# A SOLOMONIC DECISION: WHAT WILL BE THE FATE OF FROZEN PREEMBRYOS?

## INTRODUCTION

Not all married couples are blessed with the opportunity or ability to have a child due to physiological or anatomical complications that either one or both spouses may experience. Such couples are, therefore, excluded from experiencing the joy of having a child and all of the accompanying emotions and events. In an attempt to capture these feelings, a couple may adopt a child or resort to reproductive technologies to help them have a child of their own.

The use of reproductive technologies is not a modern phenomena. Arab tribesman purportedly used artificial insemination as early as the fourteenth century to dilute the gene pool of their enemies' horses.[1] The earliest reported successful application of reproductive technologies to humans occurred in the United States, over one hundred years ago, when a female medical student was artificially inseminated with sperm from the most handsome male in her class.[2] Modern widespread application of reproductive technologies to humans began with NASA's Mercury program which froze astronauts' sperm to ensure that they would be able to have children in the event they became sterile due to exposure to cosmic radiation while in orbit.[3] These relatively primitive reproductive technologies have spawned a multitude of processes which have proven to be a godsend to thousands of couples who have difficulty having children.

It is estimated that infertility[4] affects 7.1% of married couples in the United States with wives of childbearing age, and 12.9% of all couples experience some form of difficulty in conceiving or carrying a pregnancy to term.[5] To overcome these obstacles to parenthood, many of these couples resort to a variety of treatments. Some of these couples seek to treat underlying physiologi-

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[1] *See* RUSSELL SCOTT, THE BODY AS PROPERTY 198, 198 (1981).

[2] This happened in 1884. *See* Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES MAGAZINE, June 18, 1995, at 1.

[3] *See* Andrea Michelle Siegel, *Legal Resolution to the Frozen Embryo Dilemma*, 4 J. PHARMACY & LAW 43, 46 (1994).

[4] Infertility is defined as the inability to conceive after at least twelve months of unprotected intercourse. *See* The New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (1998) [hereinafter "New York State Task Force"].

[5] *See id.* at 7-36.

cal problems and anatomical obstructions[6] to conception through the use of surgery or medication.[7] Others do not correct the underlying problem but instead bypass it, allowing the individual to achieve pregnancy through a particular treatment cycle.[8] These procedures are known collectively as assisted reproductive technologies ("ART").[9] In 1995, some 11,315 live births were achieved through the use of ART.[10]

In vitro fertilization ("IVF"), a procedure which attempts to achieve conception in a laboratory rather than within the woman, accounts for 70% of the ART procedures that couples undergo.[11] The IVF process, which will be discussed in further detail, involves the removal of eggs and their exposure to sperm in a petri dish.[12] After fertilization, generally one to three preembryos are transferred to the woman's uterus where they will, hopefully, continue to develop and result in the birth of a child.[13] To increase the likelihood of success while reducing the cost of the procedure,[14] many couples choose to cryopreserve preembryos for future use. In fact, it is estimated that as many as 80,000 to 100,000 frozen preembryos are currently stored in the United States.[15]

Despite the many miracles that IVF and cryopreservation have created, they have also produced a number of problems. One problem that has received increased attention concerns the use of frozen preembryos produced by couples who later seek to dissolve their marriages; which spouse should be given the authority to decide the preembryos' fate? Consequently, as many as 20,000 preembryos that are currently frozen and kept in storage in the

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6 *See id.* at 8-10 (describing the obstacles that a couple may face when having a child).

7 *See id.* at 37-93.

8 *See id.* at 1.

9 *See id.*

10 *See* Jamie Tolan, *Twenty Percent Success Rate: CDC Project Tracked*, Newsday, December 19, 1997, at A07, 1997 WL 2722705, at *4. These statistics come from a study conducted by the Center for Disease Control based on a review of 59,142 procedures at the nation's 281 fertility clinics. *Id.*

11 *See id.*

12 *See generally*, Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 307-308 (1993).

13 A preembryo is the four to eight cell stage of development prior to the differentiating and development of the nervous and organ systems. *See* Jennifer Marigliano Dehmel, Note, *To Have Or Not To Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1381 (1995).

14 IVF generally costs between $6,000 and $8,000 per cycle. *See* Billy Cox, *In Vitro Fertilization Twenty Years Later: Test Tube Yields Miracles*, Florida Today, July 26, 1998, at 1D, 1998 WL 11944002, at *6.

15 *See* Adam Cohen, *Test-Tube Tug of War: When a Couple Splits, Who Gets the Embryos? New York's Highest Court Will Have to Decide*, Time Magazine, April 6, 1998, at 65, 1998 WL 7684848, at *2.

United States could be in legal limbo.[16] Although IVF has been in use for over twenty years[17] and despite the number of frozen preembryos currently stored in fertility clinics, there is little statutory authority or case law to guide persons in pursuit of an answer to the question of which spouse decides the fate of a frozen preembryo. Therefore, many couples are now turning to the courts to resolve this problem.

This Note will analyze one such case, *Kass v. Kass*[18] (hereinafter "*Kass*"), decided by the New York Court of Appeals, and suggest that the approach advanced by the concurrence of the Appellate Division's decision is the method that should be applied in future cases where a prior agreement between the gamete providers is either unavailable or ambiguous. Part I of this Note will provide a description of the IVF and the cryopreservation procedures. Part II of this Note will provide a brief analysis of the current case and statutory law concerning the use of IVF. Part III will outline the facts and procedural history of *Kass*. Finally, Part IV will detail various theories about how frozen preembryos should be disposed, suggesting that the party opposing implantation should ordinarily prevail unless the party desiring implantation is otherwise foreclosed from achieving parenthood.

## PART I

An IVF cycle is a laborious process, especially for women, and takes about two weeks to complete.[19] It is comprised of four different phases, only one of which involves the fertilization process in the laboratory.[20] It begins with the woman receiving daily injections of fertility drugs from midway through her previous menstrual cycle until just prior to egg retrieval to stop her own hormonal cycle.[21] These injections will enable the IVF practitioner to control the patient's ovulation and allow the patient to produce more than one egg[22] as well as make it easier to schedule egg re-

16 *See id.*

17 The first "test tube baby" was born on July 25, 1978 to a couple in Oldham, Great Britain. *See* Kevin U. Stephens, Sr., M.D., *Reproductive Capacity: What Does the Embryo Get?*, 24 S.U. L. REV. 263, 265 (1997).

18 *See* Kass v. Kass, 663 N.Y.S.2d 581, 583 (2d Dept. 1997), *aff'd* 673 N.Y.S. 2d 350, 351 (1998).

19 *See* Elizabeth Ann Pitrolo, Note, *The Birds, The Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 152 (Fall 1996).

20 *See* New York State Task Force, *supra* note 4, at 51.

21 *See id.* at 53.

22 It is advantageous to retrieve more than one egg to reduce the physical stress that the woman will undergo as well as to lessen the financial burden that a couple will face due to numerous retrievals. *See* Feliciano, *supra* note 12, at 307.

trieval for a specific time.[23] The woman's response to these injections are monitored by frequent blood tests and ultrasound examinations of the ovaries.[24] The eggs are then retrieved in one of two ways: laparoscopy[25] or ultrasound-guided transvaginal aspiration.[26]

Following retrieval, the eggs are examined and graded to determine maturity and are then stored in a tissue culture medium from two to twenty-four hours before sperm are added.[27] The sperm are then introduced to the eggs when the practitioner finds the eggs to be sufficiently mature.[28] The union is then examined one day later to determine whether the eggs have been successfully fertilized.[29] If fertilized, the new two-celled embryos are either warmed in an incubator until they are transferred to the woman's uterus or are cryopreserved for later use.[30]

After the preembryos have reached the four to eight cell stage,[31] usually on the second or third day after retrieval, preembryos are selected and transferred to the woman's uterus.[32] One or more preembryos in a droplet of culture fluid are drawn into a long sterile tube with a syringe on one end.[33] The tube is then inserted through the woman's cervix and the preembryos are deposited into her uterus.[34] The transfer procedure is relatively simple and the woman is usually able to return home afterward. Preembryos that are not immediately transferred to the woman

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23 *See id.*

24 *See* New York State Task Force, *supra* note 4, at 53.

25 This procedure removes ova from the woman's ovaries through the use of a needle-like instrument that is inserted into the woman's abdomen. During this procedure, the woman is administered a general anaesthetic. *See id.* at 52.

26 Although this procedure is generally considered safe, women often experience side effects from anesthesia, abdominal discomfort, and bleeding from the vaginal puncture site. Only one death has been reported due to the procedure. More common, but still rare, is the possibility that the aspiration needle will pierce nearby structures such as the bladder, bowel, ureter, or blood vessels, and the possibility that the retrieval will cause infection. *See id.* at 54.

27 *See id.* at 56.

28 *See id.*

29 *See id.*

30 *See id.*

31 At the four to eight cell stage, the embryos are called preembryos. *See* Dehmel, *supra* note 13, at 1381.

32 The number of preembryos transferred to the woman is an issue of medical and policy debate. To a point, the more preembryos transferred, the greater the likelihood that a pregnancy will result. However, the transfer of multiple numbers of preembryos also increases the chances of a multiple gestation with its attendant risks. *See* New York State Task Force, *supra* note 4, at 57.

33 *See id.* at 58.

34 *See id.* Like the initial egg retrieval, complications are rare but may be serious if they arise. Potential complications include uterine perforation and pelvic infection requiring hospitalization and surgery.

may be cryopreserved and stored for future use. This process freezes the preembryos in liquid nitrogen.[35]

The advantages of cryopreservation are multiple. First, it reduces the need to undergo multiple egg retrievals thereby minimizing the financial and physical cost of the procedure. It may also increase the chances of achieving pregnancy because only the strongest preembryos will survive the cryopreservation process and the transfer of the preembryos may occur at a time that is optimal for the woman to receive them.[36]

The preservation of the frozen preembryos is not indefinite. Most experts recommend that the time period for preservation should be limited to ten years.[37] Once the woman has been impregnated with the preembryos, she will then undergo the usual monitoring and treatment involved in a pregnancy achieved through in vitro fertilization.

## PART II

As noted earlier, statutory authority and case law determining the fate of preembryos subject to a custody battle is sparse, despite the long period of time that IVF has been used and the number of couples who seek its miracles each year. Most states' IVF related statutes, if a state has enacted any, consider only the operation and regulation of IVF programs.[38] Currently, only two states have enacted statutes that address the disposition of a frozen preembryo

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35 *See generally* Stephens, *supra* note 17, at 268.

36 The fertility drugs that a woman takes prior to the initial egg retrieval tend to weaken the uterine lining. Therefore, preembryos are more likely to implant themselves after having been stored because the uterus will be more receptive to implantation. *See* Feliciano, *supra* note 12, at 308.

37 *See* Dehmel, *supra* note 13, at 1381. However, scientists have argued that there is no evidence to suggest that thawing and implanting a preembryo after a considerable length of time is unsafe. Therefore, the argument against prolonged storage is ethical in nature and focuses on problematic family situations that may arise were a preembryo thawed after prolonged storage. The familial structure may be dramatically different after a prolonged storage due to divorce, death, the woman's entry into menopause, or the birth of a natural child by the gamete-providers. This latter event would also increase the chances that siblings could be born into separate generations. *See* New York State Task Force, *supra* note 4, at 294.

38 *See generally* Insurance Act, HAW. REV. STAT. § 431:10(A)-116.5 (1997) (stating that a couple will receive a one time benefit for all outpatient expenses arising from IVF covered by insurance); Occupations and Professions, KY. ADMIN. REGS. § 311.715 (1997) (asserting that public funds may not be used for IVF, public facilities may conduct IVF); Public Safety and Welfare, N.H. REV. STAT. ANN. § 168-B:13 (1997) (specifying who is eligible to participate in an IVF program); Public Safety and Welfare, N.H. REV. STAT. ANN. § 168-B14 (1997) (stating that no gamete shall be used in IVF unless the gamete donor has been medically evaluated); Public Safety and Welfare, N.H. REV. STAT. ANN. § 168-B15 (1997) (stating that no preembryo shall be maintained ex utero in the noncryopreserved state beyond 14 days after fertilization and no preembryo donated for use in research shall be transferred to a uterine cavity).

upon the divorce of the gamete providers or their desire to terminate their participation in the program.

Louisiana considers a preembryo a juridical person with recognized and enforceable rights; among others, the right to sue and be sued.[39] As such, it is illegal to intentionally destroy a viable preembryo for such destruction would be considered the equivalent to killing a human being.[40] Should a couple no longer choose to continue in the IVF program, the preembryo would be made available for adoption by another couple.[41] Therefore, considering the circumstances discussed in this Note, a Louisianan court would award the preembryo to the gamete provider that desires to continue to preserve it, either for his or her own future use or for use by another couple. This presumption in outcome is further enforced by the judicial standard by which Louisiana has adopted; the best interest of the preembryo.[42] Surely, it would not be in the best interest of the preembryo to be awarded to the gamete provider which desires to destroy it.

Florida is the only other state that has enacted a statute to address an intra-marital dispute over the disposition of a frozen preembryo.[43] It requires that a couple entering an IVF program enter into an agreement amongst itself prior to participating in the program to determine the disposition of preembryos should a dispute arise and contemplates that this agreement would be enforced.[44] Despite this provision, this statute is not fully effective for it does not indicate how a dispute would be resolved between gamete providers in the absence of an agreement; it only states that they would have joint decision-making authority over the preembryos' disposition.[45] Therefore, this statute is of little help where, in the absence of an agreement, the couple disagrees on the preembryo's disposition. Rather than solve the problem, this statute unsuccessfully attempts to sidestep it.

New York's legislature is currently considering a bill similar to Florida's bill which would require couples seeking to use IVF to enter into a comprehensive agreement concerning disposition, making such agreements legally binding.[46] This bill would require fertility clinics to provide consent forms with the following options

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39 *See* LA. ADMIN. CODE tit. 9, §§ 123-124 (1997).
40 *See id.* § 129.
41 *See id.* § 130.
42 *See id.* § 131.
43 *See id.*
44 *See* FLA. ADMIN. CODE ANN. § 742.17 (1997).
45 *See id.*
46 *See* NY A.B. 9922, 221st Leg. (NY 1997); *see also* NY S.B. 5815, 221st Leg. (1997).

for future disposition that a couple may choose from before the IVF procedure is performed: upon the death of either or both partners, the surviving partner may have the preembryos transferred to him/her, donate the preembryos to research, thaw the preembryos, donate the preembryos to another individual, or provide for such other disposition that is clearly stated; upon the separation of the partners, the preembryos may be made available to either the man or woman, donated for research, thawed, donated to another individual, or other such disposition that is clearly stated; upon the abandonment of the preembryos by the request of the couple or failure to pay storage fees for three years, the preembryos may be donated to research, thawed, donated to another individual, or other such disposition that is clearly stated; upon the death or abandonment by a patient without a partner, the preembryos may be donated to research, thawed, donated to another individual, or other such disposition that is clearly stated.[47] The bill further provides that the above agreements may be modified at a later date but only by the written consent of both partners.[48]

Although this bill may appear to be fully comprehensive, it suffers from the same fundamental flaw that ails the Florida statute: it does not address the situation of the couple who did not enter into an agreement. Therefore, if this bill is enacted, couples who entered an IVF program prior to its enactment will fail to effectuate a custodial decision. As a result, courts will still have to wrestle with the decision of which spouse should be awarded custody of the frozen preembryos. Thus far, this bill still awaits enactment.

This dearth of state statutory guidance is supplemented by private regulations proposed by professional medical organizations. Three of the most influential medical organizations in the United States are the American College of Obstetricians and Gynecologists, the American Fertility Society, alternatively known as the American Society of Reproductive Medicine, ("AFS"), and the American Medical Association ("AMA"). These organizations issue statements regarding guidelines and standards for the implementation of IVF programs and the qualifications of IVF practitioners.[49] In particular, both the AFS and the AMA have endorsed the use of agreements prior to entering an IVF program which spell out the IVF couple's decision of what to do with excess or unwanted

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47 *See id.* § 2507.3.

48 *See id.* § 2507.6.

49 *See* Robert J. Muller, Note, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763, 769 (1993).

preembryos.[50] Although their recommendations do not have to be followed, these medical societies carry great force and influence. The AFS' and the AMA's influence is evidenced in the bill that is currently under consideration by the New York legislature discussed above.

The lack of statutory consideration concerning which spouse should decide the fate of frozen preembryos extends as well to case law. Although a number of cases are currently pending or under appeals,[51] only one case, aside from *Kass*, has reached national prominence and may be relied on by other courts for guidance. *Davis v. Davis*, decided by the Supreme Court of Tennessee, was the first case to consider the disposition of frozen preembryos during an intra marital dispute.[52] When the case was initially filed, Mrs. Davis wanted to retain the preembryos for her future use while Mr. Davis desired to have them discarded because he did not want to have a child outside of the marriage. However, by the time the case reached the Tennessee Supreme Court on appeal, Mrs. Davis no longer sought to use the preembryos herself, but rather wished to donate them to another couple.[53]

After initially recognizing the Davises' right as the providers of the gametic material to retain decision making authority over the preembryos' fate,[54] the court lamented the absence of a prior

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50 *Compare* Ethics Committee of the American Society for Reproductive Medicine, "Ethical Considerations," IS (asserting that all ART programs should "require each couple contemplating embryo storage to give written instructions concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage fees, inability to agree on disposition in the future, or lack of contact with the program."), *with* Council on Ethical and Judicial Affairs, American Med. Ass'n, Code of Medical Ethics: Current Opinions with Annotations (1994) [hereinafter "AMA Ethical and Judicial Affairs"] ("Advance agreements are recommended for deciding the disposition of frozen pre-embryos in the event of divorce or other changes in circumstances. Advance agreements can help ensure that the gamete providers undergo IVF and pre-embryo freezing after a full contemplation of the consequences but should not be mandatory.").

51 A New Jersey case, currently under appeal, awarded preembryos to the woman following her divorce from her husband. *See* Elie Young, *Judge Orders Embryos Destroyed*, THE BERGEN RECORD, September 29, 1998 at A1. In Michigan, a woman is currently suing her former husband three years after their divorce to gain possession of frozen preembryos. *See* Karl Leif Bates, *Embryos Caught Up in Custody Case: Woman Files Suit Against Her Ex-Husband For Right to Implant Frozen Fertilized Eggs*, THE DETROIT NEWS, June 9, 1998 at C1.

52 842 S.W.2d 588 (Tenn. 1992); *cert. denied sub nom.*, Stowe v. Davis, 507 U.S. 911 (1993).

53 *See id.* at 589-590.

54 The court analyzed the Tennessee Wrongful Death Statute, TENN. CODE ANN. § 20-5-106 (1980), previous decisions of the state supreme court, Hamby v. McDaniel, 559 S.W.2d 744 (Tenn. 1977), and the United States' Supreme Court decision of Roe v. Wade, 410 U.S. 113 (1973), and determined that preembryos were neither "persons," which distinction would have given the preembryos rights separate from those of their progenitors, nor "property," which distinction would have given the progenitors complete control over the preembryos, but rather stated that they occupied a middle category that entitled them to "special respect because of their potential for human life." Davis, 842 S.W.2d at 594-597.

agreement between the couple concerning disposition.[55] The court indicated that it would have enforced such an agreement since it would have been consistent with giving the couple the right to decide the preembryos' fate.[56] The court then dismissed various theories of preembryo disposition[57] and their accompanying ease of application due to its perceived inapplicability of a bright-line test.[58] It chose to instead consider each of the parties' interests and burdens, and balance them against one another to resolve the dispute in a fair and responsible manner.[59] After a lengthy discussion, the court concluded that Mr. Davis' interests and burdens, among them unwanted parenthood with its possible financial and psychological consequences and his right not to procreate,[60] outweighed those of Mrs. Davis which included the desire to donate the preembryos and to avoid the realization that her participation in the IVF procedure was futile.[61] Mr. Davis promptly discarded the preembryos. However, far from giving the gamete-provider who opposed the continued use of the preembryos an automatic veto power over the rights of the gamete-provider desiring to retain the preembryos, the court noted that its decision may have differed had Mrs. Davis desired to use the preembryos herself, but only if she were unable to achieve parenthood by another means, including adoption.[62]

The *Davis* court provided a framework for others to follow when presented with a similar controversy: priority should first be given to the present intentions of the gamete providers; great weight should then be given to prior directives when present intentions do not resolve the conflict; and finally, when neither of the above methods provides a result, the parties' respective interests should be balanced to achieve a result.[63] With only this scant anal-

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As such, the court deemed it prudent to give the Davises joint decision-making authority over the disposition of the preembryos because "no other person or entity ha[d] an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequence of these decisions in the way that the gamete-providers do." *Id.* at 602.

55 *See Davis*, 842 S.W.2d at 597-598.

56 *See id.*

57 These various theories will be discussed in further detail below.

58 *See Davis*, 842 S.W.2d at 591.

59 *See id.*

60 The court recognized within the right to privacy in state and federal law a right to procreate and the right to not procreate. *See id.* at 598-603.

61 *See id.* at 603-604; *see, e.g.*, Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. U. L.Q. 759 (1998) (addressing the ethical issues involved with the destruction of frozen preembryos).

62 *See Davis*, 842 S.W.2d at 603-604.

63 *See id.* at 604.

ysis to rely on, courts have turned to legal theorists and medical societies for guidance.

## PART III

### *Kass Factual Background*

Maureen and Steven Kass were married on July 4, 1988, and shortly thereafter began their attempts to start a family.[64] Their efforts were quickly met with difficulty due to Mrs. Kass' previous exposure to Diethylstilbistrol (DES).[65] Determined to have a child, the couple enrolled in the IVF program at John T. Mather Memorial Hospital where they participated in ten IVF cycles between March 1990 and June 1993 at a total cost in excess of $75,000.[66] Although Mrs. Kass became pregnant twice, each of the cycles ultimately proved to be unsuccessful. Her first pregnancy ended in a miscarriage in October 1991 and her second was surgically terminated a few months later when the pregnancy became ectopic.[67] Prior to the couple's final procedure, they executed a single seven-page informed consent document consisting of two parts: "INFORMED CONSENT FORM NO. 2: CRYOPRESERVATION OF HUMAN PRE-ZYGOTES" and "INFORMED CONSENT FORM NO. 2—ADDENDUM NO. 2-1: CRYOPRESERVATION—STATEMENT OF DISPOSITION" (hereinafter "ADDENDUM 2-1"). The relevant parts of the first section read as follows:

> We understand that our frozen pre-zygotes[68] will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF Program and applicable law. In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage. . . . The possibility of our death or any other unforeseen circum-

64 *See* Kass v. Kass, 663 N.Y.S.2d 581, 583 (2d Dept. 1997), *aff'd* 673 N.Y.S.2d 350, 351 (1998).

65 *See id.*

66 *See id.*

67 *See* Kass, 673 N.Y.S. 2d at 352.

68 The use of the term "pre-zygotes" rather than "preembryos" to identify the object of the controversy should not mislead readers to believe that different objects are under discussion. For the purposes of this Note, the terms are interchangeable.

> stances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes. THESE IMPORTANT DECISIONS MUST BE DISCUSSED WITH OUR IVF PHYSICIAN AND OUR WISHES MUST BE STATED (BEFORE EGG RETRIEVAL) ON THE ATTACHED ADDENDUM NO. 2-1, STATEMENT OF DISPOSITION. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM. (emphasis in original).[69]

The second section stated, in relevant part, the following:

> We understand that it is the IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. We are to indicate our choices by signing our initials where noted below.
> 1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use . . . by us in a future IVF cycle.
> 2. In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to:
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.[70]

Two days after ova were removed from Mrs. Kass, four fertilized preembryos were implanted in Mrs. Kass' sister who had agreed to act as a surrogate; the five remaining preembryos were cryopreserved pursuant to "ADDENDUM NO. 2-1," set forth above.[71] Subsequently, the Kasses were informed that a pregnancy had not resulted.[72] After Mrs. Kass' sister declined to agree to act as surrogate for a second time, the Kasses succumbed to the apparent stress that each of the procedures heaped upon them and agreed to dissolve their marriage.[73] Thereafter, on June 7, 1993, Mr. and Mrs. Kass executed an uncontested divorce agreement. This agreement, typed up by Mrs. Kass, provided, among other provisions, the following:

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69 *Kass*, 663 N.Y.S.2d at 583-584.
70 *Id.* at 584.
71 *See id.*
72 *See id.*
73 *See id.*

> The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes.[74]

Mrs. Kass informed the hospital and her IVF physician by a letter dated June 28, 1993, despite the existence of this agreement, as well as the original disposition agreement executed at the outset of the final procedure, that she changed her mind and opposed the destruction or release of the frozen preembryos. She then commenced a matrimonial action seeking sole custody of the frozen preembryos so that she herself could undergo another implantation procedure.[75] Mr. Kass adamantly protested against having a child outside the bounds of marriage and counterclaimed for specific performance of the couple's agreement to allow the IVF Program to keep the preembryos for research as set forth in "ADDENDUM NO. 2-1."[76] By a stipulation executed on December 17, 1993, the Kasses resolved all financial and property issues except for each party's claim to custody of the preembryos. A divorce judgment was entered on May 16, 1994, leaving this last issue to be determined at a later date.[77]

*Procedural History*

Mrs. Kass proceeded with her custody action claiming that having participated in the IVF program and through her detrimental reliance thereupon, an implied contract formed between her and her former husband that acted as an estoppel to his efforts to prevent her from using the preembryos.[78] She also contended that at age 36, and with no prospects for a quick remarriage, the use of the frozen preembryos represented her "best and possibly, last opportunity to bear a child."[79] In response, Mr. Kass argued that any implied contract that may have existed, terminated with the end of his marriage to Mrs. Kass.[80] He went on to state that her decision to have his child out of wedlock would expose him to a great financial obligation to support a child pursuant to New York law and

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74 *Id.*

75 *See id.* at 584-585. This is the situation that the *Davis* court indicated would be a closer decision in a custody battle and what may enable implantation to occur despite the objections of one of the parties.

76 *See id.*

77 *See id.*

78 *See id.* at 589-596.

79 *Id.* at 590.

80 *See id.* at 596.

that the resultant burden upon him would be "tantamount to . . . being forced to procreate" with his ex-wife.[81]

Despite Mr. Kass' vehement opposition, the Supreme Court of Nassau County granted custody of the five preembryos to Mrs. Kass, reasoning that a woman's right to refuse to undergo an abortion and to carry a child to term equally applied to empower her with the exclusive right to decide to implant the preembryos and give birth.[82] The court went on to hold that the informed consent document executed by the Kasses was not dispositive of the disputed issue but rather provided that a court was to decide the matter in the event of a divorce.[83] Finally, the court determined that the uncontested divorce agreement, which never became operative, did not constitute a waiver of Mrs. Kass' claim of custody.[84] The court then directed Mrs. Kass to exercise her right to implant the preembryos so long as this occurred within a reasonable period of time.[85] An appeal by Mr. Kass to the Appellate division then ensued.

Although the Appellate Division's decision resulted in a plurality, all of the justices agreed that the Supreme Court had erred in equating IVF with in vivo fertilization with respect to the decisional authority that the woman retains after fertilization.[86] Relying on *Roe v. Wade*[87] and its progeny, the court determined that a woman's right to exercise exclusive control over her body is not implicated until implantation occurs; only then is her bodily integrity at issue.[88] Unless this happens, the court concluded that it must look elsewhere to determine "whether implantation over the objection of one of the parties should be permitted."[89] The court also unanimously agreed that a prior agreement executed between the parties would be valid and binding.[90] The justices were divided on whether the informed consent agreement signed by the Kasses prior to their last cycle was ambiguous, thereby precluding enforcement.

Rather than interfere with the parties' expressed intent, the plurality reasoned that "the decision to attempt to have children through IVF procedures and the determination of the fate of cry-

81 *Id.*
82 *See id.* at 585.
83 *See id.*
84 *See id.*
85 *See id.*
86 *See id.*
87 410 U.S. 113 (1973).
88 *See Kass*, 663 N.Y.S.2d 585-586.
89 *Id.* at 586.
90 *See id.*

opreserved pre-zygotes resulting therefrom are intensely personal and essentially private matters," and held that courts should defer to the mutual intent of the parties and enforce agreements embodying this intent.[91] The plurality then pointed to the frequent and liberal use of the words "we," "us," and "our" in the informed consent agreement and reasoned that the Kasses participation in the IVF program was conditioned on their marriage to one another and that they were "committed to a *single joint* decision to use IVF in an attempt to achieve parenthood."[92] (emphasis added). Therefore, according to the plurality, the Kasses did not contemplate their continued participation in the program outside of their marriage.[93] Further, the plurality highlighted the many provisions of the informed consent agreement which indicated that the Kasses had the obligation, as a married couple, to provide for the future disposition of the frozen preembryos in the agreement should they be unable to reach a mutual and joint decision in the future.[94] Since a custody battle ensued, the plurality concluded that the Kasses were unable to reach the contemplated joint decision regarding the frozen preembryos' disposition and that their prior intent controlled, as manifested in the informed consent agreement, to enable the IVF clinic to retain the preembryos for research.[95] The plurality then granted Mr. Kass' counterclaim for specific performance of the informed consent agreement, determining that the document, when read as a whole, was a clear representation of the parties' mutual intent.[96]

It is imperative to state that the perceived inoperativeness of the disposition found in the informed consent agreement by the concurrence and the dissent lay at the sentence in the agreement which read: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."[97] Both the concurrence and dissent read the sentence as instructing a court to determine which gamete provider should have decisional authority under the current situation and that the disposition chosen by the Kasses in the agreement did not control. Further, the dissent argued that the agreed disposition found in "ADDENDUM 2-1" only became triggered by "[the

91 *See id.* at 590.
92 *Id.* at 587.
93 *See id.*
94 *See id.*
95 *See id.*
96 *See id.* at 590.
97 *Id.* at 591.

Kasses'] death or any other unforeseen circumstances that may result in neither of [them] being able to determine the disposition of [their] pre-zygotes" and that divorce was not among the enumerated "unforeseen circumstances."[98] Therefore, according to the concurrence and the dissent, the situation before the court was analogous to that faced by the *Davis* court: how should a divorced couple's frozen preembryos be disposed where the parties are unable to reach a mutual and joint decision and where an intelligible contract expressing their intent does not exist?

Despite the mutual agreement by the concurrence and the dissent that the informed consent agreement was ambiguous, the concurrence joined the plurality in finding for Mr. Kass on the grounds that the party objecting to the continued use of frozen preembryos should prevail in a custody dispute except in the most exceptional circumstances.[99] A prime example of an exceptional circumstance would be where the frozen preembryos represent the other party's last hope to achieve parenthood.[100] The concurrence's rationale will be discussed in further detail in Part IV.

The dissent disapproved of the concurrence's support of a presumption in favor of either party in the Kasses predicament and advocated a balancing of the parties' respective interests and burdens since the equities of each case are sui generis.[101] The dissent recognized that the right to avoid procreation may be irrevocably lost by unwanted implantation; however, it also pointed to the fundamental right to procreate and cited its ability, in the given circumstance, to be irrevocably lost due to the other party's veto.[102] According to the dissent, "[s]imply stated, the competing fundamental personal rights of both parties must be taken into consideration and balanced utilizing a fact-sensitive analysis."[103] The dissent advised future courts to consider, as factors in the analysis, the woman's reasonable opportunities to achieve motherhood by other means, the woman's financial means and ability to relieve the man of future child support obligations, and the woman's sincerity in seeking to have a child through IVF.[104] To be balanced against the above factors would be the man's financial obligation to support his child to the age of 21 as well as the moral and psychological impact on the man who is compelled to procreate with his ex-

98 *Id.* at 598.
99 *See id.*
100 *See id.* at 592.
101 *See id.* at 594.
102 *See id.* at 599.
103 *Id.*
104 *See id.* at 600.

wife against his will.[105] Since such an analysis had not occurred, the dissent recommended that the case be remanded for such issues to be considered.[106]

Having had her victory annulled by the Appellate Division, Mrs. Kass appealed to the Court of Appeals which affirmed the decision in favor of Mr. Kass. The court concluded, as had the plurality, that the Kasses intent, as embodied in the informed consent agreement, was sufficiently clear and should be enforced.[107]

By affirming the Appellate Division on a contractual basis, the Court of Appeals left unresolved the issue of how similar disputes would be settled where a disposition agreement does not exist. Therefore, this decision will not control in the future where such an issue is presented; rather this decision will stand for the affirmation of the validity of disposition agreements.

## PART IV

How then should future disputes be handled where an agreement does not exist? The fact that few courts have entertained cases involving the disposition of frozen preembryos does not mean that there is a paucity of theories on how such disputes should be settled. In anticipation of continued disputes, legal scholars and ethicists as well as medical and legal societies have advanced eight such theories, each of which has associated advantages and disadvantages.

Many theorists have proposed the use of bright-line tests to solve disputes involving the disposition of frozen preembryos. At one end of this spectrum lies the theory that all preembryos must be used by either the gamete providers or donated to another couple for uterine transfer.[108] At the other extreme is the theory that all unused preembryos should be discarded.[109] Another model would vest control of the preembryos in the woman in all instances because while the man has an infinite amount of sperm, the woman has a limited amount of eggs that can be fertilized over the course of her lifetime. Still another method, known as the "sweat equity" approach, gives the preembryos to the woman due to her strong emotional and physical attachment to the preem-

105 *See id.* at 600-601.

106 *See id.* at 602.

107 *See Kass*, 673 N.Y.S.2d at 357.

108 *See* Colleen M. Browne & Brian J. Hynes, Note, *The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, 17 J. LEGIS. 97, 108 (1990).

109 *See id.*; *but see* Janette M. Parker, Note, *"Prenatal Adoption": The Vatican's Proposal to the In Vitro Fertilization Disposition Dilemma*, 14 N.Y.L. SCH. J. HUM. RTS. 757 (1998) (addressing the Vatican's proposal to make unwanted preembryos available for adoption).

bryos as a result of the strenuous labor involved in retrieving the eggs at the outset of the IVF procedure.[110] It has also been argued that control of the preembryos by the woman should only occur when she desires to use them herself.[111]

Each of the foregoing theories share the same advantage in that each is easily applied and each results in concrete and predictable outcomes that would dispose of these disputes quickly and efficiently.[112] They also constrain courts from making ad hoc decisions, thereby preventing them from basing opinions on their own beliefs and prejudices. Finally, due to the predictability of their outcomes, bright-line tests may prove to be an ideal guide for people to follow prior to being faced with a particular situation.[113] For instance, if a couple knew prior to entering an IVF program that a dispositional dispute in the future would result in the allocation of their frozen preembryos to one spouse rather than the other, the couple may be better prepared to handle such a dispute and know how to respond if and when it occurs. Predictability equals guidance and guidance may equal relief from future conflicts. However, each of the above tests also suffer the same disadvantage in that they are very cut and dry and do not enable courts to consider many factors that might otherwise influence their decision.[114] Courts are thereby prevented from keeping the law responsive to the current case as well as prevented from adapting the law to a changing society.[115]

Theorists who criticize the use of bright-line tests advance the competing balancing test whereby combative interests are weighed against one another to achieve an outcome.[116] This theory has received much attention in the realm of preembryo disputes and has

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110 *See* John A. Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CTR. REPORT. 7 (Nov./Dec. 1989). This theory has been criticized as misapplying the United States' Supreme Court decisions of Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), which collectively established a woman's right to bodily integrity after pregnancy. IVF, however, does not result in pregnancy until implantation occurs. Therefore, the mere fact that the woman has invested more energy in the creation of the preembryo prior to implantation is not dispositive that she should be vested with control of the preembryos. *See* Dehmel, *supra* note 13, at 1401.

111 *See* Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 372 (1986).

112 *See* James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 777 (1995). This article will provide the reader with a thorough and enlightening lecture on the application and interaction of rules, standards, and their hybrids in law. *See also* Jason Scott Johnston, *Uncertainty, Chaos and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341 (1991); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985).

113 *See* Johnston, *supra* note 112, at 345-346.

114 *See* Davis v. Davis, 842 S.W.2d at 591. (Tenn. 1992).

115 *See* Wilson, *supra* note 112, at 436.

116 *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945-946 (1987).

the support of the *Davis* court as well as the dissent in the Appellate Division's opinion in *Kass*. The most beneficial aspect of this approach is its ability to take into account a variety of factors that would otherwise be left out of an analysis if one of the above bright-line tests were used. In the current situation, this would allow for a greater appreciation of a couple's change in circumstances from the time that it entered the IVF program and the time that the dispute arose. By gently urging courts to consider all of the relevant factors, a balancing test fosters serenity and confidence in their final decision.[117] In addition, it would allow courts to treat the parties as individuals and have their respective interests considered to reach a more equitable result rather than merely relying upon a formula that is performed in a vacuum.

Despite these benefits, a balancing test is not without deficiencies. The most frequent complaint levied against this method is the seemingly arbitrary manner in which the test is applied and its inability to constrain courts from making ad hoc decisions.[118] In particular, there are concerns about the interests that should be counted in the balancing process and how these are to be weighed against one another.[119] To a certain degree, the judge's task is to "measur[e] the unmeasurable . . . [and] compare the incomparable."[120] It is not, however, the case, that competing interests cannot be compared. Values, however, must be assigned to each interest, otherwise one set of interests will always appear to outweigh another. The question then remains, "Where do these values come from?"[121] Three possible answers may be advanced: values may be derived from historical observation, current social consensus on the importance of an interest, or a court may adopt a seat-of-the-pants approach and freely speculate on the real world consequences of particular rules.[122] Where a court fails to explain the source of its values, decisions may appear arbitrary. As one commentator has stated:

> The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned to the interests. These balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced

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117 *See id.* at 962.

118 *See* Wilson, *supra* note 112, at 436.

119 *See* Muller, *supra* note 49, at 790.

120 *See* Aleinikoff, *supra* note 116, at 972 (quoting Laurent Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748 (1963)).

121 *See* Muller, *supra* note 49, at 790.

122 *See id.*; *see also* Aleinikoff, *supra* note 116, at 963.

> which strikes an "appropriate" balance, but there is little discussion of the valuation standards. Some rough, intuitive scale that is calibrated in degrees of "importance" appears to be at work. But to a large extent, the balancing takes place inside a black box.[123]

An implied contract model has also been proposed whereby the parties' mutual participation in the IVF program and their creation of the preembryos are presumed to entail their irrevocable commitment to reproduction. As a result of this contract, the preembryos will be provided to either the IVF clinic, to donate to another couple, or to the gamete-provider that wishes to continue the program.[124] This model is based upon fundamental contract law which enforces an implied contract where one party manifests an "intention to act or refrain from acting in a specified way . . . [so as] to justify a promisee in understanding that a commitment has been made."[125] In general, courts will impose an implied contract where a party makes a promise that can reasonably be expected to induce action or forbearance by the other party and that other party relies upon that promise to her detriment.[126] It is argued that such an analysis lends itself to parties participating in IVF because participation in an IVF program is:

> [c]onduct that reasonably leads to the assumption that both parties have committed to reproduction . . . [and] it may be assumed that the parties agreed to carry the IVF procedure through to implantation, because IVF serves no useful purpose other than the harvesting of the materials that compose the preembryo to be implanted.[127]

Thus, once the man has donated his sperm and the woman has donated her eggs, each is bound to see the IVF process to its conclusion. Like the previous bright-line theories discussed above, this model provides concrete and consistent results and is easily applied. However, along with the disadvantages associated with those theories, the contract model also has drawbacks of its own.

The first problem is that the contract model does not account for a change in a couple's circumstances when treatment has begun and does not allow such circumstances to enter into the determination of how the preembryos should be disposed. The IVF

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123 *See* Aleinikoff, *supra* note 116, at 976.

124 *See* Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AMER. J. FAM. L. 67, 75 (1990).

125 Restatement (Second) of Contracts, § 4 (1979).

126 *See id.* § 90.

127 Dehmel, *supra* note 13, at 1398-1399.

program is replete with delay and interim pauses between the various steps and procedures that comprise it, from gamete donation to fertilization to implantation.[128] Inferring intent only from the moment of gamete donation ignores the many decisions that must be made prior to implantation; "[b]ecause so many contingencies could intervene to change original plans, creation of the embryos alone should not be taken as an irrevocable commitment to reproduction."[129] Cryopreserving the preembryos only increases this delay and allows for minds and circumstances to change. For instance, couples may divorce, as was the case in *Davis* and *Kass*. Therefore, the trauma of going through this event should permit a couple to reevaluate their commitment to have a child.[130]

Second, the contract model may in fact distort the couple's intent. Rather than pregnancy being their ultimate goal, they might have only intended to have a child together. "The exclusive object of their 'contract' therefore depends upon their relationship with each other, implantation irrespective of this essential term is insufficient."[131] Since continuation of a marriage is a material term, the question then becomes "whether divorce frustrates the contract as to that term, or impairs the entire contract."[132] Both Steven Kass' and Junior Davis' positions parallel this argument against the application of the contract model as each were very much opposed to having a child outside the bounds of marriage; their intent and desire to have a child was restricted to having a child with their respective spouses as husband and wife.[133]

It should be readily apparent that each of the above theories have complications in their operation. Their application does not leave a sense of confidence that a correct decision has been reached. The bright-line tests are too rigid; the balancing test is susceptible to ad hoc decisions; and the contract model cannot be made to readily apply. How then should decisions be made? The best alternative would be to hybridize the theories to derive one

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128 *See id.* at 1399.

129 John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 475 (1990).

130 *See* Dehmel, *supra* note 13, at 1400.

131 *Id.*

132 Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U.MIAMI L. REV. 803, 828 (1992); *see also* Davis, 842 S.W.2d at 598 ("[t]he problem with such an analysis is that there is no indication in the record . . . that Junior Davis intended to pursue reproduction outside the confines of a continuing marriage relationship with Mary Sue [Davis]. We therefore decline to decide this case on the basis of implied contract or the reliance doctrine.").

133 *See* Kass v. Kass, 663 N.Y.S.2d 581, 585 (1997); *see also* Davis v. Davis, 842 S.W.2d 588, 603-604 (1992).

that incorporates their advantages and excludes their disadvantages. What follows from this is a test that may be described as a bright-line test with an escape hatch.[134] Such a test exists where a judge expressly leaves open a space to soften the blow of an otherwise rigid rule.[135] This escape hatch is normally an inaccessible possibility, available in only the most extreme circumstances.[136] To borrow a used metaphor, "escape hatches let off steam that otherwise might rupture a rigid rule."[137] With this form of construction, courts would be able to create predictable, clear-cut rules that cover virtually all relevant situations without completely sacrificing flexibility.[138] The concurrence in the Appellate Division's decision in *Kass* advocated such a formula by endorsing the view that except in the most extraordinary circumstances, the gamete provider desiring to avoid continued use of the preembryos should be able to veto the other's proposed implantation.[139]

The desirability of this method is multi-faceted. First, it recognizes that "[o]nce lost, the right not to procreate [discussed below] can never be regained. It is the irrevocability of parenthood that is most crushing to the unconsenting gamete provider . . ."[140] Parenthood thrusts many feelings, responsibilities, and obligations upon a person. These are exacerbated when parenthood is not desired. Once established, there is no way to end biological or emotional ties. "Even if no rearing duties or even contact result[s], the unconsenting [former spouse] will know that biologic offspring exist, with the powerful attendant reverberations of guilt, attachment, or responsibility which that knowledge can ignite."[141] Unwanted parenthood may also prove to be fodder for continued disputes between the former spouses over visitation and/or custody rights. In addition, in New York there is a financial responsibility to support a child until the age of 21 that the new parent will have to satisfy despite his or her opposition to implantation.[142] This duty is unwaivable, even where the one spouse has agreed to bear

134 *See* Wilson, *supra* note 112, at 788.
135 *See id.*
136 *See id.*
137 *Id.*
138 *See id.* at 790.
139 *See* Kass v. Kass, 663 N.Y.S.2d 581, 592 (1997).
140 *Id.*
141 Robertson, *supra* note 129, at 479.
142 *See* N.Y. Family Law § 413 (1) (McKinney 1998) ("the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine."); *but see* Lee M. Silver and Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 615-616 (1998) (arguing that the non-consenting party should be accorded the same

sole responsibility for the child and has absolved the other of any obligation.[143] Beyond this, one has to consider the effect that unwanted parenthood will have on the child. The objecting spouse may not choose to be involved in the child's life, thereby creating a situation in which the child may feel abandoned and unloved, leading to further emotional complications for the child later in life.

This formula also considers the ability of the party desiring implantation to achieve parenthood in another manner. The constitutional right to procreate and to avoid procreation has previously been recognized to exist within the right to privacy[144] which itself may be found in various locations, among them the Due Process Clause of the Fourteenth Amendment,[145] the Ninth Amendment,[146] as well as the penumbras of various other provisions of the Bill of Rights.[147] Where procreational rights conflict, resolution may be achieved by "balancing the burdens imposed on each party by [the] exercise of the other's rights."[148] Where it is possible for the party desiring implantation to achieve parenthood by other means, the right to avoid procreation should be accorded more force and weight, thereby effectively vetoing implantation and keeping the escape hatch shut. Thus, the *Davis* court, despite its explicit endorsement of a balancing test which is to be performed in the totality of the circumstances,[149] implicitly approved the use of a bright-line rule with an escape hatch, stating that "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility to achieve parenthood by means other than use of the preembryos in ques-

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status as an egg-donor or a sperm-donor and be absolved of any parental obligation towards the child).

143 *See* Matter of L. Pamela P. v. Frank S., 462 N.Y.S.2d 819 (N.Y. 1983); *see also* Matter of Harvey-Cook v. Neill, 504 N.Y.S.2d 434 (N.Y. App. Div. 1986); In re Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

144 *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992); *see also* Skinner v. Oklahoma, 316 U.S. 5454 (1942) (striking down a state statute mandating sterilization of habitual criminals); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right of a married couple to use contraception); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to use contraceptives to unmarried individuals); Roe v. Wade, 410 U.S. 113 (1973) (establishing a woman's right to seek an abortion prior to fetal viability).

145 *See* Griswold v. Connecticut, 381 U.S. at 500 (Harlan, J. concurring).

146 *See id.* at 499 (Goldberg, J. concurring).

147 *See id.* at 484 (Douglas, J.) (locating the right to privacy within the First, Third, Fourth, Fifth and Ninth Amendments).

148 Dehmel, *supra* note 13, at 1402.

149 *See Davis*, 842 S.W.2d at 603-604.

tion."[150] This "reasonable opportunity" includes the possibility to adopt as well as additional attempts at IVF.[151]

When weighed against the consequences of unwanted parenthood, it is not compelling to demand the use of the existing preembryos simply because they exist or the one party does not desire to go through the trouble of creating new ones. Ordinarily, a decision to discard a particular set of frozen preembryos would not irrevocably deny that party a chance to exercise his or her constitutional right to procreate in the future.[152] Neither is it compelling to demand the use of the existing preembryos to satisfy the desire to achieve biological parenthood. The escape hatch should only be activated where the party desiring continued use of the preembryos has established that, in the case of a woman, she is menopausal or cannot otherwise carry a child or is unable to adopt a child. Similarly, in the case of a man desiring to use the preembryos with another partner, the escape hatch should only be activated where he has shown that he is sterile or is unable to adopt a child. The constitutional right to avoid procreation must be seen as preventative of a different outcome where parenthood may be achieved in another manner; otherwise such an outcome would deny the one party its constitutional right to avoid procreation.[153]

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150 *Id.* at 604; *cf.* AMA Ethical and Judicial Affairs *supra* note 47 ("The gamete providers should have an equal say in the use of their pre-embryos and, therefore, the pre-embryos should not be available for use by either provider or changed from their frozen state without the consent of both providers. The man and woman each has contributed half of the pre-embryo's genetic code. In addition, whether a person chooses to become a parent and assume all of the accompanying obligations is a particularly personal and fundamental decision. Even if the individual could be absolved of any parental obligations, he or she may have a strong desire not to have offspring. The absence of a legal duty does not eliminate the moral duty many would feel toward any genetic offspring."); *but see* Donna A. Katz, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POLICY & L. 623 (1998) (proposing that the party with the fertility problem should be given primary consideration in determining which party retains custody of frozen preembryos).

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

152 *See* Silver, *supra* note 142, at 614.

153 *See* New York State Task Force *supra* note 4 at 317; *but see* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. Rev. 1077, 1119 (1998) (arguing that "the right of privacy is a principle concerning the allocation of power between individuals and the state, not the allocation of power among individuals. Individuals joined in a close relationship possess privacy rights against the state, not against each other. Privacy protects the freedom to create and maintain intimate associations apart from the state, not the right to prevent the state mediation of conflicts within existing relationships. Accordingly, once dissent divides the individuals in a relationship, their privacy disappears, for the state is necessarily entangled in assigning their relative rights and responsibilities. Furthermore, privacy is the quintessential negative right—a right to be free from governmental interference with intimate associations. This very principle, however, implies an important limitation: The right of privacy fails to support individuals who are calling upon the state to assist them actively in their interactions with other individuals.").

When applied to the Kasses, the use of this bright-line rule with an escape hatch should result in a court awarding the preembryos to Mr. Kass as the Appellate Division's concurrence contemplated. This is both wise and just. Although she was 36 years-old at the inception of the trial, Mrs. Kass still had the opportunity to become a parent. With the advent of modern reproductive technologies, Mrs. Kass' biological clock could have been turned back to achieve biological parenthood after her primary reproductive period has past.[154] Furthermore, Mrs. Kass could attempt to adopt a child. Clearly, Mrs. Kass had other avenues she could have pursued to become a parent prior to determining that the frozen preembryos represented her final hope to achieve motherhood. In addition, Mrs. Kass made no showing that her opportunities to become a parent would be negated if she was prevented from utilizing the frozen preembryos. Therefore, considering the circumstances of the Kasses case, the escape hatch must be kept shut in order to preserve the opposing spouse's constitutional right to not procreate.

## CONCLUSION

Courts will continue to wrestle with cases in which former spouses fight for the custody of frozen preembryos and will be compelled to make Solomon-like decisions until states adopt legislation that requires IVF patients to enter into comprehensive disposition agreements. In subsequent cases, courts will be able to continue the dialogue that this Note has sought to contribute to. In doing so, courts must be careful to ensure that they do not trample upon the constitutional right to procreational autonomy. Although this right consists of two diametrically opposed rights, the right to procreate and the right to not procreate, the latter right must be ratified to the former's detriment where the spouse desiring the continued use of the preembryos may achieve parenthood by other means. Such a formulation results in a bright-line rule with an escape hatch which should only become operable where the preembryos represent that spouse's last opportunity to have a child. By doing so, neither right is made to subsume to the other. Were the right to procreate validated where the

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154 *See* Jonathan Kaufman, *In Many Classrooms, There's a New Lesson: The Death of a Parent*, THE WALL ST. J., February 18, 1999 at A1 (reporting that in 1980, about 23 babies were born to every 1000 women between the ages 35-44 and that by 1996 the number of babies born in this age group had almost doubled to 42 per 1000 women); *see also* Gina Kolata, *Old Mother Hubbard Was Never a Sex Pot*, N.Y. TIMES, April 27, 1997 at D1 (reporting that a 63 year old California woman recently gave birth to her first child).

spouse may achieve parenthood through alternate means, the right to not procreate would be consequently tread upon and only the right to procreate would be protected. However, where the right to not procreate is endorsed under the same circumstances, the right to procreate is left intact because parenthood may still be achieved, allowing both rights to remain protected. "[O]nce lost, the right not to procreate can never be regained. It is the irrevocability of parenthood that is most crushing to the unconsenting gamete provider . . ."[155]

*David H. Fiestal**

[155] Kass v. Kass, 663 N.Y.S.2d 581, 592 (1997).

* Notes Editor, CARDOZO WOMEN'S LAW JOURNAL. J.D. Candidate (June, 2000). I would like to dedicate this Note to my parents, Robert and Judy Fiestal whose light guides me wherever I go. Thank you.