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PRE-EMBRYO CUSTODY BATTLES: HOW  
PREDISPOSITION CONTRACTS COULD BE THE  
WINNING SOLUTION

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## INTRODUCTION

Starting a family through pregnancy is not always easy. For some, conceiving a child is a daunting medical odyssey punctuated by reproductive assistance after attempts at natural conception prove

unsuccessful. In vitro fertilization (IVF)<sup>1</sup> is one such method of medical reproductive assistance that has greatly assisted couples struggling with procreation.<sup>2</sup> Yet, this medical process is not without legal complications.

Such complications arise because IVF not only provides a means for achieving pregnancy in the present, but also includes the potential for doing so in the future through the use of pre-embryos that are frozen for implantation at a later time.<sup>3</sup> The legal issues arise when a couple has opted to divorce,<sup>4</sup> and disagree about the disposition of the frozen pre-embryos that remain following IVF. For example, one party may want the frozen pre-embryos for future implantation whereas another may prefer to have them donated for research.<sup>5</sup> The courts are not united in their approaches for deciding such disputes.<sup>6</sup>

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<sup>1</sup> IVF, the most effective form of assisted reproductive technology, “is a complex series of procedures used to treat fertility or genetic problems and assist with the conception of a child. During IVF, mature eggs are collected (retrieved) from [a woman’s] ovaries and fertilized by sperm in a lab.” *In Vitro Fertilization (IVF): Overview*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/definition/prc-20018905> (last visited Jan. 7, 2016). The fertilized eggs are then implanted into a woman’s uterus, either that of the intended mother or a gestational carrier. *Id.*

<sup>2</sup> Since being introduced in the United States in 1981, IVF has resulted in more than 200,000 babies. *Infertility and In Vitro Fertilization*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization> (last visited Sept. 7, 2015).

<sup>3</sup> “Extra embryos can be frozen and stored for future use for several years. Not all embryos will survive the freezing and thawing process, although most will. Cryopreservation can make future cycles of IVF less expensive and less invasive.” *In Vitro Fertilization (IVF): How You Prepare*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/how-you-prepare/prc-20018905> (last visited Jan. 7, 2016).

<sup>4</sup> Similar issues may also arise where a couple that is not married differs as to the disposition of frozen pre-embryos at the conclusion of the relationship. This Note considers the issue only in the context of a married couple that has opted to divorce, has a pre-disposition contract, and has asked the court to decide how to dispose of frozen pre-embryos that remain following IVF.

<sup>5</sup> See Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One’s Mind*, 12 DUKE J. COMP. & INT’L L. 75, 80 (2002) (“The choices include destroying the pre-embryos, giving them to the clinic for research, donating them to another couple, and releasing them to one of the parties.”).

<sup>6</sup> As described at greater length in Section I.B., *infra*, the first such approach is a constitutional analysis through which the court determines the fate of pre-embryos by balancing one party’s right to procreate against the other’s right not to. See, e.g., *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). The second approach requires the contemporaneous agreement of the parties, pending which agreement the court maintains the status quo and directs that the pre-embryos remain frozen. See, e.g., *Szafrański v. Dunston*, 2013 IL App (1st) 122975, ¶¶ 27–31. Under the third approach, the court enforces a contract into which the parties entered at the time of IVF, in which they provide for the disposition of pre-embryos in the event of divorce. See, e.g., *Kass v. Kass*, 91 N.Y.2d 554 (1998).

Judicial cacophony in this area is troubling given the reality that both IVF and divorce are fairly commonplace in the United States.<sup>7</sup> The issue as to which of the divorcing spouses will receive possession of the frozen pre-embryos, therefore, is a recurring one.<sup>8</sup> Having a uniform legal standard is important to the efficient and effective resolution of this enduring concern. What is impeding the path toward a single cognizable judicial standard?

The complication may lie in the nature of frozen pre-embryos themselves because they evoke many difficult and debatable considerations. For example, frozen pre-embryos represent potential life, thereby implicating religious beliefs.<sup>9</sup> They delve into the realm of procreation, prompting discussion about privacy rights.<sup>10</sup> They could be viewed as a species of property, thus occasioning debate as to the policy implications of such a characterization.<sup>11</sup> These thought-provoking issues may be at the core of why the courts have yet to establish a uniform legal standard for disposing of frozen pre-embryos despite the compelling need for one.

This judicial dilemma is entirely avoidable through the use of a predisposition contract that adopts the standards required to enforce similar ante-natal arrangements. More specifically, this Note posits that disputes about the disposition of frozen pre-embryos should be decided based upon a contract between the divorcing spouses entered into before IVF that comports with the procedural and substantive fairness standards for enforcing both a prenuptial and surrogacy agreement.

This Note proceeds in four parts. Part I discusses the background of IVF and provides further detail about the three approaches courts presently use to award frozen pre-embryos in a divorce proceeding. Part II suggests that a predisposition contract<sup>12</sup> is the preferred model, albeit

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<sup>7</sup> See, e.g., *Kass*, 91 N.Y.2d at 557; see also *Marriage & Divorce*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/divorce> (last visited Jan. 7, 2016) (noting that forty to fifty percent of married couples in the United States divorce).

<sup>8</sup> "It has been estimated that tens of thousands of pre-embryos are frozen each year," thus enhancing the possibility that disposition could become an issue for resolution in divorce proceedings. See *Shapo*, *supra* note 5, at 76.

<sup>9</sup> See, e.g., *Davis*, 842 S.W.2d at 594 ([T]he trial judge concluded that the eight-cell entities at issue were not pre[-]embryos but were 'children in vitro.').

<sup>10</sup> *Id.* at 598 ("We conclude that the answer to this dilemma [whether the parties will become parents] turns on the parties' exercise of their constitutional right to privacy.').

<sup>11</sup> *Id.* at 596 (stating that "the Court of Appeals has left the implication that [the parties' interest in pre-embryos] is in the nature of a property interest" and concluding "that this point must be further addressed"); see also Bridget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. ON C.L. & C.R. 143 (2009).

<sup>12</sup> Predisposition contracts "provide a scheme for the disposition of frozen embryos in the event of contingencies, such as divorce." Noel A. Fleming, *Navigating the Slippery Slope of*

with some concerns about procedural and substantive fairness. Part III compares predisposition contracts with prenuptial and surrogacy agreements, and argues that the heightened standards for assuring that the latter two are both procedurally and substantively fair should also apply when enforcing the former. Finally, Part IV applies the paradigm for implementing prenuptial and surrogacy contracts to predisposition agreements, and proposes that courts enforce the latter only if separate from any medical consent form, voluntarily made, and based upon full disclosure so as to assure procedural fairness. Part IV further proposes that courts consider whether enforcement of a predisposition contract would result in one of the parties being unable to achieve genetic parenthood as the test for determining substantive fairness.

## I. BACKGROUND

### A. *In Vitro Fertilization*

IVF involves the removal of ova<sup>13</sup> from a woman,<sup>14</sup> fertilization of the ova in a petri dish using sperm provided from a man, and transferring the product of this process into the uterus of a woman.<sup>15</sup> As more fully explained in *Kass v. Kass*,<sup>16</sup> the IVF procedure begins with hormonal stimulation of a woman's ovaries so as to yield multiple eggs.<sup>17</sup> These eggs are removed by laparoscopy<sup>18</sup> and fused with the sperm to create a pre-zygote.<sup>19</sup> The pre-zygotes divide, becoming a pre-

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*Frozen Embryo Disputes: The Case for a Contractual Approach*, 75 TEMP. L. REV. 345, 370 (2002).

<sup>13</sup> Ova is the plural of ovum, defined as "the female reproductive cell . . . which is capable of developing, usually only after fertilization, into a new individual." *Ovum*, DICTIONARY.COM, <http://www.dictionary.com/browse/ova> (last visited Jan. 9, 2017).

<sup>14</sup> This Note assumes that the woman and man are husband and wife, however the analysis provided could also apply to same-sex married couples who had frozen embryos and are seeking divorce, as well as to unmarried couples ending their relationship.

<sup>15</sup> *Davis*, 842 S.W.2d at 591.

<sup>16</sup> *Kass v. Kass*, 91 N.Y.2d 554, 557–58 (1998).

<sup>17</sup> The fertility hormone used to increase the number of produced ova is gonadotropin. *IVF—What Is In Vitro Fertilisation (IVF) and How Does It Work?*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, <http://www.hfea.gov.uk/IVF.html> (last visited Jan. 7, 2016) [hereinafter HUM. FERTILISATION & EMBRYOLOGY AUTHORITY].

<sup>18</sup> Laparoscopy is a "type of surgery in which small incisions are made in the abdominal wall through which a laparoscope and other instruments can be placed to permit structures within the abdomen and pelvis to be seen." See *Medical Definition of Laparoscopy*, MEDICINET.COM, <http://www.medicinenet.com/script/main/art.asp?articlekey=6211> (last updated May 13, 2016).

<sup>19</sup> See HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, *supra* note 17. More specifically, the eggs are collected using ultrasound guidance, mixed with the sperm, and cultured in the

embryo,<sup>20</sup> and after reaching the four- to eight-cell stage, are transferred to the woman's uterus by cervical catheter.<sup>21</sup> The hope is that the pre-embryo will attach to the uterine wall and develop into a fetus.<sup>22</sup>

Although multiple eggs are implanted during the IVF procedure, the total removed from the woman may exceed the number that are transferred back as pre-embryos.<sup>23</sup> The remaining pre-embryos may be cryopreserved—frozen in liquid nitrogen for later use.<sup>24</sup>

Because cryopreservation can sustain pre-embryos for many years, intervening circumstances, including divorce, can arise and lead to disagreement about disposition of the remaining organisms.<sup>25</sup> To date, courts have adopted three approaches for resolving these disputes.<sup>26</sup>

B. *Courts in the United States Have Three Main Approaches for Resolving Dispositional Disputes About Frozen Pre-Embryos in the Context of a Divorce Proceeding*

Courts in the United States are not united in their approach for resolving disputes about frozen pre-embryos when the spouses who

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laboratory for sixteen to twenty hours after which point they are checked for signs of fertilization. *Id.*

<sup>20</sup> Gametes are the sexual reproductive cells (egg and sperm) that unite to form a pre-zygote. See *Gamete*, DICTIONARY.COM, <http://www.dictionary.com/browse/gamete> (last visited Jan. 9, 2017). More specifically, pre-zygotes are “eggs which have been penetrated by sperm but have not yet joined genetic material.” *Litowitz v. Litowitz*, 48 P.3d 261, 524 n.51 (Wash. 2002) (en banc) (quoting *Kass*, 91 N.Y.2d at 557 n.1). A pre-embryo is defined as “that stage in human development immediately after fertilization occurs. The pre[-]embryo ‘comes into existence with the first cell division and lasts until the appearance of a single primitive streak, which is the first sign of organ differentiation. This [primitive streak] occurs at about fourteen days of development.’” *Id.* at 262 n.2 (second alteration in original) (quoting Donna A. Katz, Article, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL’Y & L. 623, 628–29 n.42 (1998)). Courts use the terms “pre-zygote” and “pre-embryo” interchangeably, despite the distinctions in definition.

<sup>21</sup> *Id.* at 262 n.8. An embryologist monitors the development of the embryos so that the best ones will be chosen for transfer. HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, *supra* note 17.

<sup>22</sup> *Litowitz*, 48 P.3d at 262 n.8.

<sup>23</sup> HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, *supra* note 17. One or two pre-embryos are transferred to a woman under the age of forty; a maximum of three pre-embryos are transferred to those forty and older. “The number of embryos transferred is restricted because of the risks associated with multiple births.” *Id.*

<sup>24</sup> “Cryopreservation serves to reduce both medical and physical costs because eggs do not have to be retrieved with each attempted implantation, and delay may actually improve the chances of pregnancy.” *Kass*, 91 N.Y.2d at 557.

<sup>25</sup> See, e.g., *Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶ 28; *J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001); *Kass*, 91 N.Y.2d at 558; *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992).

<sup>26</sup> See *Szafranski*, 2013 IL App (1st) 122975, ¶ 16 (observing that courts have “generally conducted three types of analyses” to determine disposition of pre-embryos in a divorce proceeding).

created them have decided to end their marriage.<sup>27</sup> The legal framework for determining to whom the pre-embryos should be awarded divides into three types of analyses.<sup>28</sup> Courts adopt either a constitutional analysis,<sup>29</sup> a contemporaneous agreement approach,<sup>30</sup> or enforce a contract into which the parties entered immediately prior to IVF that includes a provision about disposition of the unused pre-embryos in the event of divorce.<sup>31</sup>

Under the constitutional analysis, the issue of disposition is framed in terms of a balancing test of procreational interests that derives from the protection of privacy as embedded in both state and federal constitutions.<sup>32</sup> Though not expressly provided, the right to privacy is inherent in the constitutional concept of liberty,<sup>33</sup> and includes the right to procreate as well as the concomitant right to not.<sup>34</sup> Because the disposition issue arises prior to the implantation of the pre-embryo, the concerns about a woman's bodily integrity that exist in the context of abortion cases are not implicated, and the spouses are viewed as equal providers.<sup>35</sup> A great tension arises when one spouse wishes to exercise the right to procreate while the other wishes to exercise their right not

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<sup>27</sup> See *supra* note 6.

<sup>28</sup> See *Szafranski*, 2013 IL App (1st) 122975, ¶ 16 (“Courts in other jurisdictions [that] have addressed the issue [of cryopreserved pre-embryos] generally conducted three types of analyses in resolving this question: (1) a contractual approach; (2) a contemporaneous mutual consent approach; and/or (3) a balancing approach.”). More specifically, the contractual approach has been adopted in five states. See *id.* ¶ 20; see also *Dahl v. Angle*, 194 P.3d 834, 840–41 (Or. Ct. App. 2008); *Davis*, 842 S.W.2d at 597; *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (en banc). Iowa and Missouri have adopted the contemporaneous mutual consent approach. See *Szafranski*, 2013 IL App (1st) 122975, ¶ 30; see also *Gadberry v. Gadberry*, No. 13SL-DR06185, at \*9–11 (Mo. Cir. Ct. Apr. 13, 2015), *aff’d sub nom.* *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016). The balancing approach has been adopted in New Jersey, Pennsylvania, and Tennessee. See *Szafranski*, 2013 IL App (1st) 122975, ¶¶ 29, 33–36.

<sup>29</sup> See, e.g., *Davis*, 842 S.W.2d at 603; see also *supra* note 6.

<sup>30</sup> See, e.g., *Szafranski*, 2013 IL App (1st) 122975, ¶ 41.

<sup>31</sup> See, e.g., *Kass*, 91 N.Y.2d at 557.

<sup>32</sup> See *Davis*, 842 S.W.2d at 604 (balancing husband’s “interest in avoiding parenthood [against wife’s] interest in donating the pre[-]embryos to another couple for implantation”).

<sup>33</sup> *Id.* at 598–99.

<sup>34</sup> *Id.* at 600–01. “[P]rocreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.” *Id.* at 601.

<sup>35</sup> Spouses “must be seen as entirely equivalent gamete-providers.” *Id.* But see *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (discussing abortion and stating that “[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor”).

to.<sup>36</sup> The constitutional analysis balances these interests in the context of a dispute about pre-embryos remaining at the time of divorce.<sup>37</sup>

The New Jersey Supreme Court applied the constitutional approach in *J.B. v. M.B.*,<sup>38</sup> where, in a divorce proceeding, the wife wanted to destroy the frozen pre-embryos and the husband wanted them donated to infertile couples.<sup>39</sup> Specifically, the court found that the husband's constitutional right to procreate would not be forfeited if the pre-embryos were not donated, whereas the wife's constitutional right not to procreate would be forever lost if the pre-embryos were used in any way.<sup>40</sup> Thus, the court ordered the pre-embryos be destroyed.<sup>41</sup>

The contemporaneous approach posits a different view. Rather than balance interests, courts applying this approach insist on unanimous agreement.<sup>42</sup> If either spouse has had a change of mind about the disposition agreement made at the time of IVF, that person's current objection takes precedence.<sup>43</sup> When a couple is unable to concur on the disposition at the time of divorce, under the contemporaneous approach, the court directs that the pre-embryos remain in storage until such time a joint decision is reached.<sup>44</sup>

Iowa's Supreme Court applied the contemporaneous approach in *In re Marriage of Witten*,<sup>45</sup> a case where the wife sought to use the pre-

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<sup>36</sup> "The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of *in vitro* fertilization." *Davis*, 842 S.W.2d at 601.

<sup>37</sup> See *J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001) (stating that precedents on the right to privacy in the context of procreational rights "provide a framework within which disputes over the disposition of pre[-]embryos can be resolved"); see also Michelle F. Sublett, Note, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585 (1990) (discussing the basis and development of the constitutional right to make individual decisions about reproduction).

<sup>38</sup> See *J.B.*, 783 A.2d 707.

<sup>39</sup> *Id.* at 710.

<sup>40</sup> *Id.* at 717 (refusing to force the wife to become a biological parent against her will).

<sup>41</sup> *Id.* at 720.

<sup>42</sup> Specifically, the contemporaneous approach holds that "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo." *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003) (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 110 (1999)); *Gadberry v. Gadberry*, No. 13SL-DR06185, at \*11 (Mo. Cir. Ct. Apr. 13, 2015), *aff'd sub nom.* *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); cf. *J.B.*, 783 A.2d 707.

<sup>43</sup> See *Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶¶ 26–28; *Gadberry*, No. 13SL-DR06185, at \*10–11.

<sup>44</sup> *Szafranski*, 2013 IL App (1st) 122975, ¶ 28 ("Unlike the other possible disposition decisions—use by one partner, donation to another patient, donation to research, or destruction—keeping the embryos frozen is not final and irrevocable. By preserving the status quo, it makes it possible for the partners to reach an agreement at a later time." (quoting *Witten*, 672 N.W.2d at 778)).

<sup>45</sup> 672 N.W.2d 768.



embryos for future implantation over the objection of the husband who sought an injunction prohibiting either party from using them without both their written consents.<sup>46</sup> The court sided with the husband upon concluding that the contemporaneous approach was the best of the three options.<sup>47</sup>

The third approach for resolving these disputes relies upon a contract set forth in a consent form that the spouses sign prior to IVF containing a provision for the disposition of the pre-embryos in the event of divorce.<sup>48</sup> Some jurisdictions recognize an exception to the contract approach where one of the parties is unable to achieve parenthood other than through use of the frozen pre-embryos.<sup>49</sup>

This third approach is the one courts most often apply, perhaps most famously so in *Davis v. Davis*.<sup>50</sup> Though the spouses in *Davis* had no predisposition contract governing the unused pre-embryos, the Tennessee Supreme Court expressly addressed the enforceability of prior agreements, stating that such arrangements should be determinative.<sup>51</sup>

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<sup>46</sup> *Id.* at 772–73.

<sup>47</sup> Specifically, the court rejected the contract approach upon finding that “it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos.” *Id.* at 781. Similarly, the court rejected the constitutional approach based on “the grave public policy concerns we have with the balancing test, which simply substitutes the court as decision maker.” *Id.* at 783; *see also Gadberry*, No. 13SL-DR06185, at \*13 (awarding the frozen pre-embryos jointly “due to the special character of this marital property,” and prohibiting either divorcing spouse from transferring, releasing, or using them without the signed authorization of the other).

<sup>48</sup> *See, e.g., Szafranski*, 2013 IL App (1st) 122975, ¶¶ 4–6; *see also Kass v. Kass*, 91 N.Y.2d 554, 565 (1998) (“Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.” (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992))); *Dahl v. Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008) (concluding that “the general framework set forth by the courts in *Davis* and *Kass*, in which courts give effect to the progenitors’ intent by enforcing the progenitors’ advance directive regarding the embryos, is persuasive”); *Davis*, 842 S.W.2d at 597; *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006) (“[A]llowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties.”); *Litowitz v. Litowitz*, 48 P.3d 261, 268 (Wash. 2002) (en banc) (enforcing the predisposition contract on which both parties rely “in asserting their rights”).

<sup>49</sup> *Davis*, 842 S.W.2d at 604 (noting, without further analysis, that “[t]he case would be closer if Mary Sue Davis were seeking to use the pre[-]embryos herself, but only if she could not achieve parenthood by any other reasonable means”). This Note posits that, in such a case, enforcing the predisposition contract would be substantively unfair. *See infra* Section IV.B.

<sup>50</sup> 842 S.W.2d 588.

<sup>51</sup> The court specifically stated in what has become influential dicta that predisposition agreements must be enforced

in order to provide the necessary guidance to all those involved with IVF procedures in Tennessee in the future—the health care professionals who administer IVF programs and the scientists who engage in infertility research, as well as prospective

In *Kass v. Kass*,<sup>52</sup> the New York Court of Appeals also applied the predisposition contract approach. In *Kass*, the husband and wife underwent IVF, as a result of which five pre-embryos were cryopreserved.<sup>53</sup> Prior to implantation, the husband and wife signed a consent form pursuant to which they directed that, in the event of divorce, the IVF program would keep any unused frozen pre-embryos for research.<sup>54</sup> Notwithstanding the consent form, the wife requested sole custody of the pre-embryos at the time of the parties' divorce so that she could undergo another round of IVF.<sup>55</sup> In denying the wife's request, the court was persuaded by the parties' clear intention set forth in their predisposition agreement.<sup>56</sup> The court respected and enforced this intent based on its belief that the spouses should be the sole decision-makers as to this quintessentially personal issue.<sup>57</sup>

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parents seeking to achieve pregnancy by means of IVF, their physicians, and their counselors.

*Id.* at 597. The court proceeded to state that it

believe[s], as a starting point, that an agreement regarding disposition of any untransferred pre[-]embryos in the event of contingencies (such as . . . divorce . . . ) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the pre[-]embryos, retain decision-making authority as to their disposition.

*Id.*; accord *Litowitz*, 48 P.3d at 267 (recognizing that the Tennessee Supreme court "has wisely observed" that disputes involving disposition of pre-embryos should be resolved based upon a prior directive contract).

<sup>52</sup> 91 N.Y.2d 554.

<sup>53</sup> *Id.* at 560.

<sup>54</sup> *Id.* at 559–60.

<sup>55</sup> *Id.* at 560.

<sup>56</sup> Specifically, the couple wanted to avoid a "stranger taking [the] decision out of their hands." *Id.* at 567 ("The conclusion that emerges most strikingly from reviewing these consents as a whole is that appellant and respondent intended that disposition of the pre-zygotes was to be their joint decision. . . . Even in unforeseen circumstances, even if they were unavailable, even if they were dead, the consents jointly specified the disposition that would be made.").

<sup>57</sup> "To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice." *Id.* at 566. *J.B. v. M.B.* is another case where the court opined on the value of pre-embryo disposition agreements despite the absence of one in the case presented. Citing to both *Kass* and *Davis*, the New Jersey Supreme Court in *J.B.* acknowledged the value of the reasoning behind the enforcement of predisposition contracts. *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001).

II. THE PREDISPOSITION CONTRACT IS THE BEST OF THE THREE JUDICIAL APPROACHES, BUT RAISES SOME CONCERNS ABOUT PROCEDURAL AND SUBSTANTIVE FAIRNESS

This Note's proposal that courts deciding disputes about frozen pre-embryos should enforce a predisposition contract is grounded in the premise that such agreements are the best of the three approaches.<sup>58</sup> As the court aptly observed in *Kass*, explicit agreements are useful in the commercial context to avoid the costs of litigation.<sup>59</sup> Their value is even greater in the noncommercial context of a fertility arrangement where the emotional costs are enormous.<sup>60</sup> Added to this benefit is the value of permitting the spouses themselves to make the uniquely personal decisions pertaining to their assisted reproductive treatments.<sup>61</sup> Advance directives also afford a degree of certainty to the medical provider, which thereby facilitates the effective operation of their IVF programs.<sup>62</sup> Thus, a key attribute of the predisposition approach is the furtherance of parenthood by both supporting those who provide assisted reproductive therapy and those who seek it.

The constitutional approach, by contrast, provides far less support in this regard because it is grounded in a misguided definition of parenthood.<sup>63</sup> Indeed, the balancing test that is the cornerstone of the constitutional approach assumes that parenthood is defined by genetics

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<sup>58</sup> See Ceala E. Breen-Portnoy, Comment, *Frozen Embryo Disposition in Cases of Separation and Divorce: How Nahmani v. Nahmani and Davis v. Davis Form the Foundation for a Workable Expansion of Current International Family Planning Regimes*, 28 MD. J. INT'L L. 275, 292 (2013) ("In case of separation or divorce, [a] written agreement would ideally help avoid many of the issues the courts see today."); see also Fleming, *supra* note 12, at 371 ("Enforcing disposition contracts with clear, specific language is the most efficient and judicious way of resolving conflicts that arise between parties concerning the disposition of their frozen embryos.").

<sup>59</sup> See *Kass*, 91 N.Y.2d at 565 (acknowledging the value of explicit agreements in a commercial context).

<sup>60</sup> *Id.* (recognizing that explicit agreements "are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable").

<sup>61</sup> Additionally, predisposition agreements maximize reproductive freedom "by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Id.*; see also Fleming, *supra* note 12, at 372 ("Freedom to contract enhances liberty, even if in the future such agreements impose constraints that one or both parties had wished to avoid.").

<sup>62</sup> Fleming, *supra* note 12, at 372 ("[C]ourts should uphold contracts for the disposition of frozen embryos because this will provide IVF clinics with certainty as to how they can store and dispose of embryos."); see also *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (addressing the importance of pre-disposition contracts as giving guidance to "the health care professionals who administer IVF programs and the scientists who engage in infertility research").

<sup>63</sup> 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, 423 (2005).

alone when weighing the parties' competing interests in procreating or not.<sup>64</sup> Such a myopic notion of parenthood is at odds with the definition applied in custody disputes where the court considers the closeness of the relationship that develops between offspring and a mother or father to determine the best interests of the child.<sup>65</sup> Moreover, if biology alone determined parenthood, then support proceedings against genetic parents would be unnecessary.<sup>66</sup> Yet these proceedings are routinely brought in instances where a mere genetic connection is insufficient to prompt financial support on a voluntary basis.<sup>67</sup>

The constitutional approach is also problematic in its mechanical application. With one lone exception,<sup>68</sup> the cases in which courts apply this approach regularly favor the progenitor who does not want implantation.<sup>69</sup> The *Davis* court<sup>70</sup> actually held that the spouse seeking not to procreate ordinarily should prevail in a divorce dispute about the disposition of frozen pre-embryos unless the other spouse has no other

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<sup>64</sup> *Davis*, 842 S.W.2d at 603 (stating that becoming parents in the genetic sense would have a "profound impact" on the gamete-providers).

<sup>65</sup> See, e.g., *Barstad v. Barstad*, 499 N.W.2d 584, 588–89 (N.D. 1993) (determining that the best interest standard is met by permitting the mother to remain custodial parent because her continuous and uninterrupted relationship with her son "has been important to [Ryan's] development as a happy, well-adjusted child" (citation omitted)). But see *Sublett*, *supra* note 37, at 604 (noting that the factors comprising the best interest test "[c]learly . . . do not apply to frozen embryos which are not developed enough to have brain activity, let alone wishes or relationships with others").

<sup>66</sup> *Upchurch*, *supra* note 63, at 423–24.

<sup>67</sup> *Id.* at 424.

<sup>68</sup> See *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012). In *Reber*, the husband and the wife underwent IVF to preserve her ability to conceive a child in light of the chemotherapy she was to undergo that was expected to hinder her fertility. *Id.* at 1132. Shortly after the IVF procedure was completed, the husband filed for divorce and had a biological child with another woman. *Id.* at 1133. In the divorce proceeding, the trial court awarded the frozen pre-embryos to the wife upon finding that her interests in procreating outweighed the husband's interests to the contrary. *Id.* at 1134. In ruling for the wife, the *Reber* court expressly disagreed with the decision in *Davis*, 842 S.W.2d at 604, holding that the possibility of adoption is sufficient to defeat the interest of the progenitor seeking to use the embryos to procreate. *Reber*, 42 A.3d at 1138 ("There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test."). Notably, the wife testified that she would permit the husband to participate in raising any child born from the pre-embryos if he wanted that opportunity, and even then would not expect any financial support from him. *Id.* at 1140. On these extreme facts, the appellate court agreed that the balance of interests favored the wife, and sustained the award of pre-embryos. *Id.* at 1142; cf. *Szafanski v. Dunston*, 2013 IL App (1st) 122975, ¶ 37 (refusing to apply *Reber* despite the wife's infertility following chemotherapy and, instead, holding that the parties' prior agreement is the best approach for resolving pre-embryo disputes).

<sup>69</sup> But see *Reber*, 42 A.3d 1131.

<sup>70</sup> Because of the absence of a predisposition agreement in *Davis*, the court applied the constitutional approach to decide the case. *Davis*, 842 S.W.2d at 598.

“reasonable possibility” of becoming a parent.<sup>71</sup> “Reasonable possibility” is broadly defined to include both a willingness to undergo further IVF procedures or to adopt.<sup>72</sup> Thus, the constitutional approach is faulty as being fully skewed against the spouse seeking to procreate.

The contemporaneous approach is also flawed. Fundamentally, this approach is unworkable<sup>73</sup> in a divorce proceeding where, by definition, the parties have been unable to reach a present agreement about the disposition of a pre-embryo and, thus, have sought judicial intervention. Moreover, the contemporaneous approach is practically unsound. Rather than promote agreement, it effectively fuels the existing dissension in a divorce proceeding by conferring upon each party the unilateral power to prevent use of the pre-embryos<sup>74</sup> and, thereby, to void a previous disposition agreement that was knowingly and fairly made. Accordingly, this approach is subject to further criticism as one that undermines consent<sup>75</sup> and contravenes *pacta sunt servanda*.<sup>76</sup> Thus,

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<sup>71</sup> “Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre[-]embryos in question.” *Davis*, 842 S.W.2d at 604; *accord J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001) (agreeing “with the Tennessee Supreme Court that ‘[o]rdinarily, the party wishing to avoid procreation should prevail’” (citing *Davis*, 842 S.W.2d at 604)).

<sup>72</sup> *Davis*, 842 S.W.2d at 604; *see also J.B.*, 783 A.2d at 717 (observing that the right to procreate is not lost if the husband, who is otherwise able to have children, loses the opportunity to use the pre-embryos at issue, whereas the wife’s “fundamental right not to procreate is irrevocably extinguished if a surrogate mother bears [the divorcing couple’s] child”).

<sup>73</sup> *See Reber*, 42 A.3d at 1135 n.5 (criticizing the contemporaneous approach as “totally unrealistic. If the parties could reach an agreement, they would not be in court”).

<sup>74</sup> *See Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶ 31 (observing that the contemporaneous mutual consent model “‘give[s] each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses,’ [which] makes no sense and may invite individuals to hold hostage their ex-partner’s ability to parent a biologically related child in order to punish or to gain other advantages” (citing 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, 1225 (2009))); *see also Davis*, 842 S.W.2d at 598 (“[The] problem with maintaining the status quo is that the viability of the pre[-]embryos cannot be guaranteed indefinitely. . . . Thus, the true effect of the intermediate court’s opinion is to confer on [the party opposing implantation] the inherent power to veto any transfer of the pre[-]embryos in this case and thus to insure their eventual discard or self-destruction.”); Shapo, *supra* note 5, at 103 (“One party’s holdout ‘right’ not to be a parent and to dispose of pre-embryos becomes a veto—and perhaps a bargaining chip in divorce—over the other party’s ‘right’ to be a parent.”).

<sup>75</sup> The court in *Kass v. Kass* noted that the contemporaneous approach effectively undermines “the seriousness and integrity of the consent process.” 91 N.Y.2d 554, 566 (1998). The court in that case aptly observed that “[a]dvance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree.” *Id.*

<sup>76</sup> “*Pacta sunt servanda*” is an expression signifying that agreements in a contract must be observed. *See Pacta sunt servanda*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Pacta+Sunt+Servanda> (last visited Jan. 4, 2016). As applied, the doctrine would be the basis for enforcing the original pre-disposition contract where the party freely agreed to the possibility of a child by donating his sperm or her eggs.

the contemporaneous approach, like the constitutional balancing test, is riddled with both theoretical and practical problems, warranting the conclusion that a predisposition contract is the preferred method for determining disputes about frozen pre-embryos in a divorce proceeding.

Notwithstanding that the predisposition approach may be the best relative choice amongst the three existing legal frameworks, such contracts are open to criticism both in terms of procedural and substantive fairness.<sup>77</sup> The procedural fairness concerns arise because pre-directives as to unused frozen pre-embryos are contained in long informed consent forms containing many provisions extraneous to disposition upon divorce.<sup>78</sup> Moreover, informed consent forms have limited options regarding disposition.<sup>79</sup> These limitations, coupled with the array of information on the form that is off point to the issue of disposition upon divorce, cast doubt on whether the parties' true intentions, as to unused frozen pre-embryos, are actually reflected.<sup>80</sup>

The concerns about procedural fairness that arise when dispositional language is contained in an informed consent form are heightened because such forms are, in essence, a contract between the spouses as a unit and the medical facility, as opposed to an agreement between the two progenitors.<sup>81</sup> As the court in *J.B. v. M.B.*<sup>82</sup> recognized,

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<sup>77</sup> See Waldman, *infra* note 120. The concerns about substantive fairness, discussed in further detail below, center on intervening events that make present enforcement of a predisposition contract fundamentally unfair.

<sup>78</sup> See, e.g., *Cahill v. Cahill*, 757 So. 2d 465, 466 (Ala. Civ. App. 2000) (noting that the consent form was seven pages long); *Kass*, 91 N.Y.2d at 558 (noting that the language directing the parties to make dispositional decisions was included in several places within the twelve page, single-spaced form); *Szafranski*, 2013 IL App (1st) 122975, ¶ 4 (“Besides outlining the risks involved with *in vitro* fertilization, the informed consent states that “[n]o use can be made of these embryos without the consent of both partners.”); see also *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (“Principles of fairness dictate that agreements provided by a clinic should be written in plain language, and that a qualified clinic representative should review the terms with the parties prior to execution.”).

<sup>79</sup> See *Cahill*, 757 So. 2d at 466 (noting as the pertinent language on disposition a list limited to five set options).

<sup>80</sup> *Cahill* is illustrative as a case where doubt exists about whether the parties' actual intent is reflected on a consent form. Because the parties did not introduce into evidence the executed informed consent, the court had nothing but language set forth on a blank form with which to determine the wife's application for an award of the pre-embryos. The court was constrained in its decision and could only conclude that the parties “appear[]” to have determined that the medical facility would keep the pre-embryos in the event of divorce. *Id.* at 467.

<sup>81</sup> See *J.B.*, 783 A.2d at 15 (discussing how the lower court granted summary judgment awarding frozen pre-embryos to the wife after “noting that there was no written contract memorializing the parties' intentions” despite the existence of a consent form); see also Fuselier, *supra* note 11, at 172 (noting that informed consent forms “represent agreements with the clinics with respect to actions the clinics should or should not take regarding the pre-embryos stored there. The contracts are not agreements between the parties themselves”).

this distinction is important because consent forms may not accurately reflect the spouses' genuine intentions regarding the disposition of frozen pre-embryos. Indeed, the lower court virtually ignored the consent form in *J.B.*, instead discerning intent from the parties' certifications that accompanied their respective motions for summary judgment in the divorce proceeding.<sup>83</sup> Likewise, the New Jersey Supreme Court held in this case that the contract the parties entered into as a unit with the medical facility did not disclose their unambiguous intentions as to the disposition of the pre-embryos.<sup>84</sup> By honing in on the absence of a discrete contract between the spouses, the court in *J.B.* gave credence to the procedural fairness problems that arise when applying the predisposition approach in a divorce action.

Other courts, however, have focused on the substantive fairness problems associated with this approach. For example, in *Davis*, the court recognized that the intense emotions associated with efforts to overcome infertility impede true informed consent.<sup>85</sup> Likewise, the court in *Witten* observed that the disposition of frozen pre-embryos is a matter of such fundamental personal importance that individuals must be allowed to opt out of their pre-directive contracts at the time of enforcement.<sup>86</sup> The *Szafranski* court concurred that the predisposition approach largely ignores the fact that intervening events could alter one's views of parenthood.<sup>87</sup> In each of these cases, the court voiced

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<sup>82</sup> *J.B.*, 783 A.2d at 711–12, 719; *see also* *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056 (Mass. 2000) (noting the informed consent “does not state, and the record does not indicate, that the husband and wife intended the consent form to act as a binding agreement between them should they later disagree as to the disposition” of the pre-embryos).

<sup>83</sup> More specifically, the wife maintained that, at the time of IVF, she and her husband “agreed to preserve the pre[-]embryos for our use in the context of an intact family.” *J.B.*, 783 A.2d at 710. Thus, she wanted the remaining embryos destroyed. By contrast, the husband swore that he and his wife “had agreed that no matter what happened the eggs would be either utilized by us or by other infertile couples.” *Id.* Thus, he sought an order permitting the remaining pre-embryos to be donated following his divorce. *Id.*

<sup>84</sup> *Id.* at 713 (noting the language in the agreement conditioning the relinquishment of the frozen pre-embryos to the medical facility unless the court ordered otherwise).

<sup>85</sup> The *Davis* court acknowledged that informed consent is necessarily impeded as “anticipating . . . all the turns that events may take as the IVF process unfolds” becomes impossible. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). Yet despite this recognition, the *Davis* court would permit a modification of the initial contract only if one of the progenitors has no other reasonable way of becoming a parent, thereby diluting somewhat its concerns about substantive fairness when applying the predisposition approach. *See id.* at 604.

<sup>86</sup> *See In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003). As such, the court found that “individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs.” *Id.*

<sup>87</sup> *See Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶ 19 (stating that the predisposition approach “ignores the difficulty of predicting one’s future response to life-altering events such as parenthood” (quoting *Witten*, 672 N.W.2d at 777)); *accord* Waldman, *infra* note 120, at 935 (“Time, relatively unimportant to men, but of crucial importance to women, may work rather dramatic changes in a woman’s interest in using a particular embryo for reproduction.”).

concern that the terms of a predisposition contract may no longer be substantively fair at the time of divorce such that some form of safeguard is warranted.<sup>88</sup> This Note posits that courts may resolve this concern and assure that predisposition contracts are both procedurally and substantively fair by adhering to the paradigm of prenuptial and surrogacy agreements.

III. THE PREDISPOSITION APPROACH SHOULD BE HONED WITH  
REFERENCE TO THE PARADIGM OF PRENUPTIAL AND SURROGACY  
AGREEMENTS

The paradigm of prenuptial and surrogacy agreements is well-suited to addressing, if not resolving, the criticisms regarding procedural and substantive fairness directed at the predisposition contract in the event of divorce. Under this paradigm, both voluntariness and intervening events are factors in deciding whether or not to enforce the prenuptial or surrogacy agreement at issue, considerations which also may apply to assure that predisposition contracts are fair.<sup>89</sup> Prenuptial agreements are also similar to predisposition agreements in terms of history, concept, and genre.<sup>90</sup> Such similarities give further credence to the proposition that prenuptial agreements are a solid and workable model for contracts disposing of pre-embryos. Likewise, surrogacy agreements are akin to predisposition agreements in that both pertain to the use of a pre-embryo, albeit in different factual contexts. The safeguards assuring that surrogacy contracts are procedurally and substantively fair are, thus, instructive in the realm of predisposition agreements as well.

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<sup>88</sup> See Waldman, *infra* note 120, at 935 (“Judicial and legislative concern is warranted because the determination to relinquish reproductive opportunities may be affected and shaken by life events apart from pregnancy and birth.”).

<sup>89</sup> See *infra* Parts III–IV.

<sup>90</sup> See *infra* Parts III–IV.



A. *Both Prenuptial and Surrogacy Agreements Are Analogous to the Predisposition Contract*

1. The Prenuptial and Predisposition Agreements Are Historically, Conceptually, and Generically Similar

a. Similarities in History Reveal that Predisposition and Prenuptial Agreements Further the Same Public Policies, such that the Latter May Be a Logical Paradigm for Implementing the Former

Predisposition contracts are, in the first instance, akin to prenuptial agreements in that they share a history of reluctant acceptance. Even though modern prenuptial agreements first appeared in the sixteenth century and were important enough to be included in the original Statute of Frauds,<sup>91</sup> they were void as against public policy in the United States prior to 1970.<sup>92</sup> One of the reasons for this long-standing judicial aversion toward prenuptial agreements was that they were thought to promote divorce.<sup>93</sup> Another reason for voiding prenuptial agreements *ab initio*<sup>94</sup> was that they were thought to commercialize marriage and to emphasize the individual over the couple.<sup>95</sup>

However, as more married women went to work, the judicial trend changed toward the realization that prenuptial agreements actually promote marital stability by permitting both spouses to lay out their expectations and to protect their individually-held assets.<sup>96</sup>

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<sup>91</sup> Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1, 2 (1992).

<sup>92</sup> In *Posner v. Posner*, 257 So. 2d 530 (Fla. 1972), the Florida Supreme Court upheld a prenuptial agreement containing spousal support provisions which had previously been deemed void as against public policy, thereby initiating the trend toward enforcing such contracts.

<sup>93</sup> Indeed, escalator clauses under which the amount of property increases upon attaining certain marriage milestones still may be void *ab initio* as promoting divorce. See Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413, 415 (2008) (citing *Davis v. Davis*, No. FA 950144807S, 1996 WL 456335 (Conn. Super. Ct., July 29, 1996)).

<sup>94</sup> “*Ab initio*” is defined as “from the inception.” *Ab Initio*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/ab+initio> (last visited Jan. 12, 2016).

<sup>95</sup> See Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 893–94 (1997).

<sup>96</sup> See, e.g., *In re Marriage of Pendleton*, 72 Cal. Rptr. 2d 840, 848 (Ct. App. 1998) (“[P]renuptial agreements may in fact encourage rather than discourage marriage. As more than one court has noted, society’s current acceptance of cohabitation without marriage offers an attractive alternative to a wealthy man or woman who cannot marry without relinquishing the right to limit his or her spousal support obligation in the event of divorce.”); *Newman v. Newman*, 653 P.2d 728, 732 (Colo. 1982) (“[I]t is reasonable to believe that such planning brings a greater stability to the marriage relation by protecting the financial expectations of the parties, and does not necessarily encourage or contribute to dissolution.”).

Commentators have also observed that prenuptial agreements are on the rise because the prevalence of divorce and remarriage encourages couples to plan carefully, independently, and realistically for their economic future.<sup>97</sup>

The same observation about careful and realistic planning applies in response to those opposed to enforcing predisposition contracts at the time of divorce. As with prenuptial agreements, such resistance is based on public policy, particularly on the notion that prior directives for disposing of pre-embryos are void ab initio as compelling one spouse to become a parent against his or her will.<sup>98</sup> Yet, as with prenuptial agreements, the public policy that concerns the critics is, in fact, promoted through judicial recognition and regulation of the objectionable contracts, rather than leaving them hostage to the extra-legal regime of the relationship.<sup>99</sup> Indeed, instead of stifling procreational freedom, predisposition agreements actually promote this liberty by allowing the spouses to discuss the options as to unused pre-embryos and, together, arrive at a cogent expression of their intentions.<sup>100</sup> This common historical background is the first of several similarities that make prenuptial agreements a logical paradigm for addressing concerns about predisposition contracts.

b. Prenuptial and Predisposition Agreements Are Fundamentally Similar in Concept, Suggesting that the Former Could Be a Paradigm for the Latter

Prenuptial and predisposition agreements are also conceptually similar, in that both seek to diminish the state's involvement in the marital relationship, notwithstanding that as long ago as 1888, the U.S. Supreme Court declared marriage to be "a great public institution, giving character to our whole civil polity."<sup>101</sup> This characterization as a "public institution" is the historic basis for state involvement in the marital relationship.<sup>102</sup> Thus, when a couple marries, they are

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<sup>97</sup> Marston, *supra* note 95, at 891.

<sup>98</sup> See, e.g., *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000) (stating that "forced procreation is not an area amenable to judicial enforcement" such that prior directive contracts violate public policy); *J.B. v. M.B.*, 783 A.2d 707, 718–19 (N.J. 2001) ("[A]greements [that] compel procreation over the subsequent objection of one of the parties . . . are violative of public policy.").

<sup>99</sup> See *Litowitz v. Litowitz*, 48 P.3d 261, 267 (Wash. 2002) (recognizing that predisposition contracts "maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." (quoting *Kass v. Kass*, 91 N.Y.2d 554, 565 (1998))).

<sup>100</sup> *Id.*

<sup>101</sup> See *Maynard v. Hill*, 125 U.S. 190, 213 (1888) (quoting *Noel v. Ewing*, 9 Ind. 37, 50 (1857)).

<sup>102</sup> Marston, *supra* note 95, at 902.

subscribing to an entire set of legal rights and responsibilities as determined by the state-created “marriage contract.”<sup>103</sup> Terms pertaining to property distribution in the event of divorce are included in this contract.<sup>104</sup>

The idea of a prenuptial agreement is for the parties to amend the default provisions of this marriage contract upon dissolution so as to dictate for themselves the terms of their spousal relationship, should it come to an end by divorce.<sup>105</sup> The rapid social changes that have occurred in American family life in recent times, including the prevalence of divorce and remarriage, justify the opportunity for spouses to dictate the terms of property distribution upon marital dissolution.<sup>106</sup>

Likewise, the increased usage of IVF supports permitting couples to dictate the terms by which unused frozen pre-embryos will be disposed should the marriage end in divorce.<sup>107</sup> As the New Jersey Supreme Court aptly observed, the law has not kept pace with advances in medical technology, which have enabled new reproductive opportunities.<sup>108</sup> The need for such legal principles, however, would be obviated by virtue of the predisposition contract that, like the prenuptial agreement, is a means by which the states’ role in a couple’s marriage may be diminished.

c. Generic Similarities Further Support the Proposition that Prenuptial Contracts May Be Models for Predisposition Agreements

Prenuptial agreements and predisposition contracts regarding unused frozen pre-embryos are also generically similar. First, they both deal with the disposition of property upon divorce. The Uniform Premarital Agreement Act (UPAA),<sup>109</sup> drafted in 1983 to provide national consistency to the terms of prenuptial agreements, lists eight permissible subjects for inclusion in these contracts, six of which deal with property rights.<sup>110</sup>

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<sup>103</sup> *Id.* at 901.

<sup>104</sup> *Id.* at 902.

<sup>105</sup> *Id.* at 903 (observing that the states’ willingness to permit such variations “parallels a trend throughout family law in which private norm creation and decisionmaking have trumped state-imposed rules”).

<sup>106</sup> *Id.*

<sup>107</sup> *See supra* note 2.

<sup>108</sup> *See* J.B. v. M.B., 783 A.2d 707, 715 (N.J. 2001) (“Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities now available.”).

<sup>109</sup> *See* UNIF. PREMARITAL AGREEMENT ACT §§ 3(a)(1)–(6) (UNIF. LAW COMM’N 1983).

<sup>110</sup> The eight permissible subjects are:

(1) [T]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located; (2) the right to buy, sell,

Similarly, frozen pre-embryos are considered property, albeit property entitled to “special respect,”<sup>111</sup> a status that the Tennessee Supreme Court in *Davis* deemed proper in 1992 when considering whether pre-embryos should be “persons” for purposes of determining their disposition. In concluding that pre-embryos are not persons, the court was guided by the reasoning set forth in *Roe v. Wade*,<sup>112</sup> whereby the U.S. Supreme Court held that a fetus has no independent legal rights.<sup>113</sup> Ultimately, the *Davis* court concluded that pre-embryos occupy an interim category in which they are less than a person but more than mere chattel because of their potential to become human life.<sup>114</sup> Thus, as with other property to be distributed in accordance with the terms of a prenuptial agreement, spouses have an ownership interest in the disposition of pre-embryos, which may be addressed in a contract between them.<sup>115</sup>

Likewise, both prenuptial and predisposition contracts share temporal similarities, in that both are to be performed, if ever, in the future.<sup>116</sup> The possibility thus exists in both instances that intervening

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use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property; (3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event; (4) the modification or elimination of spousal support; (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement; (6) the ownership rights in and disposition of the death benefit from a life insurance policy; (7) the choice of law governing the construction of the agreement; and (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

*Id.*

<sup>111</sup> See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). *But cf.* *Kass v. Kass*, 91 N.Y.2d 554, 564–65 (1998) (agreeing that pre-zygotes are not persons, but noting that “for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to ‘special respect’”).

<sup>112</sup> See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Fuselier*, *supra* note 11, at 167 (“There is a human life component to the pre-embryos—the potential for human life to develop—making them inherently special. They deserve their own classification.”).

<sup>113</sup> *Davis*, 842 S.W.2d at 595 (citing *Roe v. Wade* and noting that the Supreme Court “explicitly refused to hold that the fetus possesses independent rights under law, based upon a thorough examination of the federal constitution, relevant common law principles, and the lack of scientific consensus as to when life begins” (footnote omitted)).

<sup>114</sup> *Id.* at 597 (“[P]re[-]embryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

<sup>115</sup> *Id.* (“[Spouses] do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre[-]embryos, within the scope of policy set by law.”); see also *Reber v. Reiss*, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012) (“The parties agree, as does the [trial] court, that the pre-embryos are marital property subject to equitable distribution.”).

<sup>116</sup> See *Kass*, 91 N.Y.2d at 565 (stating that “[a]ll agreements looking to the future to some extent deal with the unknown,” but adding that “the uncertainties inherent in the IVF process

events not foreseeable at the time of execution will make enforcement unfair.<sup>117</sup> The passage of time between execution and enforcement in both instances gives rise to the need for a heightened standard of review that assures procedural and substantive fairness to protect against unconscionable results.

Finally, the two types of contracts have in common the parties—two spouses who are in a confidential relationship.<sup>118</sup> As such, in each instance, the parties do not deal at arm's length, but rather must bargain with candor, good faith, and sincerity in connection with all matters regarding the agreement.<sup>119</sup> This duty of candor is particularly important to the woman, who in each instance is often the disadvantaged party.<sup>120</sup> Thus, the safeguards that courts impose to protect against unconscionability when enforcing a prenuptial agreement should also be considered for their effectiveness in the context of a predisposition contract pertaining to frozen pre-embryos at the time of divorce.

## 2. Predisposition Contracts Can Gain Force from Surrogacy Agreements, Another Type of Ante-Natal Contract Whose Enforcement Is Predicated upon Procedural and Substantive Fairness

Surrogacy contracts, like predisposition agreements, deal with the use of reproductive assistance, though the former pertains to a gestator

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itself are vastly complicated by cryopreservation, which extends the viability of pre-zygotes indefinitely and allows time for minds, and circumstances, to change”).

<sup>117</sup> See *infra* Section III.B.

<sup>118</sup> See, e.g., *Braddock v. Braddock*, 542 P.2d 1060, 1062 (Nev. 1975) (applying Ohio law, the court stated “[a]n engagement to marry creates a confidential relation between the contracting parties and an antenuptial contract entered into after the engagement and during its pendency must be attended by the utmost good faith” (quoting *Juhasz v. Juhasz*, 16 N.E.2d 328, 331 (Ohio 1938))).

<sup>119</sup> *Id.*

<sup>120</sup> See *Marston*, *supra* note 95, at 911 (“Because women are often financially or emotionally disadvantaged in the bargaining process, they contest prenuptials at much greater rates than men. . . . Regardless of age, empirical data indicate that women generally fare worse than men in economic negotiations.”); see also *Younger*, *supra* note 91, at 19 n.83 (citing cases where husband had both greater assets and sophistication in business negotiation). Similarly, women are often the disadvantaged party in a predisposition contract. See Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 928 (2000) (“[D]ispositional agreements that preclude the unilateral use of embryos in the event of divorce are substantively skewed against the woman.”). Because men are capable of producing sperm well into their seventies and women’s ability to produce viable eggs diminishes after age thirty-five, IVF often occurs in the latter’s reproductive prime with divorce happening in the twilight of her fertile years. Thus, as with a prenuptial agreement, safeguards must be in place to assure that the husband has not overreached where the predisposition contract precludes a unilateral award of the pre-embryos to the wife.

becoming pregnant with another's pre-embryo in exchange for a fee.<sup>121</sup> In particular, the gestator agrees in advance of the pregnancy to relinquish all parental rights to the intended parents.<sup>122</sup> These agreements take two distinct forms.<sup>123</sup>

The first is a Pre-Planned Adoption Agreement, also known as a Traditional Surrogacy Agreement.<sup>124</sup> This arrangement typically involves a surrogate donating her ovum and being artificially inseminated with the sperm from the husband of a couple whose wife is infertile.<sup>125</sup> Following delivery and the surrogate's relinquishment of parental rights, the wife adopts the baby and becomes the legal parent. The second type, known as a Gestational Surrogacy Agreement, involves a surrogate who has no biological ties to the resulting baby.<sup>126</sup> Through IVF, a pre-embryo is created from either the intended father's sperm with a donor egg, the intended mother's egg with donor sperm, or the egg and sperm from the intended parents.<sup>127</sup> As with predisposition contracts,<sup>128</sup> both types of surrogacy agreements have impassioned opponents as well as supporters.<sup>129</sup>

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<sup>121</sup> *Roman v. Roman*, 193 S.W.3d 40, 49 (Tex. App. 2006) (defining a gestational agreement as "an agreement between a woman and the intended parents of a child in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction and which provides that the intended parents become the parents of the child"); *In re Baby*, 447 S.W.3d 807, 818 (Tenn. 2014) (defining surrogacy as "[t]he process of carrying and delivering a child for another person" (quoting *Surrogacy*, BLACK'S LAW DICTIONARY (9th ed. 2009))); *Johnson v. Calvert*, 851 P.2d 776, 777-78 (Cal. 1993), *modified on other grounds by In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005).

<sup>122</sup> *Roman*, 193 S.W.3d at 49.

<sup>123</sup> *In re Baby*, 447 S.W.3d at 818.

<sup>124</sup> See *id.* at 812 (defining the traditional surrogacy contract as one "which involves the artificial insemination of the surrogate, who, after giving birth, is meant to relinquish the child to the biological father and the intended mother").

<sup>125</sup> Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1156 (2014).

<sup>126</sup> See *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218, 1222 (Dist. Ct. App. 1994) (defining a gestational surrogacy contract as one "where the sperm of the married man is artificially united with the egg of his wife, and the resulting embryo [is placed] in another woman's womb"); see also Browne C. Lewis, *Due Date: Enforcing Surrogacy Promises in the Best Interest of the Child*, 87 ST. JOHN'S L. REV. 899, 900 (2013).

<sup>127</sup> See *Moschetta*, 25 Cal. App. 4th at 1222; see also Lewis, *supra* note 126, at 902-03.

<sup>128</sup> See *supra* Section III.C.

<sup>129</sup>

The process [of surrogacy] has evoked much discussion: medical, biological, sociological, philosophical, psychological, religious, economic, logical, emotional, and legal. It has been variously characterized by its proponents as, inter alia . . . a "gift of life" to childless couples, one that . . . implement[s] the principal's right to obtain a baby, and one that is sensitive to the needs of infertile couples. . . . The opponents have characterized surrogacy as, inter alia: the illegal and unconstitutional purchase and sale of human beings, babies for profit, "rent a womb" . . . and a threat to human dignity.

James T. Flaherty, *Enforcement of Surrogate Mother Contracts: Case Law, the Uniform Acts, and State and Federal Legislation*, 36 CLEV. ST. L. REV. 223, 224-25 (1988).

Those opposed to these sorts of ante-natal contracts maintain that they relegate children to a commodity and, further, that they exploit and devalue impoverished women.<sup>130</sup> Such critics believe, therefore, the surrogacy agreements of either type should be void as against public policy.<sup>131</sup> The New Jersey Supreme Court agreed with those opponents in its landmark *In re Baby M*<sup>132</sup> decision invalidating a surrogacy contract as violating public policy.<sup>133</sup> In other states, the legislatures have prohibited surrogacy contracts.<sup>134</sup>

By contrast, those in favor of surrogacy agreements counter that a woman should have the freedom to contract for the use of her own body, including in instances where doing so is for economic gain.<sup>135</sup> Furthermore, supporters arguing from the perspective of the intended parents maintain that banning surrogacy contracts is akin to interfering with the right to procreate.<sup>136</sup> Thus, they maintain that surrogacy arrangements enjoy constitutional protection.<sup>137</sup>

In light of this fervent and ongoing debate, surrogacy contracts are scrutinized for procedural and substantive safeguards in the states where they are permitted.<sup>138</sup> Such scrutiny is instructive in the realm of predisposition contracts as demonstrating that ante-natal agreements are an effective model, provided they are fair.

B. *Safeguards to Assure Procedural Fairness in the Realm of Prenuptial and Surrogacy Agreements Would Also Address the Concerns About Predisposition Contracts Pertaining to Frozen Pre-Embryos*

To protect against the risk of overreaching and unconscionable results, prenuptial and surrogacy agreements must be both procedurally

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<sup>130</sup> Lewis, *supra* note 126, at 923, 940. In actuality, this concern may be misguided as “based upon the erroneous perception that surrogates are poor, uneducated women who are preyed upon by wealthy, infertile couples. Research indicates that the average surrogate is a middle-income, educated woman who has had other children.” *Id.* at 923.

<sup>131</sup> See *supra* note 129.

<sup>132</sup> *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>133</sup> *Id.* at 411 (“We find the payment of money to a ‘surrogate’ mother illegal, perhaps criminal, and potentially degrading to women.”); see also Richard F. Storrow, *New Thinking on Commercial Surrogacy*, 88 IND. L.J. 1281, 1281 (2013) (“[J]urisdictions that prohibit surrogacy view it as per se exploitative and as inappropriately commodifying human reproduction . . .”).

<sup>134</sup> See, e.g., MICH. COMP. LAWS ANN. §§ 722.851–.863 (West 2011) (voiding surrogacy contracts and imposing criminal penalties).

<sup>135</sup> Field, *supra* note 125, at 1172 (asking the rhetorical question: “When an intelligent woman consents to such a relationship, why should she be unable to bind herself by her promise because others feel that the arrangement exploits her?”).

<sup>136</sup> *Id.* at 1178.

<sup>137</sup> *Id.* at 1177–78.

<sup>138</sup> See *infra* Sections III.B.2, III.C.2.

and substantively fair.<sup>139</sup> Legislatures and courts have often blurred these two aspects of fairness as they are closely related.<sup>140</sup> Nonetheless, both aspects of fairness serve to assure that prenuptial and surrogacy agreements are properly enforceable. The safeguards such fairness requirements provide in the context of these agreements would also resolve the concerns critics have voiced about divorce courts deciding pre-embryo disputes through the enforcement of a predisposition contract.<sup>141</sup>

### 1. Procedural Fairness in the Context of Prenuptial Agreements Requires Voluntariness and Full Disclosure of Finances

Procedural fairness seeks to assure that the bargaining process is free of coerciveness and other defects that suggest one party did not make an intended choice such that the resulting agreement would be unenforceable.<sup>142</sup> In *Gant v. Gant*,<sup>143</sup> the court bluntly recognized that parties to a prenuptial agreement are often mismatched in terms of bargaining power.<sup>144</sup> Thus, procedural fairness in that context requires that the agreement be entered into voluntarily, after both sides have fully disclosed their finances to the other.<sup>145</sup> A prenuptial agreement meeting these criteria is fairly procured.<sup>146</sup> The relevant period of judicial review is the time the agreement was executed.<sup>147</sup>

The inquiry into voluntariness in this regard exceeds that undertaken in the commercial context for fraud, overreaching, or sharp

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<sup>139</sup> Younger, *supra* note 91, at 7, 18.

<sup>140</sup> *Id.* at 18 (“If the substantive terms of an agreement seem fair to the reviewing court, operating with or without statutory guidance, procedural niceties become less important. Conversely, if the agreement seems unfair, the procedures surrounding its execution become more important.”); *see also* Waldman, *supra* note 120, at 927 (“Commentators and courts have suggested that, in practice, the two elements of unconscionability are measured according to a sliding scale. A grotesquely one-sided contract might be voided with only a slight showing of procedural defectiveness. Conversely, clear defects in the bargaining process might be sufficient to nullify a contract whose terms, though problematic, cannot be said to ‘shock the conscience.’” (footnote omitted)).

<sup>141</sup> *See infra* Part IV.

<sup>142</sup> Waldman, *supra* note 120, at 926.

<sup>143</sup> 329 S.E.2d 106 (W. Va. 1985), *overruled by* *Ware v. Ware*, 687 S.E.2d 382 (W. Va. 2009). However, the proposition that parties to a prenuptial agreement often have unequal bargaining power remains true.

<sup>144</sup> *Id.* at 114 (“[C]andor compels us to raise to a conscious level the fact that, as in this case, prenuptial agreements will almost always be entered into between people with property or an income potential to protect on one side and people who are impecunious on the other.”).

<sup>145</sup> Younger, *supra* note 91, at 19.

<sup>146</sup> *Id.* at 18.

<sup>147</sup> *Id.*



dealing.<sup>148</sup> In the context of a prenuptial agreement, voluntariness also considers such factors as the parties' sophistication in worldly affairs, the timing of the execution relative to the wedding, and the opportunity to seek independent counsel.<sup>149</sup>

Notably, the retention of independent counsel is not a decisive criterion for determining voluntariness and, thus, procedural fairness.<sup>150</sup> Rather, the key concern from both the legislative and judicial perspective is whether the party challenging the prenuptial agreement had an opportunity to seek legal advice.<sup>151</sup> The 2012 Uniform Premarital and Marital Agreement Act (UPMAA)<sup>152</sup> evinces this concern in section 9, which states in relevant part that a premarital agreement is unenforceable if a party against whom enforcement is sought did not have access to independent legal counsel.<sup>153</sup>

Some courts, likewise, do not require the actual advice of legal counsel in order to find a prenuptial agreement being challenged as procedurally unfair nonetheless enforceable. In *Pajak v. Pajak*,<sup>154</sup> the court upheld a prenuptial agreement that the wife argued was not fairly procured due to her not having had legal counsel.<sup>155</sup> Notably, the court reasoned that independent advice from an attorney is not a requirement for enforcing a prenuptial agreement when the terms are comprehensible to a reasonably intelligent adult.<sup>156</sup> Under such circumstances, the contract at issue was procedurally fair.<sup>157</sup>

In addition to voluntariness, procedural fairness in the realm of a prenuptial agreement requires that the parties candidly disclose their finances to each other prior to execution.<sup>158</sup> The requirement of financial disclosure is closely related to voluntariness and, indeed, flows

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<sup>148</sup> *Id.* at 19–20.

<sup>149</sup> See *Norris v. Norris*, 419 A.2d 982, 985 (D.C. 1980); *Simeone v. Simeone*, 581 A.2d 162, 167 (Pa. 1990).

<sup>150</sup> See, e.g., UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9(a)(2) (UNIF. LAW COMM'N 2012).

<sup>151</sup> *Id.*; see also *Younger*, *supra* note 91, at 22.

<sup>152</sup> UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9(a)(2).

<sup>153</sup> *Id.*

<sup>154</sup> *Pajak v. Pajak*, 385 S.E.2d 384 (W. Va. 1989).

<sup>155</sup> *Id.* at 388–89; see also *In re Estate of Baker*, 207 S.W.3d 254, 267 (Tenn. Ct. App. 2006) (“[S]ome states hold that the presence or absence of independent counsel is just another factor to be considered when determining if the agreement was entered into knowledgeably.”).

<sup>156</sup> See *Pajak*, 385 S.E.2d at 388–89 (“[A]dvice of independent counsel at the time parties enter into a pre-nuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, [but] such independent advice of counsel is not a prerequisite to enforceability when the terms of the agreement are understandable to a reasonably intelligent adult and both parties have had the opportunity to consult with independent counsel.”); see also *In re Estate of Baker*, 207 S.W.3d at 267–70.

<sup>157</sup> See generally *Younger*, *supra* note 91, at 26.

<sup>158</sup> *Id.* at 24–27.

from the nature of prenuptial agreements themselves.<sup>159</sup> These agreements either waive or modify marital property rights, the value of which derives from the spouses' assets.<sup>160</sup> The waiver of all or any portion of such rights cannot be voluntary, and thus cannot be fairly procured, absent full financial disclosure prior to execution.<sup>161</sup>

The extent of the required disclosure varies from case to case depending on several factors. Among these is the parties' relative worldliness.<sup>162</sup> Some courts require the more sophisticated party to a prenuptial agreement to inform the prospective spouse as to the rights being waived.<sup>163</sup> Likewise, the existence of a disproportional provision<sup>164</sup> is another factor that some courts consider when determining fair procurement, leading to a presumption that disclosure may have been insufficient in such instance.<sup>165</sup> The variety and degree of factors that courts contemplate prompts the conclusion that procedural fairness in the context of a prenuptial agreement requires enough disclosure so that each contracting party has a clear idea of the other's property and resources. Those parties that do will have entered into a fairly procured prenuptial agreement that is both voluntary and grounded upon candid communication underlying the parties' true intentions.

## 2. Surrogacy Contracts Are Procedurally Fair if the Parties Have Had the Opportunity to Seek Independent Counsel, Compensation Is Reasonable, and the Gestator Has the Right to Rescind Following Delivery

A key criterion for determining whether a surrogacy contract is procedurally fair corresponds to one of the main safeguards considered

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See, e.g., *Kosik v. George*, 452 P.2d 560, 563-64 (Or. 1969) (requiring husband with business savvy to fully inform wife of the rights she was forfeiting under the prenuptial agreement); cf. *Hengel v. Hengel*, 365 N.W.2d 16, 20 (Wis. Ct. App. 1985) (finding that wife who had moderate sophistication in financial matters need only be provided with information to enable "a general and approximate knowledge" of husband's property).

<sup>163</sup> *Kosik*, 452 P.2d at 563-64.

<sup>164</sup> A disproportional provision is a contractual term that favors one party over the other.

<sup>165</sup> See, e.g., *Schmidt v. Schmidt*, 9 Va. Cir. 273, 278 (Cir. Ct. 1987) (discussing *Batleman v. Rubin*, 98 S.E.2d 519 (Va. 1957)) (raising presumption that husband did not provide full and frank disclosure prior to executing prenuptial agreement where wife agreed to accept a sum less than a third of the value of his property); *Friedlander v. Friedlander*, 494 P.2d 208, 213 (Wash. 1972) (*en banc*) ("Where a pre-nuptial contract makes provision for a wife that is disproportionate to the means of the intended husband, it casts a burden upon the intended husband, and those claiming under him, to prove that she had full knowledge of all the facts and circumstances that materially affected the contract.").

in the realm of prenuptial agreements: voluntariness.<sup>166</sup> As in the domain of prenuptial agreements, procedural fairness in the realm of surrogacy arrangements includes the opportunity to seek legal advice.<sup>167</sup> Other aspects of the procedural fairness inquiry aim to assure that the surrogate is not coerced into the ante-natal agreement. Such safeguards are akin to those intended to protect the disadvantaged party<sup>168</sup> in a prenuptial agreement, which protections this Note argues pertain to predisposition contracts as well.<sup>169</sup>

Two such safeguards in favor of the surrogate relate to compensation and to the opportunity to rescind the agreement relinquishing parental rights.<sup>170</sup> To assure that the surrogacy contract is truly voluntary and not the result of intended parents exploiting a gestator in financial need, some states prohibit the former from paying anything to the latter,<sup>171</sup> whereas in other states the amount of compensation is limited.<sup>172</sup> Other than payment for reasonable expenses attendant with the pregnancy, no bonus or supplement of any kind is permitted.<sup>173</sup> Where compensation is permitted, it may not be contingent upon actually surrendering the child, as the surrogate must have the option to rescind her promise to terminate parental rights.<sup>174</sup>

Indeed, the opportunity to exercise that termination right post-delivery is another procedural safeguard that some courts apply to assure voluntariness.<sup>175</sup> In *A.H.W. v. G.H.B.*,<sup>176</sup> plaintiffs were intended

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<sup>166</sup> See *supra* Section III.B.1; see also *Roman v. Roman*, 193 S.W.3d 40, 49 (Tex. App. 2006) (“To validate a gestational agreement, the court must find . . . that each party to the agreement voluntarily entered into and understood the terms of the agreement.”).

<sup>167</sup> See, e.g., FLA. STAT. ANN. § 63.213(4) (West 2012) (requiring the parties to a surrogacy contract to have independent counsel); *Adoption of Matthew B.*, 284 Cal. Rptr. 18, 28 (Ct. App. 1991) (enforcing agreement where the surrogate had independent legal counsel to protect her interests and to assure that the arrangement was knowing and voluntary).

<sup>168</sup> See *supra* note 120.

<sup>169</sup> See *infra* Part IV.

<sup>170</sup> See *infra* notes 171–174.

<sup>171</sup> See, e.g., WASH. REV. CODE ANN. § 26.26.240 (West 2016) (providing that surrogate parentage contracts, whether executed in Washington or elsewhere, that provide for compensation are void as against public policy and unenforceable in the State of Washington).

<sup>172</sup> See, e.g., FLA. STAT. ANN. § 63.213(f) (limiting payment to reasonable legal and medical fees, living expenses, lost wages, and compensation for the medical risk); *In re Baby*, 447 S.W.3d 807, 826–27 (Tenn. 2014) (noting that compensation provisions will be enforced only to the extent they pertain to expenses inherent in the surrogacy process itself).

<sup>173</sup> See, e.g., FLA. STAT. ANN. § 63.213(f) (“[N]o other compensation, whether in cash or in kind, shall be made pursuant to a preplanned adoption arrangement.”).

<sup>174</sup> See, e.g., *In re Baby*, 447 S.W.3d at 826 (“[C]ompensation to a traditional surrogate should not be contingent upon her surrender of the child or the termination of her parental rights.”).

<sup>175</sup> See, e.g., FLA. STAT. ANN. § 63.213(1)(b) (providing surrogate mother with forty-eight hours after delivery to revoke consent to adoption if the child is genetically related to her); see also *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218, 1235 (Ct. App. 1994) (“[T]here is . . . no doubt that enforcement of a surrogacy contract prior to a child’s birth presents a host

parents who entered into a gestational surrogacy contract pursuant to which defendant family member agreed to be implanted with their embryo.<sup>177</sup> Prior to defendant's due date, plaintiffs commenced a proceeding for an order declaring themselves the unborn child's legal mother and father.<sup>178</sup> Though the surrogate did not oppose plaintiffs' requested relief,<sup>179</sup> the court nonetheless denied the petition, emphasizing the right to rescind as a key aspect of procedural fairness.<sup>180</sup>

Specifically, the court emphasized the emotional and biological changes that occur during pregnancy,<sup>181</sup> as well as the bond that is created between a surrogate and the baby she carries.<sup>182</sup> In recognition of this bond, the court would not allow the surrogacy contract to be used as a mechanism through which to coerce a gestator<sup>183</sup> into relinquishing her parental rights<sup>184</sup> via a pre-delivery order that directs the intended parents to be listed on the birth certificate. The court instead required the parties to abide by a seventy-two hour waiting period following delivery, thereby enforcing the surrogacy contract in a manner that respected the parties' intentions, albeit with procedural safeguards.<sup>185</sup> Accordingly, some sound precedent exists to illustrate

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of thorny legal problems, particularly if such contracts were specifically enforced."); *In re Baby*, 447 S.W.3d at 834 (vacating consent order issued pre-delivery based on the State's "statutory procedures [that] unequivocally prohibit the voluntary relinquishment of a biological birth mother's parental rights prior to birth through either surrender or parental consent to adoption").

<sup>176</sup> *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000).

<sup>177</sup> *Id.* at 949–50.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 949.

<sup>180</sup> *Id.* at 954.

<sup>181</sup> *Id.*

<sup>182</sup> Specifically, the court stated:

A bond is created between a gestational mother and the baby she carries in her womb for nine months. During the pregnancy, the fetus relies on the gestational mother for a myriad of contributions. A gestational mother's endocrine system determines the timing, amount and components of hormones that affect the fetus. The absence of any component at its appropriate time will irreversibly alter the life, mental capacity, appearance, susceptibility to disease and structure of the fetus forever.

*Id.* at 953.

<sup>183</sup> *See id.* at 954 ("A court order for the pre-birth termination of the pregnant defendant's parental rights is the equivalent of making her subject to a binding agreement to surrender the child . . .").

<sup>184</sup> *See id.* ("It is not necessary now to determine what parental rights, if any, the gestational mother may have vis-à-vis the newborn infant. That decision will have to be made if and when a gestational mother attempts to keep the infant after birth in violation of the prior agreement.").

<sup>185</sup> *See id.* (acknowledging that the "parties' detailed fifteen page agreement clearly reflects their shared intent and desired outcome for this case" and allowing them "to the maximum extent possible, the relief requested"). Thus, the court directed the attending physician who

how one form of ante-natal contract, that is, the surrogacy agreement, can be utilized and enforced so that matters of reproductive choice remain with the affected parties.

*C. Substantive Fairness Protections as Applied to Prenuptial and Surrogacy Agreements Could, Likewise, Pertain to Predisposition Contracts*

Such precedent is not limited to procedural fairness, but exists in the realm of substantive concerns as well. Substantive unconscionability considers whether the actual terms of a contract unreasonably favor one of the parties so as to be shockingly unfair.<sup>186</sup>

1. Substantive Fairness in the Realm of Prenuptial Agreements Focuses on Unforeseen Developments that Would Cause Hardship

Courts are divided as to the temporal framework for measuring substantive fairness in the context of prenuptial agreements, with some looking at the time of execution, some at the time of enforcement, and some at both.<sup>187</sup> The primary benefit to measuring the substantive fairness of a prenuptial agreement at the time of execution is that the parties' freedom to contract receives maximum respect.<sup>188</sup> Yet, limiting review to the time of execution forecloses consideration of unforeseen intervening events that render previously reasonable provisions substantively unfair and inequitable at the time of enforcement.<sup>189</sup> Thus, courts review prenuptial agreements for substantive fairness at the time of enforcement not to rewrite the parties' bargain, but to avoid the hardship and significant financial problems that would otherwise ensue due to unforeseen developments in the marriage since execution.<sup>190</sup>

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delivered the baby to wait seventy-two hours before preparing the Certificate of Parentage, noting "[t]his solution represents a modification of the agreement between the parties to the least extent necessary." *Id.*

<sup>186</sup> Waldman, *supra* note 120, at 927 n.174 ("A substantively unconscionable contract is one that no sensible man would make and such as no honest and fair man would accept." (quoting *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1087 (Ind. 1993), *abrogated by Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005))).

<sup>187</sup> Younger, *supra* note 91, at 29.

<sup>188</sup> See, e.g., *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 266 (Minn. 1989), *overruled by In re Estate of Kinney*, 733 N.W.2d 118 (Minn. 2007) ("Many jurisdictions, perhaps a majority, have opted for a time of execution review, prompted, undoubtedly, by concerns relative to freedom of contract between consenting adults.").

<sup>189</sup> Younger, *supra* note 91, at 7–8.

<sup>190</sup> *Id.* at 18.

The judicial emphasis is on unforeseen developments that cause the hardship rather than on the hardship itself. For example, in *Pajak*, both spouses had children from previous marriages, and the husband had independent wealth.<sup>191</sup> The day before their wedding, plaintiff-husband asked that defendant-wife sign a prenuptial agreement waiving all her rights to inherit under his will.<sup>192</sup> Following the husband's death, the wife sought to void the agreement on grounds of substantive fairness.<sup>193</sup> The court rejected her challenge, finding that the waiver was part of a typical prenuptial agreement, often included where spouses seek to protect the inheritance rights of children from a previous marriage.<sup>194</sup> Thus, nothing about the agreement was unforeseen so as to prevent its enforcement on substantive fairness grounds.

*Newman v. Newman*<sup>195</sup> is another case where the court denied the wife's request to void a waiver of maintenance at the time of enforcement upon finding that intervening circumstances were not unforeseen. On the contrary, at the time the prenuptial agreement was executed, the parties contemplated that the wife would complete her education so that she could work as an accountant, which is exactly what transpired.<sup>196</sup> Thus, even though the husband had considerable wealth and the wife was earning only \$1500 per month at the time of their divorce, the court did not find the maintenance waiver to be unconscionable, because the parties' expectations during the marriage had been met.<sup>197</sup>

By contrast, in *Martin v. Farber*,<sup>198</sup> the court was influenced by the wife's disingenuity during the forty-four year marriage and decided to impose a constructive trust on the wife's property in favor of her husband, notwithstanding the fact that the husband had waived his right to all the wife's property acquired before and during the marriage in a prenuptial agreement. Throughout their marriage, the husband was the sole wage earner, consistently turning over money to the wife who, in turn, promised to take care of him with those funds.<sup>199</sup> Instead, she used

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<sup>191</sup> *Pajak v. Pajak*, 385 S.E.2d 384, 387 (W. Va. 1989).

<sup>192</sup> *Id.* at 385.

<sup>193</sup> The court was not persuaded by wife's argument that the prenuptial agreement was procedurally unfair, finding that "there is no evidence that [the husband] was at all secretive or in any way misled [the wife]." *Id.* at 388.

<sup>194</sup> *Id.* at 387-88 (observing that the provision was part of "a traditional pre-nuptial agreement designed to protect the inheritance rights of children from claims made by a new wife who is not the children's mother").

<sup>195</sup> *Newman v. Newman*, 653 P.2d 728 (Colo. 1982) (en banc).

<sup>196</sup> *Id.* at 736.

<sup>197</sup> *Id.*

<sup>198</sup> *Martin v. Farber*, 510 A.2d 608 (Md. Ct. Spec. App. 1986).

<sup>199</sup> *Id.* at 612.

the money to acquire assets in her own name.<sup>200</sup> The court recognized the substantive unfairness that would result to the husband if it were to enforce the prenuptial agreement in light of the wife's unexpected intervening bad behavior.<sup>201</sup> Thus, the court imposed a constructive trust in favor of the husband on assets in the wife's estate that could be traced back to being purchased with money he provided.<sup>202</sup> In this manner, the court assured substantive fairness by protecting against unforeseen developments that would have made enforcement of the original contract shockingly unfair.

## 2. The Ramifications of Intervening Events Are Likewise a Key Factor for Courts in Determining Whether a Surrogacy Contract Is Substantively Fair

As with prenuptial agreements, intervening events are relevant to courts determining whether a challenged surrogacy agreement is substantively fair.<sup>203</sup> In a case involving breach of such a contract, relevant changed circumstances include those that impact either the surrogate's consent or the environment into which the child will be placed.<sup>204</sup> A deterioration in the relationship during the pregnancy between the surrogate and the intended parents is an example of an intervening event that affects informed consent to the extent a provision in the gestational contract permitting the surrogate to remain a part of the child's life is frustrated.<sup>205</sup> Likewise, the surrogate's purpose to surrender the child to an intact family might be frustrated if the intended parents have separated or are no longer able to provide for the child financially.<sup>206</sup>

Thus, to assure that a surrogacy contract is substantively fair in light of intervening events, some courts will not automatically accept the parties' predetermined conclusion that the best interests of the child are

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*; see also *Gross v. Gross*, 464 N.E.2d 500 (Ohio 1984) (finding an alimony provision by which maximum payment to wife was \$200 per month unconscionable at enforcement, as this amount would result in an extreme lifestyle change from the unforeseeable opulent standard of living during the marriage).

<sup>203</sup> Lewis, *supra* note 126, at 948 ("In a surrogacy contract dispute, the only changed circumstances that are relevant are those that impact the surrogate's ability to give informed consent and the child's opportunity to be placed in the best living environment.").

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See *id.*; see also *In re Marriage of Moschetta*, 25 Cal. App. 4th 1218, 1223 (Ct. App. 1994) (discussing how the traditional surrogate began to reconsider the adoption post-delivery after learning while in labor that the intended parents had separated).

furthered by placement with the intended parents.<sup>207</sup> Rather, these courts conduct a de novo review,<sup>208</sup> using the provisions of the parental scheme in the surrogacy contract as a guide for determining the child's best interests.<sup>209</sup> In this way, maximum effect is given to the parties' intentions by enforcing a surrogacy arrangement as agreed, provided that intervening events have not resulted in circumstances that require modification to assure substantive fairness.<sup>210</sup> To the extent this model has succeeded in the realm of some form of ante-natal contract, that is, both the prenuptial and surrogacy agreements, one has reason for encouragement that such a scheme befits another form of ante-natal contract, that is, those pertaining to disposition of frozen pre-embryos.

#### IV. PROPOSAL

##### A. *Predisposition Contracts Should Be Separate from Informed Consent Forms to Assure Procedural Fairness*

Courts tasked with deciding whether or not to enforce a predisposition contract in a divorce proceeding should assure procedural fairness with reference to the safeguards of full disclosure and voluntariness required to enforce a prenuptial or surrogacy agreement. To assure that directives pertaining to a frozen pre-embryo are based on full disclosure, courts should require that these provisions be set forth in an agreement that is separate and distinct from the form that the medical provider uses to obtain informed consent prior to IVF.

One option for creating such a contract is to provide for disposition of pre-embryos in the prenuptial agreement itself. The courts have not yet squarely addressed whether such a provision would be valid.<sup>211</sup> However, both the UPAA and UPMAA support this

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<sup>207</sup> See *In re Baby*, 447 S.W.3d 807, 828 (Tenn. 2014) (“[C]ourts are not bound by any surrogacy contract as to the determination of the best interests of a child.”).

<sup>208</sup> Indeed, such review is not necessarily limited to instances where one party opts not to perform a gestational contract post-delivery. Some states require the court validation of a surrogacy contract as a condition precedent to the adoption. See, e.g., UTAH CODE ANN. §§ 78B-15-801(4), -803 (West 2009).

<sup>209</sup> See, e.g., *In re Baby*, 447 S.W.3d at 829 (“In most instances, enforcing the parenting scheme as provided by a surrogacy contract will support the best interests of the child.”); *In re F.T.R.*, 2013 WI 66, ¶ 61, 349 Wis. 2d 84, 116, 833 N.W.2d 634, 649–50 (“Enforcement of surrogacy agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of their child . . . and reduces contentious litigation that could drag on for the first several years of the child’s life.”).

<sup>210</sup> See *supra* Section III.C.2.

<sup>211</sup> In *Dahl v. Angle*, 194 P.3d 834, 840 (Or. Ct. App. 2008), however, the court recognized the congruence of these two contracts, stating that “giving effect to a valid agreement evincing



possibility by allowing the parties to determine any personal right, so long as their arrangement does not violate public policy.<sup>212</sup> Thus, provisions as to frozen pre-embryos in a prenuptial agreement would comport with both these Acts, as some courts have recognized that predisposition contracts actually promote public policy in favor of procreative liberty.<sup>213</sup>

Furthermore, including provisions for disposition of frozen pre-embryos is consistent with the aim of a prenuptial agreement to determine the parties' rights and obligations in property no matter where located or how acquired.<sup>214</sup> In light of the case law confirming that pre-embryos are property, albeit entitled to "special respect,"<sup>215</sup> providing for their disposition along with other types of ownership interests upon divorce appears reasonable.<sup>216</sup>

The fact that provisions in a prenuptial agreement limiting child support, visitation, and custody rights are void<sup>217</sup> should not impede inclusion of predisposition arrangements, as pre-embryos are distinguishable from live children. As the court in *Davis* reviewed, a four- to eight-cell pre-embryo is far removed, both quantitatively and

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the parties' intent regarding disposition of embryos is consistent with our statutory and case law that give similar effect to prenuptial agreements."

<sup>212</sup> See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 3(a)(6) (UNIF. LAW COMM'N 1983); see also UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 10 cmt. (UNIF. LAW COMM'N 2012) ("[O]ther provisions which are contrary to public policy would also be unenforceable."). The National Conference of Commissioners for Uniform State Laws, also known as the Uniform Law Commission, drafted both the UPAA and the UPMAA. This Commission provides states with non-partisan legislation to bring stability to important areas of state statutory law. The UPAA has been adopted by twenty-six jurisdictions, half of which made significant changes. The Commission passed the UPMAA in 2012 to address some of the concerns with the UPAA. To date, only Colorado and North Carolina have adopted the UPMAA, though the Act is pending consideration in Mississippi. See *Premarital and Marital Agreements Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Premarital%20and%20Marital%20Agreements%20Act> (last visited Apr. 9, 2017).

<sup>213</sup> See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (noting that procreative liberty is furthered by leaving full authority to the progenitors to decide the fate of frozen pre-embryos based on privately held convictions about self-identifying as a genetic parent, and the point at which life begins).

<sup>214</sup> See UNIF. PREMARITAL AGREEMENT ACT § 3(a)(1) (noting that prenuptial agreements aim to address "the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located"); see also UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 2(6) (defining property as "anything that may be the subject of ownership").

<sup>215</sup> See *Davis*, 842 S.W.2d at 597.

<sup>216</sup> See also Sublett, *supra* note 37, at 596 ("Because the sperm and egg have united to become one, the resulting concept cannot be said to be the personal property of either the male or the female, but rather the marital property of both.").

<sup>217</sup> See, e.g., UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 10(b) (providing that a term in a premarital agreement is unenforceable "to the extent that it: (1) adversely affects a child's right to support"); see also *Reber v. Reiss*, 42 A.3d 1131, 1141 (Pa. Super. Ct. 2012) (questioning whether a party to a predisposition contract can waive support for the future child).

qualitatively, from viability—the point at which a fetus is assigned legal rights.<sup>218</sup> Accordingly, provisions for the disposition of pre-embryos would be consistent both with what a prenuptial agreement intends to include, as well as with what it seeks to exclude.

Whether or not a couple about to marry will want to include a provision that speaks to infertility in a pre-nuptial agreement is, of course, debatable. The key point, however, is that such a provision could be included in a prenuptial agreement if the parties so choose, and would likely be enforced as within a procedurally and substantively fair contract.

Removing the disposition language from the consent form and into an agreement of its own, be it a prenuptial agreement or a contract made at the time of IVF, will focus the spouses on the issue of unused pre-embryos. Such focus will, thereby, foster the private discussion that is needed in order to make a knowing contingency plan in the event of divorce.<sup>219</sup> In particular, the spouses would have the opportunity to communicate candidly with each other and share their respective feelings about the genetic connection to a child they might not raise, the inception of life, and raising a child in a family that is not intact.<sup>220</sup> Full disclosure and contemplation of these issues would obviate the criticism that predisposition contracts may not reflect the spouses' actual intentions,<sup>221</sup> as procedural safeguards would be in place to assure the terms were based upon frank information. Concomitantly, removing the dispositional language from the informed consent realm would assure voluntariness that is otherwise questionable in contracts set forth on a standardized form, presented on a take-it-or-leave-it basis, and with key provisions hidden in the fine print.<sup>222</sup>

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<sup>218</sup> *Davis*, 842 S.W.2d at 595 (stating viability is the critical point for assigning legal rights to a fetus, and “[t]hat stage of fetal developmental is far removed, both qualitatively and quantitatively, from that of the four-to eight-cell pre[-]embryos in this case”).

<sup>219</sup> *But see* *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998) (recognizing that neither party disputed that the consent form was “an expression of their own intent regarding disposition of their pre-zygotes,” nor did they dispute that their agreement was “freely and knowingly made”).

<sup>220</sup> *See* *Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶ 41 (reasoning that its decision to honor a predisposition agreement will “promote serious discussions between the parties prior to participating in *in vitro* fertilization regarding their desires, intentions, and concerns”). Such discussion could also include disposition preferences should one party have a change of heart about parenthood due to future intervening events. *Id.* (“[T]he concern that individuals may change their minds regarding parenthood . . . [and] not[ing] that this concern can be adequately addressed in a contract and should be discussed in advance of the procedure.”).

<sup>221</sup> *See supra* Section I.B.; *see also* *Fleming, supra* note 12, at 372 (“The process of executing a contractual agreement to regulate future control of frozen embryos may also have the added benefit of causing the parties to pause, think, and recognize the importance of the commitment into which they are about to enter.”).

<sup>222</sup> *Waldman, supra* note 120, at 926 (citing *Res. Mgmt. Co. v. Weston Ranch*, 706 P.2d 1028, 1042 (Utah 1985) (listing the hallmarks of procedural unconscionability as: the use of

Furthermore, courts should enforce a predisposition contract in instances where the divorcing spouses have had the opportunity to seek independent counsel. While retaining separate counsel may seem misplaced as between a married couple endeavoring to start a family, courts should at a minimum confirm that the parties have had the chance to speak with an attorney for guidance about the dispositional choices in the event of divorce. Adapting this safeguard to the formation of predisposition contracts would assure that the preferred approach<sup>223</sup> for resolving disputes about the fate of frozen pre-embryos in a divorce proceeding is procedurally fair.

B. *Predisposition Contracts Should Consider Biological Realities to Assure Substantive Fairness*

As applied to predisposition contracts, courts may need to shift their focus from unforeseen intervening circumstances to the biological realities attendant with IVF to determine substantive fairness. As the *Davis* court recognized, the possibility is quite real that one of the parties participating in IVF may have no other reasonable means to achieve genetic parenthood absent an award of the frozen pre-embryos at the time of divorce.<sup>224</sup> Because men are physically able to procreate longer than women, the wife in a divorce dispute about frozen pre-embryos is more likely to be the spouse at risk of losing the chance to become a biological parent.<sup>225</sup>

Yet, if the predisposition contract is fairly procured,<sup>226</sup> the parties will have discussed the physical realities that hinder the woman absent the option of being awarded the frozen pre-embryos on a unilateral basis. Indeed, such discussion would address concerns about future parenthood and, thereby, obviate the criticism that the predisposition approach fails to provide spouses with the opportunity to address this topic.<sup>227</sup> Perhaps the courts would no longer need to consider the

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boilerplate forms, offered on an as-is basis, and burying key terms in a morass of small print)); see also *supra* Section III.C.; *supra* note 78.

<sup>223</sup> See *supra* Section I.B.

<sup>224</sup> *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992); see also *J.B. v. M.B.*, 783 A.2d 707, 720 (N.J. 2001) (specifically expressing “no opinion in respect of a case in which a party who has become infertile seeks use of stored pre[-]embryos against the wishes of his or her partner”); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012); *supra* note 49.

<sup>225</sup> Waldman, *supra* note 120, at 928.

<sup>226</sup> See *supra* Section IV.A.

<sup>227</sup> See *supra* Parts II–III; see also Fleming, *supra* note 12, at 372 (“[C]hanged circumstances in embryo dispute cases are no different from the changed circumstances that could occur in many other contractual situations that do not render contracts unenforceable. Therefore,

applicability of the *Davis* exception<sup>228</sup> if the parties themselves enter into a predisposition contract following their discussion that cryopreserved pre-embryos might be the wife's last chance to become a genetic parent. A woman's choice to forgo use of her own pre-embryos is not troubling so long as such choice is procedurally and substantively fair.<sup>229</sup> Courts should, therefore, enforce a predisposition agreement between divorcing spouses that meets these fairness standards.

#### CONCLUSION

Predisposition agreements are the best model for determining the fate of frozen pre-embryos so long as safeguards are in place to assure procedural and substantive fairness. The solution to resolving the inconsistent judicial response in divorce proceedings involving frozen pre-embryos may, indeed, lie in the realm of prenuptial and surrogacy agreements. By expanding the fairness standards already imposed just a bit further to validate these other forms of ante-natal contracts, courts may well find the winning solution that will enable a just resolution to this recurring, if not escalating, issue.

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holding parties to prior agreements despite changed circumstances is not unfair, unless either party did not knowingly and freely enter into such agreement." (footnote omitted)).

<sup>228</sup> *Davis*, 842 S.W.2d at 604.

<sup>229</sup> Waldman, *supra* note 120, at 929 ("A woman's choice to erect a barrier to her own use of the embryos post-divorce is untroubling if it indeed represents a choice.").