EMBRYO DISPOSITION, DIVORCE & FAMILY LAW CONTRACTING: A MODEL FOR ENFORCEABILITY

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Abstract

Courts, legislatures, and scholars have struggled with how to resolve disputes between progenitors of cryopreserved embryos in the event of divorce. This Article considers whether contracts entered into by the couple regarding disposition prior to divorce should be enforced and, if so, under what circumstances. The Article answers this question by taking a multidisciplinary perspective, incorporating insights from the social science literature, and by situating embryo disposition contracts in the broader context of other family law contracts, including donor, surrogate, co-parenting, premarital and postmarital contracts, with special consideration of the gender issues embedded in these approaches. The Article argues that existing treatment of these various family law contracts lends ample support for finding embryo disposition contracts enforceable, but also demands that embryo disposition contracts satisfy certain procedural protections to ensure careful consideration and thorough understanding of the complexities of the issue by the parties.

INTRODUCTION

By some estimates, nearly half a million cryopreserved embryos are currently in storage in the United States.[1] Given the high prevailing divorce rate, disputes will inevitably arise about the disposition of these embryos. In the cases that have arisen to date, most courts have looked to forms signed by the progenitors of the embryos at the time of treatment to determine the parties' intent and to reach a resolution, sometimes years after the embryos were created. Most, though by no means all, of these decisions have purported to enforce these consent forms as "contracts."

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1 Anne Drapkin Lyerly et al., *Factors That Affect Infertility Patients' Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623, 1623 (2006) [hereinafter Lyerly et al., *Factors*].

In a previous article, I argued strenuously against treating these clinic consent forms as binding contracts between the progenitors of the embryo.[2] These documents suffer from numerous inherent flaws that render them unsuitable vehicles to determine disposition of disputed embryos. They often contain an overwhelming quantity of information dealing with matters not directly related to the question of divorce. The parties all too often execute these forms without due consideration of the ramifications; indeed, it is not uncommon for one party to sign the form "in blank," leaving the other party to fill in the dispositional choices. Presented as form contracts drafted by or on behalf of the physicians or clinics, these forms are invariably poorly written and frequently fatally ambiguous and confusing. Moreover, social science research suggests that the typical presentation of these forms (at or before commencement of treatment) occurs at a time when the parties are psychologically and emotionally ill-equipped to consider the options for disposition, and that the progenitors' attitudes about disposition, even in intact relationships, often change significantly over time and in the context of subsequent life events, particularly the success or failure of the in vitro fertilization (IVF) treatment. For all these reasons, I argued that courts should reverse the trend toward enforcement of these clinic consent forms in disputes between the progenitors. However, I explicitly left open the question of whether contracts regarding embryo disposition entered into under other circumstances should be enforceable. This Article seeks to answer that question.

An extensive literature has developed on this issue, with no consensus emerging on the proper approach or outcome in these cases. Most scholars appear to support the idea of determining disposition according to contract.[3] Some have argued, though, that embryo disputes are not suitable for contractual resolution.[4] Resolution of this question is complicated by disagreements among scholars, members of the bench and bar, physicians, and participants over the status of the embryo[5] as well as the constitutional dimensions

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

3 *See, e.g.*, I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1116 (2008) (concluding that advanced waiver of the right not to be a parent through contract should be permitted); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 990 (2001) (arguing that "precommitment strategies of frozen embryos . . . should usually be enforced").

4 Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55 (1999); Tracey S. Pachman, *Disputes Over Frozen Preembryos & The "Right Not To Be A Parent,"* 12 COLUM. J. GENDER & L. 128, 151 (2003).

5 *See, e.g.*, Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 439 (1990).

of rights related to procreation.[6] Concerns about gender and what role, if any, it plays in resolving these disputes also figure in.

This Article seeks to assess the enforceability of embryo disposition contracts by positioning them within the larger world of family law contracting. As a family law professor, I begin each year by introducing my students to the ascendancy of private ordering as one of the "themes" of family law. Much of this trend has developed around the creation of contractual regimes for altering traditional legal relationships between family members and intimates, such as premarital agreements. Statutory developments, such as no-fault divorce, represent another facet of this movement. More recently, the advent and proliferation of assisted reproduction and non-traditional families has brought private ordering to a new arena: the definition of parent-child relationships under the law.

However, this move toward private ordering has not been without its "fits and starts." Courts have struggled over whether contractual efforts to define family obligations and relationships should be judged by legal standards more protective than those developed largely to regulate commercial transactions among individuals and businesses.[7] They have also wrestled with whether individuals should be able to use contracts to determine parental status at all. Where do embryo disposition contracts fit within this larger scheme? Which model, if any, should courts use to interpret and enforce contracts regarding disposition?

Part I begins by providing an overview of the various approaches taken by legislatures and courts to resolving these disputes. Part II continues with a multidisciplinary approach to understanding the embryo disposition decision, incorporating insights from the social science literature regarding embryo disposition decision-making. The Article then turns to the heart of the analysis in Part III: a comparison of embryo disposition contracts to other types of family law contracts. These include gamete donor contracts, surrogacy and co-parenting contracts, and premarital and postmarital agreements. Drawing on lessons

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6 *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992); Pachman, *supra* note 4, at 131-37.

7 *See In re* Paternity of M.F., 938 N.E.2d 1256, 1264 (Ind. Ct. App. 2010) (Crone, J., concurring in part and dissenting in part) ("If this were strictly a contract case, I would agree . . . that Mother, as the party seeking to invalidate the Donor Agreement, would have the burden of providing its invalidity. Because the core of this dispute falls squarely within the province of family law, however . . . I would hold that Father must bear the burden . . . ."); Margaret F. Brinig, *Are All Contracts Alike?*, 43 WAKE FOREST L. REV. 533 (2008) (discussing differences between marital settlement agreements and other kinds of contracts). *Compare* Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) ("Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts."), *with* Edwardson v. Edwardson, 798 S.W.2d 941, 946 (Ky. 1990) (discussing the need for "close scrutiny" and "broad discretion" of trial court to modify or invalidate prenuptial agreements).

gleaned from the law's treatment of these other kinds of family law contracts, Part IV argues for a legal regime that enforces embryo disposition contracts, but mandates specific procedural and substantive safeguards. Finally, Part V highlights some practical considerations for lawyers and physicians working with couples that have or may have cryopreserved embryos.

I. An Overview of the Law

A. The Statutes

Most states have no statutes expressly governing embryo disposition, but a small number have statutes that address the problem in some way.[8] Some of these statutes deal explicitly with embryo disposition; others address parental status when embryos are used after divorce. California Health & Safety Code § 125315 exemplifies the first type. It requires physicians offering fertility treatment to obtain written, informed consent regarding embryo disposition.[9] It further specifies that the informed consent form include "advanced written directives" offering statutorily delineated options to the patients in the event of various contingencies, including death of one or both of the partners, separation or divorce of the partners, or abandonment of the embryos. These options include: (1) make available to the partner (male or female) in case of divorce or separation (not applicable where both parties have died or the embryos have been abandoned); (2) donate to research; (3) thaw; (4) donate to another individual or couple; or (5) make another disposition, clearly stated. Yet the statute is silent on whether these dispositions will constitute an enforceable legal agreement between the progenitors if their relationship ends.[10]

The second type of statute touching on embryo disposition relates to family law and parentage. These laws aim to clarify that if a marriage dissolves (or if, in some cases, a dissolution action is initiated) prior to the placement of gametes or embryos, the former spouse will not be considered the legal parent of any subsequently resulting child, unless the former spouse consented in writing to be a parent to the child.[11] This type of

8 Forman, *supra* note 2, at 90-95. For a detailed critique of these statutes, as well as of pending legislation, see *id.* at 90-100.

9 CAL. HEALTH & SAFETY CODE § 125315 (West 2011). New York has similar legislation pending. *See, e.g.*, S.B. 394, 234th Legis. Sess. (N.Y. 2011).

10 Other states, including Connecticut, Massachusetts, and New Jersey, have statutes requiring physicians to offer disposition choices to their patients, but these do not address contingencies such as divorce. CONN. GEN. STAT. ANN. § 19a-32d(c)(2) (West 2011); MASS. GEN. LAWS ANN. ch. 111L, § 4 (West 2010); N.J. STAT. ANN. § 26:2Z-2(b)(2) (West 2011). *See also* Forman, *supra* note 2, at 90-91.

11 ALA. CODE § 26-17-706 (2012); COLO. REV. STAT. ANN. § 19-4-106(7)(a) (West 2011); DEL. CODE ANN. tit.

provision addresses one of the critical uncertainties surrounding the use of embryos after divorce: whether a progenitor should shoulder legal responsibilities as a parent if the other progenitor is allowed to use the embryos. However, these statutes also allow a former spouse to withdraw consent to the assisted reproduction "anytime before placement of eggs, sperm, or embryos,"[12] which seems to undercut considerably the reliability of any agreement made between a married couple, as either party can apparently revoke consent to future inseminations or implantations after a divorce.[13]

B. The Cases

State appellate courts have decided nearly a dozen cases involving embryo disposition and divorce. Although the reasoning of the cases has varied substantially, particularly on the question of contractual enforcement, in the end, courts have shied away from allowing one party to use embryos to initiate a pregnancy over the objection of the other genetic progenitor.[14]

13, § 8-706 (West 2012); MINN. STAT. ANN. § 524.2-120 (West 2012); N.M. STAT. ANN. § 45-2-120 (West 2012); N.D. CENT. CODE ANN. § 14-20-64 (West 2011); TEX. FAM. CODE ANN. § 160.706 (West 2011); UTAH CODE ANN. § 78B-15-706 (West 2012); VA. CODE ANN. § 20-158 (West 2012); WASH. REV. CODE ANN. § 26.26.725 (West 2011). Hawaii, Washington, Illinois, Maryland, and New York have similar legislation pending. S.B. 1463, 26th Leg., Reg. Sess. (Haw. 2011); H.B. 1267, 62nd Leg., Reg. Sess. (Wash. 2011); H.B. 5622, 97th Gen. Assem. (Ill. 2011); H.B. 873, Reg. Sess. (Md. 2012); A.B. 10499, 235th Legis. Sess. (N.Y. 2012).

12 COLO. REV. STAT. ANN. § 19-4-106(7)(b) (West 2011); TEX. FAM. CODE. ANN. § 160.706 (West 2011). *See also supra* note 11.

13 *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) appears to be the only case to interpret this kind of statute so far. In *Roman*, the husband Randy wanted to discard the embryos; his wife Augusta wanted to implant them. The court ruled in favor of Randy, validating an embryo disposition agreement calling for discard of embryos in the event of divorce. Interestingly, the parties had conceded that neither had withdrawn consent to the disposition of the embryos prior to filing for divorce. Hence the court concluded that the contract, not the statute, controlled. *Id.* at 52-54. Why Augusta did not submit a written withdrawal of consent to the fertility clinic remains a mystery. However, certainly by the time the divorce case came to trial, Augusta had at least implicitly indicated her desire to withdraw consent, and the statute allows withdrawal any time prior to placement of the embryos. *See* 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, 1215 (2009).

14 Only one appellate court has ruled in favor of a progenitor who wanted to use the embryos in the face of opposition by her husband. Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012). In an earlier case, *In re Marriage of Nash*, 150 Wash. App. 1029 (Ct. App. 2009), the court awarded the embryos to the ex-husband, who planned to transfer them to a surrogate, based on a mediation agreement. However, the embryos were created with donor eggs, not eggs from the ex-wife. *But cf.* Karmasu v. Karmasu, No. 2008 CA 00231, 2009 WL 3155062 (Ohio Ct. App. 2009) (upholding disposition choice made in contract with clinic granting embryos to clinic "to preserve, dispose of or donate" over objection of husband-progenitor). One recent trial court ruling has also awarded embryos to a woman planning to use them over her ex-husband's objection, pursuant to a contract

1. The Balancing Approach

In the first case, *Davis v. Davis*,[15] the parties Mary Sue and Junior Davis had not entered into any written agreement regarding disposition of their seven cryopreserved embryos, created in the course of several unsuccessful IVF cycles. Initially, Mary Sue wanted to implant the embryos,[16] while Junior wanted them destroyed. With no prior agreement to reference, the Tennessee Supreme Court attempted to balance the parties' conflicting constitutional interests in procreation—Mary Sue's right to procreate and Junior's right not to procreate.[17] The court classified the parties as "entirely equivalent gamete-providers," although it recognized Mary Sue's greater physical contribution to creating the embryos.[18] Considering these competing interests, the court ultimately weighed Junior's right not to procreate more heavily, in part relying on the possibility that Mary Sue might achieve parenthood through another cycle of IVF or by adoption.[19] The *Davis* decision went further, however, and urged that if a prior agreement exists between two progenitors, courts should resolve embryo disposition disputes based on the preferences expressed in that agreement. The *Davis* court's balancing test should only come into play in the absence of an agreement between the parties, in which case the party seeking to avoid procreation would ordinarily prevail.[20]

signed by the couple at the fertility clinic prior to the procedure. Bailey Henneberg, *Maryland Woman Wins Custody of Frozen Embryos*, HYATTSVILLE PATCH (Jan. 7, 2013), http://hyattsville.patch.com/articles/judge-awards-maryland-woman-custody-of-frozen-embryos.

15 842 S.W.2d 588 (Tenn. 1992).

16 By the time the case reached the Tennessee Supreme Court, Mary Sue had changed her mind about disposition: she now wanted to donate the embryos for use by a childless couple. *Id.* at 590.

17 *Id.* at 603-04.

18 *Id.* at 601. Women undergoing IVF need to follow a strict drug protocol involving regular injections and submit to an invasive medical procedure for retrieval of their oocytes. Men must merely ejaculate into a cup. Kerry Lynn Macintosh, *Brave New Eugenics: Regulating Assisted Reproductive Technologies in the Name of Better Babies*, 2010 U. ILL. J.L. TECH. & POL'Y 257, 264-65 (2010).

19 *Davis*, 842 S.W.2d at 604.

20 *Id.* More recently, a Pennsylvania court applied the balancing test and ruled in favor of the wife who wanted to procreate. In *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012), the wife had cancer, and she and her husband underwent IVF prior to her commencing treatment. They had left blank the portion of the clinic consent form dealing with embryo disposition in the event of divorce. The court balanced the parties' procreation interests and concluded that the husband had impliedly consented to procreate when consenting to the IVF; that his consent to procreate had not been contingent on their marital status at the time the embryos were created; and that the wife had a compelling interest in using the embryos because they represented her only real chance at genetic parenthood. *Id.* at 1137, 1140-1142.

2. The Contract Approach

In the cases following *Davis*, a number of courts have taken its advice and turned to contract to determine disposition of disputed embryos. The leading proponent of this approach is *Kass v. Kass*.[21] In *Kass*, Maureen and her husband Steven had five cryopreserved embryos created in connection with several failed IVF cycles.[22] At the clinic, they signed a consent form, which provided that disposition of the embryos in the event of divorce would be determined in a property settlement.[23] However, it also included a provision that called for donation to research in the event the couple could not agree on disposition.[24] In interpreting the agreement, the New York Court of Appeals held that cryopreservation agreements should be presumed valid and enforceable,[25] and that the provision calling for donation to research should control.[26] However, the court did note that "[s]ignificantly changed circumstances" in some cases might "preclude contract enforcement."[27]

Courts that have adopted the contract approach have cited a number of rationales for preferring it. The *Kass* court argued that couples undergoing IVF should be encouraged to "think through possible contingencies" and put their wishes in writing.[28] The court noted that "[e]xplicit agreements avoid costly litigation in business transactions" and are especially valuable in matters of reproductive choice, "where the intangible costs of any

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21 Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

22 *Id.* at 175-76.

23 *Id.* at 176.

24 *Id.* at 177.

25 *Id.* at 180.

26 *Id.* at 182.

27 Kass v. Kass, 696 N.E.2d 174, 179 n.4 (N.Y. 1998). Several other courts have adopted the contract approach. *See In re* Marriage of Dahl, 194 P.3d 834, 842 (Or. Ct. App. 2008) (ruling in favor of wife who wanted to destroy embryos rather than husband who wanted to donate, where the couple's prior agreement had designated the wife as the decision maker); Roman v. Roman, 193 S.W.3d 40, 43, 55 (Tex. App. 2006) (ruling in favor of husband who wanted to destroy rather than wife who wanted to use, based on a written agreement of the parties); Litowitz v. Litowitz, 48 P.3d 261, 262, 264, 271 (Wash. 2002) (applying contract provision calling for destruction of embryos after five years of storage where embryos were created with husband's sperm and donor eggs, even though husband wanted to donate and wife wanted to use); *In re* Marriage of Nash, 150 Wash. App. 1029, 1029 (Ct. App. 2009).

28 *Kass*, 696 N.E.2d at 180.

litigation are simply incalculable."[29] In the view of the *Kass* court, advance directives "both minimize misunderstandings and maximize procreative liberty" by allowing the progenitors to make "a quintessentially personal, private decision."[30] Indeed, the *Kass* court reasoned that the very difficulty of making embryo disposition agreements justified their use: better to honor the parties' intentions before disputes arise because the possibility of indefinite cryopreservation leaves ample time for circumstances and feelings to change. Enforcing such advance agreements "underscores the seriousness and integrity of the consent process."[31]

Other cases adopting the contract approach have cited *Kass* with approval while drawing on established facets of the governing state's family law. For example, in *Roman v. Roman*, the Texas Court of Appeals viewed enforcing embryo disposition contracts as consistent with public policy because Texas allows enforcement of gestational surrogacy contracts meeting statutorily defined criteria.[32] Similarly, an Oregon appellate court buttressed its reliance on *Kass* with reference to Oregon's enforcement of premarital and marital agreements.[33] These comparative approaches to understanding embryo disposition contracts will be explored further in Part III.

3. The Contemporaneous Consent Approach

Judicial decisions in several other states have recognized the importance of agreements between the progenitors, but with a significant difference. These cases presume that cryopreservation contracts should be enforceable, but only to a point: they will not enforce embryo disposition agreements between the progenitors when one party has changed his or her mind. Thus, while a court following this approach would enforce the agreement in a dispute between the couple and the clinic, it would not do so when the progenitors disagree—at least in cases where one party wanted to use the embryos to attempt to initiate

29 *Id.*

30 *Id.*

31 *Id.*

32 *Roman*, 193 S.W.3d at 49.

33 *In re* Marriage of Dahl, 194 P.3d 834, 840 (Or. Ct. App. 2008).

a pregnancy. High courts in New Jersey,[34] Iowa,[35] and Massachusetts[36] have adopted this so-called "contemporaneous consent" approach.

Courts refusing to enforce agreements to use embryos over the later objection of a party have, like those adopting the contract approach, enunciated a variety of reasons in support of their position. In *A.Z. v. B.Z.*, the Massachusetts Supreme Court concluded that "forced procreation is not an area amenable to judicial enforcement."[37] The *A.Z.* court pointed out that earlier precedents in Massachusetts law that abolished "breach of promise" actions and insisted on a "waiting period" after birth, during which a surrogate mother could change her mind, had already determined that individuals should not be legally bound by agreements to enter or not to enter into a familial relationship.[38] The court also cited *Doe v. Doe*—a case in which the court refused to allow a husband to enjoin his wife's plan to terminate her pregnancy—for the proposition that "[t]here are 'personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should never be attempted.'"[39] From the perspective of the *A.Z.* court, allowing a change of mind, rather than enforcing a previous agreement, enhanced the individual's freedom of choice in family matters.[40] This view is consistent with the court's general reluctance to become involved in "intimate questions inherent in the marriage relationship."[41] In the court's view, "respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."[42] The New Jersey Supreme Court relied on similar concerns in requiring contemporaneous consent in *J.B. v. M.B.*.[43]

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34 J.B. v. M.B., 783 A.2d 707, 716, 720 (N.J. 2001) (refusing to enforce agreement against party choosing not to be a parent, though leaving open possibility of use if party became infertile under balancing test).

35 *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) (in absence of mutual contemporaneous consent, embryos to remain in storage with party opposing destruction paying fee).

36 A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (mutual contemporaneous consent required for use of embryo; applicability to other dispositions left open).

37 *Id.* at 1058.

38 *Id.* at 1058-59.

39 *Id.* at 1059 (quoting Doe v. Doe, 314 N.E.2d 128, 130 (Mass. 1974)).

40 *Id.*

41 *Id.* at 1058.

42 A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).

43 J.B. v. M. B., 783 A.2d 707, 717-18 (N.J. 2001) (discussing *A.Z.* and noting that New Jersey laws "also evince a policy against enforcing private contracts to enter into or terminate familial relationships," citing cases

The Supreme Court of Iowa added another dimension to the discussion. In *In re Marriage of Witten*, the Court highlighted two additional considerations. First, embryo disposition decisions "implicate rights central to individual identity."[44] As such, progenitors should be able to decide their fate based on their current values, beliefs, and desires.[45] Second, requiring binding decisions at the time of treatment ignores the great difficulty of forecasting future feelings about such intensely personal and emotional matters with such significant consequences for a person's sense of self and identity.[46] As with the other decisions adopting the contemporaneous consent approach, the *Witten* court referenced the various limits placed on family law contracts under state law, including the required waiting period prior to release of parental rights for adoption and limits on damages recoverable for a breach of promise to marry. Although the court acknowledged that premarital agreements and divorce settlements are ordinarily enforceable, it distinguished the former as dealing with money and property and the latter as addressing custody issues contemporaneously with implementation of the agreement.[47]

Both courts adopting the "contract approach" and those favoring "contemporaneous consent" argue that their approach maximizes the procreative freedom of the parties. Likewise, both ground their conclusions in existing law regarding family contracting. The precedential backdrop in these various jurisdictions regarding family contracting evinces more similarity than difference. Each undoubtedly provides a waiting period for parents relinquishing children for adoption, enforces premarital and divorce agreements, and permits gamete donation, although jurisdictions do differ on the enforceability of surrogacy contracts.[48] Nonetheless, despite these similarities on other family law matters,

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disapproving actions for breach of contract to marry and surrogacy contracts).

44 *In re* Marriage of Witten, 672 N.W.2d 768, 777 (Iowa 2003) (quoting Coleman, *supra* note 4, at 88).

45 *Id.*

46 *Id.* The court also pointed to concerns that requiring an embryo disposition decision as a condition of treatment was coercive. *Id.*

47 *Id.* at 781-82.

48 Interestingly neither New York, which adopted the contract view in *Kass*, nor New Jersey, which rejected that approach, will enforce surrogacy contracts. *See* N.Y. DOM. REL. LAW § 122 (McKinney 2010) (declaring surrogate parenting contracts contrary to the public policy, void, and unenforceable); *In re* Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 817 (Sur. Ct. 1986) (finding surrogacy contracts voidable because the individual state's adoption statutes, which are designed to safeguard the best interests of the child, take precedence over any agreement between the parties); Itskov v. New York Fertility Inst., Inc., 813 N.Y.S.2d 844, 845 (App. Term 2006) (finding, pursuant to Domestic Relations Law § 122, that surrogate parenting agreements are against public policy, void, and unenforceable); *In re* Baby M., 537 A.2d 1227 (N.J. 1988).

courts reach opposite conclusions in assessing the enforceability of embryo agreements. Such disparate rulings suggest a need to probe more deeply into the meaning of procreative freedom and the congruency—or lack thereof—between embryo disposition contracts and other kinds of family law contracts.

Because these dichotomous opinions also reflect differing assessments of the potential harm that enforcement (and nonenforcement) of disposition contracts can cause to progenitors, a review of the social science literature dealing with embryo disposition decision making can provide useful data and insight into this question and provide critical context for our comparative analysis.

II. Social Science Findings

Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time.[49] Many studies have documented how daunting participants in the IVF process find the embryo disposition decision. Substantial evidence demonstrates that patients find embryo disposition decisions "extremely difficult."[50] According to one study, almost fifty percent of the individuals surveyed found decision making about embryo disposition "distressing,"[51] while another study reported patients "feeling 'anguished' and 'agonizing' over the decision."[52] Fertility patients commonly perceive that they face "a choice among unappealing disposition options."[53] Others describe a decision-making process "often marked by ambivalence, discomfort, and uncertainty."[54] In one study involving embryos created with donor eggs, several of the interviewed couples revealed that "contemplating

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49 This literature is discussed as well in Forman, *supra* note 2, at 69-75.

50 A. D. Lyerly et al., *Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent*, 26 HUM. REPROD. 646 (2011) [hereinafter Lyerly et al., *Decisional Conflict*].

51 Karin Hammarberg & Leesa Tinney, *Deciding the Fate of Supernumerary Frozen Embryos: A Survey of Couples' Decisions and the Factors Influencing Their Choice*, 86 FERTILITY & STERILITY 86, 90 (2006).

52 Sheryl de Lacey, *Parent Identity and "Virtual" Children: Why Patients Discard Rather than Donate Unused Embryos*, 20 HUM. REPROD. 1661, 1664 (2005).

53 Anne Drapkin Lyerly et al., *Fertility Patients' Views About Frozen Embryo Disposition: Results of a Multi-Institutional U.S. Survey*, 93 FERTILITY & STERILITY 499, 506 (2010) [hereinafter Lyerly et al., *Fertility Patients' Views*].

54 Robert D. Nachtigall et al., *How Couples Who Have Undergone In Vitro Fertilization Decide What to Do with Surplus Frozen Embryos*, 92 FERTILITY & STERILITY 2094, 2094 (2009) [hereinafter Nachtigall et al., *How Couples*].

the fate of their embryos was harder than their decision to go forward with the donor oocyte procedure itself."[55] This statement is especially telling, given that one of the partners had no genetic connection to the embryo. The significant difficulty patients experience with embryo disposition decisions undoubtedly accounts for the vast number of embryos persisting in storage for years. Many patients simply decide not to decide.[56] Determining divorce disposition at the time of treatment compounds the difficulty. Patients struggling with infertility experience significant stress, which increases the likelihood of selective perception.[57]

In addition to elucidating the great challenge embryo disposition poses for patients, the literature makes clear that patients' views regarding preferred disposition often change appreciably over time.[58] One study reported in the *New England Journal of Medicine* comparing dispositional choices at time of treatment and after a three-year storage deadline had passed found that 71% of the forty-one couples had revised their preferences.[59] In a Canadian study, 59% of couples that provided an updated directive upon being contacted changed their decision.[60] Multiple Australian studies likewise found widespread shifts in

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55 Robert D. Nachtigall et al., *Parents' Conceptualization of Their Frozen Embryos Complicates the Disposition Decision*, 84 FERTILITY & STERILITY 431, 431 (2005) [hereinafter Nachtigall et al., *Parents' Conceptualization*].

56 Lyerly et al., *Decisional Conflict*, *supra* note 50, at 646 (reporting that in their survey, of those who had completed childbearing, 40% still could not identify a preferred disposition for their remaining embryos, and 20% of those expected to put off the decision indefinitely); Catherine A. McMahon et al., *Mothers Conceiving Through In Vitro Fertilization: Siblings, Setbacks and Embryo Dilemmas After Five Years*, 10 REPROD. TECH. 131, 134 (2000) (reporting 70% of parents surveyed with surplus embryos planned to delay decision as long as possible).

57 Lyerly et al., *Fertility Patients' Views*, *supra* note 53; Forman, *supra* note 2, at 69-70.

58 Lyerly et al., *Factors*, *supra* note 1, at 1629. This change may also occur for gamete donors. One study of egg donor views regarding potential egg and embryo use options revealed that 40% changed their views about oocyte directives and embryo management (e.g., approval of donation to women over fifty, to gay partners using a surrogate, and to posthumous donation) when interviewed after the donation process, as compared to the initial screening process. Moreover, 84% of donors actually expressed at least one different response at their exit interview, suggesting that most donors changed their views, even if they did not consciously realize it. C. Jensen et al., *Comparative Assessment of Pre and Post-donation Attitudes with Respect to Potential Oocyte and Embryo Disposition Among Ovum Donors in an Egg Program*, 82 FERTILITY & STERILITY S304 (2004).

59 Susan C. Klock et al., *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69 (2001).

60 C.R. Newton et al., *Changes in Patient Preferences in the Disposal of Cryopreserved Embryos*, 22 HUM. REPROD. 3124 (2007).

preferences over time.[61]

Patients' views about embryo disposition are strongly influenced by their experience with IVF.[62] Described as a "dynamic process," patients' attitudes toward the embryo disposition decision-making process evolve as they move through different stages before and after treatment.[63] Research has indicated that at the time of initial treatment, many couples see the possibility of extra embryos as a "bonus," because they do not yet know how many cycles it will take to achieve a pregnancy.[64] Consequently, they do not anticipate the challenge that surplus embryos will pose in the future. During this phase, patients do not seriously consider options other than using all stored embryos.[65] Hence couples during this time tend to experience low decisional conflict, i.e., uncertainty about disposition.[66] Ironically, then, couples may feel unduly confident in their decision even though, or perhaps because, they have not really given it careful thought.

This certainty stands in sharp contrast to the experience of patients post-treatment. These couples more frequently experienced high decisional conflict,[67] as well as conflict between partners.[68] Considerable research indicates that successful IVF, in particular, leads to changes in preference, at least among those able to make a decision.[69] Before or during

61 De Lacey, *supra* note 52, at 1663 (all participants in study had changed their mind about disposition from initial preference for donating to another couple to discarding); McMahon et al., *supra* note 56, at 134 (discussing two previous studies). Anecdotal evidence supports this conclusion as well. Susan E. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 615-16 (2005) (anecdotal evidence of author and others suggests that 50-75% of patients who initially seek to donate embryos to others ultimately change their mind).

62 Lyerly et al., *Factors*, *supra* note 1, at 1629 ("Our data suggest that the process of infertility treatment, whether successful or not, profoundly influences what these preferences turn out to be.").

63 Nachtigall et al., *Parents' Conceptualization*, *supra* note 55, at 433.

64 *Id.*

65 Lyerly et al., *Factors*, *supra* note 1, at 1627; Nachtigall et al., *How Couples*, *supra* note 54, at 2095 (finding patients could not "seriously consider other disposition options" until question of using embryos for additional attempts at conception was resolved).

66 Lyerly et al., *Decisional Conflict*, *supra* note 50, at 650.

67 *Id.*

68 McMahon et al., *supra* note 56, at 133.

69 After treatment, most couples avoid the issue unless prompted to respond, typically by bills for storage or notice of time limits on storage. Nachtigall et al., *Parents' Conceptualization*, *supra* note 55, at 433. Nachtigall identifies this response as Stage Two of the embryo disposition decision process—Avoidance. *Id. See also*

treatment, patients' preferences often reflect an altruistic aim of assisting others, resulting in a preference for donation to research[70] or donation to another infertile couple.[71] By contrast, after treatment, couples that succeeded in having a child preferred discarding the embryos, rather than donating to research.[72] Contrary to what we might expect, the successful birth of a child complicates the embryo disposition decision. Research indicates that decisions about embryo disposition are strongly influenced by the patients' conceptualization of the embryo, and that successful birth of a child alters that conception.[73] Rather than see the embryos as a "back-up" plan, patients now see them as "virtual children" and as potential siblings of the children they had through IVF.[74] While we might have assumed that viewing embryos as akin to children would reduce the interest in discarding the embryos, in fact, patients viewed donating the embryos to others more as relinquishing a child, a choice they were not willing to make.[75]

Each of the studies relied on here has its methodological limitations. Sample size, location, and demographic profile, including gender of participants, varied among them,

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Newton et al., *supra* note 60, at 3126 (noting that one-third of couples successfully contacted by clinic still failed to give final directive regarding disposition); McMahon et al., *supra* note 56, at 134 (findings consistent with others who stress importance of existing IVF child in parents' subsequent views regarding embryos). Interestingly, in half of the appellate cases, the couples had successfully conceived at least one child prior to their dispute. Cahill v. Cahill, 757 So. 2d 465, 466 (Ala. Civ. App. 2000); J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001); A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2000); Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002); *In re* Marriage of Nash, 150 Wash. App. 1029, 1029 (Ct. App. 2009).

70 Newton et al., *supra* note 60, at 3127.

71 de Lacey, *supra* note 52, at 1666.

72 *Id.*

73 *Id.*; Nachtigall et al., *Parents' Conceptualization*, *supra* note 55, at 433.

74 Nachtigall et al., *Parents' Conceptualization*, *supra* note 55, at 433; Newton et al., *supra* note 60, at 3127; de Lacey, *supra* note 52, at 1665 ("Parenthood changed the status of the embryos and the way parents thought about them."); Gillian M. Lockwood, *Whose Embryos Are They Anyway?*, *in* CONTEMPORARY ETHICAL DILEMMAS IN ASSISTED REPRODUCTION 8 (Françoise Shenfield & Claude Sureau eds., 2006) (couples with successful birth from IVF view frozen embryos as "possible children" (and potential siblings)).

75 de Lacey, *supra* note 52, at 1667; Lyerly et al., *Factors*, *supra* note 1, at 1628; Nachtigall et al., *How Couples*, *supra* note 54, at 2095. This shift in perception might help explain why someone might agree to allow the other party to use the embryos in the event of divorce, but then wish to renege on that promise after experiencing IVF or the birth of a child, though, of course, individuals might change their minds for an infinite number of reasons. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2000) (where husband and wife initially chose option of allowing wife to implant in the event of divorce, but husband objected when she actually sought to use them after divorce).

and admittedly they did not test preferences in the event of divorce. Nonetheless, they consistently demonstrate the challenge of the embryo disposition decision for participants and the significant ways in which life experiences, including the treatment itself, can change attitudes about the embryos and disposition preferences. In my earlier piece regarding embryo disposition, I argued that these insights should give courts pause in considering whether to enforce disposition provisions in clinic consent forms.[76] But do they justify a prohibition on enforcing *any* pre-divorce contract regarding embryo disposition? The answer is no—the research does not require a blanket ban on contracting, as we shall see when we consider these contracts in light of other kinds of family law contracts. But it should prompt us to consider seriously and in detail what procedural safeguards should be required and whether any substantive limits should be imposed. In the next section, I consider the ways in which existing family law courts have addressed the emotional complexity of decision making in analogous contexts.

III. Evaluating Embryo Disposition Contracts in Context

Our judicial system in general operates on the premise that the ability to contract constitutes a positive good for society. Our society and our legal system presume that contracts are an appropriate and desirable way to order human relations and transactions, so valid contracts should be enforced unless there is a good reason not to do so.[77] Historically, courts and legislatures have carved out an exception to that premise in the area of family and intimate relationships. As we shall see, though, that dogma has changed radically in the last half-century, so that the underlying premise favoring contract now applies to many aspects of family life.

In assessing the wisdom of enforcing embryo disposition contracts between progenitors, we need not write on a blank slate. In addition to the reasoning employed by the courts adopting (or rejecting) the contract approach to resolving embryo disposition disputes,[78] we can look to the legal treatment of other types of family law contracts to evaluate whether and under what circumstances such contracts might be permissible or even advisable.

Two points should be made at the outset. First, the controversy over the status of the embryo does not dispose of the question before us, regardless of which side one is on.

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76 *See* Forman, *supra* note 2, at 70-74.

77 *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2313-15 (1995).

78 *See supra* notes 21-33 and accompanying text.

Embryos have been variously classified as persons (children), property, or property deserving "special respect."[79] Some scholars argue that proper characterization of the embryo is crucial to deciding the disposition question.[80] While these disparate characterizations might ultimately prove relevant to what kind of contracting we allow for embryo disposition, we need not settle on one particular characterization to answer the question in its broadest form. For even if we were to classify the embryo as a person, parties enter into all kinds of contracts regarding persons (and children) that are enforceable, though certainly not all are.[81] So we will assume, going forward, that the status of the embryo, in and of itself, does not automatically disqualify it from being the subject of a disposition contract.

Second, contracts regarding embryo disposition and divorce undoubtedly implicate rights regarding procreation that have been deemed fundamental under the Constitution.[82] The exact nature of those rights and how they impact the disposition question demand careful consideration, but the mere fact that these contracts involve potential waivers of constitutional rights does not, by itself, justify refusing to enforce the contracts. As other scholars have persuasively demonstrated,[83] individuals may relinquish or waive many kinds of constitutional rights in a variety of ways, ranging from the casual (waiving one's Fourth Amendment rights by orally consenting to a search of one's home or person on the spur

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79 Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992) (adopting special status classification); 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, 401-05 (2005) (surveying options for classifying embryos).

80 *See, e.g.*, Upchurch, *supra* note 79, at 406 ("[R]esolution of the embryo dispute under principles of contract law necessitates a property-based view of the legal status of the embryo."). Although she also favors a property framework for deciding embryo disputes, Jessica Berg eschews the need to label the embryo, focusing instead on whether cognizable property interests in the embryo exist. Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 170 (2005).

81 For example, birth mothers can execute a contract permitting an independent adoption of their child, CAL. FAM. CODE § 8801.3 (West 2012), parents can approve employment contracts for their children, CAL. LAB. CODE § 3079 (West 2012), and divorcing couples can enter into marital settlement agreements that set forth binding provisions regarding child custody and support (although the court retains jurisdiction to approve, disapprove, or modify the agreement as needed to protect the best interests of the child), Brinig, *supra* note 7, at 539-40. By contrast, individuals generally cannot enter into enforceable provisions regarding children in a premarital agreement. *See infra* note 205 and accompanying text.

82 *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

83 I. Glenn Cohen, *The Constitution and the Right Not to Procreate*, 60 STAN. L. REV. 1135, 1185-90 (2008); Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281 (2003).

of the moment)[84] to those requiring extensive formalities (relinquishing one's fundamental constitutional right to parent by consenting to the adoption of one's child, which requires counseling and court approval).[85]

Both the status of the embryo and the constitutional dimension of procreative freedom will be explored in more depth in the context of premarital agreements. But, with these principles in mind, we can proceed to our comparative analysis. To assist us in this task, we will focus on three archetypal versions of the embryo disposition contract.

A. Framework for Analysis

All but one of the cases that have been decided thus far have pitted a party who desired to use the embryos (or donate them for use) against a party who wanted the embryos destroyed.[86] While disputes can also arise when the parties disagree about other disposition options (for example, discarding versus donating to research), the challenges inherent in these disputes pale in comparison to those presented when one party seeks to use the embryos to attempt to create a child over the other party's objection. Consequently, in searching for analogues in family law contracts, I will focus on those that involve agreements related to creation of a child. To identify these analogues, we need to consider certain key terms of our hypothetical embryo disposition contract to ascertain how closely (or distantly) it resembles other kinds of family law contracts.

Let's imagine then three archetypal versions of the embryo disposition divorce contract.[87] Version One provides that one party can use the embryos to initiate a pregnancy in the event of divorce; the parties further specify that the other party will not be considered the legal parent of any children born from transfer of the embryos after dissolution. Version Two provides that one party can use the embryos to initiate a pregnancy but that the other party will be considered a legal parent of any resulting children. Version Three provides for destruction of any remaining embryos. Each of these will be discussed in relation to

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84 *See, e.g.*, Georgia v. Randolph, 547 U.S. 103 (2006); United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Matlock, 415 U.S. 164 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

85 CAL. FAM. CODE § 8801.3 (West 2012).

86 In *Litowitz v. Litowitz*, 48 P.3d 261, 265 (Wash. 2002), the husband wanted to donate the embryos for use by others; the wife wanted to transfer them to a surrogate with the goal of parenting them herself.

87 Of course an embryo disposition contract might contain many and varied provisions, limited only by the imagination and desires of the parties and their attorneys. However, the primary controversy stems from provisions addressing the use of the embryos and what, if any, parental status accompanies that use.

the type of family law contract it most resembles to examine whether and under what circumstances these various embryo disposition contracts should be enforced and to draw lessons from the ways in which courts and legislatures have addressed the concerns raised by these contracts in analogous areas of family law. This section begins with efforts to relinquish parental rights by contract through gamete donor contracts; continues with efforts to assume parental rights by contract through sperm provider, surrogacy and co-parenting contracts; and concludes with important insights from the law of premarital and postmarital agreements.

B. Relinquishing Parental Rights and Obligations Through Contract: Gamete Donor Contracts

In Version One, an embryo disposition contract that allows one party to use the embryos to have a child and relieves the other of parental rights and responsibilities in essence constitutes an agreement by him or her that in the event of divorce, he or she will assume the role of a gamete donor. As a category, such gamete donor contracts, which waive both the donor's control over the gametes and his or her parental rights and obligations over any child conceived, have consistently been considered enforceable in various jurisdictions. A comparison between Version One contracts and sperm and egg donor contracts sheds light on several points in the debate over the enforceability of embryo disposition contracts. First, in considering the enforceability of donor contracts, courts and legislatures have not insisted that contemporaneous consent constitutes an essential characteristic of reproductive freedom; nor, in these contexts, have courts shown the same solicitude for other concerns raised against the enforcement of embryo disposition contracts: specifically, the "best interest" of the intended child and the special harm to a progenitor posed by "forced procreation." Second, the practical and biological differences in the harvesting of sperms and eggs shed light on the distinctions in the investments made by men and women in the creation of embryos; however, these distinctions may be dwarfed in comparison to the role of gendered parenting norms in governing men and women's expected relationship to their genetic offspring. Finally, experience and practice in each of these contexts stress both the importance of procedural safeguards and their role in addressing many of the concerns arising in assisted reproduction.

1. Lessons from Sperm Donation

Sperm donation is the most well-established and least controversial method of assisted reproduction, and there is abundant legal precedent for male progenitors to relinquish their parental rights and obligations along with their sperm. Many states have statutes governing

parentage and sperm donation. Nearly half the states have adopted some version of the Uniform Parentage Act (UPA), first promulgated in 1973.[88] These statutes make clear that a donor who provides semen to a licensed physician for use in artificial insemination of someone other than his wife is not considered a legal father of the child.[89] In addition, some states have statutes that allow the parties to avoid this presumption of non-parenthood if they enter into a written agreement to provide the donor with parental rights.[90] The ability of men to donate sperm without creating legal ties to the offspring when done through a physician or anonymously via a sperm bank is widely accepted, and typically accomplished through signing a consent form (if done through a physician's office) or a contract if done through a sperm bank.[91]

a. Contracting over Non-Anonymous Sperm Donations

Although most sperm donations take place anonymously through sperm banks, when an ex-wife seeks to use embryos created with her ex-husband against his wishes, the "donor" would not be anonymous. Nonetheless, the law does not typically require anonymity to extinguish parental rights for sperm donors. State statutes have not distinguished between anonymous and known donors.[92] Furthermore, several cases have upheld contracts with

88 Jan Hare & Denise Skinner, *"Whose Child Is This?": Determining Legal Status for Lesbian Parents Who Used Assisted Reproductive Technologies*, 57 FAM. REL. 365, 368 (2008) (at least some concepts set forth in UPA enacted in every state).

89 *See, e.g.*, CAL. FAM. CODE § 7613(a) (West 2012). This type of statute also typically provides that a husband who consents in writing to his wife's insemination under the supervision of a physician is considered the legal father of any resulting child. *Id.* at § 7613(b). Some states have now enacted a version of the UPA revised in 2000, which does not even require that the donor provide the sperm to a licensed physician to be considered a non-parent. UNIF. PARENTAGE ACT § 702 (2000). Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Numbers of Disputes Increase*, 45 FAM. L.Q. 443, 451 (2012) (nine states have adopted 2002 amendments to the UPA; about fifteen states still use the 1973 version).

90 CAL. FAM. CODE § 7613(b) (West 2012); DEL. CODE ANN. tit. 13, § 8-706(a) (West 2012); KAN. STAT. ANN. § 38-1114(f) (West 2012); MINN. STAT. ANN. § 524.2-120 (West 2012); N.M. STAT. ANN. § 45-2-120 (West 2012); UTAH CODE ANN. § 78B-15-706 (West 2012).

91 *See* Ferguson v. McKiernan, 940 A.2d 1236, 1246 (Pa. 2007) (noting "a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor").

92 *See, e.g.*, CAL. FAM. Code § 7613(b) (West 2012) ("The donor of semen . . . for use in artificial insemination or in vitro fertilization . . . is treated in law as if he were not the natural father of a child thereby conceived . . . ."); CONN. GEN. STAT. § 45a-775 (2011) ("An identified or anonymous donor of sperm or eggs used in A.I.D. . . . shall not have any right or interest in any child born as a result of A.I.D."); VA. CODE ANN. § 20-158(A)(3) (West 2012) ("A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.").

known donors, preserving their status as legal strangers to the resulting offspring.

In a Pennsylvania case, *Ferguson v. McKiernan*,[93] the existence of a contract protected the known donor from a claim for child support. A friend who had previously been romantically involved with the mother provided semen to a clinic for her insemination. The donor and mother entered into a contract relieving him of any parental rights or responsibilities. Five years after the child's birth, the mother sought child support. The lower court initially found in her favor, analogizing the waiver provision of the sperm donation contract to an agreement waiving child support for a child conceived through intercourse—an agreement courts have consistently found unenforceable. However, the Pennsylvania Supreme Court reversed and ruled that the contract was enforceable on the grounds that there was no meaningful distinction between the circumstances of this insemination (using a physician, with a contract) and anonymous sperm donation, where the donor would be protected from claims for support. At the same time, the opinion did draw a significant distinction between cases in which "the bargain in question occurs prior to, and indeed induces, the donation of sperm for IVF and implantation in a clinical setting" and earlier cases which "prevent[ed] parents from bargaining away a child in being's right to seek child support."[94]

Critically, the court recognized that freedom to enter into this kind of agreement was essential to "allowing people access to greater . . . options concerning the areas of reproduction."[95] Refusal to enforce the sperm donor contract would "threaten[] other contract-based alternative reproductive arrangements, such as adoption and institutional sperm donation";[96] any contract that denied child support to a biological child could be ruled unenforceable on grounds of public policy.[97] Moreover, while the court acknowledged that the best interests of the child was a relevant consideration in the dispute, that principle does not "operate to the absolute exclusion of all competing policies," as evidenced by the law's approval of adoption contracts and the rule preventing child support claims against a

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93 940 A.2d 1236. *See also* Lamaritata v. Lucas, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002) (finding contract's designation of sperm provider as "donor" qualified him as donor under statute extinguishing parental rights of donors); Leckie v. Voorhies, 875 P.2d 521 (Or. Ct. App. 1994) (denying paternity to sperm provider based on written contractual waiver of parental rights, despite evidence of paternal involvement with children).

94 *Ferguson,* 940 A.2d at 1242.

95 *Id.* at 1243.

96 *Id.*

97 *Id.* at 1243.

deceased parent's estate.[98]

The Indiana Court of Appeals faced similar concerns in another recent case in which a mother contracted with a known sperm donor to relieve him of parenting rights and obligations. In *In re Paternity of M.F. and C.F.*,[99] a man agreed to provide semen to a friend and her life partner for the friend to conceive a child. The parties signed a contract relieving the donor of all parental rights and responsibilities. The insemination succeeded, resulting in the birth of M.F. Seven years later, the mother had a second child, C.F., who was also the biological child of the donor. However, the contract between the parties only referred to the first child and not the second. The mother's relationship with her partner subsequently ended, and she sought public assistance. The County then filed an action on her behalf against the sperm provider to establish paternity and support.

Although Indiana does not have an artificial insemination statute, the court looked to the UPA for guidance and held that the contract relieving the donor of parental rights and responsibilities was valid if the semen had been provided to a physician and if the parties had executed a sufficiently thorough and formalized written contract.[100] The court found that in this case, the lengthy and sophisticated contract, which had been drafted by an attorney, was sufficiently formalized to be enforceable.[101] While the court "stop[ped] short of endorsing this particular contract as setting the minimum threshold with respect to form and content,"[102] it warned that "in view of the lack of statutory law and the paucity of decisional law in this area, parties who execute a contract less formal and thorough than this one do so at their peril."[103] In *M.F.* itself, because the sperm donor contract at issue only referenced the first child and the parties did not execute another agreement before the birth of the second child, the court concluded that the sperm provider would only be liable for child support for the second child. Hence he was a donor to one child and a father to the other. This rather startling outcome highlights the significant weight courts have placed on

98 *Id.* at 1248 & n.23.

99 938 N.E.2d 1256 (Ind. Ct. App. 2010).

100 *Id.* at 1261. *Cf. In re* K.M.H., 169 P.3d 1025 (Kan. 2007) (rejecting sperm provider's claim to parental rights based on lack of written agreement, as required by statute).

101 *Paternity of M.F.*, 938 N.E.2d at 1261 n.1, 1261-62.

102 *Id.* at 1262.

103 *Id.* The parties disputed the manner of insemination, but the court placed the burden on the party seeking to avoid the contract—the mother—to prove that insemination occurred by intercourse and without a physician. She failed to meet that burden, so the court found the contract was enforceable.

the formality and specificity with which parties express their intentions through contract in disputes over paternity in sperm donation.[104] Ultimately, judicial attention to procedural safeguards facilitates the fair and workable enforcement of these contracts.

Admittedly some dissenting judges in cases upholding sperm donor contracts have balked at relieving biological fathers of child support obligations as a matter of public policy.[105] However, these views have not prevailed. Rather, the cases that have refused to assign donor status to men who provided sperm for insemination of women they knew have usually involved donation made directly to the recipient, rather than through a physician,[106] or cases where the intent of the parties is disputed and conduct evidenced the assumption of a parental role for the sperm provider.[107] None of these cases expressed a categorical

104 This decision is also notable, however, for one factor it does not consider. Specifically, the *Paternity of M.F.* court expressed no concern about the impact of its "split decision" on the children's emotional well-being. *Id.* We could easily imagine that the children involved might experience psychological confusion or emotional distress from realizing that the older sibling was wanted by both parents and is currently being parented by both, whereas the subsequently born child would know that the biological parent had rejected responsibility for and the opportunity to have a relationship with him or her. An analogous situation may result in embryo disposition cases if the parties already have children together at the time of the divorce. This is not an unusual occurrence. In several of the embryo disposition cases decided to date, the disputing parties already had children, though in two, the children and remaining embryos were created with the husband's sperm and donor eggs. *See* Cahill v. Cahill, 757 So. 2d 465, 466 (Ala. Civ. App. 2000); A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001); *In re* Marriage of Nash, 150 Wash. App. 1029. 1029 (Ct. App. 2009) (donor eggs); Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002) (donor eggs). None of these cases addressed this concern, and the law does not typically consider the effect on existing or future offspring in addressing questions related to an individual's right to procreate or not to procreate. Nor in family law matters generally do courts usually consider the impact on children other than the one at issue in the proceeding. *See In re* Marriage of Hinman, 64 Cal. Rptr. 2d 383, 391 (Ct. App. 1997) (finding that trial court acted properly in imputing income to mother based on best interests of children subject to order, not other children of mother born of mother's new marriage); Helen Donagan, *Calculating and Documenting Child Support Awards Under Washington Law*, 26 GONZ. L. REV. 13, 63 (1991) (discussing the inequities as to child support of children from prior relationships resulting from deducting support obligations from income).

105 *See, e.g.*, *In re* Paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010) (Crone, J., concurring in part and dissenting in part) (arguing known sperm donor should have burden of proving donor agreement consistent with public policy); Ferguson v. McKiernan, 940 A.2d 1236, 1251 (Pa. 2007) (Eakins, J., dissenting) (viewing known sperm donor as a "parent" who should not be able to "bargain away" child's right to support). Courts have consistently refused to enforce contracts purporting to relieve fathers of child support obligations where the child was conceived by intercourse. *See, e.g.*, Budnick v. Silverman, 805 So. 2d 1112 (Fla. Dist. Ct. App. 2002); Straub v. B.M.T., 645 N.E.2d 597 (Ind. 1994).

106 *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986); C.M. v. C.C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977); Mintz v. Zoernig, 198 P.3d 861 (N. M. Ct. App. 2008) (sperm provider not protected by insemination statute where recipient inseminated herself).

107 *See* E.M. v. M.H., No. H036146, 2011 WL 6057847 (Cal. Ct. App. 2011) (unpublished) (granting new trial

rejection of: gamete donation as a legitimate part of assisted reproduction; extinguishing the parental rights of known donors; or using contracts to establish donor status. Thus these dissenting views would not support refusing to enforce an embryo disposition contract that gives an ex-wife the right to use embryos created with her ex-husband without assigning him parental status.[108] Rather, the known sperm donor cases strongly support the progenitor's ability to enter into an embryo disposition contract that would treat the male progenitor as a donor, rather than as a legal parent, provided sufficient procedural safeguards are in place.

The comparison between Version One embryo disposition contracts and sperm donation contracts furthermore illuminates the ways in which courts and legislatures have dealt with two concerns posed by both types of assisted reproduction agreements: first, whether the enforcement of an individual's agreement to procreate many years down the line poses a challenge for procreative freedom; and second, whether the emotional or dignitary harm of "coerced procreation" through enforcement of these agreements should justify their invalidation on grounds of public policy. While research regarding sperm and egg donors suggests that most are satisfied with the process,[109] we might reasonably question

to determine paternity of man who provided sperm to clinic for IVF where he had previously had relationship with woman and claimed intent to parent); *In re* R.C., 775 P.2d 27, 35 (Colo. 1989) (parties' agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute extinguishing sperm donor's rights); *Mintz*, 198 P.3d 861 (acknowledging possibility of enforceable donor agreement extinguishing parental rights, but finding agreement in question to relieve donor of child support obligations while acting as parent unenforceable); C.O. v. W.S., 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994).

108 In addition, as discussed earlier, several states have enacted statutes that expressly provide that former spouses are not legal parents of children born from embryos transferred after dissolution, unless the former spouse consents in writing. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106 (7)(a) (West 2011); N.D. CENT. CODE ANN. § 14-20-64 (West 2011); TEX. FAM. CODE. ANN. § 160.706 (West 2011); VA. CODE ANN. § 20-158 (West 2012); WASH. REV. CODE ANN. § 26.26.725 (West 2011). Hawaii and New Mexico have similar legislation pending. S.B. 1463, 26th Leg. Reg. Sess. (Haw. 2011); S.B. 146, 50th Leg., Reg. Sess. (N.M. 2011). These statutes thus explicitly allow use of embryos without imposing parental obligations on the ex-spouse—an issue of critical importance for couples wishing to enter into a Version One contract. They also arguably implicitly support the notion of determining parental status by agreement in this situation, since they allow an ex-spouse to assume parental rights and obligations by written consent. However, these statutes typically also allow embryo progenitors to withdraw consent up to the time of "placement" of the embryos, which arguably cuts against considering a prior disposition contract that allows one party to use the embryos binding on the parties. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106 (7)(a) (West 2011); N.D. CENT. CODE ANN. § 14-20-64 (West 2011); TEX. FAM. CODE. ANN. § 160.706 (West 2011). *But see* VA. CODE ANN. § 20-158 (West 2012). For a detailed discussion of the ambiguities created by these statutes, see Forman, *supra* note 2, at 90-99.

109 Little research exists directly assessing men's satisfaction with sperm donation. Studies have focused on attitudes toward open-identity donation and attitudes toward donation generally. *See, e.g.*, RENE ALMELING, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM 59 (2011); Rachel Cook & Susan Golombok, *A Survey of Semen Donation: Phase II—the View of the Donors*, 10 HUM. REPROD. 951 (1995); Ken Daniels, *The Semen*

whether someone could accurately predict their willingness to become a gamete donor in the future when, at the moment, they are actively seeking to become a parent or at least providing gametes to create embryos with the goal of becoming a parent. We might also credibly wonder whether compelling them to follow through on that promise would cause emotional or psychological harm of sufficient magnitude to justify refusing to honor such agreements as a matter of policy.[110]

b. "Contemporaneous Consent" and Procreative Freedom

Embryo disposition contracts, like sperm donor contracts, may contemplate use (and therefore procreation) many years after the agreement. Men who donate sperm through a sperm bank typically relinquish their rights without time limits.[111] Nor are they offered the opportunity to revoke consent to use of the sperm at a later date, though clinics have on occasion honored a request by the donor to no longer sell the sperm.[112] A donor who changes his mind might also attempt to repurchase any remaining vials of sperm, but there is no evidence that this practice occurs with any regularity, if at all. For known donors, the duration of the consent required by the clinic might vary based on clinic policies, but unconditional donations are likely the norm, simply for ease of administration, if for no other reason. Those donors that have entered into written donor agreements directly with the recipient likewise might have the opportunity to limit the duration for the use of the sperm, but the contracts discussed in the cases do not reveal if they contain such limits.[113] Hence neither current United States practice nor case law suggests that sperm donations of unlimited duration are or should be impermissible.

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of Semen Donation: Phase II—the View of the Donors, 10 HUM. REPROD. 951 (1995); Ken Daniels, *The Semen Providers, in* DONOR INSEMINATION: INTERNATIONAL SOCIAL SCIENCE PERSPECTIVES 76 (Ken Daniels & Erica Haimes eds., 1998) . For studies of egg donor satisfaction, see *infra* note 140 and accompanying text.

110 Under this version of the embryo disposition contract, we need not worry about financial burdens on the relinquishing party because the contract relieves him or her of parental rights and obligations.

111 E-mail from California Cyrobank, to author (May 24, 2011) (on file with author).

112 *Id.*

113 The closest example would be *In re Paternity of M.F.*, discussed above, where the donor agreement applied expressly to a child already conceived, and the court refused to apply it to a child conceived via a subsequent donation and born seven years later. 938 N.E.2d 1256 (Ind. Ct. App. 2010). However, the court reached this conclusion not based on any policy concerns about time-delayed use of the sperm, but because the contract referred specifically to the child already conceived and contained no indication it was intended to apply to any subsequent donation or child. *Id.* at 1263.

It is worth noting that other countries have in some instances more explicitly considered whether gamete donors should have a right to revoke consent to use of their gametes. In the United Kingdom, gamete donors have a right to withdraw consent, even after fertilization, any time prior to transfer of the embryos.[114] The law in other jurisdictions has been more nuanced. In an Australian case, a sperm donor objected to use of embryos created with his sperm.[115] The Infertility Treatment Act of 1995 ("Act") allowed gamete donors to withdraw consent before a "procedure" was carried out, but it failed to define "procedure." The clinic storing the embryos thus sought guidance from the agency regulating fertility treatment, the Infertility Treatment Authority, which in turn requested advice from the Minister for Health. Literature promulgated with the Act had language that allowed withdrawal of consent "at any time before the fertilization procedure occurs or the embryo is implanted."[116] However, after the attempted withdrawal of consent in this case, a revised interpretation of the Act was issued: "where a donor withdraws consent, the withdrawal will only be effective in the period before the gametes have been used in a fertilization procedure. That is, once an embryo is formed from donated gametes, a donor may not withdraw her or his consent."[117]

A case in Canada followed the opposite trajectory. In *Caufield v. Wong*, Wong had provided sperm to a woman, Caufield, who conceived twins.[118] The two had had an intimate relationship but never lived together. When she later sought to use the remaining embryos, the donor objected. The court ruled that the sperm was an unqualified gift and that the recipient could use the embryos. After the case was decided, the Canadian legislature developed new regulations allowing withdrawal of consent prior to use of gametes or embryos.[119] However the regulations also say withdrawal is not effective after gametes or embryos have been "used," which seems to leave unsettled the question of whether sperm has been "used" once embryos are created.

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114 Robert Sawers & Sue Avery, *Risk Management: Consent in Assisted Conception*, 8 THE OBSTETRICIAN & GYNAECOLOGIST 245, 249 (2006).

115 *See* Giuliana Fuscaldo, *Gamete Donation: When Does Consent Become Irrevocable?*, 15 HUM. REPROD. 515 (2000) (discussing the *Infertility Treatment Act 1995* (Vic) ss 13, 14, 15, 37 (Austl)).

116 *Id.* at 518.

117 *Id.*

118 Caufield v. Wong, 2005 ABQB 290 (Can.). In actuality, Wong was not truly a donor. He intended to and did parent the twins, as evidenced by an ongoing custody battle over them. Caufield v. Wong, 2007 ABQB 732 (Can.).

119 *Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137* (Can.); Porsha L. Cills, Comment, *Does Donating Sperm Give the Right to Withdraw Consent? The Implications of In Vitro Fertilization in the United Kingdom and Canada*, 28 PENN. ST. INT'L. L. REV. 111, 125-26 (2009).

conceived a child with sperm from an anonymous donor sought to conceive a sibling for the child using additional vials of the same donor's sperm, which she had previously purchased. While the mother was preparing to undergo the insemination, the donor contacted the clinic and requested that the clinic destroy his remaining vials of his sperm. He claimed a recent religious "epiphany" had led him to regret his previous donation. A committee of the Israeli Health Ministry ruled in favor of the donor, but the mother petitioned the Israeli Supreme Court for a ruling. No decision has yet been issued.[120]

Thus, neither domestic nor international courts have reached a consensus that the requirement of contemporaneous consent is more protective of procreative freedom than the ability of individuals to make binding decisions for the future.

c. The Special Harm of "Coerced Procreation"

The second question—the extent of harm from compelled use of embryos over the objection of a progenitor—is trickier. Even if we think that irrevocable sperm donations made available for use in perpetuity are fine, we may think differently if the decision to donate is made at a time when the sperm provider is actually seeking to become a parent, and the conversion to sperm donor will occur only upon a radical change in circumstance—divorce. No empirical data exists regarding this hypothesis. Legal scholars have debated the extent of the harm on male progenitors from compelled use of embryos created with their sperm. I. Glenn Cohen has identified "attributional parenthood" as a potential source of harm if the men in question have not agreed to use of the embryos, but he does not find the likelihood of this harm sufficient to curtail dispositional contract enforcement.[121] Ellen Waldman has argued that even in the absence of an agreement to allow later use, men in general suffer little detriment by use of their embryos.[122] Waldman reaches this conclusion by reviewing literature related to paternal disengagement and sperm donors' attitudes toward their offspring.[123] Although she does acknowledge the possibility of "psychological burdens" from unwanted use of the embryos and real harm in specific cases, she believes that fear of this kind of harm has received undue weight. Her point may be well taken. Several courts have plainly assumed that not only would such harm ensue, but that it can

120 Noga Godein, *Give Me My Sperm Back, Says Donor*, THE JEWISH CHRONICLE ONLINE (May 31, 2012), http://www.thejc.com/news/israel-news/68356/give-me-my-sperm-back-says-donor.

121 Cohen, *The Right Not to Be a Genetic Parent?*, *supra* note 3, at 1183-84.

122 Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004).

123 *Id.* at 1040-52.

automatically trump the interests of the party desiring to use the embryos to procreate, virtually ignoring the much greater physical burdens and contributions of the progenitor providing the eggs.[124]

This solicitude for men's psyche seems a bit odd in light of our treatment of men who become parents in the traditional way. Our laws have consistently tolerated coerced parenthood in both the legal and attributional sense, indicating society's willingness to risk some potential harm to men to serve other worthy interests. Men have no right to compel a woman to terminate a pregnancy.[125] Yet they are nonetheless considered legal fathers of any children they conceive and liable for child support, regardless of their relationship with the mother. Indeed, boys who are victims of statutory rape have been held liable for child support;[126] as have men who have been defrauded by women intending to get pregnant without the man's knowledge or consent.[127]

Ultimately, it may be indisputable that some men would experience harm from, or at least significantly regret, an earlier decision to allow use of the embryos by an ex-spouse at the time of divorce;[128] nonetheless, the specter of regret is an inherent feature of any contract and does not usually result in a blanket ban on enforcement, though it may support imposing procedural or other safeguards.

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124 *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). Other courts have not openly adopted this principle, but have reached a result that favored the procreation-avoider. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006). *See also* Judith F. Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J.L. MED. & ETHICS 197, 201 (2001) [hereinafter Daar, *Frozen Embryo Disputes*]; Strasser, *supra* note 13, at 1223-24.

125 *C.f.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 333 (1992) (holding state spousal notice requirements for abortion unconstitutional); Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) (refusing to issue an injunction requested by husband to prevent wife's abortion in the first trimester).

126 *See, e.g.*, Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Ct. App. 1996); State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993) (finding a 13-year-old boy's lack of consent to intercourse under criminal statutes irrelevant in paternity and child support proceedings on the grounds that the "State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent.").

127 Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Ct. App. 1980).

128 As discussed in the previous section, the reality of this eventuality finds support in the literature about embryo disposition decision making. *See supra* notes 15-20 and accompanying text (discussing difficulty of embryo disposition decision).

2. Gender Issues: The Egg Donation Comparison

The social science research also raises another concern we should address in assessing whether parties should be able to enter into a Version One contract that allows one of the parties to use the embryos while relieving the other of parental status: whether enforceability should vary depending on the sex of the party seeking to use the embryos because of inherent differences in the relationship of men and women to embryos created from their gametes. In other words, if the agreement in Version One is for the ex-husband to retain the right to use the embryos, not the ex-wife, does that change our assessment of either the importance of contemporaneous consent in the dissenting progenitor's procreative freedom or the extent of harm caused by enforcing a former agreement?

a. Gendered Trends in Embryo Disposition Decisions

Because the majority of respondents in the social science literature discussed above were women,[129] those studies may reflect differences in how men and women view the embryo disposition decision. Only one study of embryo disposition decision making, led by Sigal Klipstein, has focused specifically on gender differences.[130] The study reviewed consent forms filled out by couples undergoing IVF and found notable distinctions in disposition choices based on gender.[131] Interestingly, these differences did not appear when the couples made decisions regarding their gametes prior to fertilization, but once the gametes were transformed into embryos, the couples hewed to traditional gendered patterns in their dispositional choices.[132] Specifically, when the couple could vest control of

129 Hammarberg & Tinney, *supra* note 51, at 88 (72% of questionnaires completed by female; remainder by couple jointly); Lyerly et al., *Factors*, *supra* note 1, at 1624 tbl.2 (38/53—72%—of participants were women); Lyerly et al., *Decisional Conflict*, *supra* note 50, at 649 tbl.1 (78.4 % of participants were women); Lyerly et al., *Fertility Patients' Views*, *supra* note 53, at 500, 502 (2/3 of questionnaires sent to woman intending to become pregnant; 1/3 sent to partners—male or female; ultimately 78% of respondents were women); Catherine A. McMahon & Douglas M. Saunders, *Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation,* 91 FERTILITY & STERILITY 140, 140 (2009) (99 women responded; 66 men); McMahon, *supra* note 56, at 131 (all respondents were women); Nachtigall et al., *Parents' Conceptualizaiton*, *supra* note 55, at 432 tbl.1 (61% of respondents were women); Robert D. Nachtigall et al., *What Do Patients Want? Expectations and Perceptions of IVF Clinic Information and Support Regarding Frozen Embryo Disposition*, 94 FERTILITY & STERILITY 2069, 2070 (2010) (60% of participants were women) [hereinafter Nachtigall et al., *What Do Patients Want?*].

130 Sigal Klipstein et al., *Gender Bias in the Disposition of Frozen Embryos*, 76 FERTILITY & STERILITY 1181 (2001).

131 *Id.* at 1181-82.

132 *Id.* at 1183.

the embryos in either the female or the male, the female "preferentially received decision-making authority over the couples' unified gametes."[133] In the case of divorce, the majority of couples selected destruction of the embryos, but 22% chose to implant the embryos in the body of the female, compared to only 1% who selected implanting the embryo to the body of the male's current partner.[134] The authors were not able to conclusively determine whether this disparity reflected the practical difficulties a man would have using the embryos (he would need to re-partner or hire a surrogate) or an assumption that potential children would be best reared by their mothers.[135] In disposition choices related to death of one of the partners, the same percentage (59%) chose discard of the embryos if the female died as chose returning the embryos to the female if the male died (58%). In the author's view, this result "likely reflects the tendency in our society for mothers to raise children."[136] Though acknowledging that further study was necessary, the authors posited that "[p]erhaps women see embryos as babies, and men see them more as gametes. It is also possible that women bond sooner to embryos than do men. If this is true, men may not have as strong an attachment to the embryos. This may cause men to be more likely than women to relinquish authority over embryo disposition."[137] Gender bias in favor of single motherhood versus single fatherhood might also influence dispositional choices.[138]

The Klipstein study suggests gender factors at work in the embryo disposition choices of actual couples. Indeed, legal scholars like Waldman have long seen this issue as gendered.[139] This raises the question of whether a woman would suffer more harm than a man would from the enforcement of an agreement that renders her a mere gamete donor and allows the other partner to use the embryos over her objection perhaps many years later. Can a woman donate her gametes without undue negative consequences to her? If so, does that hold true when the commitment to donate does not occur relatively contemporaneously with the creation (or attempted creation) of the child, and when the gametes are, in fact, now part of

133 *Id.*

134 *Id.* at 1183 tbl.2.

135 Klipstein, *supra*, note 130 at 1184.

136 *Id.*

137 *Id.*

138 *Id.*

139 Waldman, *supra* note 122. *See also* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1071-76 (1996); Judith Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 476 (1999) [hereinafter Daar, *Assisted Reproductive Technologies*]; Pachman, *supra* note 4, at 149-53.

an embryo? A comparison between Version One contracts sought to be enforced against a woman and egg donor contracts sheds substantial light on these questions.

b. Harm and Non-Contemporaneous Use in Egg Donor Contracts

As we saw with sperm donors, a thriving and expanding market in egg donation currently exists, and studies thus far indicate overall satisfaction of egg donors with the experience.[140] Likewise the legal treatment of egg donors resembles that of sperm donors. Although many states have yet to address the legal status of egg donors explicitly,[141] those that have addressed the question generally treat egg donors, like sperm donors, as non-

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140 A.M. Braverman et al., Abstract, *What Lies Beneath the Surface: A Prospective Analysis of Ovum Donors' Satisfaction, Reactions and Beliefs Post-Donation*, 92 FERTILITY & STERILITY S131-132 (2009) (reporting 92% of donors surveyed immediately after egg retrieval "very happy about donating and 86.7% desired to donate again); D. Glujovsky et al., Abstract, *Assessment of Motivations, Attitudes and Psychosocial Features Among Voluntary Oocyte Donors in Argentina*, 86 FERTILITY & STERILITY S56 (2006) (reporting 96% of egg donors surveyed were at least as or more satisfied than expected with 95% willing to donate again); Susan Caruso Klock et al., *Psychological Characteristics and Factors Related to Willingness to Donate Again Among Anonymous Oocyte Donors*, 79 FERTILITY & STERILITY 1312 (2003) (finding 82% of donors moderately or very satisfied with donation, with 35% willing to donate again; 28% undecided); S. Purewal & O.B.A. van den Akker, *Systematic Review of Oocyte Donation: Investigation Attitudes, Motivations and Experiences*, 15 HUM. REPROD. UPDATE 449, 510-11 (2009) (reviewing the literature and finding most donors report high levels of satisfaction with medical care and most would donate again). The timing of the study may limit the weight of its conclusion. *See* Nancy J. Kenney & Michelle L. McGowan, *Looking Back: Egg Donors' Retrospective Evaluations of Their Motivations, Expectations, and Experiences During Their First Donation Cycle*, 93 FERTILITY & STERILITY 455, 463 (2009), which surveyed donors at least 2 years past donation and found in study of donors who donated from 2 to 15 years prior to survey, that 66.2% reported long-term postdonation satisfaction; among 13.8% reporting long-term negative feelings, reasons included frustration over anonymity, fear about their own fertility related to donation, and feelings that physical risks and inconvenience of donation "were not worth the compensation." The Kenney study does hypothesize that "donors' curiosity and concern about any offspring that might have resulted from their donation might increase over time" and suggests clinics and agencies "work toward developing a system through which nonidentifiable information regarding the outcomes of anonymous egg donation might be made available to the donors, particularly if a donation resulted in a pregnancy and/or live birth. Keeping anonymous donors better informed could alleviate some of the anxiety and curiosity that egg donors reported feeling years after having first donated." *Id.* at 466.

While the desire of donor offspring to identify or connect with their genetic progenitors has received much attention of late, and may be intensifying as the cohort of offspring comes to maturity, no comparable drive or indicia of widespread regret on the part of donors has yet surfaced. *See, e.g.*, David Crary, *Sperm-Donors' Kids Seek More Rights and Respect: More Donor Offspring Seek to Ban Anonymous Sperm Donation*, NBCNEWS.COM (Aug. 16, 2010), http://www.msnbc.msn.com/id/38679526/ns/health-childrens_health/t/sperm-donors-kids-seek-more-rights-respect/#.UB2YBo5WKDo.

141 NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 94 (2009).

parents.[142]

However, the question of whether women may suffer special harm from the delayed use of their gametes or the embryos created from their gametes deserves more scrutiny for several reasons: (1) in considering our analogy to sperm donation, it is important to understand that the practice of egg donation has followed a different trajectory from sperm donation, for reasons that may well bear on the embryo disposition contract question; (2) the physical involvement of the woman in creating the embryo differs substantially from the man's; and (3) social constructions of women's role, particularly as mothers, may yield different consequences for women agreeing to relinquish embryos to be parented by another. Each of these features will be discussed in turn.

c. The Practice of Egg Donation and the Woman's Biological Investment in the Embryo

Unlike sperm donors, egg donors cannot simply generate a sample and deposit it at a sperm bank for later use by unknown recipients. Both sperm and egg donors undergo medical screening, but the egg donor's contribution requires considerably more effort and physical risk to her. Egg donors must undergo hormonal treatment injections to stimulate the development of egg follicles and then must submit to an invasive egg retrieval procedure that carries rare but very serious risks, including death, to the donor.[143] By contrast, sperm donation requires no pharmacological intervention or medical risks.[144] Moreover, because,

142 *Id.* at 94-96. At least a dozen states now have statutes that explicitly treat egg and sperm donors identically, declaring them not to be a parent of a child conceived by means of assisted reproduction. *See, e.g.*, ALA. CODE § 26-17-702 (2012); COLO. REV. STAT. § 19-4-106(2), (3) (2012); CONN. GEN. STAT. ANN. § 45a-775 (West 2012); DEL. CODE ANN. tit. 13, §§ 8-102 (West 2012); FLA. STAT. ANN. § 742.14 (West 2012) (held unconstitutional as applied to donor who intended to parent child in *T.M.H. v. D.M.T.*, 79 So. 3d 787, 792 (Fla. Dist. Ct. App. 2011)); N.M. STAT. ANN. § 40-11A-702 (West 2012); N.D. CENT. CODE § 14-20-60 (2011); TEX. FAM. CODE ANN. § 160.702 (West 2011); UTAH CODE ANN. § 78B-15-702 (West 2012); VA. CODE ANN. § 20-158(A)(3) (West 2012); WASH. REV. CODE ANN. § 26.26.705 (West 2012); WYO. STAT. ANN. § 14-2-902 (West 2012). Some states have achieved the same result by case law. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (App. Div. 1994) (finding intended gestational mother to be legal mother in contested divorce of child conceived with donor egg); *In re* C.K.G., 173 S.W.3d 714, 716 (Tenn. 2005) (same).

143 *Fact Sheet: Risks of In Vitro Fertilization (IVF)*, AM. SOC'Y OF REPROD. MED. (2012), http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/risksofivf.pdf.

144 Sperm donation is not without its burdens, however. Some banks require donors to deposit samples on a weekly basis (sometimes twice a week) for a year, and donors must abstain from sexual activity two days before making the donation. Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 320 (2007) [hereinafter Almeling, *Selling*

until very recently, embryologists could not successfully freeze eggs, egg donations intended for a fresh embryo transfer need to be timed carefully with the hormonal status of the ultimate recipient (intended parent or gestational carrier). For these reasons, although anonymous donations are the norm, egg donations typically are brokered either by the fertility clinics themselves ("in-house programs") or by a separate agency. Indeed, in recent years, the use of egg donation agencies has proliferated.[145] These agencies match donors and recipients, coordinate the treatment, act as intermediaries between the recipient and the donor, and increasingly require the donor to enter into a written contract not just with the agency, but directly with the recipient(s), even in cases of anonymous donation.[146] In-house programs likewise recruit donors and match them with recipients, though they usually rely on clinic consent forms, rather than separate contracts, to set forth the terms of the arrangement.[147] When agencies are involved, egg donors (both anonymous and known) and intended parents typically enter into a separate contract regarding the donation, in addition to whatever contract the donor signs with the agency. This practice differs significantly from the typical protocol for using sperm from both anonymous and known donors.

Even though the nature of this process may increase the likelihood that egg donation will occur contemporaneously with the use of the eggs for recipients planning a fresh transfer of embryos, the problem of delayed use remains. An egg donor cycle can yield many eggs, which allows for the creation of more embryos than recipients can use in one cycle. Thus, eggs provided by an egg donor might well end up creating embryos that remain in storage for years.

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the Medical Market in Genetic Material, 72 AM. SOC. REV. 319, 320 (2007) [hereinafter Almeling, *Selling Genes*].

145 Jean Benward et al., *Maximizing Autonomy and the Changing View of Donor Conception: The Creation of a National Donor Registry*, 12 DEPAUL J. HEALTH CARE L. 225, 230 (2009). Indeed more than 100 agencies are listed on the ASRM website, spread out over twenty-six states. *See Egg Donor Agencies*, AM. SOC'Y OF REPROD. MED., http://www.asrm.org/Egg_Donor_Agencies/ (last visited June 4, 2012). These agencies have agreed to comply with ASRM guidelines and paid a fee to be listed. Undoubtedly other agencies recruit donors, as do clinics with "in-house" programs. *See, e.g.*, AM. REPROD. CENTERS, http://www.americanreproductivecenters.com/treatments/donor-eggs/become-an-egg-donor (last visited Aug. 5. 2012); SAN DIEGO FERTILITY CENTER, http://www.eggdonor4u.com/ (last visited Aug. 5, 2012).

146 *See generally* THE EGG DONOR PROGRAM, http://www.eggdonation.com/index.php (last visited Nov. 15, 2012) (process of becoming an egg donor); THE DONOR SOURCE, http://www.thedonorsource.com/californiaeggdonor.htm (last visited Aug. 5, 2012).

147 *See, e.g.*, SAN DIEGO FERTILITY CENTER, http://www.sdfertility.com/eggdonation.htm (last visited Aug. 5, 2012).

Here, the practice of egg donation appears to differ at least somewhat from sperm donations in the limits and conditions donors may impose on future use of gametes and embryos. Although the typical egg donation contract between donors and intended parents, as well as clinic consent forms for egg donors, provide that the donor gives up any and all rights to her eggs and to embryos created from those eggs, some laws and research protocols require contemporaneous consent from egg donors for donation of embryos created with their eggs *to research*.[148] Moreover, while the default language in egg donor contracts provides for a complete divestiture of rights to the eggs and embryos created from them, limitations imposed by egg donors on future use are not uncommon. For example, some egg donor contracts include clauses restricting the recipients' ability to donate eggs or embryos to research or to some other individual or couple.[149] In some cases, egg donors may condition the donation based on certain recipient characteristics, such as marital status, religion, or sexual orientation.[150] Moreover, researchers have shown concern for whether egg donation programs adequately disclose the potential uses of donors' oocytes and embryos created from them.[151]

In contrast, anonymous sperm donors sign consent forms or contracts that contain none of these restrictions on future use. While a known sperm donor in theory could impose any of these limitations, in practice, sperm donor contracts between donors and recipients are far less common than egg donor contracts, and the ones discussed in the cases do not disclose any such restrictions. Nor does the social science literature suggest that sperm donors desire to exercise control over who receives the donation or the fate of embryos

148 *See 2009 National Institutes of Health Guidelines on Human Stem Cell Research*, NAT'L INSTS. OF HEALTH, *available at* http://stemcells.nih.gov/policy/pages/2009guidelines.aspx (requiring consent at time of donation for NIH-funded stem cell research, even if donors provided general consent at time of treatment); ABA MODEL ACT GOVERNING ASSISTED REPRODUCTION § 502(2) (2008), *available at* http://apps.americanbar.org/family/committees/artmodelact.pdf.

149 *See* Litowitz v. Litowitz, 48 P.3d 261, 267, 269 (Wash. 2002) (noting that egg donor contract prohibited intended parents from allowing anyone other than intended parents to use eggs, but that contract contained no limitation on use of embryos created from eggs). Of course to the extent that an egg donor contract restricts future embryo disposition, that itself supports the practice of embryo disposition contracts between progenitors, because often (though not always), the male intended parent is the sperm provider and thus retains his own interest in the disposition of any embryos. If the egg donor can limit her options by contract, then why should we not allow an intended parent progenitor to do so as well? Indeed, the case seems even more compelling when both genetic contributors are intended parents.

150 *See* Andrea L Kalfoglou & Gail Geller, *A Follow-up Study with Oocyte Donors Exploring Their Experiences, Knowledge, and Attitudes about the Use of Their Oocytes and the Outcome of the Donation*, 74 FERTILITY & STERILITY 660, 665 (1999).

151 *See id.*; Natalie Adsuar, & Julianne E. Zweifel, *Assessment of Wishes Regarding Disposition of Oocytes and Embryo Management Among Ovum Donors in an Anonymous Egg Donation Program*, 84 FERTILITY & STERILITY 1513, 1514 (2005).

created from their donated sperm.[152]

d. Gendered Norms in Parental Roles

These distinctions in the way men and women seek future control over their gametes might reflect another factor at work: gender-based differences in how men and women are expected to view their connection to their genetic offspring and how society constructs the roles of mother and father. Indeed, it is hard to account for this difference without considering this possibility. For while differences in payment for sperm versus egg donation services and the tendency toward separate contracting even for anonymous egg donors can be readily explained by the significant physical burdens and medical risks involved in egg donation, neither of those really explain why an egg donor would have more interest in the identity of the person receiving the eggs or the ultimate fate of embryos created from the eggs. It seems equally or more likely that these differences stem from gendered distinctions in the social construction of parenthood: women are expected to want to be connected to their offspring and, indeed, except under extraordinary circumstances, raise their offspring, whereas the inevitability (or the strength) of this premise is considerably weaker for men.

Indeed, the Supreme Court's jurisprudence of fatherhood reflects this distinction. Men need to have developed an actual relationship with a child, in addition to a biological connection, before their constitutional right to parent ripens, while women's full constitutional parental identity and rights attach upon giving birth.[153] The Court justifies its differential treatment by the biological fact that women who give birth have gestated the fetus for nine months.[154] No such gestational bond has developed for egg donors or for women with disputed embryos prior to transfer of those embryos.

152 Kalfoglou & Geller, *supra* note 150, at 665 (citing study that found that only 7% of potential sperm donors "would like to have a say in the selection of recipients," though 25% preferred to not donate to single women). Admittedly, it seems likely that sperm donations from known donors are more often for fresh intrauterine insemination, which would not involve the creation of embryos. While some donations from known donors undoubtedly are used for IVF, again the preference might be for a fresh donation, which would eliminate the concern about or need to address future use of the sperm, though the possibility of frozen embryos still remains. Thus sperm donors simply may have less reason to contemplate the question. In addition, as we have seen, sperm donors who donate to a sperm bank may have a practical way of reclaiming unused sperm (buying it back), obviating the need for a contractual remedy. Egg donors would not have that option, as their eggs would have been united with another's sperm. Thus, the difference between egg and sperm donors regarding retention of some kind of control or restriction on future use might be attributable in part to physiological differences in how the gametes are used.

153 Lehr v. Robertson, 463 U.S. 248, 261 (1983).

154 *Id.* at 260 n.16.

Some scholars have argued that these gendered differences can and should play a role in the legal enforceability of embryo disposition contracts. Judith Daar argues, for example, that women should retain the unilateral right to decide to use cryopreserved embryos during a period equivalent to gestation after creation of the embryos because, like gestation, the process of egg retrieval imposes physical burdens that lead women to "feel as protective of their waiting embryos as pregnant women feel about their growing fetuses."[155] Ellen Waldman makes a different argument for a similar result: that because men as a group more easily disengage from their offspring than women, women should be afforded more control over the use of their gametes and the embryos created from them.[156] If these assumptions about women's and men's attitudes are correct, one might perhaps argue that the enforceability of Version One-type contracts should vary based on whether the female spouse or partner is the one relinquishing the embryos upon divorce.

However, several reasons should prompt us to reject this conclusion. First, the undeniable physical burdens of egg retrieval cannot compare in duration or magnitude to nine months of pregnancy and are insufficient to justify giving women an unrestricted right to use embryos over the objection of a partner or to justify differential treatment of men and women in terms of their ability to enter into binding embryo disposition contracts or to limit the options available to couples. Second, even if Waldman (and others) are right that men as a group are more prone to manifest disengagement from their offspring once the relationship with the mother terminates, this says little about the specific men who have previously expressed a concern about their potential offspring in the event of divorce. Nor does it indicate that women as a group are incapable of disengaging. The very prevalence of egg donation suggests that women are fully capable of disengaging. Moreover, there is evidence that women are capable of disengaging even while they are undergoing fertility treatment. For example, some women undergoing IVF have voluntarily donated eggs to other infertile women, in essence inhabiting two roles—donor and intended parent—simultaneously.[157]

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155 Daar, *Assisted Reproductive Technologies*, *supra* note 139, at 476.

156 *See* Waldman, *supra* note 122, at 1041-47 (describing pattern of paternal disengagement among divorced or unmarried fathers).

157 John Leeton & Jayne Harman, *Attitudes Toward Egg Donation of Thirty-Four Infertile Women Who Donated During Their In Vitro Fertilization Treatment*, 3 J. IN VITRO FERTILIZATION AND EMBRYO TRANSFER 374 (1986). Interestingly, the authors found that egg donors cared less about knowing whether a child was born than sperm donors. *Id.* at 378. *See also* C. Murray & S. Golombok, *Oocyte and Semen Donation: A Survey of UK Licensed Centres*, 15 HUM. REPROD. 2133, 2137 (2000) (finding oocyte sharing practices in 13% of clinics surveyed). Women undergoing voluntary sterilization or hysterectomies have also been recruited as donors. *Id.* More recently, some women, particularly in the United Kingdom, have chosen to donate as a way of mitigating

More importantly, we need to be wary of claims of inherent or generalizable sex differences in attitudes toward gamete donation and embryos. Rene Almeling, in her study of motivations for egg and sperm donors, concludes that agency staff influences egg donors' *stated* motivations in ways that meet societal expectations about gender roles.[158] According to Almeling:

> [While] staff at both egg donation agencies and sperm banks *prefer* altruistic donors . . . the egg donation agencies are more directive about the need for women to report altruistic motivations on profiles, while sperm banks are more likely to accept profiles from men who reference an interest in financial compensation. While women applying to be egg donors must evince caring concern for the client's quest to have children, this same emotional labour is not required of men, which corresponds to gendered norms of selfless, nurturing motherhood and distant, breadwinner fatherhood.[159]

This finding suggests that there may in fact be no inherent difference in how female donors view their donation; rather, those attitudes may be socially constructed. Almeling also aptly discerns that women gamete donors, unlike men, are required to undergo psychological evaluation and to discuss their feelings about "'having their genetics out there.'"[160] She observes that "women are perceived as more closely connected to their eggs than men are to their sperm."[161] Yet she concludes, perhaps ironically, that men donating sperm actually identify as "fathers" to their offspring, whereas egg donors do not see themselves as "mothers" to children resulting from their donation.[162] Almeling's research indicates that there is an "oversupply" of egg donors while sperm banks struggle to recruit donors,[163] again calling into question the idea that men more easily part with their gametes

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the cost of the treatment. *Id.* at 2134.

158 Rene Almeling, *"Why Do You Want to be a Donor?": Gender and the Production of Altruism in Egg and Sperm Donation*, 25 NEW GENETICS AND SOC'Y 143 (2006).

159 *Id.* at 150-51.

160 ALMELING, *supra* note 109, at 59.

161 *Id.*

162 *Id.* at 163 ("Women . . . do not show any signs of slavishly responding to some internal maternal instinct . . . .").

163 Almeling, *Selling Genes*, *supra* note 144, at 325, 336. *But see* Murray & Golombok, *supra* note 157, at 2134 (finding that shortage of sperm donors less acute than egg donors where payments to egg donors only

and are less attached to future offspring than women.[164]

Ultimately, the fact that some egg donors may desire conditions on their donations and some female progenitors may experience a greater attachment to their embryos than their male counterparts does not justify a rule that would prohibit progenitors from agreeing that the male partner can use the embryos in the event of divorce, with the female partner relinquishing all parental rights. To rule otherwise would perpetuate stereotypes and reify, rather than challenge, rigid sex roles in parenting. The gendered experiences of the embryo disposition decision may mean, however, that we need to consider carefully possible gender distinctions in fashioning procedural and substantive protections surrounding embryo disposition contracts. A look at the Version Two contract and the next category of family law contracts related to parentage can yield additional guidance on whether or how to honor embryo disposition agreements.

C. Assuming Parental Rights Through Contract: Sperm Provider, Surrogacy, and Co-Parenting Contracts

In Version Two of the embryo disposition contract, the parties agree that one party may use the embryos upon divorce, but that both parties will be considered legal parents of any resulting child(ren).

In one way, this version of the contract seems easier to enforce, since it does not raise concerns about a biological parent seeking to avoid parental responsibilities, particularly child support. However, in other significant respects, this version of the contract may prove more problematic. Unlike Version One, we cannot interpret this contract as a contract by one intended parent to act as a gamete donor in the event of a divorce. Rather, this contract involves a promise to assume the role of parent in the event of a divorce for a child not even in gestation.

As we saw earlier, a few states appear to have anticipated the possibility of embryo disposition contracts in which a party assumes parental responsibilities for a future child even in the event of divorce. Virginia's assisted conception statute provides that a party who has filed for divorce prior to implantation of an embryo is not the legal parent of any resulting child *unless* that person "consents in writing to be a parent, whether the

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minimal).

164 *See* Daniels, *supra* note 109, at 90-100.

writing was executed before or after the implantation."[165] A handful of other states likewise provide that ex-spouses are not legal parents of children resulting from embryos transferred after divorce unless they gave written consent. For example, Texas provides that if divorce occurs before placement of embryos, "the former spouse is not a parent of the resulting child *unless* the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child."[166] Neither of these statutes places any time limits on the written consent, so presumably written consent at the time the embryos are created would satisfy this requirement. However, Texas and other states with similar statutes also provide that either party may withdraw consent any time prior to placement of the embryos, suggesting the ex-spouse could prevent transfer altogether, as well as change his or her mind about assuming the role as legal parent.[167] Thus, even in states with these statutes, the enforceability of a promise to act as parent when embryos are used after divorce remains an open question.

No legal precedent exists as yet outside the assisted reproduction context for enforcing a contract to have a child with someone, at least prior to initiation of a pregnancy or birth of a child.[168] However, sperm provider, surrogacy, and co-parenting contracts each involve promises to take on the role, rights, and responsibilities of legal parenthood and may support enforcing this type of embryo disposition contract under certain circumstances.

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165 VA. CODE ANN. § 20-158(C) (West 2011) (emphasis added).

166 TEX. FAM. CODE ANN. § 160.706(a) (West 2011) (emphasis added). *See also* COLO. REV. STAT. ANN. § 19-4-106(7)(a) (West 2010); N. D. CENT. CODE ANN. § 14-20-64(1) (West 2011); WASH. REV. CODE ANN. § 26.26.725(1) (West 2011);

167 COLO. REV. STAT. ANN. § 19-4-106(7)(b) (West 2010); N. D. CEN. CODE ANN. § 14-20-64(2) (WEST 2011); TEX. FAM. CODE ANN. § 160.706(b) (West 2011) (consent of former spouse to assisted reproduction may be withdrawn in a record any time before placement of eggs, sperm or embryos); WASH. REV. CODE ANN. § 26.26.725(2) (West 2011). For a detailed discussion of the ambiguity inherent in these provisions, *see* Forman, *supra* note 2, at 92-95.

168 *Cf.* Doe v. Doe, 314 N.E.2d 128, 132 (Mass. 1974) ("We would not order either a husband or a wife to do what is necessary to conceive a child . . . any more than we would order either party to do what is necessary to make the other happy. . . . Some things must be left to private agreement."). However, courts have held parties bound by independent adoption agreements, even when they change their mind prior to finalization of the adoption, once the statutory period for revocation has passed. In *Sharon S. v. Superior Court*, 2 Cal. Rptr. 3d 699 (2003), the court refused to allow a lesbian biological parent to withdraw consent to the private independent second parent adoption by her former partner even though the adoption was not finalized. The objecting biological mother had failed to revoke within the ninety-day statutory period. However, the court left open the possibility that the biological mother might still block the adoption by showing at the final hearing that adoption was not in the child's best interests. *See also* CAL. FAM. CODE § 8815(a) (West 2004) (once consent to adoption by birth parent(s) has become permanent, prospective adoptive parents may not withdraw consent).

1. Sperm Donation Revisited

While the statutes and cases discussed in the previous section regarding sperm donation demonstrated courts' willingness to relieve a sperm donor of parental responsibilities and rights based on contract, other cases establish the corollary: that sperm providers can *assume* parental status by contract. For example, in *In the Interest of R.C.*,[169] a man, J.R., provided sperm for the insemination of a friend. A child was born as a result. When J.R. sought to establish paternity, the mother, E.C., objected to the petition and filed a motion for summary judgment. She claimed that because J.R. provided the sperm to a physician for the insemination, J.R. was merely a sperm donor under Colorado's artificial insemination statute and thus without parental rights. However, J.R. alleged that he and E.C. had agreed that he would retain his status as legal father.[170] The Colorado Supreme Court ruled that if, in fact, the parties did enter into such an agreement, then the artificial insemination statute would not apply, and J.R. would be considered a father with full parental rights and responsibilities, not a donor.[171] Indeed, refusal to recognize the father's parental status in such a situation might raise constitutional concerns.[172] Interestingly, none of the cases set forth any special requirements for enforcing an agreement to act as a father, though, as we have seen, some states have statutes that allow a sperm provider to assume parental responsibilities only by written agreement.[173]

One case has specifically recognized a party's ability to assume parental obligations via contract. In *Dunkin v. Boskey*, an unmarried couple sought to conceive a child using donor sperm.[174] They entered into a contract drafted by the fertility clinic in which both acknowledged their obligations to care for and support any children born of the insemination and promised that neither would deny that the child was their lawful child. The couple split

169 775 P.2d. 27 (Colo. 1989) (en banc).

170 *Id.* at 28.

171 *Id.* at 35. Other cases have reached a similar conclusion. *E.g.*, C.O. v. W.S., 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994) (mother and sperm provider agreed to provider's relationship with child). *But cf.*, Herman v. Lennon, 776 N.Y.S.2d 778 (Sup. Ct. 2004) (boyfriend's signing of medical consent to insemination of girlfriend with donor sperm did not constitute contract to pay child support).

172 McIntyre v. Crouch, 780 P.2d 239 244 (Or. Ct. App. 1989) (ruling Oregon's artificial insemination statute violates due process clause if sperm donor proved he relied on agreement with mother that he would have rights and responsibilities of fatherhood).

173 *See* statutes cited *supra* note 90. Interestingly, none of these statutes incorporate a time limit on the agreement.

174 98 Cal. Rptr. 2d 44 (Ct. App. 2000).

up when the child was two, and the mother cut off visitation. Although a trial court ruled that the father lacked standing to seek custody or visitation, the father was successful in suing the mother for breach of contract. The court recognized that "Parents have a right to contract with each other as to the custody and control of their offspring and to stipulate away their respective parental rights. Such contracts are binding upon them."[175] The court did acknowledge that such contracts would not be binding on the court if the contract attempted to divest the court of its power to provide for support for the child. However, in this case, the father was promising to take on the responsibilities of parenthood, not shirk them, so it furthered the policies of family law.[176] The court concluded that the father was entitled to pursue an action for damages for breach of contract.[177] Thus, precedent exists in the sperm donation context for assuming parental responsibilities by contract, as the male progenitor would do in the Version Two embryo disposition contract.

2. Co-Parenting Contracts

Courts have also in a few instances cautiously begun to recognize the assumption of parental responsibilities by contract in the context of gay and lesbian families. In *In re Bonfield*, the Ohio Supreme Court considered a petition for shared custody brought by a lesbian couple who were co-parenting children conceived by artificial insemination.[178] The court ruled that the biological parent could waive her right to sole custody of the children, and it would enforce her agreement to grant joint custody to a third party (the partner), as long as it was in the children's best interests.[179] Similarly, in *A.C. v. C.B.*, a New Mexico appellate court ruled that a settlement agreement between same-sex partners regarding custody of a child they orally agreed to co-parent was not unenforceable as a matter of law, though the court would determine visitation based on the best interests of the child.[180] Judicial decisions in several other states have recognized some kind of parental status for same-sex partners, but have declined to do so by "enforcing" a contract between the parties. Rather, the courts consider those contracts as evidence of the parties' intent and conduct that demonstrates assumption of parental status under the state's statutory

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175 *Id.* at 55 (quoting Stewart v. Stewart, 278 P.2d 441, 445 (Cal. Ct. App. 1955)).

176 *Id.* at 55-57.

177 *Id.* at 58-59.

178 780 N.E.2d 241 (Ohio 2002).

179 *Id.* at 249.

180 829 P.2d 660, 664 (N.M. Ct. App. 1992). *See also In re* Mullen, 953 N.E.2d 302, 308 (Ohio 2011).

parentage scheme or on equitable grounds.[181]

However, a number of state courts have explicitly found such contracts unenforceable.[182] Indeed, in *T.F. v. B.L.*, the Massachusetts Supreme Court ruled that a co-parenting agreement violated public policy, relying significantly on a conception of procreative freedom articulated in its earlier embryo disposition case, *A.Z. v. B.Z*, which emphasized the need for contemporaneous consent. The debate over co-parenting contracts in these jurisdictions, therefore, reflects some of the conflicting concerns that have motivated the debate over embryo disposition contracts.

3. Surrogacy Contracts

Although still controversial, a number of states now have statutes that explicitly allow surrogacy contracts, at least for intended parents using gestational carriers.[183] Other states have recognized parentage set forth in surrogacy contracts by judicial decision.[184] Significantly, most of the statutes approving surrogacy set forth specific substantive and procedural requirements necessary to validate the contract. For example, Illinois's Gestational Surrogacy Act presumes surrogacy contracts are enforceable, but only if they meet certain procedural and substantive requirements. The contract must be in writing, witnessed by two adults, and both the surrogate and intended parents must have separate

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181 *See, e.g.*, Elisa B. v. Superior Ct., 33 Cal. Rptr. 3d 46 (2005) (partner ruled presumed parent under Uniform Parentage Act); Kristine H. v. Lisa R., 33 Cal. Rptr. 3d 81 (2005) (biological mother equitably estopped from attacking pre-birth stipulated judgment declaring partner joint parent); C.E.W. v. D.E.W., 845 A.2d 1147, 1151 (Me. 2004) (same); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (co-parenting contract supported claim to de facto parent status by non-biological partner); Debra H. v. Janice R., 904 N.Y.S.2d 263 (2010) (biological mother equitably estopped from denying partner's parent relationship with child); *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (partner could assume parent-like relationship, based in part on co-parenting agreement, sufficient to award visitation).

182 *See, e.g.*, T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (finding implied contract between same-sex partners to co-parent unenforceable). *See also* Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1758 (2007) (positing that courts may resist enforcement of co-parenting agreements because they are "long-term or irrevocable consents to visits. . . . [or] a radical waiver of rights") [hereinafter Bix, *Domestic Agreements*].

183 *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47 / 25 (West 2011); NEV. REV. STAT. § 126.045 (1995); N.H. REV. STAT. ANN. § 168-B:16 (2011); TEX. FAM. CODE ANN § 160.754 (West 2011); UTAH CODE ANN. § 78-45g-801 (West 2010).

184 Johnson v. Calvert, 19 Cal. Rptr. 2d 494 (1993); Doe v. Roe, 717 A.2d 706 (Conn. 1998); Cunningham v. Tardifff, No. FA084009629, 2008 WL 4779641 (Conn. Super. Ct. 2008); Hodas v. Morin, 814 N.E.2d 320, 324 (Mass. 2004); Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); J.F. v. D.B., 879 N.E.2d 740 (Ohio 2007).

legal representation.[185] The statute further requires the inclusion of various substantive provisions regarding rights of the parties and custody of any resulting child in the contract.[186] Utah's surrogacy statute mandates that the parties execute a written agreement that must be validated by the court to be enforceable.[187] Validation requires, among other things, that the parties participate in counseling.[188] Florida allows parties to a surrogate arrangement to enter into a "preplanned adoption agreement."[189] The statute specifies both required and prohibited or unenforceable provisions, including a ban on joint legal representation for intended parents and the surrogate.[190] Texas addresses the timing of the agreement by requiring parties to enter into the agreement at least fourteen days prior to transfer to the gestational carrier.[191]

Hence precedent exists for contractually binding individuals to become parents, albeit often with explicit procedural or substantive safeguards. Nonetheless, we must acknowledge that a number of states prohibit surrogacy contracts or declare them unenforceable either through statutes or case law.[192] However, the concerns that have animated these prohibitions do not apply to embryo disposition contracts between progenitors. The reasons most often cited for refusing to enforce or to prohibit surrogacy contracts include: (1) concerns about exploiting the surrogate, particularly when commercial surrogacy is involved; (2) running afoul of prohibitions on "baby-selling"; or (3) circumventing state adoption laws that ensure counseling for the relinquishing mother, a post-birth waiting period during which she can revoke consent, and court oversight to protect the child.[193] These objections most often

185 750 ILL. COMP. STAT. ANN. 47 / 25 (West 2011).

186 750 ILL. COMP. STAT. ANN. 47 / 25 (c) (West 2011).

187 UTAH CODE ANN. 1953 § 78B-15-801 (West 2012).

188 UTAH CODE ANN. 1953 § 78B-15-803(2)(d) (West 2012). *See also* VA. CODE ANN. § 20-160 (West 2011) (requiring written contract signed and notarized, appointment of guardian *ad litem* for future child, counsel for surrogate, and counseling for all parties).

189 FLA. STAT. ANN. § 63.213 (West 2012).

190 FLA. STAT. ANN. § 63.213(4) (West 2012).

191 TEX. FAM. CODE ANN. § 160.754(e) (West 2011).

192 *See, e.g.*, D.C. CODE § 16-402(a) (2012); IND. CODE § 31-20-1-1 (2012); MICH. COMP. LAWS ANN. § 722.855 (West 2012); NEB. REV. STAT. ANN. § 25-21,200 (West 2012); N.Y. DOM. REL. LAW § 122 (McKinney 2012); N.D. CENT. CODE § 14-18-05 (2012); WASH. REV. CODE § 26-26-240 (2012) (only surrogacy contracts for compensation); *In re* Baby M., 537 A.2d 1227 (N.J. 1988).

193 *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (traditional surrogacy); *Baby M.*, 537 A.2d 1227 (traditional surrogacy); J.F. v. D.B., 879 N.E.2d 740, 743-44 (Ohio 2007) (Cupp, J., dissenting) (traditional

appear in cases involving traditional surrogacy, where the surrogate would be required to relinquish rights to a child to whom she was genetically related, though there have been cases disapproving gestational surrogacy contracts as well.[194] None of the surrogacy cases refusing to honor the agreement in terms of parentage rested their decision on concerns about compelling the biological or intended parents to assume parental responsibilities. Rather the concern was exclusively with the possible exploitation or coercion of the surrogate and with the welfare of the child.[195] Clearly an agreement between progenitors to allow use of embryos post-divorce with both parties retaining parental rights does not raise these concerns. The parties were intended parents at the time the embryos were created; neither is a third party to the arrangement; neither party was or is being paid to carry the child; and, critically, no one is being required to relinquish parental rights. Thus concerns about surrogacy simply do not apply here.

Moreover, there is precedent for holding a party to an agreement to become a parent through assisted reproduction despite the changed circumstance of divorce. In *Jaycee v. Superior Court*, an intended father, John, and his wife, Luanne, had contracted with a gestational surrogate to carry to term a child conceived through IVF with donor sperm and egg.[196] The couple separated while the surrogate was pregnant with the child, and John sought to deny paternity and avoid paying child support for the resulting child. In ruling that the family court had jurisdiction to consider an order to show cause for temporary child support, the California Court of Appeal held that it was "likely" that the intended father would be considered the legal father of the child (as the intended mother was the legal mother) when the case was adjudicated "based on the undisputed fact of John's signing the surrogacy agreement . . . which, for all practical purposes, caused Jaycee's conception every bit as much as if he had caused her birth the old fashioned way."[197] If John Buzzanca could be held to have assumed legal fatherhood by signing the surrogacy agreement, there seems no reason why progenitors could not similarly bind themselves.

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surrogacy). These concerns are reflected in state statutes requiring a written contract and specific mandatory terms. *See, e.g.*, NEV. REV. STAT. § 126.045 (2011); N.H. REV. STAT. § 168-B:25 (2011).

194 *R.R.*, 689 N.E.2d 790, 795-97 (traditional surrogate); *Baby M.*, 537 A.2d 1227 (traditional surrogate); A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. 2000) (refusing to issue pre-birth order placing intended parents' names on birth certificate of child carried by gestational surrogate).

195 *See, e.g.*, *Baby M.*, 537 A.2d at 1247-51. Critics of surrogacy have also expressed concerns about commodification, which do not apply in this situation, as these situations do not involve any market for the embryo, but decisions made about one's own embryos between the two progenitors.

196 49 Cal. Rptr. 2d 694 (Ct. App. 1996).

197 *Id.* at 702.

Moreover, statutes approving surrogacy contracts require commitments by the intended parents to assume custody and legal responsibility for any resulting child. For example, Illinois's surrogacy statute requires that the gestational surrogacy contract contain the express agreement of the intended parents to "(i) accept custody of the child immediately upon . . . birth; and (ii) assume sole responsibility for the support of the child."[198]

One complication in the analogy between *Jaycee* and the typical embryo disposition dispute is, once again, the time lag involved in embryo disposition agreements. In *Jaycee*, the surrogate was already pregnant when the intended parents separated. If the pregnancy was not already in progress, it seems unlikely that a court would have refused to allow John to terminate the contract (keeping in mind that neither John nor his wife was genetically related to the embryos being implanted in the surrogate). Indeed, surrogacy contracts routinely contain clauses that allow any party to terminate the contract upon written notice prior to transfer of the embryos to the surrogate. Virginia allows for termination of a contract already approved by the court by any party prior to the surrogate becoming pregnant,[199] although Virginia contains no such provision in its statute regarding embryo disposition on divorce.[200]

It makes sense to allow any party to terminate a surrogacy contract prior to commencement of a pregnancy when a third party is involved. The surrogate is committing to gestate a child for another—a huge physical undertaking. The intended parents are committing to have a third party carry a baby for them. These circumstances differ significantly from a promise to allow use of embryos by a partner and assume parentage of any resulting child. Moreover, the reliance is clearly different. Intended parents may incur expense and delay but still retain the same ability to procreate that they had before—by seeking another surrogate to carry their child. From the surrogate's perspective, termination of the contract would deprive her essentially of an economic opportunity. However, in the

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198 750 ILL. COMP. STAT. ANN. 47 / 25 (c)(4) (2011). *See also* N.H. REV. STAT. ANN. § 168-B:25 (2012) (surrogacy contract "shall include" statement of intended parents' consent to accept obligations of parenthood, unless surrogate gives notice of intent to keep child within statutory period); TEX. FAM. CODE ANN. § 160.754(a)(3) (West 2011) (requiring agreement to provide that intended parents will be parents of child) and § 160.762(c) (providing that intended parent may be liable for child support even if agreement otherwise unenforceable); UTAH CODE ANN.§ 78B-15-801(1)(c) (West 2012) (requiring agreement to state that intended parents become parents of child) and § 78B-15-809 (3) (providing that intended parents may be liable for child support even if agreement otherwise unenforceable).

199 VA. CODE ANN. § 20-161(A) (West 2012). *See also* UTAH CODE ANN. 1953 § 78B-15-806(1) (West 2012) (allowing any party to terminate contract by written notice before surrogate becomes pregnant).

200 VA. CODE ANN. § 20-161 (West 2012).

embryo disposition context, a party entering into the contract, at least if done prior to cryopreservation of the embryos, may have relied on the right to act as parent in agreeing to use of the embryos post-divorce and the party seeking to use the embryos may have relied on that promise in undertaking the IVF cycle and cryopreservation.

D. Insights from Premarital and Postnuptial Agreements

While contracts related to assisted reproduction, such as surrogacy and gamete donation, seem most apposite to embryo disposition contracts, another category of family law contracts may also bear on the question of embryo disposition contract enforcement: premarital and postnuptial contracts. The law's treatment of these contracts is relevant for several reasons: (1) the widespread acceptance of premarital agreements has been used to justify enforcement of embryo disposition contracts; (2) many, if not most, of the couples who would be contracting about their embryos are married or in marital-type relationships. Indeed, there are couples that have sought to address this issue in a premarital agreement; and (3) the history, limits, and diversity of approaches toward premarital agreements can yield valuable insights useful in fashioning an approach toward embryo disposition agreements.

1. Premarital Agreements

In some ways, the history of premarital agreements is emblematic of the law's treatment of family law contracts. Initially, courts widely viewed premarital agreements contemplating divorce as unenforceable.[201] Courts generally saw them as promoting divorce or impermissibly altering the "status" of marriage and declared them against public policy.[202] As the divorce rate rose and no-fault divorce swept the country, attitudes and rulings changed.[203] Today, virtually all states will enforce premarital agreements, though the procedural requirements and standards for reviewing those agreements vary significantly among the states.[204]

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201 Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998) [hereinafter Bix, *Bargaining in the Shadow*].

202 *Id. See also, e.g.*, Stratton v. Wilson, 185 S.W. 522, 525 (Ky. Ct. App. 1916), *overruled by* Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990).

203 *See, e.g.*, *Edwardson*, 798 S.W.2d at 943-44.

204 *Bargaining in the Shadow*, *supra* note 201, at 158.

Although premarital agreement provisions regarding division of property and spousal support are now routinely enforceable,[205] certain types of provisions remain universally off limits. These include provisions abrogating or limiting child support as well as those concerning child custody and visitation.[206] While prospective spouses are free to include provisions related to these topics, courts will not enforce them, as the court always retains jurisdiction to determine and act upon the best interests of the child. If we apply these standards in assessing embryo disposition agreements, the question then becomes, is embryo disposition more akin to child custody or to the distribution of property?

a. Embryo: Child or Property?

To answer this question, we consider in more depth the status of the embryo. As discussed earlier, courts and commentators have run the gamut of choices: some classifying embryos as property; others assigning them a "special" status; and a few advocating for embryos as "persons."[207] All appellate decisions to date have rejected the notion that embryos are "children" under the law and that contracts regarding their disposition would be against public policy.[208] On the contrary, every case has approved the use of contract to govern embryo disposition agreements with clinics. Moreover, even those that have refused enforcement of provisions allowing use of the embryos by one party in disputes between the progenitors have done so, not based on the court's power to determine the best interests of a child, but because of concern about the progenitors' procreation rights.[209]

The courts are correct. Although anti-abortion forces are mounting campaigns in various states to declare embryos "persons," these efforts have not succeeded and, in any case, would run afoul of the Supreme Court's determination that a fetus is not a person.[210]

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205 Even after jurisdictions lifted their ban on premarital agreements related to divorce, many initially balked at enforcing waivers of spousal support. Today, the vast majority of jurisdictions will enforce waivers, at least under certain circumstances. Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL L. 413, 423 (2008).

206 *Id.* at 426. Promises to provide more child support than the law requires are generally enforceable. Linda J. Ravdin, *Prenups to Protect Children*, 24 FAM. ADVOC. 33 (2002).

207 *See supra* notes 14-48 and accompanying text.

208 Two trial courts took this approach, but they were overruled. *See* Davis v. Davis, No. E-14496, 1989 WL 140495, at *4 (Tenn. Cir. Ct. 1989), *rev'd*, 1990 WL 130807 (Tenn. Ct. App. 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 10 P.3d 1086 (Wash. App. 2000), *rev'd en banc* 48 P.3d 261 (Wash. 2002).

209 *See supra* notes 34-43.

210 *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012) (striking down pending

If a fetus is not a person, surely an embryo would not qualify as one.[211] Nor as a matter of logic or policy do decisions about embryo disposition equate with decisions about child custody. While judicial decisions evaluating premarital agreements have stated consistently that custody and related provisions are unenforceable, in most cases, these decisions have presented the assertion as axiomatic, with little or no explanation for the conclusion.[212] Courts' reservation of the right to determine custody and visitation matters, regardless of any parental premarital agreement to the contrary, likely reflects a number of circumstances that distinguish these provisions from embryo agreements: First, courts decide custody issues based on the best interests of the child, and that determination can only be made based on the circumstances in existence at the time of enforcement.[213] Second, children have an existence and interests clearly independent from their parents. By contrast, embryos cannot have rights independent of their progenitors because they represent at best a potentiality for becoming actual children. That potentiality cannot be actualized unless someone thaws the embryos, the embryos survive the thawing, the embryos are transferred to someone's womb, pregnancy occurs, and the fetus is successfully carried to term. Opportunities for failure occur at every point of this process. Indeed the chance of a particular cryopreserved embryo resulting in a living child is likely minute, as evidenced by the hundreds of thousands of embryos languishing in storage[214] and the live birth success rate for IVF with thawed embryos.[215] An embryo disposition agreement concerns only whether and who

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personhood initiative because it conflicted with *Casey*); Erik Eckholm, *Push for 'Personhood' Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES (Oct. 25, 2011), http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html?pagewanted=all (discussing movement to declare embryos "persons"); Emily Wagster Pettus, *Mississippi 'Personhood' Amendment Vote Fails*, HUFFINGTON POST (Nov. 8, 2011) http://www.huffingtonpost.com/2011/11/08/mississippi-personhood-amendment_n_1082546.html.

211 *Cf.* Howard W. Jones, Jr., *The Dangers of "Personhood" Bills*, PILOTONLINE.COM (May 31, 2012), http://hamptonroads.com/2012/05/dangers-personhood-bills-0 (discussing the dangers that characterizing an embryo as a person poses for the legality of IVF and other medical procedures).

212 *In re* Marriage of Best, 901 N.E.2d 967, 970 (Ill.App. Ct. 2009); *In re* Marriage of Burke, 980 P.2d 265, 267 (Wash. Ct. App. 1999). *Cf. In re* Marriage of Lane, 2011 WL 1459186, *3 (Cal. Ct. App. 2011) (unpublished) (stating without citation that premarital agreement could not adversely affect child's right to support).

213 *Marriage of Best*, 901 N.E.2d at 970.

214 Lyerly et al., *Factors*, *supra* note 1, at 1623.

215 The Centers for Disease Control 2007 report on Assisted Reproduction shows a live-birth rate of 29.3% from transfers using frozen non-donor embryos. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2007 ART REPORT SECTION 3-ART CYCLES USING FROZEN NONDONOR EMBRYOS, *available at* http://www.cdc.gov/art/ART2007/sect3_fig42-43.htm#f42.

may use embryos to attempt to achieve a pregnancy and, perhaps, legal parentage of any resulting embryos, not the day-to-day custody of any child that might result. Hence the case against contractual enforcement of embryo agreements should not rest on the ground that they are akin to premarital child custody or support provisions and thus inappropriate for contractual enforcement.[216]

It does not automatically follow, though, that embryos are simply another kind of property subject to contractual disposition as property would be in a premarital agreement. The "property" at issue can transform into a child, uniquely and profoundly connected to its progenitors (whether genetic or intended), and is thus deserving of its special status. Moreover, embryo disposition agreements do implicate fundamental constitutional rights to procreate or not to procreate.[217] Scholars disagree about whether enforcing an embryo disposition contract would constitute state action necessary to find an actual constitutional infringement.[218] But even if we assume state action, in this situation, both parties have constitutional procreation rights at stake. Enforcement would arguably trample someone's constitutional rights, whichever way the court ruled. So we cannot say these provisions should be unenforceable simply because they may impact someone's constitutional rights. Nonetheless, we should not ignore the constitutional dimensions of this situation in considering whether to enforce them.

b. Constitutional Implications

We should consider, then, how the law has treated provisions in premarital agreements that implicate constitutional rights. Premarital agreements regarding children and religion offer one potential example involving family law contracting over constitutional rights.[219]

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216 Contractual resolutions of custody and child support provisions at the time of divorce are universally accepted and even encouraged, though here too, the court always retains jurisdiction to modify those provisions in the best interest of the child. *See* UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 248-9 (1998).

217 *See* Roe v. Wade, 410 U.S. 113 (1973) (recognizing fundamental right not to procreate); Eisenstadt v. Baird, 405 U.S. 438 (1972) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (same); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing fundamental right to procreate).

218 *Compare* Cohen, *supra* note 83, at 1172-79 *with* Daar, *Assisted Reproductive Technologies*, *supra* note 139, at 465.

219 Some couples have apparently entered into premarital agreements containing clauses where they agree not to have children, which would seem most analogous to the embryo situation, but no cases have yet been litigated. *Cf.* Joline F. Sikaitis, Comment, *A New Form of Family Planning? The Enforceability of No-Child Provision in Prenuptial Agreements*, 54 CATH. U. L. REV. 335, 335 (2004) (arguing against enforcement of such "no child" provisions on public policy and constitutional grounds). In one case, *In re J.M.W.*, No. 64334-

On occasion, interfaith couples have entered into agreements before marriage regarding the religious upbringing of any future children. The modern trend has clearly been against enforcement of these provisions,[220] although a few older cases approved them.[221] In many ways, the trend is consistent with the case law against enforcing custody and visitation provisions generally in premarital agreements; nonetheless, some courts have focused instead on the constitutional implications of enforcing a contract dealing with the exercise of religious liberty.

Zummo v. Zummo[222] typifies the analysis. In *Zummo*, a divorced father sought an order prohibiting the mother from taking their children to non-Jewish religious services. The father relied in part on an oral premarital agreement that any children would be raised Jewish.[223] The court refused to enforce the agreement based on three reasons: (1) the agreement was too vague to establish a meeting of the minds and provide a sufficient basis for enforcement; (2) enforcement would promote a particular religion and excessively entangle the courts in religious matters; and (3) enforcement would conflict with the public policy inherent in the religion clauses of the first amendment "that parents be free to doubt, question, and change their beliefs, and that they be free to instruct their children in accordance with those beliefs."[224]

7-I, 2010 WL 4159385 (Wash. Ct. App. 2010), a court did confront a case where a couple had agreed before marriage that her future husband could adopt her child when the child turned nine years old. When the couple divorced, the husband sought *de facto* parent status, relying on the intent expressed in the premarital agreement. The court rejected the claim, finding that the husband did not meet the statutory requirements for *de facto* parent status. The court never considered the enforceability of the adoption provision. The parties seemed to concede its lack of enforceability.

220 Stanton v. Stanton, 100 S.E.2d 289, 292-93 (Ga. 1957); Alexandra Selfridge, *Challenges for Negotiating and Drafting an Antenuptial Agreement for the Religious Upbringing of Future Children*, 16 J. CONTEMP. LEGAL ISSUES 91, 92 (2007) (observing that "religious-upbringing provisions in premarital agreements often have been refused enforcement when disputes arise"); Martin Weiss & Robert Abramoff, *The Enforceability of Religious Upbringing Agreements*, 25 J. MARSHALL L. REV. 655, 725 (1992) (noting that the authors' advocacy of enforcement is "at variance with current conventional opinion"); Jocelyn E. Strauber, Note, *A Deal Is a Deal: Antenuptial Agreements Regarding the Religious Upbringing of Children Should Be Enforceable*, 47 DUKE L.J. 971, 983 (1998) (noting courts are "remarkably consistent" in refusing to enforce premarital religious upbringing agreements).

221 Shearer v. Shearer, 73 N.Y.S.2d 337 (Sup. Ct. 1947); Ramon v. Ramon, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942); *In re* Minors of Luck, 7 Ohio N.P. 49 (Prob. Ct. 1899).

222 574 A.2d 1130 (Pa. Super. Ct. 1990).

223 *Id.* at 1141-42.

224 *Id.* at 1144.

In analogizing the court's treatment of contractual restrictions on religious freedom to restrictions on procreative freedom inherent in an embryo disposition agreement, clearly the first two concerns are inapplicable.[225] The key point is the third: the policy embodied in the first amendment "that parents be free to doubt, question, and change their beliefs." Is there an inherent right "to change one's mind" regarding procreation embodied in the constitutional right to procreate as protected by the Fourteenth Amendment, strong enough to deprive an individual of the right to enter into a contract regarding procreation?

There are significant and, I would argue, dispositive differences between religious freedom and procreative freedom. Unlike religious freedom, procreative freedom presents an "all-or-nothing" choice: an individual either procreates or does not. If an individual chooses to procreate, and the effort succeeds, an irrevocable consequence results: a child. By contrast, there is nothing irrevocable about religious freedom. The right to free exercise of religion resides largely in mental states—beliefs—and practices. It makes sense to presume that this freedom encompasses the right to alter one's views and practices at any time. Certainly it would be impossible to stop someone from altering his or her beliefs, though of course his or her ability to express those beliefs might be restricted, as it would be if premarital agreements regarding religious upbringing were enforced. As the *Zummo* court stated:

> The constitutional freedom to question, to doubt, and to change one's convictions, protected by the Free Exercise and Establishment Clauses, is important for very pragmatic reasons. For most people religious development is a lifelong dynamic process even when they continue to adhere to the same religion, denomination, or sect. . . . Importantly, it is also generally acknowledged that it would be difficult, if not impossible, for an interreligious couple engaged to be married to project themselves into the future so as to enable them to know how they will feel about religion, if and when their children are born, and as the children grow; and that it would be still more difficult for such a couple to attempt to project themselves into the scenario of a potential divorce, in order to accurately anticipate the circumstances under which religious upbringing agreements would be enforced if such agreements were given legal effect.[226]

225 Concerns about excessive entanglement or promotion of a particular religion might arise if a couple chose a disposition, such as refusal to donate to research, based on religious grounds. However, the court could not avoid touching on this issue by refusing to enforce the contract, since it would need to devise some solution to the conflict.

226 Zummo v. Zummo, 574 A.2d 1130, 1146-47 (Pa. Super. Ct. 1990).

Describing religious freedom as "inalienable," the *Zummo* court went on to conclude that "while . . . a parent's religious freedom may yield to other compelling interests . . . it may not be bargained away."[227]

The difficulty of predicting one's future feelings about one's fundamental rights, as we have seen, undoubtedly applies to embryo disposition decisions and the exercise of procreative freedom. Yet precedent strongly supports the notion that procreative freedom includes the right to make irrevocable decisions about procreation. Carrying a fetus past the point of viability in essence constitutes an irrevocable decision to procreate, as states may ban abortion at that point. Perhaps most tellingly, courts have held that the right not to procreate includes the right to permanent sterilization.[228] Although admittedly consent in these cases occurs contemporaneously with the procedure, it is still possible that an individual might well regret their decision at some point in the future. Nonetheless, we allow people to make that choice, and indeed we protect their right to do so.

Indeed, the constitutional right not to procreate enunciated in *Griswold* and *Eisenstadt* supports enforcement of a third version of the contract we have not yet considered. We have focused thus far on versions of the embryo contract that allow one party to use the embryos. At this point, we might assess the flip side of the previous versions. In Version Three of the contract, the parties agree to destroy any remaining embryos in the event of divorce. Just as Versions One and Two involve procreation rights, so too does this version. Although none of the family law contract analogues discussed previously actually involve agreements not to procreate, the underlying principles would seem to support enforcement here as well. If anything, the case is strengthened in this version, as the cases that actually considered disputed embryos have ruled consistently in favor of the procreation-avoider, regardless of the theory.[229] Thus, the barriers to enforcement of premarital agreements regarding religious upbringing because of constitutional concerns do not necessitate a similar refusal to enforce embryo disposition agreements.[230]

227 *Id.* at 1148. Clearly the contracts discussed earlier as well as our nation's adoption laws make clear that the constitutional right to parent and procreate *can* be bargained away or waived. *See supra* notes 88-108, 165-200 and accompanying text; Brown v. McLennan Cnty. Children's Protective Servs., 627 S.W.2d 390 (Tex. 1982) (upholding waiver of hearing, notice, etc., regarding termination of parental rights); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 477-80 (1993).

228 *See* Hathaway v. Worcester City Hosp., 475 F.2d 701, 705-07 (1st Cir. 1973) (holding public hospital's ban on sterilization procedures violated patients' fundamental procreation rights and equal protection); *In re* Moe, 432 N.E.2d 712, 719 (Mass. 1982) (right to sterilization applicable to incompetent).

229 *See supra* note 14 and accompanying text; Daar, *Frozen Embryo Disputes*, *supra* note 124, at 197.

230 *But cf.* Fields, *supra* note 205, at 436 (asserting that promises not to have children in a premarital

c. Enhanced Procedural and Substantive Protections

However, neither this conclusion nor the law governing premarital agreements dictates automatic enforcement of embryo disposition agreements, no matter what the circumstances or content. Depending on the jurisdiction, even premarital agreements governing ordinary property matters may require enhanced procedural protections or trigger more searching substantive review than typical commercial contracts. Indeed, perhaps the law's treatment of spousal support waivers presents the most useful analogy. Traditionally, many jurisdictions held that spousal support waivers were against public policy and *per se* unenforceable. Over time, though, most jurisdictions rethought that position and now allow such waivers, though with varying degrees of heightened protection.[231] As with embryo disposition agreements, a span of years may separate enforcement of spousal support waivers from execution. In the interim, circumstances may have changed. The right to spousal support is an important benefit of marriage, and, depending on the jurisdiction, may be justified by the public policy goal of protecting a former spouse in need. Hence, courts may be reluctant to enforce premarital waivers of support. Indeed, this concern motivated the California trial court in *Pendleton v. Fireman* to refuse to enforce a spousal support waiver.[232] The California Supreme Court ultimately overturned the trial court's ruling. Although the court explicitly declined to state whether circumstances at the time of enforcement could render such an agreement unenforceable, the court did declare that it had no problem enforcing the provision agreed to by "intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel . . . at the time they execute the waiver."[233]

The story in California did not end there, however. The legislature responded by amending its premarital agreement statute, a version of the Uniform Premarital Agreement it had adopted some years earlier.[234] Under the amended California Family Code § 1612(c), provisions relating to spousal support, including waivers, are permitted, but only if each party is represented by independent counsel at the time of execution and the provision is

agreement are not enforceable because of a fundamental constitutional right to have children, and enforcement would "excessively entangle" judiciary in infringement of constitutional right).

231 *Id.* at 423 (noting spousal waivers prohibited at common law but now permitted in forty-three jurisdictions).

232 Pendleton v. Fireman, 5 P.3d 839, 840-41 (Cal. 2000).

233 *Id.* at 848-49.

234 *See In re* Marriage of Howell, 126 Cal. Rptr. 3d 539, 546-47 (Ct. App. 2011) (discussing 2002 amendment to § 1615 adding subsection (c) in response to *Pendleton*).

not unconscionable at the time of enforcement.[235]

Moreover, the California legislature also amended its statute to specify that an agreement would not be enforceable unless the party challenging the agreement had independent counsel or waived that right after being instructed about the need for such counsel.[236] The statute henceforth would also require a seven-day waiting period between presentation of the agreement (and counsel waiver, if any) and signing of the agreement.

California's statutory requirement of independent counsel for enforceability of provisions related to spousal support goes further than many states'. But, the broader notion that premarital agreements should be subject to procedural and substantive fairness protections that differ from commercial contracts continues to garner considerable support.[237] Moreover, scholars have argued persuasively in favor of this principle based on a variety of concerns.[238] Scholars have aptly recognized that despite facial gender neutrality in consideration of premarital agreements, they tend to place women at an economic disadvantage.[239] Scholars have also identified certain cognitive and psychological processes

235 CAL. FAM. CODE § 1612(c) (West 2012).

236 CAL. FAM. CODE § 1615(c) (West 2012).

237 As Margaret Brinig observes:

> Courts, and even the Restatement (Second), of Contracts, note that these family agreements are just a species of contract. However, their complexity, their subject matter, and the special conditions under which they are made causes courts, and sometimes legislatures, to be particularly careful when interpreting or evaluating them. This care may take the form of scrutiny for unconscionability or a special attention to procedural regularity, assistance of counsel, and disclosure.

Brinig, *supra* note 7, at 540-41. Even *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), perhaps the most noteworthy judicial example *rejecting* differential treatment of premarital agreements was softened by the Pennsylvania legislature, which amended its premarital agreement statute to allow a party to challenge an agreement as "not voluntary," rather than meeting the more difficult traditional contract requirement of duress. Frederick N. Frank & Tyler D. Litchfield, *"Voluntary" Requirement Presents New Twist in Prenuptial Agreements*, 8 LAW. J. 5, 9 (2006). *See also* RICHARD A. LORD, WILLISTON ON CONTRACTS § 11:8 (2010) (noting "a majority [of courts] have yet to discard the traditional view that premarital contracts are to be governed as a special breed of agreement, and not simply as another species of commercial undertaking.").

238 At least one scholar has gone further and eschewed contractual analysis altogether, advocating instead for treating marital property rights as inalienable until the time of actual separation or divorce. Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460 (2003).

239 Bix, *Bargaining in the Shadow*, *supra* note 201, at 201-02; Gail Frommer Brod, *Premarital Agreements*

that undermine the argument for pure contractual enforcement of premarital agreements[240] and would apply as well to embryo disposition agreements. Specifically, couples entering into premarital contracts often suffer from optimism bias. Despite the indisputable statistics demonstrating that nearly one in two marriages will end in divorce, couples entering into premarital agreements seldom believe they will fall into that category.[241] This unfounded optimism may lead individuals to enter into deals that will not serve their interests in the future. Couples contemplating embryo disposition decisions likely share this optimism about the solidity of their marriage. Moreover, as we have seen, the social science research on embryo disposition decision making strongly confirms that parties entering into such agreements, at least at the time of treatment, will have difficulty forecasting their future views about disposition and exercising rational judgment.[242]

2. Postnuptial Agreements

The law governing postnuptial agreements adds one other facet to our consideration of embryo disposition agreements. Although courts have not identified them as such, all of the appellate decisions considering embryo disposition agreements have involved married couples that undertook treatment. In other words, we might view these agreements as a type of postnuptial agreement. How, if at all, does that affect our understanding? Postnuptial agreements cover a range of subjects: some deal with promises related to conduct after one spouse's death; some involve transfers of property, such as a transmutation of community into separate property; and others deal with financial matters in the event of divorce.[243] States vary widely in their treatment of these agreements, as they do with premarital agreements. Postnuptial contracts dealing with actions of a surviving spouse are routinely enforced, while others receive much greater scrutiny.[244] While some states treat postnuptial agreements as they do premarital agreements, a significant number impose

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and Gender Justice, 6 YALE J.L. & FEMINISM 229, 240-42 (1994).

240 *See* Karen Servidea, Note, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 541-53 (2005) (discussing application of cognitive limits theory to premarital agreements and critique); Anne C. Dailey, *Imagination and Choice*, 35 LAW & SOC. INQUIRY 175 (2010) (arguing for substantive fairness review of premarital agreements based on psychoanalytic understanding of imagination).

241 *See* Bix, *Bargaining in the Shadow*, *supra* note 201, at 193-94, 201-02 and sources cited therein; Servidea, *supra* note 240, at 542-43.

242 *See supra* notes 49-76 and accompanying text.

243 Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 833-35 (2007).

244 *Id.* at 833-34.

additional burdens on postnuptial agreements.[245] One state bans them altogether;[246] others require independent counsel and/or substantive fairness review.[247] In California, marital partners, unlike parties engaged to be married, stand in a fiduciary relationship to each other. California law presumes that any postnuptial agreement has resulted from undue influence and thus requires a party seeking to enforce an advantageous agreement to rebut that presumption.[248]

This presumption of undue influence makes sense when dealing with financial arrangements, where it may be relatively easy to determine who got the better of the bargain. The same cannot be said regarding embryo disposition agreements: as the law surrounding disposition is unsettled, it is unclear what rights each individual would have outside the contract. Moreover, it might be difficult to determine whether the contract provided an advantage to one party—is being able to use the embryos an advantage? Or is being able to destroy them? Unlike with rights to property or support, there seems to be no way to evaluate the bargain outside the contextualized understanding of the parties themselves. Nonetheless, the insight from the law of postnuptial agreements—that married couples occupy a special relationship of trust that warrants greater procedural or substantive protections—does apply to couples seeking to reach agreement about embryo disposition.

IV. A Model for Enforceability

A. Procedural and Substantive Safeguards

Having evaluated embryo disposition agreements in the larger context of family contracting, two salient points emerge. First, substantial precedent exists for allowing parties to contract in advance about embryo disposition and divorce. The advent of assisted reproduction has led to the development of a contractual regime for determining family status, rights, and relationships. This trend coincides with the widespread acceptance of premarital agreements as a means of ordering familial relations, particularly involving property and support, between individuals about to marry. Second, contracts related both to assisted reproduction and other family law matters have generated considerable controversy, and courts and legislatures have recognized in varying ways that the family context demands certain safeguards. Thus the law often treats these contracts differently

245 *Id.* at 838.

246 OHIO REV. CODE ANN. § 3103.6 (West 2012).

247 *See* Williams, *supra* note 243 at 838-39.

248 *In re* Marriage of Fossum, 121 Cal. Rptr. 3d 195, 201-02 (Ct. App. 2011).

from commercial contracts.

The need for such safeguards seems particularly compelling when dealing with contracts regarding embryo disposition. As we have seen, couples undergoing infertility treatment often find decisions about embryo disposition exceedingly difficult, even in an intact relationship.[249] These contracts bear on rights that have constitutional significance—the right to procreate or the right not to procreate. It would be easy to conclude that for these reasons alone, contracts governing disposition simply should not be enforced, regardless of the circumstances surrounding their execution or the substantive terms of the agreement. However, a blanket ban of this kind cannot be justified without calling into question all family law contracting. Egg and sperm donors entering into contracts to donate gametes; surrogates contracting to carry a child for another; and engaged couples contemplating a premarital agreement to govern certain matters upon divorce all run the risk of making a promise or giving up rights they later will regret. Likewise, some of these contracts implicate fundamental rights. Nonetheless, the enforceability of most of these contracts is well established, with the exception of surrogacy contracts, which remain controversial.

Moreover, while holding parties to a binding contract may appear to circumscribe their freedom at the time of enforcement, we could also see it as freedom-enhancing.[250] One person's freedom to change his or her mind comes at the expense of another's freedom to rely on a promised disposition or to choose a particular option. Without the opportunity to contract, all parties would be subject to the default rules of the jurisdiction, which might eliminate an option (such as using the embryos despite the other's objection) or be forced to submit the determination to a court under a less specific standard for resolution, taking the matter out of the parties' hands. Either result would circumscribe, rather than enhance, the parties' freedom. An embryo disposition contract may provide assurance to parties undergoing in vitro fertilization that their expectations regarding use of their embryos (and thus their right to procreate or not) will in fact be fulfilled in the future. Without this assurance, some individuals might choose not to participate and, hence, enjoy less procreative freedom than they would have otherwise. Others will proceed but end up subject to an outcome at odds with their expectations or desires.

If we accept that progenitors must have the right to contract about their embryos, at least under certain circumstances, then the question becomes what those circumstances should be. To answer that question, we need to focus on the factors that make us uneasy

249 *See supra* notes 49-76 and accompanying text.

250 *Cf.* Bix, *Domestic Agreements*, *supra* note 182, at 1758. For a thorough and more philosophical discussion of the benefits of embryo disposition contracts, see Cohen, *supra* note 3, at 1162-67.

about these contracts. These fall into roughly two categories: legal and psychological.

The legal factors include the uncertainty in most jurisdictions surrounding the default rules regarding embryo disposition at divorce and the issue of legal parentage should one party agree to allow the other party to use the embryos to initiate a pregnancy after the marriage or relationship has dissolved. Couples making disposition decisions need information and advice about the legal risks and options available to them. The psychological factors include the optimism bias and the difficulties of forecasting one's feelings about procreation and parenthood into the future in the event of a radical change in circumstances—divorce.

A variety of options exist to address these problems. The most traditional approaches would impose procedural protections and/or substantive review—the opportunity to consider the fairness of the terms of the agreement at the time of enforcement in some fashion. Procedural protections might include a requirement that the contract be in writing; that the parties be represented by counsel; that the parties comply with a waiting period of some sort between execution of the contract and treatment; or even a requirement that the contract be approved by a court. One state or another has adopted each of these types of protections as conditions for enforceability of certain kinds of family law contracts, so these protections are not without precedent.[251]

At a minimum, any embryo disposition contract should be in writing and drafted in consultation with an attorney. The writing requirement would minimize disputes over the parties' intent regarding the embryos. The counsel requirement would provide some level of comfort that the parties have been fully apprised of the legal issues surrounding embryo disposition, including not just the issue of disposition itself, but the parties' intent regarding legal parentage should the contract allow one party to use the embryos.[252] In addition, mandating legal consultation would serve an important signaling effect—driving home to the parties the significance of the agreement they are contemplating.[253] As the parties would not typically be in a position of actual conflict at the time of contracting, I would

251 *See, e.g.*, *supra* notes 232-36, 242-44; *infra* notes 253-55.

252 *Cf. In re* Paternity of M.F., 938 N.E.2d 1256, 1261 (Ind. Ct. App. 2010) (noting "[f]irst and foremost . . .that the Donor Agreement was prepared by an attorney" in discussing formalities sufficient to enforce sperm donor contract and distinguishing "a writing consisting of a few lines scribbled on the back of a scrap of paper found lying about," which would not be enforceable). A consent form drafted by an attorney for the clinic or physician would not suffice. *See* Forman, *supra* note 2.

253 *In re Paternity of M.F.*, 938 N.E.2d at 1261 (requiring formalities helps ensure forethought, careful consideration, and thorough understanding of agreements' "meaning and import").

stop short of making independent representation of each party an essential precondition of enforcement, though I would strongly encourage it. With joint representation, a lawyer would certainly need a waiver of any potential conflict of interest and would be well advised to urge representation—or at least review—by another attorney.

Given the stress experienced by couples undergoing fertility treatment, insisting on some kind of waiting period might be warranted. For example, states uniformly require a waiting period after birth before a birth mother's consent to adoption will be considered irrevocable.[254] Some surrogacy statutes require that surrogacy contracts be executed prior to the transfer of any embryos to or initiation of treatment of the surrogate.[255] For premarital agreements, some states require a waiting period between receipt or execution of the agreement and the wedding, to decrease the likelihood of duress.[256]

It might be argued that embryo disposition agreements should not be entered into until *after* treatment. Certainly the social science research would support that approach. However, refusing to enforce agreements entered into prior to treatment would deprive couples of an important opportunity to condition participation in treatment on a defined disposition in the event of divorce. For some, such assurances might be essential to moving forward or might significantly impact how they do so. We could imagine, for example, a woman about to undergo treatment for cancer that will likely render her infertile.[257] She might well want to make certain that any cryopreserved embryos will be available for her use in the event of divorce. Without such assurance, she might prefer to use donor sperm to create embryos in advance of her cancer treatment or to opt for egg freezing. Prohibiting pre-treatment disposition contracts would circumscribe her options in a way that could undermine her ability to reliably preserve her fertility. A waiting period between execution of the agreement and cryopreservation, though, would create space for parties to give serious thought to the issues involved, to consult with independent legal counsel, and to seek psychological counseling, if desired.

254 Gregory A. Franklin, *Ethical Considerations in Representing Birth Parents*, PRACTICING LAW INSTITUTE (2004), at 129.

255 *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47 / 25(b)(2) (West 2011) (surrogacy contract must be executed before commencement of medical procedures to be enforceable); TEX. FAM. CODE ANN. § 160.754(e) (West 2011) (parties must enter into agreement before fourteenth day preceding transfer); VA. CODE ANN. § 20-160(A) (West 2012) (prior to assisted conception, parties shall petition court for approval of surrogacy contract).

256 Hill v. Hill, 269 A.2d 212, 213 (Del. 1970) (requiring a ten day waiting period); CAL. FAM. CODE § 1615(c) (West 2012) (requiring a seven day waiting period).

257 *See* Reber v. Reiss, 42 A.3d 1131 (Pa. Super. 2012). A United Kingdom case also presented similar facts. Evans v. United Kingdom, App. No. 6339/05, Eur. Ct. H.R. (2007).

Requiring court approval has been reserved for surrogacy contracts and undoubtedly reflects in substantial part the concern over the potential exploitation of the surrogate, a problem not raised by embryo disposition contracts.[258] Hence, such a requirement would impose an unnecessary burden on couples undertaking IVF and is unlikely to yield a better outcome for the parties.

Whether to permit substantive review at the time of enforcement, and, if so, by what standard, presents a trickier question. Any contract of course can be subject to an unconscionability challenge, which can encompass both a procedural claim as well as a substantive claim that the contract was unfair or one-sided.[259] If the requirements enumerated above were met, there would be little room to claim procedural unconscionability.

To assess the claim of substantive unconscionability, we might look to the law of premarital agreements, once again, for guidance. As we have seen, jurisdictions vary widely in whether and how they will review premarital agreements for substantive sufficiency. The Uniform Premarital Agreement Act, adopted by many states, provides that a premarital agreement is not unconscionable unless it was involuntary or would leave an ex-spouse on public assistance if it were enforced.[260] Other states essentially reject any notion of substantive review[261] or use some variation of "fairness" review.[262] Substantive fairness review allows courts to consider if changed circumstances render the agreement unfair, but it undermines the reliability of the agreement and raises the risk that the court will rewrite it.[263]

Both of these consequences are particularly problematic in the context of embryo disposition agreements where fundamental rights are at stake. Unlike typical premarital agreements, embryo disposition agreements are much less likely to embody an inherently

258 *See* TEX. FAM. CODE. ANN. § 160.762(a) (West 2011) (requiring agreement to be validated by court to be enforceable); UTAH CODE ANN. 1953 § 78B-15-802 (West 2012) (providing for petition for court validation of surrogacy contracts); VA. CODE ANN. § 20-159B (West 2012) (requiring court approval of surrogacy contracts). One scholar has suggested prior court approval for premarital agreements as a means of countering the prevalence of exploitive premarital agreements. Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 427 (2007).

259 RICHARD A. LORD, 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2012).

260 UNIF. PREMARITAL AGREEMENT ACT § 6(b) (2011). *See generally* LORD, *supra* note 259, at § 18:7 [8].

261 *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990).

262 *See, e.g.*, Edwardson v. Edwardson, 798 S.W.2d 941, 945-46 (Ky. 1990).

263 *Simeone*, 581 A.2d at 166; 7 AM. JUR. PROOF OF FACTS 3d. 581, § 2 (2012).

unfair arrangement. Standard assumptions about bargaining power, e.g. that the wealthier partner wields the greater power, would not necessarily apply in this situation. Some scholars have argued that women as a group may be more vulnerable in this context because they must undertake the burdens and risks of oocyte stimulation and egg retrieval and because they are more likely to suffer from infertility requiring IVF.[264] While these assumptions may hold true as generalizations, they say little about the relative bargaining position of the parties in any particular case. The female partner could well be the one who wants the agreement enforced.[265] This point seems especially meaningful given the apparent bias of courts against allowing use of the embryos when one party (thought more often to be the husband) objects.[266] Assessing "unfairness" poses practical difficulties as well. Because the options are rather limited (use, donate, or discard), any chosen disposition could later come to seem "one-sided" to the partner opposing it. To avoid undermining the certainty that the parties were seeking by contracting in the first place, any substantive review would have to be rare and based on compelling changed circumstances. Foreseeable circumstances, such as failure (or success) of the IVF, for example, should not suffice to reopen the terms of the contract.[267]

However, one situation may warrant a presumption of revocability. As previous sections have demonstrated, the decision to allow one party to use the embryos finds considerable support in the laws governing various types of family law contracts—particularly gamete donor and surrogacy contracts. But we might consider whether the promise *to assume parental status* (though not the promise to allow use of the embryos) should be revocable by the promisor. Presumably it is no more difficult to predict one's desire to be a parent than *not* to be a parent (Version One), but clearly the potential harm of erring in that prediction is significantly greater for the former. We have already explored the extent of psychological harm the ex-spouse might suffer from attributional parenthood, and I have argued that the possibility of a miscalculation about that harm would not suffice to justify refusing to enforce a provision to allow use of the embryos. However, a contract that allowed use of the

264 *See* Daar, *Assisted Reproductive Technologies*, *supra* note 139, at 476; Colker, *supra* note 139, at 1071-72; Pachman, *supra* note 4, at 146; Waldman, *supra* note 122, at 1053-56.

265 *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (wife sought to enforce clinic agreement directing implantation by wife in event of divorce); *In re* Marriage of Dahl, 194 P.3d 834, 838 (Or. Ct. App. 2008) (wife sought to enforce agreement calling for destruction of embryos); *In re* Marriage of Nash, 150 Wash. App. 1029 (Ct. App. 2009) (wife sought to enforce clinic agreement for her to control custody of embryos).

266 *See* Daar, *Frozen Embryo Disputes*, *supra* note 124, at 201; Waldman, *supra* note 122, at 105.

267 In most cases, courts consider claims of unconscionability based on circumstances at the time of execution, not enforcement. LORD, *supra* note 259, at § 18:12. Some jurisdictions treat premarital contracts differently in this regard. 7 AM. JUR. PROOF OF FACTS 3d. 581, § 2 (2012).

embryos *and* required the ex-spouse to assume parental responsibilities would add another layer of harm. Now the stakes are considerably higher from a miscalculation: eighteen years of child support plus the added psychological burden of forging a relationship with a child one no longer wants to have (and with the ex-spouse) or perhaps suffering the guilt of abandoning the child.

Do these additional harms justify a different rule for a promise to act as a parent in the event the couple divorces? Possibly yes. The main reason to honor a promise to allow one party to use the embryos is to preserve that party's opportunity to procreate and parent. A party might undertake the investment in IVF (financial and/or physical) with his or her spouse (as opposed to a donor) in reliance on the assurance that the embryos will be available for use regardless of the state of the relationship. However, that does not entitle the party to anything more than he or she would have had if the couple had not been infertile. For example, a fertile wife might want desperately to have children, and her husband might have initially agreed to start a family at some point in the future. They divorce before doing so. The now ex-wife would have no right to insist that the husband father a child subsequently. (Indeed she has no right to insist during the marriage that he father a child.) By the same reasoning, while a wife who created embryos during the marriage might have a right to use them after divorce to effectuate her own interest in becoming a parent, she has no right to insist that her ex-spouse act as a legal father to those children. Of course, concluding that one person does not have a "right" to some benefit does not mean that someone cannot make an enforceable promise to provide the benefit.[268] Still, the increased burden imposed by legal fatherhood may justify a rule allowing revocation of that aspect of the promise during some defined time period. Such a rule might provide that an embryo disposition contract provision to assume legal parentage of children resulting from embryos transferred post-divorce is revocable prior to transfer of the embryos. For this provision to be effective, the contract would have to include a requirement that the party using the embryos provide notice to the other party prior to transfer. Even if we did not adopt a rule allowing for revocation, it would certainly be advisable for the attorney to counsel her client about the availability of that option.

While the various procedural protections detailed here should address concerns about lack of knowledge or thorough consideration of the legal issues raised in embryo disposition, they do not necessarily ease the psychological factors that render these decisions difficult.[269] Decisions about embryos implicate deeply held views about the status

268 For example, promises to provide child support above the amount required by law are enforceable. *See supra* note 206.

269 *Cf.* Dailey, *supra* note 240, at 202, 208 (arguing that while procedural reforms can correct cognitive

of the embryo, religion, family, and parenting. Couples likely would benefit significantly from counseling with a mental health professional about these matters. Indeed, the social science literature has repeatedly called for increased support and counseling for couples faced with this difficult decision.[270] Where third party reproduction is involved, such as surrogacy or egg donation, it is common for the surrogate or donor to be required to undergo psychological screening.[271] Surrogates often commit to counseling throughout the process as well. Screening differs from counseling, as the former results in an evaluation of the suitability of the candidate, while the latter aims to assist the participant in dealing with any emotional issues that arise during the process. However, although some surrogates or donors may insist that intended parents be screened, many willingly waive that option, and there generally is no requirement that intended parents receive counseling. Of course, sperm donation, which has long been available, typically requires neither psychological screening nor counseling. Hence, although counseling can prove invaluable to couples considering embryo disposition, it should not be a prerequisite for enforceability.

B. Remedies

Assuming couples can create an enforceable contract, what remedies would flow from a breach? More specifically, would a party be entitled to specific performance? For example, assume the contract provided that the wife could use the embryos to attempt to initiate a pregnancy. If the ex-husband sought to block the transfer to the ex-wife, would the court be able to order the embryos released to the ex-wife, or would the court be limited to awarding damages to her? The very factor that might lead us instinctively to reject the option of specific performance—that the embryos are unique to both parties—in fact provides the basis for it.[272] Specific performance is an equitable remedy that is typically available when monetary damages cannot adequately compensate the non-breaching party, such as

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distortions that lead to problematic premarital agreements, they cannot counteract unconscious psychoanalytic processes that lead parties to enter into unfair bargains).

270 *See* Hammarberg & Tinney, *supra* note 51, at 90; Nachtigall et al., *What Do Patients Want?*, *supra* note 129, at 2072; Nachtigall et al., *How Couples*, *supra* note 54, at 2096; Lyerly et al., *Fertility Patients' Views*, *supra* note 53, at 508.

271 *See, e.g.*, UTAH CODE ANN. § 78B-15-803(d) (West 2012) (requiring parties to gestational surrogacy contract to have participated in counseling with mental health professional); VA. CODE ANN. § 20-160(B)(11) (West 2012) (requiring all parties to the surrogacy contract to receive counseling by mental health professional or social worker).

272 Cohen, *supra* note 3, at 1186.

when unique property is at issue.[273] By contrast, courts generally refuse to order specific performance for personal service contracts on the ground that compelling performance in that situation would create practical difficulties and require undue supervision by the courts.[274] If the contract provides that one party can use the embryos, monetary damages may not suffice, particularly if the party cannot otherwise conceive a genetically related child. As specific performance is an equitable remedy, the court would have discretion to decide the appropriateness of the remedy based on the specific facts of the case.[275] In other circumstances, such as where only one party is a genetic progenitor of the embryo, a damages remedy might well serve adequately to remedy a breach. For example, if the embryos were created with a donor egg, a court would likely find that an award of damages would adequately compensate the ex-wife, as the money could presumably allow her to create new embryos with donor eggs and donor sperm (or sperm from a new partner).

C. Potential Pitfalls

As long as the requirements outlined in Part III are satisfied, couples undertaking IVF and cryopreservation of embryos should be able to enter into a binding contract to determine disposition of their embryos on divorce. However, it seems unlikely that many couples will avail themselves of the opportunity. IVF is an expensive proposition, and couples may well avoid any additional cost not deemed essential. Psychological barriers, as well, may inhibit people from entering into such agreements. Some might see sparing use of the option of contract as a negative outcome, but I would contend otherwise. Although I have argued here that we should preserve the option of contract for those who desire it, we should not necessarily encourage couples to avail themselves of that opportunity prior to divorce. For all the reasons set forth in the social science research, many people going through fertility treatment would be better served by waiting to decide the disposition question until the time of divorce, should that eventuality occur.

I also do not mean to suggest that contracts or consents governing disposition in the event of other contingencies, such as death or abandonment of the embryos, need to be drafted by a lawyer retained by the patients. Clinics can and should provide such forms for their own protection and their patients'. Moreover, patients can benefit from being introduced to the issues they may confront, including the possibility of divorce. Physicians

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273 Fazzio v. Mason, 249 P.3d 390, 396 (Idaho 2011); RICHARD A. LORD, 25 WILLISTON ON CONTRACTS § 67:1 (4th ed. 2012).

274 LORD, *supra* note 259.

275 *Id.* at § 67:16.

have an important role to play in educating patients about the possibility of seeking legal counsel in the event they desire to address the divorce question at any time before, during, or after treatment. Indeed, informed consent may require discussion of these issues.

If the assumption is correct that most patients will not choose to contract in accordance with the suggestions here, an increase in litigation might result. Whether that would transpire remains to be seen and may depend on the nature of the default rules regarding disposition operative in the patient's jurisdiction. Certainly though, even in a regime of contractual enforcement like the one proposed here, the default rules governing disposition in the absence of contract will surely play a critical role for those couples who eschew the contract option. Likewise, for those who choose to contract, the default rules undoubtedly will inform their choices.[276] A thorough exploration of what those default rules should be is beyond the scope of this Article and will be undertaken in a future work.

V. Meeting the Challenges of Drafting

Although an embryo disposition contract may seem on the surface like a relatively straightforward document and thus not especially challenging to draft, in fact legal and emotional complexities abound. An attorney attempting one will need to anticipate a variety of circumstances and discuss those possibilities thoroughly with the couple. The following is a checklist of issues to consider. It is far from exhaustive but should provide a useful starting point by highlighting some of the issues unique to this kind of contract:

1) The disposition choices: These can include use by one party, donation to research, donation to another individual or couple, compassionate transfer, destruction, or indefinite storage. Clients should be advised that not all of these options may be available in the future.

2) How their disposition choices might be affected by various changed circumstances, such as:

a) The success or failure of the couple's attempt to conceive and carry a child to term;
b) Adoption of a child
c) Remarriage of one or both parties;
d) Changes in health or lifestyle of the parties;
e) Religious beliefs and beliefs about the status of the embryo; and
f) Attitudes related to collaborative reproduction (e.g., using a surrogate carrier).

276 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

3) If the parties agree that one of them should have the opportunity to use the embryos to attempt to achieve a pregnancy, what would be the legal status of the other party be in relation to any offspring that might result? I.e., would the party be considered a legal parent or a gamete donor? If the former, the parties should consider whether they want to make the assumption of parental status revocable.

4) What kind of notice should be required prior to disposition of the embryos?

5) Whether to include a liquidated damages clause, which allows the parties to determine damages for breach of the contract in situations where it would be difficult to ascertain or prove actual damages.[277]

6) Whether to require alternative dispute resolution. Mediation may be a particularly helpful option in this kind of case.

7) Whether to limit the term of the agreement. Given the instability of the disposition decision and the wide variety of changed circumstances that may occur, parties might want to consider the option of limiting the term of the agreement by years or perhaps by outcome (e.g., success in bearing a child).

CONCLUSION

Without question, resolving disputes about embryo disposition when couples divorce presents a great challenge. Perhaps understandably, courts have gravitated toward an approach that encourages progenitors to decide the matter themselves by contract, prior to embarking on treatment. Unfortunately, courts have settled for clinic consent forms as evidence of such an agreement. The instinct may be right, but the vehicle is wrong.

Couples with cryopreserved embryos should be able to create an enforceable contract determining disposition in the event of divorce, but only if the contract complies with certain safeguards. Allowing the parties to decide disposition in advance as they see fit by enforceable contract enhances the parties' constitutionally protected procreation rights. However, both the social science literature about embryo disposition and the law's treatment of a wide variety of family law contracts support an approach that recognizes the vulnerability of patients undergoing treatment, the difficulty of forecasting future views about disposition, and the myriad legal issues that stem from the decision. By insisting

277 RICHARD A. LORD, 24 WILLISTON ON CONTRACTS § 65:1 (4th ed. 2012).

that any disposition contract be in writing, drafted by or in consultation with an attorney representing the parties (not the physician), and executed with due time to consider the ramifications of the decision, we can decrease the risk that couples will make a hasty, ill-informed decision that will cause them later regret or trauma. This approach acknowledges the importance of contract as a means of fulfilling the parties' desires and expectations, while respecting the vulnerabilities of those undergoing the arduous journey of assisted reproduction.