RESOLVING FRICTION ON ICE: LEGAL APPROACHES IN DECIDING DISPUTES OVER FROZEN EMBRYOS*

*Deane Denesy F. Jao***

ABSTRACT

More than two decades have passed since the first IVF center was established in the Philippines. Before then, Filipinos have had access to assisted reproductive technology (ART) available abroad. However, there have been no legislative policies regulating ART procedures and the Philippine Supreme Court has had no opportunity to decide on disputes specifically involving the use, transfer, and disposition of stored embryos. This paper looks at the three principal approaches U.S. courts have adopted in deciding embryo "custody" battles, identifies each approach's advantages and pitfalls, and provides insights on the possible issues to confront Philippine courts in adopting any of the approaches.

I. INTRODUCTION

In many dystopian films and literature—from the classics "Brave New World" by Aldous Huxley and "The Giver" by Lois Lowry, to Andrew Niccol's "Gattaca" and Michael Bay's "The Island"—reproductive technology and genetic engineering have been depicted as one of the government's means of controlling its citizens and societal structure. For now, however, it seems that our dystopian fears are far from being realized. Four decades have passed since the first *in vitro* baby was born yet even in technologically advanced countries such as the United States where *assisted reproductive technology* (ART) has been readily available, there is a lack of strong legal foundations and consistent judicial rulings on what embryos are in the eyes of the law. Is an embryo considered a person, property, or somewhere in between? Consequently, potential parties to embryo dispute cases are left with no predictable answers on questions relating to its transfer, control and

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** Junior Associate, Gerodias Suchianco Estrella Law. J.D., University of the Philippines College of Law (2017). B.S. Nursing, University of the Philippines Manila (2012). An earlier version of this paper was awarded the Arceli T. Baviera Award for Best Paper in Civil Law (2017).

disposition. Is either of the spouses more entitled to the embryo than the other? Can either of them choose to destroy it? Or, as we often see in science fiction, can the state as *parens patriae* intervene and place these embryos under its custody?

In the Philippines, there are currently no laws regulating ART and the fate of embryos produced through it. Further, the Supreme Court has not had opportunity to decide a dispute of this nature. This paper anticipates disputes on embryo disposition in the Philippines between progenitors and clinics as well as between progenitors and intended parents in case of contingencies such as separation or annulment of progenitors, death of one of them or simply a change of mind on the ART process. With American case law's persuasive influence in our jurisprudence and their courts' familiarity with disputes of this nature, this paper looks into the different approaches adopted by the U.S. courts and provides insights as to how Philippine courts can decide what approach or principles may be adopted in our setting, considering our current set of laws and precedents on constitutional, contracts and family law.

II. EMBRYOS AS PRODUCT OF ASSISTED REPRODUCTIVE TECHNOLOGY

The most recent survey on infertility in the Philippines revealed 1 in 10 Filipino couples have infertility problems.[1] ART provides hope for Filipino couples to successfully conceive. ART is broadly defined as a fertility treatment "in which pregnancy is attempted through the use of external means."[2] All ART work by imitating, to some extent, the natural process of sexual reproduction. The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) more comprehensively defines ART as:

> All treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, *in vitro* fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer,

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[1] Frances Mangosing, *1 of 10 Filipino Couples have Infertility Problems—Survey (2013)*, PHIL. DAILY INQUIRER, Aug. 24, 2013, *available at* http://lifestyle.inquirer.net/121705/1-of-10-filipino-couples-have-infertility-problems-survey/.

[2] National Conference of State Legislatures, *State Laws Related to Insurance Coverage for Infertility Treatment,* NATIONAL CONFERENCE OF STATE LEGISLATURES WEBSITE, *available at* http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx (last visited Apr 10, 2017).

> gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor.[3]

The most common type of ART is *in vitro* fertilization (IVF).[4] To begin IVF, a woman (either donor or nondonor) is given a drug to encourage the growth of follicles on the ovaries, mimicking the hormonal conditions that would trigger ovulation.[5] Follicles are small balls of cells which contains an egg ready for fertilization.[6] After about ten days, another drug is given to prepare the ovary to release the eggs.[7] A needle is then inserted into the vagina and through its wall to suck the eggs from the ovaries.[8] Fertilization takes place in vitro (meaning "in glass") in a laboratory.[9] Figure 2.1 is a diagram that illustrates the regular IVF.[10]

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[3] Fernando Zegers-Hochschild et al., *International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology*, 92 FERTIL. STERIL. 1520–24 (2009).

[4] *Id.*

[5] *In-Vitro Fertilization* , *in* BIOTECHNOLOGY: CHANGING LIFE THROUGH SCIENCE 185–89 (K. Lee Lerner & Brenda Wilmoth Lerner, ed, 2007), *available at* http://elibraryusa.state.gov/primo?url=http://go.galegroup.com.vlib.interchange.at/ps/i.do?p=GVRL&sw=w&u=wash89460&v=2.1&it=r&id=GALE%7CCX2830700050&asid=62211074687f51345aaac27f473b59ee.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Karen Goldstein & Caryn Okinaga, *Assisted Reproductive Technology*, 3 GEO. J GENDER & L. 409, 411 (2002).

[10] Emmett Mayer III, *The In Vitro Fertilization Process*, *at* http://media.nola.com/news_impact/images/ochsner-in-vitro.gif (last visited Apr. 10, 2017).

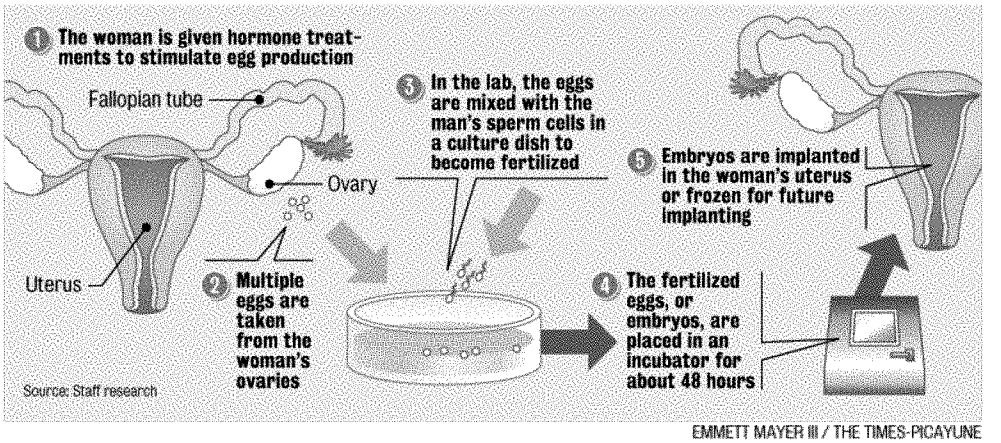

Figure 2.1. The regular IVF process.

The resulting fertilized cells, one-celled entities called zygotes, are allowed to grow for two or three days until they contain six or eight cells.[11] It is in between this zygote and cleavage stage that they are put into the uterus of the gestational mother, who may or may not be the same woman as the genetic mother, or "frozen" (cryogenically preserved or cryopreserved).[12] As to viability, there are studies to support that length of storage time has no significant effect on post-thaw survival rates or successful pregnancy outcomes.[13] In 2010, the successful birth of a healthy baby boy from a 20-year-old frozen embryo was reported by the Jones Institute for Reproductive Medicine at Eastern Virginia Medical School in the United States.[14]

While the scientific community does not consider the cryopreserved entities as *embryos* because it has not been permitted to develop beyond an eight-cell entity, the majority of U.S. courts and scholars refer to these preembryo cells as embryos.[15] For purposes of this paper, the distinction is disregarded and the terms preembryo (or "pre-embryo" as spelled out in some cited materials) and embryos will be used referring to the cryopreserved entities.

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[11] In-Vitro Fertilization, *supra* note 5.

[12] Goldstein and Okinaga, *supra* note 9 (The donated gametes can be sperm, eggs, or both.).

[13] Cynthia Marietta, *Birth of Healthy Baby from 20-Year-Old Frozen Embryo Raises Ethical Questions*, HEALTH LAW PERSPECTIVES 1–7 (2011).

[14] *Id.*

[15] Angela Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107 (2006); *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

In most stimulated IVF cycles,[16] there are more embryos created than transferred. With regard to surplus embryos, couples are required to make a decision about their outcome.[17] Most of the un-implanted embryos are destroyed within days of being created since they are not suitable to establish pregnancy, while others are frozen for future use (banking).[18] Un-implanted embryos may be donated to other infertile couples, used for research or allowed to perish.[19] The subject of the cases to be discussed in this paper are those embryos that were cryopreserved, viable for implantation, but the use of which is disputed by parties.

III. CASE REVIEW OF EMBRYO DISPUTES IN THE UNITED STATES

A. Disputes involving progenitors and clinics

One of the earliest cases of embryo dispute in the United States resembles events which might occur in a soap opera. The case of *Del Zio v. Columbia Presbyterian Hospital* involved a doctor who deliberately destroyed the contents of a test tube in which in vitro fertilization was being attempted.[20]

In 1973, Doris and John Del Zio were the first in the United Stated to have their egg and sperm cryopreserved in an attempt to have a baby. Doris had blocked fallopian tubes that prevented the union of the sperm and the egg.[21] Eventually, they were referred to William J. Sweeney III, a specialist in infertility and gynecologic survey at Cornell Medical School and its affiliate, New York Hospital, who suggested IVF procedure. The couple agreed despite being told that during the time, while the procedure had been often done in animals, there has been no success with IVF in humans, and that there was a risk of birth defects.[22] Sweeney extracted some eggs from Doris

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[16] "Because ART consists of several steps over an interval of approximately 2 weeks, an ART procedure is typically referred to as a cycle of treatment rather than a procedure at a single point in time. The start of an ART cycle is when a woman begins taking drugs to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred." *See* CENTERS FOR DISEASE CONTROL AND PREVENTION ET AL., 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT 4 (2017).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Del Zio v. Columbia Presbyterian Hosp., 74 Civ. 3588 (S.D.N.Y. 1978).

[21] Tabitha Powledge, *A Report from the Del Zio Trial*, 8 HASTINGS CTR. REP. 15–17 (1978).

[22] *Id.*

and sent the couple to Presbyterian Hospital where, John provided a sperm sample and handed it, along with Doris' eggs, to embryologist Dr. Landrum B. Shettles.[23] Shettles combined the sex cells in a clean test tube and placed the specimen in an incubator.[24]

The problem arose when news of the attempted in vitro procedure reached Dr. Raymond Vande Wiele, chairman of Columbia's department of obstetrics and gynecology and chief of Presbyterian Hospital's obstetrics and gynecology service. To Vande Wiele, the procedure was unethical and immoral to carry out with Doris and research should have been done on primates first before subjecting a human to the procedure.[25] Further, Vande Wiele felt that institutional clearance should have been sought prior to the approval.[26] Without notice either to Sweeney or the Spouses Del Zio, Vande Wiele removed the culture, effectively destroying it.[27] The following year, the Del Zios filed a suit for USD 1.5 million against Vande Wiele, Columbia University, and Presbyterian Hospital, claiming infringement of property rights in the embryo and intentional infliction of emotional distress.[28] The case did not come to trial until the summer of 1978—the same week, coincidentally, that Louise Brown was born in England, ending the race for the world's first test tube baby.[29] The jury awarded USD 50,000 to Doris for her pain and suffering, and to John, USD 3 for loss of his wife's companionship.[30] But on the second charge of conversion of property, Van Wiele was acquitted on the grounds that he came by the test tube and its contents unintentionally.

The case of *Del Zio* is important because although it did not resolve the case by defining the nature of the rights of the progenitors and the embryo, the monetary relief manifested that the court nonetheless recognized

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[23] Robin Marantz Henig, *Second Best*, NAT'L ASS'N OF SCI. WRITERS, *available at* https://www.nasw.org/users/robinhenig/SecondBest.htm (last visited Apr 8, 2017).

[24] *Id.*

[25] Deborah Kay Walther, *"Ownership" of the Fertilized Ovum In Vitro*, FAM. LAW Q. 235–256 (1992).

[26] The actual confrontation between Wiele and Shettles was recorded and according to the transcript, after Dr. Vande Wiele upbraided Shettles for proceeding without getting a clearance from Columbia's human experimentation committees, Shettles responded that since a patient of Sweeney's was involved, and the implant was to be done at New York Hospital, he had not thought Columbia's approval was required. *See* Henig, *supra* note 23.

[27] Walther, *supra* note 25.

[28] *Id.*

[29] Henig, *supra* note 23.

[30] *Id.*

that the "parents" or the donors of the embryo have *some* form of right over it.

In a more recent case dealing with conflicting claims between progenitors and an IVF clinic, the court adopted a different approach from that in the *Del Zio* case. In *York v. Jones*,[31] the issue was whether the parents had relinquished or waived some of their dispositional authority upon agreeing to the defendant clinic's terms in cryopreserving the embryo.[32]

The case started in the spring of 1986, when plaintiffs consulted with Drs. Jones and Kreiner at Jones Institute in Norfolk, Virginia in order to determine whether they were viable candidates for the IVF program.[33] The Yorks were accepted and underwent three IVF processes, all of which failed.[34] Unlike in the previous case, here the plaintiffs signed an agreement "Informed Consent: Human Pre-Zygotes Cryopreservation".[35] The Cryopreservation Agreement explained the cryopreservation procedure is available in the event more than five pre-zygotes are retrieved during the IVF treatment.[36] After signing the Agreement, the plaintiffs underwent the fourth IVF process.[37] Dr. Kreiner removed six eggs from Mrs. York and fertilized those eggs with Dr. York's sperm, creating six embryos, five of which were transferred to Mrs. York's uterus while the remaining embryo was cryogenically preserved.[38] A year after the embryo was frozen, the couple sought for its transport to another IVF clinic in Los Angeles, California where the couple decided to undergo treatment.[39] The Jones Institute refused to release the embryo for the use in another clinic, arguing that signing the Agreement limits the proprietary rights of the couple to "three fates" in case they no longer wish to initiate pregnancy, namely: (1) donate to anonymous couple; (2) donate to research; and (3) thawed but not allowed to undergo further development.[40] The couple brought the action in Norfolk to acquire

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[31] York v. Jones, 717 F.Supp. 421 (1989).
[32] Walther, *supra* note 25.
[33] York v. Jones, 717 F.Supp. 421 (1989).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

custody of their embryo and damages for breach of contract, quasi-contract, detinue, and deprivation of federal civil rights.[41]

In ruling for the Yorks based on the first cause of action, the court found that the Cryopreservation Agreement created a bailor-bailee relationship between the parties which "imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor."[42] In reviewing the Agreement, the Court noted that the defendants also recognized their duty to account for the pre-zygote by virtue of a paragraph in the Cryopreservation Agreement purporting to disclaim liability for any injury to the pre-zygote, and that the defendants consistently refer to the pre-zygote as the "property" of the Yorks in the Cryopreservation Agreement.[43]

As to the "three fates" argument of the defendants, the court ruled that the language in the contract saying, "Should we [the Yorks] for any reason *no longer wish to initiate a pregnancy*, we understand we may cho[o]se one of three fates for our pre-zygotes that remain in frozen storage," makes the argument inapplicable because the plaintiffs *do* desire to initiate pregnancy, albeit at another IVF clinic.[44] There is nothing in the contract that restricts the attempt to initiate a pregnancy to procedures employed at the Jones Institute hence the Agreement does not limit the couple's property rights over the frozen embryo.[45]

In the *York* case, the court did not make a categorical pronouncement as to the legal status of the stored embryos, however, in adopting contract

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[41] *Id.* The pertinent provision of the Cryopreservation Agreement provides: "We may withdraw our consent and discontinue participation at any time without prejudice and we understand our pre-zygotes will be stored only as long as we are active IVF patients at The Howard and Georgeanna Jones Institute For Reproductive Medicine or until the end of our normal reproductive years. We have the principle responsibility to decide the disposition of our pre-zygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both. In the event of divorce, we understand legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development."

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

law (specifically, rules on bailment) to resolve the dispute, the court utilized a pure property view of the embryo. As we will see later on, the US courts were more reluctant to impose this view when the dispute involved the progenitors themselves.[46] The same holds true under a contract-based approach in resolving frozen embryo disputes.

What can be observed in both cases is that despite the difference in the determination of the legal status of the frozen embryos and a difference in legal framework adopted by the courts (tort in the *Del Zio* case, property law in *York*), both courts, in granting relief to the couples, recognized that the progenitors have some form of legally recognizable property interest in the embryo. In other words, parents' right of recovery in these cases did not depend on an expressed categorization of legal status of the embryo.

The resolution of legal questions in the above-cited cases appears practical and equitable in situations when the progenitors are in agreement throughout the carrying-out of the ART procedure, but what happens to the stored embryos when there are unanticipated contingencies such as divorce or annulment, death of one or both of the parties, financial reversals, or abandonment?

In the next part, we will examine the different approaches adopted by U.S. courts in resolving questions on ownership, transfer, and disposition of stored embryos, as well as other issues related to it such as legal status of embryo, and procreative rights.

B. Disputes Between Biological Progenitors and/or Intended Parents

Despite the fact that IVF technology has been available for the past four decades, the question of embryo disposition is still a matter of dispute among scientific, legal, philosophical and political scholars.[47] As noted by the Court in the leading case of *Davis v. Davis*,[48] various models for the disposition of frozen embryos in case of contingencies have been proposed that range from one extreme, in which all embryos should be used for uterine transfer,

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[46] Upchurch, *supra* note 15. An exception to this however, is the case of Cahill v. Cahill wherein the ownership was awarded to the clinic based on a copy of the contract. The case will be discussed later under the contractual approach.

[47] Anthony John Cuva, *The Legal Dimensions of In Vitro Fertilization: Cryopreserved Embryos Frozen in Legal Limbo*, 8 N.Y.L. SCH. J. HUM. RTS. 383 (1991).

[48] Davis v. Davis, 842 S.W.2d 588 (1992).

to the other, in which unused embryos should be automatically discarded. The *Davis* case was the first to consider all principal approaches in deciding a "custody" dispute over frozen embryos between genetic "parents" following the couple's divorce. The *Davis* case is also important because although it ultimately adopted the balancing of interest approach, it nonetheless laid down the principles of the other approaches that were soon applied by courts of different state jurisdiction.[49]

1. Balancing of Interest Test

In *Davis*, the couple underwent the IVF procedure after several failed attempts to have children. A total of nine eggs were retrieved from Mary Sue and were subsequently fertilized with Junior Davis' sperm. Two were implanted in Mary Sue while the remaining seven embryos remained frozen at the Knoxville clinic.[50] The case began as a divorce action, when the couple was able to agree on all terms of the dissolution except the "custody" of the frozen embryos.[51] Mary Sue wanted to use the embryos for herself as she claims that they are her best chance—or her last—to have a baby.[52] The husband, however, preferred that the embryos be destroyed, arguing that he has a right to decide if he wants to become a father.[53]

The trial court approached the issue by resolving this primordial question: when does human life begin?[54] Through testimonies of expert witnesses, the circuit court concluded that the seven cryopreserved entities are human beings and that the couple has accomplished their original intent to produce a human being to be known as a child, noting that life begins at conception.[55] Consequently, the court applied the common law doctrine of *parens patriae* and held that it was "in the best interest of the children" to be born rather than destroyed.[56] Because Mary Sue can provide such an opportunity, the embryos were awarded to her.[57] The Tennessee Appellate Court disagreed with this holding and although it did not explicitly categorize

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[49] *Id.* For example, the Supreme Court of Tennessee answered the question of the enforceability of prior contingency agreements even though the issue was not raised on appeal nor elevated to their court "in order to provide the necessary guidance to all those involved with IVF procedures in Tennessee in the future."

[50] *Id.* at 592.

[51] *Id.* at 589.

[52] Walther, *supra* note 25.

[53] *Id.* at 244.

[54] *Id.* at 245.

[55] *Id.*

[56] Davis v. Davis, 842 S.W.2d 588 (1992).

[57] *Id.*

the embryos property, it nevertheless awarded "joint custody" of the embryos, citing, among others, *York v. Jones*, for the proposition that "the parties share an interest in the seven fertilized ova."[58] The appellate court, as the Supreme Court observed, did not otherwise define this interest.[59]

By the time the case reached the Supreme Court of Tennessee, Mrs. Davis no longer wished to utilize the frozen embryos herself, but wanted authority to donate them to a childless couple.[60] Mr. Davis was adamantly opposed to such donation and would prefer to see them discarded. [61]

The Supreme Court began its analysis by addressing one of the fundamental issues in the case, which is "whether the preembryos should be considered 'persons' or 'property' in the contemplation of the law."[62] It agreed with the Court of Appeals that they are not considered "persons" under Tennessee law, quoting the state's Wrongful Death Statute, jurisprudence, and other legislative enactments.[63] The court further noted the same is true under federal law, citing *Roe v. Wade* and *Webster v. Reproductive Health Services*, which explicitly refused to hold that the fetus possesses independent rights under law.[64]

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[58] *Id.* at 595.

[59] *Id.* at 595–96.

[60] *Id.* at 590.

[61] *Id.*

[62] *Id.* at 594.

[63] *Id.* at 594–95. "The policy of the state on the subject matter before us may be gleaned from the state's treatment of fetuses in the womb [...]. The state's Wrongful Death Statute [...] does not allow a wrongful death for a viable fetus that is not first born alive. Without live birth, the Supreme Court has said, a fetus is not a 'person' within the meaning of the statute... Other enactments by the legislature demonstrate even more explicitly that viable fetuses in the womb are not entitled to the same protection as 'persons'. Tenn. Code Ann. § 39– 15–201 incorporates the trimester approach to abortion outlined in Roe v. Wade (citations omitted)[...]. A woman and her doctor may decide on abortion within the first three months of pregnancy but after three months, and before viability, abortion may occur at a properly regulated facility. Moreover, after viability, abortion may be chosen to save the life of the mother. This statutory scheme indicates that as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born. This concept is echoed in Tennessee's murder and assault statutes, which provide that an attack or homicide of a viable fetus may be a crime but abortion is not."

[64] *Id.* at 595; Roe v. Wade, 410 U.S. 113 (1973); Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

Neither did the Supreme Court uphold the appellate court's finding that considered the embryos as marital property.[65] It relied on the ethical standards set by The American Fertility Society and concluded that "preembryos 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." Further, the Supreme Court said neither parties have a "true property interest" but what they do have is "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."[66]

After reaching a conclusion on the legal status of the frozen preembryos, the court discussed the enforceability of a contingency agreement. Although the court recognized that the issue was not raised on appeal and there was no written agreement between the parties executed before the IVF procedure, the court nonetheless indulged in extensive dicta regarding the importance of prior agreements in order to avoid and resolve disputes over frozen embryos.[67] Based on its proposition that the "progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority," the court recognized agreements on disposition of any untransferred preembryos in the event of contingencies should be presumed valid and should be enforced between the progenitors. However, it also recognized that "parties' initial 'informed consent' to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds,"[68] In the end, the court gave this pronouncement on the matter:

> Providing that the initial agreements may later be modified *by agreement* will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.[69]

From discussing the legal status of embryos in light of determining the enforceability of the contract, the court shifted its discussion to the

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[65] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[66] *Id.* at 597.

[67] Stephanie J. Owen, *Davis v. Davis: Establishing Guidelines for Resolving Disputes over Frozen Embryos*, 10 J. CONTEMP. HEALTH POL'Y 493 (1994).

[68] Davis v. Davis, 842 S.W.2d 588 (1992).

[69] *Id.* (Emphasis supplied.)

parties' right of procreational autonomy, saying the essential dispute here is "whether the parties will become parents."[70] This is the threshold question that ultimately led the court to decide the way it did through weighing the parties' interest in the dispute. The *Davis* case presented for the first time the two rights under procreational autonomy—the right to bear and not to bear children.[71] The court explained that unlike disputes involving pregnant women, disputes over extracorporeal embryos do not implicate a woman's bodily autonomy.[72] And while the court did recognize that women are subjected to more severe impact of the procedure and that they contribute more to the IVF process than men, "sweat equity"[73] does not determine decisional authority because the experience must be "viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood."[74] The court first looked into the burden of unwanted parenthood that will be imposed on Mr. Davis should the embryos result in gestation, considering his upbringing and personal feelings on fatherhood.[75] Balancing it against Mrs. Davis' burden of knowing that the lengthy IVF procedures she endured were futile and that the genetic material she contributed will never become children, the court upheld that her interest is not as significant as Mr. Davis' interest in avoiding parenthood.[76]

In summary, the framework adopted by the court was laid down as follows:

> Disputes involving the disposition of preembryos produced by in vitro fertilization should be resolved, first, by looking to the *preferences* of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their *prior agreement* concerning disposition should be carried out. If no prior agreement exists, then the relative *interests of the parties* in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the

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[70] *Id.* at 598.

[71] Owen, *supra* note 67.

[72] Davis v. Davis, 842 S.W.2d 588 (1992).

[73] *Id.* Under this formulation, control will be vested in female gamete-provider because of her greater physical and emotional contribution to the IVF process.

[74] *Id.*

[75] *Id.* at 603–04. Mr. Davis vehemently opposed to fathering a child that would not live with both parents. Growing up at a home for boys, separated from his parents, he testified that his concern was for the "psychological obstacles a child in such a situation would face, as well as the burdens it would impose on him."

[76] *Id.* at 604.

> preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.[77]

It can be observed that although the *Davis* court rejected the personhood and pure property view of embryos, this somewhere-in-between status did not afford the embryo any special treatment.[78] The court's preference to resolve the dispute under contract law suggests that the embryo is treated more like property than a person as pure contract law is not a typical legal framework for resolving disputes concerning born children.[79] As one author observed, the characterization only allowed the court to "remove the dispute from the realm of property law while at the same time avoid legal presumptions of family and the best interest of the child test traditionally utilized in family court".[80] Beyond that, unlike the designations of "property" and "person," the characterization does not provide a clear legal framework for the court.[81] Despite the ambiguous nature of this status, majority of courts dealing with embryo disputes have adopted this hybrid special respect status.[82] Other criticisms on the case include man's veto power over women's procreative rights,[83] the presumption of psychological bond between donor and offspring,[84] the presumption in favor of procreation-avoidance,[85] and internal inconsistency.[86] The dissatisfaction expressed by some scholars on how the decision was reached in *Davis* nonetheless did not stop other state courts from applying the framework laid down therein, making *Davis* an important legal precedent in embryo dispute cases.

i. Szafranski v. Dunston (2015)

The court in *Davis* suggested its decision might be different if the position of the wife was that she had no other alternative for reproduction.

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[77] *Id.* (Emphasis supplied.)

[78] Upchurch, *supra* note 15.

[79] Angela Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 401 (2005).

[80] *Id.* at 404.

[81] *Id.*

[82] *Id.* at 405.

[83] Owen, *supra* note 67.

[84] Ellen Waldman, *The Parent Trap: Uncovering the Myth of Coerced Parenthood in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1028–29 (2003). The author adds that "surveys of sperm donor attitudes and motivation reveal that the genetic links between donors and offspring do not typically inspire psychological bonds."

[85] *Id.* at 1034.

[86] *In re* Witten, 672 N.W.2d 768, 199 (2003).

This was the very scenario in the highly publicized case of *Szafranski v. Dunston,* an embryo dispute between an ex-boyfriend and ex-girlfriend.[87]

Karla Dunston and Jacob Szafranski had been dating for about five months when Karla was diagnosed with non-Hodgkin's lymphoma. Her oncologist recommended that she undergo chemotherapy, but also told Karla she would most likely became infertile as a result of the treatment.[88] On March 24, 2010, after meeting with fertility expert Dr. Ralph Kazer, Karla told Jacob about her options and asked if he would be willing to provide sperm to make preembryos with her, to which Jacob agreed. [89] The next day, they met with Dr. Kazer and signed the Northwestern Medical Faculty Foundation (Northwestern) "Informed Consent for Assisted Reproduction." The relevant portion of the Informed Consent states that, "Embryos are understood to be your property, with rights of survivorship. No use can be made of these embryos without the consent of both partners (if applicable)." Immediately thereafter, the Informed Consent identifies three events that would require a decision as to disposition: (1) divorce or dissolution of the marriage or partnership; (2) death or legal incapacitation of one partner; and (3) death or legal incapacitation of both partners.[90]

On April 6, 2010, the parties went to the clinic but only three eggs were successfully fertilized.[91] At first, Jacob was supportive when Karla began her chemotherapy treatment. Subsequently, however, he stopped returning her phone calls and text messages. In May, after Karla's second chemotherapy cycle, Jacob ended their relationship through a text message. Karla responded with an inquiry about the preembryos, but received no response.[92] The parties ultimately disagreed over whether Karla could use the embryos. Jacob sued to enjoin Karla from using them, and Karla filed a counterclaim seeking sole custody and control over the embryos.

During trial, Jacob testified that although he did give his approval when Karla asked him if he would be willing to provide sperm to make

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[87] Szafranski v. Dunston, 393 Ill. Dec. 604 (2015).

[88] *Id.* at 609.

[89] *Id.* at 609–10.

[90] *Id.* at 610–11, 627–28.

[91] *Id.* at 611–12. The Court narrates that "Dr. Kazer informed them that he had retrieved fewer eggs than originally anticipated and advised them that they would have a better chance of having a biological child if they fertilized all eight. Karla asked Jacob, '[W]hat should we do?' Jacob indicated to her that they should fertilize all of the eggs with his sperm. Ultimately, only three eggs were successfully fertilized."

[92] *Id.*

preembryos with her, he is of the impression that the subsequent Informed Consent required both his and Karla's approval prior to any use of the embryos.[93] Later on, Jacob argued that at the time the oral contract was formed he agreed only to donate sperm for Karla's IVF procedure so that she could attempt to have a biological child in the future. [94] In other words, the consent he gave to create embryos is not consent to their possible use at some unknown time in the future.[95] Karla testified that on March 24, she and Jacob reached an agreement that Jacob will be providing sperm to create embryos so she could have a biological child after her cancer treatment.[96] As to the Informed Consent, she explained that based on her familiarity with consent forms, it is used to get permission for a hospital and doctor to proceed with the procedure.[97]

As to the first issue on the limitation alleged by Jacob with regards to Karla's right of use of the embryos, the court held that Jacob's proposition that he has veto authority is untenable as it would allow Jacob to limit Karla's use of the embryos each time a previously unidentified circumstance or contingency arose, essentially undermining the irrefutable purpose of the IVF and embryo creation.[98]

As to the informed consent, the court ruled ~~that~~ it did not override or modify parties' prior oral contract.[99] The informed consent provision did not bar an advance agreement concerning disposition of embryos, and merely advised the parties that the hospital had no legal right to use or dispose the embryos in any manner that either party would find objectionable.[100]

The court differentiated this case from cases from other state jurisdictions that applied the contractual approach. What distinguishes this case from cases such as *Kass*,[101] *Dahl*,[102] *Roman*,[103] and *Litowitz*,[104] is that the

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[93] *Id.*

[94] *Id.* at 621.

[95] *Id.*

[96] *Id.* at 615.

[97] Szafranski v. Dunston, 393 Ill. Dec. 604 (2015). Both parties are familiar with consent forms. Karla is a physician practicing emergency medicine. Jacob is a firefighter, paramedic, and registered nurse.

[98] *Id.* at 623.

[99] *Id.* at 627.

[100] Szafranski v. Dunston, 393 Ill. Dec. 604 (2015).

[101] Kass v. Kass , 91 N.Y.2d 554 (1998).

[102] *In re* Dahl, 194 P.3d 834 (Or. Ct. App 2008).

[103] Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006).

[104] Litowitz v. Litowitz , 146 Wash. 2d 514 (2002).

foregoing cases all involved explicit language regarding the intended disposition of the embryos in the event of a specific event.[105] The consent forms in those decisions allowed the facilities to execute the pre-selected dispositional option without further consultation with the disputing parties, unlike in this case wherein the Informed Consent lacks any direction or expression of a "choice" concerning disposition of the preembryos in the event of the parties' separation.[106] As the court explained, "Rather than informing [the clinic] of the parties' election of either donation, disposal, or transfer upon the couple's separation, the Informed Consent simply prevents Northwestern from disposing of the pre-embryos in any manner without the parties' consent. The March 24 agreement is evidence of that consent."[107]

The court concurred with the lower court's ruling that Karla's interest in using the preembryos is paramount given her inability to have a biological child by any other means, a pronouncement similar to that reached in another case, *Reber v. Reiss*.[108,109] In ruling so, the cases of *Reber* and *Szafranski* illustrates the application of the conjecture in *Davis* where it was said that the balance of interests would be more likely to favor the wife (or the party) "if [the party] could not achieve parenthood by any other reasonable means." The difference in its application, however, is that in *Reber*, the court considered alterative options the wife has in order to achieve parenthood; while in *Szafranski*, the court declined to make a judicial determination that alternative methods of parenthood offer Karla an acceptable substitute to biological

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[105] Szafranski v. Dunston, 393 Ill. Dec. 604 (2015).

[106] *Id.*

[107] *Id.*

[108] Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012). As quoted in *Szafranski* I, Szafranski v. Dunston, 993 N.E.2d 502 (2013), "A husband and wife underwent in vitro fertilization to preserve the wife's ability to conceive a child after she was diagnosed with breast cancer and prescribed cancer treatments. The husband subsequently filed for divorce, and the wife sought their pre-embryos for implantation. After balancing the parties' interests, the trial court awarded the wife the pre-embryos based on her inability to achieve biological parenthood without use of the pre-embryos. On appeal, the Superior Court of Pennsylvania noted that it did not need to decide whether to adopt a specific approach because the couple had not signed the portion of the consent form related to the disposition of the pre-embryos in the event of divorce, and 'it was quite obvious that Husband and Wife could not come to a contemporaneous mutual agreement regarding the pre-embryos.' Under the circumstances, the court found that 'the balancing approach [was] the most suitable test' and concluded that the balance of interests weighed in the wife's favor because 'Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely Wife's only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all.'"

[109] Szafranski v. Dunston, 393 Ill. Dec. 604 (2015).

parenthood.[110] Despite this difference, when these two cases are contrasted to *Davis,* and *J.B. v. M.B.*[111] and *A.Z. v. B.Z.*,[112] (both discussed later below and all of which were ultimately decided by applying the balancing of interest test), it appears that the only "interest" that outweighs a party's right *not* to procreate is the other party's interest over the preembryos as their *only* opportunity to achieve biological parenthood and/or as their best chance to achieve parenthood at all.

ii. McQueen v. Gadberry (2017)

In the ~~a~~ more recent case of *McQueen v. Gadberry,* the Eastern District of Missouri Court of Appeals had to address the issue of whether the stored embryos subject of the dissolution case were children or marital property. What differentiates this case from the cases mentioned above is that there is a provision in Missouri Law, specifically section 1.205, that declares, *inter alia,* that life begins at conception and that unborn children have protectable interests.

The wife, McQueen, wanting to implant the embryos into herself, argued that the frozen embryos should be classified as children and not as *marital property of a special character* and based her argument on the aforementioned Missouri law.[113] Gadberry contended that applying section 1.205 to frozen preembryos would violate his constitutional right to privacy, right to be free from governmental interference, and his right not to procreate.[114]

At the time the embryos were created, there was no agreement or express recording of the parties' intentions regarding any procedure for addressing excess or unused preembryos.[115] Subsequently, the parties allegedly signed an agreement for the transfer of the frozen embryos to a new cryopreservation facility, including a directive regarding the disposition of embryos.[116] McQueen asserted that the handwritten directive ~~that~~ gave her control over the preembryos but Gadberry argued~~s~~ that the directive was ~~is~~ invalid and unenforceable.

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[110] *Id.* at 635.

[111] J.B. v. M.B., 170 N.J. 9 (2001). To be discussed later in the contemporaneous mutual consent approach.

[112] A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

[113] McQueen v. Gadberry, 507 S.W.3d 127 (Mo. Ct. App. 2017).

[114] *Id.* at 139.

[115] *Id.* at 134.

[116] *Id.* at 135.

As to the first issue relating to the classification of the embryo, the court ruled against McQueen and upheld the trial court's judgment which found the frozen embryos to be marital property of a special character. The court stated that Missouri Courts have interpreted the language in section 1.205 to mean that a fetus *in utero*, defined as a stage of biological development *inside* a woman's uterus, is considered a person for purposes of applying criminal and civil liability statutes against third parties for causing the death of an unborn fetus, and that this interpretation is not contrary to U.S. Supreme Court precedent.[117] Unlike prior cases interpreting section 1.205, the circumstances of this case do not involve a stage of biological development *in utero* or the application of section 1.205 to uninvolved third parties. Instead, the court explained that this case involves frozen preembryos *in vitro*, which are *outside* of McQueen's uterus and cryogenically preserved and stored in an artificial environment.[118]

In deciding whether an application of section 1.205 to Missouri's dissolution statutes would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution, the court first considered each of the parties' positions and interests under the circumstances of the case. As in *Davis*, the wife's right to procreate was balanced against Gadberry's right not to be a parent against his own will. Further, because McQueen did not have any fertility issue (as in *Reber* and *Szafranski*), the court ruled that her fundamental right to procreate would not be irrevocably extinguished if she were not awarded the frozen preembryos.[119] It upheld the trial court's decision in awarding the frozen preembryos to Gadberry and McQueen jointly, and ordered that no transfer, release, or use of the frozen preembryos should occur without the signed authorization of both parties since the award subjected neither party to any unwarranted governmental intrusion, but rather left the intimate decision of whether to potentially have more children to the parties alone.[120] Based on the discussion of the~~ir~~ respective rights of the parties, and following the footsteps of the *Davis* court, the *McQueen* court ruled that the declarations in section 1.205 relating to the potential life of the frozen preembryos were not sufficient to justify any infringement upon the freedom and privacy of Gadberry and McQueen to make their own intimate decisions.

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[117] *Id.* at 141.
[118] *Id.* at 141.
[119] *Id.* at 146.
[120] *Id.* at 147.

The court also held that an application of section 1.205, including declarations that life begins at conception or fertilization, to the frozen embryos and to Missouri's dissolution statutes under the circumstances of the case, (1) would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution; and (2) would violate Gadberry's constitutional right to privacy, right to be free from governmental interference, and right not to procreate.[121] Here, the court noted that if section 1.205 were interpreted to apply to preembryos and frozen preembryos, the State could step in and mandate implantation of *all* preembryos and frozen preembryos even if neither gamete provider wanted to use them to potentially have children.[122] Other consequences that the court noted were the intrusion of government to personal reproductive decisions of private citizens through enforcement mechanisms for implantation, as well as criminal charges for gamete providers or fertility workers for various forms of murder and manslaughter, assault or child abuse for destroying or "injuring" preembryos or frozen preembryos and for cryogenically preserving preembryos and placing them in long-term or indefinite storage.[123]

As to the enforceability of the directive, during trial it was discovered that McQueen had Gadberry sign the entire document first, then had the document relating to disposition in the event of divorce signed six days after. McQueen offered no credible explanation for the separate dates. The appeals court upheld the decision of the trial court which found that the directive on the disposition might have been filed *after* Gadberry initialed the page, hence Gadberry did not enter the agreement with full disclosure.[124] As to whether parties can enter into valid and enforceable agreements regarding the disposition of frozen preembryos upon divorce, the court took no position on the matter as it was an issue which involved personal and sensitive matters which could implicate a party's right to procreate and/or a party's right to avoid procreation.[125]

The court also answered McQueen's alternative argument that the trial court erred in awarding the frozen preembryos to the parties jointly because the trial court was required to "divide" them and award them to either McQueen or Gadberry. The court explained that precedents interpreting division of marital property do not prohibit courts from awarding property to parties jointly in unusual circumstances where the

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[121] *Id.* at 147.
[122] *Id.* at 21.
[123] *Id.* at 21.
[124] *Id.* at 155.
[125] *Id.* at 32.

property cannot be justly divided.[126] It cited cases where the properties in question were marital residences or financing instruments, all of which were awarded jointly to spouses.[127] Here, we see a pure property treatment of the courts despite it being classified as *marital property of a special character.*

iii. Public policy and parenthood as the main issues in balancing of interest test

In the cases mentioned above, it can be noted that the balancing of interest test was used because either there was no written agreement between the parties, or even if there was, the agreement does not pertain to the issue of disposition of embryos in case of contingency, or such agreement was invalid and unenforceable due to circumstances surrounding its execution.

Further, it appears that parties wishing to avoid procreation has an automatic preference in the eyes of the court over parties wishing to use the embryos for implantation. To overcome that preference, the party wishing to use the preembryos must prove that it is his/her only chance to genetic parenthood or his/her most reasonable chance for parenthood. In contrast with the best-interest approach in child custody cases, the focus in embryo disposition using the balancing of interest test is the progenitors' right to be or not be parents.

This all-or-nothing approach based on parenthood interests has garnered criticisms from some legal scholars. As Prof. Ellen Waldman commented, "[The courts] have stressed the burdens of 'forced parenthood' while dismissing the hardships associated with creating existing embryos."[128] In her paper she observes how a survey of the cases shows that there is judicial presumption that the existence of a biological tie precipitates strong psychological ties,[129] and how courts surmise that if embryos are brought to term, the objecting spouse will have to face "two equally unpalatable options"— "the strength of the parental bond will lead the spouse either to pursue a social relationship with the resulting child, thereby drawing time, energy, and psychological resources away from relationships and endeavors that better reflect the spouse's autonomous choice, or to turn away from the child and to suffer a permanent and agonal sense of loss."[130] This

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[126] *Id.* at 147.
[127] *Id.* at 157.
[128] *Waldman, supra* note 84, at 1032–33.
[129] *Id.* at 1027.
[130] *Id.* at 1027–28.

presupposition, she argued, must be rejected since several studies related to parental disengagement suggest that paternal attachment has no biological roots.[131] Rather, the studies reveal that parental relationship with a biological child is contingent on cultural and social variables.[132] The assumption that genetic links herald life-long emotional attachments are further challenged by empirical studies on sperm donors.[133] Several studies show that anonymous sperm donors' disinterest in their potential offspring is apparent, proving that biological ties can exist absent psychological attachment.[134]

Prof. Walden advocates for the substantial investments that women have in existing embryos. As an alternative legal approach to the issue of embryo disposition, instead of boiling the question down to who wants or doesn't want to be a parent, she suggests that state legislatures should provide objecting parties with legal options to be treated as gamete donor and not like a parent. Once the financial burden is removed from the equation, the courts can then focus more on the essence of the parties' interests in achieving and in avoiding procreation.[135] Another similar suggestion as a replacement to the traditional approach is to offer the objecting spouse a choice between the two extremes of full legal and non-legal parenthood—i.e. full parent, partial parental and non parental.[136] This proposal sees the possibility of determining parenthood *by agreement* as the main and legitimate way to compel parental responsibility in case of in vitro fertilization.[137]

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[131] *Id.* at 1041.

[132] *Id.* at 1041–49. Variables include residential proximity, the relationship with the other parent, cultural and familial expectations and individual maturity.

[133] *Id.* at 1049–52.

[134] *Id.* at 1049–52.

[135] *Id.* at 1060. Prof. Waldman further expounds that "when assigning weight to the myriad of interests that the women and men in frozen embryo cases seek to fulfill in frozen embryo disputes, courts should accord substantial weight only to those interests that lie at the heart of the parent-child bond sheltered by the Constitution. Thus, women who seek to use existing embryos to achieve genetic parenthood should be accorded the greatest judicial deference, while women who seek to donate their embryos to other infertile couples should be accorded significantly less interest. The right to procreate is not assignable, and, as the Davis court recognized, when embryos are sought for donation, an objecting spouse's desire to halt embryo transfer should prevail."

[136] Yehezkel Margalit, *To Be or Not to Be (A Parent)-Not Precisely the Question: The Frozen Embryo Dispute*, 18 CARDOZO J.L. & GEND. 369 (2011).

[137] *Id.* The author further expounds that "[when] assigning weight to the myriad of interests that the women and men in frozen embryo cases seek to fulfill in frozen embryo disputes, courts should accord substantial weight only to those interests that lie at the heart of the parent-child bond sheltered by the Constitution. Thus, women who seek to use existing embryos to achieve genetic parenthood should be accorded the greatest judicial deference, while women who seek to donate their embryos to other infertile couples should be accorded significantly less interest. The right to procreate is not assignable, and, as the Davis court

On the other hand, some are of the view that the interest of the objecting party should not be trumped by the party who is no longer able to produce because the party who opposes its use is not responsible for the other party's inability to produce biological children.[138] In this regard, some may argue that even if the party desiring implantation is infertile, there are other viable options such as adoption and thus, the opposing party should prevail in his or her attempt to prevent utilization of the embryos.[139]

Because this approach opens the platform to both parties to assert their respective interests and argue which prevails over the other, an inherent benefit of this approach is that it is effective in implementing public policy considerations regarding parenthood and individual party interests.[140] The drawback however, is that because of the same reason and because informed autonomous decision-making is lacking, the approach requires burdensome and costly litigation.[141] Consequently, this approach is also susceptible to inconsistency and unpredictability.[142]

What the analysis of cases above shows is that the application of the best interest test ultimately depends on the constitutional and statutory right advanced by one party against the other, under the circumstances surrounding the parties at the time the case was filed in court. Should Philippine courts adopt this approach, the constitutional dimension of procreative freedom in the context of ARTs must first be explored in depth. The court must also be prepared not only to recognize which interests are inalienable and constitutionally protected, but also to devise a method or framework on how to accord weight to those interests. The state's interest in protecting the embryos that are products of ART must also be defined and delineated by the courts should a controversy on the subject reach them before any laws specifically dealing with embryo disposition and ART in general are enacted.

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recognized, when embryos are sought for donation, an objecting spouse's desire to halt embryo transfer should prevail."

[138] Carl Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes,* 84 MINN. L. REV. (1999).

[139] Sara Petersen, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065, 1079 (2002).

[140] Michael T. Flannery, *Rethinking Embryo Disposition upon Divorce*, 29 J CONTEMP. HEALTH POL'Y 233, 276 (2012).

[141] *Id.* at 239.

[142] *Id.* at 276.

2. Contractual approach

Several cases after *Davis* followed its advice and adopted the contractual approach in determining the disposition of embryos. This view espouses that agreements regarding disposition of embryos shall generally be presumed valid and binding and shall be enforced in any dispute between the progenitors. This is currently the predominant view in U.S. jurisprudence. In determining the validity of agreements, the courts look at the elements of contracts, namely object, consent and cause, as in any ordinary contracts. The courts also adopt common-law principles of contract interpretation such as constructions as a whole, the four corners rule,[143] and plain meaning interpretation.[144]

i. Kass v. Kass (1998)

The contractual model approach was first applied in the case of *Kass v. Kass* where the wife sought the sole custody of five cryopreserved "pre-zygotes"[145] produced during the parties' participation in an IVF program when they were still married.[146] The husband opposed the removal and filed a counterclaim for specific performance of the parties' agreement to permit the IVF program to retain the pre-zygotes for research.[147]

As to who has dispositional authority, the court ruled in favor of the husband. In discussing the primacy of the contract, the court was well aware of the "extraordinary difficulty" in arriving at explicit agreements in advance regarding the disposition of embryo, especially since the IVF process inherently deals with so many complicated uncertainties and allows time for minds and circumstances to change.[148] Nonetheless, the court expressed that:

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[143] *See* Kass v. Kass, 91 N.Y.2d 554 (1998). (Emphasis supplied).

[144] *See* Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006). (Emphasis supplied).

[145] The record of the case defines "pre-zygote" or "pre-embryo" as "eggs which have been penetrated by sperm but have not yet joined genetic material."

[146] Kass v. Kass, 91 N.Y.2d 554 (1998).

[147] The consent form labeled "Addendum No. 2-1" states that:

"In the event that we [. . .] are unable to make a decision regarding disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to:

* * *

(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program."

[148] Kass v. Kass, 91 N.Y.2d 554 (1998).

> [Uncertainties inherent in the IVF process and changes in individual circumstances that might take place over time] make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree.[149]

The court did note that changed circumstances may also preclude contract enforcement but in this case, the court said that the appellant-wife did not put forth that the agreement violate public policy, or that they are legally unenforceable by reason of significantly changed circumstances.[150]

ii. A.Z. v. B.Z. (2000)

The case of *A.Z. v. B.Z.* is the first reported case tried in any state supreme court that involves disposition of frozen embryos in which the consent forms signed by the couple provided that on the donors' separation, the embryos were to be given to one of the donors for implantation.[151] In this case, the position of state supreme courts when using the contractual approach was also tested.

Unlike the reluctance of *Kass* in discussing validity of the contract, the Supreme Court of Massachusetts in *A.Z.* made a pronouncement that a divorcing party *cannot* be contractually obligated to become a parent against his or her will, as the enforcement of such contract violates public policy, even if the contract is unambiguous.[152] In this case, both of the parties signed several preprinted consent forms concerning the ultimate disposition of the frozen preembryos.[153] One of these was the consent form that asked them to make disposition decisions for certain contingencies including separation.[154] Under each contingency, the consent form provides options such as donation, destruction and a blank space where couples can stipulate other alternatives.[155]

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[149] *Id.*
[150] *Id.* at 4. *Compare with* Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2008).
[151] A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000), at 1056.
[152] *Id.* at 1057.
[153] *Id.* at 1054.
[154] *Id.* at 1054.
[155] *Id.* at 1054.

The couple's form stated, *inter alia*, that if they "[s]hould become *separated*, [they] both agree[d] to have the embryo(s) ... return[ed] to [the] *wife* for implant."[156] The couple was required to sign a consent form every time before eggs were retrieved from the wife.[157] A total of seven forms were signed by both the husband and wife, and in each instance, the wife specified the same option.[158]

During the divorce proceeding, the Probate and Family Court issued a permanent injunction in favor of the husband, prohibiting the wife "from utilizing" the frozen embryos held in cryopreservation.[159] The wife appealed.

The Supreme Court affirmed the order granting the injunction. In deciding if the consent form represented the intent of the couple, the court considered three things; namely, the purpose of the consent form, the lack of a duration provision and the contingency provided for in the form. First, the court noted that rather than serving as a binding agreement between the parties, the purpose of the consent form was to provide guidance to the *clinic* should "the donors (as unit)" no longer wish to freeze them.[160] Next, the court noted the absence of any duration provision that would evince as to until when the parties intended for the agreement to bind them, especially considering the fundamental change in their relationship.[161] Lastly, the court noted that the term used in the form was "separation", a term with distinct legal meaning different from divorce.[162] As to the contract's execution, the Court highlighted the probate court finding that the form was signed in blank by the husband before the wife filled in the language indicating that she would use the embryos for implantation on separation.[163]

After all the discussion relating to the consent form, the court eventually revealed that its real motivation in not enforcing it is that compelling the objecting spouse to be a parent against his own will is contrary to public policy.[164] To support this stand, the court cited statutes and precedents showing its reluctance in enforcing prior agreements that bind individuals to future family relationships (marriage or parenthood). "This policy," explains the court, "is grounded in the notion that respect for liberty

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[156] *Id.* at 1053. (Emphasis supplied.)
[157] *Id.* at 1054.
[158] *Id.* at 1054.
[159] *Id.* at 1052.
[160] *Id.* at 1056.
[161] *Id.* at 1057.
[162] *Id.* at 1057.
[163] *Id.* at 1057.
[164] *Id.* at 1057–1058.

and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."[165] However, in a footnote, the court intentionally refrained from deciding whether an unambiguous agreement between two donors concerning the disposition of frozen preembryos could be enforced over the contemporaneous objection of one of the donors when such agreement contemplated destruction or donation of the preembryos either for research or implantation in a surrogate.[166]

Even though Tennessee's public policy consideration in upholding the dispositional contract in *Davis* is opposite to the finding of the Supreme Court in *A.Z.* as to Massachusetts' public policy consideration,[167] interestingly, both cases nonetheless arrived at the same results. The decisive point is the objecting parties' interest in not becoming a parent, absent any circumstance that would otherwise defeat this threshold.

iii. Cahill v. Cahill (2000)

In another case, the application of the contract approach led the court to grant the ownership to the IVF clinic in possession of the frozen embryos even though that was neither parties' position. In *Cahill v. Cahill*, Alabama appellate court declined to issue judgment concerning the final disposition of parties' frozen embryos, resulting in the embryos remaining frozen at the university medical school.[168] In that case, the parties entered into an IVF contract with the University of Michigan which provided that the parties shall relinquish control and direction of the embryos to the University in case of dissolution of their marriage by court order.[169]

In the divorce proceedings, the wife asked the court to award the embryo to her while the husband opposed this and argued that the embryos are outside the court's jurisdiction. During trial, the wife, who had the custody of the original agreement, failed to produce it in court. A copy was obtained by the husband.[170] The appeals court affirmed the decision of the trial court in declining to award the embryos to either of the parties. Instead, it held that based on the evidence presented, the University, a non-party, "appears" to be

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[165] *Id.* at 1059.

[166] *Id.* at 1058, n.22.

[167] "Tennessee's public policy and its constitutional right of privacy, the state's interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy." Davis v. Davis, *supra* note 48, at 602.

[168] Cahill v. Cahill, 757 So.2d 467 (Ala. Civ. App. 2000).

[169] *Id.* at 466.

[170] *Id.* at 467.

the owner of the embryos, leaving the determination of the disposition of the embryos to be litigated between the parties and the University.[171]

Thus, as in *Kass*, the court upheld the contract despite any policy considerations or equitable arguments by the parties regarding their respective rights and interests prior to their participation in the procedure since the agreement contemplated divorce and stated the parties' intent for disposition with respect to it.[172]

iv. Litowitz v. Litowitz (2002)

In *Litowitz v. Litowitz*, the Supreme Court of Washington considered a case involving embryos from the genetic material of the husband but not the wife.[173] The two cryopreserved embryos in dispute were formed after the husband's sperm fertilized donated eggs. Neither party contested the validity of their preembryo cryopreservation contract, but each argued for a different interpretation. The wife sought to have them implanted in a surrogate carrier while the husband sought to have the embryos put up for adoption.

The court applied contracts law to decide, first, on the rights of the intended mother who is not the genetic progenitor, and ultimately, the dispositional rights over the stored embryos.

As to the preliminary issue on the rights of the intended mother who is not the biological progenitor, the court pertained to the egg donor contract, which it found to have granted both parties equal rights to the eggs.[174] Hence, despite the father having biological connection to the stored embryos, the court ruled that he has no greater contractual right to the eggs than the wife has as the intended mother. The egg donor contract, however, does not relate to the preembryos that resulted from subsequent sperm fertilization of the eggs. For that, the court looked at the pertinent terms of the parties' IVF agreement. It provided that if they (the intended parents) were unable to reach a mutual decision regarding the disposition of their embryos, they must resort to the courts.[175] It also provided that five years after the initial date of

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[171] *Id.* at 467–468.

[172] Flannery, *supra* note 140, at 244.

[173] Litowitz v. Litowitz, 146 Wash.2d 514 (2002).

[174] *Id.* at 263. The egg donor contract provided that "All eggs produced by the Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg(s). In no event may the Intended Parents allow any other party the use of said eggs without express written permission of the Egg Donor."

[175] *Id.* at 263–64.

cryopreservation, the "preembryos would be thawed but not allowed to undergo any further development" unless the Litowitzes requested participation for an additional period of time and the Center agreed.[176]

The court did not find it necessary to engage in a legal, medical or philosophical discussion whether the preembryos in this case 'children'.[177] The court decided the case solely upon the contractual rights of the parties under the preembryo cryopreservation contract. It enforced its provisions and thus ordered the remaining embryos destroyed as five years had passed since the execution of their agreement.[178] Notably, neither party's position prevailed as neither party sought that the frozen embryos be destroyed.[179]

Here, as in *Kass*, we see again how despite the court's hesitation to impose any legal status on the embryos (reasoning that it is unnecessary since progenitors' contract will be enforced nonetheless), the court's very recognition of the progenitors' authority to contract for the disposition of the embryo without court oversight implicitly highlights the property-like treatment of the embryo.[180]

Unlike the court in *Kass* however, the *Litowitz* court upheld the contract despite objections from *both* individuals who had a right to claim an interest to the embryos.[181] As one scholar observed, this approach fails to recognize the change in intention by *both* parties and seems contrary to the principle expressed in *Kass* that "[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice."[182]

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[176] *Id.* at 265–65.

[177] *Id.* at 271.

[178] *Id.* at 271–72.

[179] It is worth noting that the *Litowitz* court appeared to have disregarded the fact that he dissolution proceeding commenced only two years after the initial date of cryopreservation, and that it included a timely request that the court provide a timely disposition of the pre-embryos. The author agrees with the dissent that thus argued that contractual time period should have been tolled by the timely commencement of the litigation as a matter of law. "But the majority's disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the pre-embryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination. Thus the majority denies these parties that option left by Solomon in lieu of chopping the baby in half. The wisdom of Solomon is nowhere to be found here." *Id.* at 274 (Sanders, *J., dissenting*).

[180] Upchurch, *supra* note 79, at 406.

[181] *Id.* at 418.

[182] *Id.* at 418–19.

v. Roman v. Roman (2006)

In a case of first impression in Texas, the Texas Court of Appeals was asked to rule on the *public policy* of the State in the context of embryo agreements. Unlike in *A.Z.*, the court held in this case that the public policy of Texas would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency.

In *Roman* v. *Roman*, the husband wanted to destroy the embryos and contended that the agreement he signed with his wife clearly providing for the disposal of the frozen embryos in the case of divorce should be upheld.[183] His wife, on the other hand, wanted the embryos implanted so that she could have a biological child. During trial, she did not deny that she signed the agreement. What she did dispute, however, is the agreement's validity and its interpretation.[184] Specifically, she argues that the trial court could have chosen not to enforce the agreement because other state supreme courts have found agreements similar to the one at issue here invalid.[185]

The court looked into the laws regarding children of assisted reproduction and gestational agreements, both contained within the Uniform Parentage Act, the act that governs every determination of parentage in Texas.[186] The laws related to assisted reproduction did not have any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce.[187] Gleaning from statutes on gestational

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[183] Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006).

[184] *Id.* at 53. Augusta, the wife, "testified that she would have signed anything to move forward because her goal was to have a child. She testified that it was possible that because she was taking birth control pills she was not in the right mental state to understand the agreement. Augusta further stated that she understood the agreement, 'but I wasn't focusing on much on the [inaudible] to the outcome of the whole process of having a child.' She also stated that no one was putting any force, coercion or threats on either of the parties to sign the agreement. She understood that one of the options she had been offered was to give the embryos to herself in the event of divorce. Augusta testified that she signed the agreement with the Center. When asked whether she and Randy had had a meeting of their minds as to what would happen in the unlikely event that they ever divorced, Augusta responded, 'We didn't talk about divorce. I mean, it wasn't even a remote—it wasn't a conversation that we had. He signed and I signed—and I initialed it.'"

[185] *Id.* at 45.

[186] *Id.* at 48–49.

[187] *Id.* at 49–50.

agreements however,[188] and agreeing with the pronouncement in *Kass*, the court held that allowing the parties to voluntarily decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the parties.[189]

Having disposed of the issue on the validity of the contract under the scrutiny of public policy, the court proceeded to determine whether the contract manifested a voluntary unchanged mutual intention of the parties regarding disposition of the embryos upon divorce. The relevant term of the contract states: "If we are divorced or either of us files for divorce while any of our frozen embryos are still in the program, we hereby authorize and direct, jointly and individually, that one of the following actions be taken: The frozen embryo(s) shall be...[d]iscarded."[190]

The court, applying the plain meaning doctrine of contract interpretation and citing the evidence presented during trial, ruled that "[The embryo agreement] specifically addresses the disposition of the frozen embryos in the event of a divorce. It is undisputed that [both husband and wife] signed the entire embryo agreement, and they both initialed [it]. The evidence shows that the parties considered this section and did not sign it without thought."[191]

In the petition for writ of certiorari elevated to the United States Supreme Court,[192] questions presented by the petitioner wife dealt directly with the most argued issue in embryo disposition cases—the Constitutional right to have children in opposition to the Constitutional right to avoid procreation.[193] The petitioner also argued that this was her last chance to have

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[188] Laws on gestational agreements specifically authorize a gestational mother, her husband if she is married, each donor, and each intended parent to enter into a written agreement that relinquishes all parental rights of the gestational mother and provides that the intended parents become the parents of the child. *Id.* at 49–50.

[189] *Id.* at 50–51.

[190] *Id.*

[191] *Id.* at 52.

[192] *Id.*

[193] Theresa M. Erickson & Megan T. Erickson, *What Happens to Embryos When a Marriage Dissolves-Embryo Disposition and Divorce*, 35 WM. MITCHELL REV. 469, 485 (2008). Specifically, the petitioner presented three questions for the Justices to decide: 1. Is the fundamental right to procreate violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a biological child by other means? 2. Does the constitutional liberty interest in deciding whether to bear or beget a child encompass a right to deny implantation of embryos in a genetic parent who desires the implantation? 3.

biological children because of her age.[194] In his opposition, the husband argued against using constitutional right approach in these cases saying that "[T]he in vitro fertilization industry [should] be fundamentally changed by ruling unenforceable the almost universally used agreements between clinics and prospective parents concerning disposition of frozen [embryos]"[195] Additionally, the respondent asserted that the petitioner had "waived [her constitutional] right by signing the contract with the clinic that clearly [stated that] any frozen pre-embryos [would] be discarded in the event of divorce."[196]

In denying this Writ of Certiorari, one author surmises that the legal and medical field can deduce that "if the Supreme Court were to grant the hearing of such a case, the court would most likely rule based on contract law if a binding and enforceable contract existed between the parties that contracted away their constitutional rights to procreate or to avoid procreation."[197]

vi. *In re* Dahl (2008)

In *Dahl*, the court was yet again faced with the question of whether the contractual right to dispose of embryos is personal property that is subject to disposition in a dissolution case. In this case, a husband and wife reached an agreement on all matters in their marital dissolution action except for the disposition of six frozen preembryos created with the husband's sperm and the wife's eggs.[198] When undergoing IVF, the parties had signed a storage agreement that set forth the terms for the storage of their preembryos.[199] The agreement allowed the couple to make their own choice regarding disposition, and provided that if the parties could not agree on a disposition, they would "'designate the following [spouse] or other representative to have the sole and exclusive right to authorize and direct [the clinic] to transfer or dispose of the Embryos.'"[200]

Is the fundamental right to enter into familial relationships violated by a judicial order denying implantation of embryos by a genetic parent who is unable to conceive or bear a child by other means?

194 *Id.*

195 *Id.*

196 *Id.* at 486. United States law allows a person to waive his or her constitutional rights in civil court just as he or she can in criminal court. *See also* Overmyer Co. v. Frick, 405 U.S. 174, 185 (1972).

197 Erickson & Erickson, *supra* note 193.

198 *In re* Dahl, 194 P.3d 834 (Or. Ct. App 2008).

199 *Id.*

200 *Id.*

Unlike in *Davis*, *Kass*, and *Roman*, here it was the wife who preferred that the embryos be destroyed and who did not agree on having the embryos donated to another woman.[201] She expressed her concern that, if the embryos were successfully implanted, then the resulting offspring might eventually attempt to contact his or her genetic sibling.[202] In addition, she did not want to produce another child with her husband, and stated that if she were to produce more children genetically, she would not want someone other than her to raise them.[203]

The husband denied having initialed or read the agreement, and stated that he had signed the last page of the document without a notary present and without having seen the rest of the document.[204] He opposed the destruction of the embryo saying that he believed that "embryos are life," and opposed their destruction or donation to science because "there's no pain greater than having participated in the demise of your own child." He testified that he would do "everything" to protect his wife's and J's (spouses' first biological child) confidentiality related to the donation of the embryos but acknowledged that he could not guarantee their anonymity.[205]

As to the first question on whether the contractual right to dispose of embryos is personal property that is subject to disposition in a dissolution case under Oregon statute,[206] the court found the definition property to be "broad" and encompass rights relating to the disposition of frozen preembryos.[207]

As to what constitutes a "just and proper disposition" of the embryos, the Court of Appeals of Oregon agreed that the storage agreement "evinced the parties' intent" that the wife would decide the disposition of the preembryos in the event the parties could not agree on a disposition.[208] The court pointed out the fact that "the parties [had been] given choices when they entered the agreement on possible disposition of the embryos."[209]

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[201] *Id.* at 837.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 837.

[205] *Id.*

[206] Specifically, O.R.S. § 107.105(1)(f)(F) "(F) The court shall require full disclosure of all assets by the parties in arriving at a just property division."

[207] *In re* Dahl, 194 P.3d 834 (Or. Ct. App. 2008), at 838.

[208] *Id.* at 841.

[209] *Id.*

Despite the husband's denial of having initialed or reading the agreement at all, interestingly, the lower court did not doubt the husband's veracity.[210] Rather, it believed the husband merely had "an inaccurate recollection of signing the consent form."[211] While in general one cannot avoid the obligations of a written contract even if he or she has failed to read it, the testimony of the husband that he cannot remember reading or signing the document casts a doubt as to how seriously he considered the matter.[212] The prevalence of this practice challenges the assumption that embryo disposition contracts reflect the considered judgment of participants.[213]

vii. Validity, enforceability and reliability of agreements—
preliminary issues in the contractual approach

Surveying the legal analysis in the cases discussed above, it is apparent that where contracts were sought to be upheld as binding, the courts were confronted with preliminary issues relating to the contract's validity and enforceability.[214] These issues usually involve arguments related to the legal status of the embryo, the parties' procreative rights and the State's public policy.

On the issue of whether or not an embryo can be an object of a contract, some courts resolved this issue by first characterizing legal status of

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[210] Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW 57, 75 (2011).

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] U.S. contracts law definitions of void and unenforceable contracts are similar to that in Philippine civil law. But many U.S. courts and legal writers use such terms as "voidable," "void," "unenforceable," and "non-existent" (as referred to contracts) more or less interchangeably. Sergey Budylin, *A Comparative Study in the Law of the Non-Existent: Contract Invalidity in the U.S. and Russia, Currents: Int'l Trade L.J., Winter 2006, at 28* (*Cf., e.g.*, 17 C.J.S. *Contracts* § 196 (2006) *("[A]n illegal agreement will not be enforced and hence is not a contract .... [That is,] the agreement is void .... The expression "void," as used in this connection, has the meaning of not affording legal remedy rather than that of absolute nullity ....".)* A contract is considered void where one of the elements essential for the formation of a valid contract is missing, or where the contract was made in violation of a legal prescription or prohibition established for reasons of public order. A party cannot consent to an agreement that violates state law. (17A C.J.S. Contracts § 169); Void contracts include those arrangements contrary to public policy; for example, a contract expressly or impliedly prohibited by statute. (§ 1:5.Classification of contracts, 21 Tenn. Prac. Contract Law and Practice § 1:5); An unenforceable contract, on the other hand, is defined as one that is valid but incapable of being enforced. Isbell v. Hatchett, 2015 WL 756883 (Tenn. Ct. App. 2015). A contract is unenforceable if its formation or performance is criminal, tortious, or otherwise opposed to public policy. Espenshade v. Espenshade, 729 A.2d 1239 (Pa. Super. Ct. 1999). *See* Szafranski v. Dunston, *supra* note 87.

embryos. [215] Other courts argued that a determination of the status of the embryo is not necessary for resolution of the embryo dispute because the progenitors' contract will be enforced regardless of the embryo's legal status.[216] Since dispositional issues usually arise in settlement proceedings during divorce or separation, courts were constrained to determine whether contractual right to embryos is personal property that can be subject to disposition based on existing statutes and jurisprudence.

On the other hand, courts resolved public policy challenges on the enforcement of an agreement regarding the disposition of embryos through a review of state and federal statutes and precedents on procreational autonomy, right to privacy,[217] gestational agreements,[218] and agreements on entering (or not entering) familial relationships.[219]

Once these issues were threshed out, the courts look into the terms of the contract and the circumstances surrounding its execution. Some of the matters raised related to the content of the contracts include the determination of whether the agreement expresses the parties' dispositional intent, whether the contingency or event stated in the contract (e.g. divorce, separation, death of one or both of the parties) covers the actual contingency in the case before the court, and whether the parties intend that the agreement be binding between them as progenitors/intended parents, or between them and the hospital or clinic. The court applied common-law principles governing contract interpretation in ascertaining the intent of the parties from the terms of the contract.

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[215] *See* Davis v. Davis, 842 S.W.2d 588 (1992), where the court held that pre-embryos are neither person nor properties but occupies an interim category. *See* Mcqueen v. Gadberry, *supra* note 113, where the court held that pre-embryos are marital are property of a special character.

[216] *See* Kass v. Kass, 91 N.Y.2d 554 (1998); Litowitz v. Litowitz, 146 Wash.2d 514 (2002); *See,* however, Upchurch, *supra* note 79, where the author makes a compelling argument that the very recognition of the progenitors' authority to contract for the disposition of the embryo without court oversight, as in agreements related to custody, visitation and support pertaining to a born child, implicitly emphasizes the property-like nature of the embryo. Hence, despite statements to the contrary, resolution of the embryo dispute under principles of contract law necessitates a property-based view of the legal status of the embryo.

[217] Davis v. Davis, 842 S.W.2d 588 (1992).

[218] Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006).

[219] A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

viii. Dispositional Contracts in the Philippine Jurisdiction

Because of its judicial history, the Philippines has adopted several principles on contract law found in Anglo-American law.[220] Philippine law and American law share the same basic concepts of offer and acceptance, consideration, capacity to contract, promissory estoppel, and void and voidable contracts.[221] Our courts also follow generally the same principles of contract interpretation applied in U.S. jurisdiction.[222] Should Philippine courts adopt the contractual view in resolving an embryo disposition dispute, it would inevitably encounter similar issues relating to contract interpretation and would most likely arrive at similar conclusions using similar principles used by U.S. courts in contract interpretation. However, the same outcome may not be easily anticipated when it comes to our court's resolution on the validity of a dispositional agreement pertaining to embryos.

Can two individuals validly contract for the transfer, use, donation or destruction of embryos that has the "potential for life" under Philippine laws? Our Civil Code provides that parties are free to contract provided that stipulations, clauses, terms and conditions are not contrary to law, morals, good customs, public order or public policy.[223] A contract whose cause, object or purpose is contrary to law, morals, good customs, public order or public policy is void.[224] Citing U.S. jurisprudence, the Supreme Court has defined public policy as being that principle under which freedom of contract or private dealing is restricted for the freedom of contract or private dealing is restricted for the good of the community.[225] As applied to contracts, our jurisprudence provides that:

> Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold any transaction which, in its object operation, or tendency, is calculated to be prejudicial to the public welfare, to sound morality, or to civic honesty. The test is whether the parties have stipulated for something inhibited by the law or inimical to, or

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[220] *In re* Shoop, 41 SCRA 213 (1920).

[221] American Discovery, *The Similarities between U.S. and Philippine Laws* (2008), *available at* http://media.insidecounsel.com/insidecounsel/historical/whitepaper/348.

[222] Vincent Martorana, *A Guide to Contract Interpretation* (2014), *available at* http://webcasts.acc.com/handouts/Article_478_26B1_A_Guide_to_Contract_Interpretation__July_2014_Reed_Smith-2.pdf.

[223] CIVIL CODE, art. 1306.

[224] CIVIL CODE, art. 1409(1).

[225] Ollendorff v. Abrahamson, 38 Phil. 585 (1918), *citing* People's Bank vs. Dalton, 2 Okla., 476.

> inconsistent with, the public welfare. An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, ends to interfere with the public welfare or society, or as it is sometimes put, if it is at war with the interests of society and is in conflict with the morals of the time. An agreement either to do anything which, or not to do anything the omission of which, is in any degree clearly injurious to the public and an agreement of such a nature that it cannot be carried into execution without reaching beyond the parties and exercising an injurious influence over the community at large are against public policy. There are many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy they cannot be admitted as the subject of a valid contract. The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. *In other words all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void*, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.[226]

It is still uncertain whether or not a contract wherein parties agree on how their embryos will be disposed in the future will be considered as detrimental to public interest by the Supreme Court of the Philippines. Until a case is brought to the Supreme Court, there can be no definite answer to such question. Borrowing concepts of contracts law in relation to public policy from U.S. common law, the Philippine courts can likewise consider these two factors in weighing the interest in the enforcement of an agreement, which are (a) the parties' justified expectations, and (b) any forfeiture that would result if enforcement were denied.[227] As argued by one scholar, if parties provide for specific treatment of their embryos and expect that their directives will be carried out, they will experience frustration of purpose if courts invalidate their agreements.[228] This is especially applicable in the Philippines since despite the increasing accessibility of ART treatments to Filipinos, there is still no law specifically regulating the procedures.

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[226] Ongsiako v. Gamboa, 86 Phil. 50 (1950) *citing* 12 AM. JUR. §§ 662–64.; Sy Suan v. Regala, 105 Phil. 1024 (1959); Tee v. Tacloban Elec. & Ice Plant Co., Inc., 105 Phil. 168 (1959). (Emphasis supplied.)

[227] RESTATEMENT (SECOND) OF CONTRACTS, (1981). (Emphasis supplied.)

[228] Petersen, *supra* note 139, at 1089.

As to its validity based on existing constitutional grounds, while there are no statutes as of this writing expressly prohibiting or restricting the means by which embryos can be used, transferred or disposed, there is however, a strong constitutional argument on the matter. Article II, Section 12 of the 1987 Philippine Constitution provides:

> SECTION 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception.[...]

In connection with this, in the 2014 case on the constitutionality of the Reproductive Health Law, the Supreme Court *en banc* made a general pronouncement that "life begins at fertilization, not at implantation."[229] It unequivocally stated that:

> In all, whether it be taken from a plain meaning, or understood under medical parlance, and more importantly, following the intention of the Framers of the Constitution, the undeniable conclusion is that a zygote is a human organism and that the life of a new human being commences at a scientifically well-defined moment of conception, that is, *upon fertilization*.[230]

Justice Leonen, in his dissent, expressed his reservations with the majority opinion declaring the beginning of life, saying it complicates future constitutional adjudication, and adding that this will have real repercussions on ART, among many others.[231] While the pronouncement of the Supreme Court was made in the context of defining abortifacients, it can likewise be used as precedent in future cases involving disposition of embryos.

While the implications of the attribution of life status to embryos in *Imbong* remains unclear in the context of ART, frozen embryos will likely be treated similarly to living children in custody disputes between parents, wherein the court intervenes to determine primary custody based on an assessment of the "best interest of the child."[232] In Philippine jurisdiction, best interest is determined by all relevant circumstances that would have a bearing on the children's well-being and development. Aside from the material resources and the moral and social situations of each parent, the

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[229] Imbong v. Ochoa, G.R. No. 204819, 721 SCRA 146, 308, April 8, 2014.

[230] *Id.* at 304. (Emphasis supplied.)

[231] *Id.* at 733–34 (Leonen, *J., dissenting*).

[232] Upchurch, *supra* note 15, at 2121.

courts may also consider other factors to ascertain which one has the capability to attend to the physical, educational, social and moral welfare of the children.[233] Thus, the application of the best interest test remains uncertain in embryo dispute cases, as the child is not yet in being at the time of the dispute.[234] While the Supreme Court in *Imbong* did not declare the fertilized ovum as "person", another consequence of attributing life to it can make ART work illegal or impractical, as this would require ART clinics to provide storage for the embryos indefinitely and might also subject them to lawsuits if an embryo is damaged, wrongfully implanted in another person, or disposed of by the clinic.[235]

In comparison, should the Supreme Court categorize embryos that are products of ART as property deserving "special respect" as in *Davis*, the categorization will still leave the Philippine jurisdiction in unchartered waters, especially if there is no legislation defining what sort of "special respect" must be accorded to it. The quasi-property, quasi-person status does not have a defined set of legal framework attached to it.[236] Unlike the statuses of property or person where there are established rules on ownership or custody, "special respect" status will provide least guidance to progenitors, physicians, hospitals, and the courts on how disposition is to be decided.

Another factor that Philippine courts should consider before choosing to apply the contractual approach are the inherent disadvantages of disposition agreements, especially in the absence of any statute regulating ART practice and contracts. For one, research on embryo disposition decision-making highlights the difficulty fertility patients experience in deciding the fate of their embryos and the volatile nature of that decision.[237] Further, circumstances surrounding review and execution of the agreements, its form and substance, may cast doubts on how accurate these agreements reflect the progenitors' intentions even at the time of signing, let alone whether they can reasonably forecast their preferences years into the future in case of contingencies.[238]

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[233] Artadi-Bondagjy v. Bondagjy, G.R. No. 140817, 371 SCRA 642, 652, Dec. 07, 2001; David v. CA, 250 SCRA 82, 87, Nov. 16, 1995.

[234] Upchurch, *supra* note 15, at 2121.

[235] *Id.* at 2121–22, n.89.

[236] *Id.* at 2123.

[237] Forman, *supra* note 210, at 66–67.

[238] *Id.* at 67.

One disadvantage of embryo disposition agreements is the inherent monopoly of power residing with ART providers.[239] As originators or authors of the contract providing the ART procedure, ART clinics hold significant power over couples who, on the other hand, are in the position of being psychologically disadvantaged, since they are desperate to have a child.[240] Under such circumstances, couples may be presented with few alternatives regarding embryo disposition such that these contracts actually constitute an adhesion contract.[241] Progenitors can end up "donating" their embryos to clinics even though either or both have compelling arguments for its use or control.[242]

Another disadvantage of disposition agreement is that patients are presented with too much information too soon.[243] Clinic consent forms often present their information using technical language in densely packed, single-spaced documents that may not even clearly delineate the different subjects and obscure the significance of the embryo disposition provision.[244] Even if the dispositional agreement is on a separate form, it is just one of the many forms patients may have to wade through prior treatment.[245]

On the one hand, numerous studies have documented how embryo disposition decision-making is daunting and "extremely difficult" for participants.[246] Literature also makes clear that patients' views regarding preferred disposition often change significantly over time.[247] Patients' preferences change not only during the different stages of the IVF treatment, but also depending on its outcome.[248] In addition to these challenges,

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[239] Peter Malo, *Deciding Custody of Frozen Embryos: Many Eggs are Frozen But Who is Chosen?*, 3 DEPAUL J. HEALTH CARE L. 307, 333 (2000).

[240] *Id.*

[241] *Id.*

[242] See Cahill v. Cahill, *supra* note 168.

[243] Forman, *supra* note 210, at 67.

[244] *Id.*

[245] *Id.* at 68. "For example, in *Roman*, the court noted that the couple signed nine forms in one day, including the embryo cryopreservation consent. In *Kass*, the parties signed four documents. The first two consisted of a twelve page, single-spaced document that covered the IVF and embryo transfer procedures and an "Addendum" approving cryopreservation. They also signed a separate cryopreservation consent form-another seven pages of single spaced text, also in two parts."

[246] *Id.* at 70.

[247] *Id.* at 71.

[248] *Id.* at 72–73. "Considerable research indicates that successful IVF, in particular, leads to changes in preference, at least among those able to make a decision. Before or during treatment, patients' preferences often reflect an altruistic aim of assisting others, resulting in a preference for donation to research or donation to another infertile couple. By contrast, after

standardized forms are usually very poorly drafted, often confusing and ambiguous, that it fails to provide disposition instructions that clearly and accurately reflect the parties' intentions even at that moment in time.[249] Examples of confusing language and inconsistent nature of consent forms can easily be spotted even in the cases cited above.[250]

On the other hand, despite the challenges to this approach, some scholars are of the opinion that consent forms can work, and can actually be advisable. Contracts provide assurance to parties undergoing IVF that expectations regarding use of their embryos will in fact be fulfilled in the future.[251] To address the legal uncertainty and the psychological factors mentioned above regarding decision making in embryo disposition, one approach would be to impose procedural protections and/or substantive review.[252] Procedural requirements such as that the contract be in writing, that both parties be represented by counsel, that the parties comply with a waiting period of some sort between execution of the contract and treatment, or that the agreement be approved by court can give parties more opportunity to consider the fairness of the terms of the agreement at the time of its

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treatment, couples who succeeded in having a child preferred discarding the embryos, rather than donating to research."

[249] *Id.* at 80–83. "[In *Kass,* the court] took the court several pages of pouring through various parts of the consent for it to 'resolve; the document's many apparent ambiguities [...]. Recall that the clinic consent form in *Litowitz* stated that 'In the event we are unable to reach a mutual decision regarding the disposition of our pre-embryos, we *must* petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our pre-embryos.' However, the form went on to provide that the clinic would thaw any embryos still in storage five years after the initial date of cryopreservation. The five-year limit came after language specifically referencing decisions not to use frozen embryos for various reasons such as 'our choice, death of both of us, our achieving our desired family size.' Conspicuously, those 'various reasons' did not include divorce. As in *Kass,* the Litowitzes might plausibly have understood a dispute over disposition in the event of divorce to require an independent court resolution, and the five-year provision to apply only in the event of the other circumstances mentioned [...]. [In *Roman,* it] specifically stated that 'If we are divorced [...] while any of our frozen embryos are still in the program, we [...] authorize [...] that one of the following actions be taken [...].' Once again, the form contained a somewhat ambiguous statement that might be interpreted to allow revocation of the consent by either party, thereby undermining the reliability of the divorce disposition provision: 'We understand that we are free to withdraw our consent as to the disposition of our embryos [...].'"

[250] *Id.*

[251] Joseph Russell Falasco, *Frozen Embryos and Gamete Providers' Rights: A Suggested Model for Embryo Disposition,* 45 JURIMETRICS J. 273, 294 (2005).

[252] Deborah Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability,* 24 COLUM. J. GENDER & L. 378, 434 (2013).

enforcement.[253] Further, adding these procedural requirements signals the parties the significance of the agreement they are contemplating, decreasing the risk that couples will make a hasty, ill-informed decision.[254]

Another suggestion in strengthening this approach to honor the parties' original expectations is for courts to look for indicia of binding agreements other than explicit memorializations.[255] For example, the court in *J.B.*[256] could have investigated M.B.'s claims that he and his ex-spouse agreed that any unused embryos would be used by J.B. or donated upon the dissolution of their marriage—a claim that was supported by independent certifications from family members as well as information regarding his religious beliefs.[257] If there are written agreements, courts should investigate whether such documents govern embryo disposition in the event of contingency contemplated by the parties.[258] For example, the court in *A.Z.* based its decision partly on the fact that the consents referred to "separation" rather than divorce in particular. The said court should have probed the parties' understanding of this term, as well as the meaning attached to it and conveyed by the clinic, the drafter of the form.[259]

In sum, aside from questions involving the validity of dispositional contracts based on Philippine law and statutes related to public policy, procreative rights, and legal status of embryos, courts must also consider the inherent disadvantages of disposition agreements entered into prior to ART procedures. Without any legislation regulating ART practice in the Philippines, contracts signed by parties that are usually provided by clinics and hospitals may not afford such parties enough protection in case of contingencies.

In response to the rigid nature of the contractual approach, another approach adopted by some U.S. courts is the model that requires contemporaneous mutual consent. This approach is examined below.

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[253] *Id.*

[254] *Id.*

[255] Petersen, *supra* note 139, at 1091.

[256] J.B. v. M.B., 170 N.J. 9 (2001).

[257] Petersen, *supra* note 139, at 1091.

[258] *Id.* at 1092.

[259] Malo, *supra* note 239.

3. Contemporaneous mutual consent

The contractual approach and the contemporaneous mutual consent model share an underlying premise: "decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed."[260] The difference lies with *at what time* the partners' consent matters.[261] The contemporaneous mutual consent approach takes into consideration the parties' highly emotional state when they are confronted with having to make decisions on embryo disposition that it may be impossible for them to make an intelligent decision to relinquish a right ahead of the time the right is to be exercised.[262] Further, the gravity of the lifelong consequences of the decision on a person's identity and sense of self advances the underlying theory of this approach.[263] As the court in *Witten* quotes:

> When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast, imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies. For some people, the mandatory destruction of an embryo can have equally profound consequences, particularly for those who believe that embryos are persons. If forced destruction is experienced as the loss of a child, it can lead to life-altering feelings of mourning, guilt, and regret.[264]

To accommodate these concerns, courts have adopted the contemporaneous mutual consent approach that proposes, "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the contemporaneous mutual consent of the couple that created the embryo."[265]

i. J.B. v. M.B. (2001)

The case of *J.B. v. M.B.* used this alternative approach although it overlapped with its use of the balancing of interest approach. In this case, the

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[260] *In re* Witten, 672 N.W.2d 768, 199 (Iowa 2003), at 777, *citing* 84 MINN. L. REV. 81.

[261] *Id.*

[262] *Id.*

[263] *Id.* at 778.

[264] *Id. citing* Coleman, 84 MINN. L. REV. at 96–97.

[265] *Id. citing* Coleman, 84 MINN. L. REV. at 110.

couple underwent IVF, which resulted to eleven embryos.[266] Four were transferred to J.B. and the rest were cryopreserved. J.B. became pregnant, either as a result of the procedure or through natural means, and gave birth to the couple's daughter.[267] However, the couple separated and the wife, J.B., informed M.B. that she wanted the embryos to be destroyed.[268] The husband disagreed, citing his religious beliefs, and expressed that he wanted the preembryos donated to other infertile couples.

Both parties signed an agreement form from the IVF clinic that states that they would relinquish the embryos to the clinic's IVF Program in the event of a marital dissolution, unless a court ordered otherwise.[269] The husband, however, described his understanding differently, saying that they have lengthily and seriously discussed the IVF process before they began the treatment, as the process itself was posed a dilemma to him considering he is Catholic.[270] He alleged that they agreed that no matter what happened, any unused embryos would not be destroyed, but would be used by the wife or donated to infertile couples.[271] His family affirmed this as they certified that during several family gatherings J.B. had stated her intention to either use or donate the embryos.[272]

As to the enforceability of disposition contracts in connection with public policy issues, the court agreed with *Davis* and *Kass* and recognized the importance of "clear, consistent principles to guide parties in protecting their interests and resolving their disputes," and the widespread use of IVF.[273] Thus, it held that disposition contracts are enforceable, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos. In the absence of contemporaneous mutual agreement, the interests of both parties must be evaluated. Considering that M.B. is capable of fathering additional children, the court affirmed J.B.'s right to prevent implantation of the preembryos.[274] Since J.B. did not object to the continued storage, the court allowed M.B. to continue to pay the fees; otherwise the embryos would be destroyed.[275]

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[266] J.B. v. M.B., 170 N.J. 9 (2001).
[267] Falasco, *supra* note 251.
[268] J.B. v. M.B., 170 N.J. 9 (2001).
[269] *Id.*
[270] *Id.*
[271] *Id.* at 710–11.
[272] *Id.* at 711.
[273] *Id.* at 719.
[274] *Id.* at 720.
[275] *Id.*.

ii. *In re* Witten (2002)

In the case of *Witten*, the couple had seventeen fertilized eggs in storage that were products of the IVF treatment.[276] Prior to the treatment, the couple signed informed consent documents prepared by the medical center that provided that embryos stored will be used for transfer, release, or disposition only with the signed approval of both husband and wife.[277] During the trial marriage dissolution proceeding, on the one hand, the wife asked that she be awarded custody of the embryos as she wanted to have the embryos implanted in her or a surrogate mother in an effort to bear a genetically linked child.[278] She opposed the destruction of the embryos, and was also unwilling to donate the eggs to another couple.[279] On the other hand, the husband, too, did not want the embryos destroyed, nor was he opposed to donating the embryos for use of another couple, but he did not want the wife to use them.[280]

The wife argues that the storage agreement does not specifically address the contingency in this case, which is divorce.[281] She argued in the alternative that the court should balance her interests in procreating over the husband's interest in not procreating and that she is entitled to the fertilized eggs due to her fundamental right to bear children.[282] Finally, she argued that it is against public policy if the husband was allowed to back out of his agreement to have children.[283]

With respect to the scope of the contract, the court ruled that this case nonetheless falls within the broad provision governing the "release of embryos," in which the parties agreed that the embryos would not be transferred, released, or discarded without "the signed approval" of both husband and wife.[284] As to whether a contract is enforceable even when one of the parties later changes his or her mind, the court ruled that to enforce a prior agreement between the parties in a "highly personal area of reproductive choice" when one of the parties has changed his or her mind concerning the

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[276] *In re* Witten, 672 N.W.2d 768, 199 (Iowa 2003).
[277] *Id.*
[278] *Id.*
[279] *Id.* at 772–73.
[280] *Id.* at 773.
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*

disposition or use of the embryos would be against the public policy of the state.[285]

To support its decision in accommodating parties' mutual change in decision, the court cited statutes and case laws that recognize how decisions related to marriage and family relationship are emotional and subject to change.[286] It also expressed its general reluctance to become involved in intimate questions inherent in personal relationships.[287] The court recognized its involvement in antenuptial agreements and divorce stipulations, which courts generally enforce, but distinguished these contracts from the issue of embryo disposition as the former agreements involved chattels, real estate, and money while the latter involves the potential for life.[288] In putting premium on the parties' autonomy, it thus rejected the contractual approach and the balancing test as both simply substitute the court as decision maker.

The contract, however, was treated differently as between the parties and the medical facility. Agreeing with the pronouncement in *A.Z.* on the matter, the court recognized that the contract serves an important purpose in defining and governing the relationship between the couple and the medical facility, and in ensuring that all parties understand their respective rights and obligations.[289] Hence, the medical facility and the parties should be able to rely on the terms of the parties' contract.[290]

The court concluded that when one party changes his or her mind and the parties are not able to reach a mutual decision regarding the disposition of the embryos, public policy required that the status quo be maintained. The effect of this was that the embryos would be stored indefinitely unless both parties subsequently mutually agreed to its manner of disposition.[291] Incidentally, the parties' original agreement accorded with this public policy.[292] Thus, none of the parties were given the right to use or dispose of the embryos without the consent of the other, and the party or

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[285] *Id.* at 780–81.

[286] *Id.* at 781. This included Iowa's state law requiring seventy-two hour waiting period after child's birth before parent may relinquish parental rights, limitation of damages for breach of promise to marry, and prohibition on contracts encouraging dissolution of marriage.

[287] *Id.*

[288] *Id.*

[289] *Id.* at 782.

[290] *Id.*

[291] Flannery, *supra* note 140, at 264.

[292] *Id.*

parties who oppose destruction shall be responsible for any storage fees.[293] Whereas, in *J.B.* the court proceeded to use the balancing test in the absence of contemporaneous mutual consent, the court in *Witten* exercised more judicial restraint by refusing to resolve the conflict between the progenitors and keeping the status quo instead. Thus, even if the parties' original agreement in *Witten* were otherwise, the *Witten* court held that public policy favored a party's right to change his or her mind, and disfavored the court's ability to balance the interests of the parties upon any such disagreement.[294]

iii. When the exercise of the right to procreation begins and ends as point of contention in contemporaneous mutual consent approach

The decision in *Witten*, in maintaining the status quo, does not seem helpful, as the parties would not have gone to court if they were able to agree to the embryos' disposition in the first place. Without any procedural guidelines that would help the parties arrive at an agreement, the parties will be left at a loss considering how despite the protracted litigation, its cost, and the psychological strain that accompanies emotionally laden law suits such as this, they were left on their own to decide in the end. The court's hands-off attitude in maximizing the parties' "procreative freedom" may, in a sense, feel liberating, but absent any alternative procedure that would aid parties to arrive at a binding decision, the approach is nonetheless impractical.

Further, even the premium placed by the court on the parties' joint interest is illusory. By ordering for the maintenance of the status quo, and directing the party who oppose destruction to be responsible for any storage fees, the result is that it is the party opposing the embryos' implantation or use that is always favored by default. In contrast, the other party's opportunity to use or implant the embryos is only as good as how much longer he or she can afford to have the embryos stored in a cryogenic facility.

Before our courts can apply this approach, it must likewise answer preliminary questions relating to the validity of agreements between two parties on the disposition of embryos, as in the contractual approach, since these two approaches share the same premise that parties may validly contract on it. The diverging point between the two approaches lie on how our courts will decide the point at which the interest in procreation is realized. Under

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[293] *In re* Witten, 672 N.W.2d 768, 199 (Iowa 2003).

[294] Flannery, *supra* note 140, at 264.

the first theory, the decision to procreate is made by each progenitor when he or she agrees to undergo the treatment and consents to the use of his or her genetic material to create the embryo.[295] Thus, the primary focus in resolving an embryo dispute is the progenitor's decision at the beginning of the IVF treatment.[296] On the other hand, the other theory is that right to procreation is an ongoing choice that is initially triggered when the progenitor agrees to utilize his or her genetic material to create the embryo and continues at least until the point the embryo is implanted with the intention that it becomes a child.[297] The distinction is important because it provides for different models of resolution and different views of the progenitor's authority over the embryo—i.e. proponents of the first theory would tend to apply the contractual approach while proponents of the second one will allow parties to make contemporaneous decision.[298]

Unlike the strict contractual approach, the contemporaneous mutual consent approach is more flexible in that it provides individual parties the opportunity to change his or her mind in the event of any contingency.[299] The drawback, however, is that it lacks the predictability and enforceability of the contractual approach if parameters for changing one's mind are not clearly defined.[300] This is especially problematic if any or both of the parties based their decision to participate in the ART treatment on the other's dispositional decision in case of contingencies.[301]

IV. CONCLUSION

According to the most recent estimate that was made in 2012, at least five million babies have been born worldwide with the help of IVF and other forms of ART since the birth of Louise Brown in July 1978.[302] Interestingly, in the Philippines, the most followed baby on the social networking platform *Instagram*, with more than one million followers to boot, is the two-year-old

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[295] Upchurch, *supra* note 79, at 408, *citing* Kass v. Kass.

[296] *Id.*

[297] *Id.* at 409.

[298] *Id.*

[299] Flannery, *supra* note 140, at 275.

[300] *Id.*

[301] *Id.*

[302] Suzanne Elvidge, *Five Million Births From IVF: Study Published,* BIONEWS, October 21, 2013, *available at* http://www.bionews.org.uk/page_354987.asp (last visited May 22, 2017).

daughter of celebrity doctors Vicki Belo and Hayden Kho, Scarlet Snow Belo, an IVF baby.[303]

With the advent of this technology that has ushered hope and brought joy to many Filipino couples, it is hard to imagine Philippine courts solving the "custody" dilemma of the fertilized ovum through slamming Pandora's box shut. Likewise, they cannot ignore the "plethora of equally undefinable and immeasurable ethical and legal dilemmas" that came with this significant medical achievement.[304] As guide to Philippine courts in the event that embryo disposition disputes are brought to their bench, this paper identified the approaches used by U.S. courts in deciding these disputes involving clinics, progenitors, and intended parents.

From the review of court disputes between clinics and progenitors, the court in *York* held that a bailor-bailee relationship is deemed created between them. On the other hand, an earlier case did not have such pronouncement but it did recognize that the parties could bring a common law tort action for conversion against the clinic even though there was no contract between them. As between progenitors and/or intended parents, the three approaches used by U.S. courts that were identified were the balancing of interest test, the contractual approach, and the contemporaneous mutual consent approach.

The U.S. courts consider the unique factual backdrops, the existing laws and statutes in their state jurisdiction, and the state and federal precedents in determining which approach can be validly used for the cases at bar. The review of the cases also demonstrated how the courts' holding on the points raised by the parties relating to the characterization of the embryo, their procreative rights, and public policy considerations, affected the outcome of the case. The manner by which the courts arrived at which approach can be summarized by the chart below:

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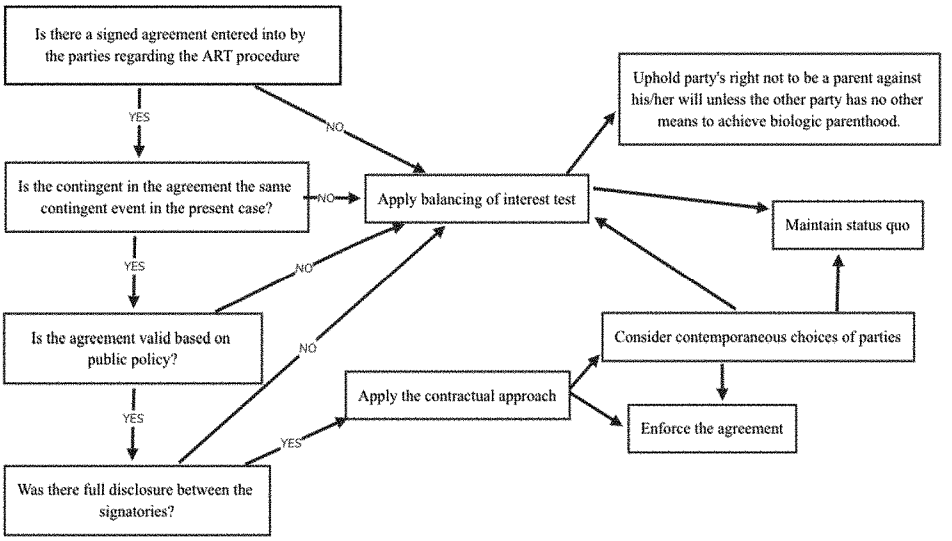
[303] Bea Rodriguez, *Scarlet Snow Belo is the most followed celeb baby with 1M followers!*, GMA NETWORK, April 19, 2017, *available at* http://www.gmanetwork.com/entertainment/celebrity life/news/30307/scarlet-snow-belo-is-the-most-followed-celeb-baby-with-1m-followers/ story; Raoul J. Chee Kee, *The little world of Scarlet Snow, Instagram's most famous baby girl–with 734,000 followers*, INQUIRER, January 15, 2017, *available at* http://lifestyle.inquirer.net/250666/little-world-scarlet-snow-instagrams-famous-baby-girl-734000-followers/.

[304] Walther, *supra* note 25, at 252.

Figure 5.1. Approaches adopted by U.S. courts and their outcomes



To arrive at which approach to use, the courts first determine whether there was any agreement signed by both parties. If there were no prior agreements entered into, such as in *Davis*, or if there was an agreement but it does not contain an expression of a choice concerning the disposition of embryos that was intended to bind the parties in case the contingent event happens (as in *Szafranski*), the court would use the balancing of interest approach. In majority of the cases where the question was raised, the validity and enforceability of a prior agreement between parties regarding the use, transfer and disposition of embryos were determined in light with statutes, including state and federal precedents, and public policy. In case the agreement violates public policy, such as in *A.Z.* where the court held that a party cannot be contractually obligated to become a parent against his/her will, the balancing of interest test was used. If the agreement passes the public policy test and if it was found that it does not violate any rights based on existing statutes, some courts would then determine if both parties were given full disclosure prior to signing the contract. If that is found wanting, the court would not enforce the original agreement, resulting to the court adopting the balancing of interest test. If it was found during trial that consent from both parties were validly obtained, the courts would then adopt either a strict contractual approach, as in *Cahill*, in *Litowitz*, and in *Dahl*, or consider if parties subsequently changed their mind. If the parties did change their mind

and they are not presently in agreement with how the embryos will be disposed, the courts would nonetheless enforce the original agreement if there were no substantial change in the parties' circumstances, as in *Kass* and in *Roman.* In the *J.B.* case, when the subsequent preferences of the parties are not mutual, the parties' interests were then weighed. In *Witten* however, the court exercised judicial restraint and chose to maintain the status quo until both parties reach a mutual agreement.

Whenever the courts adopted the balancing of interest approach, they will either approve the choice of one of the parties or order the parties to maintain the status quo, as in *McQueen.* In choosing to whom the embryos should be awarded, the court would rule in favor of the party seeking to avoid procreation. The only exception to this would be when the party who seeks the use and implantation of the embryo does not have any other means to achieve biologic parenthood. We see this rule first mentioned in *Davis*, and actually applied in the case of *Szafranski*, where the court upheld the interest of the ex-girlfriend to use the embryo for herself as her chemotherapy treatment affected her fertility.

Whenever the contract approach was used and subsequently enforced by the courts, it is interesting to note that in no case did its enforcement led to the use of the embryo for implantation.

Evidently, all of the three approaches have internal strengths and drawbacks. The balancing of interest test, although effective in implementing public policy considerations and individual party interests, requires burdensome litigation. It is also unpredictable and inconsistent. The contractual approach, on the other hand, guarantees more predictability and assures autonomous decision-making by the parties. With this predictability is its inherent disadvantage of rigidity as the contractual approach provides fewer opportunities for parties to make independent decisions upon contingencies not provided in the agreement. It may also prove unreliable due to circumstances surrounding the agreement's execution. The contemporaneous mutual consent approach may give the flexibility that the contractual approach lacks but it suffers from unpredictability and unenforceability if the parameters for changing one's mind are not clearly defined.[305]

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[305] Flannery, *supra* note 140.

As to the adoption of these foreign approaches in Philippine jurisdiction, this paper identified preliminary issues that our courts must resolve before applying the approaches mentioned above. For the balancing of interest test, constitutional and statutory rights of the parties over the embryo must be defined, and the weight of those interests against each other must be determined. For the contractual approach, the major issue is the validity of dispositional contract, which in turn may depend on the characterization of embryos and the protection it is entitled to base on our laws, precedents, and public policy considerations. Lastly, in applying the mutual contemporaneous consent, the same preliminary issues as in contractual approach must be resolved, as well as the period and parameters within which parties are allowed to exercise their procreative choice.

The adoption by the Philippine courts of the contractual and the contemporaneous mutual consent approaches is highly unlikely. Unlike in the United States where there are federal precedents such as *Roe* and *Webster* that refused to hold that the fetus possesses independent rights under law, in the Philippines the protection of the "life of the unborn from conception" is mandated by no less than the Constitution. The Philippine Supreme Court in *Imbong* went further by holding that life begins at fertilization. Any approach that adopts a pure property view of embryos will hence most likely be rejected in our jurisdiction.

Indeed, deciding the fate of an embryo resists easy answer, and court disputes on its use and disposition will force our judges to make a chilling choice. Despite the absence of domestic legislative policy on this highly controversial subject, existing jurisprudence of other states tells us that our courts need not write on a blank slate. Although there are differences in our constitution, statutes and precedents, there is wisdom in analyzing the theory behind their legal frameworks, not to mention the suggestions, commentaries and criticisms made by notable scholars on the frameworks' application, and the social science studies on decisional conflicts relating to ART procedures.

Of course, our courts are not precluded from learning from Huxley, Lowry and Hollywood—not that their works are accurate depictions of our reality. However, it is evident that our technology has been quick in keeping up with theirs. Hopefully, our courts, in turn, will also be able to keep up with the new technology that has reached our shores.

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