TO BE OR NOT TO BE (A PARENT)? – NOT PRECISELY THE QUESTION: THE FROZEN EMBRYO DISPUTE

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INTRODUCTION

Although disputes over frozen embryos are uncommon, they nevertheless attract considerable media attention with regard to their legal and ethical aspects. These legal and ethical questions force a reassessment of complex matters such as the status of the frozen embryo and whether it is a proto-person,[1] property or perhaps something in between that requires special treatment.[2] What is the just way to balance between the right to become a parent and the right not to become one contains substantial issues of critical importance.[3] Recent surveys indicate that there are approximately three hundred fertility clinics in the United States currently providing services to thousands of couples every year.[4] As a result, there are about 400,000 frozen embryos in existence, and this number is growing by tens of thousands every year.[5] Since the rate of divorce in the United States is between

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[1] Proto-person is a term used to define the unique status of the frozen embryo. Right now it cannot be treated as a human, but since it has the potential to grow and become human, it cannot be destroyed and therefore should be treated in a proper manner.

[2] This dilemma is revealed in Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), which discusses the three aforementioned status options. *See also* Susan L. Crockin, Commentary, *"What Is an Embryo?": A Legal Perspective*, 36 CONN. L. REV. 1177, 1181-82 (2004) (suggesting an approach that recognizes the normative property foundations as preferable to the right to be a parent); Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 215-19 (2005).

[3] The question as to whether there is a right to procreate through fertility treatments and consideration that such a right is limited in practice has been discussed in detail in academic circles. *See, e.g.*, Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462-68, 1474-88 (2008). *See also* Sonia M. Suter, *Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: The State's Interest: The Implications of Gonzales v. Carhart and Other Recent Cases: The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514 (2008) (discussing the effects of the latest rulings with regard to abortions and the extent of the right to procreate, in addition to the fact that we cannot yet discuss the different social aspects in a pluralistic manner).

[4] *See* Tarun Jain, *Socioeconomic and Racial Disparities Among Infertility Patients Seeking Care*, 85 FERTILITY & STERILITY 876, 876 (2006). The number of fertility clinics is steadily growing. *See id.*

[5] *See* Susan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role*

40% and 50%,[6] it is fairly easy to imagine that many of these frozen embryos may become subjects of disputes.

A survey of the few rulings handed down in the United States and the rest of the world[7] show a common approach whereby the struggle over frozen embryos is seen as a binary conflict—all or nothing—between the right to be a parent and the denial of this right. Under the binary frameworks currently employed, one side's victory often ends up being the other side's defeat. Currently, certain countries prohibit individuals from creating more embryos than they will use. The state of Louisiana has imposed a complete ban on the destruction of embryos. Certain schools of thought have suggested imposing a set limit on the number of embryos that an individual can create,[8] but a statutory limit on embryo creation would pose constitutional issues in the United States.[9] A general principle behind these rulings is that no individual should become a genetic—and therefore legal—parent against his or her will,[10] unless it is the other partner's last opportunity to become a parent.[11]

Many disputes over frozen embryos result from the spouses' failure to agree in advance about what to do with the embryos in the event of divorce, death, or loss of legal competency. Additionally, disputes may result from a simple change of

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of Intent, 39 FAM. L.Q. 663, 664 (2005).

[6] *See* Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 906 n.43 (2000) (citing Scott Stanley, *What Really is the Divorce Rate?*, DIVORCE SUPPORT, http://divorcesupport.about.com/library/weekly/aa061699.htm).

[7] *See* Dalia Dorner, *Human Reproduction: Reflections on the Nachmani Case*, 35 TEX. INT'L L.J. 1 (2000) (a famous ruling given in Israel with regard to the Nahmani couple); Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and its Impact on Israeli In Vitro Fertilization Law*, 7 CARDOZO J. INT'L & COMP. L. 325 (1999).

[8] *See* Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 61 (2003).

[9] The problem inherent in constraining someone from his full right to procreate, at least by sexual means, is a well-known constitutional issue. In general, the State has to show good reason for intervening in someone's "negative procreation right." *See* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008), for an in depth analysis of the constitutional issues.

[10] *See, e.g.*, Harv. L. Rev. Ass'n, *Family Law—Contract--Supreme Court of New Jersey Holds That Preembryo Disposition Agreements Are Not Binding When One Party Later Objects*, 115 HARV. L. REV. 701 (2001); Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 76 (2002) (stating that the rulings in five United States cases before 2002 favored the party opposing implementation); *see infra* notes 64-65 and accompanying text (discussing similar holdings in European courts). For a discussion of the importance of establishing legal parentage on the basis of genetic parenthood, and its advantages and disadvantages, *see* Yehezkel Margalit, *The Rise, Fall and Rise Again of the Genetic Foundation for Legal Parentage Determination*, 3 JOURNAL OF HEALTH LAW AND BIOETHICS (2010) (HEB.). For the different philosophical aspects of becoming a parent or blocking the right to be a parent and the different social structure of the genetic parent and the legal parent, especially from the point of view of responsibilities in England, *see* JONATHAN IVES, BECOMING A FATHER/REFUSING FATHERHOOD: HOW PATERNAL RESPONSIBILITIES AND RIGHTS ARE GENERATED (2007), http://etheses.bham.ac.uk/254/1/Ives07PhD.pdf (fatherhood is essentially a social relationship constructed within a narrative of responsibility and that there is a distinction between being a "father" and being a "progenitor," both of which give rise to different kinds of responsibilities and rights).

[11] No U.S. case squarely addresses this in its holding. The closest was J.B. v. M.B., 751 A.2d 613 (N.J.Super. Ct. App. 2000). *See* Cohen, *supra* note 9, at 1192-96 (suggesting that when infertility is probable, courts should favor the pro-implementation party).

heart on behalf of one of the partners. Such a change could be caused by an intention to separate, a desire not to become a parent, or a success with prior fertility treatments.[12] In this Article's view, there are several possibilities for pre-arranged contractual arrangements regarding the frozen embryos in the event the couple decides to end its marriage, or in any other circumstance where the couple does not agree.

Part I of this Article reviews the effects of fertility treatments on the family structure and the increasing importance of agreements to establish the legal parenthood of children born through these treatments. The more the centrality and importance of these aspects is understood, the better equipped we will be to comprehend the validity and importance of legal implementation with regard to the initial undertaking of becoming a legal parent, but to also establish agreed legal parentage after the child's birth. Part II reviews the importance and effects of establishing legal parentage, since the current legal approach sees it as a quarrel over acquiring or rejecting parenthood at almost any price. It would be preferable to neutralize this argument and offer a reasoned compromise to reconcile these two opposing approaches. Later, it reviews the various forms of "coerced parenthood," which is a recurring problem that must be resolved. Part III discusses the legal and ethical aspects of the disposition agreement. This agreement documents and preserves the original intentions of the sides to the dispute with respect to the different situations that may arise, including a future dispute between the parties to the agreement. Part IV presents the advantages of such contracts, especially the role of the agreement in establishing legal parenthood of children born through different fertility treatments and the possibility of resolving future conflicts *a priori* by agreement.

Part V, the main section of this Article, offers a compromise suggestion to help resolve the conflicts with respect to frozen embryos that arise from the binary approach. This traditional approach is applied by the judiciary system due to the public convention that legal parentage is unfolded all-or-nothing status. Our suggested solution involves a choice between full and non-legal parenthood. In this Article's view, only this additional solution can stop this existing approach towards this subject as binary and as all-or-nothing. The establishment of legal parenthood today is based upon mutual agreement, and it is possible to suggest practical alternatives offering an intermediate status between the two extremes of full legal and non-legal parenthood. The spouse who objects to continued fertility treatments and refuses to accept parenthood will be legally defined as having no parent status. The legal precedents relevant to this suggestion are presented, especially those with respect to an anonymous sperm donor and to someone deceased whom, without his

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[12] *See generally* Yehezkel Margalit, *Surrogacy – From Problematic Practice to Giving the Gift of Life* (on file with author) (discussing the more efficient modern contract law approach leading to changed circumstances and change of heart which justify the increased use of contractual arrangements with regard to fertility treatment).

agreement, became a father after his demise. Similarly, this Article considers a number of modern legislative proposals and laws in the United States that support this approach. Finally, the Article concludes with the advantages and disadvantages of the proposal and examines the possibility of writing such a clause that offers this compromise a mandatory obligation along with the general framework required for drafting disposition agreements.

I. FERTILITY TREATMENTS, THE STRUCTURE OF THE MODERN FAMILY, AND THE GROWING ACCEPTANCE OF INTENTIONAL PARENTHOOD

The last few decades have seen dramatic changes affecting the institutions of family and parenthood. While, in the past, the classic family was defined sociologically as a pair of heterosexual parents living together under one roof along with their children, sociological changes have led to a rapid and great transformation in the definitions of family, marital relations, parenthood and the relationship between parents and children.[13] Thus, today, the bio-normative and traditional marriage has lost much of its strength, and emphasis has been placed on the individual's autonomy and wishes to separate marital relations from sexuality and fertility. The societal changes that have occurred are especially relevant in light of advanced medical technology, which in many cases involves a third party from outside the marriage in planning parenthood. This situation leads to serious legal and ethical dilemmas reminiscent of the case judged by King Solomon[14] with regard to the establishment of legal parenthood.[15] Such a situation could only aggravate the possible disputes between the different parties involved in the fertility process. It is therefore urgent and essential to construct a legal framework that will resolve these possible problems in advance and establish not just a local arrangement but also a general coherent solution.

Indeed, different scholars, together with the courts, have repeatedly turned to the legislatures for their help in resolving these complex issues.[16] Various national

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[13] *See generally* Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 72-74 (1998) (explaining the different philosophical approaches to the family unit); JEFFREY BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 22-98 (1982); JACOB J. ROSS, THE VIRTUES OF THE FAMILY 124-35 (1994).

[14] In determining a case between two women both claiming to be the birth-mother of a live child, King Solomon suggested that the child be cut in two in the hopes that the real mother would show pity on her child and forego her claim to save the child's life. *See* 1 Kings 3:16-28 (story of King Solomon).

[15] *See generally* Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 383 (2007) (claiming that the different fertility treatments are the pioneers of change in family law and therefore serve as an ideal opening point for the discussion of legal parenthood); Jonathan B. Pitt, *Fragmenting Procreation*, 108 YALE L.J. 1893 (1999).

[16] *See, e.g.*, Surrogate Parenting Assoc., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 211 (Ky. 1986) (suggesting that the extension or limitation of laws dealing with the canceling of parental rights and adoption in relation to agreements dealing with surrogacy is not a question for the judge but rather for the legislator) (dictum); Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J.L. POL'Y & FAM. 242, 243 (2007) (noting the lack of academic literature in Canada dealing with these dilemmas in spite of the many cases facing judges and legislators); *see also* Tracy Cashman,

committees have met to discuss the legal and ethical problems of fertility treatments, including the dilemma of how to define parenthood.[17] However, out of fear of destroying the traditional family structure and concern for the welfare and rights of children, legislators have failed to adequately address the issue.[18]

If the contradictory trends in family law and establishment of legal parenthood, as discussed below, did not present enough problems, modern medical innovations make legal parenthood even more difficult to define.[19] Through these scientific innovations, infertile parents are able to conceive children using alternative techniques, such as through purchasing ova and sperm. Such a revolution has been termed the "'Wild West' of American medicine."[20] Although fertility treatments have enabled sterile couples to reproduce,[21] many scholars still justifiably claim that their use caused a radical split in the traditional family structure. These treatments reexamine the most basic social assumptions with regard to the institution of family and parenthood.[22] This reexamination is seen as a positive step, since in these cases the socio-legal situation enables and empowers establishment of legal parenthood by agreement. The specific case of fertility treatments can be expanded to cover more general situations and serves as an anchor for a general comprehensive discussion about the essence of determining legal parenthood by agreement, and how it can be used in an optimal manner to establish legal parenthood through mutual agreement.

This Article will illustrate the way in which current law with respect to parents and children allows "freedom of contract" only in the most limited of situations—an almost total rejection of the establishment of legal parenthood by agreement. However, a closer examination will reveal a growth in contractual

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Comment, *When is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959, 964-66 (1997) (discussing the vitality of establishing legal parentage for the child's sake).

[17] *See, e.g.*, CANADIAN ROYAL COMM'N ON NEW REPROD. TECHS., PROCEED WITH CARE: THE FINAL REP. OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES (1993); U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, OTA-BA-358, INFERTILITY: MEDICAL AND SOCIAL CHOICES (1988).

[18] For articles discussing the relevant ethical problems ascribed to these treatments, *see generally* ENCYCLOPEDIA OF BIOETHICS (Stephen G. Post et al. eds., 3d ed. 2004).

[19] *See generally* Harv. L. Rev. Ass'n., *Developments in the Law of Marriage and Family: Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (2003).

[20] *See* Marsha Garrison, *Conflicting Interests in Reproductive Autonomy and Their Impact on New Technologies: Issues of Access to Advanced Reproductive Technologies: Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1623 (2008).

[21] *See generally* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 927-33 (1996) (supporting the individual's right to bear children in almost anyway possible and discussing the effects of fertility treatment on the structure of the family).

[22] *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 842 (2002); Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691, 692-701 (1999) (opining that legal parenthood of such children should be established in the same way as that of normative children); *but see* Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951 (1996).

solutions for marital relations, including legal parenthood.[23] Various experts in the United States,[24] together with their colleagues in Canada, the United Kingdom and other countries,[25] have pointed out the need to recognize legal parenthood through agreement. This is especially pressing in the case of non-traditional families such as two partners of the same sex[26] or families belonging to minorities in different countries, where it is customary for a number of individuals, rather than a pair of heterosexual parents, to raise children.[27]

A single example of how one can use a person's agreement to become a parent and allow the process of using his gamete in order to establish its legal parenthood may be found in one of the famous legal rulings handed down in the United States with regard to "planned orphanhood."[28] A woman was inseminated

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23 *See* E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH & LEE L. REV. 1139 (2000) (calling for freedom of contract in arbitration contracts with regard to child custody and visitation rights); *see also* Vivian Bodey, *Enforcement of Interspousal Contracts: Out with the "Old Ball & Chain" and in with Marital Equality and Freedom*, 37 SW. U. L. REV. 239 (2008); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992). *See generally* Yehezkel Margalit, Determining Legal Parentage by Agreement (2011) (Ph.D Dissertation, Bar-Ilan University) (noting the increase in use of establishing legal parentage by agreement); *but see* Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189 (2001).

24 Both the United States' and the United Kingdom's courts have already ruled some decades ago to allow freedom of contract where there are no dispute between the parents. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 n.22-23 (1979) (stating propositions similar to the increasing recognition of freedom of contract with regard to divorce); *see also* Robert H. Mnookin, *The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1034-35 (1985); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 129-30 (1994) (suggesting that there is some anticipation of legal parenthood on the basis of agreement, which is the only way to promote the fertility clinic industry); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 361 (1995); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 22 (2004).

25 *See* Gillian Douglas, *Marriage, Cohabitation and Parenthood - From Contract to Status*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 211, 232-33 (John Eekelaar et al. eds., 2000) (advocating for the increased use of agreement in the establishment of legal parentage in different countries); Campbell, *supra* note 16, at 260-65.

26 Recently, it was estimated that in 2005, there were 776,943 single sex couples. *See US Census Snapshot*, THE WILLIAMS INSTITUTE (Dec. 2007), http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf (These statistics were extracted using different sources such as place of residence or ethnical origin.). *See also* Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 700 (2007) (providing information on lesbian marriages as well as other related articles); Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 370–74 (2004) (stating that lesbian parenthood, like open adoption, may be arranged by a mutually agreed contract in one of two ways: co-parenting agreements and visitation agreements).

27 The need to establish legal parentage through agreement is subordinate to the best interests of the child. The problem is more serious in the case of minorities and poverty-stricken families, such as Afro-American and Native American families. *See generally* Jane C. Murphy, *Reforming Parentage Laws: Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL OF RTS. J. 969, 985-6 (2006); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 424–27 (2008); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U.L. REV. 1 (2005) (discussing a common model of community parenting in the light of feministic criticism).

28 *See* Ruth Landau, *Planned Orphanhood: Posthumous Conception*, 49 SOC. SCI. AND MED. 185

with the semen of her deceased boyfriend, and the court decided that since the deceased had expressed his wish to be a father and left instructions regarding what to do with his sperm after his death, his wishes should be honored in a contract with the fertility clinic to which he had entrusted his semen, despite opposition of his heirs.[29] In a similar manner, a number of academic studies express the importance of agreement in establishing legal parenthood in the situation where the male partner dies.[30] On the other hand, it is worth noting that there is a common counter holding amongst the research literature which claims to use contract in this sensitive and problematic context, like the surrogacy agreement, is inappropriate.[31]

II. IMPORTANCE AND CONSEQUENCES OF ESTABLISHING LEGAL PARENTHOOD

The importance of determining legal parenthood, which is considered to be one of the most controversial issues in contemporary family law[32] and which therefore requires massive reform and regulation,[33] is critical for both the child and its parents.[34] A decree of legal parenthood benefits the child psychologically and

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(1999); Hecht v. Super. Ct., 59 Cal. Rptr. 2d 222, 227 (Cal. Ct. App. 1996).

[29] *Hecht*, 59 Cal. Rptr. 2d; *see also* Matthew Ellis, *In Vitro Fertilization and Consent Agreements: Where Does California Stand?*, 42 SANTA CLARA L. REV. 1191, 1206–7 (2002). *But see In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008) (honoring the deceased's will not to become a parent). It should be mentioned that there are some additional federal cases on posthumous conception, which are largely about Social Security Benefits.

[30] *See* Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901 (1997); *see also* Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 371-75 (2009); Amanda Horner, *I Consented to Do What?: Posthumous Children and the Consent to Parent After- Death*, 33 S. ILL. U. L. J. 157 (2008); Ruth Zafran, *Dying to be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 74-76 (2007); Gail A. Katz, *Protecting Intent in Reproductive Technology*, 11 HARV. J. L. & TECH. 683 (1998).

[31] *See* Hollinger J. Heifetz, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865 (1985) (discussing major researches which object to establishing legal parentage by agreement); *see also* Janet L. Dolgin, *Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261 (1994) (regarding the limits and lack of coherency in the current application of establishing legal parentage by agreement); June Carbone, *Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 392-3 (1994) (regarding parental relations as an automatic status which cannot be evaded); William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. 1 (1990); Garrison, *supra* note 22, at 859-66.

[32] *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295, 1297 (2005). Similarly, Professor David D. Meyer explains that the recognition of rights by people other than the biological parents of the child depends upon the establishment of legal parentage and this is the Achilles' heel of modern family law. *See* David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1461 (2006).

[33] *See* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651 (2008); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 144 (2006) (regarding the claim that the establishment of legal parentage has passed the point of no-return and that society has to determine what is legal parenthood since the law cannot do better).

[34] *See* Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. 151 (2010) (surveying the different legal claims in favor of the right of procreation and the need to limit its application because of the child to be born's best interests); *see also* Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367 (2009).

emotionally as well as economically, in that it implicates the child's rights to alimony and inheritance.[35] It also determines who will enjoy the full rights and duties of legal parenthood. These rights include:

(1) naming the child
(2) custody and visitation
(3) determining place of residence
(4) the right to appoint a guardian
(5) the right to receive information about the child and to refuse others access to this information
(6) the right to represent, demand, or relinquish the child's rights
(7) the right to choose how to educate the child
(8) the right to choose medical treatment that the parent deems appropriate
(9) rights to the child's salary
(10) tax exemptions from the Federal Income Tax, and the right to various social benefits from the Social Security System.[36]

Parental duties include concern for the child's welfare, such as providing food and economic support, education, appropriate and timely medical treatment, supervision, and in the case of a failure to supervise, responsibility for the damage.[37] Thus, a determination of legal parenthood creates a framework for resolving disagreements about guardianship, visitation rights and many other aspects of the child's welfare.[38]

The ability to determine children's legal parents is closely tied to societal welfare because if the parents' identities are known, they are responsible for the cost of raising the child, and not the state.[39] For this reason, the federal authorities in the United States have been fighting for the last three decades to establish legal parenthood for all newborn children to ensure their needs are met, *inter alia*, by enforcing child support payments.[40] Scholars differ in their opinions as to whether

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[35] *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346–47 nn.19-24 (2002) (surveying different economic rights which a child may enjoy after the ruling about legal parenthood); Cynthia R. Mabry, *Who is the Baby's Daddy (And Why is it Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 228-30 (2004) (surveying the importance of establishing legal parentage for psychological and emotional reasons).

[36] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of The Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883, 885 nn.20-34 (1984) (regarding a list of these rights and the precedents which support them).

[37] *See id.* at 885-86; *see also* BRENDA M. HOGGETT, PARENTS AND CHILDREN: THE LAW OF PARENTAL RESPONSIBILITY (1993) (discussing the parental obligations in England). For a consideration of the obligations and rights in comparative law both in England and the United States, *see* Cynthia R. Mabry, *"Who is my Real Father?" - The Delicate Task of Identifying a Father and Parenting Children Created From an in Vitro Mix-Up*, 18 NAT'L BLACK L.J. 1, 18-25 (2004).

[38] *See* Sharon S. v. Super. Ct., 73 P.3d 554, 568 (Cal. 2003).

[39] There is also much divergence in the approach each state takes. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

[40] *See generally* Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695 (1997); Sanford N. Katz, *A Historical Perspective on Child-Support Laws in the United States*, *in* THE PARENTAL CHILD-SUPPORT OBLIGATION 17, 19-20 (Judith

this effort has been successful,[41] and some have felt that these efforts had not succeeded[42] and have even tried to introduce reforms.[43] Couples' current inability to determine legal parenthood by agreement prior to the birth of the child can lead to violent conflicts after the child is born.[44] The complexity and drawn-out nature of the ensuing proceedings does great harm to all parties in this legal struggle, especially the child.[45] Therefore, reform is urgently needed.[46]

A. The Problem of "Coerced Parenthood" in its Various Forms

The most common case involving coerced parenthood is the claim of paternity fraud by one of the partners through a false claim of sterility or a claim to using contraceptives. Usually, the recalcitrant partner claims that he does not want to be forced to be a parent because he wants to avoid an unwanted genetic parenthood and because he wants to avoid legal parenthood with the obligations listed above.[47] These claims are also true even when one of the partners originally agreed to be a parent, but for various reasons reneged on his or her original agreement to participate in fertility treatments, even though a frozen embryo may have already been created.[48] Coerced parenthood has already been considered in different circumstances: the question of a woman's right to an abortion against her partner's wishes;[49] parenthood as a result of rape;[50] theft of genetic material, such

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Cassetty ed., 1983); Lowell H. Lima & Robert C. Harris, *The Child Support Enforcement Program in the United States*, *in* CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 20 (Alfred J. Kahn & Sheila B. Kamerman eds., 1988).

[41] *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare*, 30 FAM. L. Q. 519 (1996).

[42] *See generally* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 846 (2006); Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 687, 774-5 (2001).

[43] *See* Jane C. Murphy, *Reforming Parentage Laws: Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL OF RTS. J. 969, 983-6 (2006); Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 FAM. L.Q. 235 (1999).

[44] *See generally* Sarah McGinnis, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U.J. GENDER SOC. POL'Y & L. 311, 333 (2008).

[45] *See generally* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

[46] *See* Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57 (2003) (discussing the faults of the current American law concerning parental rights and calling for comprehensive reform); *see also* Ruth-Arlene W. Howe, *Parenthood in the United States*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 187, 189 (John Eekelaar et al. eds., 2000) (surveying the situation in the U.S. with regard to legal parenthood and specifically an attempt to widen the legal parenthood without jeopardizing the rights of parent and child).

[47] *See supra* note 37 and accompany text.

[48] *See* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063 (1996); *see also* Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not to be a Parent,"* 12 COLUM. J. GENDER & L. 128 (2003).

[49] There are legal precedents which rule that a woman has the right to abort, at the very least in the first three months of her pregnancy; this is her right and neither her husband nor her parents have any right to veto her decision. *See* Roe v. Wade, 410 U.S. 93, 113 (1973); Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Gonzales v. Carhart, 550 U.S. 124 (2007) (regarding the legality of the existing arrangements of abortions, the Supreme Court of the United States ruled that there are no legal problems

as sperm and ova or making use of a person's genetic material without their knowledge;[51] insufficient or ineffective contraceptive methods, and careless medical treatment leading to the birth of an unplanned child.[52]

One can still find, however, additional claims of coerced parenthood in a modern form, such as through statutory rape laws. If it were not sufficient that those minors suffered a most traumatic experience, they are forced to pay alimony for the child born of the statutory rape.[53] Other modern coerced parenthood claims can be found in the contexts of theft or loss of genetic material either by accident or intentionally by a fertility clinic or physician,[54] or in the case of a man who believes that he is the biological father of a child and later discovers that he is not.[55]

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with the existing situation); *see also* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008) (discussing the importance of the right to an abortion which empowers a woman's interest in motherhood and in carrying out her responsibilities towards her living children).

[50] *See* Judith J. Thomson, *A Defense of* Abortion, 1 PHILOSOPHY AND PUBLIC AFFAIRS 47, 65 (1971) (discussing the right of a woman who was raped to an abortion in order to avoid forced parenthood). With regards to the rights of the rapist there are a number of rulings and a number of laws which repudiate all of his rights with regard to a child born as a result of intimate relations against the mother's wishes, in spite of the genetic relationship between the rapist and his child. *See* Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her* Child, 48 ARIZ. L. REV. 97, 115–17 (2006) (discussing the correlation between the mother's agreement to intimate relations as a basis for a right to be the father and the problem of statutory rape in this connection).

[51] *See* Gerald H. Paske, *Sperm-Napping and the Right not to Have a Child*, 65 AUSTRALASIAN JOURNAL OF PHIL. 98, 99-100 (1987) (regarding a hypothetical case discussed in bio-ethical philosophical literature with regard to the theft of sperm from an unconscious man and the demand not to force parenthood upon him); *but see* S.F. v. State *ex rel.* T.M., 695 So.2d 1186 (Ala. 1996) (regarding a case where sperm was stolen from an unconscious man who was forced to accept parenthood). *See also* Onora O'Neill, *Begetting, Bearing, and Rearing*, *in* HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 26, 27-28 (Onora O'Neill & W. Ruddick eds., 1979) (regarding a similar appeal not to force a person to be a parent after the theft of genetic material by a couple); Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who is the Mother?*, 16 LAW & INEQ. J. 289 (1998) (regarding the theft of ova and forced parenthood).

[52] There are a number of cases where the court recognized parents' rights to sue a clinic, pharmacist or doctor who sterilized or prescribed contraceptives in a careless manner resulting in an unplanned birth of a child. *See, e.g.*, Zehr v. Haugen, 871 P.2d 1006 (Or. 1994) (regarding a case of a sterility procedure carried out carelessly); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (regarding a case brought against a careless pharmacist); *but see* Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987) (holding in favor of the doctor when a couple brought suit against the doctor who was careless in a sterility procedure).

[53] *See* Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996); Jevning v. Cichos, 409 N.W.2d 515 (Minn. Ct. App. 1993); State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993); Mercer Cnty. Dept. of Soc. Services *ex rel.* Imogene T. v. Alf M., 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992); *see also* Dana Johnson, Comment, *Child Support Obligations That Result from Male Sexual Victimization: An Examination of the Requirement of Support*, 25 N. ILL. U. L. REV. 515 (2005); Ellen London, *A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape*, 152 U. PA. L. REV. 1957 (2004); Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV. 411 (2002); Tina M. Allen, Comment, *Gender-Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation*, 80 U. DET. MERCY L. REV. 111, 123–24 (2002); Angela D. Lucchese, Note, *Pena V. Mattox: The Parental Rights of a Statutory Rapist*, 36 BRANDEIS J. FAM. L. 285 (1998) (discussing the rights of a person who committed statutory rape).

[54] *See* Jennifer L. Foote, *What's Best for Babies Switched at Birth? The Role of the Court, Rights of Nonbiological Parents, and Mandatory Mediation of the Custodial Agreements*, 21 WHITTIER L. REV.

The basic approach in American courts and in the rest of the world is that one should not view coerced parenthood as detrimental to the legal rights of the father. However, a new approach is gradually being introduced under which a person has the legal right to refuse to be a parent, just as he has a legal right choose to be one.[56] However, Professor Glenn Cohen believes that this legal right is not monolithic and made from only one piece but is the source of additional potential rights, where the recognition of one right does not necessarily negate the recognition of others.[57]

III. PROBLEMATIC VALIDATION OF THE DISPOSITION AGREEMENTS

Essentially, disposition agreements are agreements (a) between the spouses and (b) between the couple and the fertility clinic. These agreements supposedly reflect the intended use and disposition of frozen embryos in the event of divorce, separation, estrangement, or illness, incapacity, or death of one or both intended parents. For example, when a couple is contemplating the idea of going through fertility treatments and using the practice of IVF, they can agree in advance what will be done with their superfluous frozen embryos when a quarrel may arise between them. Some jurisdictions insist on disposition agreements as a prerequisite to receiving fertility clinic services.

315, 320-28 (1999) (discussing the existing case law and the paucity of relevant legislation in the United States); Marjorie M. Shultz, *Taking Account of Arts in Determining Parenthood: a Troubling Dispute in California,* 19 WASH. U. J.L. & POL'Y 77 (2005); Judith D. Fischer, *Walling Claims In or Out: Misappropriation of Human Gametic Material and the Tort of Conversion*, 8 TEX. J. WOMEN & L. 143 (1999). For key cases which accept or reject the process of determining fatherhood, *see* Doran v. Doran, 820 A.2d 1279 (Pa. Super. Ct. 2003); Kohler v. Bleem, 654 A.2d 569 (Pa. Super. Ct. 1995); *but see* Sekol v. Delsantro, 763 A.2d 405 (Pa. Super. Ct. 2000); *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001). For a discussion of the problems of the contemporary processes that establish fatherhood, which might force parenthood on a non-biological father and hurt both father and child, *see generally* Niccol D. Kording, *Little White Lies That Destroy Children's Lives -- Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J. L. & FAM. STUD. 237 (2004). For key articles about annulling fatherhood, *see* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35 (2003); Steven N. Peskind, *Who's Your Daddy?: An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811, 817-23 (2004).

[55] *See* Shawn Seliber, *Taxation Without Duplication: Misattributed Paternity and the Putative Father's Claim for Restitution of Child Support*, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 97 (2007) (discussing the economic aspect where the parent discovered that he was not the biological father); Andrew S. Epstein, *The Parent Trap: Should a Man be Allowed to Recoup Child Support Payments if he Discovers he is not the Biological Father of the Child?*, 42 BRANDEIS L.J. 655 (2004); *see also* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 501-07 (2000) (discussing the demand for legislative recognition of possible emotional damage to a parent caused by domestic deceit).

[56] *But see* Child Support Enforcement Agency v. Doe, 109 Haw. 240 (2005) (discussing a father's argument on appeal that a state law compelling him to pay child support for his natural child was unconstitutional; the court rejected his appeal). For an approach that is in favor of forcing the father to pay child support, even when the mother has deceived him in spite of the unfairness of this sort of ruling, *see* John G. Hall, *Child Support Supported: Policy Trumps Equity in Martin v. Pierce Despite Fraud and a Controversial Amendment to the Paternity Code*, 61 ARK. L. REV. 571 (2008).

[57] *See* Cohen, *supra* note 9, at 1135, 1139.

The courts and legislatures, which have not stayed up to date with the problems involved in the donation of genetic material, have trouble keeping up with scientific advancement. A handful of countries, including England, have legislated with respect to this matter,[58] but no similar federal legislation exists in the United States. This creates a problem with uniformity, as there are substantial differences between the legal approaches in different states.[59] First, only a small number of states have enacted legislation pertaining to disposition agreements.[60] A minority of states imposes an obligation to sign disposition agreements prior to fertility treatments.[61] In those states, the relevant questions relate to the agreements' necessity, their jurisdiction and their enforcement.[62]

The case law is similarly sparse. Besides the general tendency to avoid forcing parenthood on an unwilling parent, there is no general agreement with regard to the recognition and enforcement of disposition agreements and contracts.[63] However, there was a recent ruling in the British court system that

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[58] *See* Human Fertilisation and Embryology Act 2008 22 (Eng.); Leanne Bell, *Is the Human Fertilisation and Embryology Act 2008 Compatible with the Universal Declaration of Human Rights (UDHR)?*, 1 WEB JCLI (2009), http://webjcli.ncl.ac.uk/2009/issue1/bell1.html. For a survey of the situation in different countries, *see, e.g.*, Kellie LaGatta, *The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation*, 4 FL. COASTAL L.J. 99, 110-11 (2002); Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 St. JOHN'S L. REV. 417, 431-33 (1998).

[59] *See* Donna M. Sheinbach, *Examining Disputes over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U.L. REV. 989, 993 n.23 (1999).

[60] Only two states had legislation with regard to this issue until about ten years ago. *See* Naomi R. Cahn, *Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives*, 32 U. MEM. L. REV. 563, 572 n.35 (2002) (quoting the ABA Report). *See generally* Kathryn V. Lorio, *Successions and Donations: A Symposium: From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 41-43 (1996) (discussing the treatment of frozen embryos in Australia; Australia's law permits the implantation of frozen embryos in a surrogate mother and prohibits the destruction of frozen embryos); Jennifer M. Stoller, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459, 471-79 (2001).

[61] *See* FLA. STAT. § 742.17 (2008). The most prominent country with this view is England. *See* Human Fertilisation and Embryology Act 1990, c. 37 (Eng.),http://www.opsi.gov.uk/Acts/acts1990/ukpga_19900037_en_2 (hereinafter HEFA 1990). In California, there is a requirement to sign a form of agreement prior to any fertility treatment, but there is no clear ruling with regard to the content of the form including what to do with the frozen embryos. *See* CAL. PENAL CODE § 367(g) (2001). For an up-to-date survey of the situation in the United States in 2008, *see* Melissa Boatman, *Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes after Divorce*, 37 U. BALT. L. REV. 285, 299-301 (2008).

[62] *See* Erik W. Johnson, *Frozen Embryos: Determining Disposition Through Contract*, 55 RUTGERS L. REV. 793, 809–12 (2003).

[63] *See* Bohn v. Ann Arbor Reprod. Med. Assoc., No. 213550, 1999 WL 33327194 (Mich. App. Ct. Dec. 17, 1999); Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U.L. REV. 1021, 1025 n.10 (2004). For a description and discussion of various rulings, *see* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 411-14 (1990); *see also* Olivia Lin, *Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization Outside Contractual Autonomy*, 54 DUKE L.J. 485, 490-98 (2004) (discussing the contractual aspects discussed in court rulings in the United States). According to this commentator, the court in at least one case ignored the parents' wishes and chose to continue the pregnancy. *See* Shapo, *supra* note 10, at 102 n.206.

sparked a discussion of fertility treatments in the European Court of Human Rights ("ECHR").[64] The crux of the discussion, both in the majority and minority opinions, was the question of how to reach the proper balance between the right to be a parent and the right not to be a parent.[65] Scholars have criticized the ruling on the grounds that the analytic approach was restricted to discourse about human rights and that little attention was paid to a thorough analysis of the aspects of contractual law in this case. From their point of view and as this research shows, mutual agreement in the form of a contract is an alternate and possibly more effective way to protect human rights.[66]

A. Advantages of Disposition Agreements

A number of key legal rulings have been handed down in the United States in which agreements signed prior to fertility treatments were recognized as binding contracts.[67] About ten years ago, professional medical organizations demanded the introduction of consent forms to be signed prior to fertility treatments.[68] Most of the clinics in the United States, as early as 1990, required the couple to sign these types of disposition agreements before undergoing treatment. According to this contract, there would be a clear answer as to the fate of frozen embryos in case of death, divorce, loss of legal standing of one of the parties, loss of contact with the couple or the end of the storage period.[69]

Many legal scholars consider the questions surrounding fertility treatments to be the main issues in establishing legal parenthood by agreement. [70] Other scholars

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[64] *See* Evans v. United Kingdom, App. No. 6339/05 (Eur. Ct. H.R. Apr. 10, 2007). Prior to this case there was another discussion before the same European court in *Evans*, App. No. 6339/05 (Eur Ct. H.R. Mar. 7, 2006).

[65] *Id.*

[66] Orna Ben-Naftali & Iris Canor, *European Convention for the Protection of Human Rights and Fundamental Freedoms--Assisted Reproductive Technologies--Reproductive Freedom--Frozen Embryos--Right to Life--Right to Respect for Private Life--Gender Equality--Margin of Appreciation*, 102 AM. J. INT'L L. 128, 131-34 (2008).

[67] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Roman v. Roman, 193 S.W.3d 40 (Tex. Ct. App. 2006); Kass v. Kass, 696 N.E.2d 174, 179-80 (N.Y. 1998); Theresa M. Erickson & Megan T. Erickson, *What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce*, 35 WM. MITCHELL L. REV. 469, 487 (2009) (discussing *In re* Marriage of Dahl and Angle, 194 P.3d 834 (Or. Ct. App. 2008)). While many of these rulings are love letters to contracting, none of them actually enforces an agreement as against a current partner's expressed desire not to be a genetic parent at the time of enforcement.

[68] *See* AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (ASRM), PRACTICE COMMITTEE REPORT: ELEMENTS TO BE CONSIDERED IN OBTAINING INFORMED CONSENT FOR ART (June 1997).

[69] Waldman, *supra* note 6, at 917 n.127 (quoting THE NEW YORK STATE TASK FORCE).

[70] Christi D. Ahnen, *Disputes over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?—An Analysis of Davis v. Davis, York v. Jones, and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1344-50 (1991); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 465–69 (1990); John A. Robertson, *Resolving Disputes over Frozen Embryos*, 19 HASTINGS CENTER REP. 7, 10-11 (1989); Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 826 (1992); Mark C. Haut, Note, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 517–25 (1999). *See also* Waldman, *supra* note 63; Rachel Polinger-Hyman, *Erecting Women: Contracting Parenthood from Marriage to Divorce*, 2 HOUS. J. HEALTH L. & POL'Y 241, 283 (2002); Cahn, *supra* note 60; Colker,

who do not necessarily support full freedom of contract nevertheless support the use of contracts as the optimal solution to resolve disputes in this complicated issue, since a written contract is an established, formalized legal basis for memorializing the parties' intent and overruling other implied promises or manifestations.[71]

Disposition agreements regarding frozen embryos are a plausible solution. Indeed, with regard to IVF treatments, there are different reasons that support the validity and efficiency of the use of contracts. First, they strengthen individuals' freedom to reproduce.[72] These agreements provide clarity, certainty, efficiency and flexibility in the event of a dispute, and set down the wishes of each of the sides. Contracts may indeed minimize future conflicts,[73] providing tools to balance and to render justice in the event of a dispute. The contract, and not the state, lists the parties who own the genetic material and those who are the most qualified to determine the fate of the frozen embryos,[74] and ensures that the agreements and private arrangements are honored.[75]

When a dispute is centered on a highly intimate and emotional decision—such as the decision of whether or not to become a parent—the parties' intentions and wishes are of the utmost importance. As such, it is preferable to honor the parties' understandings rather than forcing them to accept a legal ruling. A policy of enforcing disposition agreements will encourage the parties to think about their intentions and to negotiate more carefully prior to signing such agreements.[76] By honoring disposition agreements, courts will be able to effectuate the parties' intentions without interfering too heavily with the couple's domestic life and intimate interests.[77] Further, courts will be able to limit the unethical and unfair use

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supra note 48; Johnson, *supra* note 62; Erickson & Erickson, *supra* note 67 (without a written contract the parties will have to resign their various constitutional rights which were influenced by civil law).

[71] *See* Paula Walter, *His, Hers, or Theirs--Custody, Control, and Contracts: Allocating Decisional Authority Over Frozen Embryos*, 29 SETON HALL L. REV. 937, 963-64 (1999); Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 346 (1993); Trespalacios, *supra* note 70, at 828-31.

[72] For the infrastructure of contract law and the foundations, which are most effective in strengthening the autonomy of the individual and his right to reproduce and are even more effective than discourse about human rights, *see* Ben-Naftali & Canor, *supra* note 66.

[73] *See* Cohen, *supra* note 9, at 1169; Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 56 (1999). The following agree but think that there should be room for a change of heart: Cahn, *supra* note 60, at 568-9; Haut, *supra* note 70, at 523; Colker, *supra* note 48, at 1079; Johnson, *supra* note 62, at 819.

[74] *See* Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 358-59 (1986).

[75] *See* Cahn, *supra* note 60, at 601. The enforcement of these contracts will grant stability and security in this field, elements which are lacking. *See* Ellis, *supra* note 29, at 1225.

[76] *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U.L. REV. 395, 417 (2005); Trespalacios, *supra* note 70, at 834.

[77] *See, e.g.*, Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1182-88 (1997); Sara D. Petersen, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1093 (2003); Walter, *supra* note 71, at 964.

of the frozen embryos and allow flexibility in drafting each contract in accordance with the parties' circumstances.[78]

IV. A SUGGESTED COMPROMISE BETWEEN THE RIGHT TO BE AND NOT TO BE A PARENT

A. Establishing Legal Parentage by Agreement[79]

This Article supports the possibility of determining parenthood by agreement as the main and legitimate way to compel parental responsibility by agreement in the case of in vitro fertilization and as a general way of determining legal parenthood. The degree of responsibility is based on the parties' initial agreement. Parenthood can no longer be referred to as a monolithic and permanent status but as a variety of statuses—full parental, partial parental and non-parental.[80]

The practical application of this principle can be found in our study, which suggests to an arguing couple that the one who opposes continuing the fertilization would have to accept the status of non-parenthood and in this way arrive at an agreement that fertilization can continue without prejudicing the one opposed to the idea of forced parenthood. The couple must agree at the outset of fertilization to the provisions of the agreement, similar to the disposition agreements that refer to the fate of the fertilized egg should the sides come to a disagreement. Because it is possible to agree which partner would acquire legal parenthood and her status, it is essential to promote the idea of intentional parenthood and to establish this Article's argument that supports determining legal parenthood in light of historic and modern comparative law.

In the ancient world, legal motherhood was restricted to the woman who had given birth to the child, whereas legal fatherhood was ascribed to her husband even if he was not the biological father of the child.[81] The reason was simply a lack of understanding of genetics. Today, we possess not only the ability to prove fatherhood, but also the desire to maintain the traditional bionormative structure of marriage and parenthood while directing sexuality and fertility into recognized marriage. Regardless, the best interests and rights of the child were never involved in the formation and strengthening of recognized marriage. Religion and law thus created a legal fiction that granted legitimacy to the child and thus provided that a

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[78] *See, e.g.*, Melissa Boatman, *Bringing up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes after Divorce*, 37 U. BALT. L. REV. 285, 288-89 (2008).

[79] *See, e.g.*, Jesse M. Nix, *"You Only Donated Sperm": Using Intent to Uphold Paternity Agreements*, 11 J. L. & FAM. STUD. 487, 494 (2009); Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U.L. REV. 913 (2007); John L. Hill, *What Does it Mean to be a "Parent?" The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986).

[80] *See* Margalit, *supra* note 23.

[81] *See id.* at 162-68.

child born in wedlock was the son of his mother's husband. This axiom was and remains so strong that in some of the American states it cannot be overturned, even by using proven scientific tests and even when the child was the biological son of a previous husband born after the mother had remarried.

In other words, the legal presumption of legitimacy is based upon the intention and agreement of the male who marries a woman and serves as a legal father in all circumstances to her children. This applies even if they are not his biological children and even if they were born during their marriage as a result of an adulterous relationship. Under religious and civil laws, there is a general assumption—unless the couples have not stated otherwise—[82] that the major aim of marriage, both from the public and private points of view, is primarily procreation. On the one hand, the children of these parents will enjoy different rights, specifically material support and inheritance, but on the other hand, they will be able to bequeath their property to their parents if they pre-decease them.

Nevertheless the development of modern science, our improved understanding of the mechanism of genetics, and the ability to prove parenthood biologically, religion, conservatism, and the societal presumption of legitimacy have negated the possibility of overruling the legitimacy presumption by scientific means. This is due to the traditional convention that legal parentage is established by legal fiction and not by scientific evidence. Therefore, many courts prefer using the traditional assumption instead of using the scientific means in their process of determining the paternity of the child. This may mean that general agreements regarding legal parenthood can overcome scientific conclusions with respect to biological parenthood.[83]

One significant way of acquiring legal parenthood is through the existence of intimate relations, conception and the birth of a child—inside and outside the marital unit. The other main way of acquiring legal parenthood is through adoption, which in essence establishes legal parenthood by agreement. Intention and agreement fuel the adoption process, which concludes with the granting of legal parental status. However, the marital status and the bionormative family are still apparent in that the legal system duplicates them and permits only couples with a family structure approved by law to acquire the status of legal parenthood. Thus, even today, single parents or same-sex couples are not allowed to adopt, except in

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[82] *See* Mary A. Totz, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 156-57 (1994) (regarding the general agreement and the claim that a parent should not be forced to carry out his or her parental duties); Fischer, *supra* note 54, at 155–56 n.97.

[83] It is worth noting that this conclusion doesn't work when you are the biological parent and married to the mother since you cannot disclaim by contract ex ante your legal parenthood. Indeed, some of the sperm donor paternity cases involving known sperm donors have not even let them step out of legal parenthood when the recipient mother is unmarried. The usual reason given, which may be quite problematic, has to do with the idea that the right to support belongs to the child and cannot be waived by the behavior of either parent.

difficult cases where there are no available married couples that live as a traditional family.[84]

The growth of legal parenthood by agreement is readily apparent through open adoption. Since the 1970s, both in England and in the United States, this form of adoption has grown steadily.[85] Its main feature is an agreement between two couples who agree to maintain a relationship between the adoptive parents, the biological parents and the adopted child. In this case, the parties' intentions and agreement are paramount in the establishment of legal parenthood.[86] Of the accepted ways of acquiring the status of legal parenthood—adopting child or bringing him into exist following sexual intercourse—, the social value of defending the status of traditional marriage and bionormative parenthood is paramount, and therefore, the status of parenthood is granted to those individuals who bore or adopted a child within the marital unit. Again, this reflects the tendency of the law to adhere to legal fiction instead of assimilate the existing reality of the new era.

Secularization and modern liberalism led to a "divorce revolution" in the 1970s that arguably weakened the institution of marriage, but strengthened the recognition of freedom of contract between couples to regulate different aspects of their marital life. The result was the development of privatization in the family and the appearance of new family structures that differed from the traditional bionormative parental structure. At the same time, individuals who were not necessarily married couples or biological parents wanted to realize their rights to become parents. Although unmarried fathers historically could not enjoy parental rights, they have challenged the legality of existing arrangements over the past fifty years and have won a number of important cases where the decision to give up the child for adoption was determined to no longer be solely the mother's prerogative.[87]

The various precedents with respect to unmarried fathers serve as important markers of the possibility of a functional distinction between full legal parenthood with all of its obligations and rights and partial legal parenthood with only the obligations of parenthood or even no parenthood status at all. In light of a number of consistent legal rulings by the United States Supreme Court, one may conclude

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[84] *See generally* Leah C. Battaglioli, *Modified Best Interest Standard: How States against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes between Same-Sex Couples*, 54 CATH. U.L. REV. 1235, 1240-41 (2005).

[85] *Cf.* Baker, *supra* note 33, at 686-87.

[86] *See* Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 319-25 (2008) (explaining that the existence of a contract which regulates the distribution of parental obligations and rights is appropriate for this very special arrangement); Ertman, *supra* note 26, at 700 (the open adoption, like the contract for joint parentage in the case of lesbian couples, can be regulated using legal parenthood by mutual agreement, in accordance with the intentions of the parties).

[87] *See generally* Caban v. Mohammed, 441 U.S. 380, 397 (1979); Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978). *See* Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395 (2007).

that a genetic foundation is sufficient for determining legal parenthood with respect to a number of different obligations. It is not, however, a sufficient condition for the enjoyment of various rights. In that case, a person wanting to be a legal father must fulfill all parental obligations and prove himself by "grasp[ing] the opportunity."[88] If he does not do so, he is likely to lose his parental rights and status completely.[89] There is thus important precedent regarding the possibility of discussing the significance of legal parenthood and reaching the conclusion that we are not necessarily dealing with a "package" of obligations and rights to be treated as a unit—all or nothing—but rather with a functional legal status primarily dependent upon its context. Both the best interests of the child together with the protection of his or her rights and various social interests enable us to distinguish between two distinct statuses of legal parenthood—full legal parenthood and non-legal parenthood.

Furthermore, these precedents show that in the case of a married person, the husband is only required to agree to serve as a legal parent for his wife's offspring to acquire legal parenthood, whereas an unmarried male in order to acquire this right has to demonstrate through active measures his wish to enjoy more than partial legal parenthood. This Article argues that psychological parenthood is primarily based upon intention and agreement, sometimes openly expressed and in other cases implied, of the parent to personally accept legal parenthood.[90] Indeed, in many countries, there is a possibility of acquiring legal parenthood when a person voluntarily accepts it. Where the situation can be recorded or the relationship made subject to administrative supervision or as a different solution, the relationship may be recognized through a court ruling.

B. Varieties of Parenthood Status

More than twenty years ago, Professor Katharine T. Bartlett postulated that legal parenthood is considered an exclusive status in that at any given instant the law recognizes only one male and one female as a child's legal parents. This means that any other person is completely alien to the child, unless it can be demonstrated that a legal parent is unsuitable or has abandoned the child.[91] Legal

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[88] *See Lehr*, 463 U.S. at 248, 262.

[89] *See* Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189 (Fla. 2007) (for an important precedent given recently which supports the rights of unmarried biological fathers to receive actual notice of the adoption of their child and for a list of the obligations of such a father who wants to become the legal father of his child); *see also* Laura Oren, *Unmarried Fathers and Adoption: "Perfecting" or "Abandoning" an Opportunity Interest*, 36 CAP. U.L. REV. 253, 256-65 (2007); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. OF WOMEN & L. 47 (2004).

[90] *See* Baker, *supra* note 24, at 31-38 (discussing psychological parenthood as a contract and its implications and a survey of legal rulings which support the building and acquiring of such legal psychological parenthood within different contractual doctrines).

[91] *See generally* Bartlett, *supra* note 36, at 887-93 (the accepted concept of exclusive parenthood is based upon two central themes: nature and instrumentalism). *See also* Nancy D. Polikof, *This Child does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and*

parents are the sole recipients of the rights and obligations that compose the status of parenthood. The legal parents' autonomy is comprehensive and is recognized with regard to the state, to any third party, and to the child. This applies when the law grants parenthood status not only through marriage and/or biological connections, but also when the parenthood is functional. Even if one of the parents ceases to be a legal parent, the second parent automatically assumes full responsibility and rights, as derived from the principle of concern for the best interests of the child.[92]

However, this Article argues that legal parenthood should be granted to the individual who intended and agreed to serve as the legal parent of the child. If the individual intended and desired to serve as a legal parent in all circumstances, he or she should be granted full parental status. But if in an early agreement the individual's decision was to serve as a partial legal parent, he or she should enjoy only partial parental rights in proportion to his or her degree of participation in the obligations of parenthood. An exact definition of the extent of the parenthood with respect to obligations and the rights derived from it should be set down at the beginning through an agreement between the parties, and this should be done under judicial or administrative supervision.

Nonetheless, both pre-birth intentional partial parenthood and partial parenthood by post-birth involvement in the child's life is based on the mutual agreement of the persons involved in the rising of the child. This is very similar to the agreement that stands in the heart of private agreements that are accepted with respect to parental responsibility today in different countries around the world. It is necessary to create a gender-neutral incentive that is not dependent upon sexual convention or marital status, and under which only the one who will look after all the child's needs would enjoy full rights as a legal parent. An individual who chooses to partially fulfill parental responsibilities would only enjoy partial parental rights in accordance with his or her investment in the child. An individual who refuses to carry out any parental obligations would receive non-parenthood status and not enjoy any rights, provided that such an arrangement would not impair the rights and best interests of the child.[93]

The above framework is similar to the legal solution applicable to any parent who does not want or is unable to fulfill his parental obligations towards a child: the parent's legal parenthood is annulled. The child is removed from the parent's custody and given to alternative parents who will look after the child's needs. In

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Other Nontraditional Families, 78 GEO. L.J. 459, 468-73 (1990) (this approach contradicts the principle of the best interests of the child and maintains the fiction of the homogenous family at the expense of children living in other family structures); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (the California court's rejection of the ACLU's suggestion that there be more than two legal parents in cases involving surrogacy).

92 *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 35–39 (1979).

93 *See* Margalit, *supra* note 12 (defending intentional parenthood as the right metric regarding the surrogacy case law).

the context of embryo disputes, a distinction should be made between three different levels of legal parenthood. Only a parent who intends to fulfills all of his or her obligations toward the child and treat the child with the love and affection that is so necessary for its best interests and the protection of its rights should receive full legal parenthood. This approach is designed to strengthen and not to weaken these central doctrines of the best interests of the child and preserving his rights.[94]

C. *Granting Non-Parenthood Status to the Spouse who Objects to Becoming a Parent*

This Article attempts to find a compromise suggestion to resolve disputes regarding frozen embryos. The first step towards a solution is for courts to honor disposition agreements that will include the couple's agreement as to what is to be done with their combined genetic materials under different circumstances, including divorce or the death of one of the parties. Dispositions should be given full legal backing and should be enforced whenever necessary. Even so, this compromise suggestion should be accompanied by legislation that would limit the inflexibility and the extent of the disputes that accompany such disagreements by providing the solution of granting non-legal parenthood to the subordinate spouse. It should be reemphasized that fixing the different aspects of legal parenthood by agreement in accordance with the conclusions of this Article is a necessary precondition to the feasibility and success of these two propositions—honoring and enforcing disposition agreements include the option of granting non-legal parenthood to the subordinate spouse.

As previously indicated, the usual confrontation between two parties is either over full or non-parenthood. However, according to the conclusions of this Article and following those few states which already exempt the subordinate spouse from all his parental obligations, other legislators should follow suit. Implementing this suggested compromise will result in partners who object to becoming parents being completely exempted from all rights and obligations regarding the child, in return for the objecting partner's release of the frozen embryos for the other partner's use. In other words, the partner who objects will receive non-parenthood status—similar to a donor of gamete, ovum or semen—in return for his intention or agreement to donate his genetic matter to another, without accepting legal parenthood status with its accompanying rights and obligations. Similarly, in several American states there are a number of legislative initiatives to grant non-parent status to deceased parents whose genetic material was used posthumously and without their consent to create an embryo. In such a case, the genetic parent would not become the legal parent.

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[94] *See* Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 718 (2001).

Such a solution contributes to bridging the gulf between opposing opinions with regard to the existing legal situation, under which there is no compromise between full parenthood and the complete denial of both biological and legal parenthood. In other words, if the legal struggle over the frozen embryos is seen today as binary, leaving only one of two existing possibilities, there is a third normative alternative which might bridge between the two possibilities accepted today.

D. Legal Precedents for the Suggested Compromise

1. Sperm Donation and Granting Non-Parenthood Status to an Anonymous Donor

During the 1930s and 1940s, the practice of anonymous sperm donation slowly became socially and legally accepted, particularly in the United States, for various sociological reasons.[95] In a series of legal rulings, the practice of anonymous sperm donation gathered momentum.[96] Sperm donation is based on an agreement between the two males involved in the procedure. The sperm donor agrees to donate his genetic material and to accept the status of non-parenthood, in that he will not be obliged to carry out any duties with respect to the child and will therefore not acquire any parental rights. On the other hand, since the husband agrees to his wife's insemination and enters into an agreement or implied agreement in which he undertakes all parental obligations towards the child to be born, he receives full parental status with all its rights. In light of these rulings, the state legislatures created laws in the spirit of this new contractual approach to family law, which began in 1964 with Georgia, and was followed by Oklahoma in 1967 and Kansas in 1968.[97]

However, a wider legislative recognition was only apparent in the 1970s. In 1973, the United States adopted a number of uniform laws, and in 1988, the legislature enacted laws stating that a sperm donor has neither parental status nor

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[95] *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1060-71 (2002) (describing the gradual social acceptance of artificial insemination over three centuries); Yehezkel Margalit, *Artificial Insemination from Donor (AID) - From Status to Contract and Back Again to Status?* (on file with author).

[96] *See, e.g.*, Anonymous v. Anonymous, 246 N.Y.S.2d 835 (N.Y. Sup. Ct. 1964) (holding that husband had duty to support children conceived by artificial insemination when husband consented to wife's pregnancy in a written agreement); Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding that, while the child of a consensual artificial insemination is not the husband's legal issue, the husband has a legal, contractual obligation to provide support for that child); People ex rel. Abajian v. Dennett, 184 N.Y.S.2d 178 (N.Y. Sup. 1958) (holding that a wife is estopped from asserting for the first time that her children were the product of artificial insemination so that her husband would be denied visitation rights); Strnad v. Strnad, 78 N.Y.S.2d 390 (N.Y. Sup. Ct. 1948) (holding that a father who has consented to the artificial insemination of his wife has the same parental rights as a foster parent or as if he had semi-adopted the child).

[97] *See* Harry S. Chandler, Note, *A Legislative Approach to Artificial Insemination*, 53 CORNELL L.Q. 497, 498 (1968); *see also* Walter Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U. L. REV. 777, 794-96 (1969-1970).

any obligations or rights derived from that status.[98] By 2006, the law had been adopted in full by approximately half of the American states, and adopted in part by a majority of states.[99]

A designation of non-parenthood is the result of initial agreement, intention and wish not to become the child's legal parent and not to undertake any parental obligations. An individual who assumes the status of non-parenthood is not entitled to any rights whatsoever with respect to the child. In the context of sperm donation, this "transfer" of parenthood obligations is necessary so that the law can recognize a husband's consent to artificial insemination as a marker of his agreement to accept the legal fatherhood of the child. Following his initial agreement, intention and wish to accept parental obligations, he will become the legal parent of the child together with all the rights entailed.[100] In other words, the parties define legal parenthood by agreeing to the transfer of fatherhood status from the biological parent who donated the semen to the non-biological parent. The mother's husband then assumes parental responsibility and becomes the child's legal father.[101]

2. Granting Non-Parenthood Status to the Deceased Parent who did not Give Permission to Bear a Child After his Death

The identical result—granting non-parenthood status to a person who did not intend to be a parent—can be found in section 707 of the Uniform Parentage Act ("UPA"), which provides that a person will not become a parent absent his or her express agreement. Section 707 is undoubtedly one of the major innovations of the UPA. It states that as long as the party did not expressly agree to become a parent after his death, no use should be made of his or her genetic material.[102] If someone uses the party's genetic material in contradiction of these rules and a child is born,

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[98] *See* UNIF. PARENTAGE ACT § 5 (repealed 2000), 9B U.L.A. 407 (2001); UNIF. PUTATIVE & UNKNOWN FATHERS ACT 1(2)(ii) (repealed 2000), 9B U.L.A. 160 (2001); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT 4(a) (repealed 2000), 9B U.L.A. 265 (2001) (hereinafter USCACA).

[99] *See* Brent J. Jensen, Comment, *Artificial Insemination and the Law*, 1982 BYU L. REV. 935, 952-6 (1982) (surveying how different states have approached the issue up to 1982). *See also* Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & LAW 183, 207-15 (1995) (for a later survey, covering until the year 1995); Cahn, *supra* note 60, at 570 n.25 (for a contemporary survey of the situation in the U.S.).

[100] *See* HEFA 1990, *supra* note 61, at para. 28, 30 (In England, HEFA 1990 changed the legal practice where a child born of the semen of a donor was illegitimate and ruled that in light of the agreement with regard to legal parenthood, fatherhood may be transferred from the biological father to the sociological father and the child would no longer be illegitimate). *See also* Joan Mahoney, *Great Britain's National Health Service and Assisted Reproduction*, 35 WM. MITCHELL L. REV. 403, 406-7 (2009).

[101] It is worth noting that many states recognize the older version of the UPA rule where the sperm donor is absolved of responsbility only if the sperm donor recipient is married and the recipient got the sperm inseminated through a doctor. Besides that, there is case law suggesting that the use of a known sperm donor even where the recipient is married will block any agreement stipulating that the donor is not the legal parent. Thus the landscape of the law currently is more complex than described.

[102] UNIF. PARENTAGE ACT § 707 (2000) (amended 2002).

the deceased will be considered a non-parent with no parental status. According to the UPA,

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[103]

The note and explanation to section 707 underscores the importance of establishing legal parentage by agreement, stating: "In this instance, intention, rather than biology, is the controlling factor. . . ."[104] Indeed, this remark regarding the importance of agreement in fixing legal parenthood has been used in legislative proposals in other American states, reflecting the fact that the general convention is the importance of agreement prior to fertility treatments.[105]

E. A Survey of Legislative Suggestions Consistent With Our Proposal

This Article argues that an express agreement is essential to establishing legal parenthood. Legal parenthood should never be given to an individual who has not expressed an interest in being a legal parent. Rather, such individuals should be assigned non-parenthood status. The minority opinion in *Kass v. Kass* proposed a similar argument to this Article's thesis. In *Kass*, the New York Court of Appeals held that the informed consents regarding the disposition of the frozen embryos signed by the parties unequivocally manifested their mutual intention that the frozen embryos were to be donated for research to the IVF program.[106] The court stated in its dissenting opinion: "[W]hile commentators may debate the advisability of permitting the abrogation of customary support obligations in nontraditional family settings . . . [a] strong case can be made for legislation relieving the

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[103] *Id.* The intention is to prevent the appearance of different problems regarding inheritance with regard to the rights of somebody born after the demise of the testator. It was adopted by Texas and Utah alone. *See* Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 77 (2001); Apel, *supra* note 5; *see generally* Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction,* 39 FAM.L.Q. 579 (2005); Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 PROB. & PROP. 32 (2005); *see generally* Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727 (2004); Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate*, 38 VAL. U.L. REV. 267, 296-310 (2003) (for academic analyses).

[104] *See, e.g.*, UNIF. PARENTAGE ACT § 706 cmt. (2002).

[105] *See, e.g.*, the legislative proposal of the State of Pennsylvania stating that a child born through assisted reproduction accomplished after consent has been voided by the filing and service of a divorce complaint, under § 5934 or withdrawn under § 5933, will have a legal mother and a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor, http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2008-23Assisted%20Reproductive%20Technologies%20Act%20-%20May%202008.pdf. *See also* The Proposed Pennsylvania Assisted Reproductive Technologies Act, Report of the Subcommittee on Assisted Reproductive Technologies, http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2008-23Assisted%20Reproductive%20Technologies%20Act%20-%20May%202008.pdf.

[106] Kass v. Kass, 235 A.D.2d 150 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (1998).

objectant of unwanted parenthood by treating him as a sperm donor in cases such as this."[107]

Today, however, this proposal of granting non-legal parenthood to the subordinate spouse is acquiring momentum and is widely accepted in the legislation of a number of states in varied contexts. This is also true for divorce. If the couple divorced prior to fertility treatments, then the previous partner is not the legal father of the newborn unless he accepted parenthood in a signed agreement.[108] Furthermore, there is a new approach in sub-paragraph (b) of section 706 of the UPA. If the recalcitrant partner originally agreed, he can recant later but only if the fertility treatments have not yet begun. Section 706(b) reads: "The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child."[109] As pointed out in the explanatory note, the first draft of the paragraph was drafted specifically for married couples,[110] but in a later amendment in 2002, the status of the partners was deleted to enable greater freedom of contract.[111] Therefore, the partner can withdraw his or her agreement not only in the event of divorce, but also in the case of two individuals who are unmarried and one of the parties wants to withdraw because of a change of heart. However, this is possible only if the fertility treatments have not yet begun. The common logic of the UPA sections 706 and 707 is that a person should not become a legal parent unless he or she agrees to become one. This applies both when an individual never agreed to become a parent *and* if he or she agreed but subsequently withdrew the agreement by sending a written notice to the fertility clinic.[112]

Again, the principle of intention in establishing legal parentage may override and annul the genetic foundation. In other words, it is vitally important to carry out and record a detailed process of negotiation with regard to all the different aspects

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[107] *Kass*, 235 A.D.2d at 179. *See also,* Apel, *supra* note 5, at 665 (regarding the recurring theme in these judgments, in which, in the case of divorce, the court approves of this approach).

[108] *See* UNIF. PARENTAGE ACT § 706(a) (2002).

[109] UNIF. PARENTAGE ACT § 706(b) (2002).

[110] The original language stated: "The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos." UNIF. PARENTAGE ACT § 706(b) (2000).

[111] Today the couple need not necessarily be married but any person may supply semen or agree to inseminate a woman, even if she is not his legal wife, and he will become the legal parent if he agrees. Under the former title, "Husband's Paternity of Child of Assisted Reproduction," the words "Husband's paternity" have been erased and replaced by the more general term "Paternity." The new title is "Paternity of Child of Assisted Reproduction." Incidentally, the novelty of the new paragraph has not yet been appreciated. Some states refers only to the inseminated woman's husband as donor and does not discuss an anonymous donor. On the other hand, a number of states have legislated the subject outside of the context of marriage—Delaware, North Dakota and Wyoming. *See* Jonathan Penn, Note, *A Different Kind of Life Estate: The Laws, Rights, and Liabilities Associated with Donated Embryos*, 21 REGENT U. L. REV. 207, 210 (2008).

[112] It should be mentioned here that there are some contrary state law cases, such as *Ferguson* in Pennsylvania, emphasizing the child's rights to child support as the main reason for rejecting the agreed agreement. Ferguson v. McKiernan, 596 Pa. 78 (2007).

involved when a couple signs an agreement to become parents. Where no contract or other agreement between a couple exists with respect to the problems that may arise regarding a frozen embryo in the case of death, divorce, or separation, state law will apply.

The UPA, which is similar to this Article's proposal, was adopted by a number of states, including Washington, Colorado, and Texas, and it has been contemplated by the New Mexico legislature.[113] Whereas the Washington legislature allowed an option to withdraw from the original consent in the case of a married couple and a plain written notification is enough, the legislation in Texas required that the written notice be retained by a licensed physician.[114] In New Mexico, the legislature also adopted such an agreement and option of withdrawal from it between unmarried partners.[115] The notice is to be sent to the second partner, if the insemination of the frozen embryos did not take place within a year of the original agreement. However, complete annulment of legal parenthood in the case of a recalcitrant parent was only legislated in New Mexico, but not in Washington, Colorado, or Texas.[116] According to this Article and similar to New Mexico's approach, to satisfy the different approaches and to prevent complaints of any kind, the notice should be sent to both the clinic and the second partner to make sure that the withdrawal from the initial agreement is understandable to all sides of the process.

This Article suggests that if one of the partners of the frozen embryo did not agree to continue with their use to procreate, the recalcitrant partner will not be a legal parent but will receive non-parenthood status. This suggested compromise is in accordance with up to date legislation proposals from paragraph 501(3)(e) of the Model Act: "In the event that a transfer occurs after receipt of notice in a record of that individual's intent to avoid gestation as set forth in paragraph 3(c) of this Section, that intended parent will not be the parent of a resulting child."[117] Similarly, there are also different scholars in the research literature who support

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[113] *See* ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 606 (2008), *available at* http://www.abanet.org/family/committees/artmodelact.pdf (hereinafter MODEL ACT). The states of Texas, Washington and Colorado adopted the wording of the Act without any changes. The paragraph reads: "If a marriage is dissolved before [placement] of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a [dissolution of marriage], the former spouse would be a parent of the child." *Id.* § 606(2).

[114] *See* TEX. FAM. CODE ANN. § 160.706(a)-(b) (West 2007).

[115] S. B. 183, 49th Leg., 2d Sess. (N.M. 2010).

[116] WASH. REV. CODE § 26.26.725 (West 2008) ("The consent of the former spouse or former domestic partner to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos."); COLO. REV. STAT. § 19-4-106(7)(b) (2008) ("The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record [kept by a licensed physician] at any time before the placement of eggs, sperm, or embryos."); *see also* Mark P. Strasser, *You Take the Embryos But I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFF. L. REV. 1159, 1189 n.139 (2009).

[117] MODEL ACT, *supra* note 113, § 501(3)(e).

this study's compromise proposal considering it to be important and efficient within the context of this discussion.[118]

V. ADVANTAGES AND DISADVANTAGES OF THE ARTICLE'S COMPROMISE

A. Advantages

The possibility of recognizing legitimate legal parenthood of a man based on his intentions and wishes is present in the legal literature and research of the past few decades. The main object of this research is to explore the possibility of determining agreed parenthood in a way that encompasses its various levels—full parental, partial parental and non-parental. It would be difficult for the state to resolve such a dispute surrounding the frozen embryos by forcing one of the partners to submit to the other.[119] The use of judicial force to uphold the partner who wants to become a parent, and who wishes to overcome the will of the other partner, raises the problem of coerced parenthood together with the different legal aspects involved. On the other hand, supporting the recalcitrant partner will prevent the willing partner from becoming a parent. Therefore, one of the important advantages of this proposal is the possibility of satisfying both the will of the partner who wants to become a parent and also the will of the recalcitrant partner.[120]

Thus, on the one hand, our solution does not force anyone to be a parent against his or her will. We prohibit the use of people's genetic material against their wishes and without their permission and cooperation. On the other hand, we will be able to fulfill the desires of the individuals who do wish to become parents but are constrained by unwilling partners.

Our suggested compromise is also relevant for conservative states, such as Louisiana, which does not permit the destruction of frozen embryos, thus forcing the embryos to be given to a couple who wants to adopt.[121] From a more general point of view, courts in the United States have preferred the rights of the partner who objects to being a parent against their will, unless the other partner who wants

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[118] *See, e.g.*, Waldman, *supra* note 63, at 1059-60; Cahn, *supra* note 60, at 597-99; Lee M. Silver & Susan R. Silver, *Confused Heritage and the Absurdity of Genetic "Ownership,"* 11 HARV. J. L. & TECH. 593, 615-16 (1998) (supporting this approach where it is the parent's last opportunity to bear a child and the other parent is unwilling to accept parental obligations).

[119] *See, e.g.*, Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 262 (1990).

[120] *See generally* Yehezkel Margalit, *Towards Determining Legal Parentage by Agreement in Israel*," 42 MISHPATIM 6 (2012) (forthcoming on file with author) (Heb.) (discussing the dilemma of whether to extend this proposal to coital intercourse).

[121] *See generally* Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 541-42 (2008) (discussing the legal situation in Louisiana); *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Embryo and Gamete Disposition Laws*, (updated July 2007), http://www.ncsl.org/default.aspx?tabid=14379 (discussing the legal situation in other states).

to become a parent will have no further opportunity to become a parent. This normative suggestion is consistent with the direction of the existing law today, and it may aid the partner to get the recalcitrant partner's consent to the continuation of the fertility procedure by their former partner.

Incidentally, the courts' tendency to prefer the rights of the partner who objects to being a parent takes precedence over a contract which includes an agreement to continue with the fertility procedure, even against the will of one of the partners.[122] However, this Article agrees to the possibility in principle to allow the annulment of the contract and not to carry out its various obligations only when the circumstances bring about a change of mind on the part of one of the partners.[123] Similar to the courts and legal scholars, this Article recognizes the right of a partner not to be forced into being a legal parent in light of court rulings that dealt with abortion and the cancellation of different laws on the subject of contraception.[124]

The best interests of the child and its future rights support its right to be born in spite of the special circumstances relevant to the birth. This is true in light of the inherent difficulty that exists in determining these rights before the child is born. For when a child appears before a judge, it is difficult to determine its best interests and which of the parents would be the better guardian. It becomes even more difficult when the child is not yet born and the discussion relates to a frozen embryo. One may even doubt if we are discussing the rights and welfare of an existing child when it is an embryo, as it is extremely difficult to discuss the rights and welfare of sperm, ova or frozen embryo.[125]

Let us not forget that up until recently in the eyes of Christianity and Islam, and accordingly in the legal codes of many countries, a child born out of wedlock was considered illegitimate and was legally an orphan without a father and initially without a mother.[126] However, in modern times, even a child born to its biological and legal father could be adopted, allowing its father to escape his parental obligations. Whatever the disadvantages, the child is still in a better position than if he or she had never even been born.

The courts are of the opinion that the existence of a biological child automatically involves the existence of a psychological connection, which leads to one of two options: either the wish to invest time, love, affection and resources in the child, or alternatively, to refuse to acknowledge the child and to live with a

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[122] For a list of the rulings in the United States and other countries, *see* Cohen, *supra* note 9, at 1137 n.2.

[123] *See generally* Margalit, *supra* note 12.

[124] *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Griswold v. Connecticut, 381 U.S. 479 (1965).

[125] For this issue of the Non-Identity problem, *see* Cohen, *supra* note 9, at 1131 n.48; I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. (forthcoming 2011).

[126] *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

feeling of loss.[127] Indeed, in Professor Ellen Waldman's opinion, the existing judicial approach stems from the psychological and social fear of being involved with the child only due to the biological connection. This problem is aggravated by the existing legal situation where any attempt to regulate the status of two parents who have brought a child into the world through a contract is summarily rejected.[128] This is an outgrowth of the fear that any such agreement will lead to a lessening of parental obligations on the part of one of the parents and would damage the best interests of the child and his rights.

However, the claim that a person who was forced to be a biological parent, despite not being liable for any legal parental obligation, and as a result unjustifiably suffers severe emotional damage, should be rejected.[129] An examination of the legal practice today reveals that this issue involves a social rather than genetic structure. Professor Waldman discusses two examples: the possibility of a male being able to evade his parental obligations for various reasons and the releasing of a gamete donor from his different parental obligations towards the child.[130] This understanding is reinforced by empirical findings whereby the quality and extent of the relationship between a father and his child is primarily a product of the quality of the relationship between the male and the child's mother.[131]

Similarly, different empirical data teaches that in the case of the anonymous donation of semen, the emotional connection does not exist between the anonymous donor and the child to be born from his semen. In fact, the vast majority of anonymous donors, including donation of a gamete, do not want to know if they have had children, how many, where they are living and what is their situation.[132]

However, a number of precedents are in favor of recognizing contractual obligations between the parties, including annulling the fatherhood of a donor even if his identity is known.[133] There are also precedents that limit the rights of known donors with regard to the child even on the basis of implied agreement.[134] In fact,

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[127] *See generally* Waldman, *supra* note 63, at 1027.

[128] *Cf.* Garrison, *supra* note 22.

[129] For this claim from a socio-biological view point, *see* RICHARD DAWKINS, THE SELFISH GENE 2, 102-3, 248-49 (2d ed. 1989); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1025-39 (2003).

[130] *See generally* Waldman, *supra* note 63, at 1041-48.

[131] *See generally supra* note 95 and accompany text.

[132] *See generally* Waldman, *supra* note 63, at 1048-49; *see also* Cohen, *supra* note 9, at 1142-45 (discussing data and concluding that one cannot learn anything about his or her true feelings of the fathers who are disestablishing the paternity and who may have suffered deeply from their decision).

[133] *Cf.* McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989); In Interest of R.C., 775 P.2d 27 (Colo. 1989); *In re* Sullivan, 157 S.W.3d 911 (Tex. App. 2005); *In re* H.C.S, 219 S.W.3d 33 (Tex. App. 2006); *In re* K.M.H., 169 P.3d 1025 (Kan. 2007); C.O. v. W.S., 639 N.E.2d 523 (Ohio Com. Pl. 1994).

[134] *See* Marriage of Leckie and Voorhies, 875 P.2d 521 (Or. Ct. App. 1994); Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007). For a discussion of the revolutionary consequences of this ruling, *see* David T. Rohwedder, *Ferguson v. McKiernan: Can a Sperm Donor Be Held Liable for Child Support After the Recipient Has Contractually Waived that Right?*, 32 AM. J. TRIAL ADVOC. 229

Quebec's legal system has generated a precedent-setting piece of legislation. Canadian provincial law permits the parties to sign an agreement known as the "parental project."[135] It allows the exemption of the male from parental obligations on the basis of agreement, even if the child was born of sexual relations.[136] However, if he wants to be recognized as the father, he may lay his claim in the first year of the child's life. It reads:

> [I]f the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.[137]

In Professor Glenn Cohen's opinion, regarding the basic claim in cases where it has been claimed that biological parenthood will necessarily lead to psychological parenthood, it would be very difficult to reach such a firm conclusion.[138] Furthermore, in his opinion, one may understand the wish not to be a gestational or legal parent against a person's will, but to be a biological parent without any legal obligations can only cause emotional damage.[139]

Similarly, the examples of coerced parenthood show that the male has no right to be a biological parent against his will whether the reason is the best interests of the child[140] or that of society in general, and therefore one cannot claim

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(2008).

135 A parental project involving assisted procreation exists from the moment a person alone decides, or spouses by mutual consent decide, to have a child, to resort to the genetic material of a person who is not party to the parental project. *See* QUEBEC CIV. CODE, S.Q., Art. 538 (2002), http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html; *see also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 227-32 (2009).

136 *See* QUEBEC CIV. CODE, *supra* note 135 (intending to recognize the parenthood of single sex couples and allow them to be legitimate parents to their children); *see also* Fiona Kelly, *Reforming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families*, 40 OTTAWA L. REV. 185, 193–34 (2008 – 2009).

137 *See* QUEBEC CIV. CODE, *supra* note 135 (ruling that both a couple and an individual can agree to the annulment of the legal parenthood of the male, if the agreement is in accordance with the legal conditions). For a discussion on the last Quebec's Amendments, *see* Campbell, *supra* note 16, at 254-55; Robert Leckey, *'Where the Parents are of the Same Sex': Quebec's Reforms to Filiation*, 23 INT'L J.L. POL'Y & FAM. 62, 65-69 (2009); Polikoff, *supra* note 135, at 26-29.

138 *See* Cohen, *supra* note 9, at 1148-67.

139 *See generally* RESTATEMENT (SECOND) OF TORTS §§ 46 cmt. b, 436A (1965); Cohen, *supra* note 9, at 1158-61.

140 For the various court rulings which support the prohibition of disestablishing the paternity on the basis of the best interests of the child, *see* Cohen, *supra* note 9, at 1128-29. However, one may ask to what extent is this relevant in the case of frozen embryos. For the rejection of the claim of the best interests of the child in this specific unusual case, *see id.* at 1130-31. On the other hand, the legislation in Louisiana sees the frozen embryos as a potential person and therefore does apply the doctrine of the best interests of the child. *See* LA. REV. STAT. ANN. §§ 9:129, 131 (2006); Fotini A. Skouvakis, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN. ST. L. REV. 885, 904-5 (2005).

that the Constitution allows him this negative right.[141] Furthermore, on the basis of this research that the Constitution does not defend this right, a person may draw up a contract to defend his right not to be a biological parent against his will, just as there is a legal possibility to draw up such contracts with respect to other legal rights.[142]

B. Disadvantages

This Article's suggestion is certainly not perfect and has its disadvantages. In spite of this, since these cases are evenly balanced and because it would very difficult to rule in a way that would be acceptable to everyone, the suggested compromise is the best solution under the circumstances.

One disadvantage is that the case differs from a gamete donation where the donor is interested in donating genetic material and receiving non-parenthood status. In our case, we are discussing a couple who apparently enjoyed long-term intimate sexual relations prior to their decision to undertake fertility treatment. Furthermore, prior to the formation of the frozen embryos, the couple underwent a long and far from simple medical procedure at great psychological, economic and emotional cost. Therefore, it is possible that even the offer of non-parenthood status would not completely convince the recalcitrant partner to allow the other partner to become a parent. The recalcitrant partner may even have developed a deep psychological and emotional need to become a parent, which might become complicated where there is a conflict with the other partner. It is not certain that the offer of non-parenthood would convince him to agree to become a biological but not legal parent, and therefore he or she may still reject our compromise.[143]

Furthermore, unlike the gamete donor who is usually not interested in knowing whether and how many children were born from his genetic material, it is difficult to conceive that the recalcitrant partner would succeed in emotionally separating himself from his past, his family and his possible child. After much effort invested in becoming a parent, where the former partner succeeded despite not knowing his biological child, he is still not considered his legal parent with all the relevant rights. Could such a person not feel responsibility for the child and oppose any such possibility? For even if he is not the father from a legal point of view, he may well suffer emotionally because he is still the biological father who may be emotionally connected.[144] Even if in a number of cases the recalcitrant partners agreed to the status of non-parenthood and allowed the fertility process to continue, it would not necessarily recognize such a suggestion as sufficient to ease their firm objection to becoming biological but not legal parents.

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[141] *See generally* Cohen, *supra* note 9, at 1116 n.112-13.

[142] Cohen, *supra* note 9, at 1185-96.

[143] *See* Waldman, *supra* note 63, at 1052; *see also* Apel, *supra* note 5, at 675-80.

[144] *Cf.* Cohen, *supra* note 9, at 1145 (for a summary of this claim).

Moreover, children born of anonymous gamete donations, such as children who grew up in adopted families, feel a deep emotional need to uncover their genealogical roots.[145] If this is an area in which it is difficult to maintain full anonymity today, especially in an age of information and Internet explosion, it will be difficult to hide from the child that he was born of the genetic material from a previous partner who opposed his birth. Additionally, if the child uncovered the genetic truth about his or her biological parent, he may well recognize him or her as a real parent.[146] In Professor Susan B. Apel's opinion, accepting this Article's suggestion may well lead to one of two undesirable legal results. First, the contractual approach should only be used in a very limited number of cases where children are born of frozen embryos and there is a dispute between the partners over the ova. This contradicts the UPA's approach to erase the problematic distinctions between legitimate and illegitimate children.[147] Secondly, there needs to be an awareness that a slippery slope exists that may lead to other methods of establishing parenthood by agreement. This could be used to help potential parents opt-out of their parental obligations instead of adding additional parents who wish to opt-in.[148]

However, there are certain limitations that should be placed on the contractual approach in order to ensure its success besides special awareness that will solve these potential problems. First, this Article does not define one group of children who live with a legal mother and a biological father who has no legal status. This option already exists in the case of single-parent families—a phenomenon which has increased in recent years. Furthermore, in the existing legal situation and that which we suggest, children born after their father's death will also live with a mother and without a father. Even if we were only discussing a single group of children, we could expect that their numbers will increase after people begin to understand our conclusions. This is similar to all the fertility treatments that have suffered—and some still suffer—from significant legal, ethical, and social growing pains.

Secondly, there is no reason to fear the slippery slope, since this proposal should be accompanied by appropriate legislation. Without changes to legislation, the existing legal situation is where a biological parent will continue to be a legal parent, unless the court or the appropriate administrative supervisor releases them from their obligations toward the child. This is due to the acute legal will and need to preserve the best interests and the rights of the child.

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145 *See* Jessica R. Caterina, *Glorious Bastards: The Legal And Civil Birthright Of Adoptees To Access Their Medical Records In Search Of Genetic Identity*, 61 SYRACUSE L. REV. 145 (2010).

146 *See* Cohen, *supra* note 9, at 1136-37.

147 *See* NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, 312/915-0195, UNIF. PARENTAGE ACT: PREFATORY NOTE (1973); *see also* Carol A. Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-by-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193 (1982-1983).

148 Apel, *supra* note 5, at 677-80.

C. *Towards a Mandatory Disposition Agreement?*[149]

This Article takes the position that there is a social and legal drive to make necessary preparations in advance to forestall confrontations about frozen embryos at a later stage. Therefore, based on the understanding that legal parenthood should be determined by agreement, this section presents additional suggestions beyond the requirement that legislators enact necessary statutes regarding the compromises discussed earlier.

First, a written contract that determines what will be done with frozen embryos under different circumstances should be mandatory, and the contract should be enforceable.[150] Secondly, within the first agreement, it is possible to draw up a contract that includes the parties' intention to enter into fertility treatments and defines the division of parental obligations and rights with regard to the child to be born. Accordingly, there is a need for legislation obligating a couple who wishes to start fertility treatments to ensure the treatments are preceded by a contract regarding the disposal of frozen embryos under different circumstances, especially when there is a change of circumstances.

The advantages of a contract requirement far outweigh the various disadvantages, especially because most couples understand what is best for them better than a court would. Assume, with suitable reservations, that most agreements and contracts will not lead to legal disputes and that their main advantage is to set out the intentions and wishes of the various sides with respect to both the medical and legal aspects. The possibility of abrogating their early agreement while preferring their later wishes may affect the expectations and assumptions of couples who wish to abide by their first agreement. Furthermore, in many cases, one of the parties relied on the agreement and weakened his position, a change that could have had serious consequences.

This preference for the latter situation may lead to a careless entry into the contractual sphere. The result may be that there is no real motivation to enter into a contract and to define what the parties want under different circumstances to minimize possible disputes while the legal system has no interest in seriously considering early agreements. The rejection of an earlier agreement may have a deterrent effect on the couples and prevent them from drawing up contracts if it is known that such agreements, even though they are supported by a written contract,

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[149] *See* Diane K. Yang, *What's Mine is Mine, But What's Yours Should Also be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 616-26 (2002) (discussing the problems involved in establishing pre-mandatory conditions where the procreation rights of one of the parties is at stake); 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. C.L. & C.R. 143 (2009) (discussing the importance of preliminary agreements for the couple and for the fertility clinic).

[150] *See* Cohen, *supra* note 9 (arguing that making the contract mandatory defeats the sorting function of the contract).

may not hold up in court in the event of a change in circumstances.[151] Indeed, some modern legislative proposals now require a contract that includes, among other requirements, dispositions with regard to the disposal of frozen embryos in the event of various changes in circumstances. Additionally, there are a number of legal rulings in harmony with this position.[152]

Modern contract law teaches us that one cannot enforce any contract exactly as set down in the event of a change of heart or a change in circumstances. For example, when dealing with intimate matters within the household, including fertility, pregnancy, birth, and childrearing, legal intervention and enforcement may well have serious social and personal effects.[153] It is therefore logical to allow some deviation from the original agreement when there is reasonable doubt that enforcing the contract will cause damage to the public. In extreme circumstances, where one of the sides wishes to withdraw from his original agreement, it should be permitted. This should only occur if the fertility treatments have not yet commenced and no frozen embryo has been implanted in the mother's womb.[154]

To limit the problem of the change of circumstances or change of heart, this Article suggests a number of improvements to the main proposal. First, it should be ensured that the contract between the parties and the fertility clinic is not a standard contract, proposed and drafted in favor of the clinic which cannot be changed by the couple and does not express their needs and intentions. Second, the couple should be required to receive medical and psychological guidance prior to the signing of such a contract. Third, the couple should be careful to discuss and sign these contracts, signed by the couple and the clinic, separately from the agreements for treatment so that it should be completely clear that it is a separate

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[151] *See, e.g.*, Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 215-16 (2005); John A. Robertson, Symposium, *Precommitment Issues in Bioethics*, 81 TEX. L. REV. 1849, 1870-7 (2003); Sara D. Petersen, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1080 (2003).

[152] *See, e.g.*, MODEL ACT, *supra* note 113, §§ 201(2)(j), 501(1)(a)–(b) in the Model Act which lays out respectively:

> A statement of the need for intended parents to agree in advance who shall acquire the right to possession and control of the embryos or gametes in the event of marriage dissolution, death of one or both of them, or subsequent disagreement over disposition in compliance with the provisions of Section 501 of this Act.

Id. § 201(2)(j).

> Binding agreements executed prior to embryo creation must be entered into a record by intended parents as to: (a) Intended use and disposition of embryos; (b) The use and disposition of preserved embryos in the event of divorce of intended parents, if married, illness, incapacity, or death of one or both intended parents, or other change of circumstances such as separation or estrangement . . . .

Id. § 501(1)(a)–(b). *Accord* Cahn, *supra* note 60, at 595 n.151 (quoting Model Assisted Reprod. Technologies § 1.05, Subs. 1(c)(4)).

[153] *But see* George J. Annas, *The Shadowlands -- Secrets, Lies and Assisted Reproduction*, 339 NEW ENG. J. MED. 935 (1998).

[154] *See* Coleman, *supra* note 73. *See also* Cohen, *supra* note 9, at 1185-87, for the possibility of using a damages measure instead.

and independent legal document. Fourth, one should retain the protocols that document the handing over of all medical and psychological data to the couple together with the decision-making apparatus and the signed contract. There is also a need to expand the current regulatory mechanisms with regard to adoption and surrogate to these disposition agreements.[155]

Finally, there is another possible contractual solution[156] that will resolve the deadlock between handing over the frozen embryos to a partner who wants to become a parent and the demands of a partner who objects to the procedure and orders the destruction of the frozen embryos. Any contract signed by the couple prior to the fertility treatments must include a provision that if the couple is unable to reach an agreement, they will either donate the frozen embryos to research or to a sterile couple.[157] As suggested by Section 502(1) of the Model Act, the couple that gives up the frozen embryo will receive non-parenthood status, and at the first opportunity, the couple receiving the frozen embryo will replace it.[158]

CONCLUSION

This Article supports the possibility of determining parenthood by agreement as the main and legitimate way to compel parental responsibility by agreement in the case of in vitro fertilization and as a general way of determining legal

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[155] *See, e.g.*, Waldman, *supra* note 6, at 925-30 (discussing the conclusion that an adhesion contract which only allows the destruction of the frozen embryos or their adoption is extremely problematic); Wendel v. Wendel, No. D-191962 (Ohio C.P. Dom. Rel. Ct. July 21, 1989), mentioned and discussed in Robertson, *supra* note 63, at 411-14 .

[156] *See* Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133 (2009) (specifying the appropriate contract law for this situation and situations where adoption laws should be utilized).

[157] *See* June Carbone & Naomi Cahn, Symposium, *Families, Fundamentalism, & the First Amendment: Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1015, 1023-24 (2010) (discussing the need for federal supervision of the procedures for adopting and donating frozen embryos after the change of the policy from the Bush administration with regard to research into stem cells by President Obama in 2009).

[158] According to MODEL ACT, *supra* note 113, § 502(1):

> Intended parents may choose to donate their unused embryos for any of the following purposes subject only to any limitations set forth in a record prior to donation as permitted and imposed pursuant to the provisions of Section 204 hereof, which choices shall be reflected in their agreement(s): (1)Donation to another patient(s), either known or anonymous. Donation to known individuals may only be done for the purpose of the recipient attempting to create a child and become that child's parent.

See, e.g., Lambert, *supra* note 121; Jennifer Baker, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671 (2009) (criticizing the organization Snowflake and the treatment of frozen embryo using adoption vocabulary and not donation vocabulary and the possible serious effects on the abortion question); Michelle L. Anderson, *Are You my Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U.L. REV. 589 (2006) (requesting that legislators should legislate with regard to the donation and adoption of frozen embryos to prevent injustice); Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004); Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179 (2003); 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, 587-89 (2000).

parenthood. When we can internalize the concept that legal parenthood is determined by agreement, we can then say that the degree of parenthood is based on what each receives in the initial agreement. We can no longer refer to parenthood as a monolithic and permanent status but as a variety of statuses—full parental, partial parental and non-parental.

The practical application of this principle can be found in the study in which we suggested to the arguing couple that the one who opposes continuing the fertilization would have to accept the status of non-parenthood. In this way, the couple could arrive at an agreement that fertilization may continue without prejudicing the one opposed to the idea of forced parenthood. In this Article's view, the legislatures should make the signing of a disposition agreement a mandatory precondition to fertility treatments. The disposition agreement should include an explicit clause that would offer the couple our suggested compromise. The couple would have to agree, at the outset of fertilization, to the provisions of the agreement, which would provide for the fate of the fertilized egg should the sides fail to agree, and would make it possible to determine which of the parties would acquire legal parenthood in the various unforeseen situations that could arise.