WHAT TO EXPECT WHEN CONTRACTING FOR EMBRYOS

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Courts and legislatures constantly adapt to new technologies that bring with them new types of legal disputes. Today, one such dispute arises when two people who have created human embryos using their own genetic material are later unable to agree on the appropriate fate of the embryos. This Note explores how state courts and legislatures have addressed these disputes. Embryo disputes are unlike any other as they involve the frozen potential for life and the often-heartbreaking circumstances in which once hopeful would-be parents find themselves. The result has been a wide range of often unpredictable possibilities—with courts doing everything from trying to decipher informed-consent forms to determine the parties' intent at the time they created the embryos to creating new balancing tests involving fertility that will only ever apply in embryo disputes. In many cases, the fate of the embryos depends on what state will have jurisdiction over the dispute. Although it may seem as though there must be a simple one-size-fits-all solution, this Note does not advocate for one approach over another. Each solution carries with it its own flaws, and with such an exceptional type of dispute, no one solution succeeds in providing a definitively "right" result, moral, or otherwise.

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, Class of 2021. The Author thanks her family and friends for their ongoing support, and her colleagues at *Arizona Law Review* for their excellent edits and thoughtful contributions. This Note was born of curiosity about how courts adapt to resolving deeply personal, lifechanging disputes of which it at first seems they have no place. It is dedicated to the families who have endured the often painful courtroom process and to the many judges who have endeavored to reach a just and legally sound outcome in an uncertain legal landscape.

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INTRODUCTION

With greater numbers of families relying on Assisted Reproductive Technology ("ART") as a means of having biological children, the legal world is having to adapt to new types of disputes. In particular, as part of the In Vitro Fertilization ("IVF") process, many couples opt to cryopreserve or freeze their embryos prior to implanting them.[1] Although the exact number is unknown, by some estimates, there may be up to a million frozen embryos in the United States.[2] Freezing and later implanting embryos can be a lifechanging and unproblematic process for couples who use the embryos as intended—i.e., to create a pregnancy—when they underwent the procedure. However, deeply ethical and often heartbreaking legal battles arise when couples divorce or otherwise disagree on what to do with any remaining embryos.

Although case law and legislation have become relatively settled when it comes to grappling with other reproductive aids such as sperm and egg donation, adoption, and surrogacy, they are only just beginning to develop when it comes to embryo disputes with many, if not most, jurisdictions lacking legislation or binding

1. For ease of reference, this Note will generally use the term "embryo" to refer to pre-embryos, pre-zygotes, and zygotes, except in discussing cases where courts have used a different term. As relevant here, all of these terms refer to a human egg that has been fertilized by sperm but has not yet been implanted. For a better understanding of the distinctions, see, for example, Ann A. Kiessling, *What Is an Embryo?*, 36 CONN. L. REV. 1051 (2004); Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 J. LEGAL MED. 167, 170 (2006) ("[T]he term 'embryo' is medically synonymous with multiple other terms, including 'pre-embryo,' 'pre-zygote,' and 'zygote,' used by courts and legal writers to describe a fertilized egg from the moment of fertilization until implantation into the uterus. These latter terms have been used in place of 'embryo' in various contexts, with the suggestion that there is a legal or medical differentiation to be made. Such a differentiation is medically and clinically unsubstantiated.").

2. Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html; Elissa Strauss, *The Leftover Embryo Crisis*, ELLE (Sept. 29, 2017), https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/; NAT'L EMBRYO DONATION CTR., https://www.embryodonation.org/ (last visited Dec. 6, 2019).

jurisprudence.[3] This means couples are forced to rely on courts to resolve these novel and high-stakes disputes, often with no way of knowing what to expect. Courts that have resolved these disputes generally adopt one of three approaches: the contract approach,[4] the balancing approach,[5] or the contemporaneous mutual consent approach.[6] Numerous scholars advocate for one approach or another.[7] Others argue there is a need for a federal statutory response.[8]

This Note will first summarize the case law regarding embryo disputes and the various approaches adopted by courts, along with the advantages and disadvantages of applying each approach.[9] Next, this Note will provide an overview of the existing state statutes that try to address the different concerns and issues that lead to or stem from embryo disputes, explore their efficacy, and describe various statutory schemes proposed by scholars.[10] As an illustration of how one state's embryo law can develop, this Note will discuss Arizona—a state where one couple landed in court, the legislature responded to the trial court's opinion, and the Arizona Court of Appeals and Arizona Supreme Court issued conflicting opinions.[11] Finally, this Note will address the reasons behind what has become a form of embryo exceptionalism and the complexities of attempting to arrive at a one-size-fits-all solution both in courts and legislatures. Precisely because embryos are a unique subject of dispute, this Note does not advocate for one approach over another.[12]

I. HUMAN EMBRYO DISPUTES IN THE UNITED STATES—APPROACHES ADOPTED BY THE COURTS

Where no statutory guidance exists, courts faced with the difficult task of resolving a dispute involving frozen embryos generally adopt one or a combination of three common law approaches: the contract approach, the balancing approach, or

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3. *See* discussion *infra* Part I (discussing several recent cases). *See generally* Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253 (2001) (compiling case law from only fourteen states and two federal jurisdictions).

4. *See* discussion *infra* Section I.A.

5. *See* discussion *infra* Section I.B.

6. *See* discussion *infra* Section I.C.

7. *See, e.g.*, Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 105 (2011) (arguing that courts should refuse to enforce IVF consent forms); Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 381 (2013) (arguing for "a legal regime that enforces embryo disposition contracts, but mandates specific procedural and substantive safeguards").

8. *See, e.g.*, Mary Joy Dingler, *Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U.L. REV. 293, 319 (2019) (arguing that state statutes requiring enforcement of contracts are necessary).

9. *See* discussion *infra* Part I.

10. *See* discussion *infra* Part II.

11. *See* discussion *infra* Part III.

12. For a thoughtful discussion of the various views courts have taken on the legal status of embryos, see Catherine Wheatley, *Arizona's* Torres v. Terrell *and Section 318.03: The Wild West of Pre-embryo Disposition*, 95 IND. L.J. 299, 302–06 (2020).

the contemporaneous mutual consent approach. All three approaches are discussed in this Part.

A. The Contract Approach

The contract approach enforces a signed contract between the parties so long as it addressed the future disposition of the embryos.[13] This approach has been adopted, or at least some variation of it has been employed, in Arizona, California, Connecticut, Oregon, New York, Texas, Virginia, and Washington.[14] Illinois and Tennessee employ the contract approach as the primary means of resolving disputes, but have also adopted the balancing approach for cases when the contract is too ambiguous to be instructive, does not address disposition in the circumstance at hand, e.g., divorce, or is nonexistent.[15] Similarly, Colorado courts first look for a contract which adequately addresses disposition of the remaining embryos upon divorce, but then courts employ their own nonexhaustive and multifactor balancing test fashioned to align with the public policy of the state where the contract is inadequate.[16]

Courts adopting the contract approach are often attempting to resolve disputes where one of the progenitors is seeking implantation while the other wants the embryo(s) to be donated or destroyed.[17] In all jurisdictions that employ the

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13. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) ("Agreements between progenitors . . . regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.").

14. *See* York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989); Terrell v. Torres, 456 P.3d 13, 17 (Ariz. 2020); *In re* Findley v. Lee, No. FDI-13-780539, 2015 WL 7295217, at *32 (Cal. Super. Ct. S.F. Cnty. Nov. 18, 2015); Bilbao v. Goodwin, 217 A.3d 977, 988 (Conn. 2019); *Kass*, 696 N.E.2d at 180; *In re* Marriage of Dahl & Angle, 194 P.3d 834, 839 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261, 268 (Wash. 2002).

15. Szafranski v. Dunston, 993 N.E.2d 502, 515 (Ill. App. Ct. 2013); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992); *see also* Terrell v. Torres, 438 P.3d 681, 689 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) (adopting this blended approach but later being reversed without addressing whether the balancing approach would also apply in future cases).

16. *In re* Marriage of Rooks, 429 P.3d 579, 581, 594 (Colo. 2018) ("[T]he balancing of interests approach we adopt [today] is consistent with Colorado law directing dissolution courts to divide marital property based on a consideration of relevant factors, while taking into account that pre-embryos are marital property of a special character.").

17. *See Kass*, 696 N.E.2d at 177; *In re Marriage of Dahl & Angle*, 194 P.3d at 837–38; *Roman*, 193 S.W.3d at 43. Note, however, that one of the first cases to resolve a dispute involving human embryos did not involve a dispute between progenitors. In *York v. Jones*, a couple had one frozen embryo remaining after undergoing multiple rounds of IVF in Virginia. At the time of the dispute, the couple was seeking to have the embryo transferred to a new IVF company in California, but the IVF company in Virginia refused. The couple sued for breach of contract citing a provision in the contract which stated, among other things, that the couple had "the principle responsibility to decide the disposition of [their] pre-zygotes." *York*, 717 F. Supp. at 423–24. The Virginia company cited the same provision, which provided "three fates" the couple could choose from in the event they decided not to attempt a pregnancy, but none of those contemplated transfer to another institution. First applying

contract approach, traditional contract principles, including judicial identification and resolution of ambiguities in the contract, are applied.[18]

For instance, in New York, a woman sought custody of five frozen embryos created with her husband while they were still married.[19] The original signed IVF consent form provided that, in the event of a dispute, the embryos would be donated to research.[20] In addition, a more recently signed "uncontested divorce" document provided that the disposition contemplated in the original consent form would govern and that neither party "[would] lay claim to custody of these pre-zygotes."[21] As this was an issue of first impression, the Court began its analysis by acknowledging the "mind-numbing ethical and legal questions" created by advances in science such as this, the lack of legislation or binding precedent, and various approaches to resolving such disputes suggested by scholars.[22] The Court ultimately adopted the contract approach, concluding that dispositional IVF contracts should be encouraged because they involve a "quintessentially personal, private decision" and "provide the certainty needed for effective operation of IVF programs."[23] The Court then applied traditional contract principles to resolve identified ambiguities in the signed consent form.[24]

One ambiguity that the Court identified, which would ultimately become dispositive, was that more than one provision appeared to govern disposition, an ambiguity not uncommon in disputed IVF contracts.[25] In addition to the provision stating the pre-zygotes would be donated for research, a different provision stated that "[i]n the event of divorce, [the parties] understand that legal ownership of any

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property law, the court held that the cryopreservation contract signed by the parties created a bailor–bailee relationship between the parties. Despite this, the court stated that the same principles that apply to all contracts applied to the contractual dispute here. *Id.*

18. *See, e.g.*, *Kass*, 696 N.E.2d at 180 ("The subject of this dispute may be novel but the common-law principles governing contract interpretation are not. Whether an agreement is ambiguous is a question of law for the courts."); *Roman*, 193 S.W.3d at 50 ("Absent ambiguity, we interpret a contract as a matter of law . . . 'Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered.'") (internal citations omitted).

19. *Kass*, 696 N.E.2d at 177.

20. *Id.* at 176–77.

21. *Id.* at 177.

22. *Id.* at 178–79.

23. *Id.* at 180 ("Agreements between progenitors . . . regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.").

24. *Id.* at 179–81.

25. *Id.* at 182–82; *see also* Terrell v. Torres, 438 P.3d 681, 684–85 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020). There, one provision in the IVF contract provided for a court to resolve a dispute over the embryos upon divorce, while other provisions said that the embryos could only be used with the consent of both parties. *Terrell*, 438 P.3d at 684–85. The court reasoned that the contract, read as a whole, authorized it to decide disposition. *Id.* at 690. The court applied the balancing approach and awarded the embryos to the ex-wife because she could no longer have biological children. *Id.* at 694. *But see* Terrell v. Torres, 456 P.3d 13, 15 (Ariz. 2020) (reinterpreting the contract and finding that it only authorized a court to permit donation of the embryos).

stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."[26]

The ex-wife argued this provision meant that a court of competent jurisdiction was free to determine the disposition of the pre-zygotes, but the Court interpreted this to mean that a property settlement needed to be reached between the parties themselves.[27] The Court looked to extrinsic evidence, specifically the "uncontested divorce" document, to resolve the ambiguity as "it reaffirmed the earlier understanding that neither party would alone lay claim to possession of the pre-zygotes," and expressed their mutual desire to have the original consent form govern disposition.[28] Thus, the parties' written intent to have the pre-zygotes donated for research in the event of a dispute governed, and the Court ordered that they be donated.[29]

Although this may be viewed as a just result given the contract made by the parties, a cut-and-dried application of contract law does not contemplate what one party is often losing in these situations. In *Kass v. Kass*, to create the pre-zygotes in dispute, the woman seeking custody of them had endured the egg retrieval process five times; had nine implantation procedures; became pregnant twice; had one miscarriage; and had another ectopic pregnancy that ended in surgical termination.[30] She also had a serious medical condition and claimed the pre-zygotes were her only opportunity to become a biological mother, another issue not uncommon in these disputes.[31] The Court also noted that disposition of the pre-zygotes "does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as 'persons' for constitutional purposes."[32]

In the emotionally detached world of contracts, this view is seemingly unproblematic because the parties have consented to the disposition in the contract, and courts purport to honor their privacy and autonomy by enforcing the arrangement both parties intended.[33] But other courts have expressly rejected this view when adopting different approaches.[34]

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26. *Kass*, 696 N.E.2d at 181.
27. *Id.*
28. *Id.* at 181–82.
29. *Id.* at 182.
30. *Id.* at 175–76.
31. *See id.* at 175; *see also* Terrell v. Torres, 438 P.3d 681, 684 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) (woman seeking implantation underwent IVF prior to chemotherapy as the treatment was likely to result in infertility); Reber v. Reiss, 42 A.3d 1131, 1133–34 (Pa. Super. Ct. 2012) (trial court found that wife was unable to become a biological parent without use of the frozen embryos as a result of extensive breast cancer treatment).
32. *Kass*, 696 N.E.2d at 179 (first citing Roe v. Wade, 410 U.S. 113, 162 (1973); and then citing Byrn v. New York City Health & Hosps. Corp., 286 N.E.2d 887, 890 (N.Y. 1982)).
33. *See generally* Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71 (2014) (noting that "[t]he law of contracts is not sympathetic to regret" and "the law regularly allows the contracting self to bind his future self").
34. *See* discussion *infra* Sections I.B., I.C.

Even under the contract approach, an otherwise valid ART contract concerning frozen embryos is voidable as a matter of public policy or on other grounds that traditionally justify nonperformance.[35] For instance, in Texas, a woman sought to be implanted with the remaining embryos she had created with her ex-husband after she was awarded the embryos in a divorce proceeding.[36] However, the IVF contract stated that in the event of divorce, the embryos would be discarded.[37] The appellate court attempted to resolve the issue as "narrowly as possible," anticipating future intervention by the Texas legislature.[38] After surveying case law from other jurisdictions, the court looked to existing Texas statutes governing ART and gestational agreements to determine whether enforcing contracts between progenitors was against the public policy of the state.[39] Because Texas had statutes endorsing these other types of ART, the court held that a couple could enter into a valid, voluntary contract addressing disposition of cryopreserved embryos so long as the contract was created before implantation and subject to later mutual change of mind without violating Texas public policy.[40] Thus, the court ordered the frozen embryos be discarded consistent with the parties' express contractual intent.[41]

Similarly, in Oregon, a court determined that the contract approach in embryo disputes was consistent with Oregon case law because prenuptial and antenuptial contracts were enforceable.[42] There, the court addressed a post-divorce dispute where the ex-wife sought to have the couple's remaining embryos destroyed.[43] The ex-husband, however, wanted the embryos donated because he believed they were "human lives" and that there was no greater pain "than having

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35. *Kass*, 696 N.E.2d at 179 n.4 ("Parties' agreements may, of course, be unenforceable as violative of public policy . . . . Significantly changed circumstances also may preclude contract enforcement.").

36. Roman v. Roman, 193 S.W.3d 40, 43 (Tex. App. 2006). The lower court first determined that the embryos were community property, then awarded her the embryos after "balancing the constitutional rights of both parties." *Id.*

37. *Id.* at 42.

38. *Id.* at 44. In fact, the Texas Legislature had enacted a statute providing that "[t]he consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos," but the court noted that the parties had not withdrawn consent and that the statute does not address disposition. TEX. FAM. CODE ANN. § 160.706(b) (West, Westlaw through 2019 Reg. Sess. of the 86th Legis.); *Roman*, 193 S.W.3d at 49.

39. *Roman*, 193 S.W.3d at 45–50.

40. *Id.* at 49–50 ("We agree with the New York Court of Appeals that '[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.' These agreements should thus be 'presumed valid and should be enforced as between the progenitors.'") (first quoting *Kass*, 696 N.E.2d at 180–181; then quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)). *But cf.* J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) (not invalidating disposition contracts on public policy grounds but requiring that they be "subject to the right of *either party* to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos") (emphasis added).

41. *Roman*, 193 S.W.3d at 54–55.

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

43. *Id.* at 837–38.

participated in the demise of [his] own child."[44] The contract provided that if the parties could not agree to donate the embryos, the ex-wife had authority to unilaterally direct the facility to transfer or dispose of them.[45] The court noted that normally judicial disposition of property involves property that carries some monetary value or equivalent, but embryos "cannot reasonably be viewed that way," given the deeply emotional conflict involved.[46] Still, the court ordered the embryos destroyed, consistent with the contract, and held that "[a]bsent a countervailing policy, it is just and proper to dispose of the embryos in the matter that the parties chose at the time that they underwent the IVF process."[47] Additionally, because the ex-husband had not argued that the contract was ambiguous or against public policy, the court did not engage in an extensive analysis of the jurisdiction's public policy.[48]

As noted above, Colorado, Illinois, and Tennessee employ the contract approach first, where applicable, and employ the balancing approach if necessary.[49] This framework purports that "both spouses have equally valid, constitutionally based interests in procreational autonomy . . . [and] encourages couples to record their mutual consent regarding the disposition of remaining [embryos]."[50] Outcomes of this multi-approach framework vary somewhat because in order for the contract approach to apply, the contract provisions may be required to explicitly address the circumstances, e.g., divorce, death, or some other unforeseen event, that led to the dispute. For instance, although the Tennessee Supreme Court determined that an IVF contract was otherwise enforceable, the Court did not enforce the contract because it did not address disposition upon divorce.[51]

In all jurisdictions employing the contract approach, parties can expect a court to enforce their IVF contract so long as it specifically addresses the event at issue—e.g., divorce—and unambiguously tells the court what the parties intended the court to do.[52] As such, it is especially important that IVF contracts are written

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44. *Id.* at 837. For an interesting discussion of why one court declined the invitation to resolve a debate over whether an embryo is a "human being" and when life begins, see Bilbao v. Goodwin, 217 A.3d 977, 991 n.8 (Conn. 2019) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.") (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)).

45. *In re Marriage of Dahl & Angle*, 194 P.3d at 836–37.

46. *See id.* at 839.

47. *Id.* at 842.

48. *Id.* at 841; *see also Bilbao*, 217 A.3d at 982 n.5, 983 (declining to review any argument that an embryo disposition agreement was unenforceable as against public policy because the ex-husband had failed to raise this issue at trial).

49. *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018); Szafranski v. Dunston, 993 N.E.2d 502, 515 (Ill. App. Ct. 2013); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

50. *In re Marriage of Rooks*, 429 P.3d at 594.

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

52. In one case, the Court further engaged in an analysis of the basic requirements for an enforceable contract: offer, acceptance, and consideration. *Bilbao*, 217 A.3d at 988. The offer from each party was the "opportunity to create pre-embryos by contributing gametic

unambiguously and that parties fully understand the potential long-term effects of their selected disposition option.[53] If patients do not fully understand the implications of their IVF contract and destruction or donation is written into the contract as the desired outcome following an event, they may lose an opportunity at biological parenthood or have to grapple with a biological child being born into a family they will not know. Conversely, if a contract permits one party to implant the embryos over the other party's objection, the emotional, moral, and legal obligations that come with parenthood, including child support if the objecting party chooses not to be present in the child's life, may still apply.[54]

Some scholars have suggested improvements to IVF contract practices that would, at least in jurisdictions employing the contract approach, better protect parties' interests from the outset.[55] These include: mandating a disposition contract before cryopreservation;[56] a clear distinction between informed-consent and disposition agreements;[57] mandating that the disposition agreement is binding even if one party changes his or her mind;[58] special rules for loss of fertility;[59] and a rule that parenthood obligations not be imposed on objecting parties.[60] Although these proposals would certainly empower parties and enable more predictable dispute resolution, implementing many of them would require an act of Congress, assuming that action fits within its given powers, or uniformity among all state legislatures. Further, even if heightened contracting requirements were imposed uniformly and enforcement began tomorrow, they would not resolve disputes involving one of the potential million embryos frozen in the United States today.[61]

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material" which was accepted "by signing the agreement." *Id.* at 989. The trial court held the agreement unenforceable because it lacked a mutual exchange of promises—i.e., consideration—but the Court held that finding was clearly erroneous because "the parties made mutual promises to contribute gametic material." *Id.*

53. *See infra* Section II.D for a discussion of statutes enforcing stringent requirements for IVF contracts.

54. *See* Terrell v. Torres, 438 P.3d 681, 689, 693 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) ("It is of course true that if Torres were awarded the embryos, Terrell could be legally responsible to financially support the [resulting] children.") (citing McLaughlin v. Jones ex rel. Pima Cty., 401 P.3d 492, 499 (Ariz. 2017)). *But cf. In re Marriage of Rooks*, 429 P.3d at 583–84 ("[A]lthough Colorado 'does not statutorily impose support and other parental obligations on a non-consenting genetic parent . . . , there are moral and social obligations that cannot be ignored.'").

55. *See* Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 13–19 (2016).

56. *Id.* at 17.

57. The lack of discrimination between informed-consent documents, disposition agreements, and contracts is a common criticism of the contract approach. *See, e.g.*, Wheatley, *supra* note 12, at 307 ("Informed-consent documents are primarily intended for education, disclosure, and recording consent. In a contract, however, the parties exchange bargained-for promises. Conflating an informed-consent document with a contract is problematic because it confuses who is promising what to whom and because it is unclear to what extent consent and disposition documents are contractual, and therefore binding on both parties.").

58. Cohen & Adashi, *supra* note 55, at 17.

59. *Id.* at 17–18.

60. *Id.*

61. *See supra* note 2 and accompanying text.

B. The Balancing Approach

When applying the balancing approach to embryo disputes, courts balance the parties' respective interests in potential parenthood. Generally, the interests of the party seeking *not* to become a parent outweigh those of the party seeking to implant the embryos.[62] However, this presumption can be overcome when the other party does not have a reasonable possibility of becoming a parent by other means.[63] New Jersey and Pennsylvania have adopted the balancing approach for resolving embryo disposition disputes.[64] As noted above, a combined framework employing the contract approach first, then some form of a balancing approach, has also been adopted in Colorado, Illinois, and Tennessee.[65]

Courts that employ the balancing approach tend to focus more on the constitutional implications of resolving these types of disputes than courts that employ the contract approach.[66] Procreational autonomy is a central focus for courts as they attempt to balance one party's right to procreate against the other party's right to avoid procreation.[67]

In New Jersey, the Court addressed a dispute involving a divorced couple where the ex-wife sought to have their remaining embryos destroyed, while the ex-husband wanted them to be donated in accordance with his moral and religious convictions.[68] Because the couple's IVF contract did not manifest the intent of the parties clearly (other than that they would allow a court to determine disposition), the Court first looked to the constitutional implications of their respective positions because both parties had asserted their constitutional rights to privacy in support of their positions.[69] The Court acknowledged that both the federal and state

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62. Terrell v. Torres, 438 P.3d 681, 690 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020).

63. *See id.* at 688 (explaining that the balancing test does not limit a party's interests in "parenthood" to having a biologically related child, as the interests may also include adoption possibilities). *But cf. In re* Marriage of Rooks, 429 P.3d 579, 594 (Colo. 2018) (instructing courts to only consider genetic parenthood possibilities); Reber v. Reiss, 42 A.3d 1131, 1138 (Pa. Super. Ct. 2012) (holding that adoption and foster parenting options should not necessarily be given equal weight to biological parenthood in a balancing test).

64. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001); *Reber*, 42 A.3d at 1136 (finding that application of the balancing approach was appropriate here because there was no contract between the parties).

65. *See* discussion *supra* Section I.A.

66. *See infra* notes 69–73 and accompanying text.

67. *See, e.g.*, *In re Marriage of Rooks*, 429 P.3d at 593 ("Recognizing a couple's cryogenically preserved pre-embryos as marital property of a special character . . . the underlying principle that informs our balancing test is autonomy over decisions involving reproduction.") (internal citation omitted).

68. *J.B.*, 783 A.2d at 710–12.

69. *Id.* at 715. On the ex-husband's first appeal, he argued that the trial court's decision to award his ex-wife the embryos over his objection violated his constitutional right to procreate. *Id.* at 711. The appellate court understood the dispute as a conflict between the right to procreate and the right not to procreate. *Id.* The Court reasoned that because he was still able to father children and only sought to have the embryos donated, his rights were not violated if the embryos were destroyed. *Id.* However, the Court ultimately chose not to decide

constitutions protect the fundamental rights of personal intimacy, marriage, sex, family, and procreation.[70]

In alignment with other jurisdictions using the balancing approach, the New Jersey Supreme Court held in *J.B. v. M.B.* that the interests of the party seeking to avoid procreation will generally prevail (as was the case there) unless the other party is unable to have biological children.[71] The Court reasoned that the interests of the party seeking to avoid parenthood are lost entirely if it allows implantation or donation to another party, but the other party will not entirely lose their interest in becoming a parent if they are still able to have children.[72] Conversely, where a party has no other means of having biological children, that party's interests outweigh the objecting party's interests.[73]

In Colorado, the Court fashioned its own multi-factor version of the balancing approach, holding that in balancing the interests of the parties, courts should consider the following: the intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking IVF in the first place; the emotional, financial, or logistical hardship for the party seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation.[74] "However, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos can afford a child."[75]

The dissent in *Marriage of Rooks*, however, endorsed the contemporaneous mutual consent approach, arguing that "a court should never infringe on a person's constitutional right to avoid procreation."[76] Justice Hood contended that it was the ex-husband, not the Court, who was impeding the ex-wife's right to procreate

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this case on constitutional grounds and instead held "a contract to procreate" is unenforceable due to public policy. *Id.* at 711–12. Other courts have held that procreational autonomy is a fundamental right. *See, e.g.*, *In re Marriage of Rooks*, 429 P.3d at 580–81 ("[T]his case . . . presents difficult issues of procreational autonomy for which there are no easy answers because it pits one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation, and because the fundamental liberty and privacy interests at stake are deeply personal and emotionally charged."). *But see* Terrell v. Torres, 438 P.3d 681, 693 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) (arguing that "[s]uch constitutional rights are directed at protecting an individual against government intrusion on personal decisions regarding reproduction" and would not apply when a court, authorized by contract, is empowered to resolve an embryo dispute).

70. *J.B.*, 783 A.2d at 716 (quoting *In re* Baby M., 537 A.2d 1227 (N.J. 1988)).

71. *See id.* at 716–17.

72. *Id.* at 717.

73. *See id.*; *see also* Reber v. Reiss, 42 A.3d 1131, 1136–42 (Pa. Super. Ct. 2012) (employing the balancing approach where the contract and contemporaneous mutual consent approach would be inapplicable and awarding 13 pre-embryos to woman who could not otherwise achieve biological parenthood as a result of cancer treatment).

74. *In re Marriage of Rooks*, 429 P.3d at 593–94.

75. *Id.* at 595.

76. *Id.* (Hood, J., dissenting).

because "[i]n order for a person to exercise his or her right to procreate, obviously a second party is needed."[77]

The role the court plays when applying the balancing approach poses obvious problems. The repercussions of these decisions are nearly identical to those of decisions made under the contract approach.[78] But instead of the parties having some say in the outcome through a previously executed contract, courts decide the disposition based on realities that will always be outside of at least one party's control—for example, the party seeking implantation will never be able to control the other party's desire to avoid parenthood. Conversely, neither party can control either party's inability to achieve biological parenthood due to infertility. Therefore, while the balancing approach purports to consider the constitutional rights of the parties, it ignores that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[79]

Some scholars have suggested there should be a legal-parenthood exemption for objecting parties in embryo disputes, similar to the exemption available to sperm donors.[80] This suggestion could ease one of the key concerns when courts resolve these disputes: forcing a person to become a parent against their will. However, as the dissent in *Terrell v. Torres* noted, parenthood extends beyond financial obligations, and given the parties' close family ties in that case, "there exist[ed] a high likelihood that any children, potentially seven or more of them, born of the embryos would be known to Terrell's family and friends, forcing him to choose between accepting parenthood or crassly and openly avoiding it."[81]

There, the Arizona Court of Appeals awarded a woman the remaining embryos created with her ex-husband after applying the balancing approach because she had practically no possibility of having a child, biologically or otherwise, as a result of cancer treatment.[82] Although the *Terrell* decision was later overturned on contract interpretation grounds, the balancing approach may still lead to a just result for those who feel strongly about the right to procreate and have biological

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77. *Id.* at 596.

78. *See* discussion *supra* Section I.A.

79. *In re Marriage of Rooks*, 429 P.3d at 595–96 (Hood, J., dissenting) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

80. *See* Cohen & Adashi, *supra* note 55, at 17; *see also infra* Part II (discussing existing statutes that allow this exemption).

81. Terrell v. Torres, 438 P.3d 681, 699 (Ariz. Ct. App. 2019) (Cruz, J., dissenting), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020).

82. *Id.* at 691–94. The Arizona Supreme Court overturned this case on the grounds that the reinterpreted contract signed by the parties governed and no balancing of interests was necessary. Terrell v. Torres, 456 P.3d 13, 17–18 (Ariz. 2020). And a statute passed following the trial court decision provides that, in the event of a divorce dispute involving embryos, "[t]he spouse . . . not awarded the . . . embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed . . . embryos . . . unless the spouse . . . consents in writing to be a parent." ARIZ. REV. STAT. ANN. § 25-318.03(C) (2018).

children.[83] However, without a clear statutory way out, individuals seeking to avoid procreation cannot avoid this result.[84]

C. The Contemporaneous Mutual Consent Approach

The contemporaneous mutual consent approach is set far and away from the other approaches because control of disposition remains *entirely* within the parties' control at the time of the dispute.[85] Instead of enforcing prior contracts or balancing the parties' interests to force disposition, courts maintain the status quo, i.e., the embryos will remain frozen until both parties agree to implant, destroy, or donate the embryos.[86] Only Iowa and Massachusetts have adopted this approach, perhaps because they are the only states that have found contracts governing embryo disposition unenforceable based on public policy.[87]

In adopting this approach, courts reject the contract approach, reasoning that consent to procreation matters *at the time of disposition*, not before.[88] The timing of consent can become especially important to parties seeking to avoid parenthood, considering that embryos can remain frozen indefinitely, and in some cases, the dispute arises many years after the original contract was signed.[89]

Courts adopting the contemporaneous mutual consent approach have held that enforcing these types of contracts over one party's contemporaneous objection violates public policy.[90] In Iowa, the Court reasoned that because state statutes and

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83. It should be noted that the Court of Appeals did consider the possibility of adoption for Ms. Torres, but it was not considered viable because her cancer diagnosis would make her an unlikely candidate for adoptive placement. *Terrell*, 438 P.3d at 688, 692.

84. *See infra* Part II (discussing the few states with statutes purporting to protect parties seeking to avoid legal parenthood).

85. For an argument that the contemporaneous mutual consent approach is consistent with, and simply provides additional safeguards to, the contract approach, see 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, 143 (2019) ("[The contemporaneous mutual consent] approach is the most protective of all of the competing interests at stake because it offers an additional safeguard to the Pure Contractual Approach, honors parties' potential for a change of heart, and protects the procreative liberty of the parties.").

86. *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) (adding that in Iowa, the cost of maintaining the embryos is to be paid by the party opposing destruction).

87. *Id.*; A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that the court would not require a person to become a parent over his or her contemporaneous objection). In Missouri, a court seemed to implicitly approve of this approach when it allowed frozen embryos in a divorce proceeding to be distributed jointly because that "subjects neither party to any unwarranted governmental intrusion but rather leaves the intimate decision of whether to potentially have more children to the parties alone." McQueen v. Gadberry, 507 S.W.3d 127, 157 (Mo. Ct. App. 2016).

88. *In re Marriage of Witten*, 672 N.W.2d at 782 ("We think judicial decisions and statutes in Iowa reflect respect for the right of individuals to make family and reproductive decisions based on their *current* views and values.") (emphasis added).

89. *See, e.g.*, *A.Z.*, 725 N.E.2d at 1059.

90. *See, e.g.*, *In re Marriage of Witten*, 672 N.W.2d at 782–83. This case involved a divorce dispute over the couple's seventeen remaining frozen embryos. *Id.* at 772–73. The

case law "evidence an understanding that decisions involving marital and family relationships are emotional and subject to change," courts are generally reluctant to get involved with such intimate questions.[91] Iowa law reflects this reluctance in its policies regarding adoptions where there are post-birth waiting periods before the parental rights of the biological parent(s) can be released, and courts will not enforce any contract requiring a person to marry.[92] Similarly, the Massachusetts Supreme Court held that, based on public policy, contracts cannot be enforced if they require a person to become a parent against his or her contemporaneous objection.[93] The Court reasoned that the legislature already "determined . . . that individuals should not be bound by certain agreements binding them to enter or not enter into familial relationships" when it passed laws refusing to enforce agreements to marry or to give a child up for adoption sooner than four days after the child is born.[94]

The Massachusetts case *A.Z. v. B.Z.* involved a divorced couple that had four remaining frozen embryos after multiple rounds of IVF—one of which had resulted in the birth of twins.[95] The couple's relationship deteriorated, and following the divorce, the ex-husband sought a permanent injunction to prevent his ex-wife from "using" the embryos.[96] The consent forms signed by the couple stated that upon separation, the embryos would belong to the wife for implantation.[97] Beyond finding that the contemporaneous mutual consent approach best aligned with the public policy of the state, the Court found that the consent forms in that case were problematic in their own right.[98] The Court found that the forms' predominant purpose was to explain the procedure's risks and benefits, rather than to act as a binding agreement should a dispute later arise.[99] Other problematic elements the Court observed included the lack of a duration provision in the forms; that the forms referred to the possibility of the couple becoming "separated" without further definition; and, per statute, that the form would not be a binding separation agreement in a divorce proceeding.[100]

The shortcomings of this approach are different than the others but are still significant. Although neither party will become a parent without consenting to do

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ex-wife sought to implant the embryos into herself or a surrogate as she would not be able to have a biological child otherwise. *Id.* The ex-husband sought to have the embryos donated, however, the IVF agreement signed by the parties unequivocally stated that "transfer, release or disposition" of the embryos could only move forward "with the signed approval of both Client Depositors." *Id.* Ultimately, the Court held that while IVF agreements are enforceable and binding initially, they violate public policy if one of the partners later has a change of heart about the agreed upon disposition. *Id.* at 782–83.

91. *Id.* at 781.

92. *Id.*

93. *A.Z.*, 725 N.E.2d at 1057–58 ("As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.").

94. *Id.* at 1058.

95. *Id.* at 1052–53.

96. *Id.* at 1053 (quoting the ex-husband's motion for a permanent injunction as a request to prohibit his ex-wife from "using" the embryos).

97. *Id.* at 1054.

98. *Id.* at 1056.

99. *Id.* at 1056–57.

100. *Id.*

so, one party may still miss an opportunity to become a biological parent if the other party never consents, or consents too late.[101] Courts that reject the contemporaneous mutual consent approach call it "'totally unrealistic' because if the parties were capable of reaching an agreement, then they would not be in court."[102] This approach has also been criticized as neglecting the well-established right to contract and essentially giving "one party a de facto veto over the other party by avoiding any resolution until the issue is eventually mooted by the passage of time."[103] The Court countered this criticism in *A.Z. v. B.Z.*, where it reasoned that although courts should be hesitant to invalidate contracts, a countervailing consideration is that not forcing individuals into familial relationships enhances "freedom of personal choice in matters of marriage and family life."[104] This may well be true, but the risk of employing this approach is that it results in a state of potentially endless limbo as embryos may remain frozen indefinitely, and there may never come a point where the parties agree.[105]

D. Summarizing the Advantages and Disadvantages of Each Approach

Parties entering courtrooms in any type of dispute seek favorable results and rely on courts to help them avoid an endless impasse. Unfortunately, in a dispute involving frozen embryos, there are limited solutions available to the court, and only one party will be able to achieve their desired result of implantation, destruction, or donation to either another couple or research.[106]

Under the contract approach, parties can expect courts to look to the parties' *written* intent to arrive at a resolution.[107] The first issue often seen is that the agreement itself contains ambiguities that courts must interpret—which is often because the contract was intended to serve as an informed consent between the patients and the IVF clinic, not a thoughtful agreement between the parties.[108] This poses obvious questions as to whether the parties understood the implications of the agreement when it was made. In *Terrell*, for instance, the ex-husband seeking to

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101. *In re* Marriage of Rooks, 429 P.3d 579, 592 (Colo. 2018).

102. *Id.* (quoting Reber v. Reiss, 42 A.3d 1131, 1135 n.5 (Pa. Super. Ct. 2012)).

103. *Id.*

104. *A.Z.*, 725 N.E.2d at 1059 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 499 (1997)).

105. *In re Marriage of Rooks*, 429 P.3d at 592. While the exact number is unattainable, some experts estimate that the number of abandoned frozen embryos, i.e., those for which storage fees are no longer being paid by the donors, could be in the hundreds of thousands—perhaps in part because annual storage fees can run anywhere from $500 to $1,000. *See, e.g.*, Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, CBS NEWS (Aug. 12, 2019), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806 (quoting one IVF clinic director who refuses to destroy embryos as saying, "The problem is, even if an embryo is considered abandoned, even if there's a contract in place, it's very difficult to get rid of. What if one day someone shows up and says, 'Where's my embryo?' And you wind up on the front page of the newspaper for destroying someone's embryo? The damage would be done.").

106. Even these limited results may be further limited by statute because in some jurisdictions destruction is not an option. *See* discussion *infra* Part II.

107. *See* discussion *supra* Section I.A.

108. *See* discussion *supra* Section I.A.

avoid procreation felt protected by the contractual provision stating that "[the] [e]mbryos cannot be used to produce pregnancy against the wishes of the partner . . . without the express, written consent of both parties."[109] However, before the Arizona Supreme Court ultimately reversed its decision, the appellate court would have allowed his ex-wife to proceed with implantation, in part due to ambiguities in the IVF contract.[110] The other issue is that these contracts can remain in effect indefinitely and potentially make an individual a parent many years after he or she intended, when his or her familial or financial circumstances may have changed significantly. The contract approach, however, is arguably the most predictable of the three approaches. The disposition of the embryos is governed by a contract which, if valid, means that the parties agreed to it and that the well-developed and longstanding principles of contract law apply. Applying this approach will also always lead to a decision regarding disposition and a favorable result for one party unless contractual ambiguities prevent the court from applying the approach altogether.

Under the balancing approach, parties can expect courts to look to their *current* circumstances to resolve the dispute. Unlike the contract approach, this is a test fashioned by courts to only deal with this particular type of dispute. It neither applies to other types of disputes nor has been subject to development over time due to its novelty and the relative infrequency with which embryo disputes arise.[111] Arguments on both sides have been made about pitting the right not to procreate against the right to procreate.[112] This test generally favors the former except where infertility leaves the other party with only one chance of biological parenthood.[113] No matter which interest prevails, this approach at least results in a decision regarding disposition and will likely leave one party with a favorable result.

However, as scholars have recognized, there may be a need to categorize and treat the various scenarios that lead to infertility differently when applying the balancing approach.[114] The first category would be infertility resulting from aging, which is foreseeable and inevitable.[115] The second category would be future loss of fertility that will result from upcoming medical treatment and is known at the time of IVF treatment.[116] The final category would be loss of fertility caused by circumstances that are not foreseeable at the time of treatment.[117] Although these categories have not been recognized by courts, when critiquing the balancing approach, it is helpful to envision a case where an individual falling into the first or second category has lost fertility and is awarded the embryos. The result may appear

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109. Terrell v. Torres, 438 P.3d 681, 685 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020).

110. *See id.* at 685, 694. For a full discussion of the ambiguities identified in this contract, see discussion *infra* Part III.

111. *See* discussion *supra* Section I.B.

112. *See supra* notes 69–73 and accompanying text.

113. *See* discussion *supra* Section I.B.

114. *See* Cohen & Adashi, *supra* note 55, at 17–18.

115. *Id.* at 17 (arguing that this category should not justify a "changed circumstance" enough to depart from contract enforcement).

116. *Id.* (arguing that this category is equally foreseeable).

117. *See id.* at 17–18.

facially unjust because the loss of fertility was foreseeable and should have been accounted for when the parties underwent treatment, rather than being viewed as a changed circumstance justifying later awarding the embryos to that party. Indeed, this was the case in *Terrell* as impending breast cancer treatment prompted Torres to undergo IVF treatment, but in the appellate court decision (that was ultimately overturned without applying the balancing approach) the balancing test still favored her interests, and she was awarded the embryos.[118]

Under the contemporaneous mutual consent approach, parties can expect to retain control over the fate of the embryos. Thus, it has one obvious advantage that is unavailable under the other approaches: both parties must consent *contemporaneously* for anything to move forward with the embryos.[119] But it presents the obvious and significant downside that it can create an impasse that continues indefinitely and results in a de facto veto by the party who does not want the embryo used.[120] This is because, as time passes, implantation can become impossible.[121] Thus, this approach leaves parties with little incentive to petition a court for relief knowing that an agreement must be reached between them for any further action.

II. HUMAN EMBRYO STATUTES AND LEGISLATIVE RESPONSE

Currently only a minority of states have legislation that either requires infertility doctors to have their patients sign contracts that address disposition or instruct courts on how to resolve embryo disputes. A few states, including Arizona, Colorado, and Texas, provide that in the event of an embryo dispute, the party seeking to avoid parenthood will not have legal obligations to a child born from the embryos unless they have consented to do so.[122]

A. Informed-Consent Statutes

In the first category of statutes seeking to improve patients' informed consent, Connecticut's statute requires infertility doctors to provide patients with "timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any embryos . . . remaining following an infertility treatment."[123] Massachusetts and

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118. Terrell v. Torres, 438 P.3d 681, 685, 694 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020).

119. *See* discussion *supra* Section I.C.

120. *See supra* notes 101–105 and accompanying text.

121. *See supra* notes 101–105 and accompanying text.

122. ARIZ. REV. STAT. ANN. § 25-318.03(C) (2018) ("The spouse that is not awarded the . . . embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting . . . unless the spouse provided gametes for the in vitro human embryos and consents . . . ."); COLO. REV. STAT. ANN. § 15-11-120(9) (West 2010) ("If a married couple is divorced before placement of . . . embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented . . . ."); TEX. FAM. CODE ANN. § 160.706(a) (West 2019) ("If a marriage is dissolved before the placement of . . . embryos, the former spouse is not a parent of the resulting child unless the former spouse consented . . . .").

123. CONN. GEN. STAT. ANN. § 32-41jj(c)(1)–(2) (West 2015).

New Jersey statutes contain nearly identical language.[124] At a minimum, these statutes require that patients are given the option of storing, donating, or disposing of the embryos.[125]

California has a similar statute, but the statute mandates additional information to be included on the forms, including a time limit on storage for the embryos and a desired disposition option for the embryos in each of the following circumstances: death of a partner, death of both partners, separation or divorce, and abandonment or failure to pay storage fees.[126]

Florida was one of the first states to enact a statute relating to embryo disputes, and it requires that an agreement be signed by the physician and the couple, and that the agreement govern disposition upon divorce, death, or any other unforeseen circumstance.[127] Where no such agreement exists, the statute further provides that the embryos belong jointly to the couple unless one party dies.[128]

B. Personhood Statutes

Rather than focusing on improving patients' informed consent or contract principles, some states are concerned with what happens to the embryos in the event of a dispute. For instance, Louisiana's statute provides as follows: "An in vitro fertilized human ovum is a juridical person . . . If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation."[129] The practical implication of this statute is that embryos cannot be destroyed regardless of the progenitors' wishes; thus, their only option in the event of a dispute is to give the embryos up for adoption to a *married* couple or keep them frozen.[130]

Notably, Louisiana's statute provides embryos with "juridical person" status and states that embryos "cannot be owned by the in vitro fertilization patients who owe [them] a high duty of care and prudent administration."[131] Legislatures across the country are often asked to consider enacting a similar statute, a request

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124. MASS. GEN. LAWS ANN. ch. 111L, § 4(a) (West 2005); N.J. STAT. ANN. § 26:2Z-2b(1)–(2) (West 2004).

125. § 32-41jj(c)(2); ch. 111L, § 4; § 26:2Z-2.

126. CAL. HEALTH & SAFETY CODE § 125315 (West 2004).

127. FLA. STAT. ANN. § 742.17 (West 1993). The statute applies not just to embryos, but to sperm and eggs, and further provides that absent an agreement, if one party dies, the embryos become the property of the surviving party and that any children conceived from them have no claims against the decedent's estate.

128. *Id.*

129. LA. STAT. ANN. § 9:130 (1986).

130. Alyssa Yoshida, *The Modern Legal Status of Frozen Embryos*, 68 HASTINGS L.J. 711, 716 (2017) ("[Per statute] [t]he receiving couple must be married, as well as willing and able to receive the embryo for implantation."). Whether a same-sex *married* couple would be eligible to adopt the embryos is unconfirmed, but there is no apparent legal reason that would prevent them from doing so. In the event a same-sex couple were prevented from doing so, there would likely be strong constitutional arguments for allowing them to "adopt" these embryos. *See generally Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) ("[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

131. § 9:130.

that is seen by many in the medical community as "anti-IVF."[132] The uniqueness of this statute has even produced some very high profile forum shopping involving actress Sofia Vergara and her ex-fiancé, Nick Loeb—thus far, he has been unsuccessful in getting the case tried in Louisiana.[133]

Similarly, Arizona's statute, enacted in response to the trial court's decision in *Terrell*, provides that in a divorce or legal separation proceeding involving the disposition of human embryos, courts must "[a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth."[134] In practice, this statute does not apply to unmarried couples, and it requires courts to award the embryos as prescribed for married couples, even if the parties have a disposition agreement.[135]

C. Relief-from-Parental-Obligation Statutes

The final group of statutes does not instruct courts on how to resolve disputes, but rather seeks to protect parties who want to avoid parenthood by relieving them of their parental obligations unless they have consented.[136] For example, the Texas statute provides that if divorce occurs before implantation, the former spouse is not a parent unless they have consented in writing; it further provides that consent to implantation of the embryos can be withdrawn at any time.[137] The Texas court discussed earlier, however, did not find that statute helpful or instructive on how to resolve a disposition dispute.[138] It is also notable that all three states with these statutes have written them in a way that they appear to only apply to married couples, as they only describe the context of divorce and use the word "spouse."[139]

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132. Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. L. 55, 72 (2018) ("Each year various state legislatures across the country consider requests to label embryos as human beings. These so called 'personhood' bills are often met with significant opposition and fervent support, placing the characterization of ex utero embryos squarely in the center of the ongoing culture wars. Many in the medical profession consider them to be 'anti-IVF' initiatives, with the potential to severely restrict IVF, and even obstetric, practices."); *see also* Wheatley, *supra* note 12, at 304 ("[P]ersonhood bills, though largely unsuccessful, continue to be proposed in state and federal legislatures. For instance, in the five years between 2013 and 2018, over one hundred personhood bills were proposed by state legislators.").

133. *See* Ian Mohr, *Nick Loeb's Embryo Case Against Sofia Vergara Dismissed in Louisiana*, PAGE SIX (Oct. 22, 2019), https://pagesix.com/2019/10/22/nick-loebs-louisiana-case-against-sofia-vergara-dismissed/.

134. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (West 2018). Because the statute was not in effect at the time of the lower court decision in *Terrell*, the Court of Appeals noted that it was not bound by it in its decision. Terrell v. Torres, 438 P.3d 681, 689 n.7 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020).

135. *Terrell*, 438 P.3d at 689 n.7.

136. *See supra* note 122 and accompanying text. For a better understanding of why this is necessary, see *supra* notes 54–60 and accompanying text.

137. TEX. FAM. CODE ANN. § 160.706 (West 2019).

138. *See supra* note 38 and accompanying text.

139. *See supra* note 122 and accompanying text.

D. Are These Statutes Effective?

The statutes currently in effect, which appear to govern or assist with disposition, generally fall into one of two categories. First, there are the statutes that provide more stringent informed-consent guidelines for IVF physicians and clinics.[140] The efficacy of these statutes is difficult to track as full effectiveness would inevitably result in fewer legal disputes. In jurisdictions that have adopted the contract approach, this type of statute's effect is that courts dealing with embryo disputes struggle less with contractual ambiguities because the statutes direct clinics and physicians to have parties clearly address disposition in various scenarios.[141]

In jurisdictions where a court has not addressed which approach to use in a dispute, it still may be worthwhile for a party seeking a result not contemplated in the contract to seek judicial relief by arguing that the contract violates public policy (though this may be difficult given that legislatures essentially endorse these types of contracts by attempting to regulate them) or meets the standard for some other nonperformance justification.[142] A party avoiding enforcement in a jurisdiction that has yet to examine the issue may also receive a favorable result in the form of the court finding that the statute is unconstitutional and adopting either the balancing or the contemporaneous mutual consent approach if, of course, the application of the adopted approach favors that party's circumstances.

Second, there are the statutes governing disposition, which generally favor the party seeking to implant or donate the embryos.[143] In Louisiana, parties have little incentive to seek judicial relief because results are strictly limited: the parties may use the embryos, keep them frozen, or donate them to another married couple.[144] In Arizona, at least as far as married couples go, parties can expect similar results: courts will award the embryos to the party seeking implantation.[145] For everyone else, Arizona courts will proceed with the contract approach.[146]

Although these statutes increase predictability by narrowing the scope of potential disposition results, they eliminate the option to destroy the embryos, which may have been something the parties contracted for and expected to be able to do. Further, in Arizona, the statute provides that "[i]f both spouses intend to allow the . . . embryos to develop to birth," courts must "resolve any dispute on disposition of the . . . embryos in a manner that provides the best chance for the in vitro human embryos to develop to birth."[147] It is unclear what "best chance" means as the phrase has yet to be interpreted by the courts, but the statute created a new element of

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140. *See* discussion *supra* Section II.A.

141. *See supra* notes 129–35 and accompanying text.

142. *See* discussion *infra* Part IV.

143. *See supra* notes 129–135 and accompanying text.

144. *See* LA. STAT. ANN. § 9:130 (West 1986). Note that it is not clear whether a court would allow one party to implant embryos against the other party's contemporaneous objection.

145. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

146. *See* Terrell v. Torres, 456 P.3d 13, 15 n.1 (Ariz. 2020) (describing the Arizona statute that governs disposition in the context of married couples and holding that agreements are otherwise enforceable).

147. § 25-318.03.

unpredictability in a very possible scenario—i.e., both parties intend to have the embryos implanted either in themselves, a surrogate, or another couple.

The final group of statutes discussed above does not address disposition.[148] Instead, they relieve an objecting party from their legal parental obligations unless they have consented to them. These statutes are potentially effective in avoiding disputes because the objecting party may feel more willing to allow the other to implant the embryos if the concern, as implied in some cases, is involuntary legal parenthood.[149] However, they do nothing to help the courts resolve a dispute over embryos.

III. THE STRUGGLE FOR COURTS, LEGISLATURES, AND PATIENTS: A DEEPER DIVE INTO THE DEVELOPMENT OF ARIZONA'S FROZEN EMBRYO LAW

Arizona's law is an excellent and recent example of how the law of frozen embryo disputes may develop. It touches on all of the approaches and many of the legal issues discussed above, and with an opinion released by the Arizona Supreme Court on January 23, 2020, the dust has only just begun to settle.[150] In 2014, Ruby Torres and her boyfriend, John Terrell, entered into an IVF agreement shortly after learning of a breast cancer diagnosis requiring treatment that could result in Torres's infertility.[151] The couple married a few days after signing the agreement and created seven viable embryos through IVF, which were frozen while she underwent cancer treatment.[152] The embryos remained frozen during the couple's two-year marriage.[153]

After Terrell filed for divorce, Torres sought control of the embryos because she and a medical expert believed the embryos were her only opportunity to have biological children.[154] At an evidentiary hearing during the divorce proceedings, Terrell stated that he only married Torres for health insurance purposes and that, when he agreed to participate in the IVF procedure, he thought her survival (and thus, his chances of fathering children with her) was unlikely.[155] In reversing the trial court's decision to donate the embryos, the Arizona Court of Appeals included these upsetting details in its opinion without a clear explanation of their relevance.[156]

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148. *See* discussion *supra* Section II.C.

149. *See, e.g.*, Terrell v. Torres, 438 P.3d 681, 686 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) ("Terrell did not want Torres to have the embryos because he was concerned about his 'financial liability in the future, . . . as far as . . . [his] inheritance or, [an obligation to pay] child support for a child that [he] would[] never see[].'").

150. Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020).

151. *Id.*; *see also Terrell*, 438 P.3d at 684.

152. *Terrell*, 438 P.3d at 685.

153. *Id.*

154. *Id.* at 686.

155. *Id.* at 685–86.

156. *See id.*

As noted above, Arizona has a statute governing disputes over frozen embryos.[157] The statute was passed shortly after the trial court's decision in this case and was seen as a win for pro-life interests.[158] It provides that if a divorce action "involves the disposition of in vitro human embryos, the court shall . . . [a]ward the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth."[159] The Court of Appeals stated that the statute was not binding because it was not in effect at the time of the trial court's decision, and noted that in the future, the statute would not resolve a dispute involving unmarried persons.[160] Accordingly, the court explored case law in the area and adopted a combined approach: first, a court should apply the contract approach to honor the parties' intent; then, if there is no contract or if the contract leaves the disposition to a court, a court should follow the balancing approach.[161]

Because the court interpreted the couple's IVF contract as leaving disposition upon divorce within a court's discretion, it awarded Torres the embryos in accordance with its application of the balancing approach and the finding that she was unlikely to be able to have biological children otherwise.[162] That would have appeared to be the end of it, but Terrell timely appealed, and the Arizona Supreme Court granted review.[163]

The Supreme Court agreed with the appellate court's adoption of the contract approach and held that, subject to traditional contract law defenses, "agreements between couples regarding the disposition of their embryos 'should generally be presumed valid and binding, and enforced in any dispute between them.'"[164] Focusing on one provision of the IVF contract, the Court then reviewed the appellate court's interpretation and found error requiring that it vacate the

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157. *Id.* at 689 n.7; *see also* ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

158. Christina Cauterucci, *Why Anti-Abortion Groups Love Arizona's New Frozen-Embryo Law*, SLATE (Jul. 19, 2018), https://slate.com/news-and-politics/2018/07/arizonas-new-frozen-embryo-law-is-terrible-news-for-couples-thinking-about-in-vitro-fertilization.html.

159. § 25-318.03.

160. *Terrell*, 438 P.3d at 689 n.7.

161. *Id.* at 689–90. The court had serious concerns about the contemporaneous mutual-consent approach including that "it give[s] each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses." *Id.* at 689 (quoting Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013)). Thus, the court declined "to give one party a blanket veto and accordingly reject[ed] this approach." *Id.*

162. *Id.* at 694 ("The majority finds Torres' interests in the embryos—especially given that she gave up the opportunity to use another donor and she is likely unable to become a parent (biological or otherwise) through other means—outweighs Terrell's interest in avoiding procreation.").

163. Terrell v. Torres, 456 P.3d 13, 15 (Ariz. 2020) ("We granted review because this case involved unique issues of statewide importance.").

164. *Id.* at 15 (quoting Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998)). The Arizona Supreme Court also acknowledged the existence of the Arizona statute, but noted that because the statute did not apply retroactively, it would not consider it further. *Id.* at 15 n.1.

appellate court's decision.[165] In interpreting the IVF contract, the Court found that absent contemporaneous consent to the other's unilateral use, the parties only consented to donation of the embryos.[166] The Court noted that, although it was "cognizant of the unavoidable emotional fall-out attendant to the disposition of the embryos here," they must be donated.[167]

With that dispute resolved, the question becomes: what can a couple undergoing IVF expect an Arizona court to do in the event of a dispute? If the dispute involves a married couple in a divorce proceeding, they can expect the embryos to be awarded to the spouse who intends to "develop [them] to birth," regardless of contravening contract terms.[168] As noted earlier, if both parties want to "develop" the embryos, a court may be required to engage in an undefined "best chance" analysis.[169] If the dispute involves an unmarried couple, the result will be even less clear. Per the Arizona Supreme Court decision in *Terrell*, a contract between unmarried parties will be enforced.[170] But if there is no enforceable contract governing disposition, the Court left open the question of whether the balancing approach will be employed.[171] The result is different treatment depending on whether the progenitors are married, and considerable uncertainty potentially flowing from an ambiguously written contract for unmarried persons—hardly a predictable experience for anyone entering into an IVF contract in Arizona.

IV. AVOIDING AN ICY IMPASSE: WHY FROZEN-EMBRYO EXCEPTIONALISM EXISTS

At this point, it may have become apparent that the law of frozen-embryo disputes is a mixed bag. A wide variety of results are possible across jurisdictions: there may be a statute favoring the pursuit of birth regardless of the progenitors' desires, or binding case law requiring that the parties come to an unlikely agreement, among many other possibilities. Even if the law seems settled in a particular jurisdiction, with extreme disagreements on contract interpretation—often related to the nature of the agreements at the outset—happening in courts, the possibility of an appellate court overturning a decision or disagreeing with an adopted approach is not unlikely.[172] It is tempting to think that this level of uncertainty is avoidable. Congress could pass a federal statute, or the U.S. Supreme Court could intervene and provide some level of certainty, but they have yet to do so despite decades of legal disputes and what may be over a million affected embryos.[173] Further, a federal response, though seemingly desirable, can only please those who subscribe to

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165. *Id.* at 17–18.
166. *Id.*
167. *Id.*
168. ARIZ. REV. STAT. ANN. § 25-318.03(A)(1) (2018).
169. *See supra* discussion Section II.D.
170. *Terrell*, 456 P.3d at 15.
171. *Id.* at 18 ("In light of our decision, we need not decide whether the family court should balance parties' interests if they do not have a contract governing the disposition of embryos or whether the court of appeals here correctly balanced the parties' interests.").
172. See, for example, the experience of Ruby Torres and John Terrell discussed *supra* Part III.
173. *See supra* note 2 and accompanying text.

whichever existing approach is adopted—not to mention that introduction of a completely new, untested approach is also possible. As discussed earlier, state statutory law is sparse and has been slow to develop.[174] It does not appear that the legislatures are unaware that these disputes may occur within their jurisdiction.[175] Rather, it appears the legislatures are either uncertain of the best approach or are waiting until a court case prompts them to respond.[176]

A strong case can be made for avoiding "embryo exceptionalism" in the courts. One might wonder why courts are inventing new tests and law, i.e., the balancing and contemporaneous mutual consent approaches, to deal with a relatively niche issue. The answer is that embryos *are* exceptional and existing law can only take a court so far. Consider a scenario where a court is legally authorized, and chooses, to apply a traditional justification for nonperformance, e.g., frustration of purpose,[177] to an IVF contract. Perhaps one party seeks to implant the embryos while the other wants them to be donated. The court invalidates the contract. What is the remedy? No monetary damages apply (this is not a "breach") or are desired, so the problem for the court and the parties remains: what do they do with the embryos? Until either the court or a party moves the dispute forward, the embryos will remain frozen.

The icy impasse is certainly undesirable, otherwise the parties would not be in court fighting desperately for control of their familial futures. Thus, the contemporaneous mutual consent approach is wholly ineffective at resolving disputes, despite how fair to the parties it may seem at first glance. The balancing approach, on the other hand, at least resolves the dispute by forcing the court to decide what to do with the embryos by looking at the facts surrounding a particular case; but this approach leads to results outside of the parties' control.

The judicial invention and existence of both approaches stems from the reality that a dispute over embryos is unlike anything the law has dealt with before.[178] Similarly, this reality prevents contract law from effectively resolving all

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174. *See* discussion *supra* Part III.

175. *See supra* note 132 and accompanying text.

176. *See, e.g.*, Terrell v. Torres, 438 P.3d 681, 689 n.7 (Ariz. Ct. App. 2019), *vacated and remanded*, 456 P.3d 13 (Ariz. 2020) ("During the pendency of this appeal, Arizona adopted a new statute governing the disposition of embryos in a proceeding for dissolution of marriage or legal separation.").

177. This scenario is intended to be purely illustrative as this doctrine has not been applied in the courts. It is more likely that a court would choose not to enforce this type of contract as contrary to public policy. A frustration of purpose scenario can be described as one:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW. INST. 1981).

178. Some other issues may at first glance seem similar—for instance, one might wonder how this is unlike surrogacy, adoption, or sperm and egg donation. Unlike embryos

embryo disputes. In any other type of dispute, if one party is awarded a home or some other unique form of property over another party's objections, that result forever resolves the dispute and the parties can move on with their lives, disappointed or not. It is not so with embryos. As noted earlier, if one party is permitted to implant the embryos, legal parenthood becomes a reality for the other (unless, of course, a statutory exemption is in place).[179] Donation or destruction of embryos, which were almost certainly frozen while the parties were hopeful about one day becoming parents to them, can be lifechanging in its own right. No matter whether an embryo is viewed as property, a collection of cells, or a human life, it carries the unique potential for human life and, with that, removes itself from squarely fitting into our existing legal system.

CONCLUSION

No other contractual or legal dispute is quite like one involving embryos. Thus, the reality is that a neat and equitable legal infrastructure for resolving these disputes is unlikely to be on the horizon. This Note sought to determine why courts and legislatures are so inconsistent in resolving embryo disputes, and to contemplate what the *best* solution is. However, what the best solution is depends on who you ask and the situation at hand. Aside from a general preference for the contract approach, courts do not appear to be trending one way or another, and legislatures, although well aware of the issue, are not chomping at the bit to provide guidance or make things "right."[180] The reason for that may just be that there is no one-size-fits-all solution. In a tale as old as modern time, state legislatures are attempting to align with the will of their electorates, while courts are doing their best to avoid exceptionalism and to resolve disputes with the existing precedents they have.[181]

Why does embryo exceptionalism exist? Because embryos *are* exceptional—frozen in time, they carry with them the possibility of life potentially endless years after that life was first desired.

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which can remain frozen indefinitely, surrogacy involves a relatively short window in which a comparable dispute involving whether or not to attempt to bring an embryo to birth may arise—i.e., the gestation period—and to the Author's knowledge, this has not been addressed by the courts. Adoption laws involve a living child and not simply the *potential* for human life. Finally, sperm and egg donations occur in a different context involving progenitors who are consenting to the release of their genetic material, not intending to create an embryo, and hopefully a human life, with another person to whom they are tied.

179. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

180. The three most recent cases resolving embryo disputes did all adopt the contract approach as a primary means of resolving disputes, but Colorado secondarily adopted, and Arizona did not explicitly reject, the balancing approach. *See* Terrell v. Torres, 456 P.3d 13, 18 (Ariz. 2020); *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018); Bilbao v. Goodwin, 217 A.3d 977, 988 (Conn. 2019).

181. In the famous words of Justice Brandeis, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).