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THE WISDOM OF SOLOMON: WE CANNOT SPLIT THE PRE-EMBRYOS

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INTRODUCTION

“The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom.”¹ Even with the knowledge and understanding of this concept is, it does not make it any easier to deal with the very difficult realities that come about as a result of the clash between the rapid pace of scientific discovery and the glacial pace of understanding, between wisdom and a workable legal framework to go along with it. Society has encountered complicated legal and emotional challenges since the emergence of the first “test tube” baby in 1978.²

With all of the legal issues that have emerged, very little exists in the way of legal solutions or even guidance for the individuals faced with complicated problems, moral dilemmas and emotional nightmares. Instead of continuing to ignore the reality of the situation, a workable framework is needed in this area. This article attempts to both evaluate and solve some of these problems.

Part I provides a brief look at the process of Assisted Reproductive Technology (“ART”), and explains the science behind the new realities. Part II explores the legal status of the pre-embryo and how that will impact the decisions and laws that are made. Part III presents a hypothetical problem that could feasibly happen involving the divergent wishes of both biological contributors to a pre-embryo. This section goes on to discuss how there is little to help the lawyer solve that problem currently. Part IV proposes an extended and modified tenancy by the entirety to solve many of the legal issues presented, while also alleviating some of the heartache as well.

This Part goes on to propose that the extended tenancy by the entirety for pre-embryos would include: (1) the non-severable right of survivorship; (2) no right to partition at any time; (3) no ability to transfer the pre-embryo for adoption or donation to research absent an agreement by both parties; and (4) result in property

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¹ ISAAC ASIMOV & JASON A. SCHULMAN, ISAAC ASIMOV’S BOOK OF SCIENCE AND NATURE QUOTATIONS 281 (1988).

² Paul C. Redman & Lauren Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 584 (2000).

that is not devisable or inheritable at the death of either party. By putting these legal principles in place, it would prevent the possibility of even more complicated and devastating problems that can and will arise.

I. THE PROCESS OF ASSISTED REPRODUCTIVE TECHNOLOGY (“ART”)

In order to create a pre-embryo, like those utilized in all forms of Assisted Reproductive Technology (“ART”), medical professionals must acquire sperm from a man and ova—or eggs—from a woman.³ The process of acquiring a woman’s eggs is more onerous, painful and risky than acquiring sperm.⁴ The woman will undergo a drug-induced process intended to stimulate her ovaries to produce as many eggs as possible in a single cycle.⁵ This process is called “superovulation.”⁶

When the eggs are mature enough, they are removed from the woman and harvested using a needle-guided ultrasound.⁷ They are then collected and transferred into a culture medium where they are mixed with the man’s sperm to induce fertilization.⁸ It has been common practice for at least the past ten years to attempt to fertilize all available eggs because cryopreservation of unfertilized eggs remains an experimental procedure.⁹ Technology can successfully cryopreserve sperm samples alone for future use, but existing technology cannot do the same for eggs.¹⁰ As such, doctors typically attempt to fertilize all available eggs in an effort to have as many viable pre-embryos available for ART as possible. This allows for future attempts without repeatedly subjecting the woman to the drugs, medical procedures and emotional strain involved in every cycle of egg-harvesting.¹¹

³ Ctr. for Disease Control, *Assisted Reproductive Technology (ART)*, Feb. 18, 2010, <http://www.cdc.gov/art/>.

⁴ The President’s Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies*, Mar. 2004, at 75, http://bioethics.georgetown.edu/pcbe/reports/reproductionandresponsibility/_pcbe_final_reproduction_and_responsibility.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See American Society for Reproductive Medicine, *Essential Elements of Informed Consent for Elective Oocyte Cryopreservation: A Practice Committee Opinion*, Committee Report by the Practice Committee of the ASRM (October 2007) (on file with author).

¹⁰ Kurt Martinuzzi & Alan B. Copperman, *Oocyte Cryopreservation for Elective Preservation of Reproductive Potential*, 3 CURRENT WOMEN’S HEALTH REV. 209, 209 (2007). The physical properties of the unfertilized egg make them particularly susceptible to damage during thawing following cryopreservation. Due to this issue cryo-storage of eggs are still considered experimental and not the recommended course of action. However, once the pre-embryo is created there are different physical characteristics that allow the pre-embryo to undergo both the freezing and thawing without damage.

¹¹ See Michael Tucker, Paula Morton & Juergen Liebermann, *Human Oocyte Cryopreservation: A Valid Alternative to Embryo Cryopreservation?*, 113S EUR. J. OF OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY S24–S27 (2004) (explaining that the superovulation method is used in an attempt to obtain as many oocytes as possible to allow for a higher number to be fertilized at once, thus compensating for poor embryonic viability).

The end result is that what was once separate material, provided from two individuals, has transformed. The reproductive material of the man and the reproductive material of the woman combine to create something new that emerges from the initial stages of cell division. There is suddenly the possibility of the continued development of a human life. Because of this fact, the pre-embryo falls somewhere in a state of legal purgatory—not a legally recognized person at this stage of development, and yet something more “human” than the items we normally categorize as property.

II. PRE-EMBRYOS: PROPERTY, PERSON OR SOMETHING ELSE?

The disputes considered in this article involve two gamete providers—the man who provides his sperm, and the woman who provides her egg—neither of whom are “donors.” Donors do not have any rights to their reproductive material once they are donated to an appropriate clinic or individual.¹² However, in the context of a relationship between a man and woman who both want to be involved in the life of any potential child and who are providers, as opposed to donors, the clearest approach is to modify current property laws to meet the needs of this property with special dignity.¹³ Thus, we can look to the current laws of concurrent ownership and probate to deal with the very difficult and challenging issues that arise in this context. Because of this hybrid state of existence, it would be quite difficult to simply apply property law as a whole to the pre-embryo. But, using property law as the basis and making changes where needed allows the law to provide a degree of dignity to the pre-embryo and takes into account its differences from other tangible items of property. In addition to issues that arise during the life of the gamete providers, consideration must be given to the host of issues that arise upon the death of one or both of the providers. The law must be modified to resolve those issues as well.

¹² National Conference of Commissioners on Uniform State Laws, Unif. Parentage Act § 702 & cmt., 61 (2002), <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf> (“A donor is not a parent of a child conceived by means of assisted reproduction,” and, “[t]he donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.”); TEX. FAM. CODE ANN. § 160.702 (Vernon 2008); DEL. CODE ANN. TIT. 13, § 8-702 (West, Westlaw through 77 Laws 2010); N.D. CENT. CODE § 14-20-60 (West, Westlaw through 2009 R.S.); UTAH CODE ANN. § 78B-15-702 (West, Westlaw through 2009 Gen. Session and 2009 1st Special Session); WASH. REV. CODE ANN. 26.26.705 (West, Westlaw through amendments January 15, 2010); WYO. STAT. ANN. § 14-2-902 (West, Westlaw through 2010 Budget Session). See also ALA. CODE 1975 § 26-17-702 (providing

“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction. A married couple who, under the supervision of a licensed physician, engage in assisted reproduction through use of donated eggs, sperm, or both, will be treated at law as if they are the sole natural and legal parents of a child conceived thereby.”);

N. M.S.A. § 40-11A-702 (1978) (“Donors of eggs, sperm or embryos are not the parents of a child conceived by means of assisted reproduction.”).

¹³ See Bridget M. Fuselier, *The Trouble with Putting all of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-embryos*, 14 TEX. J. CIV. LIB. & CIV. RTS. 143 (2009) [hereinafter Fuselier].

During the lives of the gamete providers, those individuals should be given the autonomy to determine how the pre-embryos will be used, transferred and disposed. And as long as one of the providers is alive, that individual can make decisions regarding the fate of the cryopreserved pre-embryo according to his or her own wishes and the wishes of the other gamete provider who is now deceased. However, once both individuals are deceased, any pre-embryos remaining in the cryopreserved state in fertility clinics and storage banks are left with a fate that must be determined.¹⁴ This is when questions regarding use, disposition and transfer become most crucial.

Property law is a good starting point for addressing these issues. As stated by Joseph William Singer:

[P]roperty law is one of the ways we organize social life; it embodies some of the deepest and most cherished values we possess. Those values sometimes come into conflict with one another. When this happens, we are forced to accommodate these conflicting values. We do this by compromising, placing limits, drawing lines, making distinctions.¹⁵

Let us begin the process of accommodating the conflicting values in the context of the pre-embryo by considering a hypothetical scenario.

III. ADDRESSING LEGAL DILEMMAS CREATED BY NEW TECHNOLOGY

John, a very distraught older man walks into a lawyer's office and relays the following story. Before John married Jane, she was diagnosed with cancer. She was to undergo chemotherapy and radiation treatments that would likely destroy her ovaries. As such, prior to her treatment and marriage, Jane and her soon-to-be husband, John, created pre-embryos in their efforts to have a biological child. The pre-embryos were cryopreserved so that they could be used in the future after Jane completed her medical treatment, and she and John were married. Jane and John eventually married and became Mr. & Mrs. Smith. They successfully went through the in vitro fertilization ("IVF") process and delivered a healthy baby girl, Joan. At that time, the Smiths still had three pre-embryos at the clinic in cryostorage. Mr.

¹⁴ Clinics do a good job of including provisions in their agreements with individuals regarding long-term storage and disposition of pre-embryos at death. However, another wrinkle that arises is that the individuals themselves often have a change of heart after entering into such agreements. The impact of that change of heart has been debated and addressed in several state courts. Some have ruled that the individuals must not be bound by these agreements with the clinics, while some state courts have taken the position that such agreements are contracts that have to be honored. Fuselier, *supra* note 13, at 148–54. See also *In re Witten*, 672 N.W.2d 768 (Iowa 2003); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Litowitz v. Litowitz*, P.3d 261 (Wash. 2002); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006 pet. denied). The parties should be allowed to have a change of heart, and a system needs to be put in place to address such issues. Those issues are addressed in Fuselier, *supra* note 13. This discussion takes up from the point in time where either the contract provisions are still in place and death is occurring, or one or both parties has indicated a different desire since the original contract. Regardless, the possibility of the death of the parties has to be factored into a solution.

¹⁵ See JOSEPH WILLIAM SINGER, *PROPERTY* xxv (2d ed. 2005).

and Mrs. Smith had a contract with their fertility clinic indicating that Mrs. Smith was opposed to destruction of the pre-embryos and opposed to adoption by another couple. She did not express any intent regarding use of the pre-embryos for scientific research. Mr. Smith did not oppose any form of disposition of the pre-embryos and was willing to donate to another couple, donate to research or have them destroyed in the event of non-use in the future.¹⁶

Mrs. Smith recently died in a tragic accident. At the time of her death, she was still happily married to Mr. Smith and Joan was a teenager who had a rare condition in which she was born without any ovaries. Mrs. Smith died with a will that she had prepared shortly before her death. The will left the cryopreserved pre-embryos to her daughter. On her twenty-first birthday, Joan requested the cryopreserved pre-embryos from the clinic, claiming them pursuant to her mother's will. She demanded possession so that she could have them implanted to carry a child.¹⁷ When the clinic notified Mr. Smith, he opposed such a transfer and disapproved of his daughter possibly carrying and raising a child that would genetically be her brother or sister. He came to a lawyer looking for answers.

IV. AN EXTENSION OF THE TENANCY BY THE ENTIRETY AS THE SOLUTION

Beginning with a traditional property model, the bundle of rights associated with property consists of the right to use, the right to possess, the right to exclude and the right to transfer.¹⁸ The right to transfer and right to possess are implicated during the life of the gamete providers, but also are integral in determining what happens to cryopreserved pre-embryos upon the death of both gamete providers. The pre-embryo layers on additional issues of concurrent ownership because of the nature of how the pre-embryo is created.

There are three different forms of concurrent ownership: tenancy in common, joint tenancy and tenancy by the entirety.¹⁹ A tenancy in common allows the

¹⁶ Fertility clinics now as a matter of course require the individuals going through these processes to sign agreements indicating their specific desires with respect to disposition of the pre-embryos that are in storage and may remain after fertility treatment is completed. These agreements are intended to provide guidance to the clinics. In the instance where the parties don't agree on an issue such as donation or destruction, the clinic will be guided by whatever provisions the parties are in agreement. See also *supra* text accompanying note 14.

¹⁷ While this scenario may seem like a plotline from a strange science-fiction soap opera, medically, the lifespan of a cryopreserved embryo is unknown. Peter A. Clark, *Embryo Donation/Adoption: Medical, Legal and Ethical Perspectives*, 5 INTERNET J. L. HEALTHCARE & ETHICS 2 (2009). Therefore, it is possible for the pre-embryo to remain in a cryopreserved state for quite some time, allowing for a situation like this to occur.

¹⁸ SINGER, *supra* note 15, at 2-3.

¹⁹ *Id.* at 346. Tenancy by the entirety is not recognized in a majority of states, but is still a form of concurrent ownership in Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. 4 THOMPSON ON REAL PROPERTY § 33.06(e) n.110 (David A. Thomas ed., 2d ed. 1998 & Supp. 2009). In most states where tenancies by the entirety do not exist, it is because the courts have held that the Married Women's Act destroyed the fifth unity necessary for the tenancy. See WILLIAM B. STOEBCUK & DALE A. WHITMAN, THE LAW OF PROPERTY, 193 n. 3 (3d ed. 2000).

undivided interests that are held by the property owners to be freely alienable, devisable and inheritable.²⁰ The tenants in common have undivided shares of ownership, but have equal rights to possession.²¹ Each tenant in common may transfer his fractional share of the property at issue by deed or lease and may mortgage his interest without the cotenant's consent.²² The commonly owned property can also be partitioned at any time at the will of one or more concurrent owners.²³ Once requested, partition will occur either by physical division or by a sale with division of the proceeds.²⁴ Because each party owns a fractional share, the cotenant's interest will pass by will or intestate succession at his death.²⁵

In comparing the joint tenancy to the tenancy in common, the key difference is the survivorship aspect.²⁶ During the life of joint tenants, all rights are fundamentally the same as with a tenancy in common. The parties have the right to possess the property, to partition the property, and to own freely alienable undivided fractional shares of the property during their lives, as if they were tenants in common.²⁷ However, once joint tenants die, those fractional shares are not devisable or inheritable due to the survivorship component that has been layered onto this form of concurrent ownership.²⁸

However, the survivorship concept has its weakness. A severance of the joint tenancy that defeats the right of survivorship may occur during a joint tenant's lifetime.²⁹ If that situation occurs, then the fractional share that has been severed becomes devisable and inheritable—it becomes a share in a tenancy in common.³⁰ If severance does not occur during the lives of the joint tenants, there will ultimately remain one survivor of all of the joint tenants who now has 100% ownership of the property, and who would therefore have an interest that is devisable and inheritable.³¹ This issue, as well as those of partition and severance, would still need to be addressed in the model for the pre-embryo. However, this is a better starting point than the tenancy in common.

²⁰ SINGER, *supra* note 15, at 347.

²¹ *Id.*

²² STOEBUCK & WHITMAN, *supra* note 19, at 178-79.

²³ *Id.* at § 5.3-5.4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* These actions—while permissible—impact the common law joint tenancy with right of survivorship by affecting a severance and destroying the right of survivorship, thus changing the concurrent ownership to a tenancy in common. See STOEBUCK & WHITMAN, *supra* note 19, at 189.

²⁸ *Id.* at 187. By a common law fiction, joint tenants together are regarded as a single owner; each tenant is seized *per my et per tout*—by the share or moiety and by the whole. In theory, then, each owns the undivided whole of the property; this being so, when one joint tenant dies *nothing passes* to the surviving joint tenant or tenants. Rather, the estate simply continues in survivors freed from the participation of the decedent whose interest is extinguished. JESSE DUKEMINIER, ET AL, PROPERTY 276 (6th ed. 2006).

²⁹ SINGER, *supra* note 15, at 349.

³⁰ *Id.*

³¹ *Id.* at 348.

An even better starting point is the third form of concurrent ownership. Tenancy by the entirety is another form of concurrent ownership that still exists in some states and is a special form of joint tenancy only available to married couples, save for a couple of exceptions like Hawaii, which recognizes this form of concurrent ownership for “life partners.”³² The tenancy by the entirety is similar to the joint tenancy but has four differences, three of which are important in this context: (1) the individual undivided interests cannot be transferred without the consent of both spouses; (2) partition is unavailable as a remedy for owners who cannot agree about what to do with the property; and (3) the relationship can only be severed by a divorce.³³

When the tenancy by the entirety originated, the husband had more management power and control than the wife.³⁴ Such a degree of control by the husband or male gamete provider would not be permissible under current U.S. laws since the U.S. Supreme Court has held that enforcement of unequal rights constituted state action in violation of the Equal Protection Clause.³⁵ While tenancies by the entirety may have fallen out of favor in most states, the reason for that is no longer a concern with the balancing of the rights of the husband and wife that have occurred in the law.³⁶ The tenancy by the entirety can be utilized as more of an equalizer of the parties, and can be used to prevent the male from asserting tyrannical control over the female as was often the case with the tenancy by the entirety model in the past. In the relationship involving the pre-embryo, this constitutional protection would allow for both parties to have an equal say in the ultimate use or disposition of the pre-embryo, with one very limited exception.³⁷ As this article proposes, the extended tenancy by the entirety for pre-embryos would include: (1) the non-severable right of survivorship; (2) no right to partition at any time; (3) no ability to transfer the pre-embryo for adoption or donation to

³² See *DUKEMINIER, ET AL.*, *supra* note 28, at 276 (In 1997, Hawaii enacted legislation permitting a tenancy by the entirety to be created between “reciprocal beneficiaries,” that is, unmarried persons who are prohibited from marrying one another.).

³³ *SINGER*, *supra* note 15, at 356. The fourth difference is that the individual undivided interests cannot be reached by the creditor of one spouse. As the pre-embryo is not being commoditized with a dollar value placed on it, the pre-embryo would not be a type of property that could even be “reached” by creditors.

³⁴ *Id.*

³⁵ See *Kirchberg v. Freenstra*, 450 U.S. 455 (1981).

³⁶ Tenancies by the entirety historically gave more power and control to the husband, leaving the wife at his mercy. However, over time constitutional challenges were made as well as state statutes enacted to give married women equal footing to their husbands. See *SINGER supra* note 15, at 363.

³⁷ In the event of divorce with disagreement as to whether one of the parties should be able to use the stored pre-embryos to have a child, there has been disagreement in the few court opinions addressing this problem. In some instances the courts have allowed for destruction of the pre-embryos even if one of the parties no longer desires that outcome. Additionally, courts have prevented a party from using the stored pre-embryos to have a child when the other party objects. A prior article written on this subject proposes that in the event of divorce when one party wants to use the pre-embryo to have a child of their own then that party should be allowed to do so even over the objection of the other party. See *Fuselier supra* note 13.

research absent an agreement by both parties; and (4) result in property that is not devisable or inheritable at the death of either party.

*A. Why Do These Characteristics of the Tenancy by the Entirety Work So Well
When Discussing the Pre-embryo?*

Because of the special characteristics of partition and survivorship that exist in this form of concurrent ownership, the tenancy by the entirety property model is the best model to begin with to create a workable framework for the pre-embryo. With the additional proposed modifications, the tenancy by the entirety can be the key to solving other problems faced in this relationship.

1. Prohibition Regarding Partition and Its Extended Application

Unlike the tenancy in common and the joint tenancy property models, partition is not an available remedy in a tenancy by the entirety.³⁸ A partition can only occur upon divorce and settlement.³⁹ Even in the context of concurrent ownership of something as unemotional and tangible as land, partition can be a difficult task. Courts have the option to partition the land in kind, which creates a physical division of the land according to the respective fractional shares of ownership, or order the sale of the land and divide the proceeds according to the respective fractional shares of ownership.⁴⁰ Historically, courts have preferred the partition in kind to avoid forcing owners to sell their shares of the land.⁴¹ In determining whether land should be partitioned in kind, courts look at the number of interests involved, the size of the tract of land, and the uniformity of value.⁴² Even when dealing with land, however, there are times when physical division is impossible and the court must resort to a sale, because once a party has requested partition, it will happen, either physically or by dividing the proceeds.⁴³ Aside from situations involving the surface of land, partition becomes even more complicated when addressing concurrent ownership of mineral estates. With regard to mineral estates, oftentimes the value is not distributed uniformly, and physical division is impossible.⁴⁴ Again, the fallback position is a sale of the mineral estate and partition of the sales proceeds. So, ultimately, partition in some form is always an option.

³⁸ SINGER, *supra* note 15, at 356.

³⁹ *Id.*

⁴⁰ 7 RICHARD R. POWELL, THE LAW OF REAL PROPERTY § 50.07[4][a] (1949).

⁴¹ *Id.*

⁴² 4 THOMPSON ON REAL PROPERTY, *supra* note 19, at § 38.04(a).

⁴³ There is an absolute right to partition outside of the context of the tenancy by the entirety. POWELL, *supra* note 40, at §§ 50.07[3][a], 51.04[1]. With a tenancy by the entirety, partition can only occur upon divorce or agreement of the parties. There can be no forced partition. *Id.* at § 52.03[1].

⁴⁴ Compare *White v. Smyth*, 214 S.W.2d 967 (Tex. 1948) with *Irons v. Ft. Worth Sand & Gravel Co.*, 284 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e).

Moreover, some complex types of property do not lend themselves to partition, regardless of the mode of concurrent ownership. One can look to condominium ownership for an example of where partition is not a feasible remedy. A person who owns an individual unit in a condominium development also has a fractional share of ownership of the common areas.⁴⁵ This means that every individual unit owner owns his or her unit in fee simple and then also holds a fractional share of ownership in common elements such as the buildings, courtyards, grounds, etc.⁴⁶ Due to the nature of the condominium development and the shared benefit and use of the common areas of the property, partition is prohibited.⁴⁷ While the individual can sell or give away his individual unit and the

⁴⁵ 4B RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* § 633.20 (2000). See STOEBUCK & WHITMAN, *supra* note 19, at 181.

⁴⁶ *Id.*

⁴⁷ This prohibition originates from the Uniform Condominium Act promulgated in 1980, not the common law of property. See UNIF. CONDOMINIUM ACT § 2-107(e) (1980). Texas and many other states have adopted the Uniform Act, or significant components of the act, including the prohibition against partition of the common elements. TEX. PROP. CODE ANN. § 81.108 (Vernon 2007); KY. REV. STAT. ANN. § 381.19 (Westlaw 2010). See also Alabama ALA.CODE 1975 § 35-8-6(c) (“The common elements and limited common elements shall remain undivided from the condominium property and shall not be the object of an action for partition or division unless the condominium property is removed from the provisions of this chapter as provided in section 35-8-20.”); Alaska AS § 34.08.150(f) (“In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.”); Connecticut C.G.S.A. § 47-74(b)(3) (providing

“The common elements shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this chapter and any covenant or provision in the condominium instruments or other document to the contrary shall be null and void, provided, that the unit owners may vote to sever all or part of the recreation facilities from the common elements and convey the same to a nonstock corporation pursuant to section 47-74c.”);

Delaware 25 DEL.C. § 81-207(f) (providing

“In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.”); Florida West’s F.S.A. § 718.107(3) (“The shares in the common elements appurtenant to units are undivided, and no action for partition of the common elements shall lie.”);

Indiana IC 32-25-4-3(e) (providing

“The common areas and facilities shall remain undivided. A condominium unit owner or any other person may bring an action for partition or division of any part of the common areas and facilities if the property has been removed from this chapter as provided in IC 32-25-8-12 and IC 32-25-8-16. Any covenant to the contrary is void.”);

Iowa I.C.A. § 499B.13(1) (providing

“The provisions of chapter 651, relating to partition of real property shall not be available to any owner of any interest in real property included within a regime established under this chapter as against any other owner or owners of any interest or interests in the same regime, so as to terminate the regime.”);

Kansas K.S.A. 58-3106(c) (providing

“The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this act as provided in K.S.A. 58-3116 and 58-3126. Any covenant to the contrary shall be null and void.”);

interests in the common areas that go along with that unit ownership, that person cannot force the parking lots, swimming pools, tennis courts, hallways and other commonly owned areas to be either physically divided or sold with the proceeds divided. The very nature of a condominium development sets up a special type of relationship among all of the individual unit owners; they all buy into the specific idea of having certain amenities and features. Allowing one individual to force a partition—either in kind or by sale—would destroy the entire goal and purpose of the condominium development.

The same statement can be made about any attempt to partition pre-embryos. When addressing the pre-embryo, partition should *never* be allowed as an option, even in the event of divorce or death. The reason for this statement is based on available medical data regarding the practices utilized in the ART industry and the associated statistics of successful implantation and pregnancy. According to an article published in 2008 in the *International Journal of Gynecology and Obstetrics*, when a double embryo transfer (“DET”) is utilized, the result was a higher pregnancy or live birth rate as compared to the single embryo transfer (“SET”).⁴⁸ The article catalogs six controlled trials that were conducted to compare the SET and DET processes. In four of these trials, the data confirmed a significantly higher clinical pregnancy rate and live birth rate per woman when utilizing DET.⁴⁹ The Reproductive Endocrinology and Infertility Committee, and other committees involved in this study, articulated the benefits and harms involved as being intended to “minimize the occurrence of multifetal gestation, particularly high-order multiples (“HOM”), while maintaining acceptable overall pregnancy and live birth rates following IVF-ET.”⁵⁰ The study makes several recommendations, the first being that the individual IVF-ET programs should be allowed to evaluate their own patient-specific data to determine the number of embryos involved in the transfer.⁵¹ The remaining recommendations involve very specific categories of patients and what would be recommended under certain circumstances. However, these additional suggestions stem from the initial recommendation that an individualized patient determination be made.⁵²

Mississippi MISS. CODE ANN. § 89-9-15 (“Except as provided in section 89-9-35, the common areas shall remain undivided, and there shall be no judicial partition thereof. Nothing herein shall be deemed to prevent partition of a tenancy in common in a condominium.”); Nevada 6. N.R.S. 116.2107 (“In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.”); New Hampshire N.H. REV. STAT. § 356-B:17(VII) (“The common areas shall not be subject to any suit for partition until and unless the condominium is terminated.”).

⁴⁸ Joint SOGC-CFAS Guidelines, *Guidelines for the Number of Embryos to Transfer Following In Vitro Fertilization*, 102 INT’L J. OF GYNECOLOGY AND OBSTETRICS 207 (2008).

⁴⁹ *Id.*

⁵⁰ *Id.* at 203. IVF-ET is In Vitro Fertilization Embryo Transfer. There are sometimes SET—single embryo transfers—and DET—double embryo transfers.

⁵¹ *Id.* at 206.

⁵² *Id.* at 207-11.

As a result of this medical issue, there are concerns with any attempt to partition pre-embryos that remain in cryostorage. As a very practical matter, it is physically impossible to partition an individual pre-embryo. The once separate gametes have been combined and developed into the pre-embryo. With respect to the situation where multiple pre-embryos remain in cryostorage, those pre-embryos should not be physically divided and awarded to the individual providers. As supported by the medical literature, the success rates of the IVF-ET are significantly greater when a double embryo transfer (“DET”) is utilized rather than single embryo transfer (“SET”). If the law were to require or allow the pre-embryos to be divided, that could significantly decrease the chance of anyone having a successful term pregnancy and live birth. If the point of creating pre-embryos in the first place is to lead to the birth of a baby, the partition of those pre-embryos would be contrary to that intent. It would be difficult to handle a situation where two pre-embryos remain, and one is awarded to the female and one to the male. Each goes through a SET, and then only one pregnancy results. In this example, let us assume that the female’s SET fails, while the male gestational carrier’s SET is successful. Is it then likely that—as a result of the partition—the gestational carrier’s pregnancy will result in the creation of a child who belongs only to the man, and not the woman? What if there is no successful pregnancy because SET was utilized? The chance of success has been decreased in an effort to divide the pre-embryos and give each part a “fair share.” The result, however, is that both parties get nothing.

2. Undefeatable Survivorship as a Component

A tenancy by the entirety, unlike the other forms of concurrent ownership, already solves much of the problem involving dispositions, both inter-vivos and at death of the first provider. A tenancy by the entirety incorporates the survivorship component of a joint tenancy so that, upon the death of the first spouse, that spouse’s fifty percent undivided interest automatically passes to the surviving spouse.⁵³ The surviving spouse now has one hundred percent ownership of the property that was the subject of the tenancy by the entirety. Also different from the other forms of concurrent ownership, there is no severance of the relationship by an inter-vivos transfer; thus, the survivorship component remains in place and cannot be unilaterally defeated.⁵⁴

Think back to Mr. Smith who has walked into the lawyer’s office looking for answers to his very difficult questions. In that scenario, once the pre-embryos were created using his sperm and Mrs. Smith’s eggs, they fused together into one new entity—the pre-embryo—the beginning of a potential new life. Part of the complexity of his situation is caused by the fact that, if the pre-embryos were

⁵³ *Id.*

⁵⁴ *Id.* at 356.

treated as property owned in a tenancy in common, then at the time of Mrs. Smith's death, she had a fifty percent ownership interest in the pre-embryos that would be devisable and inheritable, absent some limitations under the law. While her will purported to convey the pre-embryos to Joan in their entirety, Mrs. Smith could not convey more than she owned. Therefore, upon Mrs. Smith's death, Joan and her father, Mr. Smith, technically became concurrent owners of the pre-embryos as tenants in common: each with a right to possess and a right to partition, and each with an interest that is transferable, devisable and inheritable.

If Joan and her father cannot agree about what should happen to the pre-embryos or whether or not Joan should be able to use them to have a child, either of them could transfer their interest in the pre-embryos. Alternatively, they could ask for partition. Joan could demand possession of the pre-embryos as a co-owner of property; but then what would she do with them? Could she use them over the objection of her father? The answer should most definitely be a resounding no.

The survivorship component would eliminate these questions. If the concurrent ownership created between Mr. and Mrs. Smith included a right of survivorship, the upon Mrs. Smith's death, her fifty percent undivided fractional share would immediately cease to exist, and there would be nothing left to pass through her will to Joan; Mr. Smith would then have one hundred percent ownership in the pre-embryos, and Joan would not be in the picture.

This suggests that a joint tenancy would suffice, but it does not. In a joint tenancy, each tenant can unilaterally sever the joint tenancy, thereby removing the survivorship feature.⁵⁵ If treated as a tenancy by the entirety, Mrs. Smith would not have been successful, even if she had tried to engage in a unilateral inter-vivos conveyance to sever the interests.⁵⁶ Upon her death, her interest would still pass to her husband rather than through her will. This non-severable survivorship component is essential to eliminate the first problem with what Mrs. Smith has done.

B. Additional Changes to a Tenancy by the Entirety Necessary for the Pre-embryo Context

1. Application to Married and Unmarried Couples

The tenancy by the entirety property model has only been recognized historically within the confines of marriage, because it was believed that the husband and wife became one person at the time of marriage.⁵⁷ As such, the couple had to hold any property in its entirety as one person.⁵⁸ The first change

⁵⁵ *Id.* at 349.

⁵⁶ *Id.* at 356.

⁵⁷ See *Coleman v. Jackson*, 286 F.2d 98, 99 (D.C. Cir. 1960).

⁵⁸ *Id.*

that must be made to the common law tenancy by the entirety model is to extend its application outside of the traditional framework of being only available to married couples, because in the context of ART, there are often times when pre-embryos are being created outside of a marriage. However, this form of ownership fits in the context of the pre-embryo because of the relationship between the male and female providers, as well as some of the particular characteristics of the pre-embryo. This form of concurrent ownership outside of the marriage context with unmarried gamete providers can be justified based on the “oneness” they essentially share as creators of the pre-embryos. Their individual contributions to the pre-embryo are now so intertwined that they can no longer be singled out and identified.⁵⁹ Additionally, the closeness and interdependence of the parties is oftentimes analogous to the unified husband and wife traditionally used at common law as the fifth unity.⁶⁰

While these kinds of situations often involve married couples, in the instances where an unmarried couple is involved, the relationship created in the process of making the pre-embryo is also one of a single unit: a joint action involving mutually dependent parties. While other changes also need to be made, the tenancy by the entirety is a workable framework to begin constructing a new model.

⁵⁹ Another comparison is found in the law of community property. In the context of community property, it is possible that spouses each have separate property that becomes so commingled with community property that it no longer retains the separate property status. *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965). A wife inherits \$100,000 in cash which is her separate property. Then she uses that money to purchase Blackacre which will also be her separate property. The land increases in value to \$1,000,000, and is still her separate property. See *Stringfellow v. Sorrells*, 18 S.W. 689 (Tex. 1891) (established the “mule rule” which states that if the wife’s separately owned mule increased in value, the mule was still her separate property, while if the mule had a baby mule, the baby mule would be community property). But, if the wife rents out the land and collects rent, the rent is community property. See *DeBlane v. Lynch*, 23 Tex. 25 (1859) (established the “crop rule” which states that crops grown from the wife’s separately owned land were something new generated during the marriage, and were thus community property). Based on that, each party has an interest in what was newly created from the separate property, and the law addressed the concurrent ownership situation. Situations involving a pre-embryo are somewhat comparable. The problem is that at the same time, the pre-embryo scenario is unlike any other situation because of the character of what is being created—the potential for human life. However, guidance can be found in the mule and crop rules. In both instances, when something entirely new developed from the separate property, both spouses enjoyed community property status in the new property that was created. While a pre-embryo is a far cry from a crop that can be severed from the real property or the payment of a dividend, what happens is comparable with respect to legal classification. However, that legal classification must still take into account that the pre-embryo is not like a tangible chattel; the pre-embryo is unique and the law must treat it in a unique fashion.

⁶⁰ At common law, joint tenancy with right of survivorship was only created by the presence of four unities: time, title, interest and possession. SINGER, *supra* note 15, at 348. The concept of the tenancy by the entirety was similar but different in that it required a fifth unity of marriage to create this particularly unique form of concurrent ownership, not because of the items that were the subject of ownership, but because of the nature of the owners and the legal concept behind marriage with regard to making the husband and wife one unit. *Id.* at 356.

The focus from this point forward will be on the classification of the pre-embryos upon the death of the last provider, as not within the definition of "property" in the probate code.

2. The Final Death Disposition

At the time of an individual's death, determinations must be made as to how that individual's remaining assets should be disposed of; either according to the decedent's will or by the laws of descent and distribution.⁶¹ Probate courts only have jurisdiction to distribute property of the decedent.⁶² In determining what property is subject to disposition at death, a categorization of probate versus non-probate property occurs.⁶³ The Restatement Third of Property defines the probate estate as consisting of "property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death."⁶⁴ Probate property "refers to assets subject to administration under applicable laws relating to decedents' estates."⁶⁵ Property owned at death is described as property that the decedent had actual ownership of, as opposed to merely ownership in substance.⁶⁶ Ownership in substance is different from actual ownership, because true, legally recognized ownership of the property involves not just the ability to control, but also the legal right to hold title to the property.⁶⁷ However, ownership in substance refers to property that the decedent did not own, but over which the decedent had sufficient control, such as through the power to become the owner or to be treated as the owner for some purpose.⁶⁸

The pre-embryo could very easily be viewed as something over which the decedent has ownership in substance, rather than actual ownership. This characterization helps alleviate the potentially offensive or troublesome idea of the pre-embryo as pure property. While many people would accept the idea of actual ownership of cells, tissue, even reproductive material such as sperm, the concept of actual ownership of the pre-embryo becomes more troubling. However, if ownership in substance is the principle used in that context, the gamete providers would not have actual ownership or legal title to the pre-embryos as they would to a piece of land, a car, jewelry, or some other item of tangible personal property. Yet, they could enjoy ownership in substance, which acknowledges their rights to exercise control over the pre-embryos. If there is no actual ownership of the pre-embryos, and only ownership in substance,⁶⁹ then the pre-embryos would not be

⁶¹ See RESTATEMENT (THIRD) OF PROPERTY §§ 1.1, 2.1 (1999).

⁶² DUKEMINIER, ET AL., *supra* note 28, at 278-79 (6th ed. 2006).

⁶³ See RESTATEMENT (THIRD) OF PROPERTY § 1.1 (1999).

⁶⁴ *Id.*

⁶⁵ *Id.* at cmt. a.

⁶⁶ *Id.* at cmt. b.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ownership in substance includes property such as that which a person holds a general power of

within the parameters of a decedent's probate estate. As defined by the Restatement, the probate property is only that property in which the decedent enjoyed actual ownership.⁷⁰

The following proposed statutory language seeks to address this issue:

Upon the death of both parties, if there is no mutual agreement in writing as to donation for embryo adoption or either party has expressly objected to donation for scientific research, then the in vitro fertilized ovum shall be destroyed. Destruction can only be avoided with some form of donation if there is no opposition by either party during their respective lives.⁷¹

The proposed statute sets up the final pillar of the modified form of tenancy by the entirety. As with any tenancy by the entirety, when the first provider dies, property subject to the tenancy by the entirety will not pass through that individual's will or by intestate succession. However, this statutory language also prevents any pre-embryos from passing through the will of the survivor or by intestate succession if the survivor dies intestate. Basically, the parties are forced to make a disposition or direct the ultimate disposition of the pre-embryos during life. If the parties had expressed a joint desire for the pre-embryos to be donated to scientific research or to another individual for implantation by inter vivos agreement, then that agreement would be honored. If such disposition does not occur, then the default is destruction of the pre-embryos. This is the important final piece to put into place. While this may seem like a harsh result at first glance, it would actually avoid many of the more complicated problems that would otherwise arise upon death that the legal system is not equipped to handle.

There have been very few instances where a court has had to make a determination regarding the disposition of reproductive material at death. There are more requests being made, but little guidance as to how such requests should be handled.⁷² The requests in the cases reported to date have been for sperm from a deceased male to be extracted and preserved or for stored sperm to be distributed through the provisions of a will.⁷³ Without guidance, determining how to handle a pre-embryo will prove to be even more of a dilemma.

In the 1993 California case of *Hecht v. Superior Court*, a California Court of Appeals had to make a determination of whether the decedent's interest in his cryogenically preserved sperm was "property" within the jurisdiction of the probate court.⁷⁴ William Kane left his cryogenically stored sperm to his girlfriend,

appointment over, and property in a trust that a person has the power to revoke. *Id.* at cmt. b, illus. 3, 4.

⁷⁰ RESTATEMENT (THIRD) OF PROPERTY § 1.1 cmt. b (1999).

⁷¹ See Fuselier, *supra* note 13, at 187.

⁷² See Jamie Stengle, *Grieving Mother Vows to Raise Dead Son's Child. She Harvests His Sperm, Plans to Find Surrogate*, HOUSTON CHRONICLE Apr. 11, 2009, at B2.

⁷³ See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. Div. 1993); *Estate of Kievernagel*, 83 Cal. Rptr.3d 311 (Cal. Ct. App. Div. 2008).

⁷⁴ *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. Div. 1993).

Deborah Hecht, in his will.⁷⁵ The will clearly stated that he wanted his sperm to be stored for use by Deborah, so that she might have a child even after his death.⁷⁶ This bequest was made along with bequests of all of his other real and personal property.⁷⁷ The Court cited to California law, providing that the jurisdiction of the probate court only extends to the property of the decedent.⁷⁸ The Court determined that Mr. Kane had an interest in his sperm that fell within the broad definition of property in the California Probate Code section 62.⁷⁹

This case came close on the heels of the *Moore v. Regents of the University of California* decision, in which the California Supreme Court addressed a dispute over cells that were no longer in Mr. Moore's body, and over which he no longer exercised any control.⁸⁰ Although the *Hecht* Court seemed reluctant to discuss the sperm at issue in that case in terms of "property," the Court found that the disposition of the sperm was within the jurisdiction of the probate court.⁸¹ The Court cited to the American Fertility Society's ethical statement that "[i]t is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition[s are] within medical and ethical guidelines."⁸² The Court concluded that the sperm was a unique "property."⁸³ The Court could not have properly ordered the sperm destroyed by applying the provisions of the will.⁸⁴ The provisions clearly indicated an intent to leave the sperm to Hecht, and to allow her the opportunity to bear his child posthumously.⁸⁵

A more recent court opinion dealing with the disposition of a decedent's sperm comes from *Estate of Kievernagel*.⁸⁶ In *Kievernagel*, a widow—the administrator of her deceased husband's estate—petitioned a California court for distribution of the decedent's cryogenically frozen sperm.⁸⁷ The *Kievernagel* Court determined that the appropriate test for disposition was to examine the

⁷⁵ *Id.* at 276-77.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 280 (citing *Estate of Lee*, 177 Cal. Rptr. 229, 232 (Cal. Ct. App. Div. 1981)).

⁷⁹ *Hecht*, 20 Cal. Rptr. 2d at 281.

⁸⁰ *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 491-92 (Cal. 1990). The court clearly indicated they did not want to label Mr. Moore's interests in the cells that had left his body as property interests. However, Mr. Moore's claim presented a unique circumstance at that time where cells had been removed from his body, used for medical research which resulted in a very profitable patent. Mr. Moore's claim was one for conversion and recognition of property rights in order to recover a monetary award. The majority of the justices on the California Supreme Court did everything possible to avoid such a result.

⁸¹ *Hecht*, 20 Cal. Rptr. 2d at 283.

⁸² *See id.* at 282 (citation omitted).

⁸³ *Id.* at 283.

⁸⁴ *Id.* at 283-84.

⁸⁵ *Id.*

⁸⁶ *Estate of Kievernagel*, 83 Cal. Rptr.3d 311 (Cal. Ct. App. Div. 2008).

⁸⁷ *Id.* at 312.

decedent's intent.⁸⁸ Joseph stored sperm at the fertility clinic he and his wife were using for IVF.⁸⁹ The consent forms he had signed at the center stated that the frozen sperm were his sole property and that upon his death or divorce, the sperm were to be discarded.⁹⁰ When Joseph died in a helicopter crash, his widow petitioned to obtain the sperm so that she could be inseminated with it in an attempt to have a child.⁹¹

The probate court focused on the decedent's intent.⁹² The Court found that the agreement at the clinic explicitly expressed that intent and there was no evidence of anything to the contrary.⁹³ The Court relied heavily on the *Hecht* decision, as there was still little to no case law on the topic.⁹⁴ The Court agreed with the *Hecht* Court, finding the gametic material to be a unique type of property, and thus not governed by the general laws relating to gifts of personal property or the transfer of personal property upon death.⁹⁵ At the time of his death, he still had an ownership interest that gave him decision-making authority as to the use of his gametic material for reproduction.⁹⁶

Recent events in Texas and New York illustrate even more bizarre circumstances that can arise. In April 2009 in Austin, Texas, the mother of a decedent petitioned a court for her son's sperm to be removed from his body so she could fulfill his dream of having three sons.⁹⁷ In that case, the decedent did not leave his cryogenically stored sperm to someone in a will, or even express a desire for sperm to be removed from his body after his death. Instead, his mother wanted to acquire it in an effort to see that her son would have biological children, even posthumously.⁹⁸ An Austin judge granted the mother's request, and the sperm was removed from the body.⁹⁹

Days after the decision by the Travis County probate judge, this same issue arose in New York. This time, instead of the decedent's mother petitioning to extract the sperm, the fiancée of the decedent made the request.¹⁰⁰ The Bronx judge ruled in favor of the fiancée after a ten minute hearing with his decision based on "very little precedent."¹⁰¹ The judge stated that there was nothing to

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Estate of Kievernagel*, 83 Cal. Rptr.3d at 313.

⁹³ *Id.*

⁹⁴ *Id.* at 313-18.

⁹⁵ *Id.* at 315.

⁹⁶ *Id.* at 316.

⁹⁷ See Stengle, *supra* note 72.

⁹⁸ *Id.*

⁹⁹ See Associated Press, *Mom Gets OK to Harvest Dead Son's Sperm*, Apr. 8, 2009, available at www.msnbc.com/id/30115186/.

¹⁰⁰ See Kim Matas, *Docs Timing Is Everything*, AZ DAILY STAR, May 1, 2009.

¹⁰¹ See Dorian Block, *Life After Death for Family: Judge Allows Fallen Bronx Man's Seed to be Harvested*, DAILY NEWS, Apr. 18, 2009.

prevent the fiancée from doing this and, under these particular tragic circumstances, “this is all that is left for [the family].”¹⁰²

The courts have taken a somewhat simple approach to address the question raised with regard to sperm alone. However, once the egg and sperm are joined to form the pre-embryo, the pre-embryo has the potential to continue developing into a human child. In a situation where both people are deceased, this pre-embryo is the genetic product of two deceased individuals and cannot be treated exactly the same as sperm or eggs separately, or even the same as other body tissue and organs. Both parties have an interest in the pre-embryo which the law must consider.

The proposed statutory scheme, coupled with clear statements of intent of the parties placed in a modified tenancy by the entirety framework, creates a workable formula for dealing with disposition at the death of the providers. This framework has already established that the original survivorship component would work upon the death of the first provider, leaving the second provider with complete possession and ownership of the pre-embryo. However, as recognized in *Hecht*, the intent of the provider must be considered even after death. This may limit the dispositions allowed at the hands of the surviving provider, but it eliminates the possibility of a multitude of fractional shares of ownership becoming involved.

As proposed, the process would basically work as follows: (1) put in place a tenancy-by-the-entirety form of concurrent ownership with the modifications explained in this article; (2) during their lifetime, the parties would not be able to effect a severance or demand partition of the pre-embryos; (3) upon the death of the first provider, that provider’s interest would pass to the survivor; (4) the survivor’s ability to use or dispose of the pre-embryos would still be impacted by express written desires or objections made by the decedent during his or her lifetime; and (5) upon the death of the survivor, if no inter vivos disposition has been made, the remaining pre-embryos would be discarded.

V. CAN MR. SMITH’S PROBLEM BE SOLVED WITH THIS FRAMEWORK?

In the dispute between Mr. Smith and his daughter, a lawyer could provide Mr. Smith with a relatively clear answer to his problem. In using the proposed framework, the first issue would be that any interest that his daughter is claiming under Mrs. Smith’s will is invalid. With the non-severable right of survivorship in place, Mrs. Smith could not have done anything during her lifetime to destroy the right of survivorship. Additionally, using the traditional common law rules of tenancy by the entirety, Mrs. Smith could not make a transfer of her interest in the pre-embryo without the consent of Mr. Smith. At the time of Mrs. Smith’s death, 100% ownership resides with Mr. Smith. This result allows Mr. Smith to avoid the scenario where his daughter could possibly give birth to her biological sibling, making her biological child not only his grandchild, but also his son.

¹⁰² *Id.*

Mr. Smith could also rest easy knowing that upon his death he would not have to worry about his daughter trying to claim that the pre-embryos passed to her as part of her father's personal property in his will, or through the laws of intestate succession if he died intestate. During the remainder of his life he could make a disposition of the pre-embryos consistent with his deceased wife's wishes—as expressed during her lifetime—or know that the pre-embryos would be discarded upon his death.

By preventing the pre-embryos from passing through Mr. Smith's probate estate or through the laws of intestate succession, even more troublesome problems are eliminated. Think about the situation previously discussed and then consider what happens if Mr. Smith remarries. At the time of his death, he is married to the second Mrs. Smith. If the pre-embryos were classified as property under the Restatement's definition, for example, a complicated situation might arise if Mr. Smith died without a will. Using Section 38 of the Texas Probate Code for illustration, if a person dies intestate with a surviving spouse and any surviving children, all real and personal property shall pass with the surviving husband or wife taking one-third of the personal estate and the balance going to the child or children of the deceased and their descendants.¹⁰³ This would mean that the second Mrs. Smith would have a one-third fractional share of the pre-embryos and the remaining two-thirds would pass to Joan. The emotionally devastating dispute that could arise between the second Mrs. Smith and Joan defies comprehension. Keeping the pre-embryos out of Mr. Smith's probate property prevents these discussions from even starting.

CONCLUSION

While no current system works in the context of the pre-embryo, establishing a modified tenancy by the entirety property model would do the best job of addressing the potential problems that might arise in the case of dealing with pre-embryos. This framework would accommodate the special dignity of the pre-embryo and avoid some very challenging legal and moral issues that would otherwise arise.

There are four basic steps needed to modify existing law to ensure the proper handling of pre-embryos. Step one: Extend the tenancy by the entirety form of concurrent ownership outside of the marriage context solely with respect to the pre-embryo. Step two: Utilize the already present non-unilateral transfer of the pre-embryos during life, and deny partition as a remedy to the tenants by the entirety. Step three: Ensure the non-severability of the survivorship component. Step four: Prevent the pre-embryos from being classified as "property" under probate code definitions so that there can be no transfer of the pre-embryos upon the death of the survivor. While destruction of the pre-embryos may seem to be a harsh result, it is

¹⁰³ TEX. PROB. CODE § 38(b)(1) (Vernon 2003).

a much more workable and humane decision than the science-fiction soap operas that could otherwise occur.