A ONE-EGG WONDER: WORKING TO CURE JUDICIAL GENDER BIAS AND INCREASE ACCESS TO PRE-EMBRYOS FOR INFERTILE PARTIES

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The first live birth of a child conceived from in vitro fertilization ("IVF") happened in 1978. Today, over eight million children have been born through IVF procedures. The first dispute over the resulting pre-embryos was in 1990 when the Tennessee Supreme Court outlined a balancing approach with a presumption favoring non-use of the pre-embryos for courts to follow when resolving these matters. Numerous states have taken differing approaches—some have taken a contractual approach, others an approach requiring contemporaneous mutual consent before there can be a departure from the status quo, and very few state legislatures have directly addressed how to resolve disputes over pre-embryos. The balancing approach is the sole approach that addresses the issues of infertility among parties or when a party subsequently becomes infertile after creation of pre-embryos. However facially neutral the balancing approach may seem, there are inherent gender biases in its application. This Note advocates for ensuring that both parties are entitled to the same analytical starting point when the balancing approach is used in spite of a presumption for nonuse and for making the infertility exception into a working standard that courts would be more apt to apply by mitigating the damages suffered by the objecting party.

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INTRODUCTION

In vitro fertilization ("IVF") is a relatively new method of procreation; the first live birth of a child conceived from IVF happened in the United Kingdom in 1978—not even fifty years ago.[1] The development of cryopreservation, or freezing, of pre-embryos swiftly followed,[2] and IVF methodology has progressed at an exponential rate: 1–3% of annual births in the United States and Europe are the result of IVF treatment.[3] Before IVF, the options for heterosexual, infertile couples were finite if they wanted to experience biological parenthood.[4] Now, these couples are the leading population of people who pursue IVF

1 Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve* In Vitro *Fertilization*, 114 MO. MED. 156, 156 (2017).

2 Susan L. Crockin, Amy B. Altman & Meagan A. Edmonds, *The History and Future Trends of ART Medicine and Law*, 59 FAM. CT. REV. 22, 28 (2021). For purposes of this Note, the term "pre-embryo" is defined as a fertilized egg in the beginning stages—specifically the initial fourteen days following conception—of cell division, whereas the term "embryo" is used to describe "the early stages of fetal growth" through the initial eight weeks of pregnancy. *See Embryo*, NORTHWESTERN (July 26, 2004), https://groups.molbiosci.northwestern.edu/holmgren/Glossary/Definitions/Def-E/embryo.html [https://perma.cc/YM56-FGQS]; Cinzia Piciocchi & Lucia Martinelli, *The Change of Definitions in a Multidisciplinary Landscape: The Case of Human Embryo and Pre-Embryo Identification*, 57 CROATIAN MED. J. 510, 514 (2016) ("[L]aw requires fixing specific features, which would fit regulation needs rather than strictly represent scientific facts. This is the case of legal interpretation of the term 'pre-embryo,' for which the 14-day development period seems to have a strong symbolic and moral value. At the same time, however, such limit might result in an adaptable parameter since legal definitions are subjected to changes in the dialogue with science and ethics.").

3 Eskew & Jungheim, *supra* note 1, at 156.

4 Crockin et al., *supra* note 2, at 25. Prior to the development of IVF treatment, reproductive infertility treatment for heterosexual couples, who were almost always married, involved identifying the infertile spouse. *Id.* If the wife were infertile, treatment involved fertility medication and various surgical efforts. *Id.* If the husband were infertile, the favored treatment was artificial insemination. *Id.* For a short stint, it was the accepted medical practice to mix the husband's sperm with a donor's sperm and couples were told to assume the resulting child genetically belonged to the husband. *Id.* With the rise of genetic testing and same-sex couples' parenting, this medical practice became obsolete. *Id.*

treatment.[5] Today, over eight million children have been born worldwide using IVF technology.[6]

The excitement surrounding this significant medical advancement was accompanied by many legal challenges.[7] One dominant category of pre-embryo disputes that has emerged over the past four decades is between former spouses or partners where one is seeking control and potential use of the frozen pre-embryos in the absence of an adequate contract speaking specifically to pre-embryo disposition decisions.[8] This type of dispute commonly—but not always—arises in divorce proceedings.[9]

The first divorce dispute in the United States involving such a claim was filed in 1989—*Davis v. Davis*.[10] During the initial divorce action, Mary Sue Davis sought control of seven frozen pre-embryos, intending to implant them into her uterus with the hope of conceiving a biological child.[11] Junior Davis objected because he wanted to leave the pre-embryos cryopreserved until he determined whether he wanted to become a

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5 Eskew & Jungheim, *supra* note 1, at 156. It was not until 2023 that the American Society for Reproductive Medicine Practice Committee expanded its definition of "infertility" by adopting more inclusive language. *Definition of Infertility*, PRACTICE COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (2023), https://www.asrm.org/practice-guidance/practice-committee-documents/denitions-of-infertility [https://perma.cc/8V9P-MVHC] The American Society for Reproductive Medicine "previously defined infertility as the failure to get pregnant within a year of having regular, unprotected intercourse or therapeutic donor insemination in women younger than 35 or within six months in women older than 35." Jacqueline Howard, *Infertility Gets a New, Expanded Definition to Address "the Reality of All" Seeking Care, Medical Group Says*, CNN (Oct. 23, 2023), https://www.cnn.com/2023/10/23/health/reproductive-medicine-group-updates-its-definition-of-infertility-to-address-the-reality-of-all-seeking-care/index.html [https://perma.cc/TL47-3MRP]. Now, the definition is intended to expand access to "treatment to any individual, regardless of relationship status or sexual orientation." PRACTICE COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *supra* note 5. Additionally, only seven states mandate that IVF insurance benefits include same-sex couples. Jo Yurcaba, *Gay Couple Files First-of-its-Kind Class Action Against NYC for IVF Benefits*, NBC NEWS (May 9, 2024), https://www.nbcnews.com/nbc-out/out-news/gay-couple-files-first-kind-class-action-nyc-ivf-benefits-rcna151250 [https://perma.cc/8WMF-DY7A]. It is worth noting here that heterosexual couples are the leading population likely because the medical definition of "infertility" was designed to exclude same-sex couples seeking IVF treatment and, even with this definition changed, the majority of states still do not require insurance providers to cover IVF treatment thereby continuing to serve as a significant financial barrier to same-sex couples wishing to conceive via IVF. Howard, *supra* note 5; Yurcaba, *supra* note 5.

6 Crockin et al., *supra* note 2, at 23.

7 *Id.* at 28.

8 *Id.* at 29.

9 *Id.*

10 Davis v. Davis, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

11 *Davis*, 842 S.W.2d at 589.

divorced biological parent.[12] The trial court awarded Mary Sue Davis "custody" of the pre-embryos, holding that the pre-embryos were to be considered "human beings" from "the moment of conception"[13] and that Mary Sue Davis must be given the opportunity to have the pre-embryos implanted and carry the "children" to term.[14] However, the court of appeals reversed the trial court's decision, holding that the husband had a "constitutionally protected right not to beget a child where no pregnancy has taken place," and that there lacked a "compelling state interest to justify" allowing Mary Sue Davis to implant the pre-embryos against Junior Davis's wishes.[15]

By the time the case reached the Supreme Court of Tennessee, the positions of both parties had changed—both had remarried.[16] Mary Sue Davis no longer wanted to use the frozen pre-embryos and sought to donate them to an infertile couple; Junior Davis opposed the donation and preferred to dispose of the frozen pre-embryos.[17] When the couple initially signed up for the IVF program at the clinic, they did not sign a written contract detailing how to dispose of the unused, frozen pre-embryos.[18]

The *Davis* court adopted the definition of an IVF pre-embryo provided by the Ethics Committee of the American Fertility Society,[19] and "conclude[d] that pre[-]embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitled them to special respect because of their potential for human life."[20] Given the lack of judicial and legislative precedent,[21] the *Davis* court was left to its own devices to create the necessary guidelines for all involved in IVF procedures, including the health care professionals who administer the procedure, scientists who conduct infertility research, and potential parents looking to use IVF to achieve biological parenthood.[22] The steps outlined by the court for resolving disputes involving pre-embryos produced by IVF are as follows: (1) provided that any initial agreements

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12 *Id.*

13 *Davis*, 1989 WL 140495, at *9, *11.

14 *Id.* at *11.

15 *Davis*, 1990 WL 130807, at *2.

16 *Davis*, 842 S.W.2d at 590.

17 *Id.*

18 *Id.*

19 Crockin et al., *supra* note 2, at 27. The American Fertility Society was later renamed the American Society of Reproductive Medicine. *Id.* at 26.

20 *Davis*, 842 S.W.2d at 597.

21 *Id.* at 590 (explaining that there was "no case law to guide [the court] to a decision in this case" nor was there a "Tennessee statute governing [the] disposition" of cryopreserved pre-embryos).

22 842 S.W.2d at 597.

regarding the disposition of the pre-embryos may be modified by agreement at a later time, such an agreement made in preparation for contingencies, such as divorce, should be presumed binding and enforceable between the parties,[23] and (2) if there is no prior contract among the parties regarding the disposition of the pre-embryos, a balancing approach must be utilized by weighing the interests of the parties.[24] When a court utilizes the balancing approach, the parties' interests may not be considered retroactively, meaning each the efforts exerted by each party to create the pre-embryos are legally irrelevant to the analysis.[25]

Thus, while the *Davis* court did concede that women contribute the most effort throughout the IVF process, it held that Mary Sue and Junior Davis must each be seen as "equ[al] gamete-providers."[26] However, the court failed to provide a reason why each party's early contributions were irrelevant to the analysis, thus reducing Mary Sue Davis's contribution to mere genetics by failing to consider both the emotional and physical trauma she experienced throughout the IVF process.[27] Specifically, Mary Sue Davis endured "six attempts at IVF," wherein each attempt required one "month of subcutaneous injections . . . to shut down her pituitary gland[,] . . . eight days of intermuscular injections . . . to stimulate her ovaries to produce ova," and five rounds of anesthetization for egg retrieval, only for the eggs to be transferred back to her uterus two to three days later.[28] Each attempt resulted in a negative pregnancy test.[29] Mary Sue Davis completed a seventh attempt once their clinic was able to provide cryogenic preservation of the pre-embryos, which resulted in another failed transfer to her uterus and seven frozen pre-embryos.[30] Although the court considered the emotional trauma Junior Davis endured when his own parents separated during his childhood, the court would not consider this much more recent emotional and physical trauma Mary Sue Davis endured through the numerous failed IVF procedures.[31] A petition for writ of certiorari was filed in *Davis*, but the Supreme Court of the United States denied the petition in 1993.[32]

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23 *Id.*

24 *Id.* at 604.

25 Benjamin C. Carpenter, *Sperm Is Still Cheap: Reconsidering the Law's Male-Centric Approach to Embryo Disputes After Thirty Years of Jurisprudence*, 34 YALE J.L. & FEMINISM 1, 47 (2023).

26 842 S.W.2d at 601.

27 Carpenter, *supra* note 25, at 48.

28 *Davis*, 842 S.W.2d at 591–92.

29 *Id.*

30 *Id.*

31 *Id.* at 603–04; *see also* Carpenter, *supra* note 25, at 47–49.

32 Stowe v. Davis, 507 U.S. 911 (1993) (Mem.).

Over twenty states' highest appellate courts have issued decisions regarding the disposition of IVF pre-embryos and the parentage of resulting children since *Davis* was decided three decades ago.[33] Courts have used various methodologies to resolve such disputes: (1) the contractual approach, (2) the contemporaneous approach, and (3) the balancing approach.[34] A minority of states have taken a statutory approach to resolving these disputes by enacting legislation that either advises state courts on how to resolve disputes of cryopreserved pre-embryos or mandates doctors to have their infertile patients sign agreements regarding such dispositions.[35] These state statutes can be organized into three categories: (1) informed-consent statutes, which aim to improve a patient's ability to provide voluntary, informed consent;[36] (2) personhood statutes, which focus on the legal status of pre-embryos;[37] and (3) relief-from-parental-obligation statutes, which, unless consent is given, alleviates a party's parental obligations.[38]

This Note focuses on an exception, known as the infertility exception, to the balancing approach first articulated in *Davis*. About one-half of pre-embryo disposition cases to date have been resolved by the balancing approach.[39] The infertility exception is applied when a proponent is suddenly left with "no reasonable alternative means" of biologically reproducing, such as cancer precluding fertility, and implantation of the pre-embryos is the proponent's sole chance at biological parenthood; in this scenario, most courts will permit the use of the pre-embryos despite the objector's interest in not having parenthood forced upon them.[40]

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33 Crockin et al., *supra* note 2, at 30.

34 Allyson Wade, Note & Comment, *Using Contract Law to Resolve Frozen Pre-Embryo Disputes*, 81 MD. L. REV. 1049, 1054 (2022).

35 Carissa Pryor, Note, *What to Expect When Contracting for Embryos*, 62 ARIZ. L. REV. 1095, 1111 (2020).

36 *See, e.g.*, CONN. GEN. STAT. § 32-41jj(c)(1)–(2) (West 2015); MASS. GEN. LAWS ch. 111L, § 4(a) (West 2005); N.J. STAT. ANN. § 26:2Z-2b(1)–(2) (West 2004); CAL. HEALTH & SAFETY CODE § 125315 (West 2004); FLA. STAT. ANN. § 742.17 (West 1993); *see also* Pryor, *supra* note 35, at 1111–12.

37 *See, e.g.*, LA. STAT. ANN. § 9:129 (West 1986) ("A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person."); *see also* Pryor, *supra* note 35, at 1112–13.

38 *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318.03(C) (West 2018); TEX. FAM. CODE ANN. § 160.706(a) (West 2007); COLO. REV. STAT. ANN. § 15-11-120(9) (West 2010); *see also* Pryor, *supra* note 35, at 1113.

39 Carpenter, *supra* note 25, at 23.

40 *See* Nathan J. Chan, *"Don't Put All Your Eggs in One Basket" Revisited: How Exactly Does the Infertility Exception Apply to Embryo Disposition upon Divorce After* Reber v. Reiss*?*, 20 W.

After thirty years of jurisprudence addressing frozen pre-embryo disputes, a presumption favoring "the party wishing to avoid procreation" found in dicta from *Davis* has taken root regardless of the differing approaches to resolution.[41] The result has been a facially gender-neutral balancing test; however, in reality, this approach places men in a privileged position by favoring a presumption where men avoid the mere "cognitive burdens of genetic parenthood[—]even when freed from [the] responsibilities [associated with] legal parenthood"—above recognition of a "wom[a]n's . . . investment[ ] in experiencing genetic, gestational, and legal parenthood."[42]

Rather than arguing in favor of reversal of the *Davis* presumption,[43] this Note advocates an approach that works within the *Davis* presumption favoring nonuse of the pre-embryos: (1) women should not be penalized in the balancing approach for being able to reproduce—the analytical starting point should not be a moving target and the consideration of both parties' medical history should begin at the same point to remedy the inherent gender bias within the balancing approach;[44] and (2) the infertility exception must be adapted into a standard that courts might be more willing to apply by working to mitigate the harm suffered by the objecting party—rather than keeping the current state of the exception where merely one party benefits at the expense of the other.[45]

Part I of this Note provides a background on the varying approaches states have used to resolve disputes of frozen pre-embryos; it breaks down both judicial and statutory approaches.[46] Part I finishes by discussing

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MICH. U. COOLEY J. PRAC. & CLINICAL L. 49, 57 (2018). There is dicta supporting this exception articulated in *Davis*:

> 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. If no other reasonable alternatives exist, then the argument in favor of using the pre[-]embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre[-]embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

842 S.W.2d 588, 604 (Tenn. 1992).

41 *Davis*, 842 S.W.2d at 604; *see* Carpenter, *supra* note 25, at 4.

42 Carpenter, *supra* note 25, at 1, 4.

43 For more on this proposal of reversing the presumption announced in *Davis*—placing a thumb on the scale in favor of the objecting party—with a rebuttable presumption favoring the use of the pre-embryos when a couple has not otherwise agreed on their disposition, see generally Carpenter, *supra* note 25.

44 *See infra* Section III.A; *see also Davis*, 842 S.W.2d at 603–04; Carpenter, *supra* note 25, at 47–49, 55.

45 *See infra* Section III.B.

46 *See infra* Part I.

what the infertility exception is and the very few cases where it has been applied.[47] Part II explores the benefits and drawbacks of each approach.[48] Part II concludes that the different statutory approaches, as well as the contractual and the contemporaneous approaches, either fail to or insufficiently address the issue of infertility; the balancing approach is the sole approach that addresses this issue, but the name is a misnomer, as the *Davis* presumption has led to an implicit gender bias preventing a fair weighing of each party's interests.[49] Part III advocates for the use of both the balancing approach and the infertility exception.[50] Part III proposes two approaches for remedying the gender bias within the balancing approach: (1) the contemplation of both parties' medical history should begin at the same point of analysis;[51] and (2) the infertility exception must be adapted to mitigate the harm suffered by the objecting party.[52] This mitigation can be achieved by the following objectives: (1) the objector's legal obligations should be *fully* terminated, not just limited to financial obligations, like sperm donors;[53] (2) the state should not be able to determine the maximum number of children that can be born from the pre-embryos neither in the courts nor in the legislature, but rather a doctor should provide expert testimony to help determine a medically approved number of pre-embryos that can and should be used to achieve the same end dependent on each individual patient's needs;[54] and (3) alternatives to the destruction of the pre-embryos must be considered.[55]

I. BACKGROUND

A. *Statutory Approaches*

Davis set the stage for courts to consider the disposition of pre-embryos, exploring the subtle differences when applying the various

47 *See infra* Section I.D.1.

48 *See infra* Part II.

49 *See infra* Section II.D.

50 *See infra* Part III.

51 *See infra* Section III.A; *see also* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992); Carpenter, *supra* note 25, at 47–49, 55.

52 *See infra* Section III.B.

53 Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 395–97 (2013); *infra* Section III.B.1.

54 *See infra* Section III.B.2.

55 *See infra* Section III.B.3.

judicial approaches.[56] Some courts have expressed frustration due to the dearth of legislative guidance regarding the disposition of pre-embryos.[57] In 2012, for example, the Superior Court of Pennsylvania in *Reber v. Reiss* discussed how courts must analyze the specific facts presented in each individual case due to the legislature failing to address the issue.[58] In response, some states have implemented statutes regarding the disposition of cryopreserved pre-embryos with differing requirements.[59]

1. Informed-Consent Statutes

Informed-consent statutes require that infertility doctors provide patients with sufficient information in a timely fashion that would allow a person to make an informed, voluntary decision regarding the disposition of any pre-embryos remaining after IVF treatment.[60] States that have enacted these statutes include Connecticut, Massachusetts, New Jersey, California, and Florida.[61]

The Connecticut statute requires that health care providers, including physicians, provide the patient with sufficient information that allows that patient to make an informed, voluntary decision about the disposition of resulting pre-embryos from infertility treatment[62] The statute explicitly requires that such a patient is presented with an enumerated set of options for what to do with remaining pre-embryos.[63] Violating this statute constitutes a class D felony.[64]

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56 Mary Joy Dingler, Comment, *Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U.L. REV. 293, 296 (2019).

57 *Id.* at 304.

58 Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012); *see* Dingler, *supra* note 56, at 304.

59 Alexandra Faver, Note, *Whose Embryo Is It Anyway: The Need for a Federal Statute Enforcing Frozen Embryo Disposition Contracts*, 55 FAM. CT. REV. 633, 637 (2017).

60 Pryor, *supra* note 35, at 1111.

61 *See* CONN. GEN. STAT. ANN. § 32-41jj(c)(1)–(2); MASS. GEN. LAWS ANN. ch. 111L, § 4(a); N.J. STAT. ANN. § 26:2Z-2b(1)–(2); CAL. HEALTH & SAFETY CODE § 125315; FLA. STAT. ANN. § 742.17; *see also* Pryor, *supra* note 35, at 1111–12.

62 CONN. GEN. STAT. § 32-41jj(c)(1) ("A physician or other health care provider who is treating a patient for infertility shall provide the patient with timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any embryos or embryonic stem cells remaining following an infertility treatment.").

63 *Id.* § 32-41jj(c)(2) ("A patient to whom information is provided pursuant to subdivision (1) of this subsection shall be presented with the option of storing, donating to another person, donating for research purposes, or otherwise disposing of any unused embryos or embryonic stem cells."). A patient who decides to donate the pre-embryos for stem cell research must "provide written consent" and "not receive payment." *Id.* § 32-41jj(c)(3).

64 *Id.* § 32-41jj(c)(4).

The Massachusetts statute also requires that infertility patients are provided with sufficient information to make an informed, voluntary decision regarding the disposition of any pre-embryos.[65] This statute mandates that patients are presented with the same enumerated options listed in the Connecticut statute.[66] The New Jersey statute is indistinguishable.[67]

Florida's statute was among the first of state laws enacted to address pre-embryo disputes.[68] The statute requires a written agreement between the couple and their treating physician explicitly regarding the disposition of the resulting pre-embryos, and this agreement governs "in the event of a divorce, the death of a spouse, or any other unforeseen circumstances."[69] Absent such an agreement, the pre-embryos belong jointly to the couple unless one party dies.[70] The Florida statute aligns with the contract approach but fails to include any textual language explicitly stating that such written agreements are binding.[71]

Lastly, the California statute is an outlier due to its intricate nature.[72] This statute also mandates health care providers to give patients sufficient information to make an informed, voluntary decision about the disposition of resulting pre-embryos.[73] The statute mandates that patients are presented with the same enumerated options listed in the

65 MASS. GEN. LAWS ANN. ch. 111L § 4(a) ("A physician or other health care provider who provides a patient with in vitro fertilization therapy shall provide the patient with timely, relevant and appropriate information sufficient to allow that patient to make an informed and voluntary choice regarding the disposition of any pre-implantation embryos or gametes remaining following treatment.").

66 *Id.*

67 *See* Pryor, *supra* note 35, at 1111–12; N.J. STAT. ANN. § 26:2Z-2b(1)–(2) ("A physician or other health care provider who is treating a patient for infertility shall provide the patient with timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the infertility treatment. A person to whom information is provided pursuant to paragraph (1) of this subsection shall be presented with the option of storing any unused embryos, donating them to another person, donating the remaining embryos for research purposes, or other means of disposition.").

68 Pryor, *supra* note 35, at 1112.

69 FLA. STAT. ANN. § 742.17.

70 *Id.* § 742.17(2)–(3).

71 *See* Faver, *supra* note 59, at 638; discussion *infra* Section I.B.

72 Faver, *supra* note 59, at 637–38.

73 CAL. HEALTH & SAFETY CODE § 125315(a) ("A physician and surgeon or other health care provider delivering fertility treatment shall provide his or her patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.").

aforementioned statutes.[74] The California statute is unique in that facilities and/or health care providers that fail to provide such information will be punished for "unprofessional conduct."[75] The statute enumerates the different methods for disposing of the pre-embryos in a variety of situations, such as the death of a party or divorce.[76]

2. Personhood Statutes

Rather than addressing concerns of receiving informed consent from patients or stressing the importance of contract principles, the pre-embryos themselves are the bedrock of personhood statutes.[77] Louisiana's statute, for example, gives the pre-embryos "juridical person" capacity, meaning pre-embryos are "recognized as a separate entity apart from the medical facility or clinic where it is housed or stored"[78] and can "sue or be sued" with its confidentiality maintained.[79] By recognizing the pre-embryo as "a biological human being,"[80] Louisiana's statute forbids the intentional destruction of the pre-embryos either by natural means or through the actions of "other juridical person[s]."[81] When disputes arise concerning the disposal of the pre-embryos, the judicial standard for resolution is "to be in the best interest of the [pre-embryo]."[82]

Similarly, Arizona's statute mandates that where there is a dispute as to the pre-embryos, "the spouse who intends to allow the [pre-]embryos to develop to birth" is awarded the pre-embryos.[83]

3. Relief-from-Parental-Obligation Statutes

Relief-from-parental-obligation statutes aim to protect the party seeking to avoid biological parenthood, rather than focusing on how to resolve such disputes, by requiring consent for parental obligations to

74 *Id.* § 125315(b) ("Any individual to whom information is provided pursuant to subdivision (a) shall be presented with the option of storing any unused embryos, donating them to another individual, discarding the embryos, or donating the remaining embryos for research.").

75 *Id.* § 125315(a); *see* Faver, *supra* note 59, at 637–38.

76 *See generally* CAL. HEALTH & SAFETY CODE § 125315.

77 Pryor, *supra* note 35, at 1112–13.

78 LA. STAT. ANN. § 9:123, § 9:125.

79 *Id.* § 9:124.

80 *Id.* § 9:126.

81 *Id.* § 9:129.

82 *Id.* § 9:131.

83 ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (West 2018).

attach to the objecting party.[84] In addition to requiring that pre-embryos be given to the spouse who intends to use the pre-embryo, the Arizona statute also requires that "[t]he spouse that is not awarded the [pre-]embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed [pre-]embryos" unless they provide consent in writing to be a parent of any resulting child.[85] Texas and Colorado also have relief-from-parental-obligation statutes.[86]

The statutory approach—whether through informed consent, personhood, or relief-from-parental-obligation statutes—has only been taken by a minority of states.[87] With no statutory guidance, most state courts have adopted either one or an amalgam of the following common law approaches to resolving disputes involving frozen pre-embryos: the contractual approach, the contemporaneous approach, or the balancing approach.[88]

B. *The Contractual Approach*

Under the contractual approach, the contract is used as a device to effectuate intent, so courts will enforce contracts originally drafted to decide the disposition of pre-embryos.[89]

New York first adopted this approach in 1998, when the Court of Appeals decided *Kass v. Kass*.[90] In *Kass*, the wife had difficulty conceiving on her own due to prenatal exposure to diethylstilbestrol.[91] Diethylstilbestrol was a drug commonly prescribed internationally between 1940 and 1970 to help prevent miscarriage and premature

84 Pryor, *supra* note 35, at 1113.

85 ARIZ. REV. STAT. ANN. § 25-318.03(C).

86 *See* TEX. FAM. CODE ANN. § 160.706(a) (West 2007) ("If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child."); COLO. REV. STAT. ANN. § 15-11-120(9) (West 2010) ("If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child."); *see also* Pryor, *supra* note 35, at 1113.

87 Pryor, *supra* note 35, at 1111.

88 *Id.* at 1097–98.

89 Wade, *supra* note 34, at 1055–56.

90 696 N.E.2d 174, 175 (N.Y. 1998); *see* Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515, 525 (2018).

91 *Kass*, 696 N.E.2d at 175.

labor.[92] Later, it was discovered that women exposed to diethylstilbestrol in utero experienced a thirty-three percent rate of infertility as opposed to a rate of fourteen percent in unexposed women.[93]

After trying to conceive naturally and unsuccessfully attempting to conceive via artificial insemination, the *Kass* couple began IVF treatment.[94] After five egg retrievals, nine transfers of fertilized eggs, and two failed pregnancies, the couple wanted to continue IVF treatment, so the wife underwent an additional, final egg retrieval, which involved cryopreservation for the first time.[95] Before this final procedure, the couple signed four consent forms and entered into a contract with the IVF facility, specifically describing how remaining pre-embryos should be handled by the IVF treatment facility.[96] The contract explicitly stated the following:

> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-[embryos], we now indicate our desire for the disposition of our pre-[embryos] and direct the IVF program to (choose one): . . . (b) Our frozen pre-[embryos] may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.[97]

On May 20, 1993, the wife had sixteen eggs removed, which resulted in nine pre-embryos; four were transferred to a surrogate, which failed to result in a pregnancy, and five were cryopreserved.[98] After this, the couple decided to divorce.[99] On June 7, 1993, about three weeks after signing the consent forms with the IVF treatment facility, the couple signed an uncontested divorce agreement stating that the pre-embryos "should be disposed of [in] the manner outlined in [the] consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-[embryos]."[100] On June 28, 1993, the wife informed the hospital by letter of the divorce and opposed destroying or releasing

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92 Rachael E. Rogers, Shuyi Chai, Andrew J. Pask & Deidre M. Mattiske, *Prenatal Exposure to Diethylstilbestrol Has Long-Lasting, Transgenerational Impacts on Fertility and Reproductive Development*, 195 TOXICOLOGICAL SCIS. 53, 53 (2023).

93 *Id.*

94 *Kass*, 696 N.E.2d at 175.

95 *Id.* at 175–76.

96 *Id.* at 176.

97 *Id.* at 176–77.

98 *Id.* at 177.

99 *Id.*

100 *Id.*

the pre-embryos.[101] One month later, the wife took legal action and requested sole custody of the five cryopreserved pre-embryos for the purpose of undergoing another implantation procedure.[102] The husband opposed and counterclaimed for specific performance of the couple's agreement with the IVF treatment facility.[103]

The *Kass* court concluded that the disposition of pre-embryos is not enmeshed with a woman's right to privacy regarding reproductive choice, nor that the pre-embryos should be considered "persons" protected by the Constitution.[104] Rather, the *Kass* court held that agreement between the gamete donors concerning the disposition of pre-embryos "should generally be presumed valid and binding, and enforced in any dispute between them."[105] The *Kass* court reasoned that this holding encourages potential IVF treatment patients to think through all possible circumstances regarding cryopreservation, including disposal of pre-embryos, and to put "their wishes in writing"; it protects the freedom of the parties to contract by preventing inappropriate state intervention.[106] Applying this holding to the facts at issue, the *Kass* court found that the consent forms the parties signed with the IVF program facility unquestionably showed a mutual intention to donate the pre-embryos for research despite the wife's infertility.[107]

Other courts have taken this approach—most recently the Court of Appeals of Georgia in 2023.[108] In *Smith v. Smith*, both parties were diagnosed as infertile and determined IVF presented the best opportunity to conceive.[109] The husband had two adult children from a previous relationship, but IVF was the wife's only chance at biological parenthood—she had no children.[110] Prior to beginning IVF treatment, the parties executed several documents pertaining to the cryopreservation of the resulting pre-embryos.[111]

Of the four eggs that were retrieved and fertilized, only one pre-embryo successfully made it through the procedure, and that pre-embryo had been cryopreserved since the parties separated.[112] The wife filed for

101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 179.
105 *Id.* at 180.
106 *Id.*
107 *Id.* at 181.
108 Smith v. Smith, 892 S.E.2d 832, 839 (Ga. Ct. App. 2023).
109 *Id.* at 834.
110 *Id.*
111 *Id.*
112 *Id.*

divorce in January 2022 and requested custody of the pre-embryo for purposes of undergoing an implantation procedure because due to her age and medical diagnosis, this was her sole chance to be a biological parent.[113]

The *Smith* court found that the contract controlled; the agreement unambiguously stated the couple's joint intention of donating the pre-embryo if the couple were unable to agree on its disposition.[114] It is worth noting that the trial court interpreted the contract differently, holding that the agreement was not controlling and instead awarded the pre-embryo to the wife, reasoning the equitable division of property doctrine applied and that the wife made significant contributions to creating the pre-embryo, including altering her diet and undergoing various medical procedures.[115] Despite the ambivalence between the interpretation of the contract by the trial court and that of the Court of Appeals of Georgia, the latter still found the agreement unambiguous.[116]

C. *The Contemporaneous Approach*

The second major approach the judiciary has taken to resolving disputes of the disposition of pre-embryos is the contemporaneous approach.[117] The contemporaneous approach prioritizes "maintain[ing] the status quo," so the parties to the contract cannot use, donate, or dispose of the pre-embryos until an agreement is reached.[118] First proposed in 1999 by Carl Coleman,[119] this approach, unlike the contract

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113 *Id.* at 835.

114 *Id.* at 840–41.

115 *Id.* at 836 (discussing that the trial court found the contract provided agreement for the disposition of the pre-embryos in three separate events). Specifically, the trial court held that "should they divorce, the agreement would not be controlling. Rather, upon the dissolution of their marriage, they decided that the disposition of their [pre-]embryo would be determined in a property settlement by order of this [c]ourt." *Id.*

116 *Id.* at 840–41.

117 Wade, *supra* note 34, at 1057.

118 *Id.* at 1057 (quoting Pryor, *supra* note 35, at 1107; Jocelyn P. v. Joshua P., 250 A.3d 373, 405 (Md. Ct. Spec. App. 2021)).

119 Sarah B. Kirschbaum, *Who Gets the Frozen Embryos During a Divorce: A Case for the Contemporaneous Consent Approach*, 21 N.C. J. L. & TECH. 113, 117 (2019); *see also* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 57 (1999). The article concludes that, rather than taking "the contractual approach, the law should require the couple's mutual consent before any affirmative disposition of a frozen embryo is enforced. While such consent could be provided before the embryos are created, both partners should retain the right to change their minds until a disposition decision is actually carried out." Coleman, *supra* note 119, at 126. Coleman is the Associate Dean for Graduate Programs and a Professor of Law at Seton Hall Law School. *Carl H.*

approach, encourages allowing parties to change their minds.[120] IVF contracts are generally enforceable when a dispute arises concerning the disposition of the pre-embryos; at the time of enforcement, if one of the parties has second thoughts about the disposition of the pre-embryos, the contract becomes unenforceable and the pre-embryos remain cryopreserved until the parties can come to an agreement.[121]

One state that has implemented the contemporaneous approach is Massachusetts, as demonstrated by *A.Z. v. B.Z.*[122] After the wife in *A.Z.* endured two ectopic pregnancies, the disputing couple began IVF treatment, which resulted in twin daughters and two vials of pre-embryos cryopreserved for future use.[123] Before the couple separated, the wife, wanting more children, thawed one of the vials containing pre-embryos and had an implantation procedure without telling her husband; he had learned of the implantation only after being notified of the procedure by the couple's insurance company.[124] The marriage deteriorated soon after, and the couple began divorce proceedings with one vial containing four pre-embryos remaining cryopreserved at the clinic.[125] The husband sought a permanent injunction that would prohibit the wife from accessing the remaining frozen pre-embryos.[126]

A signed consent form was required for each egg retrieval procedure.[127] The husband was present for the execution of the first form, but the husband signed a blank consent form during each subsequent procedure with the wife filling in her disposition preference afterward.[128] On the first form she filled out, she wrote that the couple agreed the pre-embryos should be returned to her "[s]hould [the couple] become separated."[129] All of the disposition preferences written in later forms were considerably similar to the words she wrote for the first form.[130]

The Supreme Judicial Court of Massachusetts held that the consent form should not be enforced for several reasons.[131] First, the court found that the consent forms were only intended to serve as a binding

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Coleman, SETON HALL L., https://law.shu.edu/profiles/colemaca.html [https://perma.cc/8K2X-HKSG].

120 *See* Wade, *supra* note 34, at 1066; Kirschbaum, *supra* note 119, at 117.

121 Kirschbaum, *supra* note 119, at 117.

122 725 N.E.2d 1051, 1059 (Mass. 2000); Kirschbaum, *supra* note 119, at 127.

123 725 N.E.2d at 1052–53.

124 *Id.* at 1053.

125 *Id.*

126 *Id.*

127 *Id.* at 1054.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 1056.

agreement between the parties as a unit with the clinic; the agreement was not intended to govern should that unit deteriorate.[132] Second, the court found no evidence to support the proposition that the form was to govern now—four years after it was signed—because there was no duration provision in the consent forms.[133] Third, the court refused to recognize that the language "[s]hould we become separated" meant to govern in the event of divorce because separation and divorce have two distinct legal meanings.[134] Fourth, the conduct of the donors regarding the execution of the form called into question whether the consent form contained both donors' intentions, since the wife would fill in her wishes after the husband signed the blank document.[135] Finally, the court found the consent forms "legally insufficient," as the forms were inadequately completed to be considered an enforceable contract.[136]

Regardless of whether the couple entered into a contract regarding the disputed pre-embryos, the court said it would refuse to enforce a contract that forced a party "to become a [biological] parent against his or her will."[137] The court reasoned that public policy forbade them from doing so, stressing the importance of freedom to contract.[138]

D. *The Balancing Approach*

The third and final major approach the judiciary has taken to resolve such disputes is the balancing approach.[139] Almost fifty percent of cases have been resolved using this approach.[140] First used in *Davis* by the Supreme Court of Tennessee,[141] the balancing approach directs a court toward the current preferences of each party and, in the event of a dispute with no enforceable contract, utilizes a multistep analysis to balance the interests of competing parties.[142] Originally, the *Davis* court "consider[ed] the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing

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132 *Id.*

133 *Id.* at 1056–57.

134 *Id.* at 1057.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.* at 1057–58 ("As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy.").

139 Carpenter, *supra* note 25, at 23.

140 *Id.*

141 Wade, *supra* note 34, at 1058; Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

142 Wade, *supra* note 34, at 1058.

resolutions."[143] The Colorado Supreme Court in *In re Marriage of Rooks* later refined this analysis.[144]

Like *Davis*, *Rooks* was another decision made by a state judiciary lacking legislative guidance.[145] The Colorado Supreme Court adopted the balancing approach, holding that the court should first look to any existing, enforceable agreement between the parties that clearly states their intent regarding the disposition of the pre-embryos in the event of divorce; if none exists, then the court should balance the parties' interests when awarding the pre-embryos.[146] The court rejected the contemporaneous approach, concluding that this approach was implicitly rejected by the legislature in the Colorado Probate Code.[147] Additionally, the court echoed various concerns other jurisdictions have raised regarding the contemporaneous approach: (1) it is unrealistic because the parties would not be in court had they been capable of independently reaching an agreement; (2) it is unrealistic to think that the parties could reach an agreement on such an "emotionally charged" issue; and (3) one party is given a "de facto veto" because that party can avoid resolution simply by waiting until a sufficient time has passed, thereby creating an incentive to unfairly utilize the disposition of the pre-embryos in divorce proceedings.[148]

After finding the Rooks's contract failed to resolve the issue surrounding the disposition of their cryopreserved pre-embryos, the Colorado Supreme Court remanded the case to the trial court, concluding that inappropriate factors were considered at both the trial and appellate level in their respective analyses when balancing each party's interests.[149] The court then created a "non-exhaustive list" of factors that a court should consider when balancing each party's respective interest to award the pre-embryos:

> (1) the intended use of the pre-embryos by the spouse who wants to preserve them . . . ; (2) the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological

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143 *Davis*, 842 S.W.2d at 603.

144 *See* Wade, *supra* note 34, at 1058; In re Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

145 *Rooks*, 429 P.3d at 581 ("Thus, in the absence of specific legislative guidance in these circumstances, we adopt an approach that seeks to balance the parties' interests given the legislature's general command in dissolution proceedings requiring the court to divide the marital property equitably.").

146 *Id.* at 586.

147 *Id.* at 590–92 (noting that the Probate Code addresses the legal relationship between an objecting party and a resulting child: "[i]f mutual contemporaneous consent were required to proceed with implantation, there would be no need to address the [existence of the] legal relationship" because that child, and thus that relationship, would not exist).

148 *Id.* at 592.

149 *Id.* at 586.

> children through other means; (3) the parties' original reasons for undertaking IVF . . . ; (4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logisitical considerations; (5) a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and (6) other considerations relevant to the parties' specific situation.[150]

The court also specified the following as inappropriate considerations when applying the balancing test: (1) courts are expressly prohibited from limiting a family's size based on fiscal considerations, so whether the party seeking biological parenthood can afford another child cannot be a consideration; (2) in that same vein, the number of existing children that party has cannot preclude preservation or use of the existing pre-embryos; and (3) whether the party seeking to become a genetic parent could instead become a nongenetic parent, such as through adoption, is irrelevant because *genetic* parenthood is "the relevant interest at stake."[151] In *In re Marriage of Fabos and Olsen*, the Colorado Court of Appeals further added to the state's list of factors to be considered when balancing each party's respective interest to award the pre-embryos; the court held that a party's subjective religious beliefs cannot be considered in the first *Rooks* factor but rather should be considered independently within the overall balancing test.[152] Other courts have also weighed one's religious or moral beliefs when conducting this analysis, specifically regarding the third *Rooks* factor—each party's reason for pursuing IVF treatment.[153]

1. The Infertility Exception

For the initial twenty years of jurisprudence surrounding pre-embryo disposition, the party seeking to use the pre-embryos in cases utilizing the balancing approach had an alternative to becoming a genetic parent: that party could, either naturally or through additional IVF

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150 *Id.* at 581; *see also id.* at 593–94.

151 *Id.* at 594.

152 In re Marriage of Fabos & Olsen, 518 P.3d 297, 304–06 (Colo. App. 2022).

153 Carpenter, *supra* note 25, at 24; *see, e.g.*, Jocelyn P. v. Joshua P., 250 A.3d 373, 409 (Md. Ct. Spec. App. 2021) ("Regarding the third factor, the circuit court only noted that the parties' reason to pursue IVF 'was to have children jointly as a married couple.' But again, Jocelyn testified that 'before we went through this procedure, [ ] we agreed that every single embryo would be used because we create a life and it was our responsibility to give that embryo the opportunity of life.' Even if the trial court does not find that a mutual oral agreement was reached between the parties, Jocelyn's testimony, assuming the court finds it credible, is directly relevant to the third factor regarding the parties' original reasons for undergoing IVF.").

treatment, combine their gametes with that of a donor or a new partner; these cases held that the objecting party could not be forced to become a genetic parent because their opponent had alternative means of achieving the same interest at stake—*genetic* parenthood.[154]

But, what if that stake could not be achieved by reasonable alternative means? *Reber v. Reiss* presented this very situation predicted by these cases: the party seeking to use the pre-embryos became completely infertile after freezing the pre-embryos, and thus was left with no reasonable means of experiencing biological parenthood.[155] Specifically, the couple in *Reber* was advised to undergo IVF to preserve Andrea Reiss's ability to conceive after she was diagnosed with breast cancer.[156] Ms. Reiss delayed starting her cancer treatment for months to endure the IVF process, which resulted in thirteen pre-embryos using the couple's gametes; all were cryopreserved.[157] After the IVF process was completed, Ms. Reiss successfully underwent rigorous cancer treatment, which left her infertile.[158] The court awarded the pre-embryos to Ms. Reiss because the couple never reached an agreement regarding how to dispose of the pre-embryos in the event of divorce prior to enduring IVF, and these pre-embryos were likely Ms. Reiss's sole chance to experience biological parenthood—or even parenthood at all given the difficulties "older, single women" face throughout the adoption process.[159] Thus, the infertility exception was created: where no reasonable alternative means of experiencing genetic parenthood exist, the objecting party could be forced to procreate.[160]

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154 Chan, *supra* note 40, at 54–55.

155 *Id.* at 57; *see also* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) ("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. If no other reasonable alternatives exist, then the argument in favor of using the pre[-]embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre[-]embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.").

156 42 A.3d 1131, 1132 (Pa. Super. Ct. 2012).

157 *Id.* at 1133.

158 *Id.*

159 *Id.* at 1139, 1142. Given the distinct differences in experiencing pregnancy compared to adopting, the court concluded that adoption or fostering are not alternatives to pregnancy and "should [not] be given equal weight in [the] balancing [analysis]." *Id.* at 1138–39. Further, the court said that "[e]ven if adoption w[ere] not [such] a distinct experience[,] . . . adoption [wa]s not a practical option for [Ms. Reiss]." *Id.* at 1139. Older, single mothers are often excluded from the age, marital status, and income requirements for private and foreign adoption. *Id.* For "public adoption, there are . . . more adoptive parents than children available . . . ." *Id.* Thus, the pre-embryos were likely Ms. Reiss's sole opportunity to experience "parenthood at all." *Id.* at 1140.

160 Chan, *supra* note 40, at 57.

In the cases that followed where the balancing test was used, the prevailing party was whoever sought to avoid genetic parenthood—except for one.[161] In *Szafranski v. Dunston*, Karla Dunston was diagnosed with cancer and informed that her treatment would likely leave her infertile, like Ms. Reiss, thus making IVF a suitable option to preserve her ability to achieve genetic parenthood.[162] Ms. Dunston asked Jacob Szafranski if he would donate his sperm to create pre-embryos, as they were in a relationship at the time; he agreed and provided his sperm on two separate occasions.[163] After a two-day trial, the circuit court found that Mr. Szafranski and Ms. Dunston had entered into an oral contract, and the appellate court affirmed.[164] After adopting the balancing approach,[165] the appellate court concluded the scope of the oral contract included no limitations on Ms. Dunston's use of the pre-embryos; specifically, Mr. Szafranski's consent to use the pre-embryos to have a child was not required.[166] In the alternative, looking to weigh the interests of the parties and citing *Reber*, the court held that Ms. Dunston's interests outweighed Mr. Szafranski's because the pre-embryos were her sole chance at genetic parenthood.[167]

In April 2024, the Ninth District Court of Appeals in Ohio also had this very setup: a woman who endured two rounds of IVF treatments—producing fourteen pre-embryos—and was subsequently diagnosed with cancer.[168] The trial court concluded that the frozen pre-embryos were to be considered marital property and divvied up the pre-embryos between the parties; the wife appealed, arguing the trial court erred in applying the contractual approach when the balancing approach should have been the standard used.[169] The court acknowledged the lack of legislative guidance in Ohio on this issue and found all three of the traditional judicial approaches to be inadequate in that they fail to consider that "[t]he frozen [pre-]embryos are life in one of its earliest stages of development . . . ."[170] Rather than embracing the infertility exception that the balancing approach provides, the court held that "the express public policy of the [s]tate . . . is to prefer the preservation and continuation of life whenever

161 Carpenter, *supra* note 25, at 24.

162 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015).

163 *Id.* at 1137–39.

164 *Id.* at 1137.

165 *Id.* at 1147.

166 *Id.* at 1148–53.

167 *Id.* at 1162–63.

168 E.B. v. R.N., No. 30199, 2024 WL 1651614, at *1 (Ohio Ct. App. Apr. 17, 2024).

169 *Id.* at *1–2.

170 *Id.* at *2–3.

constitutionally permissible."[171] Here, since both parties wanted the frozen pre-embryos to achieve pregnancy either through donation or personal use,[172] the issue presented was whether the wife should be permitted to use the pre-embryos to experience pregnancy herself.[173] The court held that the wife would keep the pre-embryos for her personal use because of her health, her age, and the inevitable consequence for the husband of being a biological parent.[174] Thus, despite being able to reach the same conclusion through the infertility exception to the balancing test, the court instead took a public policy approach,[175] marking a radical departure from the traditional judicial approaches discussed *supra*.[176]

Most existing judicial and statutory methods used to resolve disputes over cryopreserved pre-embryos when a couple separates insufficiently address the issue of infertility as a change of circumstance or fail to address it at all. Women seeking to use the pre-embryos have succeeded in only three such cases,[177] but the infertility exception was only utilized in two.[178] Given that the leading population of those who pursue IVF treatment are heterosexual, infertile couples,[179] and nearly one-half of these cases have been resolved by the balancing approach as of 2023,[180] the infertility exception ought to be made functional, thereby making pre-embryos more accessible to a party who has no reasonable alternative means to experience genetic parenthood.

II. ANALYSIS

A. *The Various Statutory Approaches Are Insufficient to Address a Party's Infertility and Provide No Reasonable Alternative to Experiencing Genetic Parenthood*

All three statutory approaches fail to carve out any exception for an individual who becomes completely infertile and has no reasonable alternative means to experience genetic parenthood. This was first

171 *Id.* at *3 (citing to OHIO REV. CODE ANN. § 9.041 (West 2007), a statute addressing abortion).

172 *Id.* at *3–4.

173 *Id.* at *4.

174 *Id.* at *4–5.

175 *Id.* at *3.

176 *See supra* Sections I.A–I.D.

177 Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012); Szafranski v. Dunston, 34 N.E.3d 1132, 1147–53 (Ill. App. Ct. 2015); *E.B.*, 2024 WL 1651614, at *4–5.

178 Carpenter, *supra* note 25, at 33 (writing prior to the decision of *E.B.*, 2024 WL 1651614).

179 *See supra* note 5 and accompanying text.

180 Carpenter, *supra* note 25, at 23.

exemplified in the case of Mimi Lee and Stephen Findley in 2016 in California, which has an informed-consent statute.[181] Lee was 41-years-old when the couple decided to pursue IVF treatment to preserve Lee's fertility after her cancer diagnosis in 2010, just days before their wedding.[182] Lee, who has a joint M.D./Ph.D. in neuroscience and was a practicing anesthesiologist after training in neurosurgery,[183] and Findley, a finance executive,[184] signed an agreement at the time of their IVF treatment that, should they divorce, the pre-embryos should be destroyed.[185] Lee testified, based on her experience as a medical practitioner, that she believed the consent form was more comparable to a medical directive and thought she could later reconsider her decision rather than believing she was signing a binding contract.[186] Additionally, Lee provided expert testimony that she was not diagnosed as "infertile" prior to her cancer diagnosis because, per the previous definition of infertility used by the Practice Committee of the American Society for Reproductive Medicine,[187] such a diagnosis for women over the age of thirty-five is made after six months of unsuccessfully attempting to conceive, and Lee's experience did not fit this description.[188] Despite Lee being a forty-six-year-old cancer survivor with no other opportunity to bear biological children, the court held in favor of Findley and emphasized the importance of honoring the Legislature's statutory scheme of giving effect to each party's intention at the time of contract, ignoring Lee's inability to otherwise experience genetic parenthood.[189]

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181 *See* Findley v. Lee, No. FDI-13-780539, 2016 WL 270083, at *1 (Cal. Super. Ct. Jan. 11, 2016); *see also* Andy Newman, *California Judge Orders Frozen Embryos Destroyed*, N.Y. TIMES (Nov. 18, 2015), https://www.nytimes.com/2015/11/19/us/california-judge-orders-frozen-embryos-destroyed.html [https://web.archive.org/web/20230812233536/https://www.nytimes.com/2015/11/19/us/california-judge-orders-frozen-embryos-destroyed.html]; *see also supra* notes 71–76 and accompanying text.

182 *See Findley*, 2016 WL 270083, at *4–5; *see also California Woman at Center of Frozen Embryos Legal Battle Speaks Out*, ABC NEWS (Aug. 6, 2015, 2:12 PM), https://abcnews.go.com/US/california-woman-center-frozen-embryos-legal-battle-speaks/story?id=32913352 [https://perma.cc/YPF6-FN8W].

183 *See Findley*, 2016 WL 270083, at *3.

184 *Id.*

185 Newman, *supra* note 181.

186 *See Findley*, 2016 WL 270083, at *9; *see also* Maura Dolan, *Divorced Couple's Frozen Embryos Must Be 'Thawed and Discarded,' Judge Rules*, L.A. TIMES (Nov. 18, 2015, 3:12 PM), https://www.latimes.com/local/lanow/la-me-ln-frozen-embryos-20151118-story.html [https://perma.cc/W55F-YVPT].

187 Howard, *supra* note 5.

188 *See Findley*, 2016 WL 270083, at *4 n.7.

189 *See Findley*, 2016 WL 270083, at *2; *see also* Newman, *supra* note 181 ("The policy best suited to ensuring that these disputes are resolved in a cleareyed manner—unswayed by the turmoil, emotion and accusations that attend to contested proceedings in family court—is to give effect to the intentions of the parties at the time of the decision at issue.")

Thus, California's informed-consent statute failed to provide Lee, an educated medical practitioner, with the very clarity the statute requires: "[T]imely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment."[190]

Next, personhood statutes encourage inappropriate forum shopping, as demonstrated by *Vergara v. Loeb*.[191] In 2013, actress Sofía Vergara and her ex-fiancé, Nick Loeb, shared two cryopreserved pre-embryos after receiving IVF treatment in California.[192] Vergara and Loeb signed a directive prior to treatment, agreeing that one party cannot use a pre-embryo to create a child without written consent from the other.[193] Before the pre-embryos could be implanted, the couple separated.[194] Loeb first attempted to sue Vergara in Santa Monica, where he sought court approval to use the pre-embryos and implant them into a surrogate.[195] A few months later, on December 6, 2016, Loeb voluntarily dismissed the Santa Monica suit without prejudice.[196] However, one week before his voluntary dismissal, Loeb created a trust "for the future benefit of . . . two principal beneficiaries[:] . . . 'two daughters, Isabella Loeb and Emma Loeb, who [were] presently in a cryopreserved embryonic state' at the clinic."[197] Then, on December 7, 2016, just one day after voluntarily dismissing the Santa Monica action, Loeb filed a lawsuit against Vergara in Louisiana state court, "naming the pre-embryos, the trust, and the trustee as plaintiffs."[198] The complaint sought similar relief to that desired in the Santa Monica action—giving Loeb the pre-embryos and terminating Vergara's parental rights—and additional relief, specifically because "Vergara had tortiously interfered with the pre-embryos' ability to inherit from the trust by preventing transfer to a surrogate."[199] Vergara was able to remove the Louisiana suit to federal court, which later

190 CAL. HEALTH & SAFETY CODE § 125315(a) (West 2024).

191 No. B313234, 2022 WL 4393915, at *2–3 (Cal. Ct. App. Sept. 22, 2022), *review denied* (Jan. 11, 2023). *See generally* Nick Loeb, Opinion, *Sofía Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES (Apr. 29, 2015), https://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html [https://web.archive.org/web/20231007222847/https://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html].

192 *Vergara*, 2022 WL 4393915, at *1.

193 *Id.*

194 *Id.* at *2.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

dismissed the matter for lack of personal jurisdiction over Vergara.[200] Thus, the varying state statutes and judicial methods for handling such disputes allow for someone like Loeb, who knows they are unlikely to obtain a judgment in their favor in one state, to forum shop and file suit in another.[201]

Finally, the three states with relief-from-parental-obligation statutes—Arizona, Texas, and Colorado—only apply to married couples, as the language in each statute discusses the dispute over pre-embryos solely in "the context of divorce . . . us[ing] the word 'spouse.'"[202]

Thus, all three statutory approaches fail to carve out any exception for a completely infertile party who has no reasonable alternative means to experience genetic parenthood. California's informed-consent statute failed to protect Mimi Lee—an infertile cancer survivor—and allow her to experience biological parenthood.[203] Personhood statutes encourage forum shopping, as demonstrated by *Vergara*, which not only leaves a party with no reasonable alternative means of achieving biological parenthood without relief but also results in prolonged, costly litigation due to inappropriate forum shopping.[204] Finally, relief-from-parental-obligation statutes only cover married couples and do not account for situations involving an unmarried couple with frozen pre-embryos, like Ms. Dunston, and the party who seeks to use them has no alternative means of experiencing genetic parenthood.[205]

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200 *Id.* at *3.

201 Faver, *supra* note 59, at 642.

202 *See* Pryor, *supra* note 35, at 1113; *supra* notes 84–86 and accompanying text.

203 *See supra* notes 181–190 and accompanying text.

204 *See supra* notes 191–201 and accompanying text.

205 *See* Pryor, *supra* note 35, at 1113; *supra* notes 84–86 and accompanying text. Courts in recent cases have been noting the express interest in experiencing genetic parenthood and how other means of parenthood, such as adoption, are not suitable alternatives to the pregnancy experience. *See* In re Marriage of Rooks, 429 P.3d 579, 594 (Colo. 2018) ("Finally, we note that some courts have mentioned adoption as an alternative to biological or genetic parenthood through conventional or assisted reproduction. However, because we conclude the relevant interest at stake is the interest in achieving or avoiding *genetic* parenthood, courts should not consider whether a spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children." (citing Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992); Reber v. Reiss, 42 A.3d 1131, 1138 (Pa. Super. Ct. 2012))); *Reber*, 42 A.3d at 1138–39 ("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. . . . As a matter of science, traditional adoption does not provide a woman with the opportunity to be pregnant.").

B. *The Contractual Approach Insufficiently Addresses Infertility Because the Approach Fails to Allow for Parties to Change Their Minds in Response to Life-Altering Events*

The contractual approach has been praised by its supporters for encouraging and protecting the right to contract; parties are encouraged to discuss all possibilities before receiving IVF treatment, thus preempting costly litigation and inappropriate judicial intervention.[206] However, the contractual approach fails to account for individuals who change their mind by binding them to their prior decisions, thus failing to protect those who become infertile and have no alternative means of achieving biological parenthood.[207]

Kass would have been decided entirely differently had it been tried in a balancing approach jurisdiction where the infertility exception would apply. In New York, Maureen Kass was left infertile after she was exposed prenatally to a drug that caused her infertility.[208] While undergoing IVF treatment, Maureen Kass had six egg retrievals, nine transfers, and two failed pregnancies.[209] As a result of her inability to keep a pregnancy, she used a surrogate, specifically her sister.[210] Despite being left with no reasonable alternative means to experience genetic parenthood, the Court of Appeals of New York found that the consent forms the Kasses signed with the IVF program facility undoubtedly manifested their mutual intention to donate the pre-embryos for research purposes.[211]

If the balancing approach were applied here rather than the contractual approach, the infertility exception would be applicable because Ms. Kass, like Ms. Reiss, was left with no reasonable means of experiencing genetic parenthood.[212] Thus, the contractual approach is insufficient to resolve such disputes because this approach fails to

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206 *See* Wade, *supra* note 34, at 1055–56 ("Proponents of this approach argue it encourages parties to think and talk through all possibilities before engaging in IVF and cryopreservation, allows for predictability and certainty for both the parties involved and pre-embryo storage facilities, avoids costly litigation, and allows the parties to make the ultimate choice, rather than a court.").

207 *Id.* at 1056 ("Those that oppose this approach argue that it is unfair to bind individuals to prior decisions regarding reproduction. They argue that it is inappropriate to enforce such an agreement because it is difficult to predict one's response to life altering events. Given that a person's values may change, opponents argue that upholding such agreements forces parties to enter into parenthood against their will, undermining the right to privacy and reproductive autonomy." (footnotes omitted)).

208 *See supra* notes 91–94 and accompanying text.

209 Kass v. Kass, 696 N.E.2d 174, 175–77 (N.Y. 1998).

210 *Id.* at 177.

211 *Id.* at 181.

212 *See supra* note 155–160 and accompanying text.

sufficiently address the scenario where a party—regardless of gender—is left with no reasonable alternative means to experience genetic parenthood.

C. *The Contemporaneous Approach Explicitly Rejects an Infertility Exception, Thus Providing No Reasonable Alternative to Experiencing Genetic Parenthood*

The contemporaneous approach has what the contractual approach lacks, as those who endorse this approach praise the fact that it does not bind individuals to their prior decision by acknowledging that it is impossible for one to make such an intelligent decision in advance.[213] However, opponents argue that this approach is impractical because judicial intervention would be unnecessary if the parties were capable of reaching an agreement amongst themselves.[214] Additionally, the concern has been raised that the objecting party could use the pre-embryos as unfair leverage to negotiate a divorce settlement in bad faith.[215]

This very scenario was presented in Iowa, the only state utilizing a pure contemporaneous approach.[216] Tamera Witten endured the IVF process after being unable to conceive naturally and underwent several failed transfers.[217] She then sought to use the pre-embryos either via direct implantation or implantation of a surrogate to experience genetic parenthood and testified that she would allow her husband, Trip, to either exercise or terminate his parental rights.[218] Trip, on the other hand, testified that he preferred to donate the pre-embryos to another couple but did not want them destroyed; his sole concern was that Tamera could not use them.[219] After endorsing the contemporaneous approach, the court held that the pre-embryos must remain cryopreserved unless both donors authorize their transfer, release, disposition, or use: "If a stalemate

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213 Wade, *supra* note 34, at 1057 ("Proponents of this approach argue that it is impossible to make intelligent decisions to give up a right in advance of the time that right needs to be exercised, that it puts the decision in the hands of the parties and avoids court involvement in people's personal choices, and that it upholds the right not to enter into parenthood.").

214 *Id.*

215 *Id.* at 1057–58 ("Opponents further argue that this approach gives the party resisting use of the pre-embryos more power during divorce settlements, allows one party to breach a contract on which the other relies, gives no weight to the reproductive autonomy of the person seeking to become a parent, and fails to recognize important considerations for the party seeking to use pre-embryos, like the inability to become a parent otherwise.").

216 Carpenter, *supra* note 25, at 21.

217 In re Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003).

218 *Id.*

219 *Id.* at 773.

results, the status quo would be maintained."[220] Additionally, Tamera, as the party opposing destruction, was left to bear the expenses of cryopreserving the pre-embryos.[221] Since the agreement the couple signed with the storage facility only required the facility to store the pre-embryos for "ten years from the date of the[ir] agreement," all Trip had to do to prevent Tamera from using the pre-embryos was withhold his consent until the clock ran out.[222] This exemplifies how women's interests are often quashed in favor of "privileging men's interests" through this approach.[223]

By emphasizing the importance of maintaining the status quo, the contemporaneous approach explicitly rejects the infertility exception by disallowing one party's inability to otherwise achieve genetic parenthood to supersede the interests of the objecting party.[224] When he first proposed this approach in his law review article, Carl Coleman emphasized the importance of recognizing why the pre-embryos were initially created: "a mutual undertaking by the couple to have children together."[225] Coleman further stressed that the objecting party should not be forced into unwanted biological parenthood to cure such circumstances that he or she failed to create.[226]

However, this approach unfairly absolves the objecting party from *all* responsibility by focusing on the part outside of their control and wholly ignoring the part within their control: the proponent relies on the objecting party's promise regarding the disposition of the pre-embryos before initially agreeing to endure the IVF process.[227] In other words, courts completely ignore that the objecting party entered the IVF process by voluntarily contributing their gametes with the intention that the

220 *Id.* at 783.

221 *Id.*

222 *Id.* at 772.

223 Carpenter, *supra* note 25, at 22.

224 Chan, *supra* note 40, at 65–66.

225 Coleman, *supra* note 119, at 83 ("If the partner seeking to use the [pre-]embryos is unable to have children through other means, her desire to use the couple's remaining frozen [pre-]embryos may seem stronger. Yet, the fact that a person has a deep desire to have genetic offspring does not mean that she has a right to do so through any possible means. The [pre-]embryos would not exist but for the contribution of both partners' genetic material. Because the [pre-]embryos are the products of the couple's shared procreative activity, any decision to use them should be the result of the couple's mutual choice." (footnote omitted)).

226 *Id.* at 83–84 ("Once the mutuality of the endeavor has ended, the fact that one partner is no longer able to have genetic offspring should not give her the right to disregard her partner's objections and appropriate the [pre-]embryos for her own exclusive use. It is not as if the partner who objects to the use of the [pre-]embryos was the cause of the other partner's inability to have genetic offspring.").

227 Chan, *supra* note 40, at 66–68.

gametes be combined for the sole purpose of creating a child.[228] Even when one's biological clock ticks away resulting in the natural loss of fertility, the objecting party also merely has to wait until "the point of no return" to successfully avoid genetic parenthood.[229] While the contemporaneous approach emphasizes the importance of not binding people to their prior decision by acknowledging that parties may change their minds, it also explicitly rejects considering a party's—often a woman's—infertility, thus leaving her with no reasonable alternative means to experience genetic parenthood.

D. *The Balancing Approach Is the Sole Judicial Approach that Addresses the Issue of Infertility Among the Parties but Must Be Made into a Workable Standard that Puts Parties on an Equal Playing Field Regardless of Gender*

The balancing approach has been praised for "it[s] recogni[tion of] both interests in reproductive autonomy"—the right to experience genetic parenthood and the right not to procreate.[230] The approach has also been commended for its allowance of flexibility based on the specific facts presented on a case-by-case basis.[231] Unlike the contract approach and the contemporaneous approach, the balancing approach allows for a party's change of circumstance to be taken into consideration and prevents a party from having unfair leverage during the negotiation phase of divorce proceedings.[232]

However, with the near majority of cases to date having been resolved by utilizing the balancing approach, the name is misleading in that "[m]ost courts [fail to] meaningfully balance" each party's respective interests and instead begin "from the almost irrebuttable presumption against use established in *Davis*. . . ."[233] Only in *Reber* and *Szafranski* have courts balanced the interests in favor of the party seeking use; the objecting party prevailed in every other case since *Davis* was decided thirty years ago.[234]

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228 Carpenter, *supra* note 25, at 63.

229 Chan, *supra* note 40, at 67–68.

230 Wade, *supra* note 34, at 1059.

231 *Id.* at 1059–60.

232 *See generally* In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018) (holding that a balancing approach is the proper methodology for resolving such disputes after rejecting the contemporaneous approach and deciding to weigh the interests of the parties after finding no valid contract existed between the parties).

233 Carpenter, *supra* note 25, at 23.

234 *Id.* at 24.

Even without this presumption as a starting point, different courts have differing opinions on what factors should be considered in the analysis, with most aiming to minimize or completely discredit any factor that would support the party seeking use.[235] For example, the *Rooks* factors continue to encourage courts to consider the emotional, financial, and logistical tribulations the objecting party would experience but not the hardships that would be experienced by the party seeking use.[236] The foundation for this factor was established in *Davis*: the court first acknowledged that the physical and emotional trauma women endure throughout the IVF process "is more severe than is the impact of the procedure on men" but then treated this trauma as legally irrelevant by establishing "the analytical starting point at the time of disposition," thus not inclusive of the time women commit to enduring the IVF process.[237] The experience of gestational pregnancy for women has also become legally irrelevant, as "courts have treated the loss of the opportunity [for women] to experience pregnancy as a 'non-event,'" thus leading it to not be considered in the balancing test.[238] By "den[ying] the features of wom[anhood] . . . that men do not share," specifically a woman's ability to be pregnant, courts have "render[ed the female] experience invisible."[239]

Such cases also often invite aspersions on single motherhood, having the impact of "us[ing] a woman's past exercise of her procreative rights to limit her current procreative freedom."[240] For example, both "a woman's financial resources [and] . . . the fact that [a] woman has already had children" have both been factors that weighed against her ability to use cryopreserved pre-embryos as recently as 2021.[241]

Therefore, while the balancing approach is the sole approach that recognizes both interests in reproductive autonomy, the so-called flexibility it is praised for has been very heavily skewed in favor of the objecting party—often the man.[242] The sole factor known to have affected the outcome of the balancing test in favor of the party seeking use "is when the [pre-]embryos represent[ ] the woman's only reasonable

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235 *Id.*

236 *See In re Marriage of Rooks*, 429 P.3d at 593–94; Carpenter, *supra* note 25, at 25.

237 Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992); Carpenter, *supra* note 25, at 25 (emphasis omitted).

238 Carpenter, *supra* note 25, at 52.

239 *Id.* at 51 (quoting Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 106 (1992)).

240 *Id.* at 25–26 ("In addition, the cases have invited paternalistic judgments regarding a single woman's ability to support additional children.").

241 *Id.*

242 *See supra* notes 230–241 and accompanying text.

opportunity" to experience genetic parenthood.[243] Courts differ on the meaning of reasonable opportunity.[244] In *Davis*, the court established "an unworkable standard" by indicating that the wife could have merely endured an additional round of IVF to achieve genetic parenthood despite having already endured seven rounds of IVF over three years, thereby ignoring both the physical and emotional toll this could take on a woman in addition to the financial cost she had and would incur through the numerous rounds of treatment; yet, limiting a man's "potential financial exposure" when conducting the balancing test is treated as a highly important consideration.[245] Some courts have also indicated that adoption is a suitable substitute for women, but this solution wholly ignores the interest at stake: experiencing *genetic* parenthood.[246] Had a woman thought adoption was a sufficient substitute, why would she incur the physical, emotional, and financial toll of IVF initially if not to experience pregnancy and have a biological child?[247]

III. PROPOSAL

It has been proposed that "a presumption favoring use"—rather than the *Davis* presumption favoring nonuse—is the solution because (1) it requires judges to no longer discount the interests of the party seeking use; (2) it requires "nonconsenting parties [and the judiciary] . . . to articulate why their interest in avoiding [biological] parenthood [should] outweigh[ ]" the interest of experiencing the same; and (3) it requires placing one's conduct ahead of their biology.[248] However, with a significant amount of cases having already been resolved using the balancing approach,[249] the *Davis* presumption favoring nonuse has been consistently used in the thirty years of jurisprudence since *Davis*, thus becoming the approach taken by the majority of jurisdictions.[250] Rather than argue for the reversal of *Davis*, this Note proposes a more efficient method: remedying the inherent gender bias in the balancing

243 Carpenter, *supra* note 25, at 27.

244 *Id.*

245 *Id.* at 63–64.

246 *Id.* at 65–66.

247 *Id.* at 66.

248 *Id.* at 71.

249 *Id.* at 23.

250 *Id.* at 68.

approach by shifting the analytical starting point of the analysis,[251] and adapting the infertility exception to the *Davis* presumption into a workable standard by mitigating the harm suffered by the objecting party, thereby making it more accessible to infertile parties.[252] Altering the balancing approach to account for "women's unique sweat equities" is not a new concept,[253] but this jurisprudence was not created in "a world beyond gender constructs and confinement."[254] Especially given the propensity of male judges to rule in favor of men,[255] a mere modification of the balancing test is insufficient. Rather, this Note proposes that it is necessary to both (1) work toward mitigating the harm suffered by the objecting party—often men—that way courts are more apt to apply the infertility exception; *and* (2) remedy the inherent favoritism found within the balancing approach to cure such judicial gender bias thereby increasing access to pre-embryos for infertile women. The following solutions have been proposed to mitigate the objector's harm when the infertility exception is applied in the balancing approach: (1) "the object[ing party]'s legal obligation to [financially] support the child . . . is terminated;" (2) the state "determines the maximum number of children that can be born" from the pre-embryos "based on the proponent's financial and psychological capabilities;" and (3) "unused [pre-]embryos [are held] in [a] trust [by the clinic performing the procedure] for the proponent until . . . she procreates the state-mandated maximum number of children, [and] . . . the clinic . . . destroy[s] the remaining [pre-]embryos" once this number is reached.[256] These solutions insufficiently address such harms. First, merely terminating the objecting party's financial obligation to the resulting child is far too limited; the objector's legal obligations should *fully* terminate and not just be limited to financial obligations, like sperm donors.[257] Second, the state should not be able to determine the maximum number of children that can be born from the pre-embryos—neither in the judiciary nor the legislature—because not only are such authority figures unlikely to have the medical training necessary to determine the medically proper amount, but this solution would give the state too much authority over an individual's

251 *See id.* at 54 ("By situating the analytical starting point at the [pre-]embryo's disposition, not creation, courts have been able to acknowledge, yet disregard, the disproportionate efforts women undergo in IVF to fertilize eggs.").

252 *See supra* note 42 and accompanying text (introducing the *Davis* presumption).

253 Lilah Kleban, Note, *Towards an Equitable Review of Pre-Embryo and Divorce Disputes for Women*, 18 NW. J.L. & SOC. POL'Y 131, 149 (2022).

254 *Id.* at 136.

255 *See infra* notes 264–266 and accompanying text.

256 Chan, *supra* note 40, at 82–83.

257 *See infra* Section III.B.1; Forman, *supra* note 53, at 395–97.

right to procreate or not to procreate.[258] Finally, it is necessary to consider alternatives to destroying the remaining pre-embryos.[259]

A. *The Experience of Womanhood Should Be Respected in the Balancing Test*

By denying a woman's ability to reproduce, courts using the balancing approach have rendered the features of womanhood not shared by men inconspicuous.[260] However, despite the fact that "women . . . have lost the majority of these cases, [women were] . . . twice as likely to win at the trial level than men."[261] When considering the thirteen cases as of 2023 where women sought to use the pre-embryos to conceive a child, the trial courts held in favor of the women in the majority—seven—of these cases; five of those seven were reversed and remanded on appeal.[262] In other words, women seeking to use the pre-embryos succeeded in only two of those thirteen cases on appeal.[263] One explanation for this could be "that trial . . . judges are [merely] less concerned [with establish]ing public policy and [are] more focused on the equities between the [existing] parties."[264] Yet, it is worth being skeptical of this reasoning because the trial judges are the judges "who sit closest to equities, see the parties, and hear the testimony," but they are still consistently overturned on this issue.[265] These cases reflect a dynamic across numerous states, so it is not merely an isolated incident.[266]

After considering the judge's gender in each of these cases, a clear correlation emerged.[267] Although "women [we]re . . . more likely to win at the trial level, their odds [dramatically decreased] when the judge [wa]s . . . ma[le]."[268] "Though . . . less likely to [succeed] at the appellate level, a similar correlation . . . remain[ed: m]ale appellate judges [are] twice as likely" to hold in favor of the man, and female appellate judges held in the man's favor one-half of the time.[269]

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258 *See infra* Section III.B.2.

259 *See infra* Section III.B.3.

260 *See supra* Section II.D.

261 Carpenter, *supra* note 25, at 32.

262 *Id.* at 32–33.

263 *Id.* at 33.

264 *Id.*

265 *Id.* at 34.

266 *Id.*

267 *Id.*

268 *Id.* at 35.

269 *Id.*

As suggested by this empirical data,[270] the experiences of womanhood should be respected in the balancing test. The analytical starting point for the balancing test should not be a moving target allowing a court to consider the emotional childhood trauma of the objecting party but not the much more recent emotional trauma women endure throughout numerous IVF procedures.[271] The lost opportunity to experience gestational pregnancy should not be considered a legally irrelevant "non-event."[272] In fact, the Appellate Court of Maryland agreed, admonishing the lower court for "giving so much weight to [the husband]'s interest in destroying the pre-embryo over [the wife]'s inability to achieve pregnancy through any other reasonable means and the immense level of physical and emotional sacrifice that she invested in the pre-embryo."[273] It is imperative to keep this momentum going—such factors should be brought to the forefront and not only considered but respected by the balancing approach in its current framework with the *Davis* presumption intact.

B. *Mitigation of the Objecting Party's Damages Is Necessary for the Infertility Exception to Be Made into a Workable Standard*

1. The Objecting Party's Legal Obligation Should Fully Terminate

Unlike IVF procedures, sperm donation is the "least controversial method of assisted reproduction" with ample legal precedent for men to renounce their parental rights with the donation of their sperm.[274] Many states have statutes governing this arrangement ensuring the following presumption: where a man provides his sperm "to a licensed physician [to] use [to] artificial[ly] inseminat[e a woman] other than his wife[, he] is not considered a legal father [to] the [resulting] child."[275] Thus, the practice of men donating sperm without legal ties to the resulting children when done through a physician is a widely accepted practice.[276]

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270 *See supra* notes 259–267 and accompanying text.

271 *See* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992); *see also* Carpenter, *supra* note 25, at 47–49.

272 Carpenter, *supra* note 25, at 52.

273 Jocelyn P. v. Joshua P., 302 A.3d 1111, 1118 n.3 (Md. App. Ct. 2023). It is worth noting here that although the court did award the pre-embryos to the wife, it did so using the contractual approach—explicitly avoiding addressing the lower court's errors in balancing the parties' interests—concluding that the couple had an oral contract to "give each pre-embryo an opportunity to be born 'no matter what.'" *Id.* at 1117.

274 Forman, *supra* note 53, at 395.

275 *Id.* at 395–96.

276 *Id.* at 396.

However, while most of these sperm donations are completed anonymously through a sperm bank, when a woman "seeks to use [pre-]embryos created with her ex-[partner] against his wishes," the dynamic clearly differs from an anonymous donation.[277] Regardless, anonymity is not legally required to terminate a sperm donor's parental rights, as exemplified by state legislatures failing to distinguish between anonymous and known donations in their statutes and several state courts upholding contracts with known donors to preserve their nonlegal parent status.[278] Further, allowing gamete providers to enter into sperm donation agreements has been held by courts to be essential to guaranteeing access to the continuously expanding assistive reproductive market.[279] Refusing to enforce these contracts would threaten all contract-based reproductive alternatives, including adoption.[280] Thus, with continuing access to alternative reproductive methods—such as assistive reproductive technology like IVF or other contract-based reproductive alternatives discussed *supra*—being a public policy concern, it is imperative that an objecting party's full legal rights terminate in the context of IVF. Although the objecting party would indisputably experience some emotional harm from allowing their opponent to use the pre-embryos, "regret is an in[trinsic] feature of any contract" and rarely allows for "a blanket ban on enforcement."[281]

2. Doctors' Expertise Should Be Relied upon to Determine a Medically Approved Number of Pre-Embryos that Can Be Used

The state is an inadequate actor to be determining the maximum number of children that can be born from the pre-embryos. In the beginning stages of IVF, doctors used to implant several pre-embryos into a woman hoping at least one would survive, and this often led to multiple births.[282] Today, due to medical advancements in the preparation and cryopreservation of pre-embryos, as well as the institution of medical guidelines concerning the number of pre-embryos that should be transferred, doctors have successfully been able to "reduce[ ] the quantity [and] increase[ ] the quality of [pre-]embryos transferred . . . [to] reduce the risk of multiple[births]."[283] However, it is

277 *Id.*

278 *Id.* at 396–97.

279 *Id.* at 397.

280 *Id.*

281 *Id.* at 404.

282 Eskew & Jungheim, *supra* note 1, at 158.

283 *Id.*

still recommended today that multiple pre-embryos be implanted under certain medical scenarios.[284] Allowing either the judiciary or the legislature to arbitrarily determine the number of pre-embryos to be implanted into a woman ignores the individual needs of each female patient and could potentially put their reproductive health at risk or lead to more pregnancies than intended.[285] Thus, it is inappropriate for the state to determine the maximum number of pre-embryos that can be implanted without proper medical consultation on a case-by-case basis because members of neither the legislature nor the judiciary have the necessary medical training to determine the number of pre-embryos that can be successfully and safely transferred into a woman.[286] Rather, a medical doctor who is aware of the current state of the pre-embryos and the woman's health would be much better suited to make this determination.[287]

Additionally, this would give the state too much authority over an individual's constitutional right to procreate. The Supreme Court first recognized the right to "procreative liberty" in *Skinner v. Oklahoma*.[288] There, the Court explicitly stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching [sic] and devastating effects."[289] In *Skinner*, the Court addressed an Oklahoma state statute called Oklahoma's Habitual Criminal Sterilization Act, which deprived "habitual criminal[s]" of the right to procreate.[290] Allowing the state to determine the maximum number of children that can be born from the pre-embryos is similar to Oklahoma's unconstitutional sterilization act because both deprive individuals of this "basic liberty" of procreation without state intervention.[291]

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284 *See id.*

285 *See supra* notes 282–284 and accompanying text.

286 Erin Lloyd, *From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children*, 12 CARDOZO J.L. & GENDER 155, 188 (2005) ("[M]any commentators, and even courts, have criticized the use of judges as substitute decision-makers in medical decisions.").

287 *See supra* notes 282–284 and accompanying text.

288 Christine E. White, *Let IVF Take Its Course: Reconceiving Procreative Liberty for the Twenty-First Century*, 35 WOMEN'S RTS. L. REP. 1, 7 (2013).

289 Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

290 *Id.* at 536.

291 *Id.* at 541.

3. Alternatives to Destruction Must Be Considered

According to the *Davis* court, pre-embryos are neither persons nor property but rather "occupy an interim category that entitles them to special respect because of their potential for human life."[292] Merely destroying the remaining pre-embryos without a second thought as to other disposal methods, such as donation, is not treating the pre-embryos with the "special respect" the law has traditionally provided.[293] Additionally, the Supreme Court has failed to address the implications of its holding in *Dobbs v. Jackson Women's Health Organization* on IVF procedures.[294]

The justices of the Supreme Court of Alabama were thrust from their "ivory-tower isolation"[295] and "subjected . . . to the scrutiny of world opinion"[296] when the state court became one of the first since *Dobbs* that ruled on prohibitions of the disposal of unused, cryopreserved pre-embryos in *LePage v. Center for Reproductive Medicine, P.C.*[297] Alabama has long recognized the principle that "unborn children" are considered "children" in the context of Alabama's Wrongful Death of a Minor Act, which permits parents' recovery of punitive damages for the loss of their child.[298] In *LePage*, the plaintiffs each underwent IVF treatments that led to the creation of several pre-embryos with some being stored in "a cryogenic nursery" located at a local hospital.[299] In December 2020, a patient at the hospital wandered into "the cryogenic nursery and removed several [pre-]embryos."[300] The subzero temperatures the pre-embryos were stored at caused the patient's hand to freeze-burn, and the patient subsequently dropped the pre-embryos—effectively "killing them."[301]

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292 Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

293 *Id.*

294 *A Q&A with Melissa Murray on the* Dobbs *Decision's Impact on Assisted Reproductive Technology*, N.Y.U. L. NEWS (Sept. 27, 2022), https://www.law.nyu.edu/news/-melissa-murray-supreme-court-IVF-dobbs [https://perma.cc/H28F-XFDY].

295 LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 1947312, at *1 (Ala. May 3, 2024) (Sellers, J., dissenting).

296 *Id.*

297 *See* Geoff Mulvihill, *What to Know About Alabama's Fast-Tracked Legislation to Protect In Vitro Fertilization Clinics*, ASSOC. PRESS (Mar. 6, 2024, 10:46 PM), https://apnews.com/article/alabama-ivf-clinic-lawsuit-immunity-things-know-0d16d3be139f42c96bc3ab35c4467f55 [https://perma.cc/H4QX-L8VT]; LePage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024), *reh'g denied*, No. SC-2022-0515, 2024 WL 1947312 (Ala. May 3, 2024).

298 ALA. CODE § 6-5-391 (1975); *LePage*, 2024 WL 656591, at *1.

299 *LePage*, 2024 WL 656591, at *1.

300 *Id.*

301 *Id.*

The plaintiffs sued, asserting claims under Alabama's Wrongful Death of a Minor Act.[302] The question the court addressed was whether the Act is inclusive of "extrauterine children—that is, unborn children who are located outside of a biological uterus at the time they are killed."[303]

The court concluded that the Act "applies to all . . . children, regardless of their location."[304] In contrast to *Davis*, the *LePage* court reasoned "that an unborn child is a genetically unique human being whose life begins at fertilization and ends at death."[305] The court took a textualist approach and concluded this was true when the Act was first enacted in 1872, citing to numerous nineteenth-century dictionary definitions of the word "child" and *Dobbs*.[306]

The dissent recognized the sweeping impact of this decision,[307] which resulted in the University of Alabama at Birmingham health system—"the largest hospital in the state and . . . among the [twenty] 'largest and best equipped' hospitals in the country"—pausing IVF treatments.[308] Alabama lawmakers were quick to respond, having passed legislation eighteen days later that gives IVF providers and their employees immunity from civil lawsuits and criminal prosecution over the destruction or damage to a pre-embryo.[309] The bill is silent, however, on whether extrauterine pre-embryos are "legally considered children."[310]

Other post-*Dobbs* decisions concerning pre-embryos are inconsistent with Alabama's decision. For example, the Second Court of Appeals of Texas, in a matter of first impression since *Dobbs*,[311] held that pre-embryos were not to be considered "unborn children" but rather

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302 *Id.* at *2.

303 *Id.* at *1.

304 *Id.*

305 *Id.* at *2.

306 *Id.* at *5–6 ("Those expressions are in keeping with the United States Supreme Court's recent observation that, even as far back as the 18th century, the unborn were widely recognized as living persons with rights and interests." (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 246–48 (2022))).

307 *Id.* at *26 (Cook, J., dissenting) ("No court—anywhere in the country—has reached the conclusion the main opinion reaches. And, the main opinion's holding almost certainly ends the creation of frozen [pre-]embryos through in vitro fertilization ('IVF') in Alabama.").

308 Anna Betts, *After Ruling, University of Alabama at Birmingham Health System Pauses I.V.F. Procedures*, N.Y. TIMES (Feb. 21, 2024), https://www.nytimes.com/2024/02/21/us/university-alabama-birmingham-ivf-embryo-ruling.html [https://web.archive.org/web/20240715234044/https://www.nytimes.com/2024/02/21/us/university-alabama-birmingham-ivf-embryo-ruling.html] (quoting *UAB Hospital*, UAB MED., https://www.uabmedicine.org/locations/uab-hospital [https://perma.cc/PAA3-HKEP]).

309 S.B. 159, 2024 Reg. Sess. (Ala. 2024). *See generally LePage*, 2024 WL 656591.

310 Mulvihill, *supra* note 297.

311 Antoun v. Antoun, No. 02-22-00343-CV, 2023 WL 4501875, at *1 (Tex. App. July 13, 2023), *review denied* (June 14, 2024).

"property subject to contractual requirements between the parties."[312] In a matter of first impression,[313] a Virginia trial court judge concluded that the pre-embryos at issue were considered "goods or chattels" that could be partitioned according to state law.[314] The Virginia matter drew national attention[315] because, in his reasoning, the judge cited to a previous version of the law that classified enslaved people as property that could be partitioned.[316] Now that it has been decided that cryopreserved pre-embryos can be valued and sold,[317] oral arguments for the partition hearing were held this year.[318] It is worth noting that by classifying pre-embryos as "property," both of these post-*Dobbs* opinions directly contradict *Davis*' holding "that pre[-]embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitled them to special respect because of their potential for human life."[319]

In an attempt to address this lack of uniformity and to protect "nationwide access to fertility treatment, including [IVF]," the "Right to IVF Act" was introduced in the United States Senate in 2024.[320] However, the legislation was blocked by Senate Republicans and failed to move forward.[321]

The lack of both judicial guidance and legislation regarding this issue from the majority of state governments, as well as the conflicting definitions of a pre-embryo and its legal status among states, will lead to selective enforcement of the law, thus leaving many people vulnerable to

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312 *Id.* at *7.

313 Heidemann v. Heidemann, No. CL-2021-0015372, 2023 Va. Cir. LEXIS 13, at *4, *8 (Va. Cir. Ct. Feb. 8, 2023) (holding that pre-embryos are "goods or chattels" that can be partitioned).

314 *Id.* at *8.

315 Christine Hauser, *Judge Cites 1849 Slavery Law in Ruling Embryos Can Be Considered Property*, N.Y. TIMES (Mar. 16, 2023), https://www.nytimes.com/2023/03/16/us/virginia-slave-laws-embryos.html [https://web.archive.org/web/20240422213634/https://www.nytimes.com/2023/03/16/us/virginia-slave-laws-embryos.html]; Matthew Barakat, *Judge Uses a Slavery Law to Rule Frozen Embryos Are Property*, ASSOC. PRESS (Mar. 9, 2023, 4:59 PM), https://apnews.com/article/embryos-slavery-chattel-custody-virginia-82e1f36ecbcf35ec4659e8e2c3443c4f [https://web.archive.org/web/20240816222706/https://apnews.com/article/embryos-slavery-chattel-custody-virginia-82e1f36ecbcf35ec4659e8e2c3443c4f].

316 *Heidemann*, 2023 Va. Cir. LEXIS 13, at *8–14.

317 *Id.* at *9.

318 Olivia Diaz, *A Va. Woman Wants Access to Two Frozen Embryos. Her Ex-Husband Says No.*, WASH. POST (Apr. 26, 2024, 5:58 PM), https://www.washingtonpost.com/dc-md-va/2024/04/26/virginia-embryos-divorce-legal-fight [https://web.archive.org/web/20240426101711/https://www.washingtonpost.com/dc-md-va/2024/04/26/virginia-embryos-divorce-legal-fight].

319 Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

320 Right to IVF Act, S. 4445, 118th Cong. (2024).

321 Clare Foran & Ted Barrett, *Senate GOP Blocks Bill to Guarantee Access to IVF Nationwide*, CNN (June 13, 2024, 8:27 PM), https://www.cnn.com/2024/06/13/politics/senate-ivf-bill-vote/index.html [https://perma.cc/Y869-K5JF].

potential civil or criminal penalties if alternatives to destruction are not to be considered.[322]

CONCLUSION

Some estimates show that almost half a million pre-embryos are currently cryopreserved in the United States.[323] This is not an issue that will cease to exist but rather one that is still making its way through state courts for the first time—as recently as 2024.[324] Despite the numerous approaches taken by different states, the balancing approach has been adopted by most jurisdictions.[325] The balancing approach is not without its flaws, as the presumption favoring nonuse has resulted in a facially neutral but implicitly gender-biased balancing test.[326] Working within this majority approach and refining the already established procedural safeguard of the infertility exception will provide the most efficient method for resolving such disputes. Making the infertility exception to the *Davis* presumption favoring nonuse a functional standard by mitigating the harm of the objecting party and respecting the experiences of womanhood that men do not share will help remedy the gender bias that has infiltrated the balancing test by making use of the pre-embryos more accessible to infertile parties—often women.

322 *A Q&A with Melissa Murray on the* Dobbs *Decision's Impact on Assisted Reproductive Technology*, *supra* note 294.

323 Forman, *supra* note 53, at 378.

324 *See* Freed v. Freed, 227 N.E.3d 954, 958 (Ind. Ct. App. 2024); *see also* Pieper v. Carlson, No. A23-0806, 2024 WL 322668, at *2 (Minn. Ct. App. Jan. 29, 2024).

325 Carpenter, *supra* note 25, at 68.

326 *See* discussion *supra* Section II.D.