

Yours, Mine, or Ours: Resolving Frozen Embryo Disputes Through Genetics

Carinne Jaeger*

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INTRODUCTION

In vitro fertilization (IVF) has become increasingly popular since the first “test tube baby” was born more than thirty years ago.¹ As people are

* J.D. Candidate, 2017, Seattle University School of Law; B.A., 2013, Washington State University. I would like to thank Professor Deidre Bowen for her support, guidance, and ability to dig me out of analytical holes; Chelsea Raines and Marianne Parry for being my sounding boards; and Sean Bannan for his love and support.

1. Susan Donaldson James, *Test Tube Baby Louise Brown Turns 35*, ABC NEWS (July 25, 2013), <http://abcnews.go.com/Health/test-tube-baby-louise-brown-turns-35-medical/story?id=19764283> [<https://perma.cc/4YBX-HSNC>].

delaying childbirth in favor of other pursuits, couples often turn to the harvesting and freezing of eggs, sperm, and embryos² to achieve these goals.³ Since 2007, the American birth rate has been declining steadily.⁴ Despite this decline, the births of babies conceived using IVF has been increasing; in 2015, IVF accounted for about 1.6% of all babies born in the United States.⁵ This is quite a feat, as the process of harvesting, fertilizing, and storing eggs or embryos is expensive and invasive.⁶ “In an in vitro fertilization procedure, eggs are collected from the woman’s ovaries and mixed with the man’s sperm outside the body, usually in a glass dish in a laboratory. . . . The fertilized eggs are then cultivated for a few days in the laboratory and transferred to the woman’s uterus.”⁷ “As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use.”⁸ However, many disputes have arisen⁹ when a couple creates embryos and stores them but later divorces. What happens to the frozen embryos?

This issue is further complicated when instead of having both a man and a woman contribute their genetic material to create an embryo, only one spouse contributes genetic material and a donor provides the additional eggs or sperm. The analysis changes from a “dual-progenitor” dispute, where both parties to the litigation have contributed genetic material, to a “sole-progenitor” dispute, where only one of the parties to the litigation has contributed genetic material.

2. There are biological developmental differences between an embryo, a pre-embryo, a pre-zygote, etc.; however, for the sake of simplicity, this Note will only use the term “embryo”. See generally Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 127 n.1 (1999).

3. See Jen Christensen, *Record Number of Women Using IVF to Get Pregnant*, CNN (Feb. 18, 2014, 2:36 PM), <http://www.cnn.com/2014/02/17/health/record-ivf-use/> [<https://perma.cc/4YBX-HSNC>].

4. *Id.*

5. See *ART Success Rates*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/artdata/> [<https://perma.cc/GV7V-T6CH>]; see also Christensen, *supra* note 3.

6. See Christensen, *supra* note 3. The average cost of one IVF treatment in the United States is \$12,400. *Id.*

7. *What is IVF?*, CTR. FOR HUM. REPROD., <https://www.centerforhumanreprod.com/services/infertility-treatments/ivf/> [<https://perma.cc/5MG3-6B88>].

8. *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998).

9. See, e.g., Danielle & Andy Mayoras, *Embryo Lawsuit Between Sofia Vergara and Nick Loeb Getting Out of Hand*, FORBES (Nov. 18, 2016, 8:48 AM), <http://www.forbes.com/sites/trialandheirs/2016/11/18/embryo-lawsuit-between-sofia-vergara-and-nick-loeb-getting-out-of-hand/#7c3011175cd0>; Katie Mettler, *Frozen Pre-Embryos: Life or ‘Marital Property’? Mo. Court Decides Tough Custody Case*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/ex-husband-in-frozen-embryo-dispute-cant-be-forced-to-become-a-father-mo-court-rules/?utm_term=.4d54c751f3c5 [<https://perma.cc/XN86-U64R>]; Madeline Schwartz, *Who Owns Pre-Embryos?*, NEW YORKER (Apr. 28, 2015), <http://www.newyorker.com/tech/elements/who-owns-pre-embryos> [<https://perma.cc/5CDC-BHSD>].

As of this Note's publication, only two appellate decisions dealing with sole-progenitor disputes have been issued,¹⁰ and the solutions posed by these courts are not ideal. Courts have attempted to apply current dual-progenitor analyses to the sole-progenitor context, but they simply do not apply in the same fashion. Sole-progenitor situations are very different from dual-progenitor situations and should be subject to a different analysis;

[b]ecause an individual who lacks a genetic connection to an embryo has a lesser stake in how the embryo is disposed, the resolution of disputes over the disposition of embryos created with donor sperm and/or eggs requires a different set of rules than those that apply to disputes over embryos created with both partners' gametes.¹¹

Therefore, because analyses applied in the dual-progenitor context are not appropriate in the sole-progenitor context, the partner whose genetic material was not used must rely on different theories if they want to claim ownership over any frozen embryos at the time of divorce. These theories can range from marital presumption or community property rights to claims of parentage through intentionality. However, as this Note will argue, none of these claims of ownership by the non-genetic spouse are sufficient to overcome concerns of forced procreation on the genetic progenitor. It is unconscionable for a court to allow a non-genetic spouse to have embryos implanted that will force the genetic progenitor of those embryos to become a parent against his or her will. Under current analytical frameworks, this is a distinct possibility. Because of this concern and the lack of sufficient remedies provided by the current frameworks, this Note advocates for a new framework that favors genetics over all other considerations and awards absolute ownership rights to the sole-genetic progenitor.

This genetic framework will encourage judicial efficiency by creating a bright line rule not only for courts but also for couples considering IVF—giving couples more clarity as to the disposition of their embryos should they separate. Disputes involving only one genetic progenitor will likely continue to arise as IVF technology becomes more common and affordable. Additionally, as same-sex marriage is now legal across all the states, same-sex couples will likely engage in efforts to have children, which may involve IVF, and may get divorced.¹² These issues

10. See *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *In re Marriage of Nash*, 2009 WL 1514842, at *1 (Wash. App. 2009).

11. Coleman, *supra* note 2, at 115.

12. See Paige Chamberlain Ornduff, *Who Gets the Bun That Doesn't Make It to the Oven? The Rights to Pre-Embryos for Individuals in Same-Sex Relationships*, 8 CHARLESTON L. REV. 557, 582–90 (2014).

are only beginning and this Note seeks to shed some light on this growing area of law.

Part I of this Note provides some background on the current frameworks being used by courts in dual-progenitor disputes, while Part II presents the only two cases to deal with sole-genetic progenitor disputes and details how the courts conducted their analyses. Part III explains how courts establish legal parentage and how these legal parentage standards apply to frozen embryo disputes, specifically ones that involve only one genetic progenitor. Part IV proposes a new genetic framework to assist in the resolution of these issues. This Note concludes with a recommendation for future legislative intervention to aid in the widespread and uniform resolution of these types of disputes.

I. DUAL-GENETIC PROGENITOR FRAMEWORKS

While frozen embryo jurisprudence is still developing, courts have settled on three main analyses to resolve disputes. However, before a court can begin to do an analysis under one of these analytical frameworks, the court must first determine what type of property is in dispute.¹³ The court must ask: What is an embryo? Is it property, a child, or something in between: a special kind of property with protections and considerations?¹⁴

Most courts find that the embryo is a special kind of property.¹⁵ One court succinctly stated that embryos are not “persons” or “property,” but instead “occupy an interim category that entitles them to special respect because of their potential for human life.”¹⁶ This means that each party has an ownership interest in the embryo, in that they have decision-making authority over its disposition, but they do not have true property interests.¹⁷

After a court determines the property category that the embryo occupies, it must then decide which analysis is proper to determine ownership rights or custody of the embryo.¹⁸ The analytical frameworks that have been developed are the (1) contemporaneous mutual assent approach,¹⁹ (2) contractual approach,²⁰ and (3) balancing test approach.²¹ It is relevant to note that these frameworks have arisen through

13. *Id.* at 568.

14. *See* *Davis v. Davis*, 842 S.W.2d 588, 594–97 (Tenn. 1992).

15. *See id.* at 597.

16. *Id.*

17. *See id.*

18. Ornduff, *supra* note 12, at 570.

19. *See In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).

20. *See* *Szafranski v. Dunston*, 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015); *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998); *In re Marriage of Dahl*, 194 P.3d 834, 840 (Or. Ct. App. 2008); *Davis*, 842 S.W.2d at 597; *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. Ct. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261, 268 (Wash. 2002).

21. *See* *Davis*, 842 S.W.2d at 603.

dual-progenitor disputes, where both spouses have contributed genetic material to the creation of an embryo.

A. Contemporaneous Mutual Assent Approach

One of the frameworks used by courts when deciding disputes involving frozen embryos is the contemporaneous mutual assent approach. Under this framework, “decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed.”²² This approach proposes that “no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the mutual consent of the couple that created the embryo.”²³ Under this approach,

advance instructions would not be treated as binding contracts. If either partner has a change of mind about disposition decisions made in advance, that person’s current objection would take precedence over the prior consent. If one of the partners rescinds an advance disposition decision and the other does not, the mutual consent principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out.²⁴

One court implemented a contemporaneous mutual assent–contractual hybrid approach and held that parties’ prior agreements were and are binding *unless* either party changes his or her mind about the disposition of any frozen embryos.²⁵ The court found it would be against public policy to “enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind.”²⁶

The biggest flaw with this framework is that it may cause the parties to reach a “stalemate.”²⁷ As one court noted, “This approach strikes us as being totally unrealistic. If the parties could reach an agreement, they would not be in court.”²⁸ Moreover, it places a lot of power in the hands of the parties to reject the other party’s proposed use of the embryos, causing potentially drawn-out and contentious litigation. For these reasons, this approach is both unfavorable and unrealistic.

22. Coleman, *supra* note 2, at 81.

23. *Id.* at 110.

24. *Id.* at 110–11.

25. *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)).

26. *Id.* at 781.

27. Ornduff, *supra* note 12, at 574.

28. *Reber v. Reiss*, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012).

B. Contractual Approach

The most popular framework is the contractual approach. Using the contractual approach, courts evaluate the contract(s) that the parties entered into when commencing the IVF process, most often with the IVF facility.²⁹ This is a simple way for courts to examine the parties' intent before the embryo existed.

In *Kass v. Kass*, a New York court found that the consent form the couple signed prior to undergoing the IVF process was a binding agreement that indicated their mutual assent to donate their embryos³⁰ for research in the event of divorce.³¹ Both parties later signed a divorce agreement stating that the frozen embryos should be disposed of in a manner outlined in the consent form and that neither party nor anyone else would lay claim to custody.³² About a month later, the wife filed an action for sole custody of the embryos so that she could try the implantation process again and have another child.³³ The husband maintained his desire for the embryos to be donated for research, as the couple had agreed in their initial contract.³⁴ The Court of Appeals, the highest court in New York, found that the agreement was binding and manifested a mutual assent that the embryos be donated for research.³⁵

In *Kass*, the court relied upon the original contract as evidence of the parties' intent before the embryos came into existence.³⁶ Because there was a contract involved, the court was tasked with enforcing the contract and using it as evidence of the parties' prior intent.³⁷ Proponents of this approach find that using contracts is a much easier way for courts to adjudicate issues like this one because it does not require the court to evaluate or balance the interests and desires of the parties. Moreover, courts have held that an agreement, specifically regarding the disposition

29. See Coleman, *supra* note 2, at 71.

30. The court in *Kass* chose to use the term "pre-zygotes," which are defined in the record as "eggs which have been penetrated by sperm but have not yet joined genetic material." *Kass v. Kass*, 696 N.E.2d 174, n.1 (N.Y. 1998) (internal citation omitted).

31. *Id.* at 181.

32. *Id.* at 177.

33. *Id.*

34. *Id.* at 175.

35. *Id.* at 181; see also *In re Marriage of Dahl*, 194 P.3d 834, 842 (Or. Ct. App. 2008) (finding that the agreement signed by the couple designating custody/exclusive rights to transfer or dispose of the embryos to the wife indicated intent for the wife to get custody); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006) (finding that an agreement providing that embryos were to be discarded at the time of divorce served state public policy by allowing parties to voluntarily decide the disposition of the frozen embryos prior to cryopreservation).

36. *Kass*, 696 N.E.2d at 180-81.

37. *Id.* at 182.

of frozen embryos, should be presumed valid and enforced as between the progenitors.³⁸

However, critics of the contractual approach argue that it “insufficiently protects the individual and societal interests at stake.”³⁹ Take Massachusetts for example, where the Supreme Court declined to honor an advance agreement regarding the disposition of embryos on public policy grounds in *A.Z. v. B.Z.*⁴⁰ The couple had signed an agreement stating that in the event of divorce or separation, the embryos would be returned to the wife for implantation.⁴¹ While the couple was separated, the wife had one embryo implanted.⁴² During the divorce proceedings, the husband filed for an injunction to prevent the wife from implanting any more embryos.⁴³ The court refused to enforce the original IVF agreement granting the wife use of the embryos because it would compel the husband to become a parent against his will.⁴⁴ “As a matter of public policy, [the court] conclude[d] that forced procreation is not an area amenable to judicial enforcement.”⁴⁵

In *Davis v. Davis*, the Supreme Court of Tennessee reached a similar conclusion. While that court found that agreements between progenitors should be presumed valid and be enforced, in the event that there is no prior agreement between the parties, the court must instead weigh the interests and burdens of the parties.⁴⁶ In weighing the interests of the parties, heavy favor should be shown towards a party wishing to avoid procreation.⁴⁷ The court recognized that “[o]rdinarily, the party wishing to avoid procreating should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”⁴⁸ Applying this holding, if given a dual-progenitor situation where one party wants to implant the embryos and have more children while the other party wants to dispose of or donate the embryos, the court should rule in favor of the party wishing to dispose of or donate the embryos because otherwise, the court would essentially be forcing the other party to become a biological parent against that party’s

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

39. See Coleman, *supra* note 2, at 88.

40. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057–58 (Mass. 2000).

41. *Id.* at 1054.

42. *Id.* at 1053.

43. *Id.*

44. *Id.* at 1057–58.

45. *Id.*

46. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

47. *Id.*

48. *Id.*

will. As the court in *A.Z. v. B.Z.* expressed, this is a violation of public policy.⁴⁹

Notwithstanding these concerns, the *Davis* court found that this preference for avoiding forced procreation is not absolute.⁵⁰ It may be overcome by a showing that the party wishing to implant the embryos cannot achieve biological parenthood through any other means.⁵¹ This situation usually arises in situations where one party is rendered infertile due to medical treatment but was able to contribute gametes to make embryos prior to the treatments.⁵² Under those circumstances, the presumption against forced procreation can be overcome to aid parties in exercising their constitutional rights to be parents.⁵³

While the contractual approach is more straightforward because courts are only tasked with enforcing the contracts signed by the parties, which indicate a clear manifestation of the parties' intent regarding disposition of any remaining embryos, contracts that allow for the possibility of forced procreation create serious public policy concerns.

C. Balancing Test Approach

The last analytical framework that courts consider to resolve frozen embryo disputes is the balancing test approach. Using the balancing test, a court weighs "the parties' relative interests with respect to the [embryos]."⁵⁴ Consider *Reber v. Reiss*, where the court found that the balancing approach was the more suitable test and that often a party's inability to have a child will weigh in that party's favor.⁵⁵ In *Reber*, a couple created embryos through IVF prior to the wife undergoing chemotherapy for breast cancer.⁵⁶ When the couple split up, the wife wanted ownership of the embryos so she could implant them, as they were her only chance to have biological children.⁵⁷ However, the husband wanted the embryos to be destroyed and discarded.⁵⁸ The court found that

49. *A.Z.*, 725 N.E.2d at 1057–58.

50. See *Davis*, 842 S.W.2d at 604.

51. *Id.* Cf. *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001) (finding that, in balancing the interests, the wife's right to not procreate outweighed the husband's right to procreate because he had other reasonable means of reproducing).

52. See, e.g., *Szafranski v. Dunston*, 34 N.E.3d 1132, 1136 (Ill. App. Ct. 2015) (appellee commenced the IVF process to cryopreserve embryos before being treated for lymphoma, treatments for which would likely render her infertile); *Reber v. Reiss*, 42 A.3d 1131, 1132–33 (Pa. Super. Ct. 2012) (wife underwent the IVF procedure to freeze embryos prior to treatment for breast cancer).

53. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that one has a basic, fundamental right to procreate and be a parent).

54. *Szafranski*, 34 N.E.3d at 1161.

55. *Reber*, 42 A.3d at 1142.

56. *Id.* at 1132–33.

57. *Id.* at 1133.

58. *Id.*

the wife's desire and inability to have children outweighed the husband's desire to not be a forced biological parent.⁵⁹ The court granted her ownership of the embryos because she had no reasonable alternative to biological procreation.⁶⁰ This decision perfectly exemplifies the suggestion by the *Davis*⁶¹ court that the presumption against forced procreation is not absolute and can be overcome.

However, allowing courts to balance the interests of the parties involves more judicial interference than the contractual or contemporaneous mutual assent approaches, making the balancing test a less desirable framework. While the balancing test approach does give the court more leeway to consider all facets of the issue, it also gives the court a large amount of discretion in deciding these cases, which may lead to more appeals and a general lack of consensus. Additionally, there are public policy concerns that courts should not interfere and make decisions in this very personal and emotional area of a person's life.⁶²

II. SOLE-GENETIC PROGENITOR CASES

Only two appellate cases have been decided thus far where only one of the parties to the litigation was a genetic progenitor.⁶³ In these cases, the courts attempted to apply the above analytical frameworks in order to resolve the disputes but ran into problems.

A. Litowitz v. Litowitz

In *Litowitz v. Litowitz*, the Washington State Supreme Court decided a case of first impression regarding the disposition of frozen embryos⁶⁴ when only one of the parties was the genetic progenitor.⁶⁵ The married couple created five embryos, with sperm from the husband and eggs from a donor.⁶⁶ The couple had three of the embryos implanted into a surrogate who delivered a child, while the remaining two embryos stayed frozen in

59. *Id.* at 1134; *see also Szafranski*, 34 N.E.3d at 1161 (affirming a determination based on both an oral contract and a balancing test that the appellee's right to procreate outweighed the interests of the appellant to avoid forced procreation because she had created the embryos before undergoing medical treatment that rendered her infertile).

60. *Reber*, 42 A.3d at 1142.

61. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

62. *In re Marriage of Witten*, 672 N.W.2d 768, 779 (Iowa 2003); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

63. *See Litowitz v. Litowitz*, 48 P.3d 261, 263 (Wash. 2002); *In re Marriage of Nash*, 2009 WL 1514842, at *1 (Wash. App. 2009).

64. The court refers to the entity as a "pre-embryo." *Litowitz*, 48 P.3d at 262. For simplicity's sake, this Note will only use the term "embryo." *See text accompanying supra note 2.*

65. *Litowitz*, 48 P.3d at 262, 265.

66. *Id.* at 262.

cryogenic storage.⁶⁷ The couple had entered into a contract with the IVF facility and mutually agreed that after five years, the embryos were to be thawed but not allowed to undergo further development, unless the couple was granted an extension.⁶⁸ The contract also stated in the event that the parties are unable to reach a mutual agreement regarding the disposition of the embryos, that the couple must petition the court for determination.⁶⁹

When the couple divorced, the wife expressed her desire to implant the embryos in a surrogate in order to have more children, while the husband wanted to put the remaining embryos up for adoption.⁷⁰ The parties had entered into a contract with the egg donor, which gave sole rights of ownership over the eggs to the husband and wife.⁷¹ The wife argued that she should be awarded equal rights to the remaining embryos by virtue of the egg donor contract, as she could not claim a right of ownership arising from biology.⁷² The wife argued that because both she and her husband had equal rights to the eggs, they also had equal rights to the resulting embryos.⁷³ The court did not agree.⁷⁴ It recognized that the donor contract gave equal rights to the couple over the eggs but that those ownership rights did not extend to the embryos; any rights the wife had to the eggs via the egg donor contract were extinguished when the eggs were fertilized.⁷⁵ The ownership rights did not transfer because the eggs became new entities: embryos.⁷⁶ The court recognized that because the wife had not contributed any genetic material to these embryos and was not biologically related to them, “any right she may have to the [embryos] must be based solely upon contract.”⁷⁷ As a result, the court applied the contractual approach and evaluated each party’s rights based upon the contract they entered into with the IVF facility.⁷⁸

In adopting this contractual approach, the court declined to address the relevant issues associated with sole-progenitor disputes and only held that the contract should be enforced as written, which provided for the thawing of the embryos.⁷⁹ In reaching this determination, the court found:

67. *Id.* at 262–63.

68. *Id.* at 263–64.

69. *Id.* at 263.

70. *Id.* at 264.

71. *Id.*

72. *Id.* at 267.

73. *Id.* at 266, 267.

74. *Id.* at 267.

75. *Id.* at 269.

76. *Id.*

77. *Id.* at 267.

78. *Id.* at 271.

79. *Id.* This case was peculiar in that the court did not actually award the embryos to either party. The court only held that the contract should be enforced as written, which provided for the thawing of the embryos. It did note that because more than five years had passed since the execution of the

“It is not necessary for this court to engage in a legal, medical or philosophical discussion whether the [embryos] in this case are ‘children,’ nor whether Petitioner (who was not a biological participant) is a progenitor as is Respondent (who was a biological participant).”⁸⁰ In so holding, the court failed to set a firm and guiding precedent.

B. In re Marriage of Nash

Similarly, in *In re Marriage of Nash*, the court began with a contractual analysis when dealing with another sole-genetic progenitor case; however, the court was unable to reach a determination and ended up applying a balancing test.⁸¹ In this case, a married couple used IVF to inject the husband’s sperm into donor eggs, and when the couple got divorced, they had to decide who should have ownership over the remaining embryos.⁸² The wife wanted the embryos to be disposed of, but the husband wanted to keep them in case he decided to have more children through a surrogate.⁸³ Interestingly, the contract the couple signed with the fertility clinic gave the wife, who did not contribute genetic material, the rights to the embryos if the parties divorced *and* the issue was not addressed in the settlement.⁸⁴ In an odd twist, because the parties addressed this issue during mediation, even though they did not fully resolve it, the court concluded that the issue was addressed in the settlement, and therefore, the wife no longer had a right to the embryos by way of the contract.⁸⁵ Because the contract was no longer applicable, the appellate court applied a balancing test and affirmed the trial court’s decision to award the father, as the genetic progenitor, the embryos, noting that the wife did not have any prospective parental rights to the embryos.⁸⁶

This case follows a similar pattern as *Litowitz*: any rights to the embryos that the wife could claim could only be based on contract because she had no biological or genetic connection to the embryos.⁸⁷ However, the distinction here is that the *Nash* contract was no longer applicable to the situation and therefore could not be enforced, unlike the contract in *Litowitz*. Because the contract could not be relied upon in *Nash*, the court

contract, and there was no evidence in the record to indicate whether the parties had requested an extension, the embryos in question could very well have been destroyed, which would render the case moot. *Id.* at 269–71.

80. *Id.* at 271.

81. *In re Marriage of Nash*, 2009 WL 1514842, at *5 (Wash. App. 2009).

82. *Id.* at *1, *3.

83. *Id.* at *3.

84. *Id.*

85. *Id.* at *3, *5.

86. *Id.* at *1, *7.

87. *See id.* at *7; *Litowitz v. Litowitz*, 48 P.3d 261, 267 (Wash. 2002).

had to find an alternative solution and chose to balance the interests of the parties.

While neither of these cases provides a good model of analysis due to the strange five-year disposition provision potentially rendering the case moot in *Litowitz* and the odd drafting that created uncertainty in *Nash*, they do show that sole-progenitor cases are different than dual-progenitor cases. In both of these cases, the courts touched on the lack of a genetic connection between one party and the embryos and how that makes for a weaker claim of ownership rights. As *Litowitz* recognized, the genetic progenitor has a claim arising out of genetics, but the non-progenitor must rely on alternative claims of ownership.⁸⁸ Therefore, in this kind of situation, the non-progenitor must rely on a claim arising out of parentage in an effort to stake a claim of ownership on any frozen embryos. This Note will now explore the various ways one may assert a legal right of parentage.

III. PARENTAGE IN THE FROZEN EMBRYO CONTEXT

When applying one of the dual-progenitor analytical frameworks,⁸⁹ courts often engage in a discussion of the rights and interests of the parties as parents as a way to establish ownership or responsibility.⁹⁰ Parties have argued that they have ownership rights to embryos as a result of their role in the creation of the embryos or through their status as a potential legal parent. There are three main ways to determine who is a legal parent: (1) marital and gestational presumption, (2) biology, and (3) intentionality. While all methods are relevant, the intentionality argument is the main argument that a non-progenitor will have to rely on in a frozen embryo dispute.

A. Marital and Gestational Presumptions

Marital and gestational presumptions have traditionally been the primary statutory mechanisms through which parentage is determined. Gestational presumption presumes that a woman who gives birth to a child is the legal mother of that child.⁹¹ Similarly, the marital presumption presumes that the husband of a woman who gives birth to a child is the child's legal father.⁹² If this marital presumption does not exist because the

88. See *Litowitz*, 48 P.3d at 267.

89. See *supra* Part I.

90. See, e.g., *Litowitz*, 48 P.3d at 267–68; *In re Marriage of Nash*, 2009 WL 1514842, at *7 (Wash. App. 2009); see also *infra* Part III.C–D.

91. UNIF. PARENTAGE ACT (UPA) § 201(a) (amended 2002) (UNIF. LAW COMM'N 2002).

92. UPA §§ 201(b), 204(a). The UPA has been fully adopted by Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Legislative*

mother of a child is unmarried, then the father may establish paternity through genetic testing or an acknowledgement of paternity.⁹³

However, these gestational and marital presumptions cannot be applied to determine ownership in the frozen embryo context. The main argument against these presumptions for frozen embryos is that these presumptions apply to children *born* to a woman.⁹⁴ In cases involving frozen embryos, a child has not yet been born or even implanted in a uterus, and thus a mother cannot assert a claim of ownership based off marital or gestational presumption.

Moreover, these methods are outdated for determining parentage. Traditionally, these presumptions have been used to determine which people are the *biological parents* of a child, and thus the legal parents. But in our current, modern age, people often become parents to children that are not biologically connected to them—whether through adoption, surrogacy, or in vitro fertilization with a donor. Additionally, in the wake of the legalization of same-sex marriage, courts are now presented with the question of how to establish parentage for children born to same-sex couples, where only one spouse is the biological parent.⁹⁵ Because there are now so many different ways to form a family and have children, courts and legislatures have been forced to create new definitions for “legal parent” that extend beyond mere presumption.

B. Biology

The biological, or genetic-identity, approach determines parentage based upon who the biological parents of the child are or who is genetically related to the child.⁹⁶ This approach recognizes that

an important aspect of parenthood is the experience of creating another in one’s “own likeness.” Part of what makes parenthood

Fact Sheet-Parentage Act, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act> [<https://perma.cc/7RTQ-EX6B>].

93. UPA § 201(b).

94. UPA § 201(a)(1), (4).

95. See June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663 (2016); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74 (2006); see also *Della Corte v. Ramirez*, 961 N.E.2d 601, 602 (Mass. App. Ct. 2012) (former same-sex spouse of child’s mother was the same as “husband” under the statute); *Shineovich & Kemp v. Shineovich*, 214 P.3d 29, 40 (Or. Ct. App. 2009) (statute granting legal parentage to husbands of women who conceived by artificial insemination extended to cover same-sex domestic partners).

96. *Belsito v. Clark*, 644 N.E.2d 760, 767 (Ohio Ct. Com. Pl. 1994) (concluding that when a child is delivered by a gestational surrogate, the natural parents of the child shall be determined based on which individuals are the genetic parents).

meaningful is the parent's ability to see the child grow and develop *and see oneself in the process of this growth*. Through this process, the parent views himself or herself as a creative agent in nature.⁹⁷

Additionally, this approach can be diluted down to a simple property argument that "persons possess property rights in the products, processes, and organs of their bodies and in any commodities developed from these sources."⁹⁸ Because a child is a result of the products (sperm and eggs) and the processes (gestation) of the parents, the child is therefore property of the parents.⁹⁹

Again, this approach fails to take into account the various other ways in which families form. This argument is also not one that a non-progenitor can rely upon in asserting a claim of parentage and ownership, for obvious reasons.

C. Intentionality

One of the newest and broadest approaches to parentage is intentionality. The intentionality approach finds that the legal parents of a child are the people who intended to be the parents of a child.¹⁰⁰ This often arises in surrogacy cases where a surrogate may have a statutory claim to parentage over the child through a gestational presumption, but the legal parents are the ones who intended to be the parents of the child and initiated the procreative process.¹⁰¹ The theory is that if it weren't for the actions of those people, then the child in question would not exist.¹⁰²

The intentionality analysis is illustrated well by *In re Marriage of Buzzanca*.¹⁰³ In this case, a couple acquired eggs and sperm from donors and used IVF to create an embryo.¹⁰⁴ This embryo was then implanted into a surrogate who was to carry the baby to term and then turn the child over to the couple.¹⁰⁵ However, during the pregnancy, the couple split up and the husband decided he no longer wanted the child.¹⁰⁶ The trial court was then presented with six possible parents for this baby and concluded that

97. John Lawrence Hill, *What Does It Mean to Be A "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 389 (1991) (emphasis in original).

98. *Id.* at 391.

99. For a discussion of why biology is not always sufficient to convey procreative rights, see generally *id.*

100. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (1998); *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); see also Hill, *supra* note 97, at 414.

101. See, e.g., *Buzzanca*, 72 Cal. Rptr. 2d at 282; *Johnson*, 851 P.2d at 782.

102. See *id.*; Hill, *supra* note 97, at 414–15.

103. See *Buzzanca*, 72 Cal. Rptr. 2d at 280.

104. *Id.* at 282.

105. *Id.*

106. *Id.*

none of them could be the legal parents, and therefore the child *had no legal parents*.¹⁰⁷ The appellate court disagreed.¹⁰⁸

In regard to the gamete donors, the appellate court found that, while the unknown donors may have a genetic claim to the child, the intended parents had a superior claim based on intentionality, which acts as a tiebreaker in the event of a conflict.¹⁰⁹ Today, the egg and sperm donors would be found to have relinquished their parentage rights upon donation and unable to be considered legal parents.¹¹⁰ The current Uniform Parentage Act (UPA) plainly states the parentage status of a donor: a donor is not a parent of a child conceived by means of assisted reproduction.¹¹¹ However, this statute was not in effect at the time of *Buzzanca*,¹¹² and further, because the donors were unknown to the court, the appellate court did not spend much time arguing that the donors could be the legal parents.¹¹³ Thus, the genetic donors were rejected as legal parents, which left the surrogate and the intended parents of the child for legal parent consideration.¹¹⁴

The surrogate's basis for legal parentage arose from gestational maternity—she gave birth to the child.¹¹⁵ However, the appellate court found that the contract between the intended parents and the surrogate deemed the surrogate only a carrier, and but for the consent of the intended parents to allow the surrogate to carry and gestate the embryo, the child would not have been born.¹¹⁶

The appellate court concluded that the intended parents were the legal parents of the child because of their responsibility for creating the child and their intention at the time of implantation to be the legal parents of the child.¹¹⁷ Because this couple brought all these people together to

107. *Id.*

108. *Id.*

109. *Id.* at 288 (finding that the *Johnson* decision would mandate that intentionality be the tiebreaker).

110. UPA § 702.

111. *See id.*

112. UPA § 702 was not enacted until 2000. The 1973 version of the UPA did not contain a provision regarding assisted reproduction; however, it did contain a provision which specified that a male donor would not be considered the father of a child born of artificial insemination if the sperm was provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife. UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM'N 2000) (citing UNIF. ACT ON PARENTAGE § 5(b) (UNIF. LAW COMM'N 1973)).

113. *See Buzzanca*, 72 Cal. Rptr. 2d at 285–86.

114. *Id.*

115. *Id.* at 282.

116. *Id.* at 288.

117. *See id.* at 282–83. Additionally, the court relied on older precedent to establish paternity by estoppel, which found that a man or woman is responsible for a child born during the marriage as a result of medical procedures. *Id.* at 286–88 (relying on *People v. Sorensen*, 437 P.2d 495 (Cal. 1968)).

help them create a child and but for their actions, they were determined to be the legal and responsible parents.¹¹⁸

This approach could be applicable in a sole-progenitor, frozen-embryo dispute because it provides a method that the non-progenitor spouse could utilize to establish parentage rights over the embryo. As has been discussed, the non-progenitor would need to establish rights through either contract or intentionality because biology and marital and gestational presumptions are not applicable. However, conflicts between intentionality and biology in the existing case law demonstrate that a non-progenitor argument based solely upon intentionality is likely to fail.

D. Conflict Between Biology and Intentionality

An interesting case arose in California that discussed both intentionality and biology—*Johnson v. Calvert*.¹¹⁹ The court found that maternity could only be established through intentionality after both gestational and genetic options had been exhausted.¹²⁰ The applicable statute was a part of the California Civil Code adopted from a section of the Uniform Parentage Act.¹²¹

In *Johnson*, a couple contracted with a surrogate to carry their genetic embryo (embryo formed with husband's sperm and wife's egg).¹²² Things did not go well, and after relations between the couple and the surrogate mother broke down, the couple filed for a declaratory judgment to establish that they were the legal parents of the unborn child.¹²³ The surrogate claimed that she was the mother of the child based on the fact that she would gestate and deliver the child,¹²⁴ a valid form of proof of maternity under California law.¹²⁵ The genetic mother based her claim on the fact that she was the biological mother of the child, also a valid form of proof of maternity.¹²⁶ Because the statute¹²⁷ recognized both forms, genetic and gestational, as establishing maternity, the court then moved to look at intentionality in order to resolve the dispute.¹²⁸ The court recognized that the genetic mother had greater intentionality because, but

118. *See id.*

119. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

120. *See id.* at 782.

121. *Id.* at 778–79.

122. *Id.* at 777–78.

123. *Id.* at 778.

124. *Id.* at 779.

125. *Id.* at 780.

126. *Id.* at 779.

127. *Id.* at 778–79.

128. *Id.* at 782.

for her acts, the child would never be born.¹²⁹ It was the genetic mother and father's intention to have the surrogate carry the child and then return it to the couple to raise; it was not their intention to donate an embryo to the surrogate.¹³⁰ Because the court found that the statute in question did not indicate a preference for genetic mother over gestational mother, or vice versa, it chose to look at intentionality as the "tiebreaker" in order to select one legal mother.¹³¹ The court concluded that the genetic, intentional mother had the superior claim.¹³²

While this intentionality framework establishes a common law way for the parent of a child born of assisted reproductive technology to establish parentage without being genetically related to or having birthed the child, it does not apply to sole-progenitor disputes. If this framework is applied to situations where only one spouse or "parent" is the genetic "parent" of a frozen embryo, then the intentionality argument never becomes relevant. In a dispute involving only one genetic "parent," there is no dispute between a genetic and gestational mother because the "child" has not yet been born—there is no gestational mother. Therefore, as *Johnson* only looked to intentionality as a tiebreaker,¹³³ a biological/genetic claim of parentage would trump any claim that another parent may have arising out of intentionality because intentionality should only come into play after other options have been exhausted.

IV. PROPOSAL: ABSOLUTE GENETICS FRAMEWORK FOR SOLE-PROGENITOR DISPUTES

As a result of this panoply of court decisions regarding frozen embryos, a new framework should be adopted. Both of the courts that were presented with sole-progenitor disputes, *Litowitz* and *Nash*, seemed to struggle with how to resolve these personal family issues when a contract either is not applicable or does not provide a sufficient solution. Both courts could have used a different framework to guide the analysis, as none of the current dual-progenitor frameworks were ideal given the situation presented. This Note advocates for a framework for the disposition of frozen embryos where the sole-genetic progenitor is always awarded sole custody and/or ownership rights in a dispute.

This framework, which would favor the genetic progenitor in an absolute sense, is a more favorable framework for sole-progenitor disputes because the current frameworks either do not adequately resolve the

129. *Id.*

130. *Id.*

131. *Id.* at 782.

132. *Id.* at 781–82.

133. *Id.* at 782.

conflict or create too many foreseeable public policy concerns. The current frameworks (contemporaneous mutual consent,¹³⁴ balancing test,¹³⁵ and contractual¹³⁶) simply do not work in a sole-progenitor dispute. The contemporaneous mutual assent framework is impractical; if the parties could agree on what to do with the embryo(s), they would not be in court.¹³⁷ While the balancing test does allow the court to consider each party's wishes and burdens, and any public policy concerns, it gives the court too much power. It places the entire outcome in the trial judge's hands, which will inevitably lead to inconsistent rulings, more potential for abuse of discretion, and many appeals. An ideal, long-term solution would involve a broadly applicable standard, such as a uniform code for states to adopt, to guide judges or legislatures in making determinations. Neither the contemporaneous mutual assent approach nor the balancing test is a viable, long-term solution for these types of disputes.

While most courts seem to favor the contractual approach, this approach too has one major flaw: it allows for the possibility that a person may be forced to become a parent against their will. This public policy concern that other courts have highlighted¹³⁸ is so important that it must outweigh the benefits of relying on the parties' contract. Holding people to earlier contracts when it could result in a person being forced to surrender or dispose of an embryo created with their genetic material or become a parent to a biological child that they do not want is simply unconscionable. Additionally,

couples entering into premarital contracts often suffer from optimism bias. . . . This unfounded optimism may lead individuals to enter into deals that will not serve their interests in the future. Couples contemplating embryo disposition decisions likely share this optimism about the solidity of their marriage. Moreover, as we have seen, the social science research on embryo disposition decision making strongly confirms that parties entering into such agreements, at least at the time of treatment, will have difficulty forecasting their future views about disposition and exercising rational judgment.¹³⁹

While proponents of the contractual approach rely on contracts as manifestations of prior intent regarding the disposition of frozen embryos, these manifestations are not reliable. These contracts are executed while

134. See *supra* Part I.A.

135. See *supra* Part I.C.

136. See *supra* Part I.B.

137. *Reber v. Reiss*, 42 A.3d 1131, 1135 (Pa. Super. Ct. 2012).

138. See cases cited *supra* Part I.C.

139. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 431 (2013).

the couples are still together, planning for their future, and theoretically, believing they will never divorce. While it is typically public policy to hold people to their prior agreements, because of the nature of the “property” involved—an embryo with the potential to become a child—and the circumstances under which the agreements are usually executed, they should not be honored in the sole-progenitor context. The public policy argument against forced procreation and against allowing an “uninvolved” party control over your “property” must outweigh the arguments in favor of honoring contracts. If a genetic progenitor wishes to relinquish their embryo to the non-genetically related spouse, they can still do so through adoption or other later-executed contracts. Further, if parties do not have an enforceable contract, they are left with no satisfactory framework at all.

Those seeking to invalidate the argument that forced procreation should be avoided at all costs would point to instances where a person has no alternative means to beget biological children other than the frozen embryos created with their gametes. These cases tend to show that while courts seek to protect people from being forced to become biological parents, this rule is not absolute and can be overcome by a showing that the other party has no other reasonable means of biological procreation.¹⁴⁰ Proponents of the contractual approach would ask: What about people who are no longer able to have children of their own? Should they be forced to surrender their only hopes of having biologically related children just because their partner has changed his/her mind and no longer wants to be a parent? While these are valid concerns, none of these issues are relevant because those issues assume the embryo has been created with *two* biological parents. This proposed genetic framework should only be applied to sole-progenitor disputes. In sole-progenitor disputes, only one spouse is the genetic progenitor; thus, there can never be a situation where one’s right not to procreate is violated in order to allow another his/her only chance at becoming a biological parent. While the contractual approach may be the best framework for dual-progenitor disputes, it is not the best for sole-progenitor disputes.

The public policy of avoiding forced procreation is one of the primary concerns that this genetic framework seeks to address. For a court to affirmatively allow another person to cause your child to be born against your will would violate your right to be free from unwanted governmental

140. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *Szafranski v. Dunston*, 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015); *Reber v. Reiss*, 42 A.3d 1131, 1132–33 (Pa. Super. Ct. 2012). Cf. *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001).

intrusion on this private, personal area of life.¹⁴¹ It is also not good policy to allow a court to award a non-progenitor an embryo, something that has the potential for life, over and against any opposition from a genetic progenitor. Even if contrary to a contract, the sole progenitors should always be awarded the embryos by virtue of their genetic connection and the other spouse's lack of genetic connection.

Some may argue that intentionality is a valid way to establish parentage and that the non-biological "parent" has rights as an intended parent. The spouses came together and formed an embryo jointly with the intention to birth and parent a child together. However, genetics remains one of the primary ways to establish parentage; because the embryo was created using that person's genetic material, this person would be considered the legal and natural parent of any resulting child.¹⁴² The other person, who does not share any genetics with the embryo, therefore has two main ways to establish legal parentage over any resulting child: marital presumption¹⁴³ or intentionality.¹⁴⁴ As discussed previously, marital presumption applies to children who have been *born*;¹⁴⁵ as the embryo is only a frozen embryo and not a born child, this presumption does not yet apply. The non-biologically connected person is then left with an argument for rights arising out of intentionality: he or she is the intended parent of this embryo, but for the actions of this person and his/her spouse, the embryo would not exist.¹⁴⁶ However, there is no intent until the embryo has been implanted and has the active potential to become a child. To that end, courts have stated that the value of embryos lie in their "potential to become, after implantation, growth and birth, children."¹⁴⁷

This point of implantation is an important distinction. It has appeared in statutes and cases. Many states have enacted statutes that address frozen embryo disputes.¹⁴⁸

These statutes seek to clarify that if a marriage dissolves or, in some cases, a dissolution action is filed, prior to placement of gametes or

141. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). A possible constitutional argument could also be made under a right to privacy, however that is outside the scope of this Note. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

142. See *supra* Part III.

143. See *supra* Part III.A.

144. See *supra* Part III.C.

145. See *supra* Part III.A.

146. See *supra* Part III.C.

147. *Davis v. Davis*, 842 S.W.2d 588, 598 (Tenn. 1992) (emphasis in original) (citing appellee's brief).

148. COLO. REV. STAT. § 19-4-106 (7)(a) (2011); N.D. CENT. CODE § 14-20-64 (2011); TEX. FAM. CODE ANN. § 160.706 (West 2011); VA. CODE ANN. § 20-158 (2011); WASH. REV. CODE 26.26.725 (2011).

embryos, the former spouse will not be considered the legal parent of any subsequently resulting child, unless the former spouse consented in writing to be a parent of a child if the assisted reproduction occurred after marital dissolution.¹⁴⁹

If the couple divorces prior to the placement or implantation of embryos, the non-genetic parent would not be considered the legal parent of any resulting child.¹⁵⁰

In addition to the legislature, courts have also dealt with the distinction between frozen embryos and implanted embryos.¹⁵¹ For example, in *In re Baby S*, the husband and wife contracted with a surrogate to carry a child created with the husband's sperm and a donor egg.¹⁵² During the pregnancy, the wife separated from the husband and indicated her intent to file for divorce.¹⁵³ The surrogate filed a petition declaring that the husband and wife were the legal parents while the wife sought to invalidate the surrogate contract, and thus be relieved of her status as the legal mother.¹⁵⁴ Because the surrogate contract identified both parties as the "intended parents," and because all of the wife's actions leading up to and after the embryo was implanted were ones of an intended parent, the court found that "[the baby] would not have been born but for [the wife's] actions and express agreement to be the child's legal mother."¹⁵⁵ Had this separation of the couple taken place prior to implantation of the embryo, there would have been no issue regarding parentage because there would be no baby. Once an embryo has been implanted and the female carrier is confirmed as pregnant, then there will be a child in nine months. Implanting the embryo so it may develop into a child is the additional step that is necessary for intentionality; at that point, but for the actions of the intended parents, the child would not exist. The same cannot be said of a frozen embryo. Additionally, most courts have not found that an embryo constitutes a child, but instead a kind of "special property";¹⁵⁶ thus there can be no "parents."¹⁵⁷ Therefore, the argument that the non-biological spouse in a sole-progenitor dispute has a claim to the embryo arising out of parental intentionality is moot because there is not yet a child.

149. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 92 (2011).

150. See, e.g., WASH. REV. CODE § 26.26.725 (2011); see also statutes discussed *supra* note 148.

151. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (1998); *In re Baby S*, 128 A.3d 296, 298 (Pa. Super. Ct. 2015).

152. *Baby S*, 128 A.3d at 298.

153. *Id.* at 300–01.

154. See *id.* at 301.

155. *Id.* at 306.

156. See *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992).

157. "Parent" is defined as "[t]he lawful father or mother of someone." *Parent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Further, courts have found that intentionality is only a tiebreaker when there is a conflict between other valid forms of maternity or paternity, such as gestational and genetic.¹⁵⁸ The court in *Johnson v. Calvert* recognized that intentionality is used as a means to select one parent when there are two valid competing legal claims.¹⁵⁹ As such, if a court were deliberating between a genetic parent and an intentional parent, the genetic parent would have the stronger claim under *Johnson*.¹⁶⁰ The court there recognized that a genetic link or presumption is greater than an argument for intentionality.¹⁶¹

There is no better framework that adequately protects the interests of genetic progenitors. This framework would help courts in sole-progenitor disputes by creating a more bright line rule that would not only give courts more guidance in resolving these disputes but also allow people considering IVF a clearer understanding of what will happen to their embryos if the couple divorces. Under this proposal, the genetic progenitor is always given the sole right of ownership and control over the embryos, even if a contract says differently. This right may only transfer to the non-genetic party if the sole progenitor relinquishes rights and essentially donates the embryos to the other party. Otherwise, the sole-genetic progenitor may do whatever he or she wishes with the embryos, regardless of the wishes of the other party. By placing absolute ownership in the hands of the genetic progenitor, courts would guarantee that public policy would never be violated by authorizing forced procreation.

CONCLUSION

As the current analytical frameworks being utilized by courts in dual-progenitor, frozen-embryo disputes do not adequately address the concerns present in sole-progenitor disputes, a new framework is necessary for these sole-genetic progenitor situations. This Note advocates for courts to implement a framework that grants the sole genetic progenitor absolute rights of ownership over the frozen embryos, as the non-genetically related spouse has no sufficient available ownership theory upon which to claim legal rights over the embryos.

This proposed framework would create a more efficient solution for settling sole-progenitor disputes. As IVF continues to become more prevalent and less expensive, and as couples continue to put off childbearing until later in life, situations such as these are likely to arise more frequently. Courts should not be limited to the three original

158. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

159. *See id.*

160. *See id.*

161. *See id.*

frameworks (contemporaneous mutual assent, balancing, and contractual), but should instead take the time to delve into the rights of each party under the circumstances.

While some legislatures have attempted to aid in the resolution of these issues by enacting statutes that clarify that if a couple divorces prior to any implantation of embryos, the non-biological parent will not be considered a legal parent of any resulting children, this is only one step toward widespread clarity.¹⁶² Other states should follow suit and enact a statute that would accomplish this goal of preventing a non-genetically related spouse from laying claim to embryos in a divorce. Alternatively, a uniform code or addition to the UPA would be helpful to create consistency among the states and give more guidance to courts and couples considering IVF. As the body of assisted reproductive technology law continues to grow, either state legislatures or courts will have to respond to these new technologies in order to protect societal interests.

162. *See generally* Forman, *supra* note 149.