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The Veto Approach: Disposal Strategies for Disputed Frozen Embryos

Sara C. Gaugier
Michigan State University College of Law

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I. Introduction

In 2002, the Society for Assisted Reproductive Technology (SART) issued a survey of all 430 then-existing assisted reproductive centers in the United States. Of the 340 centers that responded, SART determined that 396,526 embryos were being held in storage, over 88% of which were designated for further patient use.[1] These frozen embryos are a byproduct of in vitro fertilization (IVF), a practice of creating an embryo ex utero which has produced 54,656 infants since its inception, but generally results in an excess of the combined gametes not used for procreation.[2] IVF is unique in that it can provide the means to create a genetically related child to an otherwise infertile couple; however these byproducts remain controversial. Death, divorce, or a variety of other personal circumstances may take one of those nearly 350,000 embryos designated for "future use" and leave its status in limbo, regardless of the initial intentions of the donors. This status is further complicated by the fact that the embryo is equally created by two individuals, who may have at the time of creation agreed on one fate for their joint creations, but later take opposing sides.

In regards to disputes between two conflicting biological gamete donors, there is no uniform federal law to resolve disputes over embryo ownership, and few states have sought to tackle the novel issues related to this emerging science.[3] Case law also remains sparse in this area, resulting in a patchwork analysis that highlights two competing fundamental principles that

[1] Hoffman, D, et. al., Cryopreserved embryos in the United States and their availability for research, May 2003, *available at* http://www.ncbi.nlm.nih.gov/pubmed/12738496, *hereinafter* "Hoffman Report."
[2] US Department of Health and Human Services Centers for Disease Control 2006 Assisted Reproductive Technology Report, *available at* http://www.cdc.gov/art/ART2006/index.htm, *hereinafter* "CDC Report."
[3] Donna M. Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 Cath. U. L. Rev. 989, 993-94 (1999).

consistently emerge in the area of IVF – the ability of an individual to autonomously decide whether or not to procreate and the ability of an individual to create open contracts related to the eventual disposition of their property. Courts of different jurisdictions have proceeded both directions: in some cases enforcing each and every provision of a pre-conception contract between potential parents in the event of disputes, and in others, not allowing certain provisions to pass muster due to the desire of one party. As the use of IVF expands in the US,[4] the dichotomy of these positions and the potential debate within the field are also likely to increase. Hence, there is an apparent necessity for a uniform theory of analysis when co-creators of an embryo come into dispute.

This paper first gives a brief overview of in vitro fertilization and the status of the embryo as either property or something more. Then it will explore the principle of procreative autonomy in our legal history, and its effect upon reproductive related jurisprudence. Next, it will review the IVF related case law and its divergent paths: one holding procreative autonomy as the chief goal, and the other holding that the parties' ability to contract should prevail. It will then introduce the "Veto Approach," an IVF related analytical framework which seeks to keep both principles intact – protecting both privacy and expectational interests of the parties. This "veto" preserves the contract except in those situations where one party refuses to allow development of the embryo into a child, allowing their interests to trump the interest of the party seeking to positively use the embryo. Placing more weight on the decision of the party advocating non-use of the embryo is consistent with the practical utilization of IVF, where the actual affirmative decision to procreate often occurs at a later time than embryo conception. Finally, the paper will address the difference between the Veto Approach and other existing common law and statutory

[4] According to data cited in the "Hoffman Report," *supra* at note 1, and the "CDC Report," *supra* at note 2, from 2003 to 2006, the number of IVF clinics rose from 430 to 483.

approaches, and why the Veto Approach more accurately reflects the intent of the co-creators of the embryo.

II. Background of IVF

In 1978, Louise Brown was dubbed England's "miracle baby," a healthy girl conceived outside her mother's womb through the first ever in vitro fertilization process.[5] The cycle of IVF generally starts with stimulation of the potential mother's ovaries, resulting in the maturation of multiple egg follicles at once.[6] These are removed and fertilized outside the mother's body in a petri dish with the sperm of the potential father, creating a "pre-zygote."[7] The pre-zygotes divide into four to eight cell stages and then one or more are manually implanted back into the mother's uterus. If successful, the pre-zygote will attach to the uterine wall and develop into a fetus.[8] The success rate of a cycle is about thirty-percent per egg-retrieval, and costs upwards of $10,000 to $12,000 to complete; thus, multiple pre-zygotes are often implanted in the hope that just one may attach.[9] The high cost and variable success rate, coupled with the fact that a single egg stimulation will produce more eggs than can be implanted, results in the storage of unneeded pre-zygotes (at this stage called "pre-embryos") in the event that the first IVF cycle does not take. These are "frozen," or cryogenically preserved, and stored at the facility for later use. Freezing

[5] Jennifer Marigliano Dehmel, *to Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos*?, 27 CONN. L. REV. 1377 (1995).
[6] Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 58 (1999).
[7] *Id.*
[8] Kass v. Kass, 91 N.Y.2d 554 (1998).
[9] John A. Robertson, *Recommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 991 (2001).

of the individual gametes is uncommon, as they are more delicate and thus generally have lower fertilization rates compared to similarly stored fertilized embryos.[10]

There are five possible outcomes for these "surplus" embryos: (1) remain in cryostorage until future transfer into the mother's uterus; (2) donation to another person seeking to have a baby; (3) donation for research; (4) remain in cryostorage indefinitely; or (5) destruction.[11] As stated previously, most couples initially choose to retain these pre-embryos for their own future use. This plan of action offers the couple several potential benefits. First, it lessens the necessity of further ovarian stimulation and egg retrieval from the mother, in the case that another IVF procedure occurs.[12] Secondly, it allows an individual to retain his or her ability to produce genetic offspring in the event of eventual infertility.[13] Finally, it decreases the incentive to transfer a large number of embryos into the mother in the initial IVF procedure and prevents multiple gestation, a scenario which creates greater risk of complication to both mother and potential offspring.[14] With the lack of general federal regulation, IVF clinics are often left to themselves to determine how the couple will proceed in announcing their intentions regarding their pre-embryos. Most often, these exist in the IVF consent agreement itself, a contract between the clinic and the couple to engage in the procedure itself. While they often consider the event of a dispute over the embryos, these directives may or may not be followed and are therefore frequently the source of dispute in IVF jurisprudence.[15]

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[10] Lauren Fielder Redman, *Seeking A Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer?*, 35 TULSA L.J. 583, 586 (2000).
[11] Briget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. ON C.L. & C.R. 143, 147 (2009).
[12] Coleman, *supra* at note 6, at 61.
[13] *Id*. at 61 (citing retained potential for children of women undergoing chemotherapy or approaching middle age).
[14] *Id*. at 62.
[15] For example, *see Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006) (finding an embryo agreement valid, although parties never discussed event of divorce). *But see In re Marriage of Dahl*, 2008 WL 4490304 (Or. Ct. App. 2008) (in divorce proceeding, awarded destruction of embryos per request of wife, regardless of directive requiring written authorization from both parties before destruction).

III. Status of the Human Embryo and Reproductive Autonomy

The full discussion of the status of the human embryo is far too detailed, morally challenging, and controversial to be fully explored within the scope of this paper. Hence, only a cursory discussion is given to this matter – enough to give an understanding of the rights the courts are encountering when making embryo related decisions. For simplicity's sake, the different views of the legal status of the embryo exist on a continuum, with the most stringent being the "Right to Life" perspective, which considers the pre-embryo a person, with full rights and protections under the law,[16] to a pure property perspective, which considers the pre-embryo nothing more than tangible, personal property of the gamete providers.[17] The ethical decision taken by the government and the courts has fallen somewhere in the middle. One common stance is the embryo as something to be treated with "special respect" due to its potential to produce life.[18] This view arose out of a 1994 American Fertility Society statement, and was eventually held to be controlling in *Davis v. Davis* in the Tennessee Supreme Court, one of the first IVF cases decided.[19] *Davis*, discussed further below, held "… any interest that [the parties] have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos within the scope of policy set by law."[20]

It is this "dispositional control" that is said to be well established between the gamete providers, and courts have awarded damages for mishandling by other parties leading to theft,

[16] Dehmel, *supra* at note 5, at 1382.
[17] Fuselier, *supra* at note 11, at 162.
[18] See Coleman, *supra* at note 6, at 67-68.
[19] 842 S.W.2d 588, 596-97 (Tenn. 1992).
[20] *Id.* at 597.

misappropriation, or negligent handling of embryos.[21] The earliest example, in *Del Zio v. Columbia Presbyterian Medical Center* in 1978, the district court in New York awarded an IVF patient $50,000 when a doctor who disagreed with her efforts deliberately destroyed her incubating embryo.[22] While the damages in this case were awarded for intentional infliction of emotional distress rather than conversion (which was also claimed), the *Del Zio* court noted that the speculative nature of the conversion damages likely led the jury to "conclude, and properly so, that any damages for conversion were already included in the damages awarded for the emotional distress."[23] Hence, commentators have noted this case as the first significant implication that embryos may be classified as property.[24] In 1989, *York v. Jones* expanded this holding, finding not only a property interest in pre-embryos, but a right to determine their disposition.[25] *York* considered a disagreement between the Yorks, a couple who donated gametes and The Jones Institute, the IVF institute that created and stored their pre-embryo. The Yorks sought to have their embryo transferred from Jones in Virginia to another clinic in California, which Jones denied.[26] Regardless of a "pre-freeze agreement" which did not include transfer as a disposition option, the Court found that the relationship between the Yorks and Jones amounted to a bailment, with the Yorks retaining ultimate property rights.[27]

This dispositional control between the couple is complicated due to joint-control, with both parties having equal say in the fate of their potential offspring. This differentiation is a key difference between assisted reproduction and coital reproduction, where the mother retains

[21] John A. Robertson, *Recommitment Strategies for Disposition of Frozen Embryos*, 50 Emory L.J. 989, 991 (2001).
[22] *See Del Zio v. Columbia Presbyterian Medical Center*, No. 71-3588 (S.D.N.Y. 1978).
[23] *Id.* at 18.
[24] Lynne M. Thomas, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There be a Connection?*, 29 ST. MARY'S L.J. 255, 278 (1997).
[25] *See York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).
[26] *Id*. at 424.
[27] *Id.* at 427.

superior interest and control of the embryo because of her interest in her own body.[28] Conversely, while the IVF process is more burdensome on the potential mother than the potential father, each individual's gametes have the same reproductive interests.[29] Thus, unlike abortion, which may be unilaterally decided upon by the mother as long as the pre-embryo remains outside the womb, the potential father retains equal say in disposition.

This joint-control relates directly to the principle of reproductive or procreative autonomy. The roots of this principle lie in the 14th Amendment's concept of liberty and the fundamental right to privacy. Starting in 1942, the United States Supreme Court held that there is a fundamental right in an individual's freedom of choice in procreation.[30] After recognizing the right, the Court in subsequent cases held the inverse to be fundamental as well – preventing state statutes from overly restricting access to contraceptive devices or abortion in order to preserve an individual's decision to not procreate.[31] "Fundamental rights" analysis generally looks at disputes between an individual and the state, rather than individual versus individual, but nonetheless must be taken into account by the courts when balancing interests between parties or choosing whether or not to enforce contracts.[32]

In the aforementioned *Davis v. Davis*, the first major decision relating to a dispute between co-donors of an embryo, the Tennessee Supreme Court found procreational autonomy

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[28] John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990) at note 50.
[29] *Id.*
[30] *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (procreation recognized as a "basic liberty" when striking Oklahoma requirement to sterilize certain criminal offenders).
[31] *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking state statute preventing married couples from obtaining contraception), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (expanding *Griswold* to non-married couples), *Roe v. Wade*, 410 U.S. 113 (fundamental right of privacy expands to a woman's ability to prevent pregnancy through abortion).
[32] Lauren N. Makar, *Casenote: Fourteenth Amendment – Procreational Autonomy as a Fundamental Attribute of the Privacy Rights*, 12 SETON HALL CONST. L.J. 681, 688 (2002).

to be a deciding factor.[33] Mary Sue and Junior Davis turned to in vitro fertilization after a series of tubal pregnancies left Mary Sue unable to conceive naturally.[34] The couple attempted IVF six times in total starting in 1985 – all of which were unsuccessful, and the couple divorced in 1989.[35] At the time, seven pre-embryos remained frozen at the IVF clinic from a 1988 hormonal stimulation. At the time of divorce, Mary Sue sought control of the pre-embryos for her own personal efforts to conceive, while Junior objected and preferred they remain frozen.[36] By the time the Supreme Court heard the case, both parties had shifted positions: Mary Sue seeking to donate the embryos for use of another couple, and Junior wanting to dispose of them.[37]

After noting the pre-embryos' status as "property with special respect," the court turned to procreative autonomy. For the purposes of IVF, both Mary Sue and Junior were seen as "entirely equivalent gamete-providers," because of each person's equal potential to become parents, making the sex of the gamete provider immaterial.[38] Thus, either party's "interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood."[39] The final decision was a balance of the parties' counter-interests, Junior's experience with absentee biological parents (and subsequent opposition to fathering a non-custodial child) versus Mary Sue's desire to donate, resulting in a decision for Junior and the eventual disposal of the embryos.[40] This holding which solidified procreative autonomy within IVF disputes. However, the decision as a whole has led to two strands of analysis within other jurisdictions.

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[33] 842 S.W.2d 588 (Tenn. 1992).
[34] *Id*. at 591.
[35] *Id*. at 591-92.
[36] *Id*. at 589.
[37] *Id.* at 590.
[38] *Id.* at 601 ("None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here.").
[39] *Id.* at 603.
[40] *Id.* at 604.

IV. Legal Background

The *Davis* starting point runs down divergent paths. While the final result in *Davis* balances the interests of the two parties, its conclusion sets forth a three step analysis to resolve pre-embryo custody disputes: (1) looking first at the preferences of the progenitors; (2) next to prior agreements concerning disposition; and (3) finally to a balance of the procreative interests of the parties.[41] This next section considers the judicial framework initiated by *Davis*, and its implications on IVF.

a. *The Contract-Centric Approach*

Despite the *Davis* court's ultimate holding, the case ultimately stands for the enforcement of contracts or directives created by the two gamete-providers prior to production of the embryos. In *Kass v. Kass* in 1998,[42] the then married couple underwent ten unsuccessful IVF procedures over three years, costing over $75,000.[43] Before the final egg retrieval, the first which involved cryopreservation of any embryos, the couple signed two informed consent forms – one titled "In Vitro Fertilization and Embryo Transfer," and the other "Cryopreservation Statement of Disposition" – which together consented to retrieval and cryopreservation, and gave the couple ultimate decision on disposition.[44] The agreement specifically contemplated divorce,

[41] *Davis*, 842 S.W.2d at 604.
[42] 91 N.Y.2d 554 (1998).
[43] *Id.* at 558, 560.
[44] *Kass* at 558-560.

stating that the embryos would be determined through the property settlement.[45] The second form contained a number of options for disposition of surplus embryos, and directed the couple to initial next to their chosen disposal method, which at the time, was indicated to be release of the embryos to the IVF facility for research purposes.[46] Three weeks later, the couple divorced and executed an "uncontested divorce agreement" directing that the pre-embryos would be disposed of in the manner outlined in the consent form.[47] Three weeks after that, the wife wrote a letter to the IVF physician opposing the destruction, then commenced the action for custody to eventually try again for a child; an action opposed by the husband, who preferred to abide by the agreement.[48]

Citing *Davis* as requiring a balancing test *in the absence* of a prior written agreement, *Kass* held that: "Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."[49] The *Kass* holding serves four public policy goals[50]: (1) avoidance of (potentially immeasurably) costly litigation; (2) lessening confusion related to procreative liberty by allowing the decision to be made ahead of time; (3) proficient administration of IVF programs; and (4) compulsion of the parties to consider the implications of IVF thoughtfully.[51] Thus, the Court's analysis centered upon general contract law, which determined that the IVF consent form clearly and unequivocally expressed the intent to donate the embryos for research when the parties could not agree on the disposal method.[52]

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[45] *Id.* at 559.
[46] *Id.* at 560.
[47] *Id.*
[48] *Id.*
[49] *Id*. at 565.
[50] Makar, *supra* at note 32, at 693.
[51] *Kass* at 565-66.
[52] *Id*. at 569.

Courts in Oregon, Texas, and Washington followed the contract-centric approach from *Davis* to *Kass*, considering that agreements made prior to cryopreservation are to be upheld when present.[53] Further, the state of Florida, the only state to have passed embryo-dispute related legislation, embraces the contractual approach and directs couples and physicians to enter into written agreements for disposition in event of "divorce, the death of a spouse, or any other unforeseen circumstance."[54] Professor John Robertson, a leading authority on the legality of alternative reproduction topics,[55] asserts that the contractual approach is the only way to protect procreative autonomy interests in embryo disputes.[56] Otherwise, the decision lies in the hand of the state, the IVF clinic, or the judiciary, which opens the door to insufficient valuation of the reproductive concerns of the individual.[57] The analogy used is to living wills and donor cards, advanced directives to protect one's interests and autonomy in future events where the individual is unable to decide.[58] Coupled with this, Robertson cites administrative efficiency, decrease in disputes over embryo distribution, and less costly litigation as further benefits of the contractual approach.[59]

[53] *See In re Marriage of Dahl*, 2008 WL 4490304 (Or. Ct. App. 2008) (holding that signed agreement at time of embryo creation making wife the primary decision maker was valid and ordering embryos destroyed per her request); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. Houston 1st Dist. 2006) (holding that agreement initialed by parties for destruction of embryos upon divorce but not discussed between the parties was valid and enforceable); and *Litowitz v. Litowitz*, 146 Wash.2d 514 (2002) (holding contract with fertility clinic directing thawing and disposal of embryos after five years and reversing a lower court decision ordering custody of embryos to husband because wife did not donate eggs used).
[54] FLA STAT § 742.14
[55] Coleman, *supra* at note 6, at 75.
[56] John A. Robertson, Prior Agreements for Disposition of Frozen Embryos, 51 OHIO ST. L.J. 407, 415 (1990).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 417-18.

b. ***The Balance of Interests Approach***

In 2000, after *Kass*, two cases diverged from the contract-centric path, based on the ultimate decision that agreements to enter into familial relationships should not be enforced when a party subsequently reconsiders his or her decision.[60] The first was Massachusetts' *A.Z. v. B.Z.*[61] The couple in *A.Z.* underwent in vitro fertilization procedures from 1988 to 1991, resulting in twins.[62] For the remaining frozen pre-embryos, the couple executed a number of consent forms, which noted that the disposition, if the couple should separate, would favor the wife for eventual implantation. Shortly before their separation in 1995, the wife, who could not conceive naturally, unilaterally had one of the vials of frozen embryos thawed.[63] The couple then divorced, with one vial of four pre-embryos remaining in storage, which the wife sought to attempt to use for production of another child, per the consent forms, and husband opposing.[64]

The Massachusetts court, citing *Kass*, refused to uphold the disposition provision in the consent forms and award the pre-embryos to the wife. The holding was twofold. The first analysis rejected the consent form itself as "legally insufficient in several important respects" and not "approach[ing] the minimal level of completeness needed to demonstrate it as enforceable contract in a dispute between husband and wife."[65] Of the five reasons cited, three dealt with specifics of the individual case (the consent form lacked a duration period, used the

[60] Elizabeth A. Trainor, 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).
[61] 431 Mass. 150 (Mass. 2000).
[62] *Id*. at 152.
[63] *Id.* at 153.
[64] *Id.*
[65] *Id*. at 159.

term "separated" and not "divorced," and doubt existed as to whether the husband's signature constituted his actual intent).[66]

The two others were representative of IVF consent forms more generally, such as the ones used in *Kass* and its progeny. First, the consent form's primary purpose was to explain to the donors risks and benefits of freezing and provide guidance to the clinic "if the donors (as a unit) no longer wish to use the frozen pre-embryos," thus making it a definition of the relationship of the clinic and the parties rather than a directive between the parties themselves.[67] Secondly, the consent form was not a separation agreement, nor did it anticipate custody, support, or maintenance for the potential offspring.[68]

The second analysis related to procreative autonomy, stating that even if the directive itself had been sufficiently enforceable, the court "would not enforce an agreement that would compel one donor to become a parent against his or her will."[69] As a principle of public policy, this consideration would be enough to outweigh an individual's freedom of contract. Cited were several state cases which adopted the holding that a court would not enforce a prior agreement to bind individuals into future familial relationships upon reconsideration of that decision.[70] This balancing test thus sided squarely with the husband.

Just three months later in 2000, the Superior Court of New Jersey decided *J.B. v. M.B.*[71] Again, upon husband and wife's divorce, pre-embryos created for the purposes of IVF were in contention, with the husband preferring to either keep the embryos in storage for possible future use between him and another woman, or in the alternative donated to another couple for use, and

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[66] *Id*. at 158-59.
[67] *Id.* at 158.
[68] *Id*. at 159.
[69] *Id.* at 160.
[70] *Id.* at 161.
[71] 331 N.J. Super. 223 (2000).

the wife seeking to have the embryos destroyed. The couple's consent form directed relinquishment under the circumstances of dissolution of marriage, among other things, however the husband sought to introduce evidence that the wife had agreed to donate to another couple in that event.[72] Noting the *Davis*/*Kass* path, the court ultimately relied on the *A.Z.* rationale and concluded that a contract to procreate was in violation of New Jersey public policy.[73] Again, disposition of the embryos relied on balancing interests – the wife's interest in not producing offspring versus the husband's interest in doing so. And also again, the interest in procreative autonomy prevailed.[74]

However, to say that balancing tests purely weigh the interests of procreative autonomy would be a misstatement. In both *A.Z.* and *J.B.*, as well as in their progenitor *Davis*, the court was apt to point out other ways in which the balancing test was influenced based on the circumstances of the party. First in *Davis*, while eventually finding that greater procreative autonomy interests in not having a child allowed a potential father to block transfer for use to another couple, the court stated: "The case would be closer if Mary Sue Davis were seeking to use the pre-embryos herself, but only if she could not achieve parenthood by any other reasonable means."[75] The assumption here seems to be that procreative autonomy interests in not becoming a parent may be outweighed by the other party's interest in having a child, when the disputed pre-embryos offer that party their only chance at reproduction. This theme continued in *J.B.*, where the husband sought to gain custody of the pre-embryos for later use or donation, as the court recognized that "enforcement of the wife's right [not to procreate] would

[72] *Id.* at 227.
[73] *Id.* at 234.
[74] *Id.* at 235.
[75] *Davis*, 842 S.W.2d at 604.

not seriously impair the husband's right to procreate," because the husband remained fertile.[76] Professor Robertson, cited above, sees this as a large exception – enforcement of an agreement only in the case that a party is infertile at dispute.[77] This would skew future decisions toward honoring the wishes of the female partner, as women are more likely than men to have become infertile due to age by the time disputes arise.[78] The problem of "unwanted parenthood" then still applies.

c. *Other Options*

Besides the two main approaches applied by the Courts, academic commentators have noted a variety of other options of varying efficacy. One would be a unilateral approach giving the female gamete donor the ultimate decision making power. This was the trial court's original holding in *Kass v. Kass*, which (even in light of the *Davis* decision) gave the mother full control of the pre-embryos for implantation.[79] The basis of the holding was that there was no difference for the male partner between in vitro and in vivo fertilization, and just as the U.S. Supreme Court had held that a potential father cannot compel abortion or force conception, the mother's procreative rights would be superior in IVF.[80] Despite the overruling of the trial court's holding in *Kass* at the appellate level, some for this approach support still exists. The rationale, again analogous to coital reproduction, is that the woman's interest is inherently greater because

[76] *J.B.*, 331 N.J. Super. at 232.
[77] Robertson, *Recommitment Strategies*, *supra* at note 9, 1014.
[78] *Id*. at 1015.
[79] *Kass v. Kass*, N.Y. L.J., Jan. 23, 1995 (N.Y. Sup. Ct. 1995).
[80] *Kass* Trial Ct. at 34. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (struck down spousal consent to abortion).

egg retrieval is a more invasive process than sperm donation.[81] The embryos are thus more valuable to the woman, and "more essential to her capability to become a parent."[82]

Automatic direction of disputes to the partner who seeks to use the embryo, as well as automatic destruction upon disagreement exist as well. The former can rely either on moral groundings (that pre-embryos, as life, deserve to come to term) or "implied contract" grounds – that undergoing IVF creates an implied contract to use the embryos to have a child, despite a revocation of that decision later.[83] The latter is a hard and fast bright line rule, considered a "price of the progenitors' freedom and mutual dependence."[84] The difference between the two is whose procreative rights should be given greater weight; however they both work best when the dispute relates to use by one partner versus non-use, and may miss completely certain options (for example, if the partner who chooses bringing the embryos to term should control, who wins when one prefers disposal and the other donation to a research facility?). Lastly, a proposed solution to these dilemmas is the "mutual consent" approach, requiring the couple to come to an agreement before the IVF clinic does anything with the pre-embryos.[85] This protects a partner's procreative autonomy to avoid the creation of an unwanted child, but is likely to result in a greater number of pre-embryos left in limbo within IVF clinics.

V. The Veto Approach – The Best of Both Worlds

The jurisdictional separation down either line of the *Davis* holding leads to unpredictability. A couple outside of these few particular states that have made decisions on the

[81] Coleman, *supra* at note 6, at 79.
[82] Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1074 (1996).
[83] Coleman, *supra* at note 6, at 76.
[84] *Id*. at 80.
[85] *Id*. at 87.

issue are more than able to make directives concerning the disposition of their frozen pre-embryos, but will be faced with uncertainty as to whether this decision will be upheld, or stricken for state public policy reasons. The thrust of this paper is to meld the divergent *Davis* lines in a way that both protects the ability of the parties to decide aspects in the future, while retaining the procreative right not to procreate. The result is a "veto" framework – allowing a couple to veto a previously made decision in a contract, directive, or advanced agreement when that prior decision would result in procreation. The veto would work as such: upon a dispute between parties related to frozen pre-embryos, the court will first look at any directive, if it exists between parties, and enforce it as necessary through general contract law. However, when a directive will result in the conception of a child – either by implantation within the female party or the current partner of the male party, by implantation into a surrogate, or donation to another infertile couple – and one party now disagrees with that directive, the change in circumstances and overarching public policy considerations of procreative autonomy will allow the party to revoke his or her consent. Directives that will not result in offspring (donation for research purposes, thawing and disposal, or continued storage at the IVF facility) cannot be revoked, as they lack these policy considerations. Upon the death of one party, the court will operate as if no revocation was made by the deceased, and thus the directive will be followed. This approach is supported by three assumptions reflected in the *Davis* progeny, and makes for a more workable model of handling such disputes.

a. *Three Assumptions*

i. *Distinct to the IVF world, "conception" and the "decision to procreate" occur at different times.*

The practicality of in vitro fertilization – the invasiveness of egg extraction, the somewhat unreliability of implantation, and the ability to freeze pre-embryos for future – all give an incentive to both the potential parent and the IVF clinic to produce more pre-embryos than the parent would likely want to bring to term. Because hormonal stimulation produces a lesser number of eggs than sperm available to fertilize, the number of eggs produced generally determines the number of pre-embryos a clinic will make. For example in *Davis*, the pre-embryos frozen were a result of a hormonal stimulation of higher than average production.[86] That is not to say that a couple could not take active control over the amount of pre-embryos that would be created, then implanted or frozen, but that it makes more practical and economical sense to produce pre-embryos from the available gametes and delay the decision of whether to eventually implant for a time after the couple knows the outcome of early rounds of IVF.

This delayed decision making power supports the rationale that "conception" (meaning the joining of male and female gametes) and the "decision to procreate" occur at two separate and distinct times. With conception occurring outside the body in a laboratory, the couple knows that they will not begin to produce a child at that time, but at the time of implantation. For example, a couple may begin IVF treatments by extracting gametes and "conceiving" pre-embryos, then run into life circumstances for which having a child at that moment would be inconvenient. The couple could delay the implantation a few months, then schedule implantation, thus making the affirmative decision to procreate. Or they could choose not to follow through at all. Compare this flexibility with coital reproduction, where no such process would allow for the delay of this decision. Thus, future courts should recognize these as two

[86] *Davis*, 842 S.W. at 592.

separate events, knowing that IVF patients often do not have the intent to procreate, even after conception.

This assumption directly refutes the aforementioned implied contract theory, where the induction into an IVF program implicitly agrees to procreate.[87] Under the veto theory, the court will recognize that no decision to procreate has been made, only a decision to conceive an embryo. From a procreational autonomy standpoint, the veto approach reflects the implicit thoughts of the parties entering IVF – the notion that they are not producing a child at conception, but at implantation. A framework which characterizes this decision as having been made at the outset of IVF treatment, at the deposit of gametes, or at conception does not recognize that biologically, the offspring is not being incubated yet, nor does it recognize that by mutual consent, the couple can back out of the treatment. By waiting until implantation to consider that the individuals have actively decided to procreate is better reflective of the realistic circumstances of the in vitro fertilization process.

ii. *Change in the relationship of the parties is*, per se*, a significant change in circumstances to allow for preconception agreements to be altered.*

Following a recognition that conception occurs at Time A, and the decision to procreate occurs at Time B, in the same way that a couple by mutual consent may back out of continuing IVF procedures when significant changes arise, one party unilaterally may also back out of their prior decision to produce offspring upon a significant change such as divorce, separation, or other breakdown of the relationship. With this assumption in mind, a Court should analyze precommitment agreements skeptically, as a directive made under and for the purposes of circumstances that no longer exist. The background of this assumption can be traced to *A.Z. v.*

[87] *Coleman*, supra at note 6, at 77.

B.Z's initial trial court opinion.[88] The judge in the *A.Z.* trial court decision concluded that "no agreement should be enforced in equity when intervening events have changed the circumstances such that the agreement which was originally signed did not contemplate the actual situation now facing the parties."[89] Using this rationale to invalidate the directive to give the remaining pre-embryos to wife, the court was left to balance the interests of the parties.[90]

This assumption directly strikes against the *Davis* dictum and the conclusion in *Kass*. *A.Z.* circumvented around these holdings simply by mentioning in a footnote that "we do not necessarily subscribe to the views expressed in those decisions."[91] However, there is some support within the contract-centric approaches for the invalidation of precommitment agreements. Footnote four of the *Kass* opinion states "Parties' agreements may, of course, be unenforceable as violative of public policy. Significantly changed circumstances also may preclude contract enforcement. Here, however appellant does not urge that the consents violate public policy, or that they are legally unenforceable by reason of significantly changed circumstances."[92] The facts show why the appellant (in this case, the wife seeking to reproduce from the frozen embryos) wouldn't bring a changed circumstances argument – it likely would work against her case to argue that the destruction of the marriage changed the circumstances surrounding IVF in a way that would support production of a child, despite a directive stating the opposite.

Altering the facts of *Kass* may provide a better illustration of why the policy of equitable alteration of pre-embryo precommitment agreements is the optimal solution for a court faced with such a dispute. Instead of a directive to donate the embryos for research purposes, assume

[88] 431 Mass 150.
[89] *Id*.
[90] *Id*.
[91] *A.Z.*, 431 Mass 150, 157 n. 19.
[92] *Kass*, 91 N.Y.2d 554, 565 n. 4.

the directive states that any remaining pre-embryos are the property of the husband to use within his sole discretion, and the wife seeks to block this provision, which may result in the production of children by implantation into a surrogate or the husband's new partner. Under these facts, arguing a changed circumstance defense is logical. Wife would state that the directive when originally signed contemplated giving the husband discretion for use between the two original partners only. The wife's consent was given under the assumption that his discretion would provide for a child raised by the couple together, rather than one raised by the husband himself. Perhaps circumstances exist as in *Davis*, where the wife's personal experience strongly opposes the placement of a child in a home without both biological parents. Would the *Kass* court have concluded that the contract should still apply? Footnote four seems to suggest no, or at least stand for the proposition that there would at least be some effect upon the court's holding.

A judicial analysis that would allow a veto over active reproduction would not only better reflect the intent of the parties in the case of such changed circumstances, but also provide similar stability as compared to a contract approach, thus giving the couple the best of both options. The main argument supporting a contract-centric judicial theory is mutual reliance: the couple makes contract together, states their current desires for disposal, and then can trust that this statement of intent will be honored.[93] However, the veto approach allows for this same aura of stability in a different way. While a contract may be invalidated in certain parts, the couple should be well aware of their ability to make such changes when executing the document. Thus, any provisions allowing for the creation of a child at a later date are made with the knowledge that it can be changed with unilateral action. Such knowledge should reinforce the weighty decision that the couple is making, allowing for various secondary options to be listed should one

[93] Robertson, *supra* at note 9, at 1002.

party choose to take advantage of their veto and decisions to be made in reliance with the new judicial framework.

iii. *Procreative autonomy directs the legal system to place the interests of the spouse not in favor of procreation over the interests of the favoring spouse*.

If precommitment agreements should only be selectively enforced based on the relevant provision, there needs to be some overarching principle that directs which agreements should be retained and which should be disposed of. That principle is procreative autonomy: the right of an individual to control whether or not he or she will produce offspring. So which of the two should receive greater value? The veto approach, rather than balancing interests, relies on the presumption that the procreative autonomy of the party desiring not the reproduce should always win, regardless of the sex of that party or the overarching circumstances. Rather than a balancing of the individual interests of the parties, a court will have a strict analysis to follow.

So, first and foremost, why should the interests of the non-reproductive parent trump the interests of the other, who seeks to make use of the embryos? Simply, it is because forced parentage should not be required. The roots here lie once again in *Davis*, which determined through a balancing test that avoidance of procreation should prevail.[94] In making this holding, the court stated that the experience of reproduction "…must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood," noting both the "possible financial and psychological consequences."[95] Every case that has administered a balancing test after *Davis* has come to this same conclusion.[96] As mentioned before, *Kass* honored a contract partly because the contract was not forcing parentage, thus the

[94] *Davis*, 842 S.W.2d 588, 601, 603.
[95] *Id.*
[96] *See A.Z. v. BZ*, 431 Mass. 150 (1999) *and J.B. v. M.B.*, 331 N.J. Super. 223 (2000), *infra*.

public policy decision never arose.[97] The precedent is clearly evolving into one that denies forcing parentage, even in cases when this decision was made through other means.

A second rationale for valuing the decision not to procreate over the decision to procreate goes to the heart of the in vitro fertilization process itself. IVF, as of the current technology, is still a risk – meaning that the possibility that it won't work still remains. A couple entering treatment will be aware, via the consent forms they sign, that even despite their five-figure investment and full compliance with the program, a child may not result. IVF is an option that gives those who otherwise could not produce the chance to have a child. The fundamental right of reproduction goes so far as to allow everyone *the chance* to reproduce and pass on their genetic material,[98] but does not say that everyone is deserving of a child. In essence, this means that the potential psychological detriments to a potential parent who cannot reproduce are a risk our society is willing to take. It follows from this rationale that an IVF patient, who upon the end of a relationship is met with opposition from the fellow gamete donor in his or her decision to use their pre-embryos does not have the same right to procreate. IVF gives one the opportunity at genetic offspring they would not otherwise have, not the right to reproduce, and thus it makes sense that a parent who seeks to preserve procreative autonomy by not reproducing should win a dispute of this nature.

The second question to ask is why a "veto" is even necessary. If *Davis* and its progeny have continually employed balancing tests, and each balancing test arrives to the same conclusion to not force parenthood upon an individual, why do we need a veto? The answer here is to look at what not only *Davis*, but also the other balancing test cases, *A.Z.* and *J.B.*, leave open to interpretation. While each put the most weight on the right of a party not to reproduce

[97] *Kass*, 91 N.Y.2d 554, 565 n. 4.
[98] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

within the balancing test, other confounding factors contributed, which may swing a future decision in the other direction, and impose parenthood on an unwilling party. *Davis* was specific in this distinction, stating: "The case would be closer if Mary Sue Davis were seeking to use the pre-embryos herself, but only if she could not achieve parenthood by any other reasonable means."[99] *J.B. v. M.B.* was less explicit with its balancing test, but reinforced the same notion that "balancing the interests" would include weighing a party's inability to genetically reproduce without the embryos.[100] Ending the balancing test would close this loophole in the name of procreative autonomy and the right to prevent conception using one's own genetic material.

This veto power would reconcile a problem many skeptics used to criticize the *A.Z* and *J.B.* line of cases and used to support precommitment directives:[101] it would allow for greater predictability for the couple. Predictability comes from the fact that the original gamete donors may be able to give their consent to certain non-reproductive matters, and at least give some idea of what they believe their wishes will be in the future with respect to procreation, but not be forced into parenthood if these wishes change. For this reason, provisions in a contract related to non-procreative matters should be held binding by a court. For example, if a couple directs in a consent form that they desire to donate their surplus pre-embryos to the IVF clinic for further scientific research, a later dispute related to the embryos would be held to the contract. However, if that directive stated that the embryos would be eventually used for a procreative purpose, either given to one party to produce a child, or donated to another infertile couple, upon a revocation of one's consent, the court will not enforce the contract. Knowing these principles before entering IVF would result in predictability: the couple would know in advance their

[99] *Davis*, 842 S.W. 588, 604.
[100] *J.B.* v. *M.B*, 331 N.J. Super. 223, 232 ("Recognition and enforcement of the wife's right would not seriously impair the husband's right to procreate. Though his right to procreate using the wife's egg would be terminated, he retains the capacity to father children.").
[101] Robertson, *Recommitment Strategies*, *supra* at note 9, 1004.

options. The difference between scenario A and scenario B above is only the fate of the embryos, however assuming that (1) procreative autonomy should favor preventing forced parenthood and (2) that a party who has conceived an embryo through IVF has not yet made a decision to procreate, it is only in scenario B where the court has the justification to strike the directive. These two rationales are absent from scenario A, and thus directives to those respects should not be altered.

VI. Conclusion

Relying on the three preceding assumptions, the workability of various jurisdictions' methods of settling disputes related to frozen embryos is suspect. Further, as the field expands, such disputes are likely to recur in those jurisdictions which have encountered such issues, and expand into jurisdictions without any settled judicial framework. Therefore, it is vital to develop a simple and stable model to settle such problems, and give couples who choose IVF some idea of what their expectations should be.

The veto approach would solve the problems of instability and promote an individual's freedom to contract, while also reflecting the intent shared by most IVF patients due to the practical necessities of developing surplus pre-embryos. This increased stability would be the greatest change. Currently, a couple would have to look at the prior case law of their particular jurisdiction, deduce whether that court will follow the *Davis* to *Kass* contract-centric approach or the *Davis* to *A.Z.* and *J.B.* balancing test approach, then consider how their individual case will hold up depending on the applied analysis. Of course, this assumes the jurisdiction has taken such a case before. With such little precedent, even if one IVF dispute-resolution model has

been favored, the particularized circumstances of the couple, perhaps some not encountered previously, may swing the holding one way or another. By adopting the veto approach, a jurisdiction is directed in its decisionmaking based on the circumstances in a clearly defined way. Directives are thus given greater weight, as their efficacy is guaranteed under most, non-procreative circumstances, while also upholding procreative autonomy interests. Under this analysis, the veto approach successfully melds the two developing lines of court decisions related to in-vitro fertilization disputes in a practical way.