard to custody of the zygotes.[98] At the time of their hearing before the Tennessee Court of Appeals, Mrs. Davis wished to donate the embryos to a childless couple, while her ex-husband wanted them to be discarded.[99] Mr. Davis sought to block any implantation on the grounds that such a procedure would produce an unwanted fatherhood, thus violating his constitutionally protected right to avoid fatherhood.[100]

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[91] *See id.* at 180 (citing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).

[92] *See* Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

[93] *See id.*; Kass v. Kass, 663 N.Y.S.2d 581, 585 (N.Y. App. Div. 1997).

[94] *See Kass*, 663 N.Y.S.2d at 593 (Friedmann, J. concurring).

[95] *See Davis*, 842 S.W.2d at 589.

[96] *See id.*

[97] *See id.*

[98] *See id.* at 590 ("We note . . . that their positions have already shifted.").

[99] *See id.*

[100] *See* Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Ct. App. Sept. 13, 1990).

At trial, while Mrs. Davis wished to use the fertilized ova for self-implantation, the court awarded her sole custody and unilateral control over their implantation.[101] Characterizing the frozen embryo as a "person" and, following the analysis of *Roe v. Wade*,[102] the trial judge held that as a corollary of her right to bodily integrity, the female had unique decisional authority.[103]

On appeal, the judges reversed the trial court and awarded joint custody of the embryos to the parties, "with equal voice over their disposition," insofar as they shared an interest in the fertilized ova.[104] The court of appeals found that the legal status to be accorded to the embryos necessitated "more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born."[105] Certainly, prior to implantation, the legal status of the embryo is of a lower grade than that of the implanted embryo. Accordingly, the court asserted that there could be "no compelling state interest" to justify an order of "implantation against the will of either party."[106] The appellate court based its decision on its perception of the trial court's holding as a flawed understanding of the Constitution. The ex-husband's unwillingness to become a parent was constitutionally protected because a pregnancy had not yet begun.[107]

Judge Franks, speaking for the court in *Davis*, recognized a citizen's right to procreate as a "basic civil right" that cannot be violated by the state.[108] To award custody of the frozen eggs to the female "constitutes impermissible state action" and violates the male's "constitutionally protected right not to beget a child where no pregnancy has taken place."[109] After reviewing the legal status of the fetus in Tennessee, the court concluded that the there was "no compelling state interest" to justify an order of implantation against the will of either party.[110] In a footnote, the court warned of the potential nightmare stemming from state control over reproduction, describing a sinister policy in Nazi Germany that forced people who alleg-

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[101] *See id.* at *1.

[102] 410 U.S. 113 (1973).

[103] *See Davis*, 842 S.W.2d at 595.

[104] *Davis*, 1990 WL 130807, at *3.

[105] *Id.* at *2.

[106] *Id.*

[107] *See id.*

[108] *See id.* ("The decision whether to bear or beget a child is a constitutionally protected choice.").

[109] *Id.*

[110] *See Davis*, 1990 WL 130807, at *2.

edly possessed hereditary diseases to prove to a court why they should not be sterilized.[111]

In sum, the court reasoned that a "potential for life" is not the legal equivalent of a "person" and, as a result, the trial court's legal scheme must fail. The trial judge was criticized for

> his fact finding and legal conclusions [which] ignored the public policy implicit in the Tennessee statutes, the case holdings of the Tennessee Supreme Court and the teachings of the United States Supreme Court. We are required to resolve the issue consistent with the existing Tennessee law and the parties' constitutional rights.[112]

As such, the court awarded the parties joint custody and control of the frozen embryos. The court explained that to uphold the lower court's ruling would be "repugnant and offensive to constitutional principles."[113]

On appeal to the Supreme Court of Tennessee, the court questioned whether safeguarding of a litigant's constitutional rights should automatically lead to an order of joint custody with equal voice.[114] The court of appeals decision guaranteed a stalemate whenever the in vitro couple disagreed, thus making it virtually impossible for the embryo ever to be implanted. The state supreme court sought to assess whether or not the inevitable result of an automatic veto was the most judicious way to handle this thorny issue of control.[115] The court affirmed the earlier court of appeals decision, but

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[111] *See id.* n.7. The court stated:

> A haunting reminder of the evils of uncontrolled state action is found in Schuman's contemporary account of the state's control of reproduction in Nazi Germany: Under the sterilization law a series of 'Hereditary Health Courts' were established throughout the Reich with appellate courts and a Supreme Hereditary Health Court with power to deliver final judgments. Before these bodies all persons suspected of hereditary disease are obliged to appear and show cause why they should not be rendered sterile through a surgical operation.

Id.

[112] *Id.* at *3.

[113] *Id.*

[114] *See Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992). Although the court of appeals granted to the Davises "joint control" of the embryos and "equal voice" over their disposition, the practical consequences of this ruling is to grant to the unwilling partner more than an "equal voice". In effect, the party who opposes implantation is granted veto power since the unwilling partner must consent to any implantation. The likelihood of obtaining such consent is remote, if not impossible. Thus, what on paper seems like an equitable solution can become, in practical terms, the granting of exclusive rights of control to one party. *See* Feliciano, *supra* note 2, at 340.

[115] *See Davis*, 842 S.W.2d at 604; *see also* Feliciano, *supra* note 2, at 341-42 ("*Davis* is

modified that ruling, stating that the "[c]ourt of [a]ppeals, at least by implication, may have swung too far in the opposite direction."[116] The court, however, emphasized that review of the previous appellate decision was necessary because of "the obvious importance of the case in terms of the development of law regarding new reproductive technologies," and the need for "adequate guidance," which the intermediate court had not provided.[117]

The court abandoned the "person" versus "property" dichotomy utilized by both the trial court and the court of appeals. To conclude that the embryo was a person ran counter to the prevailing view gleaned from state statutes and judicial precedent.[118] Similarly, to rule that the zygote was property would grant automatic veto power to any party opposing implantation.[119] Mechanically granting such authority would lead to inequitable results without any investigation into the "bundle of rights" possessed by each gamete provider.[120] Accordingly, the court incorporated the ethical standards set by the American Fertility Society, and concluded that the embryo was neither a person nor property.[121] Instead, the embryos "occupy an in-

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not meant to be understood as vesting automatic veto power in the party who does not want to utilize the embryos.").

[116] *Davis*, 842 S.W.2d at 595.

[117] *Id.* at 590 ("[T]he decision of the Court of Appeals does not give adequate guidance to the trial court . . . .").

[118] *See id.* at 596.

[119] *See id.* at 598 (stating that the effect of the appellate court's ruling would grant the father "inherent power to veto any transfer of the preembryos in this case. . .").

[120] *See id.*

[121] *See id.* at 596-97. The court found that "the most helpful discussion on this point is found not in the minuscule number of legal opinions that have involved 'frozen embryos,' but in the ethical standards set by The American Fertility Society . . . ." *Id.* at 596.

The court noted the three major ethical positions cited by The American Fertility Society (Society) as to the status of the frozen embryo:

> 1) As a human subject, which bars any action that might harm the embryo;
>
> 2) As no different from any other human tissue, and therefore places no restrictions on the actions taken with the embryo;
>
> 3) The middle position which finds that although the embryo does not deserve the respect accorded to human persons, it does deserve greater respect than that given to ordinary tissue.

Id. at 596.

In consequence, the Society recommends that decision-making authority be granted to the gamete providers as they donated the genetic material and because the fundamental right to procreate is involved. *See id.* at 597. The Society makes these recommendations in those instances where there is no specific legislation on the subject. *See id.* at 597.

terim category that entitles them to special respect because of their potential for human life."[122]

Both federal and state law precluded judicial recognition of the preembryo's legal status as a person and, therefore, the investiture of "legally cognizable interests" independent of their progenitors. The court concluded that to hold otherwise would effectively outlaw IVF programs in Tennessee, contrary to legislative intent.[123] It did not follow, however, that just because the gamete providers do not have a true property interest, they do not possess an ownership interest in the zygotes.[124] Specifically, the court held that "[parents] do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."[125] The court stated that decisional authority must reside in the progenitors alone since no one else bears the consequences of these decisions to the same extent.[126] Given the policy decision that such decisional authority is reserved exclusively to the gamete providers, the supreme court found that, as a starting point, any agreement regarding disposition of any untransferred embryos "should be presumed valid and should be enforced as between the progenitors."[127]

The *Davis* decision could not be based on the contract model because there was no formal agreement between the Davises and the IVF facility, either at the time of the infertility procedures or at any later date. But, the *Davis* court opined that the contract model was the preferred method of conflict resolution:

> [W]e hold that disputes involving the disposition of preembryos produced by [IVF] should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is a dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed.[128]

Absent an enforceable contract, Judge Daughtrey stated that a court must balance the relative benefits derived versus the burdens imposed through the exercise or the prevention of procreative

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[122] *Davis*, 842 S.W.2d at 597.

[123] *See id.* at 595.

[124] *See id.* at 597 ("[Parents] do have an interest in the nature of ownership . . . .").

[125] *Id.*

[126] *See id.* (stating that progenitors should retain decision-making authority).

[127] *Id.* at 597.

[128] *Davis*, 842 S.W.2d at 604.

rights.[129] Without using the term "presumption," which implies a definitive legal construct, the court suggested that, as a default rule, the scale should be tipped in favor of the party wishing to avoid procreation.[130] This rule allows that party to prevail unless the other side had no reasonable possibility of achieving genetic or biologic parenthood by any other means.[131] Therefore, one party's preference for using frozen embryos for the sake of mere convenience or cost efficiency would not be an adequate basis for granting custody to implant.[132] Accordingly, the court in *Davis* found that the husband had a greater interest in avoiding procreation than his ex-wife, who sought to donate the embryos to a childless couple.[133]

The court left open the possibility of a different result in cases where a woman sought self-implantation and could adduce evidence that this represented her last opportunity for genetic motherhood.[134] This was precisely the argument that Mrs. Kass asserted to the New York courts. She asserted greater rights to the frozen embryos insofar as they represented her final chance for pregnancy and motherhood.[135] The *Kass* court did not address this issue because it decided that the contract and its provisions were dispositive of the legal issues in the case.[136] The concurrence and dissent in *Kass*, however, opined that Mrs. Kass had not presented sufficient evidence to prove her case.[137] Among the factors she could have asserted to prove her case

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[129] *See id.* at 603. Judge Daughtrey held that the balancing of the relative interests of each party is "a task familiar to the courts," precisely because judges have always wrestled with conflicting interests of constitutional import. *See id.*

[130] *See id.* at 604 (stating that "Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood").

[131] *See id.* (noting that this case might have been different if Mary Sue Davis could not achieve motherhood "by any other reasonable means").

[132] *See id.* Among the criteria to be considered in this test are: "[T]he positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Id.* at 603.

[133] *See id.* at 604.

[134] *See Davis*, 842 S.W.2d. Judge Daughtrey did not actually state that the frozen embryos must represent the last opportunity for genetic/gestational motherhood. Yet, in giving examples of what amounted to an inability to "achieve parenthood by any other reasonable means," including additional IVF attempts or adoption, Judge Daughtrey implies that the frozen eggs must represent the final chance for such genetic/gestational parenthood. *See id.*

[135] *See* Kass v. Kass, 663 N.Y.S.2d 581, 596 (N.Y. App. Div. 1997) (Miller, J., dissenting).

[136] *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) ("Because [the issue] is answered in this case by the parties' agreement . . . we have no cause to decide whether the pre-zygotes are entitled to 'special respect.'").

[137] *See Kass*, 663 N.Y.S.2d at 593 (Friedmann, J., concurring). Because Mrs. Kass merely contended that she had a medical condition that inhibited her ability to con-

would be evidence of financial ability, emotional investment, and motivations for wishing parenthood.[138]

The decision in *Davis*, alongside its presumption that written, executed instruments should govern parties' actions, allowed for the distinct eventuality that a contract might not anticipate all events, emotional and psychological, that may transpire as the IVF process unfolds.[139] Because the court did not need to interpret a contract, however, it was unnecessary to decide further how such a dispute could be resolved.[140]

How should a court adjudicate a contract that may not be the result of arm's length negotiations? Would that be deemed a contract of adhesion? Additionally, could the passage of time or the occurrence of unanticipated events frustrate a contract's purpose or make its performance impossible? Unfortunately, the *Davis* court failed to discuss such issues.

The New York Court of Appeals in *Kass* held that for a contract to be enforceable, it must be proven to have been freely consented to and knowingly made.[141] Indeed, the Kasses never indicated that the contract was made either involuntarily or unknowingly. Instead, the Kasses argued that the voluntariness of the agreement with the IVF facility was irrelevant because the contract did not govern an allocation of decision-making power between themselves as individuals, but rather was only an agreement between themselves as a couple and the IVF program.[142] The court specifically addressed that issue and it is precisely that reasoning that constitutes the seminal precedent for future litigation. The court stated that the couple's intention, as garnered from an agreement between them as a single entity and the

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ceive, the concurrence found that she failed to satisfy her threshold burden. *See id.* at 593-94 ("[T]he plaintiff has effectively proven on the instant record that she could not make the necessary showing of exigency even if she were afforded the opportunity . . . her submissions to date have been unconvincing."). The dissent argued that Mrs. Kass's arguments were insufficient because she assumed that she "should prevail as a matter of law without a factual inquiry." *Id.* at 601 (Miller, J., dissenting).

[138] *See id.*

[139] *See Davis*, 842 S.W.2d at 597 ("It follows that the parties' initial 'informed consent' to IVF procedures [would] often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.").

[140] *See id.* The court does, however, suggest that modification of the initial agreement be allowed with the proviso that the modification be reached through a process of mutual agreement. *See id.*

[141] *See Kass*, 696 N.E.2d at 180 ("Nor do the parties contest the legality of those agreements or that they were freely and knowingly made.").

[142] This argument could be made precisely because contracts were provided by the IVF program.

IVF program, must be taken as evidence of intent among the partners themselves.[143] No separate instrument or agreement was necessary to determine the couple's intentions inasmuch as that intention could be inferred from the executed instrument with the IVF facility.[144] The *Davis* court, on the other hand, did not address this issue given that the parties had not entered into an agreement.

The decision in *Kass* resolved two critical independent legal issues. First, New York would follow the contract model for resolution of decision-making authority with regard to frozen embryos.[145] Second, New York would not require evidence of a separate agreement between the couple because their intentions would be deduced from their written, executed agreement with the IVF program.[146]

The *Kass* court, following the model of contract and the rules of contract interpretation, did allow for modification of contract provisions.[147] As with any contract, however, such modification becomes enforceable only where each party to that agreement freely consents to any subsequent modification. The court did not discuss whether a contract model in this area contravened public policy considerations because there was no need for its discussion.[148] Instead, the court stated merely that all agreements remain subject to public policy considerations.[149] No discussion of what constitutes public policy ensued because neither party had raised the issue and the court chose not to initiate such a discussion.[150]

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[143] *See Kass*, 696 N.E.2d at 180 ("While these documents were technically provided by the IVF program, neither party disputes that they are an expression of their own intent regarding disposition of their pre-zygotes . . . The central issue is whether the consents clearly express the parties' intent regarding disposition of the pre-zygotes in the present circumstances.").

[144] *See id.*

[145] *See id.* ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.").

[146] *See id.*

[147] *See id.* ("Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty . . . .").

[148] In a footnote, Chief Judge Kaye states that Mrs. Kass did not argue that the consents ran counter to public policy or that they become legally unenforceable because of a significant change in circumstances. *See id.* n.4.

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

[150] *See id.* at 182 n.5. Chief Judge Kaye disagreed with the appellate division on this point, noting that

> unless public policy is violated, parties to a litigation are free to chart their own procedural course — as they did here. On January 9, 1995, both sides agreed that the matter should be determined on the submissions . . . . "The record upon which we must rule was thereby estab-

III. PUBLIC POLICY CONSIDERATIONS

The courts in *Kass* and *Davis* were each mindful of their significant role in a new and technologically burgeoning area.[151] Chief Judge Kaye stated, "Although statutory and decisional law are sparse, abundant commentary offers a window on the issues ahead, particularly suggesting various approaches to the issue of disposition of prezygotes."[152] The court did not defer to the legislature but instead viewed the judiciary as the most appropriate forum to determine the proper framework within which the question of dispositional control of frozen zygotes or embryos should be resolved.[153]

Without direction from either the legislature or the judiciary in earlier New York case law, the *Kass* court carefully examined the significant academic scholarship on the subject. Four distinct approaches to the issue of dispositional control emerge from this analysis.

A. Sole Authority in Gamete Provider(s)

The first approach is to empower the gamete provider(s) and to vest dispositional authority in him (them) exclusively as a corollary of that control.[154] By awarding sole authority to the biological provider(s), this model simultaneously removes any and all authority from any other body or institution. Such a grant of decision-making

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lished."

Id. (quoting Kass v. Kass, 663 N.Y.S.2d 581, 590 (N.Y. App. Div. 1997).

[151] *See id.* at 178. Chief Judge Kaye stated that in the last twenty years "thousands of children have been born through IVF" and "tens of thousands of frozen embryos" are in storage, but "[t]he law, whether statutory or decisional has been evolving more slowly and cautiously." *Id.* In *Davis*, on the other hand, Judge Daughtrey, speaking for the Supreme Court of Tennessee, stated: "[E]ven with no statutory authority or common law precedents to guide us, we do have the benefit of extensive comment and analysis in the legal journals." Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

[152] *Kass*, 696 N.E.2d at 179.

[153] *See id.* at 180. Chief Judge Kaye viewed the role of the judiciary as the enforcer of the parties' expression of choice, stating that "[t]o the extent possible it should be the progenitors — not the state and not the courts — who by their prior directive make this deeply personal life choice." *Id.*

[154] *See, e.g.*, Poole, *supra* note 2, at 81 ("[E]ach donor must be able to veto the implantation of any embryo . . . ."). The legal commentators who would grant exclusive control to one of the two biological providers include Poole, who states that the female gamete provider is equal to the male gamete provider and, as such, has an equal right of control. *See id.* Consequently, either gamete provider should, as a default rule, be allowed to veto implantation containing his genetic material. *See id.* Andrews, on the other hand, would grant control to the female gamete provider. *See* Andrews, *supra* note 2, at 407 ("[T]he woman's wishes should govern because of a presumption that it is better to have an embryo gestated by its biological parent . . . .").

power evinces a belief that only those who provide genetic material have the right to fix the disposition of their body products. Neither the legislature nor the judiciary, as an institution, is possessed of this right.

This model, however, does not assure that control is always exercised by the same progenitor.[155] Scholars have disagreed as to which of the two putative parents should be granted the greater control. For example, Elisa Poole states that because the contract model is merely a partial solution, the parties will often not be able to anticipate unforeseen circumstances.[156] As such, she argues that the ideal model invests both gamete providers with equal rights to terminate the procreative process.[157] Her position is predicated on the assumption that a unique opportunity is afforded to the couple undergoing IVF treatment, precisely because the sequencing of physical stages can be technologically manipulated.[158] Implantation, generally a stage immediately following fertilization, can in fact be delayed. Therefore, Poole argues, there is no bodily integrity issue during this time interval between the fertilization and the implantation stages.[159] In the IVF context, either the male or the female is allowed to make a decision whether or not to procreate, which in a natural setting is limited to the female. Therefore, to preserve equality in decision-making rights, veto power should be granted to either gamete provider who is unwilling to proceed with the IVF process.[160]

The rationale behind this theory of dispositional rights is that only an automatic veto affords to the individual the assurance of avoiding unwanted parenthood, because both donors have the same constitutional right to make procreative decisions.[161] Poole claims

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[155] *But see* Poole, *supra* note 2, at 81 ("[B]oth donors have the same constitutional right to make procreative decisions"). *See generally* Andrews, *supra* note 2.

[156] *See* Poole, *supra* note 2, at 91 ("[T]here will always be situations in which the parties did not contract and for which such a default rule is needed.").

[157] *See id.* at 81 (stating that although a woman has invested more in creating the embryos, she should not have a greater right in determining the fate of those embryos).

[158] *See id.* at 84 ("[IVF] involves more levels of decision making than does a normal pregnancy.").

[159] *See id.* Specifically, Poole states that "[t]he window of opportunity that occurs after fertilization and before implantation in IVF allows both men and women to exercise the fundamental right to exercise procreative choice that is limited to women in the natural context." *Id.*

[160] *See id.* at 90 ("Both donors should have the same basic rights to make procreative decisions.").

[161] *See id.* at 81 ("[E]ach donor must be able to veto the implantation of any embryo . . . This right to veto is needed in order for the individual to avoid the burdens of unwanted parenthood.").

that the Supreme Court in *Roe v. Wade*[162] focused on the burdens of pregnancy and parenthood and granted equal decision-making rights to both the female and the male.[163] However, *Roe* cannot then be interpreted to mean that a person's right to control his genetic material and reproductive capacity is subsumed within the right to procreate. To this end, Poole suggests that the "Supreme Court should extend the fundamental procreative right to include control over one's genetic material. The right claimed is not just the right to be free from psychological burdens of unwanted parenthood. It is also the right to control one's genetic material and reproductive capacity."[164]

Lori Andrews[165] reaches a different conclusion, although based upon the same assumption that it is the gamete provider, and not the state, who is best equipped to make decisions about the genetic material he provides.[166] Not only is the progenitor most suited to make such fundamental, personal decisions, but the right to make these decisions stems from the constitutional rights to privacy and personal autonomy.[167] Andrews, however, concludes that greater rights should be given to women.[168] Analogizing this situation to the legal principle that a woman may abort a fetus without her husband's consent, Andrews states that the same reasoning may therefore apply to a far earlier stage in the procreative process. Furthermore, she argues that the woman's wishes should govern because "it is better to have an embryo gestated by its biological parent."[169]

This reasoning is questionable. If, for example, *Roe* stands for the proposition that a woman has a right not to procreate, one might wonder whether Andrews is not taking an unduly narrow interpretation of that decision. *Roe* certainly permitted the woman to control

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[162] 410 U.S. 113 (1973).

[163] *See* Poole, *supra* note 2, at 82.

[164] *Id.*

[165] Attorney and Research Fellow, American Bar Foundation.

[166] *See* Andrews, *supra* note 2, at 358-59 ("Throughout this century, the Supreme Court has emphasized the protected nature of private family decisions . . . . Procreation and child rearing are necessary conditions for individual and social well-being.").

[167] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) ("[T]he Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state.").

[168] *See* Andrews, *supra* note 2, at 406 ("The woman has been held to have a right to abort without the husband's consent and the right not to abort over the wish of the husband that she abort.").

[169] *Id.* at 407. Andrews claims that this is so because a man is incapable of gestating an embryo. *See id.*

the procreative process by allowing her to have an abortion subject to some limitations.[170] But most importantly, *Roe* holds that the State has no compelling interest in this process prior to the viability of the fetus.[171] At that point, the fetus could sustain life outside the mother and therefore have an independent status from its mother. *Roe* did not purport to vest greater or lesser rights in either of the putative biological parents. In fact, *Roe* and its progeny are cited for the principle that the right to procreate and the right not to procreate are independent rights, each equally protected for either gender.[172] *Roe*, therefore, need not be extended to apply to all procreative mechanisms because there is no pregnancy until implantation has taken place.[173]

Still another approach might favor the woman. That argument, also known as the sweat equity factor,[174] rests on the assumption that procreative rights, by their very biological nature, cannot be equal for both genders. In the IVF process, the female undergoes a physically and emotionally trying, not to mention invasive, procedure. On the other hand, the male's biological contribution is a far simpler one. In giving weight to the sweat equity theory, the tendency is to favor the female progenitor, precisely because she has endured more hardship.[175] This "sweat equity," it is suggested, should grant her superior decision-making rights.[176]

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[170] *See* Roe v. Wade, 410 U.S. 113, 155 (1973) ("[T]he right [to have an abortion] is not absolute and is subject to some limitations . . . .").

[171] *See Carey*, 431 U.S. at 686 ("'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.").

[172] *See e.g.*, Andrews, *supra* note 2, at 75 ("The Supreme Court's rhetoric can be interpreted to cover all procreative decisions.").

[173] *See id.* (noting that pre-implantation embryos cannot be viewed as viable).

[174] *See* Robertson, *Resolving Disputes*, *supra* note 83, at 7. This theory recognizes the differences in physical hardship endured respectively by the male and the female. The female does most of the sweating and should therefore have greater decision making rights. *See id.* Professor Robertson argues against this rule, stating that "the difference in bodily burdens between the man and the woman in IVF is not so great . . . that it should automatically determine decisional authority over resulting embryos." *Id.*; *see also* Poole, *supra* note 2, at 89 (discussing the "sweat equity" rule and Professor Robertson's assertions). *But see* Feliciano, *supra* note 2, at 347 ("Such dismissal of the sweat equity argument grossly underestimates the physical strain on a female IVF participant.").

[175] *See* Robertson, *Resolving Disputes*, *supra* note 83, at 7.

[176] *See* Poole, *supra* note 2, at 88 ("Donors invest time, money, and gametes in the IVF process, but only the woman incurs physical risk.").

B. Implied Contract

The second model for resolving disputes over dispositional authority adopts the implied contract as its necessary framework.[177] An implied contract infers an agreement or a contract based upon the dealings of the parties.[178] An agreement is created whether or not the parties signed a formal document.[179] Each party exchanges mutual promises to complete the IVF procedure and to contribute the genetic material to effectuate the process leading up to the cryopreservation of the fertilized ova.[180] This argument, therefore, is based on the notion that a contract exists between the parties because each of the gamete providers agreed to the IVF procedure with the facility.[181]

Furthermore, because each party is aware of the other's reliance on this contract, the doctrine of promissory estoppel can be invoked to prevent the unwilling party from terminating the other's right to procreate.[182] The donation of gametes by each party is viewed as a commitment to reproduce using them. To allow the unwilling gamete provider to railroad the other side's wishes would be a destruction of a condition in that implied agreement. Moreover, by enrolling as infertility patients with an IVF program, one partner demonstrates that he relied, to his detriment, on the other party's participation. The unwilling partner should, therefore, be estopped from opposing subsequent implantation.

On the other hand, not all who would view this process as an example of the implied contract would apply promissory estoppel.[183] Among the complications anticipated by one proponent of the implied contract framework is the issue of whether the continuation of

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[177] *See* Trespalacios, *supra* note 2, at 828 (describing the use of an implied contract approach to the storage of pre-embryos); Feliciano, *supra* note 2, at 345 ("[L]ooking to an implied contract between the parties may provide an equitable solution . . . ."); *see also* Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992) (noting the possibility of an implied contract in such situations).

[178] *See* RESTATEMENT (SECOND) OF CONTRACTS § 1-12 (1987) ("When [an agreement] is manifested by conduct, it is said to be implied in fact . . . . The distinction between this kind of contract and a contract expressed in words is unimportant: both are true contracts formed by a mutual manifestation of assent.").

[179] *See* Feliciano, *supra* note 2, at 346 ("[P]articipation in an IVF program reasonably leads to the assumption that both parties have committed to reproduction.").

[180] *See* Trespalacios, *supra* note 2, at 829.

[181] *See* Feliciano, *supra* note 2, at 346.

[182] *See id.* at 346-47.

[183] *See* Trespalacios, *supra* note 2, at 829-31.

the marriage is a prerequisite to enforcement of the contract.[184] If yes, then further questions arise with regard to a change in circumstances. For example, would divorce frustrate the implied contract and be grounds for a discharge of contract?[185] A proponent of the implied contract theory asserts that the "sole purpose of creating preembryos [is] to facilitate their growth and development into children. If there [is] no evidence that the parties discussed other possibilities, then the agreement [does] not encompass such possibilities."[186]

C. *Express Contract*

A third approach would require the execution of a formal contract that details the parties' wishes specifically, and indicates the mechanism to be followed where future unforeseen events upset the dispositional scheme as set by contract.[187] Another approach would not only advocate the enforceability of a written contract, but would also require the legislature to enact statutory provisions mandating the requirement of such a contract in any dealings between the infertile couple and the IVF facility.[188]

The advantages of such a model lie in its clear evidence of intent.[189] The written document provides protection against the erosion of memories at precisely that moment in time when such dimming of these recollections is least desirable. By encouraging the enforceability of a written document, parties are urged to ponder seriously the consequences of their actions. The integrity of the contract process cannot be undermined when parties are held to their negotiated agreement. After all, in an ideal context, a contract is the byproduct of a freely negotiated process, to which each party voluntarily gives his consent. Moreover, contracts provide that degree of legal cer-

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[184] *See id.* at 829 ("If continuation of their marriage is a material term, then the question becomes whether divorce frustrates the contract as to that term.").

[185] *See id.*

[186] *Id.* at 830.

[187] *See* Robertson, *In the Beginning*, *supra* note 2, at 463-76 (describing the implications of the express contract theory); Robertson, *Resolving Disputes*, *supra* note 83, at 10-12 (discussing advance agreements on disposition); Robertson, *Prior Agreements*, *supra* note 2, at 409-11 (asking whether such directives will be enforced); Trespalacios, *supra* note 2, at 827-28 (noting that the IVF process could utilize express agreements).

[188] *See* Andrews, *supra* note 2, at 407 (asserting that the state might mandate the use of such agreements).

[189] *See* Trespalacios, *supra* note 2, at 828 ("These agreements could then provide the courts with evidence of the parties' original intentions to facilitate resolving disputes arising after IVF.").

tainty and predictability necessary for the efficient operation and management of any IVF program. What is essential, however, is that both the infertile couple and the IVF facility must know, in advance, whether the dispositional agreements will control.[190]

There is, however, one option available to a disgruntled party who contests the contract's enforceability. That is, that the contract is not the result of a voluntary process.[191] The issue evolves into whether such an agreement is in fact a contract of adhesion.[192] An adhesion contract is one in which there is no arm's-length, give-and-take bargaining process insofar as one of the parties to the contract was in a position to exert superior strength over the other. Where the negotiation process is, in effect, absent or the agreement is not the end result of a consent voluntarily given, that contract may be set aside as not being the product of a meeting of the minds. Legal doctrines that permit the setting aside of contracts stem from the legal postulate that where consent to contract is absent, a contract cannot exist. Such situations may include a contract induced by fraud or duress. Unforeseen changes or unanticipated events do not, however, negate consent and, therefore, are not necessarily grounds for setting aside an agreement.[193] There may indeed be cogent arguments of unfairness when disposition agreements are enforced despite changed circumstances.[194] According to Professor Robertson, however, the risk of unfairness does not override the advantage of certainty that accrues to infertile couples and IVF programs from the enforcement at law of such dispositional agreements.[195]

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[190] *See* Robertson, *In the Beginning*, *supra* note 2, at 464 ("[A]ll parties gain from the ability to rely on prior instructions when future contingencies occur."). Advance planning minimizes both the frequency as well as the cost of resolving disputes. *See id.*

[191] *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) (noting that the parties did not "contest the legality of [the] agreements, or that they were *freely and knowingly* made") (emphasis added).

[192] An adhesion contract is defined as a

> [s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording [the] consumer realistic opportunity to bargain . . . . [A] [d]istinctive feature of adhesion contract[s] [is] that [the] weaker party has no realistic choice as to its terms.

BLACK'S LAW DICTIONARY 25 (6th ed. 1991).

[193] *See* Robertson, *Prior Agreements*, *supra* note 2, at 420 ("[A]dvance agreements for disposition raise few problems of foreseeability or changed circumstances . . . .").

[194] *See id.*

[195] *See* Robertson, *In the Beginning*, *supra* note 2, at 468-69 ("The need for certainty when entering into embryo freezing, and for preventing the burdens of parenthood that one partner insisted on avoiding, outweighs the interest of the party who has changed his or her mind . . . .").

The primary issue is whether decisions of such a personal nature should be the subject of private contract negotiation as opposed to state regulation based on public policy considerations. This debate has been largely settled by case law. First, the United States Supreme Court has held that personal decisions regarding procreative rights are constitutionally protected and cannot become the subject of state involvement unless the state demonstrates a compelling interest in the matter.[196] That stage is reached when the implanted fetus is viable.[197] Various state cases have embraced the contract as the appropriate vehicle for the resolution and regulation of procreative rights and obligations. In Tennessee, for example, the *Davis* court found that

> an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce . . .) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.[198]

Moreover, the court in *Kass* held that "it should be the progenitors — not the state and not the courts — who by their prior directive make this deeply personal life choice."[199] The *Kass* court continued that although the consent documents were "technically provided by the IVF program," these instruments bind the couple to each other.[200] This contract between the couple and the IVF facility was "freely and knowingly made" and was "an expression of their own intent regarding disposition of their pre-zygotes."[201]

D. Progenitor's Bundle of Rights — A Balancing Test

The fourth and final method for the disposition of decisional authority between progenitors over the zygote or embryo rests in what is, in effect, the measurement of the progenitor's bundle of rights, or the measurement of the respective burdens and benefits of

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[196] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion in matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973).

[197] *See Roe*, 410 U.S. at 163 (noting that the "compelling point" is at fetal viability).

[198] Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

[199] Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

[200] *Id.*

[201] *Id.*

each progenitor.[202] The gamete provider's right to procreate is weighed against the right not to procreate. The test for granting custody to one progenitor balances the merits of each party's interests.[203] This inquiry involves several factors, including the following: the positions of the parties, the significance of each party's respective interests, and "the relative burdens that will be imposed by the differing resolutions."[204] The default rule, according to this approach, favors the party objecting to parenthood when the other party has a "reasonable possibility" of achieving parenthood by other means.[205] Where that goal cannot be achieved inasmuch as no other reasonable alternatives for pregnancy exist, the objections of the unwilling party will be overruled. Professor Robertson, a proponent of this approach, states that one must consider the "irreversibility of the respective losses at issue . . . . The party who wishes to avoid offspring is irreversibly harmed if embryo transfer and birth occur, for the burdens of unwanted parenthood cannot be avoided."[206]

The criteria for this test were outlined by the Tennessee Supreme Court in *Davis*. The analysis anticipates consideration of all relevant facts.[207] Each side's preference is measured against the burden that their position would impose on the opposite party.[208] Although the criteria determined by the balancing of burdens and benefits are fixed, the measurement of these criteria is set against the factual circumstances of each case. It should be remembered that the *Davis* court applied the balancing test precisely because there was no contract between the parties.[209] Only when an enforceable contract is missing will such a test be used. Even the *Davis* court, which adopted the balancing of the bundle of rights test, noted that such disputes would be better resolved through contractual principles.[210]

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[202] *See* Robertson, *In the Beginning*, *supra* note 2, at 476-81 ("[R]esolution of such disputes requires a close look at the competing interests of each party . . . .").

[203] *See id.* at 453 "The legal status of the fertilized egg and early embryo will thus be determined by the balance struck among the competing interests of gamete providers, embryo protection. . .").

[204] Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).

[205] *See id.* at 604 ("[O]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.").

[206] Robertson, *Resolving Disputes*, *supra* note 83, at 8.

[207] *See Davis*, 842 S.W.2d at 603.

[208] *See id.*

[209] *See id.* at 590 (noting that there was no written agreement between the parties).

[210] *See id.* at 597 (stating that it would discuss the use of agreements to provide necessary guidance to others utilizing IVF procedures).

To what extent, if any, can the quantification of interests under the balancing test acquire a subjective dimension? Has the test adequately screened for and eliminated subjective considerations? Courts should be vigilant of applying subjective criteria because an examination of factual circumstances might lead to such a tendency. Differing interpretations of an identical set of facts are quite possible. How will the balancing test measure up as new technologies emerge in this constantly changing field?

Addressing this issue by utilizing guidelines for contractual interpretation and legal enforceability, as did the court in *Kass*, serves to reinforce several objectives, including:

(1) Respect for individual's decisions regarding intensely private matters;
(2) Respect for the seriousness of the contract process;
(3) Assurance of greater consistency and uniformity in contract interpretation; and,
(4) Predictability of outcome, which allows both the prospective gamete provider and the IVF facility to anticipate the governing rules in advance.

Of the four approaches outlined in this article, the contract approach is, for the four reasons noted above, most meritorious and deserving of adoption by sister states.

CONCLUSION

In a culture that values both family and children, infertility is a disease in search of a cure. Medical research and technological advances in IVF fertilization procedures have begun to roll back the toll of this disease. In its trail, however, these miracles have also engendered legal and ethical controversies, including how to master this medical technology and to use it in accordance not only with our cultural values, but our legal definition of family and rights of privacy.

Such a debate has surfaced with the creation through IVF of fertilized eggs, which may be stored in an IVF bank for an indefinite period of time to be implanted at a future date or perhaps never at all. How should we allocate dispositional control over spare, frozen, or stored embryos? It is clear that in this context, the law is playing catch-up with established medical facts. How has the law provided guidance and direction in an emotionally charged and ethically challenging field?

Where there is no legislation and almost no case law, the judiciary faces a daunting task. Should it choose, intentionally, to step in and seek to extrapolate legal rules from a consensus of that culture's

value system? Alternatively, the judiciary, as an institution, could back off from such activism and defer to the legislature to impose legal norms.

An examination of the two principal cases, however, *Kass* in New York and *Davis* in Tennessee, demonstrates that judges in two very different states are willing to grapple with this assignment. Both were eager to solicit counsel of academic commentators to distill guidelines that will offer consistency and uniformity in practice. The goal for the judiciary, as it is for the academic scholars, is to fashion legal norms that balance the tension between the interests of an infertile couple and the countervailing interests of a society that seeks to preserve its value system. In this area of infertility, four separate models have emerged for the resolution of conflict regarding dispositional authority over frozen embryos: a contract analysis, the implied contract theory, the bundle of rights balancing test, and the criterion of exclusive control to the biologic donors. Each of these four distinct approaches, as discussed in this Article, deserves attention. The central issue remains, however, as to which approach will simultaneously accommodate both the interests of the infertile couple and those of the larger society.

For this author, the New York Court of Appeals in *Kass*, by adopting the contract model as the medium for resolution of the question of dispositional control over the embryo, has promulgated a trail-blazing precedent. With *Kass*, the New York Court of Appeals was the first court in the nation to rule that private agreements regarding embryo disposition are legal and must be enforced in a court of law. Such a holding by New York's highest court speaks of that state's strong commitment to procreative liberty and to freedom of contract.