Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag

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ABSTRACT

Without concrete legislative guidance, courts are left to a variety of unsatisfactory methods of determining the disposition of frozen embryos in dissolutions and custody disputes. Beginning in 1992, courts have been issuing problematic rulings that are reached through the application of three approaches: (1) the balancing-interests test; (2) the contemporaneous mutual consent approach; and (3) the contractual approach. These approaches are examined in this Comment through the lens of selected cases and the largely inequitable outcomes for parties are critiqued. Courts even lament the lack of statutory guidance in deciding these disputes but are resigned to employing these largely flawed, inequitable approaches. This Comment goes on to address the statutes already in place in a handful of states—but even where there are statutes in effect, they fail to adequately address the issue and guide the courts in determining the disposition of frozen embryos. After critically examining selected statutes from states with more progressive statutes, as well as those with more conservative guidelines, this Comment proposes a model statute for states to use as a framework when enacting new legislation to address this increasingly pressing issue. As case after case suggests, legislation is sorely needed to provide a guiding light for courts as couples litigate the disposition of frozen embryos. The model statute uses courts' favored contractual approach and the current statutes, namely those enacted in California and Florida, as a starting point. This Comment concludes that the best protocol to resolve custody disputes is for states to enact legislation providing that contractual arrangements between couples beginning the in vitro fertilization process must be honored in the face of custody disputes and further suggests that required mediation be employed

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when the contract cannot be upheld. This approach endorses procreational autonomy and prevents the delivery of more inequitable results to parties litigating the disposition of their embryos during dissolutions.

INTRODUCTION

The year 1978 marked a permanent shift in family law dynamics: Louise Brown was born in England, and her birth was the first to result from in vitro fertilization (IVF).[1] Three years later, in 1981, Elizabeth Carr was born in the United States from IVF.[2] In 1984, the first child produced from a frozen embryo,[3] named Zoe, was born in Australia.[4] These births are landmarks in history and provided hope for infertile couples; however, the emerging field of IVF also inexorably changed the landscape of custody disputes in family law cases, raising new questions about personhood, parental rights, and procreational autonomy.

IVF is a commonly sought alternative to the natural conception process as a result of infertility struggles. Infertility is defined as the inability to conceive within twelve months.[5] According to the 2016 Assisted Reproductive Technology (ART) Fertility Clinic Success Rates Report published in October 2018, a total of 263,577 ART cycles occurred nationally, with 934 of those cycles using "fresh" embryos from frozen non-donor eggs.[6] As of July 2018, more than eight million births had occurred through IVF since Louise Brown's birth.[7] The process itself includes multiple steps including ovulation induction, egg retrieval, sperm retrieval, fertilization, and embryo transfer (or freezing).[8] A woman using her eggs takes synthetic hormones to cause her body to produce multiple eggs, as opposed to the single egg that naturally develops every month,

1. Louise Brown, *Louise Brown on 40 Years of IVF: 'I Was the World's First IVF Baby, This Is My Story'*, INDEPENDENT: INDY/LIFE (July 25, 2018), https://www.independent.co.uk/life-style/health-and-families/ivf-baby-louise-brown-story-test-tube-world-first-40th-anniversary-a8455956.html [https://perma.cc/KV7E-DNNM].

2. Lisa Schencker, *World's First and America's First IVF Babies Meet in Chicago for First Time*, CHI. TRIB. (June 17, 2017), https://www.chicagotribune.com/business/ct-first-ivf-babies-meet-0617-biz-20170616-story.html [https://perma.cc/85AM-ZQ5A].

3. Although "pre-embryo" is the technical term, this Comment will conform with the colloquialism: "embryo."

4. *First Baby Born of Frozen Embryo*, N.Y. TIMES (Apr. 11, 1984), https://www.nytimes.com/1984/04/11/us/first-baby-born-of-frozen-embryo.html [https://perma.cc/93SJ-TC5X].

5. *Infertility: Symptoms, Treatment, Diagnosis*, UCLA HEALTH, http://obgyn.ucla.edu/infertility [https://perma.cc/2867-NYJQ].

6. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, 2016 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT (2018).

7. Eur. Soc'y of Human Reproduction and Embryology, *More than 8 Million Babies Born from IVF Since the World's First in 1978*, SCI. DAILY (July 3, 2018), https://www.sciencedaily.com/releases/2018/07/180703084127.htm [https://perma.cc/5M72-49GY]; *see also* Brown, *supra* note 1.

8. *In Vitro Fertilization (IVF)*, MAYO CLINIC (Mar. 22, 2018), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/W4PW-MAA3].

and the eggs are then retrieved by a physician (usually) through a transvaginal ultrasound.[9] The male will then provide a semen sample and the egg will be fertilized.[10] Because the synthetic hormones taken by the woman cause the production of a large number of eggs, there are more embryos produced than will be transferred to the uterus at a single time; therefore, embryos may be frozen for storage and possible future use.[11] Cryopreservation allows the fertilization of all harvested eggs, creating extra embryos for transfer during later IVF cycles.[12] Further, it prevents the woman from the burden of repeated cycles of egg retrieval if more than one cycle is necessary.[13]

Cryogenically preserved embryos may remain frozen for years before being used.[14] It is unsurprising, then, that when couples do divorce, the frozen embryos become the center of custody battles. Without a proper statutory response, courts facing the issue of embryonic disposition for the first time are forced to look to inconsistent rulings and inequitable outcomes as a guiding light. The lack of statutory direction is a growing problem for courts when trying to make a determination of which party is entitled to custody of the embryos in divorce disputes.[15]

Part I of this Comment provides a history of the three major frameworks applied by courts that determine embryo disposition. Part II explains, analyzes, and critiques current statutes. Part III, using current statutes and case law as a basis, will propose a model statute as a solution

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9. *Id.*

10. *Id.*

11. Carl L. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 60 (1999); *see also* Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. L. 55, 63 (2018) (discussing the rapid progression of IVF technology allowing for cryopreservation of early-stage embryos; the opportunities arising from this rapid progression require courts to consider new categories of parents and the status of frozen embryos, leading to the categorizations of genetic, intended, or gestational parents). The cryopreservation of embryos leads to dispositional choices such as disposal or donation. *See, e.g.*, Andrew Hough, *1.7 Million Human Embryos Created for IVF Thrown Away*, TELEGRAPH (Dec. 31, 2012), https://www.telegraph.co.uk/news/health/news/9772233/1.7-million-human-embryos-created-for-IVF-thrown-away.html [https://perma.cc/7RY9-M43F]; Jasmine Taylor-Coleman, *The Americans Who "Adopt" Other People's Embryos*, BBC NEWS (July 18, 2016), https://www.bbc.com/news/magazine-36450328 [https://perma.cc/W4PW-MAA3].

12. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 408 (1990).

13. *Id.*

14. Coleman, *supra* note 11, at 60 (stating that practitioners estimate embryos can remain cryogenically preserved for up to fifty years).

15. U.S. CONST. amend. XIV; *see* Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 547 (2008) ("Though not explicitly delineated in the Constitution, the right to procreative liberty exists in constitutional notions of liberty and privacy.").

to the epidemic of inequity in courts across the country.[16] This statutory solution will safeguard procreational autonomy while emphasizing the importance of a binding agreement at the outset of IVF treatment that will prevent the need for future litigation concerning the disposition of frozen embryos.

I. CASE HISTORY

Since 1992, courts have been exploring the nuances in applying the contractual approach, the balancing-interests approach, and the contemporaneous mutual consent approach.[17] *Davis v. Davis* set the tone for future decisions regarding the disposition of embryos. Following the footsteps of the *Davis* court, other courts have operated under the same analytical frameworks for the past twenty-seven years.[18] Although courts generally agree that the contractual approach is appropriate when couples state their intent regarding the disposition of their embryos, when there is no agreement, the balancing-interests test is employed.[19] This section addresses the three approaches utilized by courts, the use of the balancing approach due to the lack of binding agreements, and the inherent flaws in weighing one person's fundamental right to procreate against another's right to avoid procreation.

A. Davis v. Davis

The issue of the disposition of frozen embryos first appeared before the court in 1992 when Junior Davis and Mary Sue Davis brought the custody issue to the Supreme Court of Tennessee.[20] Appealing the court of appeals' custody award to Junior, Mary Sue was, once again, denied custody of the frozen embryos. All terms of the parties' dissolution were agreed upon, except for the disposition of seven frozen embryos stored in a Knoxville fertility clinic.[21]

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16. *See generally* In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

17. *Davis*, 842 S.W.2d 588. This was the first case where a court was asked to determine the disposition of frozen embryos.

18. Michael T. Flannery, *"Rethinking" Embryo Disposition upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233, 239 (2013) (stating that courts have consistently applied the analytical frameworks set out in *Davis*, which "have generally proven workable").

19. *See id.* Courts in New York, Oregon, Texas, Alabama, and Washington have applied the contractual approach. *Id.* at n.19. The contemporaneous mutual consent model has been applied in fewer states, notably Massachusetts and Iowa. *Id.* at n.98.

20. *Davis*, 842 S.W.2d at 588.

21. *Id.* at 589.

The case presented an issue of first impression, with Mary Sue desiring control of the frozen embryos to be transferred post-divorce.[22] The trial court's order was reversed, giving custody to the wife on the basis that the husband had a "constitutionally protected right not to beget a child where no pregnancy [had] taken place . . . [and] there is no compelling state interest to justify . . . ordering implantation against the will of either party."[23] At the time of the court's decision, both parties had remarried, and Mary Sue petitioned for authority to donate the frozen embryos to a childless couple. Junior Davis, on the other hand, opposed a donation and expressed the preference that the frozen embryos be discarded.[24] If an initial agreement existed regarding the control of the embryos in the event of divorce, the question posed to the *Davis* court might have been easier to answer,[25] as is made evident by the court's creation of three different analyses: (1) the contractual approach, (2) the balancing-interests approach, and (3) the contemporaneous mutual consent approach.[26]

In its analysis regarding the disposition of embryos, the *Davis* court held that an agreement made by the parties regarding the disposition of frozen embryos should be presumed valid and enforceable.[27] The court reasoned, "[T]his conclusion is in keeping with the proposition that the progenitors, having provided the genetic material giving rise to the [preembryos], retain decision-making authority as to their disposition."[28] In proposing this analysis, the court included the caveat that initial agreements should be modifiable if both parties agree to protect couples from the risk of one party not providing truly informed consent, but otherwise, the prior agreements are considered binding.[29]

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22. *Id.*

23. *Id.*

24. *Id.* at 590.

25. Mark P. Strasser, *You Take the Embryos but I Get the House (And the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFF. L. REV. 1159, 1162 (2009) (stating that an initial agreement would have factored into the court's analysis and helped make its decision, but the Davises never reached such an agreement).

26. Flannery, *supra* note 18, at 237–38.

27. *Davis*, 842 S.W.2d at 597.

28. *Id.*

29. *Id.* While recognizing the importance and enforceability of original contractual arrangements, the court also recognized the volatility of human emotion. As part of its holding, the court concluded that initial agreements ought to be enforced, but at the same time it "recognize[d] that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems." *Id.* Due to the emotional turbulence involved in contracting during the IVF process, the parties' initial informed consent might not be genuinely informed; anticipating the emotional and psychological repercussions of the events of the IVF process is almost impossible to predict. *Id.*; *see also* April J. Walker, *His, Hers or Ours?-Who Has the Right to Determine the Disposition of Frozen Embryos after Separation or Divorce?*, 16 BUFF. WOMEN'S L.J. 39, 41–42 (2008) (noting that, even if the parties agreed on the disposition of the embryos at the start of the IVF process, the parties are likely to change their minds during the separation or divorce process).

When there is no agreement, or the initial agreement is no longer agreed upon by the parties, courts are forced to step into dangerous territory. In *Davis*, the parties had not executed an agreement before dissolution.[30] As such, the court was forced to implement a different test which required a person versus property analysis.[31] The court found that the value of the frozen embryos rests in the "potential to become, after implantation, growth and birth, *children*."[32] The potential for human life and the possibility parties will become parents turns on the parties' exercise of their constitutional right to privacy.[33] The concern for the constitutional right to privacy then triggered the right to procreate.[34] The court stated, "[T]he essential dispute here is not where or how long to store the preembryos, but whether the parties will become parents . . . [w]e conclude that the answer to this dilemma turns on the parties' exercise of their constitutional right to privacy."[35] The court was then forced to convolutedly balance each party's right to procreate and right not to procreate.[36] In this case, awarding custody to Mary Sue would impose unwanted parenthood on Junior Davis, along with the attendant financial and psychological consequences.[37] On the other hand, IVF is an extremely taxing process for a woman, and refusal to permit donation or award custody would "impose on her the burden of knowing that the lengthy IVF

30. *Davis*, 842 S.W.2d at 598.

31. *Id.*

32. *Id.*

33. *Id.* at 598–99 (citing the Fourteenth Amendment of the United States Constitution, which provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law").

34. *Id. But see* McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) (holding that the embryos were marital property of a unique character); Litowitz v. Litowitz, 48 P.3d 261, 271 (Wash. 2002) (stating that it was not necessary to engage in any discussion as to the legal status of the embryos and limiting the decision based solely upon the contractual rights of the parties).

35. *Davis*, 842 S.W.2d at 600 (holding that in terms of the Tennessee state constitution, the right of procreation is a vital part of an individual's right to privacy, and that federal law is to the same effect). *But see* Tracey S. Pachman, *Disputes over Frozen Embryos & the "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128, 138 (2003) ("Not only do the courts in the preembryo dispute cases apply the right to privacy in an unconventional, and most likely unconstitutional, form by transforming a right to be free from government interference into a right that individuals may enforce against one another, they may have violated the privacy of both parties by inquiring into the substantive details of a uniquely private agreement.").

36. *Davis*, 842 S.W.2d at 600.

37. The court noted the psychological consequences of imposing parenthood on Junior Davis because of his childhood trauma. *Id.* at 603–04. Following his parents' divorce and the nervous breakdown of his mother, Junior Davis was only able to have monthly visits with his mother and only saw his father three more times before he died. *Id.* The separation from his parents caused him severe problems, and he believed he suffered because of his inability to forge a relationship with his parents. *Id.* As a result, he adamantly opposed fathering a child who could not live with both parents; he also opposed donating the embryos because the receiving couple might divorce, which would deprive the child of being raised by two parents. *Id.*

procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children."[38]

The *Davis* court, applying the balancing-interests test, concluded that Junior's interest in not being a parent outweighed Mary Sue's interest in donation.[39] The court commented that the case would have been closer if Mary Sue were seeking custody to parent the children herself, but only if she could not achieve parenthood through other reasonable means.[40] The court concluded that the party wishing to avoid procreation should usually prevail, so long as the other party has a "reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered."[41]

Despite acknowledging the trauma of the IVF process, the court viewed another IVF process as a reasonable opportunity for Mary Sue to achieve parenthood.[42] In *Davis*, the court weighed one substantial trauma against another: the court did not draw a definite conclusion as to why the psychological trauma Junior may have experienced by being forced to question his parental status was more significant than Mary Sue's interest in donating the embryos—or even in having children using the embryos—or the emotional, financial, and physical trauma Mary Sue would have to experience by undertaking IVF process all over again.[43]

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38. *Id.*

39. *Id.*

40. In supporting its reasoning, the *Davis* court cited Junior's childhood struggles and stated:

> If [Mary Sue] were allowed to donate these preembryos, [Junior Davis] would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. He testified quite clearly that if these [preembryos] were brought to term he would fight for custody of his child or children. Donation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.

Id.; *see* Strasser, *supra* note 25, at 1175. Strasser notes that Mary Sue could have had legitimate reasons for choosing to donate the frozen embryos to a childless couple; she may have valued being a genetic parent and wanted to donate the embryos to another couple because Junior would not have to face the financial responsibility as the legal father. *Id.* Strasser goes on to say, "Regardless of why Mary Sue wanted to donate the embryos, someone else might want to donate them precisely because she would receive psychic benefit just from knowing that she had become a genetic parent." *Id.*; *see also*, Szafranski v. Dunston, 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015) (holding that the trial court did not err in finding that Karla Dunston's interests trumped Jacob Szafranski's based on evidence that the embryos represented Karla's last and only opportunity to have a biological child from her eggs); Madeleine Schwartz, *Who Owns Pre-Embryos?*, NEW YORKER (Apr. 28, 2015), https://www.newyorker.com/tech/annals-of-technology/who-owns-pre-embryos [https://perma.cc/3YV5-MRY7] (providing an editorial perspective on *Szafranski v. Dunston*).

41. *Davis*, 842 S.W.2d at 604.

42. *Id.*

43. *See* Strasser, *supra* note 25, at 1178–79. Strasser notes that Mary Sue's eggs were harvested when the Davis's marriage was unstable, and Junior Davis hoped that the birth of a child would

Further, the court assumed that Mary Sue would be able to undergo the process again. Notwithstanding the physical and emotional turmoil involved with the process, the financial burden alone can be a deterrent.[44] In weighing the procreational autonomy of one party against another, the court essentially stripped Mary Sue of her right to use the embryos to have a child by preserving Junior's right to avoid parenthood.[45] Essentially—and perhaps inadvertently—in applying the balancing-interests test, the *Davis* court set a precedent resulting in too many inequitable outcomes.

B. Kass v. Kass

The dispositional dispute over frozen embryos reared its ugly head in a New York court as an issue of first impression.[46] In *Kass*, the parties executed an informed consent document that expressly stated their intent that the frozen embryos "be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research

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improve their relationship. *Id.* at 1179. If Junior Davis was willing to bring a child into the relationship in the hope it would improve the relationship, then he must not have been, as Strasser states,

> [I]nalterably opposed to permitting children genetically related to him to be brought into a home where the adults might eventually part ways . . . his actions during the marriage belied his commitment to never wanting to father children who might not be living in a two-parent home. . . . [E]ven were it true that Junior or someone like him might feel badly about being genetically connected to a child raised by other, the court seemed unwilling to consider that an analogous argument might be made about the feelings of the parent who wants the embryos donated, i.e., that he or she might feel terribly were the embryos discarded rather than given the opportunity to flourish.

Id. For a further critique, however indirect, of the balancing approach, see Nick Loeb, *Sofia Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES (APR. 29, 2015), https://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html [https://perma.cc/A59Q-LVWS].

44. The national average for beginning an IVF cycle is $12,000 before medications, which alone vary from $3,000 to $5,000, totaling (conservatively) $18,000; the frozen cycle, when frozen embryos are transferred rather than "fresh" embryos, averages between $3,000 and $5,000. Jennifer G. Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 4, 2014), https://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility/#f40616e24dd6 [https://perma.cc/TN2S-8DWJ].

45. *See* Strasser, *supra* note 25, at 1176–77. Strasser writes:

> The *Davis* court cautioned that it would not have been willing to override Junior's wishes unless Mary Sue had no other reasonable options. Mary Sue's interest in being a genetic parent combined with her interest in nurturing a child biologically related to her might not have overcome Junior's interest in not being a genetic parent.

Id.

46. Kass v. Kass, 696 N.E.2d. 174 (N.Y. 1988). In *Kass*, the parties married in 1988. *Id.* at 175. Maureen Kass was unable to conceive a child naturally, so the parties enrolled in the Long Island IVF program and signed four consent forms provided by the hospital. *Id.* at 175–76. The parties underwent ten unsuccessful attempts to have a child. *Id.* at 176. The parties made one more attempt to conceive, this time using Maureen Kass's sister as a surrogate. *Id.* at 177. When no pregnancy resulted, and Maureen's sister refused to continue as the surrogate, the parties almost immediately dissolved their marriage. *Id.*

investigation as determined by the IVF Program."[47] Maureen Kass later determined that she was opposed to the destruction or release of the embryos and petitioned for sole custody of the frozen embryos so that she could undergo another IVF transfer.[48]

The *Kass* court adopted the *Davis* reasoning that an initial agreement should be enforced in the absence of a subsequent agreement departing from the initial agreement.[49] The *Kass* court stated the relevant question—who had dispositional authority over the frozen embryos—was answered by the parties' agreement.[50]

The *Kass* court stated that agreements between progenitors regarding the disposition of their frozen embryos should generally be presumed valid and binding, and the agreements should be enforced in any dispute between the parties.[51] The court went on to state, "[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing."[52]

In a case where the parties reach an agreement, and one party later changes his or her mind, the court need not engage in a balancing-interests approach: the contractual approach should govern.[53] The interests of the parties do not need to be weighed because the parties have already entered into an agreement.[54] The contractual approach keeps courts away from murky analyses and maintains the parties' procreational autonomy.[55]

C. In re Marriage of Rooks

Rooks, the most recent state supreme court case on the disposition of frozen embryos, adopted the balancing test approach in the absence of

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47. *Id.* at 176–77.

48. *Id.* at 177.

49. *Davis*, 842 S.W.2d at 597.

50. *Kass*, 696 N.E.2d at 179.

51. *Id.* at 180.

52. *Id.*; *see* Strasser, *supra* note 25, at 1182. Commenting on *Kass*, Strasser wrote:

> Were such agreements enforceable only when the parties continued to agree with what had been originally decided, the agreements would be of relatively little use—either the parties would continue to agree about the disposition about the embryos and there would be no challenge to the enforcement of the agreement or, if one of the parties had had a change of heart, the original agreement would be of no use in determining what to do.

Id.

53. *Kass*, 696 N.E.2d at 180.

54. *Id.*

55. *Id.* ("Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process."); Erik W. Johnson, *Frozen Embryos: Determining Disposition through Contract*, 55 RUTGERS L. REV. 793, 800 (2003) (stating that the *Kass* court's holding is the most appropriate in such cases because a valid prior agreement existed, so the court was not forced to apply the balancing-interests approach or determine the legal status of the embryos).

statutory instructions.[56] In deciding to apply the balancing-interests test, the Supreme Court of Colorado recognized the inherent flaws in such an approach.[57] The court stated that the case "present[ed] difficult issues of procreational autonomy for which there are no easy answers because it pits one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation, and because the fundamental liberty and privacy interests at stake are deeply and personally charged."[58] Without statutory direction, though, courts are left with a flawed method of weighing parties' fundamental procreative rights against one another.

The *Rooks* court held that both parties' interest in procreational autonomy should be honored by the court. In other words, the court held an agreement expressing the spouses' intent regarding the disposition of any frozen embryos in the event of divorce should be upheld.[59] The court held, in the absence of an agreement, the parties' interests should be balanced and provided six factors to consider when weighing the parties' interests.[60]

First, the court should consider the intended use of the frozen embryos by the party who wants to preserve them. Second, the court must consider the physical ability, or lack thereof, of the spouse seeking to implant the frozen embryos to have biological children through other means. Third, the parties' original reasons for undergoing IVF should be considered. Fourth, the hardship for the party seeking to avoid becoming a genetic parent, including emotional, financial, or logistical factors is relevant. Fifth, a court should consider a spouse's demonstrated bad faith or attempt to use the frozen embryos as unfair leverage in the divorce proceedings. Finally, any other factors relevant to the parties' specific situation should be considered.[61]

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56. In re Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018) ("Thus, in the absence of specific legislative guidance in these circumstances, we adopt an approach that seeks to balance the parties' interests given the legislature's general command in dissolution proceedings requiring the court to divide marital property equitably.").

57. *Id.* at 580–81 (stating that the case "fundamentally concerns the disposition of a couple's marital property").

58. *Id.* at 580.

59. *Id.* ("[C]onsidering the nature and equivalency of the underlying liberty and privacy interests at stake, a court presiding over dissolution proceedings should strive, where possible, to honor both parties' interest in procreational autonomy when resolving disputes over a couple's cryogenically preserved frozen embryos.").

60. *Id.*

61. *Id.* The court goes on to state that a court should not consider whether the party seeking to become a genetic parent is financially stable enough to support a child, nor shall the number of a party's existing children, standing alone, be a reason to deny a party the right to custody of the embryo. *Id.* The court also states that courts should not consider whether the spouse seeking to use the frozen

Rooks presented a case where the parties did not have an agreement. Ms. Rooks desired to preserve the embryos to be transferred, citing her inability to have more children "naturally," whereas Mr. Rooks desired to thaw and discard the embryos because of his wish not to have more children from his relationship with Ms. Rooks.[62] The Colorado Supreme Court held that the court of appeals erred in its employment of the balancing test. Its consideration of Ms. Rooks' already-existing children; the potential economic impact of another child; the impact of another child on the other children; and its concern for Ms. Rooks' ability to manage a "large family" as a single mother in light of her unemployment, lack of financial resources, and the health issues faced by one of the children were improper.[63] The framework the Colorado Supreme Court formulated while applying the balancing-interests approach "recognizes that both spouses have equally valid, constitutionally based interests in procreational autonomy. It encourages couples to record their mutual consent regarding the disposition of remaining [preembryos] in the event of divorce by an express agreement."[64]

The *Rooks* factors, in the absence of statutory language articulating a bright-line rule for embryo disposition, help add clarity to the amorphous balancing-interests approach. Former cases, such as *Davis*,[65] have not applied such in-depth factors when applying the balancing-interests approach. However, the framework is still a method of last resort. The *Rooks* court effectively admitted it was a disfavored approach when it stated that it would encourage parties to provide for the disposition of their embryos through express agreement.[66] The court only established the factors because the *Rooks* court had no express agreement designating

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embryos to become a genetic parent should instead adopt a child or otherwise parent non-biological children. *Id.*

62. *Id.* at 583.

63. *Id.* at 585 (in articulating the factors to be considered in the balancing-interests test, the *Rooks* court explicitly stated that the financial circumstances and already-existing children of the spouse who wishes to preserve the embryos are not to be considered).

64. *Id.* at 594.

65. *Davis*, 842 S.W.2d 588. The court considered looser factors based on an indefinable "interest," rather than specific factors. *Id.* For example, the court considered the burden of unwanted parenthood on Junior Davis, especially because of his own childhood experience of being separated from his parents, Mary Sue's interest in donating the frozen embryos to another couple to avoid the emotional struggle of realizing that the invasive IVF procedures she underwent were futile, and Mary Sue's ability to become a parent by other reasonable means in the future. *Id.* at 603–04. The *Rooks* factors nuance the *Davis* factors and are not as dismissive of the desires of the spouse who wishes to preserve the frozen embryos to be a genetic parent. *Rooks*, 429 P.3d at 594. In *Rooks*, the court stated the following: "[B]ecause we conclude the relevant interest at stake is the interest in achieving or avoiding *genetic* parenthood, courts should not consider whether a spouse seeking to use the [preembryos] to become a genetic parent could instead adopt a child or otherwise parent non-biological parent." *Id.*

66. *Rooks*, 429 P.3d at 592.

what should be done with the frozen embryos, and no Colorado statute indicates disposition in cases of divorce.[67] Courts recognize the inherent flaws with the balancing-interests test but are left with no legislative recourse; thus, the balancing-interests test is reluctantly applied.[68]

Rooks demonstrates that, even in 2018, there was still inadequate legislative response to the issue of how frozen embryos should be disposed or distributed. A lack of statutory resolutions will only result in a continuing influx of cases in court, and the courts will have no choice but to adopt unsatisfactory approaches in order to reach the most "equitable" inequitable solution for the parties.[69]

It is evident that the courts are dissatisfied with the approaches they are effectively forced to apply. *Reber v. Reiss*, a Pennsylvania case from 2012, establishes this when lamenting the lack of legislative guidance on the disposition of embryos.[70] Without legislative guidance, cases such as *Davis*, *Kass*, and *Rooks* will continue to proceed to the courts and more unsatisfactory, inequitable results will emerge, further stymieing the courts with bad precedent and leaving them reluctant to upset the status quo and unable to provide equitable relief to parties that their honor procreational autonomy.

II. EXISTING STATE STATUTORY RESPONSES

The moral ambiguity surrounding IVF makes it surprising that there is not further statutory regulation from states surrounding the process. Out of fifty states, few statutes regarding the IVF process or the disposition of embryos exist.[71] For a field as turbulent as IVF disputes, there are less than

67. *Id.* at 591.

68. For further reading on the impact of these inequitable results on participants in IVF, see Chris Bodenner, *A Custody Battle over Embryos*, ATLANTIC (Feb. 5, 2017), https://www.theatlantic.com/notes/2017/02/a-custody-battle-over-embryos/514934/ [http://perma.cc/3YB9-UA7K].

69. *See generally* Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012). *Reber v. Reiss* is another example of the unsatisfactory response courts employ when determining the disposition of embryos. The *Reber* court departed from the reasoning in *Davis*, in which the court stated that, as a general matter, the party who has an interest in not procreating should generally outweigh the party's interest in procreating. *Davis*, 842 S.W.2d at 604; *Reber*, 42 A.3d at 1142. Instead, the *Reber* court declined to treat the husband's interest in not being a parent as more significant than the wife's interest in having a biological child (which she was unable to do because of a breast cancer diagnosis). *Reber*, 42 A.3d at 1142. Due to a lack of statutory guidance, the court reluctantly applied the balancing-interests approach. *Id.*; *see also* Roman v. Roman, 193 S.W.3d 40, 49 (Tex. App. 2006) (lamenting the absence of statutory guidance from the State of Texas, stating, "Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce.").

70. *Rooks*, 429 P.3d at 581. *See generally Reber*, 42 A.3d 1131; *Roman*, 193 S.W.3d 40.

71. Cynthia E. Fruchtman, *Cops and Robbers in Assisted Reproduction: Who Is Who as Between Cryobanks and Depositors of Gametes (Sperm or Oocytes) and Embryos?*, AM. BAR ASS'N SEC. OF FAM. 2014 SPRING CLE CONF. (2014) (listing California, Louisiana, Connecticut, Florida, Maryland, New Jersey, Ohio, Oklahoma, and Texas. Fruchtman only lists eleven states with statutes addressing

twenty statutes concerning the issue—an inadequate number. These statutes do not provide a proper legislative response to the cases going to court, forcing the courts' wild card hands and leading to inequitable results for parties.[72] Many courts admit the need for legislation, stating that the courts would be forced to examine cases individually until such a time that the legislature finally decides to tackle the issue.[73] This section examines and critiques selected statutes—some of which do better than others at attempting to wrangle with the issue regarding how frozen embryos should be treated—and notes the pitfalls or advantages of each.

A. California

Beginning with California, the law[74] primarily focuses on the duty of a provider of fertility treatment to provide the patient with "timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment."[75] The statute further provides that failure to supply the information to a patient constitutes unprofessional conduct.[76] California law states that any patient receiving fertility treatment shall have options regarding the disposition of any unused embryos.[77] These options include: (1) storing unused embryos; (2) donating the embryos to another individual(s); (3) discarding the embryos; or (4) donating the remaining embryos for research.[78]

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the disposition of embryos, but Arizona added itself to the list in 2018 when it enacted its legislation). For further reading on the Arizona law, see Alexandra Faver, *Whose Embryo Is It Anyway? The Need for a Federal Statute Enforcing Frozen Embryo Disposition Contracts*, Note, 55 FAM. CT. REV. 633, 637–38 (2017).

72. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106 (West 2009); CONN. GEN. STAT. ANN. §32-41jj (West 2015); KAN. STAT. ANN. § 65-6702 (West 1992); KY. REV. STAT. ANN. § 311.715 (West 1995); MASS. GEN. LAWS ch. 111L, § 4 (2005); N.H. REV. STAT. ANN. § 168-B:13 & B:18 (West 2014); N.J. STAT ANN. § 26:2Z-2 (West 2004); N.D. CENT. CODE. ANN. § 14-20-64(1) (West 2005); OHIO REV. CODE ANN. § 3111.97 (West 2006); OKLA. STAT. tit. 10, § 556 (2000); TEX. FAM. CODE ANN. § 160.706 (West 2007); WYO. STAT. ANN. § 14-2-906 (West 2013); *see also* Uniform Parentage Act § 706 (2000) (outlining the legal status of a former spouse to a child resulting from an embryo if the marriage was dissolved before the embryo is transferred); Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 489, 507 (2012) (analyzing the Uniform Parentage Act as one that embraces procreative liberty by not imposing undesired legal parentage despite biological connection).

73. *Rooks*, 429 P.3d at 581; *see also Reber*, 42 A.3d at 1131, 1142; *Roman*, 193 S.W.3d at 49.

74. CAL. HEALTH & SAFETY CODE § 125315 (West 2004).

75. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2004).

76. *Id.*

77. CAL. HEALTH & SAFETY CODE § 125315(b) (West 2004). Although outside the scope of this Comment, for further reading on the legal issues and circumstances surrounding donation, see generally Lambert, *supra* note 15.

78. *Id.*

California mandates that the fertility treatment provider shall provide a form to the patient(s) that establishes advanced written directives regarding the disposition of the embryos.[79] The provided form places a time limit on possible storage of the embryos at the clinic or storage facility while also providing a choice for disposition in the event of contingencies, including death, separation, and divorce.[80] Finally, patients who consider donating the embryos for research must be provided informed consent from their medical providers, with specific information conveyed to the individual(s).[81] California takes its law a step further than many states by requiring an advance directive, rather than merely requiring health care providers to supply timely, relevant, and appropriate information to patients; information is essential, but that information must be used to inform a decision at the start of the process.[82]

Narrowing in on the section of primary concern—the choices given to the partners in the event of divorce or separation—there are six options: (1) the embryo shall be made available to the female partner; (2) the embryo shall be made available to the male partner; (3) the embryo shall be donated for research purposes; (4) the embryo shall be thawed with no further action taken; (5) the embryo shall be donated to another couple or individual; or (6) the embryo shall be disposed of in another manner that

79. *Id.*

80. CAL. HEALTH & SAFETY CODE § 125315(b)(1)–(4) (West 2004).

81. The donating couples must be informed of the following by the health care provider: (1) a statement that the embryos will be used to derive human pluripotent stem cells for research and that the cells may be used (at a future time) for human transplantation research; (2) a statement that all identifiers associated with the embryos will be removed before the derivation of human pluripotent stem cells; (3) a statement that the donors will not receive any information about subsequent testing on the embryo or the derived human pluripotent cells; (4) a statement that derived cells or cell lines, with all identifiers removed, may be kept for many years; (5) disclosure of the possibility that the donated material could have commercial potential, and a statement that the donor(s) will not receive any financial or other benefits from any commercial development; (6) a statement that the human pluripotent stem cell research is not intended to provide direct medical benefit to the donor(s); and (7) a statement that the donated embryos will not be transferred to another woman's uterus, will not survive the human pluripotent stem cell derivation process, and will be handled respectfully. CAL. HEALTH & SAFETY CODE § 125315(c)(1)–(7) (West 2004).

82. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 32–41jj (West 2015) (providing that a health care provider shall provide the patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any embryos following infertility treatment—the individual shall be provided with the option of storing, donating to another person, donating for research, or disposing of unused embryos); MASS. GEN. LAWS ch. 111L § 4 (West 2005) (providing that patients shall be supplied with timely, relevant, and appropriate information to allow them to make an informed and voluntary choice regarding the disposition of embryos and that patients will be provided with an informational pamphlet describing the aspects of the IVF process as well as an informed consent form stating the patient has received and reviewed said pamphlet); N.J. STAT ANN. § 26:2Z-2 (West 2004) (stating that a health care provider shall supply an infertility patient with timely, relevant, and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of embryos following infertility treatment and that donation of embryos must be accompanied by written consent).

is clearly stated.[83] This statute is a solid start.[84] California has taken a step in the right direction by putting the decision in the hands of the couple undergoing fertility treatment.

The decision to begin the IVF process is an intensely personal one, and all contingencies should be left in the couple's hands to decide. Requiring that couples provide for the disposition is an important step; moreover, it is significant that the couples receive informed consent and mutually agree on the matter chosen. An intensely personal matter ought to remain that way—intensely personal.[85] Agreements regarding disposition in the event of separation or divorce should be both required and enforced. By including these provisions in a statute, power would remain with the couples, not with the fickle courts.[86] However, what California lacks is a clause requiring and enforcing such agreements.[87]

Requiring dispositional decisions regarding frozen embryos in the event of divorce forces couples to make a decision and plan; effectively forcing the couples' hand will make them consider what they truly desire for their embryos, rather than saving the tough conversation for an expensive legal battle down the road.[88] Enforcing said agreements also assures couples that the dispositional choices they make in the forms are

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83. CAL. HEALTH & SAFETY CODE § 125315(b)(3)(A)–(F) (West 2004); *see also* Judith Daar, *Whose Embryo Is It Anyway? California Finally Takes a Stand*, 58 ORANGE COUNTY LAW. 34 (2016) ("California has surprisingly lagged in one key area of ART law—the disposition of frozen embryos at divorce or separation of the progenitors.").

84. *See* Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 381 (2013) (stating that the California statute is silent on whether the dispositions will constitute an enforceable legal agreement between the couple if their relationship ends).

85. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1988) ("Explicit agreements . . . are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. 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.").

86. *See id.*

87. Daar, *supra* note 83, at 39. The author distinguishes *Findley v. Lee* and the public dispute between TV-actress Sofia Vergara and her now ex-boyfriend, Nicholas Loeb, regarding the disposition of two frozen embryos. *Id.* Findley and Lee and Vergara and Loeb were offered the opportunity to express their dispositional preferences and intent for their embryos. *Id.* However, the clinic consent forms signed by Vergara and Loeb were incomplete because they did not provide directions for disposition in the event of separation. *Id.*

88. *See Kass*, 696 N.E.2d at 180; Erik W. Johnson, *Frozen Embryos: Determining Disposition through Contract*, 55 RUTGERS L. REV. 793, 820 (2003) ("The benefits of upholding agreements over preembryo disposition (as well as legislation that requires such contracts to be made) are clarity, certainty, efficiency, and flexibility.").

concrete.[89] Without a promise of enforcement, there will be no end to the litigation and uncertainty of the disposition of embryos.

B. Louisiana

Louisiana takes a starkly opposite approach to disposition compared to California. Under Louisiana law, a human embryo is defined as "an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child,"[90] and is granted the legal status of a juridical person.[91] Louisiana law strictly prohibits the intentional destruction of a viable embryo[92] and states that the judicial standard for disposition of the embryo shall be in the best interest of the embryo.[93]

The recognition of an embryo as a juridical person surpasses the commonly accepted notion that embryos are of a unique character because of the potential for human life.[94] In the statutes regulating the disposition of embryos, couples' only option for disposition is to allow another couple to "adopt"[95] the embryos.[96] This embryo-centered legislation effectively

89. Findley v. Lee, 378 Ill. App. 3d 1136 (2008) (holding that the form the couple completed electing to thaw and discard the embryos in the event of divorce controls and the intent of the parties at the time must be given conclusive effect); *see also* Daar, *supra* note 83, at 37 ("[T]he holding in [Findley v. Lee] is significant for both its clarity and for its position within the larger jurisprudence governing embryo disputes. That is, in adopting a contract-specific approach, the court essentially declined to apply other legal frameworks used in sister jurisdictions."); Maura Dolan, *Divorced Couple's Frozen Embryos Must Be 'Thawed and Discarded,' Judge Rules*, L.A. TIMES (Nov. 18, 2015), https://www.latimes.com/local/lanow/la-me-ln-frozen-embryos-20151118-story.html [https://perma.cc/9BJD-PVUH].

90. LA. STAT. ANN. § 9:121 (1986).

91. LA. STAT. ANN. § 9:124 (1986).

92. LA. STAT. ANN. § 9:129 (1986) (stating an inviable embryo is one that fails to develop over a thirty-six hour period, except when the embryo is in a state of cryopreservation—and is therefore not a juridical person).

93. LA. STAT. ANN. § 9:131 (1986); *see also* Kellie LaGatta, Comment, *The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation*, 4 FLA. COASTAL L.J. 99, 108 (2003) ("If the donors dispute over the frozen embryos, the courts follow the 'best interests of the child' philosophy to resolve conflicts among the parties involved.").

94. Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

95. Debele & Crockin, *supra* note 11, at 67 (explaining that there is a debate among professionals, policymakers, and the public as to the use of the term "adoption" as opposed to "donation"). The issue is linked to the dispute over the classification of embryos: persons, property, or something in between. The term "adoption" tends to be used by advocates of characterizing embryos as persons, with the view that the disposition of such embryos should be governed by the best interests of the child, which might often mean adoption. *Id.*

96. LaGatta, *supra* note 93, at 108 ("The Louisiana statute explicitly states that 'an in vitro fertilized human ovum exists as a juridical person' and is thus entitled to the same rights as human beings and is not property of the donors. The statute punishes the intentional destruction of the embryos because of their status as human beings, and the only way to avoid this punishment is for the donor to relinquish any rights to the embryos and make the embryos available for adoption.").

ignores the wishes of the couple who created the embryos. Disputes regarding these embryos are pushed through the main entrance of courtrooms for judges to decide the best interest of the embryo, which would likely always lead to the embryo being born.[97] If one thing is clear, it is that more litigation in IVF is not needed. Rather, clarity to the opaque legal landscape of IVF disputes should be brought forth by the legislature and should stem from the parties' own decision making, not the courts'.

C. Arizona

In August 2018, Arizona adopted the newest piece of legislation on the disposition of embryos that is also the first of its kind.[98] The law states that, in the event of a dispute regarding the disposition of in vitro human embryos, the *court* shall award the embryos to the spouse who intends to allow the embryos to develop to birth.[99] The wording of the statute itself states that extensive litigation is necessary, and the law cannot facially provide a cut-and-dry solution. Simply telling courts to award custody to the party who intends to allow the embryo to develop to birth may work if one party seeks to destroy the embryo and the other party does not. However, consider what happens when both parties desire custody of the embryo; the Arizona statute attempts to solve this problem by providing the following:

> If both spouses intend to allow the in vitro human embryos to develop to birth and both spouses provided their gametes for the in vitro human embryos, [the court shall] resolve any dispute on the disposition of the in vitro human embryos in a manner that provides the best chance for the in vitro human embryos to develop to birth.[100]

The crux of the issue is how courts will then determine who or what will provide the best chance for the in vitro human embryos to develop to birth. Determining this new amorphous issue will likely lead to the creation of a new—flawed—balancing test or a best interests analysis when there is no evidence to weigh what would be in the future child's best interest.[101] When both parties intend to allow the embryo to develop

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97. Strasser, *supra* note 25, at 1201 ("In most if not all cases, it would be better for the child to live than never to exist[.]").

98. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

99. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2018).

100. ARIZ. REV. STAT. ANN. § 25-318.03(A)(2) (2018).

101. *See* In re Marriage of Witten, 672 N.W.2d 768, 775 (Iowa 2003) (critiquing the use of the best interests of the child approach when determining the disposition of embryos by noting that IVF custody disputes do not involve maximizing physical and emotional contact between the parents and the child. Instead, they involve the "more fundamental decision of whether the parties will be parents at all"). The court further notes that it would be "premature" to consider which parent is in the best position to raise a child when said "child" is frozen in a storage facility. *Id.* Here, the court is effectively

to birth, it becomes circular for the law to mandate that the court must make its decision in the manner that provides the best chance for the embryo to develop to birth. In effect, the law protects the embryos, not the interests of the parties who created the embryos.[102]

The only remedy provided for a party who does not want the embryos to develop is their release from parental responsibilities and no right, obligation, or interest with respect to any child resulting from the embryos—unless the spouse consents to being a parent.[103] Here, all power is taken away from one or both partners; they cannot make individualized dispositional choices. Instead, the choice will be made for the parties by the court.[104]

D. Florida

Florida's statute is on the cusp of being considered a model statute because it unflinchingly places the power in the couples' hands, not in the courts'.[105] The first section of the statute provides that a couple and the treating physician shall enter into a written agreement that provides for the disposition of the "commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance."[106] The statute further provides for the event where there is no written agreement, mandating that any remaining eggs or sperm shall remain under the control of the party who provided the eggs or sperm, or

being asked to decide which party has a better likelihood of allowing the embryo to develop to birth; determining this issue will lead to a balancing test of, among other things, the parties' relative financial status, the parties' intangible future plans, and so on.

102. The legislation was enacted largely in response to an Arizona case between Ruby Torres and John Joseph Terrell, where the judge was tasked with balancing Torres' interest in being a parent against Terrell's interest in not being a parent; the judge ruled the embryos should be put up for adoption. Cha quotes Torres, saying, "So both of us would have a child out there . . . . We just wouldn't be raising the child, and 18 years down the road if she or he wanted to find us he or she can and probably will." Ariana Eunjung Cha, *Who Gets the Embryos? Whoever Wants to Make Them into Babies, New Law Says*, WASH. POST (July 17, 2018), https://www.washingtonpost.com/national/health-science/who-gets-the-embryos-whoever-wants-to-make-them-into-babies-new-law-says/2018/07/17/8476b840-7e0d-11e8-bb6b-c1cb691f1402_story.html?utm_term=.9a44a989202c (last visited Sept. 24, 2019).

103. ARIZ. REV. STAT. ANN. § 25-318.03(C) (2018).

104. *See* Cha, *supra* note 102 ("The American Society for Reproductive Medicine, which represents doctors, nurses and other professionals who work on fertility issues, opposed the measure, arguing that it would have a profound impact on reproductive medicine. To protect patient choice, the measure would force clinics to ship embryos out of state for storage, increasing the risk of accidents, the society argued. It said the measure would hurt stem-cell research . . . because scarce embryos would be tied up in legal battles and not be available to be donated to science.").

105. FLA. STAT. ANN. § 742.17 (West 1993).

106. *Id.*

the decision-making authority shall reside jointly with the commissioning couple.[107]

A potential issue with the statute lies in subsection (2). It is, perhaps eerily, reminiscent of the contemporaneous mutual consent approach.[108] In principle, the two are similar; both ideas essentially promote the notion that the embryos should remain frozen until the parties can reach an agreement.[109] The issue becomes tougher because deciding the disposition is exceptionally difficult and, without a contract, court guidance may be needed.[110] Emotions are fraught when couples face the prospect of divorce and losing embryos; while a dispositional decision is difficult at the beginning of the IVF process, it is likely easier for couples to agree on a contract at the beginning, a time of hope, rather than at the end of a marriage.[111] The Florida statute is concerning in that it may lead to litigation in the event the commissioning couple cannot reach an agreement, thus requiring a judicial decision. Compared with the Arizona and Louisiana statutes, the Florida law effectively keeps more cases out of court.[112]

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107. FLA. STAT. ANN. § 742.17(1)–(2) (West 1993).

108. Flannery, *supra* note 18, at 255 (explaining the contemporaneous mutual consent approach as a less strict approach to the enforcement of contracts regarding embryo disposition by allowing parties to change their minds from their original agreement upon changed circumstances, such as divorce); *see also* Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006) (holding that it will serve public policy to allow parties to voluntarily decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind); Forman, *supra* note 84, at 385 (explaining that courts that follow the contemporaneous mutual consent approach will not enforce embryo disposition agreements between the parties when one party has changed his or her mind); Walker, *supra* note 29, at 51 (discussing the approach the Roman court took in reaching its holding).

109. Meagan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 HASTINGS WOMEN'S L.J. 179, 189 (2014) (explaining that the contemporaneous mutual consent approach proposes that the embryo should not be used by either partner, donated, used in research, or destroyed without the consent of both parties).

110. *Id.* at 183 (stating the language in subsection (2) does not provide much guidance for divorcing couples).

111. Forman, *supra* note 84, at 388–90. The author explains the extraordinary emotional difficulty couples face when making dispositional decisions. Forman cites one study, which states that almost fifty percent of individuals surveyed felt "distressed" about making a decision regarding embryo disposition, and another study reported patients felt "anguished" and "agonized" over such a decision. *Id.* at 388. Forman further notes that the patients felt that the decision-making process was "often marked by ambivalence, discomfort, and uncertainty." *Id.* Further, Forman states that often, at the beginning of the process, patients do not anticipate the challenge that "surplus" frozen embryos will pose and do not give the decision enough careful thought. *Id.* at 391. Post-treatment, according to Forman, couples frequently experience "high decisional conflict," as well as a conflict between partners. *Id.* However, although the decision-making process may not be as seriously considered at the beginning, it is no doubt an easier time to reach an agreement than at the end of a marriage when a custody battle is looming.

112. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (2018); LA. STAT. ANN. § 9:131 (1986).

III. A NEW BEGINNING AND A MODEL STATUTORY RESPONSE

It is tempting to state that the federal government should enact a statute that regulates embryo disposition across all fifty states.[113] However, this country needs to preserve the principles of federalism; a federal statute mandating disposition of embryos is not the solution. This nation is grounded in principles of federalism, and that fact should not change with regard to IVF regulations. However, it is no secret that states often model their laws off other states' statutes—this can be observed by reading the statutes listed above.[114] Why, then, should there not be a model statute proposed that states may look to and adopt? States are aware of the problems with courts determining embryo disposition without any statutory guidance.[115] The proposed model statute will merge with the courts' favored contractual approach but will make the contractual approach the only approach.

A. The Contractual Approach and Its Application to the Model Statute

State public policy and reluctance to enact legislation stymies court efforts to follow a cut-and-dry approach to disposition determinations.[116] Courts have long held that they should honor an initial agreement between parties when determining the disposition of frozen embryos.[117] Still, courts grapple with the question of how disposition should be decided when the parties dispute the initial agreement.[118] The answer is simple: parties should not be able to change their minds. Dispositional decisions regarding embryos deserve weighty consideration—but that consideration should take place at the beginning of the process and remain binding.[119]

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113. *But see* Faver, *supra* note 71, at 634 (proposing a model federal statute regarding the disposition of embryos); LaGatta, *supra* note 93, at 111 (arguing that "federal uniform policy regarding disposition of frozen embryos and the participation in the IVF process is a must").

114. *See* Fruchtman, *supra* note 71. It is readily apparent that many of these statutes are identical to one another, in both principle and wording, except for a few outliers.

115. Cha, *supra* note 102.

116. *See* Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992) ("[G]iven the relevant principles of constitutional law, the existing public policy of Tennessee with regard to unborn life . . . and the ethical considerations that [we] have developed in response to that scientific knowledge, there can be no easy answer to the question we now face."); *see generally* Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012).

117. *See Davis*, 842 S.W.2d at 597 ("We believe, as a starting point, that an agreement regarding disposition of any untransferred [preembryos] in the event of contingencies . . . should be presumed valid and should be enforced as between the progenitors."). The *Davis* court goes on to state that life is not static, and agreements should be able to be later modified by agreement, but in the absence of such agreed modification, the original agreement should be binding. *Id.*

118. *Id.*

119. Forman, *supra* note 84, at 388–90. *But see* A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000) (holding that even if the husband and wife entered into an unambiguous agreement between

A statutory solution to the courts' dilemma comes packaged as a model that closely resembles those of California and Florida.[120] As in California, statutes must promote the supply of "timely, relevant, and appropriate information" to patients seeking infertility treatment.[121] This information helps enlighten the decision-making process as patients prepare to provide a directive as to how remaining embryos should be handled.

An advance directive should also be required by statute, with the caveat that it is binding.[122] While evidence shows that couples do not seriously consider dispositional decisions at the preliminary stage of the IVF process, as a matter of public policy, they must. If they still do not give appropriate consideration to the disposition of their embryos then it must be a matter of "buyer beware."[123] The public policy is twofold: first, and obviously, the decision to undergo IVF treatment should not be taken lightly, and couples must plan for every contingency, including the unhappy prospect of divorce or separation; second, allowing couples to change their minds will only lead to the same litigation that has occurred for the past twenty-six years.[124] Yes, the *Davis* court conceded that if both couples change their minds but mutually agree on an alternative to the initial agreement, then said agreement need not be honored.[125] However,

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themselves regarding the disposition of frozen preembryos, the court would still refuse to enforce an agreement that would compel one donor to become a parent against their will).

120. *See* CAL. HEALTH & SAFETY CODE § 125315 (West 2004); FL. STAT. ANN. § 742.17 (West 1993).

121. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2004); *see also* Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 619 (2011) (arguing healthcare facilities need to do more to engage intended parents at the outset to help them make a disposition decision).

122. CAL. HEALTH & SAFETY CODE § 125315(b) (West 2004). *But see* Coleman, *supra* note 11, at 57 (arguing that requiring couples to make binding decisions about the disposition of remaining embryos undermines, rather than promotes, procreative liberty).

123. Forman, *supra* note 84, at 388–90. *See* Laufer-Ukeles, *supra* note 121, at 619 (arguing that couples should be urged to consider the fate of remaining embryos, the legal and ethical ramifications of dispositional choices, as well as the possible circumstances that may result in disputes in advance).

124. *See* Kass v. Kass, 696 N.E.2d. 174, 180 (N.Y. 1988). The court noted the importance of honoring original agreements, while also noting the difficulties of considering every contingency. The court stated,

> While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. All agreements looking to the future to some extent deal with the unknown. Here, however, the uncertainties inherent in the IVF process itself are vastly complicated by cryopreservation, which . . . allows time for minds, and circumstances to change. Divorce; death, disappearance or incapacity of one or both partners; aging; the birth of other children are but a sampling of the *obvious* changes in individual circumstances that might take place over time. These factors make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis.

Id. (emphasis added).

125. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

in a contentious custody battle, it should be no surprise that emotions are fraught and couples are not likely to agree, so the contemporaneous mutual consent model examined by courts like *Davis* is ultimately not realistic. Thus, making preliminary agreements required and binding will halt potential litigation in its tracks and provide a bright line, cut-and-dry rule to a hot-button issue.[126]

The imposition of a binding agreement is where this model statute diverges from Florida's.[127] Florida, perhaps wisely, provides for the event that there is no initial agreement between the commissioning couple.[128] Under the model statute, such an event would not be a possibility. While the Florida statute aims to keep the power with the couple by stating that the dispositional decision still rests with the couple even when there is no agreement, in cases of divorce or separation that still opens the door to litigation.[129]

The proposed model statute also, above all else, aims to maintain the commissioning couple's agency and decision-making authority.[130] It is logical and right that the dispositional decision ought to remain with the couple whose genetic material created the embryo.[131] The statute would mandate that couples exercise their authority at the preliminary stage of

126. *But see* Marold, *supra* note 109, at 196. Marold cites research conducted in 2010 by the Department of Social Medicine at the University of North Carolina at Chapel Hill, which found that parties feel extreme difficulty at being forced to make a decision and concluded that informed consent forms should be reviewed by the couples every so often. *Id.* Marold asserts that research suggests the clinic consent form should not be considered a legally binding contractual agreement. *Id.*

127. FLA. STAT. ANN. § 742.17(2) (West 1993).

128. *Id.*

129. *Id.*

130. Authors such as Faver and LaGatta propose that federal legislation include the caveat that parties must participate in counseling and receive authorization before beginning the IVF process. *See* Faver, *supra* note 71, at 639 ("[P]sychological counseling will not only be mandatory for the facility to offer, but also mandatory for the participants to attend in order to move forward with IVF. The mental health professional is required to sign off that the participants fully understand the consequences of going through the IVF process and that neither party was pressured into making the disposition decision."); LaGatta, *supra* note 93, at 114 ("[L]egislation should also proscribe that couples undergo counseling and receive authorization prior to participating in an IVF program."). The model statute set forth in this Comment will not include any such provision; in the interest of maintaining individual autonomy and mirroring the experience many couples undergo when conceiving naturally (meaning that counseling is not required before attempting to conceive naturally), couples should be free to make the decision to begin the IVF process at their discretion. *See also* J.B. v. M.B., 783 A.2d 707, 715 (N.J. 2001) (citing *Davis*, 842 S.W.2d at 597) ("As they are both contributors of the genetic material comprising the preembryos, the decision should be theirs to maintain.").

131. *See* Coleman, *supra* note 11, at 88 (stating that a central aspect of procreative freedom is the right to make contemporaneous decisions about how one's reproductive capacity will be used); *see also* In re Marriage of Dahl and Angle, 194 P.3d 834, 842 (Or. Ct. App. 2008) (holding that absent a countervailing policy, it is just and proper to dispose of the embryos in the manner that the parties chose at the time they began the IVF process).

the process.[132] This would make the agreement required, binding, and most importantly, preserve the couples' authority.[133] The proposed statute allows them to exercise their wishes in the event of contingencies, such as death, separation, or divorce, while keeping their authority from being displaced into the unpredictable hands of the courts.[134]

B. The Status of Embryos Under the Model Statute

Courts have held that embryos are entitled to special respect because of the potential for human life;[135] essentially, they are an intermediary between persons[136] and property. As such, courts are still grappling with a meaningful way to dispose of them while still honoring the rights of the progenitors.[137] Inherent in every case is the acknowledgment of the

132. *But see* Coleman, *supra* note 11, at 106 ("Decisions about having children should be made in the spirit of trust and mutual cooperation, not as part of a negotiated deal backed by the force of law."); Cori Schreider, *Cryopreserved Embryo Disputes: Weighing Interests Regarding Genetic Parenthood*, 20 J. HEALTH CARE L. & POL'Y 75, 80 (2017) (stating that evidence reveals that contracts and consent forms are not a reliable method of determining the disposition of embryos). Although requiring couples to form a binding directive at the preliminary stages of the process may seem cold, it is a reality that there will be remaining embryos whose fate must be determined. One might argue that the process should be as close to the process of natural conception as possible. However, the stark reality is that when children are born naturally, there are no "remainders" or "leftovers" to consider; in an IVF process, there are leftover embryos to be stored and potentially used, so couples must consider the future of those embryos in a manner different than a couple who can conceive naturally. *See* Coleman, *supra* note 11, at 110 ("[T]he process of leaving advance instructions will force the couple to consider carefully the implications of creating multiple embryos, including the possibility that they may create more embryos than they will ever use.").

133. Forman, *supra* note 84, at 433 ("We could also see [enforceability] as freedom-enhancing. One person's freedom to change his or her mind comes at the expense of another's freedom to rely on a promised disposition to choose a particular option. Without the opportunity to contract, all parties would be subject to the default rules of the jurisdiction, which might eliminate an option (such as using the embryos despite the other's objection) or be forced to submit the determination under a less specific standard for resolution, taking the matter out of the parties' hands. Either result would circumscribe, rather than enhance, the parties' freedom.").

134. *See* Robertson, *supra* note 12, at 464–65. ("The argument for recognizing the binding effect of joint advance instructions and acceptance of IVF program conditions rests on several grounds. The right to use embryos to reproduce or to avoid procreation should include the right to give binding advance instructions because certainty about consequences is necessary to exercise reproductive options. In addition, all parties gain from the ability to rely on prior instructions when future contingencies occur. Finally, it minimizes the frequency and cost of resolving disputes that arise over disposition of embryos.").

135. *Davis*, 842 S.W.2d at 597; *see also* Jeter v. Mayo Clinic Arizona, 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005) (holding that preembryos occupy an interim category between mere human tissue and persons because of their potential to become persons, and such embryos are due varying degrees of special respect dependent on the issue involved).

136. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding no embryo enjoys protection as a "person" under federal law); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

137. *See, e.g.*, *Davis*, 842 S.W.2d 558; In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012); *see also* LaGatta, *supra* note 93, at 101 (arguing that embryos need a definitive status and, because there is no uniform law assigning a status to embryos, courts are forced to "reluctantly turn to one of four

fundamental right both to be a parent and not to be a parent.[138] Moreover, the interests of the party who desires not to be a parent often win and the embryo is ordered to be destroyed;[139] thus, despite the unique status embryos are said to maintain, the rights of the progenitor often trump any consideration given to the embryo. The model statute would maintain the special status of the embryos while taking power away from the court to disregard the special status in favor of progenitor rights. The basic solution is this: allow the couples to decide at the earliest stage of the IVF process—when they are filling out the forms and choosing the disposition of *their* embryos themselves.[140] Inherent in the couples' decision will be a recognition of the status conferred on their embryos. As a matter of policy, it is better for couples to assign meaning or status to the embryos they created, by determining their disposition according to their mutual wishes, than for the court to assign its own unscrupulous determination of what the embryos are worth to individual couples.[141]

C. Safeguards

Present in many contracts is the possibility that the contract lacked a manifestation of assent or a meeting of the minds between the parties, and

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hypotheses, involving the status of the frozen embryos: (1) the constitutional view of the United States Supreme Court; (2) the embryo as a person; (3) the embryo as property; (4) the embryo deserves special consideration"). LaGatta states that the view that embryos deserve special respect is the most widely accepted of the four hypotheses. *Id.*

138. U.S. CONST. amend. XIV; *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the Fourteenth Amendment guarantees "the right of the individual to . . . marry, establish a home and bring up children").

139. *See Davis*, 842 S.W.2d at 604 (holding that, ordinarily, the party wishing to avoid procreation has the greater interest and should prevail).

140. *But see* Rita Lowery Gitchell, *Should Legal Precedent Based on Old, Flawed, Scientific Analysis Regarding When Life Begins, Continue to Apply to Parental Disputes over the Fate of Frozen Embryos, When There Are Now Scientifically Known and Observed Facts Proving Life Begins at Fertilization?*, 20 DEPAUL J. HEALTH CARE L. 1, 2–3 (2018) (asserting that courts, by recognizing human embryos as human beings, should "evaluate contracts that describe embryos as mere property as invalid, under known scientific fact, refuse to allow contract law to condemn human life, and only consider actual advance directives concerning the embryos, in light of the embryos' best interests"); *see also* Michelle L. Anderson, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589, 606–07 (2006) (using existing case law as examples of the need for uniform legislation in every state that establishes the legal status of embryos).

141. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 452 (1990) ("At issue in determining legal status are several questions relating to the locus and scope of decisional authority over embryos . . . the question is what actors have decisional authority, may they exercise that authority in advance . . . ."); Diane K. Yang, *What's Mine Is Mine, but What's Yours Should Also be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 617 (2002) ("[T]he participants' interests, as reflected by their agreement, would be the courts' primary concern if litigation occurs. Advance directives, therefore, sidestep the need to classify [preembryos] as either persons or property.").

there is always a concern for unconscionability.[142] A central issue arises if the treatment provider does not follow protocol in explaining the relevant, appropriate, and timely information to patients before the advance directive is executed.[143] In the event of a failure to follow the statutorily prescribed protocol, thus resulting in an invalid contract, the dispositional choice should not be made for the couple.[144]

Policy dictates that the couples' ability to choose what happens to the embryos should not be taken away from them. The commissioning couple should not be stripped of their agency because a treatment provider failed to follow the statutorily prescribed duties. The model statute will provide that in the event there is no valid agreement between the parties (and the parties are unable to agree), then the parties must participate in mandatory mediation.[145]

The model statute will mirror California's statute in that failure to follow procedural steps will constitute unprofessional conduct and result in a monetary penalty.[146] Such a provision will put facilities and treatment providers on notice that their conduct will be monitored and procedures must be followed.

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142. Forman, *supra* note 84, at 437 (arguing that standard assumptions about bargaining power are not of great concern in this type of arrangement and that embryo disposition agreements, unlike premarital agreements, are less likely to be inherently unfair).

143. *See* Faver, *supra* note 71, at 640; *see also* Ashley Alenick, *Pre-Embryo Custody Battles: How Predisposition Contracts Could Be the Winning Solution*, 38 CARDOZO L. REV. 1897, 1910 (2017) (proposing that predisposition contracts should be separate from informed consent forms in the interest of preserving procedural fairness and assuring dispositional directives are based on full disclosure). Timely, relevant, and appropriate information can include confidentiality protections, all possible dispositional options, length of storage, destruction procedures, etc. For more information regarding informed consent procedures, see AM. BAR ASS'N SECTION OF FAMILY LAW'S COMM. ON REPROD. AND GENETIC TECH., AM. BAR ASS'N MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 201–03 (2008), https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf [https://perma.cc/7F8F-H9SB].

144. *But see* Faver, *supra* note 71, at 640. In Faver's proposed federal statute, she provides default rules in the event the contract is found unconscionable—the embryos will be thawed out—and the couples must be made aware of the default disposition to ensure knowledge of what will happen if the agreement is found invalid.

145. This proposed provision loosely follows the structure of Florida's statute but takes it a step further by ensuring couples engage in mediation in order to come to a decision regarding the embryos. Mediation provides a more relaxed, congenial environment than a courtroom, while also keeping the power in the hands of the couple, rather than a judge, because a mediator exists to facilitate, not mandate. *See* FLA. STAT. ANN. § 742.17(2) (West 1993); *see also Advantages of Alternative Dispute Resolution*, LEGAL SERVICES COMM'N (Jul. 31, 2014), https://lawhandbook.sa.gov.au/ch27s10s01.php [https://perma.cc/67S9-FS54].

146. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2004). The proposed model statute will take a finding of unprofessional conduct a step further by imposing a monetary penalty if statutory procedures are not followed in the attempt to channel and regulate providers' behavior.

With safeguards in place, the statute will protect the validity of contracts while also protecting parties' interests concerning the disposition of the embryos.

CONCLUSION

It is apparent that state response to an ever-growing issue is mostly unsatisfactory.[147] With case law being inconsistent, inequitable, and, in a word, disastrous, a response is needed—and quickly.[148] Existing state legislation needs to be revisited, and the vast number of states without legislation need to respond to a problem that will not simply vanish.[149]

The most crucial objective in implementing state legislation is preserving individuals' autonomy and procreative rights.[150] Litigation places the decisions in the hands of the courts, which are then forced to weigh two equitable interests—the interest in procreating and the interest in not procreating—against one another.[151] In cases where the contractual approach is not adopted, and instead the balancing test is employed, one person's procreative autonomy is taken away in the interest of preserving the other party's interests.[152] As a matter of public policy and in the interest of individual liberty, these decisions ought to be left to the parties themselves to determine their interest in their procreative autonomy, as well as how they assign meaning to the status of their remaining embryos.[153] When courts are forced to engage with these issues, however

147. LaGatta, *supra* note 93, at 115. LaGatta states that, as reproductive technology advances, the number of couples participating in IVF will continue to grow, and the number of disputes that arise regarding the disposition of embryos will also continue to grow. *Id.*; *see* Tim Schlesinger, *Embryo Disposition upon Separation or Divorce*, 4 SCITECH LAW. 22, 25 (2016) (concluding that "[o]ne thing is certain: [t]his is an issue that cries out for responsible legislation. The millions of couples undergoing fertility treatments (as well as the physicians and healthcare professionals) deserve to know the answer to these questions before they spend years in litigation trying to find out").

148. LaGatta, *supra* note 93, at 115 (arguing that without federal legislation, many more disputes will be brought to courts).

149. See *supra* note 72 for a list of statutes currently in effect; strikingly few states attempt to deal with the specific issues associated with IVF, while many allow consent to be withdrawn or provide a release from parental responsibilities.

150. Universal among case law is the interest in preserving procreational rights. *See generally* Coleman, *supra* note 11 (arguing for an inalienable rights approach for determining the disposition of embryos that prioritizes the couples' procreational autonomy, going so far as that a person's current objection would take precedence over prior consent).

151. *See generally, e.g.*, In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

152. *See generally, e.g.*, *Rooks*, 429 P.3d 579; *Davis*, 842 S.W.2d 558.

153. Robertson, *supra* note 12, at 424.

reluctantly, they yield devastating results that leave one person, or sometimes both parties, disappointed, confused, and disturbed.[154]

The provisions in the model statute are aimed at maintaining procreational autonomy and individual liberty by allowing parties to enter into a reliable agreement that will determine the disposition of embryos in a manner they see fit. While making such agreements binding may draw criticism, primarily because the statute provides no leeway for couples to change their minds, it also ensures that these contracts will be dependable and will keep couples out of court; it forces couples to seriously plan for a future they responsibly need to consider. Binding agreements will substantially reduce litigation that leads to inequitable results. Furthermore, requiring mandatory mediation will enable parties to settle their disputes out of court with a facilitator, rather than a decision maker, which will maintain parties' agency and independence.

Under the model statute's guidance, states will be able to enforce legislation that simultaneously helps guarantee individual liberty while enabling couples to safely and assuredly navigate the IVF process.

154. Cha, *supra* note 102. *See generally Rooks*, 429 P.3d 579; *Kass*, 696 N.E.2d 150; *Reber*, 42 A.3d 1131; *Davis*, 842 S.W.2d 558.