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Preserving Procreative Potential with a SmART Prenuptial Agreement

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PRESERVING PROCREATIVE POTENTIAL WITH A SMART PRENUPTIAL AGREEMENT

*Lynda Wray Black**
*Chelsea E. Caldwell***

“The significant problems we face cannot be solved at the same level of thinking we were at when we created them.”¹

ABSTRACT

Historically, the paradigmatic prenuptial agreement was crafted for the protection of wealth in anticipation of marriage to an economically disadvantaged party. The premarital agreement’s parameters extended only to financial assets; public policy barred the future spouses from anticipatorily addressing issues of child custody. Thus, the subject matter of the prenuptial contract (both historically and presently) fits nicely into the bright line legal divide between property and person.

The science behind assisted reproductive technology (ART) has dimmed the property/person distinction. A couple may hold legal title to embryos carefully designed from the woman’s eggs and her partner’s sperm. These embryos are not children but are something more than mere property. Courts face a modern-day Sophie’s Choice when one party’s desire to activate the embryos’ procreative potential through implantation conflicts with the other party’s intent to forestall the same. Unlike the best-interest-of-the-child standard which balances competing parental interests in a custody conflict, a best-interests-of-the-embryo standard would always favor use over non-use and, therefore, fails to value the reproductive choices of the parties. It is well established in law that the embryo is not a child. Rather, the embryo is akin to an indivisible property interest whose future use (or not) will be decided by the one to whom title to the interest is awarded.

The prenuptial agreement is well suited to provide a binding pre-conflict resolution of hypothetical conflicts occurring well into the future marriage of

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¹ Albert Einstein was a German-born theoretical physicist on whose theories the field of modern physics rests. *Albert Einstein*, QUOTES, <https://www.quotes.net/quote/9226> (last visited Aug. 5, 2020).

the parties. Accordingly, the authors propose expanding prenuptial agreements to include historically unincorporated property, namely, cryopreserved embryos, eggs, and sperm. Repurposing a time-tested contract for the *ex ante* protection of reproductive marital property interests is facially gender neutral, but in practice the smART prenup would lessen the biological gender divide stemming from the female's shorter window for procreation.

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I. INTRODUCTION

Why did they have to look so perfect? Roxana thought to herself, as she stared at the oversized framed portrait of sleeping newborn twins. The countless photos of babies—singles, twins, and the occasional triplets—made the room feel a little less clinical and depicted the silent hopes of all present. But deep below her hopes, Roxana knew that joy and disappointment were equally probable outcomes. As the door swung open, she was startled

by the sound of her name, “Roxana Joseph!” She yanked at Dean’s sweatshirt, motioning for him to follow—separating him from the travel magazine that he reluctantly tossed into his chair. A nurse led Roxana and Dean down the long hallway to the examination room; Dr. Rose would be with them shortly. All too familiar with this place, the two sat in silence. The thicket of emotions left no room for words. All had been said. Neither dared validate the fear nor jinx the hope. Roxana stared blankly at the monitor hanging on the gray wall by the sink, thus far only a stage for lifeless looking follicles. Roxana breathed a quick prayer that the morning injections of her now daily routine would produce the elusive heartbeat. Tomorrow, they will know.

The door handle turned; Dr. Rose entered the room. “Hello!” she said with a warm smile. “Are you ready?” “Yes, just nervous,” Roxana collectedly replied. Dr. Rose explained the rather quick procedure under light intravenous sedation, by which Dr. Rose and her assistant would retrieve the mature eggs from Roxana’s ovaries. If the fertility drugs were effective, the number of mature eggs harvested should approach fifteen.² Once fertilized with Dean’s sperm, the eggs would become embryos. And, after several days, the healthy embryos would be cryogenically preserved.³ “Fifteen,” whispered Roxana, as she gently squeezed Dean’s hand. Following medical protocol, Dr. Rose handed Roxana and Dean a “clinic directive.”⁴ Glancing over the lengthy paragraphs of legal jargon printed minutely on the mandatory form, Dr. Rose sighs, “[t]his is all Greek to me,”⁵ and points them to the one

² Sesh Kamal Sunkara, Vivian Rittenberg, Nick Raine-Fenning, Siladitya Bhattacharya, Javier Zamora & Arri Coomarasamy, *Association Between the Number of Eggs and Live Birth in IVF Treatment: An Analysis of 400 135 Treatment Cycles*, 26 HUM. REPROD. 1768–74 (2011), <https://academic.oup.com/humrep/article/26/7/1768/2913935>; see also Amanda Chan, *For Successful In Vitro Fertilization, Women Should Harvest 15 Eggs*, LIVESCIENCE (May 30, 2013), <https://www.livescience.com/35680-optimal-number-eggs-harvest-ivf.html>.

³ Cryopreservation is the sustaining of cells by freezing at a very low temperature. American Society for Reproductive Medicine, *Cryopreservation and Storage*, REPRODUCTIVEFACTS.ORG, <https://www.reproductivefacts.org/topics/topics-index/cryopreservation-and-storage/> (last visited Aug. 5, 2020). Cryogenic preservation of embryos, more commonly referred to as embryo freezing, is a flash freezing process by which the water is removed from an embryo and the remaining cells are placed into liquid nitrogen. Korin Miller, *Is It Better to Freeze Eggs or Embryos?*, CCRM FERTILITY (Oct. 17, 2017), <https://www.ccrmivf.com/news-events/freeze-eggs-embryos/>.

⁴ *Disposition of Embryos Declaration of Intent*, UNIV. OF ROCH. MED. CTR., <https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/fertility-center/documents/disposition-of-embryos-declaration.pdf> (last visited Aug. 5, 2020) (providing an example of a six-page clinic directive called a “Declaration of Intent”).

⁵ Originally coined by Shakespeare, this idiom now references anything too difficult to decipher by the average reader. Notwithstanding the importance of medical consent forms, such forms often are presented to patients without a thorough medical, much less legal, explanation. The signing of a consent form has become one of many items on the clinic’s check list. M. Cristina Magli, Etienne Van den Abbeel, Kersti Lundin, Dominique Royere, Josiane Van der Elst, & Luca Gianaroli, *Revised Guidelines for Good*

important detail that the clinic must know before proceeding, namely, which of them will hold the authority to direct the storage or usage of their embryos in the event of their divorce.⁶ With a cheerful goodbye, Dr. Rose instructs them to return with the signed form for tomorrow's procedure.

Roxana and Dean were in no rush to have children when they married several years ago; however, the past thirty months of trying to conceive have made thirty-five-year-old Roxana increasingly anxious over their inability to get pregnant. "We are so healthy. How can we be infertile?" The word itself stings as Roxana reluctantly admits its applicability.⁷ Already disappointed

Practice in IVF Laboratories, 23 HUM. REPROD. 1253, 1256 (2008), <https://academic.oup.com/humrep/article/23/6/1253/585867>.

⁶ Often the authority to direct storage or usage of stored embryos is buried within a lengthy document. For example, the language quoted below appears on page eight of a nine-page consent form for Family Fertility Center in Bethlehem, Pennsylvania:

CONSENT TO CRYOPRESERVATION AND STORAGE OF HUMAN EMBRYOS

C. Divorce or dissolution of relationship

In the event of a divorce or dissolution of the relationship between the two joint owners of the embryos during the period of storage, we agree that absent court decree or settlement agreement in writing between both parties to the contrary, our cryopreserved embryos will not be released to one of the partners or their representative, appointee, or assignee for any purpose without the written consent of **both** of us.

We further agree that a settlement agreement in writing signed by **both** of us OR a court decree will be presented to the Family Fertility Center directing the disposition of all the frozen embryos. This may entail maintaining the embryos in storage, and the fees and other payments due the clinic for these cryopreservation services.

Signature of partner/individual _____ Date _____

Signature of partner _____ Date _____

Ha-Lin Christina Lee, *Consent to Cryopreservation and Storage of Human Embryos*, FAM. FERTILITY CTR. 8 (2020), <https://familyfertility.com/wp-content/uploads/2020/04/2-Consent-to-Cryopreservation-Storage-of-Human-Embryos-20180528.pdf>. The authors are attorneys with personal and professional expertise in the field of assisted reproduction. Nevertheless, deciphering the typical clinic directive is a tedious endeavor. In addition, the authors note that the website of Family Fertility Center contains twenty-five separate ART consent forms. *Consent Forms*, FAM. FERTILITY CTR., <http://familyfertility.com/contact-us/consent-forms/> (last visited Aug. 5, 2020).

⁷ The World Health Organization defines infertility as "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse." *Infertility Definitions and Terminology*, WORLD HEALTH ORG., <https://www.who.int/reproductivehealth/topics/infertility/definitions/en/> (last visited Aug. 6, 2020) [hereinafter *Infertility Definitions and Terminology*]; see also American Society for Reproductive Medicine, *Defining Infertility*, REPRODUCTIVEFACTS.ORG, <https://www.reproductivefacts.org/news-and>

by several unsuccessful intrauterine inseminations, in vitro fertilization is the next step in their infertility journey. With all sexual relations planned and timed to maximize the probability of pregnancy, intimacy bears the unspoken pressure of procreation. While the burden of infertility weighs upon them both, Roxana's burden is no doubt heavier than Dean's.⁸

The stress of infertility can lead to mental and marital discord.⁹ While both the marriage and divorce rates in the United States have decreased over the last ten years,¹⁰ the percentage of marriages that will end in divorce has remained at approximately forty percent.¹¹ After a multi-year struggle with infertility, Roxana and Dean's marriage becomes a statistic. Amidst their divorce mediation,¹² the attorneys discover their remaining frozen embryos and the signed clinic directive which grants Dean the authority over the embryos—a designation made hastily, without due consideration and without legal advice. Roxana, now forty years old, faces losing the embryos which embody the only real chance she has of having her biological child.¹³ Signed under stress and among a myriad of health-related forms and releases, the boilerplate clinic directive emerges as the controlling document for the now contested frozen embryos. What irony for the impregnable Roxana to face an impregnable clinic directive.

Roxana and Dean could have addressed frozen embryo disposition in a self-settled contract, but planning for frozen embryo disposition is not standard legal advice to couples from either the family lawyer or the estate

publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/defining-infertility/ (last visited Aug. 6, 2020).

⁸ Macaela MacKenzie, *Why Aren't Men Talking About Fertility?*, GLAMOUR (Apr. 22, 2019), <https://www.glamour.com/story/why-arent-men-talking-about-fertility> ("The fertility conversation feels distinctly female.").

⁹ The leading causes of divorce might not be scientifically proven; however, there is ample sociological evidence supporting conflicts over money and a lack of intimacy as frequent causes of marital strife. Jason Crowley, *What Are Common Reasons for Divorce?*, SURVIVE DIVORCE (Apr. 10, 2021), www.survivedivorce.com/common-reasons-for-divorce. Both issues are faced by the infertile couple. See generally Leslie Buckle, Gordon G. Gallup Jr. & Zachary A. Rodd, *Marriage as a Reproductive Contract: Patterns of Marriage, Divorce, and Remarriage*, 17 ETHOLOGY & SOCIOBIOLOGY 363 (1996).

¹⁰ *U.S. Marriage and Divorce Rates by State: 2008 & 2018*, U.S. CENSUS BUREAU (Jan. 15, 2020), <https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state.html>.

¹¹ *Marriage & Divorce*, AM. PSYCHOL. ASS'N, <https://www.apa.org/topics/divorce/> (last visited Aug. 6, 2020).

¹² Every domestic law intake form should include a question about fertility treatments, the location of any cryopreserved reproductive material, and the existence of any signed clinic directives, copies of which should be requested.

¹³ Noting the procreative potential within a cryopreserved embryo, author Elissa Strauss dubs it a "maybe baby." Elissa Strauss, *The Great Frozen Embryo Debate*, GLAMOUR (Oct. 11, 2018), <https://www.glamour.com/story/frozen-embryo-debate-human-life-or-cells> [hereinafter *The Great Frozen Embryo Debate*].

planner. Nor is it standard medical practice during treatment for infertility to refer the patient(s) to legal counsel for guidance on the execution of consent forms. In fact, from the medical perspective, the couple represents a solidary unit. As long as the liabilities of the clinic are minimized through a clinic directive drafted to answer the “who” and the “what” terms of embryo preservation, storage, and disposition, the lawyer’s contribution to the fertility journey appears to be satisfied.¹⁴ The ethicists have contributed much to the nuances of frozen embryo disposition by posing the “whys” and asking the “shoulds” of embryo preservation as the scientific “cans” within assisted reproductive technology (“ART”) research and practice outpace established social policy.¹⁵ But until now, the “where” and “when” of the embryo disposition decision making process has escaped proper scrutiny. The time is at hand for practicing attorneys to recognize proactively and preemptively their quintessential role in planning for and preventing frozen embryo disputes. The estate planning or family law practitioner can add another vantage point to that of the clinic’s desire for immunity and ethicist’s big picture questions. The expectations of the owners of the cryogenically preserved reproductive property can be prioritized within standard legal practice in a readily available legal form.

As thirty-something professionals, Roxana and Dean did consult legal counsel during their engagement. They signed a standard prenuptial agreement to document their individual property rights and reduce costly litigation over property division should their dreams of a forever future fizzle. The familiarity of the premarital agreement within legal practice has removed the sting of its being an omen for divorce. Rather, the prenuptial agreement

¹⁴ “The clinic” as such does not care whether the embryos are left frozen, used, donated, or discarded as long as the clinic bears no liability for following the terms of the directive and continues to be paid for any ongoing services. A quick perusal of typical clinic directives will reveal that the protection of the clinic is the paramount concern addressed by the directive, which was certainly prepared and reviewed by counsel for the clinic. A typical directive authorizes the clinic to destroy stored embryos without notice or liability after one year, or if the parties’ selected disposition becomes impractical in the discretion of the clinic, or upon the parties’ nonpayment of storage fees. *See, e.g., Lee, supra* note 6; *see also Embryo Disposition Consent*, MASS. GEN. HOSP. FERTILITY CTR. (Feb. 6, 2020), <https://www.massgeneral.org/assets/MGH/pdf/obgyn/fertility/consent-forms/Consent-to-Disposition-of-Cryopreserved-Embryos.pdf>. The authors do not suggest discarding clinical directives. They contend, however, that clinic directives are an ineffective vehicle for a binding disposition agreement between the parties.

¹⁵ *See, e.g.,* Ethics Committee of the American Society for Reproductive Medicine, *Disposition of Abandoned Embryos: A Committee Opinion*, 99 FERTILITY & STERILITY 1848 (2013), [https://www.fertstert.org/article/S0015-0282\(13\)00281-1/fulltext](https://www.fertstert.org/article/S0015-0282(13)00281-1/fulltext) [hereinafter Ethics Committee of the American Society]; *see also* Strauss, *supra* note 13 (quoting Lisa Campo-Engelstein, Ph.D. of Albany Medical College who states, “Embryos are valuable because people value them, not because of their innate worth.”).

is a safety net to preserve expectations which is executed while hopes and dreams are still aligned. Like divorce, infertility erases hopes and dreams and substitutes, therefore, disappointment and self-doubt. Assisted by the guidance of their respective legal counsel and with the calm rationality accorded to ex ante decision making, Roxana and Dean could have reached a consensus regarding the disposition of their possible future embryos as they were deciding the disposition of real and personal property, business interests, and family heirlooms. The advisability of prenuptial agreements is well established within legal practice. Expanding property interests addressed by the prenup to include the separate property of each party's genetic material (egg or sperm) as well as the cryopreserved marital property (the embryos) utilizes a tried-and-true legal form to address a novel problem. By focusing couples on the property of infertility well in advance of the undulating wave of emotions that the infertility journey produces, an intentional prenuptial agreement will yield a better and more enforceable contract than the typical clinic directive.¹⁶ But, such is not standard legal practice within either the estate planning or family law fields. The authors suggest it should be.

Embryo disposition disputes will continue and increase as ART services have become sophisticated family planning tools,¹⁷ and the number of frozen embryos stored through the United States continues to rise.¹⁸ This article proffers the use of a seasoned legal document in a novel way to meet the nuances of procreational expectations in the age of ART.¹⁹ Including an ART property provision in the prenuptial agreement will not only eliminate the uncertainty of relying upon ambiguous holdings from state courts faced with resolving conflicts over embryos but will also allow parties to document their intentions regarding procreative property simultaneously with divvying

¹⁶ The authors suggest that the clinic directive is comparable to a prenuptial agreement signed as the bride walks down the aisle.

¹⁷ Data Bridge, a research firm, predicts that by 2026 the global fertility industry could rake in 41 billion dollars in sales. *The Fertility Business Is Booming*, THE ECONOMIST (Aug. 8, 2019), <https://www.economist.com/business/2019/08/08/the-fertility-business-is-booming>.

¹⁸ Estimates of the number of frozen embryos stored in the United States vary, with one study estimating the number to be 1.4 million. Francoise Baylis & Heather Widdows, *Human Embryos and Eggs: From Long-Term Storage to Biobanking*, 33 MONASH BIOETHICS REV. 340, 341 (2015), <https://link.springer.com/article/10.1007/s40592-015-0045-8>.

¹⁹ The dilemma of embryo disposition upon divorce has been tackled eloquently by various scholars. See, e.g., John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990); Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493 (1999); Michael T. Flannery, "Rethinking" *Embryo Disposition Upon Divorce*, 29 J. CONTEMP. HEALTH L. & POL'Y 233 (2013); Ashley Alenick, *Pre-Embryo Custody Battles: How Predisposition Contracts Could Be the Winning Solution*, 38 CARDOZO L. REV. 1879 (2017); Anna El-Zein, Note, *Embryo-Uh-Oh: An Alternative Approach to Frozen Embryo Disputes*, 82 MO. L. REV. 881 (2017).

up other marital property. Part II of this article sets the stage with a brief history of the legal and societal reach of the classical premarital agreement. Part III provides a brief introduction to ART, focusing on defining the embryo and its legal status as property. Part IV dissects the roots and growth of the legal principle examined in embryo disposition cases—“the right (not) to procreate”—along with the various approaches courts have taken to resolve these disputes. Thereafter, Part V advocates as a best practice the inclusion of an ART provision in all prenuptial agreements. With intentional modernization, the paradigmatic prenuptial agreement can address the growing impact of ART by incorporating infertility planning. Thus, the traditional prenup has emerged smARTer.

II. THE TRADITIONAL, INARTFUL PRENUP

The history of the prenuptial agreement provides a microcosm of the history of (and prejudices surrounding) the property rights between spouses.²⁰ The prenuptial agreement has served first to expand and then to limit the rights of the more financially fragile spouse.²¹ The perceived necessities (or risks) from which the premarital agreement was born have evolved over time, but the core mission of its purpose—namely, the concretization and allocation of property rights between spouses (or, perhaps, between families)—has remained. Over centuries, the prenup has been challenged and refined, but it has survived. The prenup relies upon the well-established prerequisites of contracts law, upon the *ex ante* fairness of agreements reached upon hypothetical facts, the probable actuality of which is known to neither party and upon its adaptability to a myriad of unique facts. The first iteration of a prenuptial agreement likely was used to provide financial protection to a wife when property ownership was not a woman’s right. By contract, an intended husband agreed to the financial provision of his chosen wife even if she were to lose his favor. Early foundations of prenups have been traced back to ancient Egypt.²² Another early iteration of the prenuptial contract is the Hebrew marriage contract, the Ketubah.²³ The

²⁰ *How Prenups Have Changed Throughout U.S. History*, PRENUPTIALAGREEMENTS.ORG, <https://www.prenuptialagreements.org/history>.

²¹ See generally Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997).

²² Sheri Stritof, *The History of Prenuptial Agreements*, SPRUCE (Jan. 13, 2020), <https://www.thespruce.com/history-of-prenuptial-agreements-2302015> (citing Katherine Stoner & Shae Living, PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR AND LASTING CONTRACT (6th ed. 2008)).

²³ With its purpose of marking a husband’s financial support obligations to his wife in the event of his death or a divorce, the ketubah “is really the religious equivalent to the contemporary pre-nuptial agreement of secular civil law.” Tani Gordon, *What Is a Ketubah and Where Did It Come From?*,

direct predecessor to the American-styled prenuptial agreement was first seen in sixteenth century England.²⁴ the financial protection for wives crossed the Atlantic officially in 1848 when New York passed the Married Women's Property Act.²⁵

When reviewing the validity of an early prenuptial agreement, courts embraced paternalism as the following quote demonstrates: "What person so exposed to imposition as a woman, contracting personally with her intended husband, just on the eve of marriage—at a time when all prudential considerations are likely to be merged in a confiding attachment, or suppressed from an honorable instinct and sentiment of delicacy."²⁶

It would be a reproach to the law, if the very virtues and graces of woman were thus allowed to become the successful means of overreaching and defrauding them in bargains; and we feel confident that a court of equity, when called upon to adjudicate the rights of parties under such an agreement as that which is set up in this case, will require the agreement to be free from taint of fraud, and also to be the advantage of the woman.²⁷

Until the 1970s, a prenuptial agreement that altered the disposition of marital assets upon divorce generally was unenforceable in the United States.²⁸ With the state serving as the (unwelcome) third party to the marriage, private attempts to modify the state's allocation of financial rights and obligations between spouses were voided by state court judges. Public policy of the day saw divorce as an affront to the status of marriage and premarital agreements as a precursor to divorce. Courts voided these agreements for many reasons, one Alaska Supreme Court noting that "the traditional common law view was that prenuptial agreements in contemplation of divorce . . . were inconsistent with the sanctity of marriage and the state's interest in preserving marriage and maintaining the financial security of divorced persons."²⁹ Courts uniformly viewed these agreements as "inherently conducive to divorce and as allowing a husband to circumvent his legal duty to support his wife."³⁰ Interestingly, the same courts upheld

KETUBAH.COM (Mar. 14, 2016), <https://ketubah.com/blog/what-is-a-ketubah-and-where-did-it-come-from/>.

²⁴ Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. L. 1, 2 (1992).

²⁵ Married Women's Property Act (1848), N.Y. DOM. REL. LAW § 50 (McKinney 1848).

²⁶ *Stilley v. Folger*, 14 Ohio 610, 613 (Ohio 1846).

²⁷ *Id.*

²⁸ *See Marston*, *supra* note 21, at 897.

²⁹ *Brooks v. Brooks*, 733 P.2d 1044, 1048 (Alaska 1987).

³⁰ *Id.*

prenuptial agreements that involved property rights of a surviving spouse at widowhood.³¹ Death, unlike divorce, failed to challenge the institution of marriage.

By 1970, the courts began to note the change in public policy regarding divorce. A Florida court held that prenuptial agreements that contemplate divorce “should no longer be held to be void ab initio as ‘contrary to public policy.’”³² The court noted that, despite the traditional interest of the state in the marriage relationship, the strict public policy of the law against divorce has been significantly relaxed.³³ The reputation of the prenup was changing; no longer was it “in contemplation of divorce, but rather in contemplation of marriage.”³⁴ Thus, the era of prenuptial agreements as affirmative indicia of spousal contracts had begun.

Far from providing women a buffer against the financial ruin attendant to independence from male protection, more modern prenups became a device for wealthy families to protect the primogeniture of family fortunes against gold-digging women.³⁵ They served as a way to limit what a wife could “buy into” in the event of a divorce.³⁶ Occasionally, the gender norms were reversed and the woman possessed the family fortune,³⁷ but more often than not, the modern prenup was a shield for the wealthy man, not a sword of empowerment for the status of the interpretation of prenuptial agreements through a paternalistic lens also waned with one court stating “[n]o longer will courts in viewing antenuptial contracts invariably begin ‘with the realization that between persons in the premarital state, there is a mystical, confidential relationship which anesthetizes the senses of the female partner.’”³⁸ Other courts have followed this line of reasoning (now the majority view) that prenuptial agreements providing for property division upon divorce promote marital stability because they set forth the expectations

³¹ See *Rider v. Rider*, 669 N.E.2d 160, 162 (Ind. 1996) (holding that historically, antenuptial provisions dealing with death of a spouse have had a better prospect for enforcement than those governing divorce).

³² *Posner v. Posner*, 233 So. 2d 381, 385 (Fla. 1970).

³³ *Id.*

³⁴ *Posner v. Posner*, 206 So. 2d 416, 420 (Fla. Dist. Ct. App. 1968) (Swann, J., dissenting), *rev'd*, 233 So. 2d 381 (Fla. 1970).

³⁵ See KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-A-Fella Records 2005).

³⁶ Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE L.J. & FEMINISM 229, 239 (1994).

³⁷ Elizabeth Oglethorpe required General Oglethorpe to sign a prenup in 1744. Stritof, *supra* note 22.

³⁸ *Potter v. Collin*, 321 So. 2d 128, 132 (Fla. Dist. Ct. App. 1975).

and responsibilities of both parties.³⁹ To provide uniformity of content and certainty of enforcement throughout the country, in 1983 the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Premarital Agreement Act (“UPAA”) for enactment in all states.⁴⁰ Inconsistent and significant amendments to the UPAA by the twenty-six enacting states⁴¹ prompted the promulgation of the Uniform Premarital and Marital Agreements Act of 2012 (“UPMAA”).⁴² The philosophical bent of the UPMAA is broad freedom of contract hemmed in by the short fences of procedural due process and minimal substantive fairness at the time of execution.⁴³ The reach of these two uniform laws certainly bolsters the usefulness of the prenuptial agreement as a planning tool. Today, the contractual force of a duly executed prenup is recognized.⁴⁴

There remains an abundance of commentary criticizing modern premarital agreements,⁴⁵ the courts upholding them,⁴⁶ and the uniform acts

³⁹ Younger, *supra* note 24; *see* Barnhill v. Barnhill, 386 So. 2d 749, 751 (Ala. Civ. App. 1980); *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976); *Newman v. Newman*, 653 P.2d 728 (Colo. 1982); *In re Marriage of Stokes*, 608 P.2d 824 (Colo. App. 1979).

⁴⁰ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT (2012), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f5d36125-9433-c7d8-28ec-6244f4a316e6&forceDialog=0> [hereinafter UPAA].

⁴¹ *See* Amberlynn Curry, Comment, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 J. AM. ACAD. MATRIMONY L. 355, 355–56 (2010).

⁴² *Uniform Marital Agreement Act*, PRENUPPROS, <https://www.prenuppros.com/uniform-premarital-agreement-act> (last visited Apr. 7, 2021).

⁴³ UPAA, *supra* note 40, at 2 (approved and recommended for enactment in all states) (“The general approach of this act is that parties should be free, within broad limits, to choose the financial terms of their marriage. The limits are those of due process in formation, on the one hand, and certain minimal standards of substantive fairness, on the other.”).

⁴⁴ *Simeone v. Simeone*, 525 Pa. 392 (Pa. 1990).

⁴⁵ Frommer Brod, *supra* note 36, at 279 (“[R]ecent developments relating to premarital agreements . . . suggest that lawmakers are operating under an assumption of women’s formal legal equality. By focusing on women’s idealized de jure equality, lawmakers have ignored women’s actual, continuing social and economic inequality. By ignoring women’s de facto inequality, lawmakers reforming the law of premarital agreements have overlooked the adverse economic impact that premarital agreements have on women as a class.”); *see also* Elizabeth Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 354 (2016) (“[S]cholars and lawyers have told us to be wary of premarital agreements—unfairly characterizing them as being coercive, unfair, sexist, unromantic, and even predictors of future divorce.”); *5 Myths About Prenuptial Agreements*, HAAS & ASSOCIATES, <https://carolinafamilylaw.com/5-myths-prenuptial-agreements/> (last visited Feb. 8, 2018) (debunking five popular misconceptions placing prenuptial agreements in a bad light).

⁴⁶ *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2077 (2003) (“The United States has simultaneously experienced a trend toward equal division of marital property, reflecting the conception of marriage as partnership and rejecting the notion of a patriarchal relationship. The notion of equality inherent in the partnership conception of marriage is at odds with a system in which courts refuse to review antenuptial agreements for substantive fairness at the time of their enforcement.”).

seeking to regularize them.⁴⁷ Many consider premarital agreements to be unromantic, turning marriage into a business proposition rather than a loving relationship.⁴⁸ Whether one applauds or disavors the premarital agreement in theory, all must acknowledge that over time, the requirements of an enforceable prenup have become clear. Motivations aside, proper execution to establish procedural conscionability has become a paint-by-numbers legal exercise. The fundamentals of disclosure, voluntariness, and lack of substantive unconscionability, supplemented by advice of counsel, written memorialization, and advance timing, solidify the effectiveness of this ancient form of contract in even the strictest jurisdictions.⁴⁹ Only now, the definition of property contained in the prenup needs to be expanded to include the couple's reproductive property.

In 2020, it would not constitute original scholarship to point to legal norms and practices that demand reformation in the name of gender justice.⁵⁰ Family law, in particular, has reformed many such norms and practices.⁵¹ What the authors add to this foundation, however, is the specific language by which a well-established legal document can be powerfully transformed into an instrument which safeguards an emerging form of property⁵²—namely, reproductive rights. The language added to the prenup would be gender neutral, allowing the parties to prioritize their respective claims to the reproductive property of the marriage. But, because the burden of infertility

⁴⁷ Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 127 (1993); see also J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 84 (2011) (disagreeing with, among other things, the UPAA's policy judgment to forgo review of the fairness of the terms of the prenup as of implementation at the time of divorce).

⁴⁸ Abby Mims, *Prenup Is a Four-Letter Word*, NYTIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/style/modern-love-prenup-is-a-four-letter-word.html>; Jeffrey A. Weissman, *Seven Steps to Building a Better Prenup*, WEALTHMANAGEMENT.COM (May 11, 2017), <https://www.wealthmanagement.com/high-net-worth/seven-steps-building-better-prenup> ("Broach the topic of a prenuptial agreement and most people cringe. Prenuptial agreements (prenups) carry a certain stigma and many misconceptions, such as, they're for the very rich or uncaring; they're an admission of failure before you even marry; they rob weddings of their romance and they are an 'I get everything, you get nothing' arrangement.").

⁴⁹ In some jurisdictions, independent counsel is a necessary prerequisite to the enforceability of a premarital agreement. *E.g.*, *Rowland v. Rowland*, 599 N.E.2d 315 (Ohio Ct. App. 1991).

⁵⁰ Frommer Brod, *supra* note 36, at 229 (proposing that the enforcement (or not) of premarital agreements should reflect the eradication of gender discrimination and not simply be premised upon freedom of contract principles).

⁵¹ An example can be seen in the repeal of heartbalm statutes by states. For a discussion of the reach of one state's heartbalm remedy to residents of another state, see Lynda Wray Black, *The Long Arm's Inappropriate Embrace*, 91 ST. JOHN'S L. REV. 1 (2017).

⁵² See *Davis v. Davis*, 842 S.W.2d 588, 595–97 (Tenn. 1992).

falls more heavily on the female gender,⁵³ the expansion of the prenup to protect the property of infertility advances gender justice in practice.

III. THE EMBRYO AS ART

For the infertile couple,⁵⁴ intent always precedes the design. While other couples produce a masterpiece by effortlessly (and often unintentionally) spilling paint onto a canvas, the infertile couple stares wistfully at a blank canvas. Each stroke is carefully, costly,⁵⁵ and sometimes painfully added. Both intimacy and immediacy have lost their places in procreation. To appreciate the depth of embryo disposition disputes, one must understand the ARTful creation of the litigated embryo. Our paradigmatic infertile couple, Roxana and Dean, submit to the collection of their genetic material so it can

⁵³ While the percentages of male and female infertility are roughly equal among the adult population in the United States, women experience infertility more negatively than do men. Anjani Chandra, Casey C. Copen & Elizabeth Hervey Stephen, *Infertility and Impaired Fecundity in the United States, 1982–2010: Data From the National Survey of Family Growth*, 67 NAT'L HEALTH STAT. REP. 1 (2013); see also *How Common is Infertility?*, NAT'L INST. CHILD HEALTH & HUM. DEV., <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common#:~:text=About%209%25%20of%20men%20and,States%20have%20experienced%20fertility%20problems.&text=In%20one%2Dthird%20of%20infertile,both%20the%20man%20and%20woman> (last modified Feb. 8, 2018) (“About 9% of men and about 11% of women of reproductive age in the United States have experienced fertility problems.”). For an interesting study on Polish couples experiencing infertility, see Malgorzata Nagórska, Anna Bartosiewicz, Bogdan Obrzut & Dorota Darmochwał-Kolarz, *Gender Differences in the Experience of Infertility Concerning Polish Couples: Preliminary Research*, 16 INT'L J. ENV'T RES. & PUB. HEALTH 2337 (2019) (“As it turns out, having your own child is more important for women than for men.”).

⁵⁴ Infertility is defined as no pregnancy after one year of unprotected sexual intercourse. *Infertility Definitions and Terminology*, *supra* note 7. For purposes of this article, the authors include within the definition of infertility those incapable of biological procreation for any reason. For example, those naturally infertile, those resulting infertile by illness or trauma, and symbiotically infertile same-sex couples.

⁵⁵ Health insurance coverage generally does not extend to ART procedures. Claims by several female residents of New Jersey seeking to expand the state's mandated health insurance coverage to same-sex couples using ART were dismissed on Eleventh Amendment grounds. See *Krupa v. N.J. State Health Benefits Comm'n*, No. 2:16-cv-4637-SDW-LDW, 2018 U.S. Dist. LEXIS 10571 (D.N.J. Jan. 23, 2018).

be formed and frozen⁵⁶ as gametes, zygotes, or embryos,⁵⁷ using in vitro fertilization (“IVF”).⁵⁸ For Roxana, the collection of her genetic material was preceded by a month-long regimen of daily hormone injections to stimulate her ovaries into producing multiple mature eggs.⁵⁹ Gauging the success of the injections required Roxana’s thrice weekly trips to the clinic to undergo blood tests and ultrasound examinations to monitor acutely the growth of her follicles. With no leeway for errors in timing and after IV sedation, an egg was aspirated from each of Roxana’s mature follicles.⁶⁰ Not all eggs retrieved

⁵⁶ The American Society for Reproductive Medicine defines cryopreservation as, “freezing at a very low temperature, such as in liquid nitrogen (-19° C) to keep embryos, eggs, or sperm viable.” American Society for Reproductive Medicine, *Cryopreservation and Storage*, REPRODUCTIVEFACTS.ORG, <http://www.reproductivefacts.org/topics/topics-index/cryopreservation-and-storage/> (last visited Aug. 7, 2020). An embryo can be transferred before vitrification, known as a “fresh embryo transfer,” or after vitrification once thawed, known as a “frozen embryo transfer.” Zahra Basirat, Hajar Adib Rad, Sedigheh Esmailzadeh, Seyed Gholam Ali Jorsaraei, Karimollah Hajian-Tilaki, Hajar Pasha & Faeze Ghofrani, *Comparison of Pregnancy Rate Between Fresh Embryo Transfers and Frozen-Thawed Embryo Transfers Following ICSI Treatment*, 14 INT’L J. REPROD. BIOMED. 39, 39 (2016). The trend has moved away from fresh embryo transfer to frozen embryo transfer. Kurt T. Barnhart, *Introduction: Are We Ready to Eliminate the Transfer of Fresh Embryos in In Vitro Fertilization?*, 102 FERTILITY & STERILITY 1, 1 (2014). Data suggests a frozen embryo transfer provides the embryo with a more optimal “physiologic environment” for implantation, having given the intended mother time to detox from stimulation medications. *Id.*

⁵⁷ Gametes, zygotes and embryos represent the continuum of reproductive development. A “gamete” is defined as a haploid male or female cell, which when combined with another gamete of the opposite sex can become an embryo; gametes are more commonly known as an “egg,” “ovum,” or “sperm.” A “zygote” is defined as the embryo’s early stage of development; or the first few days following the fertilization of the egg. An “embryo” is defined as a diploid cell which has the potential of becoming a live human being; or a fertilized egg either in the female uterus or stored for cryopreservation for future transfer to a uterus. Chelsea E. Caldwell, *Baby Got Back? Enforcing Guardianship in International Surrogacy Agreements when Tragedy Strikes*, 49 U. MEMPHIS L. REV. 847, 857 n.45 (2019).

⁵⁸ Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 274–80 (1997). Despite the significance of IVF, a large percentage of the American population does not exactly understand the medical procedures underlying the in vitro fertilization process. For instance, a 1986 telephone survey sponsored by the Office of Technology Assessment revealed that 54% of those adults surveyed responded with a negative answer when asked whether they understood the meaning of in vitro fertilization. Moreover, it probably is reasonable to assume that even those people who do have some knowledge of in vitro fertilization generally have only a superficial understanding. *Id.* at 273.

⁵⁹ *Id.* at 277. IVF is a science of probability. In a normal cycle of ovulation, a woman produces one egg; the production of more eggs increases the probability of creating a healthy embryo suitable for an IVF transfer. *Id.* at 277–78.

⁶⁰ *Id.* at 278. “During the egg retrieval, [the] doctor uses vaginal ultrasound to guide the insertion of a long, thin needle through [the] vagina into the ovary and then into each follicle to retrieve eggs.” American Society for Reproductive Medicine, *In Vitro Fertilization (IVF): What Are the Risks?*, REPRODUCTIVEFACTS.ORG (2015), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/in_vitro_fertilization_ivf_what_are_the_risks_factsheet.pdf.

are mature enough for fertilization.⁶¹ With the contribution⁶² of Dean's sperm⁶³ to fertilize the mature retrieved eggs, the embryonic stage of development begins.⁶⁴

A. The Embryo as Science

What exactly *is* an embryo? American Society for Reproductive Medicine defines an embryo as “the fertilized ovum *after* it has begun the process of cell division.”⁶⁵ More specifically, the embryo is a multicellular organism that contains a diploid set of chromosomes and has the potential of becoming a live being.⁶⁶ Put simply, the embryo is the fertilized egg.⁶⁷ Despite the widespread use within the academic literature and statutory

⁶¹ Jean Scott, *IVF: It's a Numbers Game*, FERTILITY SOLS., <https://fertilitysolutions.com.au/ivf-its-a-numbers-game/> (last visited Aug. 7, 2020). It's a numbers game, but it isn't—not all eggs retrieved will fertilize; not all fertilized embryos will survive the progression to the transfer ready blastocyst stage. *Id.* Some embryos will arrest or delay in development and thus not produce a quality, transferrable blastocyst. *Id.* Perhaps it is more appropriate thought of in terms of the principle “survival of the fittest.” *Id.* For example, as understood in a rule of thirds, nine eggs may be retrieved from a woman, six eggs may fertilize into embryos, and two embryos may progress to the blastocyst stage. *Id.* But despite that only two viable embryos remain, if they are good quality blastocysts, they can still provide a good chance of establishing a pregnancy because they have naturally selected themselves as the most likely embryos to thrive and succeed. *Id.*

⁶² There is an interesting linguistic dispute underlying and influencing the embryo disposition dispute. Does Dean contribute sperm or donate it? Professor Lynda Wray Black coined the phrase “sperm lender” to precisely describe and ascribe the parenting rights of the so-called sperm donor within ART. Lynda Wray Black, *The Birth of a Parent: Defining Parentage for Lenders of Genetic Material*, 92 NEB. L. REV. 799, 818 (2014) [hereinafter *The Birth of a Parent*]. Does the appropriate nomenclature depend on Dean's legal relationship to Roxana? Madeleine Schwartz, *Who Owns Pre-Embryos?*, NEW YORKER (Apr. 28, 2015), <https://www.newyorker.com/tech/annals-of-technology/who-owns-pre-embryos>.

⁶³ Traditionally, this is done through a semen collection at a fertility clinic. Alternative surgical options to the semen collection in the clinic are “Microsurgical Epididymal Sperm Aspiration (“MESA”),” “Testicular Epididymal Sperm Aspiration (“TESA”),” and “Percutaneous Epididymal Sperm Aspiration (“PESA”).” *Fertility Options After Vasectomy*, FERTILITY ASSOC. OF MEMPHIS, <http://www.fertilitymemphis.com/vasectomy/> (last visited Aug. 7, 2020).

⁶⁴ *What Happens in the IVF Lab: IVF Lab Process*, TENN. REPROD. MED., <https://trmbaby.com/library/ivf/lab/> (last visited Aug. 7, 2020). Normal embryo progression starts from a zygote (day 1), to an eight-cell embryo (day 3), then to a morula (day 4), and a blastocyst (day 5). *Id.* “Blastocysts are embryos that are nearly ready to implant”. *Id.* “Blastocysts have developed three distinct regions: [(1)] an inner cell mass, which becomes the baby, [(2)] the trophectoderm, which becomes the placenta, and [(3)] the fluid-filled cavity, which will form a structure called the yolk sac.” *Id.*

⁶⁵ *Embryo*, AM. SOC'Y FOR REPROD. MED., <https://www.asrm.org/topics/topics-index/embryo/> (last visited Aug. 7, 2020) (emphasis added).

⁶⁶ Steven H. Snyder, *What Every Estate Planning Attorney NEEDS to Know About Assisted Reproduction: Avoiding Malpractice by Learning About Reproduction*, ABA (Feb. 9, 2018), <http://apps.americanbar.org/dch/thedl.cfm?filename=/RP546000/relatedresources/SnyderOutline.DOC>.

⁶⁷ *Id.*

provisions⁶⁸ of the term “embryo” to describe the combined cryopreserved material, it is a misnomer.⁶⁹ “Zygote” is the correct scientific term for a fertilized ovum *fewer than* a few days old.⁷⁰ And “blastocyst” is the precise term for an *early-stage embryo*, typically once the cell division has reached day five.⁷¹ Best practice guidelines encourage the use of a day-five blastocyst for cryopreservation and so called embryo transfer.⁷² Rather than correct the ubiquity of the misuse of precise scientific terms, the authors will adopt the term “embryo” to refer to the fertilized cryopreserved genetic material.

B. Embryos as Property

The immediately preceding definitional paragraph notwithstanding, what exactly *is* an embryo? Scientifically speaking, we know what an embryo is, but from a legal, moral, or emotional standpoint, the answer is unclear. Thus far, United States case law has categorized genetic material as “property”⁷³ and “quasi-property”⁷⁴ entitled to “special respect.”⁷⁵ As property, it is subject to disposition by the individual(s) from whom the genetic material came.⁷⁶ Recent lawsuits over the spoilage of frozen embryos confirmed the embryo’s legal classification as property.⁷⁷ Furthermore, like

⁶⁸ See, e.g., TENN. CODE ANN. § 36-2-402 (LEXIS through 2020 Sess.) (defining “embryo” as “an individual fertilized ovum . . . to eight-week development.”).

⁶⁹ Brief for Appellant at 13, *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. App. E.D. 2016) (No. ED 103138).

⁷⁰ Snyder, *supra* note 66; see also *Fetal Development*, MEDLINEPLUS, <https://medlineplus.gov/ency/article/002398.htm> (last visited Aug. 7, 2020).

⁷¹ Snyder, *supra* note 66; see also Raul Artal-Mittelmark, *Stages of Development of the Fetus*, MERCK MANUAL, <https://www.merckmanuals.com/home/women-s-health-issues/normal-pregnancy/stages-of-development-of-the-fetus> (last modified Aug. 2019).

⁷² George Kovalevsky, Stacy M. Carney, Linda S. Morrison, Caitlin F. Boylan, Adrienne B. Neithardt & Ronald F. Feinberg, *Should Embryos Developing to Blastocysts on Day 7 Be Cryopreserved and Transferred: An Analysis of Pregnancy and Implantation Rates*, 4 FERTILITY & STERILITY 1008, 1008 (2013). Research shows that day-five blastocysts have a higher success rate for survival and implantation than day-six or -seven blastocysts. *Id.*

⁷³ *Hall v. Fertility Inst.*, 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (“[T]he frozen semen is . . . property . . . and she has full rights to its disposition.”) (holding that the decedent’s frozen sperm is “property” and that it could be gifted to his girlfriend before his death); see also *York v. Jones*, 717 F. Supp. 421, 426–27 (E.D. Va. 1989) (“The Court finds that the inference to be drawn from these provisions of the Cryopreservation Agreement is that the defendants fully recognize plaintiffs’ property rights in the pre-zygote . . .”).

⁷⁴ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); see also *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1263 (Ariz. Ct. App. 2005) (holding that a frozen embryo outside the womb is not a person).

⁷⁵ *Davis*, 842 S.W.2d at 597; see also *Jeter*, 121 P.3d at 1263 (holding that a frozen embryo outside the womb is not a person).

⁷⁶ Snyder, *supra* note 66.

⁷⁷ *Penniman v. Univ. Hosps. Health Sys. Inc.*, 130 N.E.3d 333, 338 (Ohio Ct. App. 2019).

other forms of personal property, stored genetic material may be bequeathed by its owner to another for posthumous reproduction.⁷⁸ Regardless of what categorization applies between jurisdictions, courts have uniformly held that genetic material may be “subject, within certain limitations to ownership, control, and disposition of its contributors.”⁷⁹ The legal ownership, control, and self-settled disposition of embryos is the focus of this article.

*Davis v. Davis*⁸⁰ was the first case in the United States to decide the disposition of embryos following a divorce.⁸¹ With the aid of fertility specialists, Mary Sue and Junior Davis created embryos for their future use, subsequently sought the dissolution of their marriage, and Mary Sue sued for “custody” of the embryos for procreation.⁸² Junior objected, arguing that the embryos should be destroyed.⁸³ Noting the absence of a contract between Mary Sue and Junior regarding the agreed disposition of the embryos, the court balanced the parties’ respective interests and held that the party wishing to avoid procreation (Junior) should prevail:

We conclude that preembryos⁸⁴ are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that [the parties] have in the preembryos 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 preembryos within the scope of policy set by law.⁸⁵

Contending with the legal status of the embryo is the recognition of its moral status.⁸⁶ Some give the embryo a moral status from the moment the

⁷⁸ *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 277 (Cal. Ct. App. 1993). For the most part, stored sperm has been categorized as “property.” *Id.*

⁷⁹ *Snyder*, *supra* note 66.

⁸⁰ *Davis*, 842 S.W.2d at 588.

⁸¹ *Id.*; see also Sarah Holman Loy, Comment, *Responding to Reber: The Disposition of Pre-Embryos Following Divorce in Pennsylvania*, 122 PENN. ST. L. REV. 545, 559 (2018).

⁸² *Davis*, 842 S.W.2d at 589. At first Mary Sue wanted to use the embryos herself to have a child, but then changed her mind and wanted the embryos to be donated to another infertile couple. *Id.* at 590.

⁸³ *Id.* at 590.

⁸⁴ *Snyder*, *supra* note 66. A “preembryo” is defined as the early stage of a developing embryo; specifically, the first three days following the fertilization of the egg. Throughout legal literature, “preembryo” is seen used interchangeably with the terms “embryo,” “zygote,” and “blastocyst.” *Id.*

⁸⁵ *Davis*, 842 S.W.2d at 597.

⁸⁶ JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 74 (LexisNexis 2d ed. 2013).

egg is fertilized, equal to what is accorded to a human outside the womb.⁸⁷ Others view the embryo as having no moral status, lacking the attributes to meet the standards of a rights-bearing person.⁸⁸ At first blush, classifying the embryo as “property” and even “quasi-property” seems disparaging. Surely, embryos demand more respect than a car or ordinary human tissue.⁸⁹ Even though the embryo is not a person, it possesses the potentiality of personhood.⁹⁰ Some scholars denote the legal shift from “status” to “respect” as an acknowledgement of its moral component.⁹¹ However, even “special respect” will seem “like empty rhetoric if it leads to no limits at all on what may be done with embryos.”⁹² But nonetheless, the legal status of the embryo will always undermine its moral facet when faced with the rival interests of procreative choice and bodily integrity.⁹³

Roe v. Wade established that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,” thus the unborn are afforded no constitutional protection.⁹⁴ It follows then that, *a fortiori*, the unplanted embryo which precedes the fetus on the continuum of procreation has no claim to protective personhood. From the authors’ perspective, this is a good thing and necessary for the continued advances in ART. Setting aside the interests of bodily integrity and procreative choice propelling *Roe*, extending constitutional protection to un-implanted embryos would upend the entire ART field.⁹⁵ If an embryo were afforded the rights of persons, destruction of the embryo would be killing, and research on embryos would

⁸⁷ *Id.* This position originates from the Roman Catholic Church. *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (last visited Aug. 7, 2020). The Congregation for the Doctrine of The Faith states “[t]he human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.” *Id.*

⁸⁸ DAAR, *supra* note 86.

⁸⁹ Strauss, *supra* note 13, at 5 (quoting Lisa Campo-Engelstein, “[The embryo is] not a little person. It’s also not not a little person.”).

⁹⁰ DAAR, *supra* note 86.

⁹¹ *Id.* (citing John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990)).

⁹² *Id.*

⁹³ Professor John Robertson explains “[w]hether this symbolic value must always be preserved will depend on the competing interests at stake in the various situations in which the questions of disposition of the early embryo arise.” John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 450 (1990).

⁹⁴ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

⁹⁵ Brief for Appellant, *supra* note 69, at 36.

come to a halt.⁹⁶ This would leave only long-term storage or use of the embryos for implantation as the only remaining options. Recent data estimates the frozen embryo population to be 1,000,000 just in the United States.⁹⁷ Mandating perpetual storage of all unused frozen embryos is simply impractical. Moreover, civil actions, such as wrongful death suits,⁹⁸ would be a substantial threat to the economic viability of fertility clinics.⁹⁹ Classifying embryos as property is the legal foundation that allows the ART field to operate freely, and their status as property permits family law and estate planning practitioners to include the disposition of embryos in a smARTer adaptation of the paradigmatic prenuptial agreement.

III. THE RIGHT (NOT) TO PROCREATE

The right (not) to procreate has become the prevailing legal interest in embryo disposition cases.¹⁰⁰ Faced with the inexact classification of embryos,

⁹⁶ *Id.*

⁹⁷ *What We Do*, NAT'L EMBRYO DONATION CTR, <https://www.embryodonation.org> (last updated July 18, 2020).

⁹⁸ Ariana Eunjung Cha, *These Would-Be Parents' Embryos Were Lost. Now They're Grieving—and Suing*, WASH. POST (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving--and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4_story.html?utm_term=.099669103d3a (describing the would-be parents loss of their embryos due to a freezer tank malfunction at a fertility center in Ohio; “the most explosive suit seeks to declare embryos people, potentially opening up the Cleveland center to charges of wrongful death.”). While personhood status for the embryo would create a plethora of problems for the ART field, it is impossible not to feel sympathy for these would-be parents who may have lost their only chance at having a genetic child of their own. *Cf.* Ellen Trachman, *Time for a New Tort: Reproductive Negligence*, ABOVE THE L. (Apr. 4, 2018), <https://abovethelaw.com/2018/04/time-for-a-new-tort-reproductive-negligence/> (describing Dov Fox’s law review article, entitled “Reproductive Negligence,” and the hope for this new cause of action that would provide a remedy for would-be parents when their potential parenthood is wrongfully deprived) (citing Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017)). Fox divides the landscape of reproductive wrongs into three parcels: (1) forcing unwanted pregnancy or parenthood (aka a botched vasectomy); (2) preventing wanted reproduction (like, for example, a hospital losing all your embryos); and (3) disrupting plans to have a child with particular genetic traits (such as wanting a child genetically related to you, instead of having your embryos accidentally switched with other patients). He proposes distinct causes of action for each. He refers to these as rights against procreation imposed, deprived, and confounded.

⁹⁹ Brief for Appellant, *supra* note 69, at 34.

¹⁰⁰ *See* McQueen v. Gadberry, 507 S.W.3d 127, 147 (Mo. App. E.D. 2016). Moreover, Gadberry’s fundamental right not to procreate would be irrevocably extinguished if McQueen bears more of Gadberry’s children, a situation where Gadberry would be forced to become a biological parent again, this time against his will. *See* J.B. v. M.B., 783 A.2d 707, 717 (2001) (finding a spouse’s fundamental right not to procreate would be irrevocably extinguished under similar circumstances). In addition, Gadberry would be subjected to unwarranted governmental intrusion into the intimate decision of whether to potentially have more children. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted

courts facing competing interests in the embryos prioritize the reproductive rights of the claimants.¹⁰¹ Furthermore, the inability to delineate precisely when procreation occurs explains why courts favor procreative autonomy over the right to procreate.¹⁰²

A. A Brief SCOTUS History

The negative right of procreative freedom started as a small sprout from the constitutional right to privacy;¹⁰³ over time, this privacy right has grown to encompass procreative choice. Current procreative disputes could not have been contemplated by the lawyers or justices whose legal theories and court decisions solidified the privacy right because the necessary reproductive technologies were, as yet, undeveloped.

1. The Privacy Right

Beginning in 1923 with *Meyer v. Nebraska*, the Supreme Court laid the framework that the right to privacy was implied in the Fourteenth Amendment.¹⁰⁴ Commonly recognized as the first express acknowledgement of privacy as a right, Justice Brandeis stated in *Olmstead v. United States* that the “makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people].”¹⁰⁵ Building upon that framework, *Griswold v.*

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child[.]”).

¹⁰¹ By prioritizing the intent of the owners of the procreative property as memorialized in a binding prenuptial contract, the authors intentionally side-step the myriad of constitutional issues presented in the embryo disposition disputes. Professor John A. Robertson has written prolifically (and brilliantly) on these issues. See, e.g., John A. Robertson, *Precommitment Strategies for Disposing of Frozen Embryos*, 50 EMORY L.J. 889 (2001).

¹⁰² *Id.* at 1029 (arguing that persons may waive their constitutional rights via a “precommitment strategy,” and that such waivers can include the right to avoid procreation).

¹⁰³ Brief for Appellant, *supra* note 69, at 34 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)) (“The Supreme Court’s Fourteenth Amendment jurisprudence makes clear that the negative right to avoid procreation is not just *implied* by cases invalidating state action that would prevent a party from attempting to procreate. Instead, the right to be free from undesired procreation is itself explicitly protected and just as fundamental to ordered liberty.”).

¹⁰⁴ *Meyer v. State of Nebraska*, 262 U.S. 390 (1923). For the first time, the Supreme Court hinted that the right to privacy was implied in the Due Process Clause in the Fourteenth Amendment. Although this case dealt with Meyer’s right to teach German, and parents’ rights to have their children learn the language, *Meyer* was later used as a precedent to uphold contraceptive and abortion rights. See *Meyer v. Nebraska—Significance*, LAW.JRANK.ORG, <http://law.jrank.org/pages/23415/Meyer-v-Nebraska-Significance.html> (last visited Aug. 10, 2020).

¹⁰⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Connecticut protected a married couples' right to privacy in the use of contraception to avoid procreation by establishing a "zone of privacy created by several fundamental constitutional guarantees."¹⁰⁶ In 1972, *Eisenstadt v. Baird* further concretized that right by striking a state law criminalizing the distribution of contraceptives to unmarried persons, declaring "if 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."¹⁰⁷

2. The Liberty Right

Distinct from the right of privacy, the Supreme Court also recognized a fundamental liberty right to bodily integrity.¹⁰⁸ *Meyer v. Nebraska* likewise pioneered the liberty interest, defining it to not only include "freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children."¹⁰⁹ In *Skinner v. Oklahoma*, the Supreme Court struck down a forced-sterilization statute, noting that procreation is "one of the basic civil rights of man" that is "fundamental to the very existence and survival of the race."¹¹⁰ And in *Bowers v. Hardwick*, the Supreme Court stated that the Due Process Clause confers "a fundamental individual right to decide whether or not to beget or bear a child."¹¹¹ More recently, the Supreme Court recognized the liberty interest in *Obergefell v. Hodges*, stating that "choices concerning contraception, family relationships, procreation, and childrearing" are "protected by the Constitution" and "among the most intimate that an individual can make."¹¹²

3. The Negative Right

Evolving from the right to privacy and liberty is the Supreme Court's abortion-rights jurisprudence, which still remains a contested, emotionally charged issue.¹¹³ The negative right to avoid procreation is not only implied

¹⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

¹⁰⁷ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

¹⁰⁸ Brief for Appellant, *supra* note 69, at 28.

¹⁰⁹ *Meyer*, 262 U.S. at 399.

¹¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹¹¹ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

¹¹² *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

¹¹³ See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (calling *Roe* not only a rule "of personal autonomy and bodily integrity" but also "an exemplar of *Griswold*

but the negative right to avoid procreation is just as explicitly protected as ordered liberty.¹¹⁴ *Roe v. Wade* is the seminal case that legalized abortion during the first trimester of a pregnancy,¹¹⁵ while *Planned Parenthood v. Casey* reaffirmed its central holding, but only up to the point of viability instead of the first trimester.¹¹⁶ The tiny seed of the right to privacy grew its roots to procreation. And not only is procreation considered in the traditional context of sexual relations, but, due to medical advances, the potential of procreation must now be contemplated even years *after* individuals have no physical contact with each other.

liberty” and noting that “constitutional developments [since *Roe*] have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child.”). Despite the widespread belief that *Roe* is the controlling precedent on abortion law, *Casey* is actually the case in point. Andrew C. McCarthy, ‘Don’t You Dare Touch *Roe*!’—*Judicial Confirmation Silly Season Begins*, NAT’L REV. (Jul. 7, 2018), <https://www.nationalreview.com/2018/07/supreme-court-unlikely-to-overturn-roe-v-wade/>. *Roe* legalized abortion within a trimester framework; in other words, the state only had the power to stop a woman from getting an abortion past the first trimester. *Roe*, 410 U.S. at 164–65. The state could regulate abortion in the second trimester only in order to protect the mother’s health. *Id.* In the last trimester, states could ban and prohibit abortion, unless it compromised the health of the mother. *Id.* *Casey* limited this, changing the framework from trimesters to viability—a state can now only stop a woman from getting an abortion after viability of the fetus, unless the mother’s health is compromised. *Casey*, 505 U.S. at 846. Andrew McCarthy explains:

Go ahead and *Roe, Roe, Roe* your boat . . . we’ve actually been living in a *Casey* world — as in *Planned Parenthood v. Casey*—for the past quarter century. For good and for ill. “Don’t you dare touch *Roe*” is the political hyperbole of Democrats and their fellow travelers. It is not a serious legal position—as if serious legal positions had anything to do with confirmation politics.

McCarthy, *supra* note 113.

¹¹⁴ Brief for Appellant, *supra* note 69, at 30.

¹¹⁵ See generally *Roe*, 410 U.S. 113.

¹¹⁶ *Casey*, 505 U.S. at 873.

B. An ART Exhibition of Embryo Disposition by State Courts

ART is such an emerging area of law;¹¹⁷ only a total of fifteen embryo disposition cases exist to date.¹¹⁸ The table below provides a comprehensive look at each case and its resolution:

Year	State Court	Case Name	Third-party gamete source?	Approach used by the Court	Valid Contract?	Disposition agreement enforceable?	Terms of disposition agreement?	Reproductive Use Allowed? Ultimate Resolution
1992	Tennessee: Supreme Court	<i>Davis v. Davis</i> ^a	No	Balancing-of-interests approach: presumption against reproductive use unless a party cannot procreate or adopt	No	No	N/A	No: The Court favored the ex-husband's right not to procreate.
1998	New York: Court of Appeals	<i>Kass v. Kass</i> ^b	No	Contractual approach: enforce a valid agreement	Yes	Yes	Research Use	No: the embryos should be donated to research
2000	Alabama: Court of Civil Appeals	<i>Cahill v. Cahill</i> ^c	No	Contractual approach	Yes	Yes	Property of lab	No: The embryos remained property of the lab.
2000	Massachusetts: Supreme Judicial Court	<i>A.Z. v. B.Z.</i> ^d	No	Contemporaneous mutual consent: even valid agreements are unenforceable if they impose unwanted parenthood	No	No	N/A	No: The Court favored the ex-husband's right not to procreate
2001	New Jersey: Supreme Court	<i>J.B. v. M.B.</i> ^e	No	Contemporaneous mutual consent	No	No	N/A	No: The Court favored the ex-wife's right not to procreate
2002	Washington: Supreme Court	<i>Litowitz v. Litowitz</i> ^f	Yes (egg donor)	Contractual approach	Yes	Yes	Destruction after five years of storage	No: The embryos should be discarded

¹¹⁷ ART is the “Wild West” of family law. Ellen Trachman, author of assistive reproductive technology blog on abovethelaw.com, describes a fascinating new technique employed by ART. Ellen Trachman, *2 Women Were Pregnant with the Same Baby—What Does That Mean Legally?*, ABOVE THE L. (Nov. 7, 2018), <https://abovethelaw.com/2018/11/2-women-were-pregnant-with-the-same-baby-what-does-that-mean-legally/>. Two women are now capable of being pregnant with the same baby. *Id.* Trachman describes a lesbian couple, Ashleigh and Bliss Coulter, who used the method known as “Effortless IVF” to both carry their child. *Id.* Eggs were retrieved from Bliss and combined with donor sperm in a capsule called the “InvoCell.” *Id.* With traditional IVF, the embryos are placed in a Petri dish to grow in the lab for several days. *Id.* Instead, with Effortless IVF, the embryos, now inside the InvoCell were transferred immediately into the uterus of Bliss, secured by a diaphragm and left to develop in her body—a more natural environment of conception. *Id.* The embryos were then removed, cryopreserved, and one was transferred to Ashleigh’s uterus, who gestated the baby to birth. *Id.* Thus, both women were pregnant with their child. *Id.* Trachman further explores the legal implications of both women being the legal parents of their child because of this technique. *Id.*

¹¹⁸ See Trachman, *supra* note 117.

2003	Iowa: Supreme Court	<i>In re Marriage of Witten</i> ^g	No	Contemporaneous mutual consent	Yes	No	N/A	No: The embryos will remain frozen until there is a mutual agreement
2006	Texas: Court of Appeals	<i>Roman v. Roman</i> ^h	No	Contractual approach	Yes	Yes	Destruction in the event of divorce	No: The Court favored the ex-husband's right not to procreate
2008	Oregon: Court of Appeals	<i>In re Marriage of Dahl & Angle</i> ⁱ	No	Contractual approach	Yes	Yes	Ex-wife's exclusive right to choose between research use and destruction	No: The Court favored the ex-wife's right to destroy the embryos
2012	Pennsylvania: Superior Court	<i>Reber v. Reiss</i> ^j	No	Balancing-of-interests approach	No	No	N/A	Yes: The Court favored the ex-wife's right to procreate because she could not reproduce otherwise
2015	Illinois: Appellate Court	<i>Szafrański v. Dunston</i> ^k	No	Contractual approach and balancing-of-interests approach	Yes (oral contract)	Yes	Used by ex-girlfriend	Yes: The Court favored the ex-girlfriend's right to procreation because she could not reproduce otherwise
2016	California: Superior Court	<i>Findley v. Lee</i> ^l	No	Contractual approach	Yes	Yes	Destruction in the case of divorce	No: The Court favored the ex-husband's right not to procreate despite the ex-wife's infertility.
2016	Missouri: Court of Appeals	<i>McQueen v. Gadberry</i> ^m	No	Contractual approach and Balancing-of-interests approach	No	No	N/A: Conflicting evidence of an agreement	No: The embryos will remain frozen until there is a mutual agreement
2018	Colorado: Supreme Court	<i>In re Marriage of Rooks</i> ⁿ	No	Contractual approach and Balancing-of-interests approach	No	No	N/A: To be determined by a court of law	Remanded to trial court to balance both parties' procreational interests
2020	Arizona: Supreme Court	<i>Terrell v. Torres</i> ^o	No	Contractual approach	Yes	Yes	Donated to another couple or a fertility bank in the case of divorce	No: Even though the ex-wife created the embryos for the purpose of preserving her fertility due to cancer, the Court gave weight to the contract signed by the parties

¹¹⁹ See I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 5 (2016). The cases cited above in chronological order are as follows: (a) *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); (b) *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); (c) *Cahill v. Cahill*, 757 So. 2d 465 (Ala. Civ. App. 2000); (d) *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); (e) *J.B.*

As a default rule, courts favor a party's right not to procreate.¹²⁰ When faced with an embryo disposition dispute, courts have taken three different approaches: (1) the contractual approach, (2) the contemporaneous mutual consent approach, and (3) the balancing approach.¹²¹

1. The Contractual Approach

A majority of courts first take into consideration whether the parties had an agreement *before* the embryos were created that directed the disposition of the embryos upon dissolution of the marriage.¹²² Courts use the contractual approach to enforce such agreements.¹²³ Most often, enforced written agreements are in the form of a clinic directive, provided by the fertility clinic, and written to protect the fertility clinic, *not* the parties signing them.¹²⁴ These directives usually require the parties to select a default option in the event of death and in the event of divorce, either to (1) relinquish control of the embryos to the other party, (2) donate the embryos to an infertile couple, (3) donate the embryos for research, or (4) destroy the embryos.¹²⁵ If the directive or contract *clearly* provides for the disposition of

v. M.B., 783 A.2d 707 (N.J. 2001); (f) *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); (g) *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); (h) *Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006); (i) *In re Marriage of Dahl & Angle*, 194 P.3d 834 (Or. Ct. App. 2008); (j) *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012); (k) *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015); (l) *Findley v. Lee*, No. FDI-13-780539 (Cal. Super. Ct. 2016); (m) *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); (n) *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018); (o) *Terrell v. Torres*, No. CV-19-0106-PR (Ariz. 2020).

¹²⁰ See Cha, *supra* note 98; Trachman, *supra* note 98.

¹²¹ Loy, *supra* note 81, at 552 (describing the three predominant approaches regarding pre-embryo disposition but noting that “some states provide for the disposition of pre-embryos by statute. For example, in Florida, couples undergoing IVF must enter into written contracts specifying how pre-embryos will be handled if they divorce.” See FLA. STAT. § 742.17 (2017)). However, despite that the Florida statute states that the couple and treating physician “shall enter into written agreement that provides for the disposition of the commissioning couple’s [embryos]. . . . [a]bsent a written agreement, decisionmaking authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple,” thus not providing any better of a resolution than the current approaches do. *Id.*

¹²² See Trachman, *supra* note 117; see *infra* Section IV.B (noting that the contractual approach is the prevailing view of courts deciding an embryo disposition dispute).

¹²³ *In re Marriage of Rooks*, No. 15CA0990, 2016 Colo. App. LEXIS 1486, at *9 (Oct. 20, 2016) (“We concur with those courts that have adopted the contract approach and have enforced a valid agreement entered into between the spouse as to disposition of the embryos on dissolution of marriage.”).

¹²⁴ Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIMONIAL L. 57, 83 (2011) (“[C]linics provide the [directive] forms and their primary purpose is to provide written documentation of the patients’ informed consent and thereby protect the physician from liability.”).

¹²⁵ *Id.* See generally *Consent to Cryopreservation (Freezing) and Storage of Embryo(s)*, MEMPHIS FERTILITY LAB., INC., http://www.fertilitymemphis.com/wp-content/uploads/2015/11/Consent-for-Embryo-Freezing-and-Storage-11_24_2015.pdf (last updated Apr. 8, 2015).

the embryos in the event of divorce, the directive will likely control.¹²⁶ If there is any uncertainty in the language, courts are likely to resort to the default rule of the right to avoid procreation.¹²⁷ There is one exception to the default rule: courts are more inclined to favor the right to procreation over the right to avoid procreation if the party wishing to use the embryos has lost her reproductive ability.¹²⁸

1. The Contemporaneous Mutual Consent Approach

Few courts employ a contemporaneous mutual consent approach, whereby if the parties have not previously come to an agreement regarding the disposition of the embryos upon divorce, the court “will not decide” either.¹²⁹ Rather, the embryos will be left frozen indefinitely until the parties reach a mutual agreement.¹³⁰ This approach has only been used in cases where the language of the disposition agreement between the parties was ambiguous.¹³¹ Courts that have taken this approach reason “judicial enforcement of an embryo disposition agreement ‘in this highly personal area of reproductive choice’ would be against public policy . . . [and there are] ‘grave public policy concerns’ with the balancing test, which ‘substitute[s]

¹²⁶ Flannery, *supra* note 19, at 237–39.

¹²⁷ *Id.*; see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (where the directive used the term “‘should we become separated’ in referring to the disposition of the frozen pre-embryos without defining ‘become separated.’ Because this dispute arose in the context of a divorce, [the Court could not] conclude that the consent form was intended to govern [upon divorce]” and moreover would not enforce such an agreement that would compel a party to procreate against his will).

¹²⁸ Compare *Reber v. Reiss*, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012), and *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (in an overwhelming majority of these cases, it is the woman who wishes to use the embryos for procreational purposes), with *Findley v. Lee*, No. FDI-13-780539, slip op. at 72–73 (Cal. Super. Ct. Jan. 11, 2016) (where the Court favored the ex-wife’s right not to procreate over the ex-husbands wishes to donate the embryos), and *In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) (with a similar outcome). See *infra* Section IV.B.

¹²⁹ *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003). See generally *Loy*, *supra* note 81, at 557; *supra* Section II.B.2.

¹³⁰ See sources cited *supra* note 129.

¹³¹ *A.Z.*, 725 N.E.2d at 1057 (“In summary, the [directive] is legally insufficient in several important respects and does not approach the minimum level of completeness needed to denominate it as an enforceable contract in a dispute between the husband and the wife.”); *J.B. v. M.B.*, 783 A.2d 707, 713 (N.J. 2001) (“[The directive] do[es] not manifest the parties’ clear intent regarding disposition of the preembryos in the event of a dissolution of their marriage.”); *Witten*, 672 N.W.2d at 773 (explaining that “the agreement had a specific provision governing control of the embryos if one or both parties died, but did not explicitly deal with the possibility of divorce;” despite the Court recognizing that there was no specific provision governing the disposition of embryos upon divorce, the Court believed that the general provision governing “release of embryos,” in which “the parties agreed that the embryos would not be transferred, released, or discarded without ‘the signed approval’ of . . . [the couple],” was broad enough to cover disposition upon dissolution of marriage).

the courts as decision makers in this highly emotional and personal area.”¹³² Realistically, courts that adopt this approach are de facto resorting to the default rule of non-procreation. The “not deciding” of the issue, in favor of the status quo means that the embryo will be stored indefinitely.¹³³ Moreover, this approach is essentially the courts’ punting the issue back to the parties. The requisite supposition on which the contemporaneous mutual consent approach depends is the unrealistic expectation that parties entangled in a frozen embryo disposition dispute would reach an agreement with the passage of time. In the meantime, the embryos are held hostage. Adherence to the status quo simply prolongs their ultimate death.¹³⁴

2. The Balancing-of-Interests Approach

If the parties did not have an agreement for embryo disposition upon divorce, the court balances the parties’ respective interests to reach a resolution.¹³⁵ And even if the parties do have an agreement, the court may still consider the interests of each party.¹³⁶ Ultimately, the balancing-of-interests approach resorts to the default rule that courts favor a party’s right not to procreate, as long as the other party still has a reasonable alternative to achieve procreation.¹³⁷ The *Davis* court stated, “[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [j]embryos in question.”¹³⁸ However, if a party loses his or her

¹³² *In re Marriage of Rooks*, No. 15CA0990, 2016 Colo. App. LEXIS 1486, at *8 (Oct. 20, 2016) (quoting *Witten*, 672 N.W.2d at 781, 779, 783).

¹³³ *See generally In re Marriage of Rooks*, 429 P.3d 579, 592 (Colo. 2018) (“[The] contemporaneous [mutual] consent approach gives 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.”).

¹³⁴ *Id.* at 589 (“[O]ne could imagine such a person imposing continuing psychic damage by hinting that he or she might consent to the ex-spouse’s use of the [pre-]embryos sometime in the future—the ex-spouse might well continue to be on an emotional rollercoaster when considering the possibility of finally becoming a parent. Or the [pre-]embryos might in effect be held hostage—they would be released for use only if the ex-spouse were willing to give up something valuable in return, for example, in a property settlement or in exchange for more favorable support terms.” (quoting Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFF. L. REV. 1159, 1210 (2009)); *see also* Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013) (noting that Iowa’s approach may provide a bargaining chip for an ex-spouse to effectively hold embryos hostage to punish the other ex-spouse or to gain other advantages).

¹³⁵ *Rooks*, 2016 Colo. App. LEXIS 1486, at *7; *J.B.*, 783 A.2d at 713–14, 719–20; *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).

¹³⁶ *See Findley v. Lee*, No. FDI-13-780539, slip op. at 61 (Cal. Super. Ct. Jan. 11, 2016); *McQueen v. Gadberry*, 507 S.W.3d 127, 144 (Mo. Ct. App. 2016); *Rooks*, 429 P.3d at 592 (Colo. 2018).

¹³⁷ Flannery, *supra* note 19, at 238.

¹³⁸ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

reproductive capability, courts have held that such party's interests are paramount to the other party's right to avoid procreation.¹³⁹

C. Procreational Timing: T-minus Fertilization or Implantation?

The etymology of the term "procreation" traces back to its Latin predecessor "procreare," which means "to bring forth offspring," stemming from "pro," meaning "forth" and "creare," meaning "to create."¹⁴⁰ Thus, one would logically conclude that procreative rights attach at the *creation* of the embryo, within which lies the consent to procreate.¹⁴¹ With traditional *in vivo* fertilization, procreative rights *do* attach at the creation of the embryo, upon the egg becoming fertilized by the sperm.¹⁴² Said differently, procreative rights attach upon "the act," and parties have no power to control the reproductive process past "the act."

However, with *in vitro* fertilization, procreative rights must attach at implantation, *after* "the act."¹⁴³ Even though courts deciding ART cases have not definitively answered exactly when procreative rights attach, courts have implied it to be at implantation solely by hearing these issues. If the procreative right attached at the same point in time as the right attaches with traditional reproduction, upon "the act," then there would be no procreative issue to decide because the parties would have already exercised their

¹³⁹ *Rooks*, 2016 Colo. App. LEXIS 1486, at *7 ("[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [] embryos in question." (alteration in original) (quoting *Davis*, 842 S.W.2d at 604) (quotation marks omitted)); *J.B.*, 783 A.2d at 719–20 (ruling in favor of the wife's interest to avoid procreation after considering that the husband was already a father and was capable of fathering other children); *Reber*, 42 A.3d at 1132–43 (upholding a ruling in favor of forty-four year old wife, who had no children and had undergone IVF before cancer treatment in order to preserve her ability to conceive a child).

¹⁴⁰ *Procreation*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/procreation> (last visited Aug. 10, 2020).

¹⁴¹ See generally *Rooks*, 2016 Colo. App. LEXIS 1486, at *23 ("We reject wife's unsupported argument that husband relinquished his constitutional right not to procreate by consenting to the use of his sperm to fertilize wife's 'last eggs.' The storage agreement contradicts this theory by specifically providing for allocation of the embryos on dissolution to be decided in the 'divorce/dissolution decree paperwork.'").

¹⁴² *Kass v. Kass*, No. 19658/93, 1995 WL 110368, at *2, *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998). An *in vivo* husband's rights and control over the procreative process ends with ejaculation. From that moment until the fetus reaches a stage of development sufficient to trigger the State's interest in its life, the fetus' fate rests with the mother to the exclusion of all others.

¹⁴³ *Id.* at *3 ("[A]n *in vitro* fertilization should give rise to additional rights on the part of the husband.").

procreative rights upon creating the embryo. Thus, procreative rights attach *after* the embryo is created if the embryo is fertilized *in vitro*.¹⁴⁴

Courts have extracted a flawed gender-neutral procreative autonomy from *Roe* and its progeny.¹⁴⁵ *Roe*'s right to avoid procreation is grounded in an individual's right to privacy.¹⁴⁶ *Casey* limited that right up to viability only within the context of the *woman's body* and *her* right to privacy.¹⁴⁷ The man's right to avoid procreation is cut off at the moment of conception and the man has no control if conception occurs past "the act."¹⁴⁸ Thus, the right to avoid procreation is inherently gendered and grounded in the *woman's* bodily integrity.¹⁴⁹ Moreover, if viability is the threshold, essentially there can be no procreative right even for the woman past "the act," if and when medicine advances to a point where a fetus can survive from the embryonic stage at conception or by an artificial womb.¹⁵⁰

Should ART be a determining factor of *when* procreative rights attach? Within "the act" lies the man's consent to create the *in vivo* embryo.¹⁵¹ However, a man's consent does not lie within "the act" to create the *in vitro* embryo.¹⁵² ART provides a power of control over the embryo that parties do

¹⁴⁴ *Id.* at *2 ("As I perceive it, the key to an intelligent discussion is the question of whether there is a conceptual or propositional difference between the product of an in vitro fertilization and the product of an in vivo fertilization.").

¹⁴⁵ *Id.* ("It cannot seriously be argued that a husband has a right to procreate or avoid procreation following an in vivo fertilization. He cannot force conception. He cannot compel or prevent an abortion." (citing *Roe v. Wade*, 410 U.S. 113 (1973))).

¹⁴⁶ See *supra* Section III.A.1.

¹⁴⁷ See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). See *supra* Section III.A.3.

¹⁴⁸ See ONLINE ETYMOLOGY DICTIONARY, *supra* note 140.

¹⁴⁹ Mary Ziegler, *Abortion and the Constitutional Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263, 1306 (2014) ("Most courts, including the Supreme Court of Tennessee in *Davis*, correctly refuse to read a gender-specific decision-making authority into ART cases, recognizing that '[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions' apply to IVF." (citing *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992))).

¹⁵⁰ *Id.* at 1311 (2014) ("[A]s *Szafranski* acknowledges, abortion jurisprudence does not offer any clear answers as to the relative value of rights to seek and avoid procreation once a woman's bodily integrity is no longer on the line.").

¹⁵¹ ONLINE ETYMOLOGY DICTIONARY, *supra* note 140.

¹⁵² *Id.* In *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016), the court stated that Mr. Gadberry possessed no right to change his mind after creating the embryos he chose to create. On the same thread Justice Roncallo in the trial court in *Kass v. Kass* stated:

In my opinion there is no legal, ethical or logical reason why an *in vitro* fertilization should give rise to additional rights on the part of the husband. From a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization, and fertilization of the ovum is the inception of the reproductive process. Biological life exists from that moment forward. The fact that an *in vitro* zygote does not seek to fulfill its biological destiny immediately upon such fertilization does not alter that fact. The rights of the parties are

not have with traditional reproduction: the frozen embryo is arrested in time between the stages of creation and implantation. Impliedly, an embryo created through *in vitro* fertilization gives rise to a differing continuum of procreative rights.¹⁵³ Logically, a man's procreational autonomy must be extended past the deposit of sperm and through implantation, to account for the ability to start-stop the reproductive process through ART.¹⁵⁴ Thus, divergent to *Roe* and its progeny, the procreative "rights of the parties [in ART cases] are dependent upon the nature of the [embryo] not the stage of its development" ¹⁵⁵

D. Prioritizing Procreation

Reproductive liberty is not divided into equal competing rights in the ART context. Only in cases of special circumstance does the right to avoid procreation fail to trump the right of those wishing to procreate.¹⁵⁶ That special circumstance is refined only to a party's knowledge of the complete inability to reproduce.¹⁵⁷ Individuals seeking fertility treatment most likely already lie on the brink of infertility.¹⁵⁸ Those that are fortunate enough to

dependent upon the nature of the zygote not the stage of its development or its location. To deny a husband rights while an embryo develops in the womb and grant a right to destroy while it is in a hospital freezer is to favor situs over substance.

Kass v. Kass, 1995 WL 110368, at *3, *rev'd*, 235 A.D.2d 150 (N.Y. App. Div. 1997), *aff'd*, 91 N.Y.2d 554 (N.Y. 1998).

¹⁵³ See *supra* notes 139–149 and accompanying text.

¹⁵⁴ See *supra* notes 139–149.

¹⁵⁵ Kass, 1995 WL 110368, at *3.

¹⁵⁶ Ziegler, *supra* note 149, at 1309 ("Although [embryo disposition cases] recognize a right to procreate that may prevail in certain factual circumstances, the trauma and regret linked to unwanted genetic parenthood mean that the right not to procreate usually trumps any countervailing procreative interest.").

¹⁵⁷ Some women may have completely lost their reproductive ability but do not know it yet. Fertility ignorance is common in today's society, especially considering that more and more women are waiting until their late twenties, thirties, and forties before trying to conceive. Quoc Trung Bui & Claire Cain Miller, *The Age that Women Have Babies: How a Gap Divides America*, N.Y. TIMES (Aug. 4, 2018), <https://www.nytimes.com/interactive/2018/08/04/upshot/up-birth-age-gap.html>. This goes hand in hand with the fact that more women are attaining an education and entering the work force and are putting off starting a family until after establishing a career. *Id.* Presumptively this seems to be a responsible decision, however, women's reproductive systems are still anachronistically living in the 1940s and have not kept up to pace with this feminist movement. One would think that women, especially professionals, would be mindful of their biological clock, but the lack of education surrounding infertility has led to a fertility denial complex—women thinking that it will not matter if they simply delay family planning, and that infertility is a "fixable" problem, when for a vast majority of women who are older, it actually isn't. Erin Gloria Ryan, *The Fertility Denial Complex*, JEZEBEL (Nov. 15, 2011, 2:50 PM), <https://jezebel.com/5859741/the-fertility-denial-complex>.

¹⁵⁸ See generally Arthur L. Greil, Kathleen Slauson-Blevins & Julia McQuillan, *The Experience of Infertility: A Review of Recent Literature*, 32 SOCIO. HEALTH ILLNESS 140, 141 (2010) ("[T]he presence

have the success of creating an embryo have no guarantee that they will have the same success again. Recall the hypothetical scenario of Roxana and Dean. Roxana, forty years old when she and Dean divorce, stands a slim chance in successfully creating *more* embryos, should she be forced to undergo yet another round of IVF as her only remaining path to have a child of her own. The default rule of the right to avoid procreation is far reaching and perhaps stretches to individuals who are in the same special circumstance of having lost reproductive capability, they just have no knowledge of it yet.¹⁵⁹ Moreover, reproductive ability is not the only factor to consider in whether a party has lost the ability to become a genetic parent. Time is a gender-based enemy of the woman,¹⁶⁰ and fertility treatment is expensive.¹⁶¹ Thus, other

of infertility is signaled, not by the presence of pathological symptoms, but by the absence of a desired state. It is, in the words of Koropatnick et al a ‘non-event transition.’” (quoting Stephanie Koropatnick, Judith Daniluk & H. Anthony Pattinson, *Infertility: A Non-Event Transition*, 59 FERTILITY & STERILITY 163 (1993))).

¹⁵⁹ Kass, 1995 WL 110368, at *3.

¹⁶⁰ *Advancing Age Decreases Your Ability to Have Children*, AM. SOC’Y FOR REPROD. MED., <https://www.asrm.org/globalassets/asrm/asrm-content/learning--resources/patient-resources/protect-your-fertility3/age.pdf> (last visited Aug. 10, 2020). Advancing age decreases a woman’s ability to have children, “while women and their partners must be the ones to decide the best time when (and if) to have children, women in their twenties and early thirties are most likely to conceive.” *Id.*; see also Nancy A. Klein, *Prevention of Infertility Source Document: The Impact of Age on Female Fertility*, AM. SOC’Y FOR REPROD. MED., https://www.asrm.org/globalassets/asrm/asrm-content/learning--resources/patient-resources/protect-your-fertility3/age_femaleinfertility.pdf (last visited Aug. 10, 2020) (“Compared to other major organ systems, the female reproductive system ages to the point of failure at a relatively young age. Although the average age of menopause is 51, peak efficiency in the female reproductive system occurs in the early 20’s with a steady decline thereafter. There is a gradual loss of fertility as a function of female age with the rate of decline in fertility becoming more dramatic after the age of 35.”). Aging male fertility is poorly understood; studies show that increased age for the male contributes to decreased fecundability, increased time to conceive, and increased miscarriage; but these impacts are slight compared to the biological line drawn in the sand for the woman. Isiah D. Harris, *Male*, 13 REV. UROL. 184, 190 (2011). Guinness World Records holds the oldest man to father a child was reportedly ninety-two years old. *Oldest Legal Father*, GUINNESS WORLD RECS., <http://www.guinnessworldrecords.com/world-records/oldest-father-> (last visited Aug. 10, 2020). Other than the biblical figure Sarah, who was ninety years old when her son Isaac was conceived, few women can compete. See *Genesis* 17:17 (King James) (“Then Abraham fell upon his face, and laughed, and said in his heart, Shall a child be born unto him that is an hundred years old? And shall Sarah, that is ninety years old, bear?”).

¹⁶¹ *Overview: ASRM Takes Proactive Steps to Address Access to Fertility Care*, AM. SOC’Y FOR REPROD. MED. (Sept. 10–11, 2015), <https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/news-and-research/press-releases-and-bulletins/pdf/atcwhitepaper.pdf>. In 2015, the American Society for Reproductive Medicine reported that the average cost for a single IVF cycle was \$12,400. *Id.* CNN Health reports the average cost today for a single IVF cycle to be \$20,000. Elissa Strauss, *40 Years Later, Why Is IVF Still Not Covered by Insurance? Economics, Ignorance, and Sexism*, CNN HEALTH (July 25, 2018, 12:48 PM), https://www.cnn.com/2018/07/25/health/ivf-insurance-parenting-strauss/index.html?fbclid=IwAR2e-itoBiv7z_zD3PoMK8zyAi5FOA24dwflxoOWRtUGTtnCjU9skDTQtqk. Fertility treatment remains uncovered by insurance to a large degree, with only eighteen states that have passed laws requiring some form of coverage. American Society for Reproductive Medicine, *State Infertility Insurance Laws*,

limiting factors can indirectly have the same effect of occluding an individual's ability to procreate past the successfully created embryo.¹⁶²

Courts reason that an underlying policy of reproductive autonomy is unwanted parenthood.¹⁶³ Again, this is mistakenly drawn from *Roe* and its progeny.¹⁶⁴ Abortion rights jurisprudence touches on an “independent and unique set of constitutional concerns surrounding unwanted pregnancy—not undesired parenthood.”¹⁶⁵ A party who is seeking to avoid procreation, residing in a state that has adopted the recently approved revisions to the Uniform Parentage Act, can choose to not be the intentional parent without taking away the other party's ability to reproduce.¹⁶⁶ Effectively, genetic parenthood would operate in like manner as a genetic donor.¹⁶⁷ Genetic parenthood has failed to be recognized as a practical option, and courts fail to acknowledge the significant difference between genetic parenthood and intentional parenthood.¹⁶⁸ Parenthood is recognized and achieved in many ways in American society.¹⁶⁹ The consequences and responsibilities that

REPRODUCTIVEFACTS.ORG, <https://www.reproductivefacts.org/resources/state-infertility-insurance-laws/> (last visited Apr. 22, 2021). The American Society for Reproductive Medicine continues to lobby for insurance coverage, causing a shift in this trend, with the American Medical Association declaring infertility a “disease” in 2017, in hopes to “promote insurance coverage and payment.” Strauss, *supra* note 161.

¹⁶² See *supra* notes 157–158.

¹⁶³ Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992) (“Beginning with the burden imposed on Junior Davis, we note that the consequences are obvious. Any disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences. The impact that this unwanted parenthood would have on Junior Davis can only be understood by considering his particular circumstances, as revealed in the record.”).

¹⁶⁴ Ziegler, *supra* note 149, at 1311.

¹⁶⁵ *Id.* at 1311–14. Taken literally, “*Roe* and its progeny recognize a right to abortion, not a right to avoid procreation in all contexts.” *Id.* at 1314.

¹⁶⁶ UNIF. PARENTAGE ACT § 707(a) (UNIF. L. COMM’N 2017). The Uniform Parentage Act (“UPA”) revisions provide that a former spouse who has previously consented to assisted reproduction may withdraw their consent at “any time before transfer that results in a pregnancy by giving notice of the withdrawal of consent in a record to a woman giving birth to a child conceived by assisted reproduction and any clinic or health care provider facilitating the assisted reproduction. Failure to give notice to the clinic or health care provider does not affect a determination of parentage” *Id.*

¹⁶⁷ See Ziegler, *supra* note 149, at 1314.

¹⁶⁸ *Id.*

¹⁶⁹ See *The Birth of a Parent*, *supra* note 62 (describing the imperative need for the law to replace gender-specific laws with gender-neutral laws to keep pace with the rise in nontraditional families). Even beyond the increasing number of lesbian and gay couples having children of their own, today's multi-parent families assume a variety of different forms, including: a lesbian couple with a sperm donor; a gay male couple with an egg donor and a surrogate; an opposite sex couple with a sperm donor, egg donor, and/or surrogate; step-parents, guardians, and grandparents; the donors of genetic material; a surrogate biologically related to the intended parents; adults that a parent may have allowed to act as a parent to the child; polyamorous families; individuals co-parenting who are not in spousal-like relationships; and, any combination of the above. Diane Goodman, Past Chair, Address at the American Bar Association 2018 Fall CLE Conference, Section of Family Law, Why Can't This Child Have Two Mommies and a Daddy?

come with intentional parenthood and raising a child are simply not present in the context of genetic parenthood.¹⁷⁰ Genetic parenthood costs a party nothing more than sharing a biological link with the resulting child, and this option could be a solution that would serve each party's interests.¹⁷¹ However, courts should not need to untie these Gordian Knots.¹⁷² In fact, with proper legal planning, the Gordian Knot should never be tied as couples negotiate options to embryo disposition when they negotiate and document a plethora of marital matters within the prenuptial agreement.

IV. A SMARTER PRENUP

Embryo disposition in the event of divorce should become a standard provision in the prototypical premarital agreement. As projections of infertility among American women continue to rise,¹⁷³ so will the usage of ART by those economically enabled.¹⁷⁴ While prenuptial agreements cannot cover the custody of children or the award of child support, they *can* cover “custody” of embryos.¹⁷⁵ Typically, embryos will not be separate property brought into a marriage but rather marital property created during the

(Oct. 4, 2018). California, by statute, permits more than two parents to be the legal parents of a child if a judge finds that:

recognizing only two parents would be detrimental to the child. In determining detriment to the child, the [C]ourt . . . consider[s] all relevant factors, including but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

CAL. FAM. CODE § 7612(c) (West 2020).

¹⁷⁰ See Ziegler, *supra* note 149, at 1311–15.

¹⁷¹ *Id.*

¹⁷² “[A]n intricate problem, especially a problem insoluble in its own terms—often used in the phrase *cut the Gordian [K]not* . . . a knot tied by Gordius, king of Phrygia, held to be capable of being untied only by the future ruler of Asia, and cut by Alexander the Great with his sword.” *Gordian Knot*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Gordian%20knot> (last visited Aug. 10, 2020) (emphasis added).

¹⁷³ “The number of women experiencing infertility will range from 5.4–7.7 million in 2025, with the most likely number to be just under 6.5 million.” Elizabeth Hervey Stephen & Anjani Chandra, *Updated Projections of Infertility in the United States: 1995–2025*, 70 FERTILITY & STERILITY 30, 30 (1998).

¹⁷⁴ *IVF Cost: Analyzing the True Cost of In Vitro Fertilization*, CNY FERTILITY (Oct. 12, 2020), <https://www.cnyfertility.com/ivf-cost/#:~:text=above%20mentioned%20figures,-,The%20Average%20Cost%20of%20IVF%20Billed%20by%20the%20Fertility%20Clinic,no%20Dfrills%2C%20IVF%20cycle%20>.

¹⁷⁵ See *infra* Section II.B.

marriage.¹⁷⁶ Marital property as reflecting the contribution of both spouses is divided either equally or equitably.¹⁷⁷ However, unlike more traditional marital property, such as family photographs or artwork, division of embryos is impractical.¹⁷⁸ Additionally, even though courts are notionally sitting in the throne of King Solomon, they do not like to split the baby and would rather the parties have a prior agreement expressing the couple's true intentions.¹⁷⁹ Moreover, even though a couple may not suffer from infertility and the provision essentially becomes a non-issue, standard language can nevertheless work as an extra provision that has no legal effect.¹⁸⁰ Prenuptial agreements often include such provisions that cover the slightest of potentials, even if the provisions themselves end up having no application to the parties.¹⁸¹ As such, prenuptial agreements should be broadened to contemplate and include the division of genetic property.

¹⁷⁶ Generally, property acquired during the marriage is marital property. TENN. CODE ANN. § 36-4-121 (2017) (“‘Marital property’ means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage . . .”).

¹⁷⁷ See generally 5 WILLISTON ON CONTRACTS § 11.8 (4th ed. 2020) [hereinafter WILLISTON ON CONTRACTS].

¹⁷⁸ A thoughtful comparison of the equitable division of embryos is the equitable division of pets. Both embryos and pets occupy a *special* category of property; their specialness derived from their characteristic of being alive, so to speak, making them indivisible and an irrational allocation in terms of custody and visitation rights between the divorcing spouses. See *Hament v. Baker*, 97 A.3d 461, 465 (Vt. 2014) (“[A]n agreement to share custody of the family dog or other pet would be unenforceable in the family division.”). While a frozen embryo is not a person (nor a pet), it is alive enough to occupy that special interim category of property, as discussed *supra* Section II.B. Pet parents (or owners) form emotional attachments with their pets, just as intended parents form emotional attachments with their embryos. This phenomenon is leading to pet custody legislation in some states. See, e.g., ALASKA STAT. ANN. § 25.24.160(a)(5) (West); ALASKA STAT. ANN. § 25.24.200(c), (f) (West); 750 ILL. COMP. STAT. ANN. 5/503(n) (West 2019); CAL. FAM. CODE § 2605 (West 2019). Pet disposition, like embryo disposition, could be addressed in the prenuptial agreement.

¹⁷⁹ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (“We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as . . . divorce . . .) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.”). See 1 *Kings* 3:16–28, for the narrative behind the “split the baby” expression. *Id.* King Solomon, by ploy to flush out the truth of which of two women was the rightful mother of an infant, proposed to split the baby with a sword, dividing half of the baby between the two women. *Id.* The rightful mother, who kept her baby’s best interest at heart, renounced her claim to custody over the child to the illegitimate mother, so the baby’s life could be spared. *Id.*

¹⁸⁰ See generally WILLISTON ON CONTRACTS, *supra* note 177 (“Modern statutes provide the parties with substantial latitude concerning the scope of the premarital agreement, and it is today generally permissible to deal with virtually every aspect of the parties’ marital relationship.”). The prenuptial agreement in its entirety is a tool that plans for the potential of the event of divorce. *Id.*

¹⁸¹ See generally *id.*

A. *The First Question: Is There an Agreement?*

A prior agreement between the parties provides the court the framework on which to base an embryo disposition dispute.¹⁸² Despite which approach each jurisdiction adopts, thus far every court deciding an embryo disposition dispute has first examined whether the parties had a preexisting agreement.¹⁸³

¹⁸² See *id.*

¹⁸³ See generally cases cited *supra* note 119. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1065 (Mass. 2000) (“In view of the purpose of the form (drafted by and to give assistance to the clinic) and the circumstances of execution, we are dubious at best that it represents the intent of the husband and the wife regarding disposition of the preembryos in the case of a dispute between them. In any event, for several independent reasons, we conclude that the form should not be enforced in the circumstances of this case.”); *Cahill v. Cahill*, 757 So. 2d 465, 467 (Ala. Civ. App. 2000) (“[T]hese documents constituted the parties’ agreement, despite an express direction from the trial court that [the spouse] steps to cause the University to produce the signed agreement and the trial court’s stated concern that the contract gave the University an interest in the zygotes.”); *Findley v. Lee*, No. FDI-13-780539 32 (Cal. Super. Ct. 2016) (“The Court finds that the contract approach is required by the statutory scheme created by the Legislature, followed by California public policy favoring judicial deference to the intent of the contracting parties, and supported by the weight of authority from courts in other states that have considered similar cases. The first step, therefore, is to determine whether the parties entered into a binding agreement.”); *Litowitz v. Litowitz*, 48 P.3d 261, 268 (Wash. 2002) (“The cryopreservation contract provided ‘in the event [the couple is] unable to reach a mutual decision regarding the disposition of [their] pre-embryos, they must petition a court of competent jurisdiction for instructions concerning the appropriate disposition of [their] pre-embryos.’ Petitioner and Respondent agreed to this. Neither questions whether the cryopreservation contract is an enforceable one. Indeed, they both rely upon it in asserting their rights.”); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 839 (Or. Ct. App. 2008) (“We acknowledge that there is some inherent awkwardness in describing those contractual rights as ‘personal property,’ as we discuss in more detail below. However, we nonetheless conclude that the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a ‘just and proper’ division under [statute]. The trial court did not err in treating it as such.”); *In re Marriage of Rooks*, 429 P.3d 579, 580 (Colo. 2018) (“Considering the nature and equivalency of the underlying liberty and privacy interests at stake, a court presiding over dissolution proceedings should strive, where possible, to honor both parties’ interests in procreational autonomy when resolving disputes over a couple’s cryogenically preserved pre-embryos. Thus, we hold that a court should look first to any existing agreement expressing the spouses’ intent regarding disposition of the couple’s remaining pre-embryos in the event of divorce.”); *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003) (“[W]e think the present predicament falls within the general provision governing ‘release of embryos,’ in which the parties agreed that the embryos would not be transferred, released, or discarded without ‘the signed approval’ of both [parties]. This provision is certainly broad enough to encompass the decision-making protocol when the parties are unmarried as well as when they are married.”); *McQueen v. Gadberry*, 507 S.W.3d 127, 144 (Mo. Ct. App. 2016) (In an embryo disposition dispute “and a court determines there is no valid and enforceable agreement between the parties concerning the disposition of the frozen pre-embryos upon divorce, courts of other states have resolved the dispute by balancing the relative interests of the parties. . . .” (citing *J.B. v. M.B.*, 783 A.2d 707, 708, 712–714, 716–717 (N.J. 2001))); *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) (“In this case, we need not decide whether to adopt one approach or another. Both [lower courts] applied the balancing approach because neither party had signed the portion of the consent form related to the disposition of the pre-embryos in the event of divorce or death of one party.”); *Roman v. Roman*, 193 S.W.3d 40, 44 (Tex. App. 2006) (“In this case of first impression in Texas, we consider the merits of the trial court’s award of frozen embryos to Augusta as part of a ‘just and right’ division of community property in light of the parties’ prior written agreement to discard the embryos.”); *Szafranski v. Dunston*, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013) (“We therefore

The Tennessee court in *Davis* stated that “as a starting point” in resolving such a dispute, an agreement regarding disposition of the embryos in the event of divorce “should be presumed valid and should be enforced as between the progenitors.”¹⁸⁴ Practitioners ought to take this cue from the judiciaries’ inquiry. The practicing bar should incorporate embryo disposition in the prenuptial agreement, utilizing the potential of the prenuptial agreement to plan for such an event upon divorce rather than resorting to the court for an answer.

B. It’s a Contract(ual) Approach, but Better

The contractual approach is the prevailing view of courts deciding an embryo disposition dispute.¹⁸⁵ Only two of the fifteen courts deciding these cases have expressly rejected the contractual approach.¹⁸⁶ The remainder of courts have adopted it or would have adopted it but for there being either no contract in place between the parties, or because the contract between the parties was ambiguous.¹⁸⁷

Advantages of the contract approach, as the New York court observed in *Kass*, are that [the contractual approach] “reserv[es] to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision”; it avoids litigation in “personal matters of reproductive choice”; and it “provide[s] the certainty needed for effective operation of IVF programs.”¹⁸⁸

Courts basically beg the litigants for a contract in these cases; they have no desire to decide the procreative future for either party. Likewise, neither party could wish for a third party, such as the court, to determine their procreative autonomy. Furthermore, parties *and* courts are provided no certainty by the parties not reaching a prior agreement. The lack of precedential embryo disposition cases leaves ambiguity not only in respect

join those courts that have held that “[a]greements 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.” (alteration in original) (quoting *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998))).

¹⁸⁴ *Davis*, 842 S.W.2d at 597; see also *Rooks*, 2016 Colo. App. LEXIS 1486, at *5 (“Under the contract approach, an agreement between spouses that was entered into when the embryos were created and cryo-stored will be enforced as to the disposition of the embryos on dissolution of marriage.”).

¹⁸⁵ *Loy*, *supra* note 81, at 552.

¹⁸⁶ *A.Z.*, 725 N.E.2d at 1057; *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).

¹⁸⁷ *Supra* Sections III.B.2, III.B.3.

¹⁸⁸ *Rooks*, 2016 Colo. App. LEXIS 1486, at *6 (quoting *Kass*, 696 N.E.2d at 180); see also *Szafranski*, 993 N.E.2d at 515 (Ill. App. Ct. 2013); *Roman*, 193 S.W.3d at 50.

to which approach a Court will adopt but also ambiguity of the resolution a Court will reach in applying any of the three approaches. Accordingly, parties should take an affirmative step to contract their intentions of embryo disposition.

To a degree, parties are taking that affirmative step through the clinic directive—the contract in question in all of the existing embryo disposition cases.¹⁸⁹ But rather than the clinic directive, prenuptial agreements are the proper place for parties to decide the future of their combined genetic material. While the clinic directive effectively expresses the certainty of a prior agreement and a plan to avoid litigation, the clinic directive is not a standard practice applied for the best interest of either party but instead the clinic.¹⁹⁰ By any means, the clinic does not want to be caught in an embryo tug of war between two adversary parties, each of whom have an equal biological claim.¹⁹¹ Furthermore, the clinic directive signed by a married couple is a de facto postnuptial agreement, and it is usually presented to the patient once the couple has begun the fertility process, but before the embryos are cryopreserved.¹⁹² As such, it is hastily entered into at a time of heightened emotions.¹⁹³ Recall the hypothetical scenario of Roxana and Dean. Surely, it is not implausible that Roxana was put in a position of duress if Dean refused to proceed with their fertility journey unless Roxana agreed to let him control

¹⁸⁹ See *supra* cases cited in note 119; *A.Z.*, 725 N.E.2d at 1056 (“However, a clinic directive’s ‘primary purpose is to . . . record the donors’ desires for disposition of the frozen preembryos at the time the form is executed in order to provide the clinic with guidance if the donors (as a unit) no longer wish to use the frozen preembryos. The form does not state, and the record does not indicate, that the parties intended the [] form to act as a binding agreement between them should they later disagree as to the disposition. Rather, it appears that it was intended only to define the [parties]’ relationship as a unit with the clinic.”).

¹⁹⁰ “The clinic” as such does not care whether the embryos are left frozen, used, donated or discarded as long as the clinic bears no liability for following the terms of the directive and continues to be paid for any ongoing services. A quick perusal of typical clinic directives will reveal that the protection of the clinic is the paramount concern addressed by the directive, which was certainly prepared and reviewed by counsel for the clinic. A typical directive authorizes the clinic to destroy stored embryos without notice or liability after one year, or if the parties’ selected disposition becomes impractical in the discretion of the clinic, or upon the parties’ nonpayment of storage fees. See, e.g., Lee, *supra* note 6. See also *Embryo Disposition Consent*, *supra* note 14. The authors do not suggest discarding clinical directives. They contend, however, that clinic directives are an ineffective vehicle for a binding disposition agreement between the parties.

¹⁹¹ “Because of the uncertainties that exist in such a situation, programs should require each individual or couple contemplating embryo storage to give written instructions concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage charges, inability to agree on disposition in the future, or prolonged lack of contact with the program. Such an advance directive should occur prior to the first treatment cycle, or at the time of cryopreservation, or both.” See Ethics Committee of the American Society, *supra* note 15, at 1848.

¹⁹² *Id.* at 1849.

¹⁹³ See, e.g., El-Zein, *supra* note 19, at 902 (“Like a prenuptial agreement, frozen embryo contracts deal with parties at a deeply-sensitive time in their lives.”).

the embryo disposition. Abruptly, Roxana's dreams of becoming a parent would come to a halt if she did not rashly agree to relinquish control over their embryos to Dean should the couple subsequently divorce. Couples are ill-equipped to make such a significant decision amidst the process of their fertility journey. Embryo disposition addressed in a prenuptial agreement fits the mold of the contractual approach, but better. Even without the framework of divorce, the smART prenup forces couples to discuss the disposition of unused or supernumerary embryos. With forty percent of cryopreserved embryos going unused,¹⁹⁴ intact couples also must face the embryo disposition dilemma.¹⁹⁵

Current law and public policy strongly favor prenuptial agreements.¹⁹⁶ As more and more couples creatively avail themselves of prenups, these agreements "have attained prominence in the national imagination."¹⁹⁷ Prenuptial agreements take the form of a contract that is "deliberately prepared and . . . manifests the true intention[s] of the parties."¹⁹⁸ Because prenuptial agreements are only enforceable if the agreement was entered into fully, fairly, knowingly, and with full disclosure, contracting within this document avoids the turbulence that a clinic directive expels to a large degree.¹⁹⁹ Parties would be more equipped to make a rational determination; one that is freer of emotion as the disposition decision contemplated is distanced from the present both in time and in certainty.

This call to action is a practical one. Couples take the affirmative step to enter into premarital agreements prior to marriage for good reason, even if it is to plan for the potential of the bad. Both divorce and infertility are unknown future threats to the nascent marriage. Infertility has been described as "a medical condition which diminishes self-esteem, social lives[,] and

¹⁹⁴ Ethics Committee of the American Society, *supra* note 15, at 1862–65 (2020).

¹⁹⁵ See *infra* Section V.D.

¹⁹⁶ WILLISTON ON CONTRACTS, *supra* note 177 ("Although their use has become far more common during recent years, [prenuptial agreements] have long been . . . upheld by the courts . . . however, because they are favored by public policy, they are typically construed liberally so as to carry out the intention of the parties.").

¹⁹⁷ See Marston, *supra* note 21, at 891.

¹⁹⁸ KYLE C. BISCEGLIE ET AL., N.Y. Com. Litig. Guide § 8.06 [2] (2020).

¹⁹⁹ WILLISTON ON CONTRACTS, *supra* note 177 ("Thus, modern statutory and case law holds that in order for a premarital agreement to be enforceable, the parties must fairly disclose their respective financial status and other material information, the agreement must be voluntarily and freely entered, the division of property in the event of death or divorce must not be unfair, and the terms of the agreement may not otherwise be unconscionable at the time it is entered into or in some jurisdictions, at least as to support obligations, at the time of dissolution.").

bank accounts.”²⁰⁰ Strikingly, the same could be said of divorce. It follows that the pre-planning for property division should now incorporate pre-planning for the distribution of the couple’s reproductive property. Prenuptial agreements are drafted in the client’s terms, and as such, their preference of embryo disposition can truly reflect *their* best interests, rather than the clinic’s. Even though the subject is complicated and controversial, exploiting the legal status of the embryo as property allows parties to contract its future while avoiding addressing the conundrum of when personhood begins. Suitably, encouraging parties to make a decision in a neutral space and with representation of their own counsel is the most proper time to consider such consequential matters.²⁰¹

C. *A Paint-by-Number Archetype*

Despite the infinite manifestations of premarital agreements, the core structure of a well-drafted prenup is remarkably consistent from agreement to agreement. Addressing procreational property rights within a prenuptial agreement would require purposeful expansion of the definitions of separate property and marital property assigned by the prenup.²⁰² A typical premarital agreement provides for each spouse to retain his or her separate property both during and following the marriage. By way of example, a premarital agreement might provide as follows:

Property to Remain Separate

All property, both real and personal, belonging to each of the parties on the date of their marriage, all property thereafter acquired by inheritance or gift, all appreciation (or increase in equity) of any such property, if any, during the marriage regardless of the contribution of either spouse to such appreciation and all property acquired in exchange for any such property (herein collectively referred to as “Separate

²⁰⁰ *Infertility Quote of Unknown Origin*, COMICSPipeline.COM, <https://i2.wp.com/www.comicpipeline.com/wp-content/uploads/2019/10/merriam-webster-was-wrong-infertility-quotes-happyshappy.jpeg?fit=800%2C800&ssl=1> (last visited Feb. 4, 2020).

²⁰¹ Instead of executing the paradigmatic dual-representation model of a premarital agreement, the parties might pursue instead a collaborative model in which the couple consults with a single lawyer. For a recommendation of the collaborative approach as improving the stability of the ensuing marriage see Carter, *supra* note 45, at 354. The recommendations of this article are equally applicable to prenups achieved via dual-representation or collaboration.

²⁰² This article assumes a dual property state in which the domestic relations law recognizes both separate and marital property and provides for the equitable division of marital property. The terms of a smART prenup could be adapted for community property states.

Property”) shall be the sole and separate property of each of the respective parties, and their rights and privileges in such property shall be the same as if they had never married. Except as provided herein, each party waives and releases any and all rights to the Separate Property of the other, which rights he or she may acquire as a result of the marriage.

For a smART prenup, the following language should be added to the definition of separate property: “and any and all unfertilized reproductive property of a party, wherever and whenever preserved for reproductive use, without regard to any financial or other contribution to such property by the other party.” The estate planning or family law practitioner will recognize that such language removes nothing from the paradigmatic statutory definition of separate property. The language serves only to include unambiguously the reproductive property of each spouse. As separate property, in the event of divorce, the reproductive property of each spouse would be awarded without limitation to that spouse. In its practical application, this definition will offer a disproportionate benefit to women. The lay reader might be thinking, “of course a woman’s eggs are her separate property,” and thus be perplexed by the authors’ attention to a non-existent problem.²⁰³ However, the practitioners of family law and estate planning will recognize that through the application of the doctrine of transmutation²⁰⁴ to the separate property of procreation, a cryogenically preserved egg can transmute from its original classification as the woman’s separate property into marital property to which each spouse has equal or equitable claim. By way of example, a non-owner spouse can acquire ownership rights in a house titled exclusively to the other spouse through contributions of her individual efforts or finances to the preservation of such house. In addition, the use of marital funds to preserve separate property also taints the separateness of such property. By extension, the use of the husband’s separate funds or the couple’s marital funds to finance the ART process of egg removal or the ongoing cryopreservation of the eggs could trigger the classification of such eggs as property of the marriage.²⁰⁵

²⁰³ While it would be nice to believe that the sophistry of scholastic embodied in the query “how many angels can dance on the head of a pin?” was limited to medieval times, we all have read more recent embodiments of “good brain power put to nonsensical ends.”

²⁰⁴ Transmutation is simply the process of changing the character of property from separate to marital or vice versa over the course of a marriage. Transmutation can occur affirmatively by retitling the property or by a court’s application of state statutory provisions which acknowledge the contributions of a non-owner spouse. *See, e.g.*, TENN. CODE ANN. § 36-4-121 (b)(1)(B) (2020).

²⁰⁵ The identical analysis would apply to a man’s sperm. Such analysis is statistically less important for this article for two reasons. First, the science of cryopreservation of sperm has been less successful than that of eggs. Second, unlike the loudly ticking biological clock of women, a healthy man will never

In addition, the smART prenup should grant to each party the right to convey his or her Separate Property. The following language is illustrative:

Right to Convey Unaffected

Each party shall have the absolute and unequivocal right to sell, mortgage, transfer, and convey his or her Separate Property without execution by the other of any instrument of conveyance.

Next, the smART prenup must define marital property and designate to whom reproductive marital property is distributed in the event of a divorce. Often, marital property is defined in the negative as all property not otherwise defined as Separate Property. The smART prenup should affirmatively include within the definition of Marital Property “any and all fertilized reproductive property of the parties, wherever and whenever preserved for reproductive use, without regard to any financial or other contribution to such property by each of the parties.” Lastly, and most crucially in the context of embryo preservation, the operative provisions for the division and distribution of Marital Property (which often superficially invoke fairness by giving half to each spouse) must be drafted to provide distinct dispositive provisions for any and all frozen embryos. The “split the baby” appeal of traditional marital property division is (uniquely and ironically) unworkable in the ART property context.²⁰⁶

D. The Lagniappe of Compassionate Transfer

Couples at the starting line of the infertility journey are focused on the finish line—the birth of a healthy baby. Even when this victory is achieved, the infertility journey has not ended. The phenomenon of unused cryopreserved embryos remains as a perhaps unanticipated but logically resultant conundrum of modern-day procreation through ART. The title holders to embryos cannot simply preserve them in perpetuity. The disposition question must be addressed and, when addressed, triggers

stop producing sperm. *Older Men Lack Sperm Quality*, WEBMD HEALTH NEWS (Nov. 3, 2000), <https://www.webmd.com/men/news/20001103/older-men-lack-sperm-quantity-quality#2>. See generally Harris, *supra* note 160.

²⁰⁶ The authors’ proposal to broaden the definition of marital property as included within a prenuptial agreement would also preserve the expectations of pet owners upon divorce. Not unlike frozen embryos, pets are distinct from the inanimate property typically divided upon divorce. Therefore, the classification of a pet as mere property fails to acknowledge its importance to the owner. Several states (California, Alabama, and Illinois) now incorporate the best-interest-of-the-pet within the standards of marital property division upon divorce. The authors submit that specifically tailored provisions of a prenup would be an effective way to improve the disposition decision of pets upon divorce.

feelings of anguish and decisional conflict.²⁰⁷ Such decisional conflict is not unique to divorcing couples but applies equally within a marriage now complete with the desired number of children. In either scenario, the embryo disposition decision is highly personal. Memorializing the decision (or at least designating the decision maker) in a pre-nuptial agreement well in advance of the creation of the embryos should lower the decisional conflict.

One study found that contemplating the fate of unused embryos was harder than the initial decision to pursue infertility treatment.²⁰⁸ Contributing to the difficulty is the couple's characterization of the unused embryos.²⁰⁹ While the law may clearly de-humanize the embryo, the biological creators of unused frozen embryos may personify them as "maybe babies."²¹⁰ By front-loading the disposition decision to a premarital agreement, the decision-making process involves yet-to-be-created hypothetical embryos, which should lessen the ambivalence and discomfort of the disposition decision.

Commonly pursued options for embryo disposition, apart from awarding the embryo to one of its creators, include discarding (destroying) the embryo by discontinuing the cryopreservation, donating the embryo for research, or donating the embryo to other individuals or couples for their using in ART.²¹¹ Understandably, those facing the disposition decision may find each of these options unacceptable.²¹² While the weight of how and when to dispose of unused embryos falls on both men and women, one method of embryo disposition is uniquely female. Compassionate transfer is an alternative form of embryo disposition in which the embryo's placement into the woman's reproductive tract is timed quite intentionally *not* to result in successful implantation.²¹³ Thus, the discarding of the embryo occurs naturally by the woman's body. By preserving a woman's right to be awarded unused embryos for the purpose of compassionate transfer, a smART prenup

²⁰⁷ See generally A. D. Lyerly, S. Nakagawa & M. Kuppermann, *Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent*, 26 HUMAN REPROD. 646 (2011).

²⁰⁸ Robert D. Nachtigall, Gay Becker, Carrie Friese, Anneliese Butler & Kirstin MacDougall, *Parents' Conceptualization of Their Frozen Embryos Complicates the Disposition Decision*, 84 FERTILITY & STERILITY 431 (2005).

²⁰⁹ *Id.*

²¹⁰ Noting the procreative potential within a cryopreserved embryo, author Elissa Strauss dubs it a "maybe baby." *The Great Frozen Embryo Debate*, *supra* note 13.

²¹¹ See Jacqueline C. Hairston, Amanda Kohlmeier & Eve C. Feinberg, *Compassionate Embryo Transfer: Physician Practices and Perspectives*, 114 FERTILITY & STERILITY 552 (2020), <https://doi.org/10.1016/j.fertnstert.2020.04.026>.

²¹² See *id.* at 1849.

²¹³ Brent Monseur, Ruben J. Alvero & William D. Schlaff, *Compassionate Embryo Transfer: Part of a Bigger Question*, 114 FERTILITY & STERILITY 500, 500 (2020), [https://www.fertstert.org/article/S0015-0282\(20\)30528-8/fulltext](https://www.fertstert.org/article/S0015-0282(20)30528-8/fulltext).

can ease the anxiety associated with destroying embryos or otherwise maintaining them in “dispositional limbo.”²¹⁴

VI. CONCLUSION

Judgment Affirmed. Roxana sits in disbelief, realizing that by those words not only affirmed is the doomed fate of her embryos but also affirmed is her inconceivable chance of ever having a child of her own. In a perfect world, turning back time, Roxana could have negotiated potential embryo disposition when she negotiated other marital property disposition in the prenuptial agreement that Dean insisted she sign. Roxana understood the importance of the prenuptial agreement to financially protect Dean but failed to recognize its potential to reproductively protect her. Rather than the prenuptial agreement (in its gendered and renowned way) to metaphorically act as a sword against the woman to protect the affluent man, by including procreational provisions, the prenuptial agreement can simultaneously act as an empowering shield to protect the woman.

Notwithstanding the uncertain predictability of which approach a jurisdiction adopts, the majority of courts prefer that parties have an agreement directing disposition of their embryos. Respectively, these courts take favor in honoring the parties’ intent. The practicing bar should strive to be proactive in the ART realm and include a provision in the prenuptial agreement directing the disposition of any potential embryo in advance of divorce. The stake is high for the client and the burden is low for the attorney who is already drafting the prenuptial agreement. Despite the seeming unlikelihood of prospective spouses resorting to fertility treatment, freezing embryos, and subsequently divorcing, this scenario has become a realistic possibility and one with irreversible consequences to the client. Let’s deliver the authority of potential embryos at the outset—but deliver the authority in a manner ascribed by statute that is fully, fairly, and knowingly with full disclosure. Over time, planning for the disposition of potential genetic material in the prenuptial agreement will add efficiencies to and decrease the emotional toll of the dissolution of a marriage, as the prenuptial agreement turns the division of such genetic material into a simple matter of contractual enforcement. That smART contract might preserve the hope of biological children for one trapped by the hourglass of infertility.

²¹⁴ *Id.*