

DEALING WITH CRYOPRESERVED EMBRYOS UPON DIVORCE: A CONTRACTUAL APPROACH AIMED AT PRESERVING PARTY EXPECTATIONS

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The development of assisted reproductive technologies, including cryopreservation, or freezing, of embryos created through in vitro fertilization, has given rise to complex legal questions. Because cryopreservation permits indefinite storage of embryos, if couples fail to specify disposition directions, they may disagree regarding embryo treatment upon the occurrence of contingencies such as divorce. Few courts have resolved such disputes, and those that have appear to uphold the rights of the party seeking to prevent implantation in the absence of a written agreement specifying otherwise. In this Comment, Sara Petersen proposes that courts should draw upon contract law principles in determining whether the parties to such conflicts actually reached agreements regarding embryo disposition in the event of divorce. After analyzing existing precedent, the author assesses proposed approaches for deciding which party's interests should prevail and concludes that these methods are inherently ineffective. She then argues that, in an effort to preserve party expectations and to provide fair results, courts instead should examine whether the parties executed binding contracts or achieved mutual assent. Furthermore, she suggests that couples undergoing cryopreservation will be more likely to contemplate and to provide for various outcomes if they know that courts will look at evidence of their conversations and thought processes prior to cryopreserving their excess embryos.

INTRODUCTION	1066
I. INFERTILITY AND AVAILABLE TREATMENTS	1068
II. EXISTING PRECEDENT AND ITS ADHERENCE TO POLICY AND THE "RIGHT NOT TO PROCREATE"	1070
III. CURRENT AND PROPOSED APPROACHES AND THEIR INHERENT INEFFECTIVENESS.....	1077
A. Balancing of Procreational Rights.....	1077
B. Inalienable Rights Approach Allowing for Preference Changes	1080

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C. Assigning Decisionmaking Power According to Reproductive Differences.....	1080
D. Implying Contracts from Parties' Decisions to Undergo IVF	1081
IV. A CONTRACTUAL APPROACH AIMED AT FINDING AND HONORING PARTY AGREEMENTS.....	1082
A. Resolution Through the Utilization of Contract Law Principles	1082
B. Addressing Potential Pitfalls of the Contractual Framework.....	1089
CONCLUSION AND APPLICATION OF THE CONTRACTUAL FRAMEWORK.....	1091

INTRODUCTION

A recent ruling by the New Jersey Supreme Court once again highlights the legal quandaries posed by divorcing couples' disagreements over the disposition of their frozen, stored embryos.¹ With no binding national precedent to guide its determination, the New Jersey court balanced the parties' interests. It ultimately concluded that despite her ex-husband's objections, the respondent could prevent their cryopreserved embryos from ever being implanted.² Though the court noted that any enforceable contract between the parties might have disposed of this issue, it found that the parties had not, in fact, entered into an agreement governing the treatment of their embryos should they divorce.³ The court instead weighed the appellant's right to procreate against the respondent's right not to procreate and found that the latter interest was more compelling in light of the circumstances.⁴

As cases like this one illustrate, although the development of assisted reproductive technologies (ARTs) has certainly offered new hope to couples coping with infertility, it has also given rise to complicated issues, especially upon the occurrence of contingencies such as divorce. Though couples that avail themselves of ARTs may be committed to the process and to one another at the outset, they may eventually end their relationships, thereby altering their reproductive courses. Cryopreservation, or freezing, of embryos created through in vitro fertilization (IVF) inherently breeds such disputes, as it allows couples to delay implanting their embryos for several years.⁵ Thus, if they decide to divorce and still have embryos in

1. See *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

2. *Id.* at 719–20.

3. *Id.* at 708, 714. The court held “that J.B. and M.B. never entered into a separate binding contract providing for the disposition of the cryopreserved preembryos.” *Id.* at 714.

4. *Id.* at 716–17; see also *id.* at 720 (noting that the appellant “is a father and is capable of fathering additional children”).

5. See Carl T. Hall, *The Forgotten Embryo: Fertility Clinics Must Store or Destroy the Surplus That Is Part of the Process*, S.F. CHRON., Aug. 20, 2001, at A1 (“With current freezing tech-

storage, they may clash over what to do with the embryos because they no longer plan to reproduce and become parents together. As one scholar notes, in these situations the parties “should have joint dispositional authority over external embryos resulting from their gametes.”⁶ Indeed, those courts that have addressed such controversies appear not to have accorded the embryos themselves any rights, particularly by mandating implantation and thus allowing them to develop and be born.⁷ Therefore, courts must resolve situations in which parties with proportionate power differ as to whether their stored embryos should be implanted, donated, stored indefinitely, or discarded.

This Comment addresses the dilemmas that courts confront when divorces precipitate disputes over the disposition of cryopreserved embryos. To date, only a handful of states have encountered such cases.⁸ However, the popularity of ARTs and the myriad opportunities for cryopreservation⁹ suggest that similar controversies will continue to arise, thus requiring a workable, uniform framework for analyzing the parties’ claims and achieving fair outcomes.¹⁰

Part I of this Comment discusses the medical aspects of IVF and cryopreservation and presents statistics on infertility and embryo storage across the country. Part II analyzes existing precedent, taking note of the various approaches courts have employed and the inherent limitations of basing

niques, it seems possible for frozen embryos to survive for decades.”). The Alta Bates IVF Program in Berkeley, California, notes that it has stored embryos for as long as six years. *See id.*

6. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 456 (1990). Assuming that no donor gametes are used to create the embryos, “the couple that provides the gametes to create the embryos has the strongest claim to decisional authority or ownership of the embryo.” *Id.* at 455–56.

7. *See* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409 (1990) (suggesting generally that although embryos may deserve special respect, they are not people and therefore are owed no legal duties). “There is also a wide consensus, though it is more contested and even limited by law in a few states, that embryos have no rights or interests in themselves.” *Id.*; *see also* Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 197 (1997) (noting that the rights of the entities resulting from assisted reproductive technologies (ARTs) “have been largely ignored by law, notwithstanding the direct relevance of such diverse fields as contracts, property, family, and constitutional law”).

8. *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B., 783 A.2d at 707; Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 10 P.3d 1086 (Wash. Ct. App. 2000), *rev’d*, 48 P.3d 261 (Wash. 2002).

9. “[M]ost of the approximately 400 American clinics that offer [in vitro fertilization (IVF)] also freeze embryos.” Gina Kolata, *Researchers Can’t Count on Using Clinics’ Embryos: Very Few Will Be Made Available for Stem-Cell Research, Fertility Experts Said*, ORLANDO SENTINEL, Aug. 26, 2001, at A10.

10. Indeed, as Katherine R. Guzman notes, “Mind-blowing technologies irrefutably exist; the issue shifts from their desirability to whether the law will respond to the changes they precipitate and, if so, how it will respond.” Guzman, *supra* note 7, at 251.

such rulings on a distinction between a right to procreate and a right not to procreate. Part III assesses alternative methods that have been proposed for deciding which party's interests should govern embryo disposition.

In Part IV, this Comment contends that courts should utilize principles from contract law to determine whether the parties to such disputes reached an agreement regarding embryo disposition in the event of divorce. It suggests that a *per se* rule of unenforceability with respect to any contract governing embryo disposition is impractical and inefficient in light of today's technological capabilities. Thus, courts should examine whether or not such couples (1) executed a binding, written agreement, or in the absence of a written instrument, (2) reached a mutual assent using traditional notions of contract formation. This Comment considers these cases from the perspective of contractual policy aimed at protecting parties' expectations, suggesting that weight should be given to their motivations, hopes, and beliefs at the time they reached an agreement. It then addresses potential criticisms of using contract law to resolve these very personal, familial disagreements. Finally, by applying this proposed methodology and analyzing the outcomes, it concludes that a contractual approach does provide the fairest resolution to these disputes.

I. INFERTILITY AND AVAILABLE TREATMENTS

Many American couples are unable to conceive genetic offspring naturally. According to data collected by the Centers for Disease Control and Prevention in the 1995 National Survey of Family Growth, "7% of married couples in which the woman was of reproductive age (2.1 million couples) reported they had not used contraception for 12 months and the woman had not become pregnant."¹¹ Furthermore, "[o]f the approximately 60 million women of reproductive age in 1995, about 1.2 million, or 2%, had had an infertility-related medical appointment within the previous year and an additional 13% had received infertility services at some time in their lives."¹² Such services include ARTs, which were introduced in the United States in the early 1980s to facilitate pregnancy, usually through the transfer of embryos into a woman's womb.¹³ ARTs procedures, and IVF in

11. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL & PREVENTION, 1998 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 3 (2000), <http://www.cdc.gov/nccdphp/drh/art98/faq.htm#2>. According to the 1998 report, the latest data on infertility available to the Centers for Disease Control were from the 1995 National Survey of Family Growth.

12. *Id.*

13. *Id.* at 1.

particular, “involve surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to the woman’s body.”¹⁴

Often IVF cycles yield several viable embryos, but because of the health risks associated with multiple births, many couples opt not to implant all the embryos and instead choose to freeze and store unused embryos for later implantation.¹⁵ Cryopreservation entails maintaining the embryos in a solution of liquid nitrogen “to protect the fertilized eggs from damage. Frozen embryos are stored at . . . approximately -400°F . . .”¹⁶ The ability to cryopreserve affords couples greater flexibility in their family planning, as it allows for the possibility of subsequent pregnancies without the woman having to undergo additional cycles of “ovarian stimulation and retrieval,”¹⁷ which is an invasive and painful procedure. Moreover, if and when couples do decide to thaw and to implant their stored embryos, the transfer procedure is identical to that involving fresh embryos immediately following IVF.¹⁸ Thus, cryopreservation presents an appealing alternative for people coping with an inability to conceive naturally and searching to expand their options.¹⁹ Indeed, hundreds of American IVF clinics also offer embryo cryopreservation. While there are no “national data on the number of frozen embryos,” “[t]ens of thousands of embryos are frozen at fertility centers . . . [and] almost every embryo is spoken for.”²⁰ These thousands of embryos all represent potential legal disputes between the parties that

14. *Id.* at 3.

15. Technically, the stored entities are “preembryos.” This “is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus.” Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253, 260 (2001). However, for purposes of uniformity, this Comment refers to these entities as “embryos.”

16. SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, A PATIENT’S GUIDE TO ASSISTED REPRODUCTIVE TECHNOLOGIES 30, <http://www.sart.org/PDFs/TextPatients.pdf> (last visited Feb. 2, 2003); see also Hall, *supra* note 5 (remarking that the embryos are preserved in “thin ‘straws,’ receptacles that resemble extra-long coffee-stirrers”).

17. See SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 16, at 30.

18. *Id.* at 31.

19. See Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 308 (1993) (noting that cryopreservation cuts medical costs, decreases physical stress for female IVF participants, and increases the chances of achieving successful pregnancies). “[O]nly the strongest embryos survive the freezing process, and since the fertility drugs used to induce ovulation actually weaken the uterine lining, stored embryos are more likely to implant themselves because the uterus is more receptive to implantation after a lapse of time . . .” *Id.* (citing John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 949 (1986)).

20. Kolata, *supra* note 9 (stating that these frozen embryos are “1 to 5 days old and consist of one to 120 cells”); see also Hall, *supra* note 5 (noting estimates that there are approximately 200,000 frozen embryos currently in existence).

created them should those parties ever disagree over embryo disposition after marital dissolution. Therefore, in anticipation of future controversies, American courts should fashion an effective process for examining embryo conflicts.

II. EXISTING PRECEDENT AND ITS ADHERENCE TO POLICY AND THE "RIGHT NOT TO PROCREATE"

The Tennessee Supreme Court first addressed a divorce-related dispute over embryo disposition in 1992 in *Davis v. Davis*.²¹ There, the court concluded that in the absence of an agreement between the parties or of applicable state law, it should weigh the parties' interests in reaching a holding.²² The Davises had participated in six cycles of IVF after failed attempts to conceive naturally and to adopt.²³ Their infertility clinic neglected to provide them with its standard consent forms,²⁴ and there was no evidence that the couple contemplated disposition of their embryos at divorce or "considered the implications of storage beyond the few months it would take to transfer the remaining frozen embryos."²⁵

After locating decisionmaking authority in both parties,²⁶ the Tennessee court suggested that, in keeping with this proposition, any agreement between progenitors respecting embryo disposition upon the occurrence of certain contingencies should be presumed valid and enforceable.²⁷ Thus, the court appears to have acknowledged that advance agreements regarding embryo treatment not only are acceptable from a policy perspective but also merit enforcement.²⁸ Nevertheless, the court found that the Davises had no binding agreement and also declined to find that they had entered into an implied contract to reproduce through their participation in ARTs.²⁹

21. 842 S.W.2d 588 (Tenn. 1992).

22. See *id.* at 591.

23. *Id.*

24. See *id.* at 592 n.9 ("Apparently the clinic was in the process of moving its location when the Davises underwent this last round and, because timing of each step of IVF is crucial, it was impossible to postpone the procedure until the appropriate forms were located." (internal quotations omitted)).

25. *Id.* at 592.

26. See *id.* at 597; see also Robertson, *supra* note 6, at 454-76.

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

28. But see *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001), discussed *infra* text accompanying notes 72-81. The court in *J.B.* discussed public policy concerns underlying agreements involving family relationships. *Id.* at 717-20. See also *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000), discussed *infra* text accompanying notes 51-55.

29. See *Davis*, 842 S.W.2d at 598. Rather than presume through parties' participation in IVF that they have an implied contract specifically to *implant* embryos, courts could instead look for evidence of an implied contract governing embryo disposition *in general*. Courts could con-

In concluding that the Davises had not executed a contract, the court focused on the absence of a written instrument between them and further decided that they had not discussed or considered what to do with their embryos if various circumstances arose.³⁰ The court ultimately held that these disputes should be resolved by looking to the parties' preferences and, if their wishes are in controversy or are unascertainable, by enforcing any prior agreement. If there is no agreement, though, the court should weigh the parties' interests and "[o]rdinarily, the party wishing to avoid procreation should prevail."³¹ Here, appellee Junior Davis succeeded on his claim to avoid genetic parenthood and to discard the stored embryos in accordance with the infertility clinic's usual procedures.³²

Several years later, in *Kass v. Kass*,³³ the New York Court of Appeals did find a binding agreement between disputing progenitors and consequently enforced that contract as an expression of the parties' intent regarding disposition of their embryos.³⁴ The Kasses had executed four consent forms provided by their infertility clinic before freezing their surplus embryos.³⁵ In one of these consent forms, the couple agreed that upon divorce, legal ownership of their stored embryos would be determined in a property settlement discharged by court order.³⁶ Moreover, in an addendum to that form, they indicated that if they were unable to make a decision regarding embryo disposition, they would direct the IVF clinic to use the embryos in scientific

sider evidence of the parties' backgrounds, beliefs, and motivations when they begin using ARTs. See *infra* Part IV for discussion of how courts could conduct such inquiries and of why such inquiry would be beneficial.

30. See *id.* at 590, 592, 598. The court noted that the record contained "no indication" that the parties had anticipated contingencies, including divorce, when they decided to cryopreserve their embryos. *Id.* at 598. Yet, the opinion contains no mention of specific facts describing what the parties did or did not discuss, and it seems somewhat implausible that a couple undergoing six IVF cycles and deciding to freeze their excess embryos would not at least contemplate events such as death and divorce.

31. *Id.* at 604.

32. *Id.* at 604-05. The court struck a balance in favor of Junior's preferences because appellant Mary Sue wished to donate the embryos (rather than implant them herself) and, according to the court, because she had alternate means for becoming a parent. *Id.* at 604. However, it is worth noting that Mary Sue had already suffered several ectopic pregnancies and had attempted to become a parent through IVF and adoption, all to no avail. *Id.* at 591-92; see also *infra* text accompanying notes 96-99. On petition to rehear, the court remanded for a determination of how to dispose of the embryos, because the clinic's usual method was to donate excess embryos. *Davis v. Davis*, No. 34, 1992 Tenn. LEXIS 622, at *3 (Nov. 23, 1992) (per curiam). "Such a disposition [was] not authorized under the opinion, because it [was] the very outcome that Junior Davis . . . sought to avoid . . ." *Id.* at *3-*4.

33. 696 N.E.2d 174, 175 (N.Y. 1998).

34. *Id.* at 181-82.

35. *Id.* at 176.

36. See *id.*

research.³⁷ The *Kass* court agreed with the *Davis* court that agreements between gamete donors should be enforced and noted that the uncertainties inherent in the IVF process and various circumstances that may arise “make it particularly important that courts seek to honor the parties’ expressions of choice, made before disputes erupt.”³⁸

Once it found that the parties had executed advance directives, the *Kass* court determined whether these provisions clearly applied to the circumstances at hand.³⁹ Appellant Maureen Kass urged the court to construe the parties’ consent form specifying disposition through property settlement to require that a court determine embryo ownership at divorce.⁴⁰ However, the court found that all of the Kassses’ consent forms, as well as the divorce instrument they signed, expressed their intent that disposition occur only pursuant to their joint agreement.⁴¹ Accordingly, the court found that the present situation constituted an “unforeseen circumstance” that triggered application of the addendum, and therefore mandated that the embryos be donated to the IVF clinic for acceptable research purposes.⁴² Yet, if the Kassses had not executed an express agreement, the court may well have balanced the interests as the *Davis* court did,⁴³ rather than look for other evidence of a binding agreement between them.

Similarly, in *A.Z. v. B.Z.*,⁴⁴ the Supreme Judicial Court of Massachusetts considered the effect of a consent form between a couple and their IVF clinic regarding disposition of cryopreserved embryos.⁴⁵ The parties participated in IVF, which resulted in the birth of their twin daughters and produced excess embryos that they froze and stored.⁴⁶ Amongst other pre-printed consent forms, the couple executed forms specifically related to cryopreservation that required each spouse’s signature and that asked them

37. See *id.* at 176–77.

38. *Id.* at 180. The court further observed: “Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree.” *Id.*

39. See *id.*

40. See *id.* at 181.

41. See *id.* at 182.

42. *Id.* This case illustrates the idea that enforcing parties’ disposition agreements will not always entail implantation. Further, it may be dangerous to imply a contract to implant from their participation in IVF when it is unclear whether implantation truly is their “default” choice. See discussion *infra* Part III.D.

43. See *Kass*, 696 N.E.2d at 178–79.

44. 725 N.E.2d 1051 (Mass. 2000).

45. *Id.* at 1052.

46. *Id.* at 1053. The couple actually froze two vials of embryos. The wife had one vial thawed and implanted without telling her husband, thus leaving one remaining vial in storage at the time of their divorce. *Id.*

to make disposition decisions for stated contingencies, including separation.⁴⁷ Below each listed circumstance, the form mentioned destruction and donation as options; it also allowed the progenitors to write in additional alternatives.⁴⁸ In total, the couple signed seven consent forms. Each was identical to their original agreement, which was completed by the wife in the husband's presence and which provided that, in the event of separation, the embryos would be returned to the wife for implantation.⁴⁹ After executing the original form, the husband signed each subsequent form without any disposition instructions on it, and the wife then completed the relevant information and signed the form herself.⁵⁰

In deciding whether to enforce the most recent consent form, the court inquired whether it represented both parties' wishes should they later disagree over disposition of their embryos.⁵¹ The court concluded that neither the form itself nor the record indicated "that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition."⁵² It found additional support for this conclusion by noting that the consent lacked a duration provision and did not specifically mention divorce⁵³ (though it did discuss separation⁵⁴). Ultimately, the court revealed its true motivation for not enforcing the consent provision, namely, that it did not want to force the husband to become a parent against his will. The court thus hearkened back to the holding in *Davis* that the party opposing procreation usually should prevail.⁵⁵ Hence,

47. See *id.* at 1053–54. Once embryos were produced and frozen, a new form authorizing thawing and transfer was unnecessary unless the couple changed their prior preferences. *Id.* at 1053 n.8. Though the form provided for disposition "[s]hould [the parties] become separated," it did not further clarify whether becoming "separated" entailed divorce, legal separation, physical separation, or the occurrence of any of these events. *Id.* at 1054, 1057.

48. See *id.* at 1054. Furthermore, when the wife called the clinic for clarification, she was told that "she could cross out any of the language on the form and fill in her own [language] to fit her wishes." *Id.* at 1054 n.9. This evidence suggests that, in signing the forms, the parties truly were encouraged to contemplate thoughtfully the various contingencies.

49. See *id.* at 1054.

50. *Id.* Though the husband could argue that under the circumstances, he did not know what he was committing to (particularly on the final, governing consent form signed in August 1991), the provision for disposition at separation remained unchanged from that appearing on the initial consent form (for the execution of which he was present).

51. See *id.* at 1056.

52. *Id.* The court continued: "Rather, it appears that [the form] was intended only to define the donors' relationship as a unit with the clinic." *Id.* This interpretation of the instrument, however, begs the question of what purpose there is in asking couples to contemplate and to provide for certain contingencies if their prior directives will not be enforced.

53. See *id.* at 1056–57.

54. See *supra* note 47.

55. See A.Z., 725 N.E.2d 1057; see also *supra* note 31 and accompanying text. The A.Z. court suggested that enforcing contracts that mandate implantation is inappropriate judicial action,

the court indicated that even if the consent form embodied the parties' true intentions at the time they executed the agreement, it would never be upheld as long as it provided for implantation at separation.

Several months after the A.Z. decision came down, the Washington Court of Appeals also concluded that a divorcing husband was not contractually obligated to become a parent in *Litowitz v. Litowitz*.⁵⁶ The Litowitzes had one child together and then decided to undergo IVF using a donor's eggs after Becky Litowitz had a hysterectomy.⁵⁷ In their consent form, the couple agreed that the stored embryos would be thawed and discarded under certain circumstances, including death. However, the listed contingencies did not include divorce.⁵⁸ The Litowitzes eventually separated, and Becky claimed that she should be allowed to continue the procreation process using the stored embryos, in accordance with the couple's egg donor contract.⁵⁹

The court determined that while the Litowitzes had the right to decide disposition, their cryopreservation consent form did not contain express directives governing embryo disposition in the event of divorce.⁶⁰ Furthermore, the court was unwilling to imply an agreement to raise another child after divorce, citing the absence of evidence indicating that David Litowitz wanted to pursue reproduction outside the marriage and suggesting that courts should act cautiously regarding such intimate issues.⁶¹ Additionally, the court based its holding on a preference for David's right not to procreate, especially given that he was the only party that had contributed genetically to the embryos in question.⁶² It stated that David could "exercise his right

as it may violate public policy. A.Z., 725 N.E.2d at 1058 n.23 (citing the Kass court's suggestion that public policy concerns may render some agreements unenforceable).

56. 10 P.3d 1086, 1088 (Wash. Ct. App. 2000), *rev'd*, 48 P.3d 261 (Wash. 2002). This case differs from the other cases examined herein in that the husband's sperm was used to fertilize donated eggs rather than eggs retrieved from his wife. *Id.*

57. *Id.* Any embryos created using the donor's eggs and David Litowitz's sperm could be implanted in and carried by a surrogate, as Becky was unable to give birth naturally following her hysterectomy. *Id.* It is unclear from the opinion why the Litowitzes did not opt to artificially inseminate a surrogate using David's sperm, a less costly and less complicated procedure. Perhaps they wanted to minimize the potential surrogate's involvement, worrying that she might become more attached to the resulting child if she was both its genetic and its gestational parent.

58. *Id.* at 1089. It seems somewhat anomalous that clinic consent forms would urge participants to contemplate a range of potential events, but would exclude marriage dissolution from such a list.

59. See *id.* at 1090. The egg donor contract stated: "[T]he Intended Parents shall have the sole right to determine the disposition of said egg(s)." *Id.* at 1088. This contract was between Becky and David Litowitz, the "intended parents," and the egg donor and her husband. *Id.*

60. See *id.* at 1091 ("The consent form provides only that, 'In the event we are unable to reach a mutual decision . . . we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our pre-embryos.'").

61. See *id.* (analogizing to concerns raised by the courts in *Davis* and *A.Z.*, respectively).

62. See *id.* at 1092.

not to procreate in a limited way that allows the preembryos to develop but avoids placing him in the unwanted parenting role.⁶³ Thus, in awarding the stored embryos to David, the court concluded that he should not be required to continue with the parties' original "family plan" and that he should instead be free to donate them to another couple without assuming any parenting obligations.⁶⁴

Last year, though, the Washington Supreme Court revisited this case and concluded that the court of appeals had erred in finding that the couple's consent form did not apply and in granting custody of the remaining embryos to David Litowitz.⁶⁵ The court looked closely at the cryopreservation contract between the Litowitzes and their infertility clinic and decided that because the parties could not reach an agreement, it was proper for the court to determine disposition pursuant to the contract.⁶⁶ It then noted that under the contract, "the remaining preembryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation"⁶⁷ Using the date on which three of the Litowitz embryos had been implanted in a surrogate as its starting point, the court found that more than five years had elapsed.⁶⁸ Hence it determined that, in accordance with the five-year termination provision, the clinic was instructed by the Litowitzes to thaw the two remaining embryos and to prevent them from developing.⁶⁹ If the embryos had been destroyed, the parties' dispute would be moot; however, if they were still in storage, the court would consider their disposition under the cryopreservation contract.⁷⁰ Therefore the court concluded that even absent explicit provisions regarding disposition at divorce, the couple's cryopreservation consent form could and indeed did govern embryo treatment when, as here, they could not achieve a mutual decision.⁷¹

63. *Id.* at 1092–93.

64. *Id.* at 1093.

65. *Litowitz*, 48 P.3d at 271.

66. *Id.* at 267–68; *see also supra* note 60.

67. *Litowitz*, 48 P.3d at 271.

68. *Id.* at 268–69.

69. *Id.*

70. *Id.*

71. *Id.* at 268. The Washington Supreme Court's analysis offers significant support for the proposal in Part IV of this Comment. In suggesting that "[c]ontract interpretation must be based on the intent of the parties," the court continues:

Intent may be discovered . . . from viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

Id. (citations and internal quotations omitted); *see also* discussion *infra* Part IV.

Finally, the New Jersey Supreme Court heard *J.B. v. M.B.*,⁷² in which the divorcing parties disagreed over whether their frozen embryos should be discarded, maintained in storage, implanted, or donated.⁷³ The couple underwent IVF, which resulted in surplus embryos that they decided to cryopreserve.⁷⁴ They had one daughter (either as a result of IVF or through natural procreation) but separated several months later, and the wife filed a divorce complaint seeking a court order regarding the frozen embryos.⁷⁵ The husband demanded that the court compel his wife to permit the stored embryos to be implanted or given to other infertile couples.⁷⁶ While *J.B.*, the wife, certified that she and her husband had never discussed embryo disposition at divorce, *M.B.*, the husband, contended that they had thought seriously about the moral implications of their participation in IVF and had agreed that no matter what happened, the embryos would be utilized.⁷⁷

Despite this conflict in testimony, the New Jersey court did not remand the case for a determination of the parties' intentions at the time they began ARTs. Instead, it concluded that even if the parties could enter into a valid agreement concerning embryo disposition under these circumstances, "a formal, unambiguous memorialization of the parties' intentions would be required to confirm their joint determination,"⁷⁸ and no such instrument existed here. Furthermore, the *J.B.* court agreed with the *Davis* court that the party wishing to avoid procreation generally should prevail in these situations.⁷⁹ Finally, it went on to say that while there are benefits to enforcing embryo disposition directives, agreements executed at the initiation of IVF

72. 783 A.2d 707 (N.J. 2001).

73. *Id.* at 708–14.

74. *Id.* at 710.

75. *Id.*

76. *See id.*

77. *Id.* He suggested that his wife actually came up with the idea of donating the embryos, and his family "certified that on several occasions during family gatherings *J.B.* had stated her intention to either use or donate the preembryos." *Id.* at 711. So even though the court ultimately found no agreement between the disputants, there did appear to be evidence, albeit contradicted, that they indeed had contemplated embryo disposition in light of various contingencies.

78. *Id.* at 714.

79. *See id.* at 716. Noting that *M.B.* can still reproduce even if he is unable to use or donate these particular embryos, the court then suggested that *J.B.*'s "fundamental right not to procreate is irrevocably extinguished if a surrogate mother bears [her] child." *Id.* at 717. This rationalization is problematic, however, in that it does not allow for the possibility that *M.B.* may become sterile. Additionally, it equates procreation with parenthood, prematurely projecting legal obligations (and emotional repercussions) onto *J.B.* in the event these embryos actually are utilized. In focusing on *J.B.*'s "right not to procreate," the court also seems to lose sight of the fact that *J.B.* already is a parent to one child and thus has extinguished this right through her own volition.

should be subject to change by either party up to the point of disposition.⁸⁰ Therefore, the court upheld J.B.'s right to prevent implantation, specifying that the embryos should either be discarded or preserved in storage as long as M.B. paid all the associated fees.⁸¹

III. CURRENT AND PROPOSED APPROACHES AND THEIR INHERENT INEFFECTIVENESS

A. Balancing of Procreational Rights

As the existing cases demonstrate, courts' holdings to date have ultimately appeared to strike a balance in favor of one spouse's right not to become a parent against his or her wishes.⁸² Hence, even if the disputing parties have an agreement governing disposition of their embryos, these decisions suggest that such a contract may not be enforced if it requires implantation in the event of divorce.⁸³ One argument suggests that society benefits from allowing one party to override both parties' contractual intent in order to avoid forced parenthood, which causes psychological strain even if the progenitors have no contact with the resulting offspring.⁸⁴ Another

80. *Id.* at 719. "The public policy concerns that underlie limitations on contracts involving family relationships are protected by permitting either party to object at a later date to provisions . . . that that party no longer accepts." *Id.* Thus, practically speaking, this reasoning appears to render prior agreements ineffective for lack of certainty and to suggest that any agreement to implant following divorce is unenforceable if either party objects to that outcome.

81. *Id.* at 720; see also Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 112 (1999) ("When the couple is unable to agree to any disposition decision, the most appropriate solution is to keep the embryos where they are—in frozen storage."). *But see* Robertson, *supra* note 6, at 467 n.75 (noting that indefinite storage can in reality become a "euphemism for nontransfer or discard"). Carl Coleman suggests that "preserving the status quo . . . makes it possible for the partners to reach an agreement at a later time." Coleman, *supra*, at 112. This conclusion presumes that the parties will actually be able to agree at some point. Yet, as seen in *J.B.*, where disposition was eventually determined by a court, a subsequent accord of this sort seems unlikely.

82. See Trainor, *supra* note 15, at 261–62 (discussing the current trend of performing a constitutional law analysis weighing "one party's fundamental right to procreate" against "the other party's right not to procreate").

83. See discussion *supra* Part II.

84. See Donna M. Sheinbach, Comment, *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, 1025–26 (1999). This contention assumes, however, that genetic parents will actually experience emotional consequences from knowing that their embryos were utilized. Further, "[i]f the non-consenting party simply wants to avoid having custody or financial responsibility, a court could convert the party's status from being the *parent* . . . to being an 'egg donor' or 'sperm donor' without the . . . obligations of parenthood." Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 615 (1998).

author adds: "Irreversibility is the critical factor weighing against forcing an unconsenting IVF participant to become a parent," for the "impact of unwanted parenthood simply is more burdensome and irreparable than the consequences [of] forfeiting use of particular embryos."⁸⁵ Yet these views ignore the fact that in agreeing to disposition terms and in providing for implantation or donation, parties likely contemplate scenarios in which the embryos are used. Through this forethought, they come to terms with any potential outcomes.⁸⁶ Furthermore, any approach aimed at upholding one party's right to avoid procreation is necessarily limited for, as several courts admit, the balance may come out differently if the party seeking implantation has no other means of achieving parenthood.⁸⁷ Indeed, some scholars have suggested that any party desiring to implant the frozen embryos should have to demonstrate "as a threshold matter" that he or she is unable to create new embryos.⁸⁸ Yet others claim that the interests of a party who is no longer able to reproduce should not trump in embryo disposition disagreements, as the party who opposes using the embryos is not responsible for the other party's inability to produce genetic offspring.⁸⁹ However, both the *J.B.* court⁹⁰ and various scholars have alluded to the potential strength of a claim by a party who has become sterile and desires implantation, thus further illustrating the shortcomings inherent in presumptions favoring those who oppose implantation.⁹¹

Especially in situations where the parties initially agreed regarding implantation, it seems unfair to permit one party to change his or her mind

85. Jennifer Marigliano Dehmel, Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1402 (1995); see also Robertson, *supra* note 6, at 480 n.107 (discussing the use of particular, previously created embryos as opposed to later created embryos, and finding no meaningful differences).

86. Additionally, "there is no reason why the party [later] opposing implantation cannot simply choose not to be a parent to any resulting child." Feliciano, *supra* note 19, at 348.

87. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

88. Silver & Silver, *supra* note 84, at 614. When there is no advance directive, "[a]s long as the party wishing to reproduce could create other embryos, the desire to avoid biologic offspring should take priority over the desire to reproduce with the embryos in question." Robertson, *supra* note 6, at 480. At least Robertson suggests striking the balance in favor of the party opposing implantation when there is no prior agreement specifying that the embryos should be utilized (rather than striking this balance even in derogation of agreed-upon advance directives).

89. See Coleman, *supra* note 81, at 83. "Once the mutuality of the endeavor has ended, the fact that one partner is no longer able to have genetic offspring should not give her the right to disregard her partner's objections and appropriate the embryos for her own exclusive use." *Id.*

90. See *J.B. v. M.B.*, 783 A.2d 707, 720 (N.J. 2001).

91. "If the right to reproduce and the right to avoid reproduction are in conflict, favoring reproduction is not unreasonable when there is no alternative way for one party to reproduce." Robertson, *supra* note 7, at 420; see also Robertson, *supra* note 6, at 481 n.109.

subsequently and effectively invalidate that prior agreement.⁹² For example, in *A.Z.*, even though the parties had signed consent forms providing that they would proceed with implantation in the event of separation, the court did not enforce those directives, creating “a disturbing outcome.”⁹³ Absent the legal, financial, and custodial obligations of parenthood, “biologic reproduction without more,”⁹⁴ especially when contemplated by the parties, should not automatically be deemed “such a burden that the original agreement to have reproduction occur should be overridden.”⁹⁵

Some may argue that, even if the party desiring implantation is infertile, adoption is a viable option and that the opposing party, therefore, should prevail in his or her attempt to prevent utilization of the embryos. Yet, as seen in *Davis*, adoption is not always feasible. The Davises were unable to adopt as a couple, and it seems unlikely that Mary Sue Davis would be successful pursuing adoption as a single, divorced person.⁹⁶ As adoption candidates age, they become less attractive to adoption agencies.⁹⁷ Other obstacles include the long waits for children and costs that may be prohibitive for some candidates (particularly those who have already spent large amounts of money on ARTs and divorce proceedings).⁹⁸ Using cryopreserved embryos also may be more desirable than adopting because it establishes a genetic tie between the individual and the child.⁹⁹ Thus, adoption does not seem to be

92. See Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1069 (1996). “To allow the person who does not wish to become a parent to play the trump card is to exercise an extremely powerful veto in the life of the other person when there initially was mutual consent.” *Id.* “Because that initial consent existed, there is no good reason to give presumptive value to the person who has changed his or her mind.” *Id.*

93. Donna A. Katz, Note, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL’Y & L. 623, 662 (1998). “First, [this outcome] completely negates the utility of such agreements, since they are entered into in case the unexpected happens Additionally, since the agreement addressed the issue of . . . [separation], it certainly does seem to have contemplated both the idea of divorce and that of delayed implantation.” *Id.* Moreover, the *A.Z.* court considered the fact that the parties already had children, but “[i]t simply is unclear why past procreative success should determine future procreative rights.” *Id.* at 665–66; cf. discussion *supra* note 79.

94. Robertson, *supra* note 7, at 420.

95. *Id.*; see also Katz, *supra* note 93 n.192 (suggesting that “reproduction” occurs at conception, so that if implantation occurs after divorce, only gestation takes place outside the marriage, as it also can with coital reproduction if the couple divorces during pregnancy).

96. For further discussion, see *supra* note 32.

97. Katz, *supra* note 93, at 651 (citation omitted).

98. *Id.* at 651–52.

99. See Guzman, *supra* note 7, at 248. “[A]doption represents an imperfect response . . . whereas the frozen embryo embodies [the] ultimate solution short of perfection. The individual or couple establishes some physical connection . . . to the child The biological tie reinforces the traditional relationship if not the traditional method.” *Id.* Whereas some may contend that this argument places too much emphasis on genetic parenthood, it nevertheless makes sense,

an efficacious option for parties who may be barred from implanting their frozen embryos in order to protect their ex-spouses' right not to become parents. In light of these unfair consequences, striking the balance to avoid forced procreation seems unjustified, especially when couples provide for implantation in their advance agreements.

B. Inalienable Rights Approach Allowing for Preference Changes

Carl Coleman advocates an inalienable rights approach based on the idea that even if parties craft directives for various contingencies, they should be free to change their minds as circumstances change.¹⁰⁰ He suggests that in order to protect parties' rights to "make decisions consistent with their contemporaneous wishes, values, and beliefs,"¹⁰¹ they should be permitted to consent or to withhold consent regarding embryo disposition up until the point at which the disposition decision is carried out.¹⁰² However, this approach provides little incentive for parties to think through various contingencies when they first participate in ARTs and decide to cryopreserve excess embryos, for they know that any plans they make may be revoked if either one of them experiences a change of heart. Coleman argues that the exercise of thinking through possible occurrences will nevertheless be beneficial.¹⁰³ However, such thought processes hardly will aid in resolving disposition disputes if any manifestation of the parties' contemplation is unenforceable.

C. Assigning Decisionmaking Power According to Reproductive Differences

Still others propose that disposition decisions should be allocated based on the parties' relative contributions to the procreative process. One

especially within the context of people undertaking great effort and expense in order to produce genetic offspring.

100. See Coleman, *supra* note 81, at 126. This argument is "grounded in considerations of public policy, not constitutional law. Thus, the point . . . is that enforcing a disposition decision over either partner's objection would be bad public policy." *Id.* at 81 n.137. One must consider, though, whether *not* enforcing disposition decisions also constitutes bad policy.

101. *Id.* at 88.

102. *Id.* at 88–89. Coleman maintains that his approach "ensures that, as a person's identity changes over time, she will not be forced to live with the consequences of prior decisions that are no longer consistent with the values and preferences of the person she has become." *Id.* at 96. He goes on to state that most couples do not even realize that they may have to make disposition decisions until IVF clinics alert them. *Id.* at 120. Yet this idea seems to give too little credit to IVF/cryopreservation consumers, who may be savvy and thoughtful enough to make binding decisions.

103. *Id.* at 110.

author suggests that courts should give greater weight to the wishes of the party whose fertility problem led the couple to utilize ARTs in the first place.¹⁰⁴ While this approach may appear to create more just outcomes when divorcing couples disagree about embryo disposition, it is unhelpful in situations where both parties have medical conditions that contributed to their reproductive difficulties.

In a variation on this idea, the “sweat equity” theory awards greater authority to the woman as the IVF participant who endures greater physical burdens and discomfort.¹⁰⁵ This argument proceeds on the idea that because a woman’s ability to reproduce deteriorates with time, “[i]n most cases, if the woman is denied custody of the frozen embryos, she will face a declining possibility of becoming a parent.”¹⁰⁶ Thus, courts should think twice before preventing implantation and ruining a woman’s chances of becoming a genetic parent. However, basing disposition decisions on reproductive differences seems basically unfair. Also, this approach does not appear to resolve situations in which the woman is the party seeking embryo destruction rather than implantation.¹⁰⁷ Indeed, it seems difficult, if not impossible, to rely on a woman’s greater physical investment and declining fertility to justify *not* using the stored embryos.

D. Implying Contracts from Parties’ Decisions to Undergo IVF

In addition to the frameworks already discussed, another approach uses principles of implied contract formation to suggest that a couple’s participation in IVF constitutes an agreement to pursue reproduction.¹⁰⁸ Thus, because the parties agreed to reproduce, courts should permit implantation whenever either party seeks it.¹⁰⁹ The implied-contract approach places great

104. See Katz, *supra* note 93, at 625 (stating that the party plagued by infertility “should be given primary consideration in determining which party retains custody of frozen preembryos”).

105. See Dehmel, *supra* note 85, at 1399. Robertson notes that “a man would seldom need [the] embryos to reproduce, because it is relatively easy for him to produce others with a new partner. On the other hand, depending on how one views the burdens on women of undergoing IVF, the agreement to . . . [discard] could always—or never—be overridden by the woman.” Robertson, *supra* note 7, at 416 n.30.

106. Colker, *supra* note 92, at 1066. Colker maintains that “reproductive differences between women and men should be relevant to the disposition of disputes.” *Id.* at 1063.

107. See, e.g., J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

108. See Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 828–31 (1992); see also Dehmel, *supra* note 85, at 1399 (discussing Trespalacios’s theory). “This argument thus equates the exchange of gametes and creation of the preembryo with creation of a contract . . .” *Id.*

109. Trespalacios, *supra* note 108, at 807. Mario Trespalacios’ framework “assumes that the biological donors mutually decided to undergo IVF, thereby entering into a contract . . . to create

weight on the parties' original intentions, asserting that in order to achieve the fairest outcome, those plans should be enforced.¹¹⁰ Moreover, it does not require a formal memorialization of the parties' wishes, but rather recognizes a binding agreement simply through their involvement in the ARTs process.¹¹¹ The danger inherent in this interpretation, though, is that by looking only to the parties' participation in IVF as evidence of intent, it neglects to examine other indicators of the parties' wishes and, perhaps baselessly, presumes intent to implant no matter what circumstances the parties face. In contrast to the approach balancing procreation rights, which tends to err on the side of the party opposing implantation, this framework provides for embryo utilization in every scenario.¹¹² Yet some critics feel that donation of gametes should not "be taken as an irrevocable commitment to reproduction in the context of IVF, where other positive steps must be taken for pregnancy to occur."¹¹³ So although it does place more focus on the parties' intentions, the implied contract theory mandating embryo implantation also may be presumptively unfair, because it concentrates only on those intentions as they are manifested by the parties' participation in ARTs.

IV. A CONTRACTUAL APPROACH AIMED AT FINDING AND HONORING PARTY AGREEMENTS

A. Resolution Through the Utilization of Contract Law Principles

Given the innate inadequacies of the aforementioned approaches, courts should turn to the law of contracts for assistance in resolving disputes between divorcing progenitors. Though some may argue that contracts, an area of law traditionally associated with commercial activity, is not appropriate

pre-embryos for the purpose of implantation, with the ultimate goal of achieving live births." *Id.* at 827.

110. See *id.* at 818 (stating that "a contract-oriented approach seeking to protect the more vulnerable party will best achieve an equitable result, as well as most closely conform to the intent of the parties"); see also Silver & Silver, *supra* note 84, at 612. "If a parental intent rule applied, the embryos would always be implanted. The partner who wanted the embryos born would always win . . ." *Id.*

111. See Trespalacios, *supra* note 108, at 829. "[T]hrough the bilateral exchange of promises to complete the IVF process by the exchange of gametes for the engineering of a pre-embryo, the parties create a contract whether or not they have signed a written agreement." *Id.*

112. Trespalacios feels that "the attempt to balance procreative rights does not help the courts reach a determination in these cases." *Id.* at 824. Perhaps his dissatisfaction lies in the fact that, rather than truly balance the competing interests, courts appear to lean per se towards preventing implantation. Indeed, "the 'joint control' determination virtually assures that the pre-embryo will not be implanted." *Id.* at 817.

113. Robertson, *supra* note 6, at 475 n.93.

for the very intimate context of embryo disposition,¹¹⁴ this body of law, if applied consistently, could provide courts with a sensible framework with which to approach these disagreements.¹¹⁵ Additionally, if parties know that courts will look at evidence of the conversations and thought processes they undertake prior to cryopreserving excess embryos, they likely will have more incentive actually to consider ahead of time how they wish to treat their embryos in the event of various contingencies. Moreover, if clinics include explicit instructions on consent forms that specify the legal implications of their choices, parties will be aware of any applicable law. One scholar notes that allowing parties to contract with respect to embryo disposition affords them more freedom of choice even though it means that they may be bound once the anticipated circumstances occur.¹¹⁶ Therefore, courts should first and foremost employ contract principles in deciding cases regarding embryo disposition. Rather than merely paying lip service to the idea that agreements between progenitors should be enforced, but in truth basing their rulings on upholding the “right not to procreate,” courts should validate disposition contracts. They can do so not only by recognizing formal, written memorializations of the parties’ desires, but also by examining the facts to determine whether the parties did contemplate and agree to certain directives.¹¹⁷

At a minimum, courts hearing divorce-precipitated embryo disputes should look at the parties’ written agreements, if any, to determine how to dispose of the embryos under the circumstances. If infertility clinics ask couples to complete consent forms prior to undergoing cryopreservation and

114. See, e.g., *infra* notes 133–147 and accompanying text; see also Ellen H. Moskowitz, *Some Things Don’t Belong in Contracts*, NAT’L L.J., June 8, 1998, at A25. “Contracts put the power of the state behind some, but not all, private promises, and they have not governed the structure of potential or actual family relationships.” *Id.* Yet Moskowitz goes on to suggest that couples bring their disputes to courts, “which would require individualized assessments that would consider the couples’ unique circumstances . . . or any advance plans the couple had made.” *Id.* She seems to suggest, then, that it actually may be acceptable for courts to recognize couples’ prior directives respecting embryo treatment.

115. Indeed, regarding disposition instructions, Robertson suggests: “When disputes arise, courts should enforce these directives as other contracts would be enforced.” Robertson, *supra* note 7, at 424.

116. See *id.* at 415 & n.29 (likening such directives to living wills in this regard). Robertson believes that “it is essential that gamete providers have the power to make binding agreements for future disposition of embryos,” so that they retain decisionmaking authority over these personal dilemmas. *Id.* at 415; see also Trainor, *supra* note 15, at 270 (discussing the Kass court’s suggestion that “knowing that advance agreements will be enforced underscores the seriousness of the consent process”).

117. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (“An agreement is a manifestation of mutual assent on the part of two or more persons.”). Thus, convincing evidence of promises exchanged in the course of party discussions and deliberations perhaps may prove the existence of agreements.

those forms require the couples to state their disposition preferences in light of certain contingencies, those elections can and should govern.¹¹⁸ Enforcing prior agreements provides incentives for the clinics themselves to proffer relevant information and well-drafted consent forms that encourage their customers to plan carefully.¹¹⁹ Indeed, if program guidelines and customer choices are not recognized in courts of law, programs may be forced to store the embryos indefinitely when divorcing parties disagree. This lack of certainty may deter both potential participants and medical professionals from freezing embryos.¹²⁰ In general, courts should do their part to motivate clinics to share acquired facts with couples and thereby persuade them to ponder sincerely the consequences of their decisions to cryopreserve excess embryos.¹²¹ Moreover, when progenitors and clinics execute consent form provisions and those directives are not enforced, their reliance on the forms and attention to the decisionmaking process are invalidated, perhaps broadening the range of legally actionable issues.¹²² Couples dealing with the

118. See Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 939 (1999) (“[T]he contract that originally provided the basis for a legal relationship between the couple and the infertility clinic may now also serve to allocate the scope of decision-making between the partners.”). Paula Walter also notes that “[b]y encouraging the enforceability of a written document,” parties are motivated to think earnestly about the repercussions of any advance directives they specify. *Id.* at 964. For example, the New York Task Force on Life & the Law, advising fertility clinics in that state, suggests that before they create embryos using IVF, the progenitors should indicate their disposition instructions “in the event of death, permanent loss of decision-making capacity, divorce, termination of the facility’s storage period, or loss of contact with the storage facility.” TASK FORCE ON LIFE & THE LAW, N.Y. STATE DEP’T OF HEALTH EXECUTIVE SUMMARY OF ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (rev. 1999), at <http://www.health.state.ny.us/nysdoh/taskfce/execsum.htm>.

119. See Robertson, *supra* note 7, at 416 (noting that advance agreements provide “the certainty needed for efficient operation of embryo freezing programs”); see also AM. SOC’Y FOR REPRODUCTIVE MEDICINE, DISPOSITION OF ABANDONED EMBRYOS (July 20, 1996) (“Because of the uncertainties that exist . . . programs should require each couple contemplating embryo storage to give written instruction concerning disposition of embryos . . .”), at <http://www.asrm.com/Media/Ethics/abandon.html>.

120. See Robertson, *supra* note 7, at 417. It would certainly be problematic to allow the fallout from particular decisions to prevent already vulnerable people from seeking solutions to their fertility problems.

121. “If clinics want to avoid litigation, and the parties want to actualize their intentions, a full and frank discussion would be beneficial to all parties before beginning the IVF process.” Colker, *supra* note 92, at 1079; see also AM. SOC’Y FOR REPRODUCTIVE MEDICINE PRACTICE COMMITTEE, 1997, REPORT: ELEMENTS TO BE CONSIDERED IN OBTAINING INFORMED CONSENT FOR ART (1997) (urging clinics to address the following topics in obtaining informed consent for the cryopreservation of embryos: description of the relevant procedures, potential risks, and disposition of frozen embryos in the event of various occurrences, including “[d]ivorce or dissolution of partnership”), at <http://www.asrm.org/Media/Practice/informedART.html>.

122. See Robertson, *supra* note 7, at 418 (suggesting that “legal recognition [of advance directives] will minimize disputes and the cost of resolving disputes”). “Surely enforcement of

uncertainties of assisted conception should be able to trust that any decisions they make regarding embryo disposition will be acknowledged and upheld by courts.¹²³ Even if the parties later dispute whether these prior provisions should be enforced, their changed preferences cannot negate the fact that they did agree to and specify what should be done with their embryos under certain conditions. Thus, these agreements should serve as powerful evidence and eliminate protracted battles revolving around conflicting stories.¹²⁴

Even in the absence of a written agreement, though, courts should look for indications that parties reached an understanding regarding disposition of their embryos upon divorce. For example, in *J.B.*, there was a substantial factual question as to whether the couple had contemplated and discussed what to do with their embryos should they divorce.¹²⁵ Yet the court dismissed this issue without further investigation, stating only that there was no formal memorialization embodying the parties' intentions.¹²⁶ Employing a contracts analysis, however, reveals that parties can create binding agreements without executing a precise instrument, provided they exchange promises. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹²⁷ Furthermore, such promises may "be stated in words either oral or written, or may be inferred wholly or partly from conduct."¹²⁸ Therefore, it seems plausible that parties undergoing

prior agreements for disposition of embryos is less likely to generate litigation and more likely to resolve it efficiently when it does arise." *Id.*

123. "Indeed, making [these agreements] binding is essential to provide the advance certainty . . . necessary for couples and IVF programs to proceed with embryo freezing." Robertson, *supra* note 6, at 466.

124. Indeed, in cases where the parties did seriously contemplate various contingencies and reach agreements regarding embryo disposition in light of those contingencies, it would be best for their written memorializations to be integrated, or complete, agreements. Then, the parol evidence rule would apply, focusing interpretation at trial on "the meaning of the terms of the writing . . . in the light of the circumstances," RESTATEMENT (SECOND) OF CONTRACTS §212 (1981), and precluding introduction of evidence pertaining to contemporaneous oral agreements and previous oral or written agreements, see 4 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 631, at 951-53 (Walter H.E. Jeager ed., 3d ed. 1961). Thus, although the rule "does not eliminate the need to interpret the agreement and give contextual meaning to its admitted terms," ARTHUR ROSSETT & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION 543 (6th ed. 1999), it does serve to focus a court's inquiry by keeping out evidence that could complicate and prolong the proceedings.

125. See *J.B. v. M.B.*, 783 A.2d 707, 710-12, 714-15 (N.J. 2001).

126. See *id.* at 714.

127. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

128. *Id.* § 4. The comment to this section elaborates:

Contracts are often spoken of as express or implied. The distinction involves . . . no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent

IVF, and cryopreservation in particular, may reach an understanding regarding disposition of their embryos in certain scenarios. Then, they may exchange promises that they will cryopreserve the embryos and abide by their agreed-upon directives when and if the anticipated contingencies occur. Moreover, in proceeding with the creation of embryos and the freezing process, they manifest their commitment to their agreement.¹²⁹ Such contracts to dispose of excess embryos in a certain manner should also meet enforceability standards, as courts may mandate specific performance of the parties' promises if they ultimately disagree, resulting in breach.¹³⁰

Critics may argue that an agreement expressed orally or through conduct may still be unenforceable because it violates the Statute of Frauds. The Statute of Frauds requires that any promise "that is not to be performed within one year from the making thereof"¹³¹ must be in writing. However, this provision applies only to those contracts "whose performance cannot possibly be completed within a year,"¹³² and therefore does not appear applicable to the situations of couples participating in IVF and cryopreservation. First, it is possible that the parties may make disposition decisions, cryopreserve their embryos, and subsequently divorce, thereby activating their advance directives, all within the span of one year. Furthermore, if the parties promise to abide by their disposition agreement in exchange for one another's acquiescence to the freezing and storage of excess embryos, that endorsement of cryopreservation will indeed occur within one year of their reaching an understanding.

Several of the existing cases suggest that contracts regarding embryo disposition may also be invalidated on the grounds that they violate public policy.¹³³ This idea reflects social concern about the commodification of family relationships and reproduction¹³⁴—a concern that "contracts for the disposition of frozen embryos undermine important societal values about

may be manifested by words or other conduct . . . so intention to make a promise may be manifested in language or by implications from other circumstances . . .

Id. § 4 cmt. a.

129. See *id.* §§ 17–19 (noting that formation of a contract requires a bargain in which each party makes a promise or begins or renders performance).

130. See *id.* § 8 ("An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available . . .").

131. *Id.* § 110.

132. *Id.* § 130 cmt. a.

133. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

134. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 335 ("The fear is that impersonal reproduction, involving technological assistance . . . and transfers of reproductive entities and services, results in the commodification, and thus the devaluation, of human life.").

families, reproduction, and the strength of genetic ties.”¹³⁵ Commodification criticisms are particularly prevalent with respect to surrogacy contracts, in which a woman typically agrees to carry a couple’s child (and sometimes also to contribute her gamete to the creation of the embryo) in exchange for a fee.¹³⁶ Critics thus equate this process with “baby selling,” and/or suggest that it devalues human life by fostering the conceptualization of babies as commodities to be bought and sold.¹³⁷ Yet while surrogacy contracts entail one party paying the other to assist in reproduction and ultimately in the creation of a child, the same is not true of couples’ agreements regarding embryo disposition, which involve no monetary exchange at all.¹³⁸ These contracts, in contrast, simply represent the parties’ attempt to anticipate and to provide for potential contingencies. Furthermore, embryo disposition agreements do not inherently exploit or assign value to the relative contributions of the gamete donors; rather, these contracts simply specify treatment of already created embryos.¹³⁹

Embryo disposition agreements also differ from surrogacy contracts in that they are accords between two parties who, at least at the time of agreement, are engaged in an intimate relationship. Together, they have faced fertility problems, undertaken ARTs, and decided to cryopreserve any surplus embryos resulting from their participation in IVF. It therefore seems unlikely

135. Coleman, *supra* note 81, at 57. “[R]equiring couples to make binding decisions about the future disposition of their frozen embryos undermines a central aspect of procreative freedom.” *Id.* Yet it is difficult to support this view when couples freely choose to make such binding agreements in an effort to avoid subsequent uncertainty. See *supra* note 116 and accompanying text.

136. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2307 (1995).

137. See Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 143 (1986) (“The surrogate, at least, usually does not create a child merely because she wants it for its own sake, but because she wants to earn a fee from its production.” (citation omitted)). See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (equating paid surrogacy with baby selling).

138. Even within the surrogacy context, “[t]he presence of money does not mean that babies are being sold, but rather that the services of baby production are being sold.” Shoshana L. Gillers, Note, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 714 (2001). “Money itself is no stranger to reproduction. Routine doctor visits, hospital services, not to mention fertility treatments, all cost money.” *Id.*

139. Conversely, critics argue that in arranging for the purchase of women’s reproductive abilities, surrogacy agreements may commodify women, their personal characteristics, and their reproductive services. See, e.g., Radin, *supra* note 137, at 1932–35. However, others contend that surrogates choose freely to “be surrogate mothers, as a form of generosity. They do not feel that their role diminishes their personal integrity.” Gillers, *supra* note 138, at 714. Additionally, “[t]here is no evidence that surrogacy as currently practiced actually causes conceptual changes of objectification and commodification.” Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2361 (1995). It therefore seems even less likely that recognition of embryo disposition agreements would lead to such “conceptual changes.”

that they would approach disposition decisions regarding their frozen embryos in a detached, disrespectful manner.¹⁴⁰ Instead, rather than treating their embryos as expendable commercial entities, such couples likely would make disposition decisions only after careful, compassionate consideration of various circumstances that could arise and alter their situations. Also, presumably, they would memorialize their agreements in forms that reflected their thoughtful deliberations, rather than the structure of standard commercial contracts, which would be inappropriate and unhelpful in the context of embryo disposition.¹⁴¹

Last, enforcing the parties' agreed-to directives helps to preserve the private character of embryo disposition by permitting the parties' desires to prevail. It is difficult to argue that allowing a court to make its own assessment regarding a couple's embryos is more respectful than allowing the couple's personal agreement to govern. This is especially true given that the former approach creates contentious, drawn-out battles (involving additional parties and legal theories) that seem to devalue the embryos in ways that contractual enforcement does not.¹⁴²

Moreover, in an age marked by dynamic technological capabilities and parties that are not only willing but also are anxious to avail themselves of those capabilities, public policy arguments based on unsubstantial, inapplicable commodification concerns have little force. In reality, use of ARTs is, at least to some extent, a commercial activity, and it seems impractical to declare any agreements stemming from ARTs unenforceable per se because they supposedly contradict public policy. This is especially true given that, as noted above, enforcing parties' disposition contracts promotes the realization of their expectations and thus proves to be a more respectful solution.¹⁴³

140. Similarly, one author who writes in favor of enforcing surrogacy contracts asks: "[O]nce any weight is given to the sense of frustration and quiet desperation that drives couples to a surrogacy decision, how could one condemn the transaction on the ground that it glorifies base instincts and practices?" Epstein, *supra* note 136, at 2319.

141. For a parallel argument in the surrogacy context, see *id.* at 2308 ("[T]he contracting process for surrogates, and the terms of a surrogacy contract, take on a form that is radically different from the ordinary contract of sale for a fungible good or service.").

142. Indeed, "the question now becomes whether legal enforcement of intentions about procreation and parenthood is feasible and desirable." Shultz, *supra* note 134, at 346. Further, although parties may make conflicting claims regarding the exact terms of their agreements, courts will be able to rely definitively on contract principles to guide them in interpreting and upholding these accords. Thus, their inquiries will become simpler and more efficient.

143. "Using contract law . . . draws attention away from the embryos and to the original intent of the parties." Feliciano, *supra* note 19, at 345; see also Robertson, *supra* note 7, at 414 (stating that allowing couples to make advance agreements gives them the opportunity "jointly to determine their reproductive futures"). "A main reason for enforcing prior directives for frozen embryos is that it maximizes the gamete providers' procreative liberty by giving them control over future disposition of embryos . . ." *Id.* at 415.

Though the *Restatement (Second) of Contracts*¹⁴⁴ provides for unenforceability on grounds of public policy, invalidation in accordance with this provision requires that the public policy interest clearly outweigh the interest in enforcing the contract terms: “In weighing the interest in the enforcement of a term, account is taken of (a) the parties’ justified expectations, [and] (b) any forfeiture that would result if enforcement were denied.”¹⁴⁵ Certainly, if parties provide for specific treatment of their embryos and expect that their directives will be carried out, they will experience frustration of purpose if courts invalidate their agreements.¹⁴⁶ Hence, it seems difficult to imagine how inapposite policy concerns could or should take precedence over the parties’ own determinations.¹⁴⁷

B. Addressing Potential Pitfalls of the Contractual Framework

Some critics cite the problem of adhesion contracts in their objections to using the contractual approach, particularly with respect to written consent forms provided by infertility clinics.¹⁴⁸ Professor John Robertson notes: “Clearly, such an agreement must be knowingly, intelligently, and freely made—the minimum requirements for legally binding informed consent.”¹⁴⁹ And, if certain clinics are unwavering in making customers adhere to their rules and procedures, couples should be free to “shop around” for programs that allow them more flexibility in drafting their disposition directives.¹⁵⁰

144. See RESTATEMENT (SECOND) OF CONTRACTS (1981).

145. *Id.* § 178.

146. Additionally, “forfeiture” in its most technical sense will occur if the parties provide for implantation or donation in the event of divorce and, by choosing not to enforce their contract, courts actually mandate that the embryos be destroyed or stored indefinitely.

147. In fact, the very personal, intimate nature of these scenarios (often cited by those who oppose using contract law) supports the idea that the parties should be free to agree without interference from the state. See *supra* note 142 and accompanying text.

148. See, e.g., Walter, *supra* note 118, at 957. Robertson also suggests that “IVF programs and embryo banks may have such monopoly power that the conditions they offer give couples little real choice, making them the equivalent of adhesion contracts.” Robertson, *supra* note 6, at 465.

149. Robertson, *supra* note 6, at 465 n.73. He continues: “[IVF clinics] should consider appointing special consent counselors or auditors to monitor the couple’s understanding, and consult IRB’s [Internal Review Board’s] or institutional ethics committees to improve their consent procedures.” *Id.*

150. Market preferences should then motivate more stringent clinics to alter their regulations and encourage those clinics whose forms lack specific disposition provisions to include them. See *supra* notes 119, 121 and accompanying text. Currently, many clinics’ informed consents only include general paragraphs urging participating couples to consider that embryo disposition may be determined in a court of law if they ever divorce. See, e.g., ASSISTED REPRODUCTIVE TECHNOLOGIES PROGRAM, CENTER FOR HUMAN REPRODUCTION, CRYOPRESERVATION OF HUMAN EMBRYOS DESCRIPTION, EXPLANATION AND INFORMED CONSENT 4 (2001) (“We fully understand that . . . should we pursue dissolution of our marriage, the custody of the embryos shall be decided in a court of law.”), http://www.centerforhumanreprod.com/pdf/cryo_human_embryos.pdf

Indeed, it appears that some clinics already permit participants to write in any provisions that are not included on the standard consent forms.¹⁵¹ Thus, the adhesion contract complaint does not emerge as a viable hindrance to adopting a contracts-oriented approach for resolving embryo disposition issues.¹⁵²

Another criticism of enforcing couples' prior agreements is that contingencies, such as divorce, that arise constitute changed circumstances that render the contracts unenforceable.¹⁵³ One author asserts that "the decision to procreate is not made in a vacuum, and when circumstances change so drastically as with the dissolution of the donors' marriage, any implicit agreement . . . necessarily is void."¹⁵⁴ This argument proceeds on the notion that even though couples may provide for various contingencies while they are still together, they can never appreciate fully how they will feel about embryo disposition upon divorce.¹⁵⁵ Indeed, surveys of couples that have stored frozen embryos suggest that they may be prone to changing their minds while their embryos remain frozen.¹⁵⁶ However, parties' potential for altering their wishes should not be relied upon to invalidate their advance agreements.¹⁵⁷ The fact is that in providing for various contingencies, they do

(last updated Apr. 24, 2001); DIVISION OF REPRODUCTIVE ENDOCRINOLOGY AND INFERTILITY, OREGON HEALTH SCIENCES UNIVERSITY, FREEZING (CYROPRESERVATION) OF EMBRYOS INFORMED CONSENT (2001) (suggesting that participants' decisions regarding disposition of their embryos must be joint, except where disposition may be affected by divorce), <http://www.fertilityoregon.com/forms/Cryocons.pdf> (last updated Feb. 7, 2001); DIVISION OF REPRODUCTIVE ENDOCRINOLOGY & INFERTILITY, UNIVERSITY OF ARKANSAS FOR MEDICAL SCIENCES, INFORMATION PACKET AND CONSENT FOR WIFE AND HUSBAND 16 (2001) ("Should you get a divorce . . . the disposition of the frozen embryos might be determined in a court of law. You should consider this issue very carefully and obtain expert legal advice if necessary."), <http://www.uams.edu/obgyn/infertility/IN%20VITRO%20FERTILIZATION2.doc>.

151. See, e.g., *supra* note 48 and accompanying text. Perhaps even those clinics whose forms do not plainly provide space for participants to add directives may still allow their customers to revise by writing on the forms or by crossing out particular language and rewriting it. See *id.*

152. "[A]s long as the parties are informed and told that other programs may offer less rigorous conditions, the bargaining power of IVF programs should not invalidate all dispositional agreements . . ." Robertson, *supra* note 7, at 423.

153. See Trainor, *supra* note 15, at 253. "Substantial changes in circumstances, such as divorce or death, may arise that come into serious conflict with the donors' original contractual intent." *Id.*

154. Dehmel, *supra* note 85, at 1400.

155. See Feliciano, *supra* note 19, at 343 (suggesting that "no agreement can possibly anticipate the full range of possibilities that could arise after the cryopreservation"); see also Robertson, *supra* note 7, at 419 (discussing "the possibility of unfairness that could arise when a party's circumstances have changed").

156. In a study of couples with frozen embryos: "Of the 41 couples that had recorded both a pre-treatment and post-treatment decision about embryo disposition, only 12 (29%) kept the same disposition choice." *What Do Patients Want to Do with Excess Embryos?*, AM. SOC. REPROD. MED. BULL., Oct. 17, 2001, at <http://www.asrm.org/Washington/Bulletins/vol3no37.html>.

157. "[A]dvance agreements for disposition of embryos raise few problems of foreseeability or changed circumstances different from those that arise in a vast array of other transactions which

contemplate their feelings,¹⁵⁸ and if they know that their contracts will be enforced, they likely will have greater incentive truly to project themselves into potential situations and to ponder carefully the most desirable outcomes for their embryos.

CONCLUSION AND APPLICATION OF THE CONTRACTUAL FRAMEWORK

Using contract law to resolve divorce-precipitated disposition disputes therefore emerges as a sensible, efficacious, and fair method. Though existing judicial decisions have hinted at the helpfulness of relying on prior agreements between the disputing progenitors, they appear to have shied away from a full and thorough application of contract principles. In the absence of (or perhaps even in spite of) formal written instruments, they have declined to recognize and enforce mutual understandings reached by the parties prior to undertaking cryopreservation.¹⁵⁹ However, in accordance with basic doctrines of contract formation and in an effort to honor the parties' original expectations, courts should look for indicia of binding agreements other than explicit memorializations.¹⁶⁰ Such factual determinations are especially critical when the parties present conflicting evidence regarding their deliberations (or lack thereof).

For example, the *J.B.* court might have reached a different holding had it investigated M.B.'s claims that he and his ex-spouse agreed that any unused embryos would be used by J.B. or donated upon the dissolution of their marriage. His statement appeared to be supported by independent certifications from family members as well as information regarding his religious beliefs.¹⁶¹ Thus, the court should have initiated a thorough inquiry into

are held binding, despite a changed situation that makes the original agreement now undesirable to one of the parties." Robertson, *supra* note 7, at 420; see also Shultz, *supra* note 134, at 349 ("Parenthood is not the only matter about which feelings and preferences change. Enforcement of promises occurs precisely because people change their minds about performing obligations they have assumed.").

158. See Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos*, 7 B.U. PUB. INT. L.J. 315, 328 (1998) (discussing the *A.Z.* case). "In essence the 'changed condition' . . . was the couple's divorce, exactly the condition for which the informed consent form was designed to provide a contingency plan." *Id.*

159. See discussion *supra* Part II.

160. See Walter, *supra* note 118, at 947 (discussing the *Kass* court's acknowledgment that party intentions may be inferred "from all factual circumstances as well"); see also discussion *supra* note 71.

161. See *J.B. v. M.B.*, 783 A.2d 707, 710–11 (N.J. 2001). Specifically, M.B. asserted that, as a Catholic, he was troubled by the IVF procedure in general. *Id.* at 710. Thus, he claimed that he and J.B. "had many long and serious discussions regarding the process and the moral and ethical

whether the parties did exchange promises and thereby create a binding contract. The parties could have presented evidence to support their respective contentions, including any witnesses to their discussions relating to IVF and cryopreservation and any evidence of their personal hopes and expectations, such as written correspondence, journal entries, or conversations with others. Moreover, if the lower court that initially heard this dispute had performed such fact-finding, it might have preempted the protracted litigation that occurred, ultimately reaching the highest state court.¹⁶²

Even in cases where the parties have executed written documents, courts should vigorously investigate whether such documents govern embryo disposition in the event of divorce. To illustrate, though the parties in *A.Z.* executed several consent forms with respect to their cryopreserved embryos, the court there declined to enforce the disposition instructions provided in the consents.¹⁶³ It based its decision, at least in part, on the fact that the consents referred to "separation" rather than divorce in particular.¹⁶⁴ However, if the court had been focused on analyzing this conflict from a contractual perspective, it should have looked at evidence of the meaning of "separation" within the particular context. That is, it should have probed the parties' understanding of this term as well as the meaning attached to it and conveyed by the clinic, the drafter of the form. Additionally, the court should have inquired into the parties' intentions regarding their consent form and the occurrences that would trigger its application. Specifically, it should have examined whether, in signing subsequent blank forms, the husband intended for the earlier directives specifying implantation at "separation" to remain in effect.

Granted, contract enforcement may sometimes be precluded if the terms come into conflict with other legal principles.¹⁶⁵ Certainly, courts would need to exercise caution in situations where the parties agreed to implant in the wife's uterus and the wife no longer desired that outcome.¹⁶⁶ Yet, presumably, the couple's initial intention to implant could still be satisfied through the use of a surrogate or through donation to another infertile couple.

repercussions." *Id.* M.B. contended that they "agreed that no matter what happened the eggs [sic] would be either utilized by [them] or by other infertile couples." *Id.*

162. See *supra* note 142 and accompanying text.

163. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056-57 (Mass. 2000).

164. See *id.* at 1057; *supra* note 47 and accompanying text.

165. An example would be an agreement between J.B. and M.B. mandating implantation only in J.B., who ultimately wanted to prevent implantation when the parties eventually divorced.

166. See Robertson, *supra* note 7, at 419 n.37, 422 n.47. "Such an agreement probably would not be enforceable because of the unwanted intrusion on the woman's body." *Id.* at 422 n.47.

Also, admittedly, even if courts do employ the contractual approach and examine whether the parties achieved mutual assent, there will be situations in which the parties did not contemplate divorce or decide on an appropriate dispositional outcome. In those cases, courts may have to hearken back to earlier decisions and weigh the parties' relative interests. However, if courts begin to apply contract principles to their resolution of embryo disputes, couples utilizing cryopreservation services hopefully will be encouraged to discuss frankly their options and to provide for contingencies like divorce ahead of time. Presumably, IVF/cryopreservation clinics will become aware of courts' contracts-based determinations and inform their clients accordingly, advising them to reach mutual understandings with respect to embryo disposition.¹⁶⁷ Further, if they know that their advance directives will be enforced, progenitors will exercise more care in pondering these situations and may even become savvier in selecting their IVF programs. Thus, if courts use contract principles to make sense of this very unsettled, controversial area of law, they should succeed in minimizing the scope and number of disputes that go to trial while also, and more importantly, honoring the parties' intentions.

167. Compare this projection with clinics' current clauses urging participants to consider that their disagreements may be resolved in court, but neither offering clarification regarding how courts will make such rulings nor recommending that the parties agree to disposition directives in advance. See discussion *supra* note 150.
