



12-1-2019

Who Gets the Frozen Embryos During a Divorce? A Case for the Contemporaneous Consent Approach

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**WHO GETS THE FROZEN EMBRYOS DURING A DIVORCE? A CASE
FOR THE CONTEMPORANEOUS CONSENT APPROACH**

Sarah B. Kirschbaum*

The increase in the use and success of Assisted Reproductive Technology has come with an increase in legal and ethical dilemmas facing courts and prospective parents. In particular, courts in the past 25 years have grappled with the issue of frozen embryo disposition during a divorce proceeding. Most couples sign some form of contract before freezing their embryos. Many state courts, however, interpret and enforce these contracts differently than they do other contracts. While approaches to in vitro fertilization contract interpretation and enforcement already exist in some states, many states have yet to decide what will happen if a frozen embryo dispute arises. This Recent Development proposes a solution that respects the principles of contract law while still protecting the competing interests of the parties involved.

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I. INTRODUCTION

Assisted Reproductive Technology (“ART”) has rapidly expanded in ways that many courts are continuing to wrestle. While the media mostly covers the highly sensational disputes between couples and in vitro fertilization (“IVF”) clinics,¹ a more common IVF dispute is occurring all over America: the dispute over frozen embryos during a divorce proceeding. Some states have addressed through case law or statute what will happen during a frozen embryo disposition dispute. These states, however, overwhelmingly favor methods of IVF contract interpretation and enforcement that do not protect the highly personal, competing interests of couples during a dispute.² Additionally, many states have yet to address the issue at

¹ *NJ couple sues fertility clinic, saying wrong sperm used to conceive child*, ABC7 (Sept. 12, 2019), <https://abc7ny.com/society/couple-says-fertility-clinic-used-wrong-sperm-to-conceive-baby/5532537> [<https://perma.cc/2TWH-D2S4>]; see also Isaac Stanley-Becker, *She gave birth to twins through IVF. But the babies weren’t hers, a lawsuit alleges*, WASH. POST (July 8, 2019), <https://www.washingtonpost.com/nation/2019/07/08/twins-ivf-birth-lawsuit/> [<https://perma.cc/SX6R-C454>].

² See, e.g., *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018) (adopting the Pure Contractual Approach); *Terrell v. Torres*, 438 P.3d 681 (Ariz. App. Ct. 2019)

all. This lack of clarity and uniformity leaves couples pursuing IVF vulnerable and subject to significant uncertainty regarding the disposition of their frozen embryos, even when they sign contracts.

This lack of uniformity persisting in frozen embryo law impacted Modern Family star Sofia Vergara and her ex-fiancé Nick Loeb in 2015.³ After calling off their engagement, Vergara and Loeb began a contentious two-year dispute over their frozen embryos created while the two were still together.⁴ Vergara was certain she wanted to keep the embryos frozen while Loeb wanted to implant the embryos into a surrogate.⁵ Over the two-year dispute, the couple spent thousands of dollars and litigated in multiple states over the disposition of their frozen embryos.⁶ Because of the legal gray areas that persist in frozen embryo disputes, Loeb attempted to move the proceeding from state to state to increase the likelihood of obtaining the outcome he wanted.⁷ Although this celebrity legal battle (like many celebrity lawsuits) may seem far removed from any legal battle a typical couple may encounter, disputes over frozen embryo disposition are a reality that many Americans face.⁸

Participation in ART is increasing in the United States.⁹ Between the years 1987 and 2015, ART contributed to the birth of more than 1 million babies.¹⁰ Couples choose to expand their

(adopting the Pure Contractual Approach); *Bilbao v. Goodwin*, No. 20078, 2019 WL 5607809 (Conn. Nov. 5, 2019) (adopting the Pure Contractual Approach).

³ Anna Almendrala, *What Sofia Vergara's Case Reveals About IVF's Legal Gray Areas*, HUFFINGTON POST (Dec. 9, 2016) https://www.huffpost.com/entry/avoid-custody-battle-over-frozen-embryos_n_584a03dfe4b0bd9c3dfc1a8f [<https://perma.cc/XX5V-NG8H>].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, 2016 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT (Oct. 2018), <https://ftp.cdc.gov/pub/Publications/art/ART-2016-Clinic-Report-Full.pdf> [<https://perma.cc/3PX5-9GW7>].

⁹ *Id.*

¹⁰ *IVF by the Numbers*, PENN MEDICINE (Mar. 14, 2018), <https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers> [<https://perma.cc/7U64-9ZHR>].

families through ART for a number of reasons.¹¹ ART is available for older couples, infertile couples, and same-sex couples when they may otherwise be unable to conceive through natural means.¹²

While ART has had a positive impact in the lives of thousands of couples, the increased use of this technology has come with significant legal and ethical implications. Particularly, courts have struggled with the disposition of frozen embryos during divorce proceedings.¹³ Today, before embarking on their IVF journeys, couples usually sign contracts drafted by an attorney or supplied as a part of the IVF clinic consent form that address what will happen to the frozen embryos in the event of a divorce.¹⁴ Typically, an IVF contract states the parties' intent for the disposition of the frozen embryos in the event of the divorce, and requires both parties to sign the contract before proceeding with any IVF-related procedures. In the event of a divorce, most states allow parties to donate their embryos to research, donate the embryos to another infertile couple, award the embryos to one of the biological parents, discard the embryos, or keep the embryos frozen indefinitely.¹⁵

Unfortunately, courts that have addressed frozen embryo disposition have struggled to remain uniform in their methods of IVF contract interpretation and enforcement.¹⁶ In states that have addressed frozen embryo disposition, three different approaches have emerged: the Pure Contractual Approach, the Balancing Test

¹¹ *Infertility and In Vitro Fertilization*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization#1> [<https://perma.cc/Z8TD-KEFH>] (last visited Oct. 31, 2019).

¹² *Id.*

¹³ Anna El-Zein, *Embryo-Uh-Oh: An Alternative Approach to Frozen Embryo Disputes*, 82 MO. L. REV. 881, 884 (2017); *see also* Tracy J. Frazier, *Of Property and Procreation: Oregon's Place in the National Debate Over Frozen Embryo Disputes*, 88 OR. L. REV. 931, 932 (2009).

¹⁴ *See* Gwen Mayes, "Wait a Minute, I've Changed My Mind"—*Finding the Right Time to Determine the Disposition of Frozen Embryos*, MEDSCAPE (July 25, 2005), <https://www.medscape.com/viewarticle/508555> [<https://perma.cc/K53T-HP62>] ("One important legacy of *Davis v. Davis* is the incorporation of written agreements and consent processes from the beginning of IVF treatments that spell out what will happen should a couple, at a later point, disagree on the disposition of unused embryos.").

¹⁵ *Id.*

¹⁶ El-Zein, *supra* note 13, at 884; *see also* Frazier, *supra* note 13, at 932.

Approach, and the Contemporaneous Consent Approach.¹⁷ Additionally, many courts have not yet addressed the issue at all.¹⁸ The lack of an established approach in those states leaves couples vulnerable because it is unclear how their contracts will be interpreted or enforced if a dispute arises. Courts may choose to follow one of the existing approaches—which do not always result in the same outcome for the embryos—or those courts may choose to adopt a novel approach.

The Contemporaneous Consent Approach, originally proposed by Carl Coleman in a 1999 law review article,¹⁹ has been implemented in a few courts,²⁰ and should be adopted in the remaining states still looking for guidance. The Contemporaneous Consent Approach enforces IVF contracts generally unless a party has a change of heart regarding the disposition of the embryos at the time of enforcement.²¹ In other words, under this approach, IVF contracts are enforceable if a dispute arises between the couple that does not address embryo disposition or if a dispute arises between the IVF clinic and the couple.²² However, if a party has a change of heart regarding the disposition of the embryos at the time of enforcement, the contract will no longer be enforceable.²³ At that point, the embryos must remain frozen until the parties can come to a mutual agreement.²⁴ Thus, with the Contemporaneous Consent

¹⁷ El-Zein, *supra* note 13, at 884.

¹⁸ *Id.*

¹⁹ Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 88–89 (1999).

²⁰ See *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

²¹ Coleman, *supra* note 19, at 110.

²² See Coleman, *supra* note 19, at 89; see also Marisa G. Zizzi, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391, 406 (2012).

²³ Coleman, *supra* note 19, at 112.

²⁴ *Id.*

Approach, a court will only enforce a contemporaneous decision between the couple.²⁵

This Recent Development proposes the Contemporaneous Consent Approach as the appropriate method of IVF contract interpretation and enforcement and explains why this approach protects the interests of couples more than any other approach that has been applied in courts thus far. Currently, many states have no case law or statutes addressing the enforceability of contracts dealing with the disposition of frozen embryos.²⁶ This lack of clarity and uniformity in the law leaves couples pursuing IVF vulnerable, even if they address all issues through a contract because it is uncertain how courts will interpret the contract or if courts will enforce the contract at all. Ultimately, understanding how courts will interpret and enforce IVF contracts will help drafters create more comprehensive and protective IVF contracts. Having this understanding will also provide prospective parents with assurance when embarking on their IVF journeys that their intentions for the disposition of their embryos at the time of enforcement will be respected if a dispute arises.

Part II of this Recent Development introduces Assisted Reproductive Technology generally and explains the process of IVF and cryopreservation.²⁷ Part III introduces the three main approaches courts have implemented when interpreting and enforcing IVF contracts. Part IV introduces the statutory approaches in Louisiana and Florida for addressing the disposition of frozen embryos. Part V establishes why the Contemporaneous Consent Approach should be adopted by courts still looking for guidance during frozen embryo disputes. Finally, Part VI addresses some of the drawbacks of the approach and proposes potential solutions.

²⁵ *Id.*

²⁶ *See infra* Appendix A.

²⁷ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8, at 533 (Cryopreservation is “the practice of freezing eggs or embryos from a patient’s ART cycle for potential future use.”).

II. THE TECHNOLOGY: ASSISTED REPRODUCTIVE TECHNOLOGY, IVF, AND CRYOPRESERVATION

Assisted Reproductive Technology is used to describe any and all technology involving embryos and eggs used to facilitate a pregnancy.²⁸ The term “embryo” is used from “the moment cells divide after fertilization until the eighth week of pregnancy.”²⁹ There are multiple methods of ART involving embryos, but ART is generally the process of “surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to a female patient or gestational carrier or donating them to another patient.”³⁰

The three most common forms of ART are gamete intrafallopian transfer, which “involves using a fiber optic instrument called a laparoscope to guide the transfer of unfertilized eggs and sperm (‘gametes’) into a woman’s fallopian tubes through small incisions in her abdomen,”³¹ zygote intrafallopian transfer which involves fertilizing a woman’s eggs in the laboratory and then using a laparoscope to guide the transfer of the fertilized eggs (“zygotes”) into a woman’s fallopian tubes,³² and finally, IVF.³³ IVF is by far the most common form of ART.³⁴ Other forms of ART exist beyond the procedures previously described, but they are rarely implemented.³⁵

IVF involves removing a woman’s eggs through an egg retrieval surgical procedure, fertilizing the eggs in a laboratory, and then

²⁸ *Id.* at 3.

²⁹ Jon Johnson, *Embryo freezing: What you need to know*, MEDICAL NEWS TODAY (Mar. 13, 2019), <https://www.medicalnewstoday.com/articles/314662.php> [<https://perma.cc/733X-TSJ2>].

³⁰ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8, at 3.

³¹ *Id.*

³² *Id.* at 536.

³³ Johnson, *supra* note 29; *see also* Christina L. Preville, *Collaborative Law in Pennsylvania and the Frozen Embryo Debate*, 8 J. OF ENVTL. AND PUB. HEALTH L. 80, 84 (2013) (“The Society for Assisted Reproductive Treatment found that 99% of ART procedures are IVF.”).

³⁴ *Id.*

³⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8, at 4.

transferring the resulting embryos into the uterus of the female.³⁶ For more complicated IVF procedures, “fertilization involves a specialized technique known as intracytoplasmic sperm injection (ICSI). In ICSI, a single sperm is injected directly into a woman’s egg.”³⁷ The embryos created through any method of IVF can either be implanted in the woman immediately or can be frozen for later use through a process known as cryopreservation.³⁸

Cryopreservation is “the practice of freezing eggs or embryos from a patient’s ART cycle for potential future use.”³⁹ The process involves replacing the water from inside the cells of the embryo with a material called the cryoprotectant.⁴⁰ Once the water is removed, the embryos are chilled to their “preservation state” at which point the embryos reach a temperature at which they will not deteriorate.⁴¹ At this point, the embryos are frozen, and then stored in liquid nitrogen at temperatures around -321°F.⁴²

³⁶ Johnson, *supra* note 29; *see also* 1 Lloyd T. Kelso, N.C. Family Law Practice § 9:4 (2017).

³⁷ Johnson, *supra* note 29. *See also In Vitro Fertilization (IVF)*, MAYO CLINIC, (June 22, 2019), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/T8JE-GPU2>].

³⁸ Johnson, *supra* note 29; *see also In Vitro Fertilization (IVF)*, *supra* note 37.

³⁹ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8, at 533. (“An ART cycle starts when a woman begins taking fertility drugs or having her ovaries monitored for follicle production. If eggs are produced, the cycle progresses to egg retrieval. Retrieved eggs are combined with sperm to create embryos. If fertilization is successful, at least one embryo is selected for transfer. If implantation occurs, the cycle may progress to clinical pregnancy and possibly live birth. ART cycles include any process in which (1) an ART procedure is performed, (2) a woman has undergone ovarian stimulation or monitoring with the intent of having an ART procedure, or (3) frozen embryos have been thawed with the intent of transferring them to a woman.”).

⁴⁰ *Id.*; William C. Shiel, *Medical Definition of Cryoprotectant*, MEDICINET, <https://www.medicinenet.com/script/main/art.asp?articlekey=7253> [<https://perma.cc/WJQ7-833F>] (“A chemical component of a freezing solution used in cryopreservation to help protect what is being frozen from freeze damage. The chemical glycerol, for example, is commonly used as a cryoprotectant to protect frozen red blood cells.”).

⁴¹ Johnson, *supra* note 29.

⁴² *Id.*

According to physicians, there is no limit to the length of time an embryo can remain frozen.⁴³ There is ample evidence of successful pregnancies from frozen embryos stored for up to ten years.⁴⁴ It is worth noting, however, that IVF and cryopreservation are relatively modern reproductive technologies, and researchers have not yet completed long-term studies on the outcomes of embryos that have been frozen for extended lengths of time.⁴⁵

Couples choose to freeze their embryos for a number of reasons. First and foremost, cryopreservation makes IVF less expensive for the couple and less invasive for the woman.⁴⁶ The IVF egg retrieval procedure can be quite costly. One egg retrieval procedure could cost upwards of \$10,000.⁴⁷ The hormones used before the egg retrieval procedure may cost an additional \$3,000 to \$5,000.⁴⁸

Furthermore, the surgical egg removal process is often taxing on a woman physically.⁴⁹ The process includes ovulation induction, which requires the woman to go through multiple synthetic hormone treatments and the egg retrieval surgical procedure, which requires sedation and could lead to cramping and pain during and after the procedure.⁵⁰ So, to ensure a higher IVF success rate and fewer egg retrievals, many more eggs are removed during the first egg retrieval procedure to reduce the need for multiple procedures.⁵¹ Because it is unclear which embryos will be viable, more embryos are created and frozen than would be intended for actual implantation.⁵² In addition,

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *In Vitro Fertilization (IVF)*, *supra* note 37.

⁴⁷ Sarah McHaney & Rebecca Jacobson, *7 things every woman should know before freezing her eggs*, PBS: NEWSHOUR (Dec. 10, 2014), <https://www.pbs.org/newshour/science/freeze-eggs> [<https://perma.cc/8RHP-NLGN>].

⁴⁸ *Id.*

⁴⁹ Mayes, *supra* note 14. For a more in-depth argument on how and why women contribute more to the IVF process, see Tracey S. Pachman, *Disputes Over Frozen Preembryos & The "Right Not to Be a Parent,"* 12 COLUM. J. GENDER & L. 128 (2003).

⁵⁰ *In Vitro Fertilization (IVF)*, *supra* note 37.

⁵¹ *Id.*

⁵² *Id.*

married couples may choose to freeze their embryos because there is some literature suggesting frozen embryos are more viable than freezing eggs and sperm separately for future use.⁵³

III. JUDICIAL APPROACHES TO IVF CONTRACT INTERPRETATION AND ENFORCEMENT

Generally, IVF contracts addressing the disposition of frozen embryos exist in two forms: a contract is either drafted by an attorney or it is provided through the IVF clinic consent form.⁵⁴ Both methods of IVF contracting typically address what will happen to the embryos in the event of a divorce. Regardless of the method a couple uses to enter into a contract before embarking on IVF,⁵⁵ most couples have some written documentation signed by both parties addressing the disposition of the embryos in the event of a divorce.⁵⁶

Frozen embryo disputes arise in courts when, at the time of enforcement of the contract (i.e. the divorce), parties do not agree on the disposition of the frozen embryos. Literature in this area has classified the various methods of interpretation and enforcement of IVF contracts during disputes into three approaches: the Pure Contractual Approach, the Balancing Test Approach, and the Contemporaneous Consent Approach.⁵⁷

To better illustrate how each approach differs from the others, imagine the following hypothetical scenario: Bob and Jane Doe start the process of IVF because Bob is about to begin chemotherapy which may result in his infertility. Because of Bob's potential

⁵³ McHaney & Jacobson, *supra* note 47.

⁵⁴ See Deborah L. Foreman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW 57, 59 (2011).

⁵⁵ For a more in-depth analysis on the difference between the two forms of IVF contracts, see generally *id.*

⁵⁶ See Frazier, *supra* note 13, at 904. Florida has even enacted a statute requiring couples to sign written agreements before beginning IVF, see FLA. STAT. § 742.17 (2019).

⁵⁷ Melissa Boatman, *Comments: Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes after Divorce*, 37 U. BALT. L. REV. 285, 288–99 (2008). For a visual depiction of which states follow each judicial approach and which states have yet to determine an approach, see *infra* Appendix A.

infertility, the couple signs an IVF contract awarding the frozen embryos to Bob in the event of a divorce. Years pass and Bob is in fact infertile now. The couple files for divorce, but Jane has had a change of heart and no longer wants Bob to have the embryos because she does not want to become a biological parent. She now wishes for the embryos to be destroyed. Bob, however, still wants use of the embryos.

The following subsections will briefly introduce each IVF contract interpretation and enforcement approach, give an example of an impactful case from a state implementing that particular approach, and then demonstrate how a court employing each approach would interpret and enforce Bob and Jane Doe's hypothetical IVF contract.

A. Pure Contractual Approach

First, the most common approach of IVF contract interpretation and enforcement is the Pure Contractual Approach.⁵⁸ Courts implementing the Pure Contractual Approach treat IVF contracts the same as any other type of contract.⁵⁹ IVF contract interpretation and enforcement follows the same principles of general contract law, such as the requirement of mutual assent at the time of the agreement, with no specialized rules applied in the event a dispute arises.⁶⁰ The rationale behind this method is that competent adults are free to contract, and their intent at the time of the contract should be enforced as in other types of contracts.⁶¹ The same safeguards, thresholds, and defenses available in any other contract dispute are available in IVF contracts under this method of IVF contract interpretation and enforcement.⁶² Furthermore, this approach maintains the notion that there is nothing inherently different about IVF contracts than any other form of contract, thus not utilizing any specialized rules for interpretation or enforcement.

⁵⁸ *Id.*

⁵⁹ El-Zein, *supra* note 13, at 886; *see also* Frazier, *supra* note 13, at 941.

⁶⁰ El-Zein, *supra* note 13, at 886.

⁶¹ *Id.*

⁶² Frazier, *supra* note 13, at 941.

New York has followed the Pure Contractual Approach since 1998. In *Kass v. Kass*,⁶³ the court was faced with a dispute over frozen embryos during a divorce proceeding.⁶⁴ Maureen Kass and Stephen Kass signed an IVF agreement that stated their frozen embryos would be donated to research in the event of a divorce.⁶⁵ At the time of the divorce, however, Maureen had a change of heart.⁶⁶ Maureen wanted to use the embryos.⁶⁷ Steven, however, refused this idea because he did not want parentage forced onto him.⁶⁸ The New York Court of Appeals held that the IVF agreement the couple signed was enforceable despite Maureen's change of heart.⁶⁹ In accordance with standard New York contract law, the court held that the agreement "unequivocally manifest[ed] their mutual intention" at the time of execution.⁷⁰ Therefore, the embryos were donated to research as established by the original contract despite Maureen's changed desires.⁷¹

Using the Pure Contractual Approach, a court is likely to enforce Bob and Jane Doe's hypothetical IVF contract discussed above and award the embryos to Bob, thus ignoring Jane's change of heart at the time of enforcement. Because the Pure Contractual Approach aligns with all of the basic principles of contract law, the court would be reluctant not to enforce any prior written agreement. In this case, the only defense available to Jane would be the contract law public policy defense. Jane could try to argue that the contract forces parentage upon her which violates public policy. Thus, the contract should be void. The success of this public policy argument, however, would be determined under the discretion of the court.⁷²

⁶³ *Kass v. Kass*, 91 N.Y.2d 554, 557 (N.Y. 1998).

⁶⁴ *Id.*

⁶⁵ *Id.* at 558.

⁶⁶ *Id.* at 560.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 565.

⁷⁰ *Id.* at 567.

⁷¹ *Id.*

⁷² The uncertainty of the public policy defense as a whole is discussed later in Section V.

B. Balancing Test Approach

Second, some states instead follow a Balancing Test Approach in which the court may choose to disregard a couple's previous IVF agreement and weigh the competing interests of the parties at the time of the divorce to determine the proper disposition of the frozen embryos.⁷³ Using this approach, courts may weigh factors such as a party's religion, infertility, and the desire of a party not to become a parent.⁷⁴ In addition, this approach is often employed when no frozen embryo agreement exists between the parties at the time of divorce.⁷⁵

New Jersey has followed the Balancing Test Approach since 2001. Similar to *Kass*, in *J.B. v. M.B.*,⁷⁶ the court was faced with a dispute over frozen embryos during a divorce proceeding.⁷⁷ The parties signed an agreement stating that in the event of a divorce the embryos would revert back to the IVF clinic.⁷⁸ The court first stated that New Jersey "evinces a policy against enforcing private contracts to enter into or terminate family relationships."⁷⁹ The court then weighed the interests of the wife and husband.⁸⁰ The wife, although infertile, wanted the frozen embryos to be discarded.⁸¹ The husband, a devout Catholic, wanted the use of the embryos and to develop them into children.⁸² Ultimately, the court held that the mother's right not to bear children was paramount over the father's wish to have the embryos and ordered the embryos to be discarded.⁸³

Using the Balancing Test Approach, a court would likely not recognize Bob and Jane Doe's prior agreement because of the personal, familial nature of the contract. Instead, the court would weigh the interests of Bob and Jane at the time of enforcement

⁷³ Frazier, *supra* note 13, at 933.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

⁷⁷ *Id.*

⁷⁸ *J.B. v. M.B.*, 783 A.2d 707, 710 (N.J. 2001).

⁷⁹ *Id.* at 717.

⁸⁰ *Id.* at 719.

⁸¹ *Id.* at 710.

⁸² *Id.*

⁸³ *Id.* at 720.

against each other to determine what the best outcome should be for the frozen embryos. For Bob and Jane, the court would likely weigh Bob's current inability to have a biological child of his own against Jane's desire to not have any biological children with her ex-husband. Ultimately, the Balancing Test Approach is highly fact dependent and how the dispute would come out in this particular balancing test is completely determined under the discretion of the court.

C. *Contemporaneous Consent Approach*

Finally, the third approach is the Contemporaneous Consent Approach. This Recent Development endorses the Contemporaneous Consent Approach as the appropriate method of IVF contract interpretation and enforcement because the approach honors the basic principles of contract law while still protecting couples' competing interests during a dispute. The Contemporaneous Consent Approach aligns with the principles of contract law but adds an additional safeguard to the process. Using this form of IVF contract interpretation and enforcement, courts generally enforce an IVF contract absent a change of heart by one of the parties at the time of enforcement.⁸⁴ When a dispute arises, the court requires both parties to agree at the time of enforcement before any final disposition of the frozen embryos takes place.⁸⁵ Until a mutual decision is reached between the parties, the court does not make any decisions regarding the frozen embryos—the embryos either remain frozen until no longer viable or until storage is no longer an option.⁸⁶ If the parties subsequently come to a mutual agreement on their own, the court would enforce that contemporaneous agreement.⁸⁷ Carl Coleman first proposed this approach in a law review article in 1999.⁸⁸ In the article, Coleman argues that the Pure Contractual Approach “insufficiently protects the individual and societal interests at stake” because there is something inherently different and more personal about contracts

⁸⁴ Coleman, *supra* note 19, at 110.

⁸⁵ *Id.*

⁸⁶ Preville, *supra* note 33, at 90–91.

⁸⁷ Coleman, *supra* note 19, at 110.

⁸⁸ *Id.*

for frozen embryo disposition.⁸⁹ Thus, to protect those individual interests, the Contemporaneous Consent Approach provides an additional safeguard to the process by requiring both parties to agree at the time of enforcement before any final disposition of the frozen embryos.

Massachusetts has implemented the Contemporaneous Consent Approach since 2000. Similar to the disputes in the *Kass* and *J.B.* cases, in *A.Z. v. B.Z.*,⁹⁰ the court was faced with a dispute over frozen embryos during a divorce proceeding.⁹¹ Before beginning the IVF process, the couple signed a consent form stating that in the event of a divorce, the embryos would be awarded to the wife because she was not able to become pregnant through conventional means of conception.⁹² At the time of divorce, however, the husband had a change of heart and no longer wished for the wife to be awarded the embryos and potentially have parentage forced upon him.⁹³ The court held that even if the agreement between the parties was valid, the court would not enforce the contract because one of the parties had a change of heart.⁹⁴ The court thus “would not enforce an agreement that would compel one donor to become a parent against his or her will.”⁹⁵

Using the Contemporaneous Consent Approach, in the hypothetical case of Bob and Jane Doe, the court would not enforce their prior agreement. Because Jane had a change of heart regarding the disposition of the frozen embryos, the court would order indefinite storage until the parties come to a mutual agreement regarding the disposition of their frozen embryos. If Bob and Jane later come to a mutual agreement, a court would then enforce that subsequent contemporaneous agreement.

⁸⁹ *Id.* at 88.

⁹⁰ *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

⁹¹ *Id.* at 1051.

⁹² *Id.* at 1054.

⁹³ *Id.* at 1057.

⁹⁴ *Id.*

⁹⁵ *Id.*

IV. STATUTORY APPROACHES

While most states have chosen to leave the issue of frozen embryo disposition to the courts, a handful of states have chosen to address this issue through statutes.⁹⁶ While these laws may be further developed and interpreted by courts, the statutes provide parameters the courts must use as the starting point in IVF contract interpretation and enforcement. Florida and Louisiana are two states that have enacted statutes addressing frozen embryo disputes. These two statutes embody typical language legislatures adopt in these types of laws, but come to very different conclusions on the disposition options for frozen embryos. Generally, Florida codifies the Pure Contractual Approach, requiring parties to enter into prior agreements before beginning IVF,⁹⁷ while Louisiana provides frozen embryos with a legal status by referring to the embryos as “juridical person[s].”⁹⁸ These two states’ statutes demonstrate how adopting a statutory scheme to address frozen embryo disposition can lead to significantly different outcomes.

A. Florida’s Approach

In 1993, Florida enacted a statute addressing the disposition of frozen embryos.⁹⁹ The statute states that parties must enter into a written agreement that provides for the disposition of the commissioning couples’ eggs, sperm, and preembryos¹⁰⁰ in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.¹⁰¹ The statute goes on to explain, in the absence of an agreement, the parties providing the egg and sperm have control over the embryo and the decision-making resides jointly with the couple.¹⁰² The statute also states that, in the event of the death of one

⁹⁶ See, e.g., CAL. PENAL CODE § 367g (2017); FLA. STAT. § 742.17 (2017); LA. REV. STAT. ANN. § 9:121–9:133 (2017).

⁹⁷ FLA. STAT. § 742.17 (2017).

⁹⁸ LA. REV. STAT. ANN. § 9:130 (2017).

⁹⁹ FLA. STAT. § 742.17 (2017).

¹⁰⁰ *Id.* § 742.13(12) (“‘Preembryo’ means the product of fertilization of an egg by a sperm until the appearance of the embryonic axis.”).

¹⁰¹ *Id.*

¹⁰² *Id.*

party, the embryos will go to the surviving party.¹⁰³ Finally, the Florida statute addresses that, if a child is born from an embryo after the death of a party, the child will not be able to inherit from the deceased party unless the decedent's will has provided for such an occasion.¹⁰⁴ This statute suggests that written agreements will be enforced while also accounting for what will happen if a dispute arises in the absence of a written agreement.

Despite the breadth of this statute, it leaves its interpretation open to Florida courts. While the statute appears to be a codification of the Pure Contractual Approach, it still does not speak to how agreements will be interpreted or enforced by courts, such as what a court should consider to be void because of public policy considerations or whether a court would force parentage on a party if the contract called for it.

B. Louisiana's Approach

In 1986, Louisiana enacted a statute that provided frozen embryos with a legal status.¹⁰⁵ One of the provisions of this statute establishes that a human embryo is a "juridical person which cannot be owned by the in vitro patients."¹⁰⁶ In addition, the statute prohibits using the embryo for research purposes¹⁰⁷ and prohibits destruction of the embryos.¹⁰⁸ Finally, the statute provides that any disposition must pass a "best interest of the in vitro fertilized ovum" test before any disposition decision is enforced.¹⁰⁹ While this statute does not provide guidelines on whether a court should enforce an IVF contract generally, it does set parameters for IVF contracts as the starting point. An IVF contract calling for embryos to be discarded or donated to research in the event of divorce would not be enforced because it directly contravenes the statute, thus violating public policy.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ LA. REV. STAT. ANN. § 9:121-9:133 (2017).

¹⁰⁶ *Id.* § 9:130.

¹⁰⁷ *Id.* § 9:122.

¹⁰⁸ *Id.* § 9:129.

¹⁰⁹ *See* Kelso, *supra* note 36.

This statute, however, also still leaves much to be determined by Louisiana courts. For example, this statute does not speak to whether an IVF contract is void on its face because of the nature of the agreement even if the agreement does not call for the embryos to be discarded or donated to research.

Although adopting a statute may appear like a simple, comprehensive approach to address frozen embryo disposition disputes, the Florida and Louisiana statutes evidence how adopting a statutory scheme can lead to significantly different outcomes for states. Furthermore, statutory schemes still leave much to the discretion of the state courts. Such approaches fail to address the lack of uniformity in frozen embryo law that persists today.

V. THE STRENGTHS OF ADOPTING THE CONTEMPORANEOUS CONSENT APPROACH

Although implemented by only a few states,¹¹⁰ and thus highly underutilized, the Contemporaneous Consent Approach should be adopted in the remaining states looking for guidance on interpreting and enforcing IVF contracts. The strengths of this approach are abundant: the approach honors many of the principles of contract law, thus respecting couples' rights to contract concerning the disposition of their frozen embryos, while providing an additional safeguard to the process to ensure all of the interests at stake are protected.

A. *Providing an Additional Safeguard to the Pure Contractual Approach*

The Contemporaneous Consent Approach aligns with the general principles of contract law, such as mutual assent and enforcement if valid.¹¹¹ Parties are able to freely enter into IVF agreements and, if no later dispute arises, their intent at the time of the contract will be honored by courts.¹¹² With this approach, there

¹¹⁰ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

¹¹¹ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

¹¹² *Id.*

is no fear that a court would rule the entire agreement void simply because of the nature of the agreement as in the Balancing Test Approach.¹¹³ In addition, treating these contracts as entirely void because of the highly personal, private nature of the agreement would render any and all IVF contracts futile. Ensuring IVF contracts are still valid, absent a change of heart, becomes particularly important in two situations: if the creators of the frozen embryos get into a dispute, not with each other, but with the IVF clinic, or alternatively, if the creators get into a dispute with each other, not over the disposition of the embryos, but over some other provision in the IVF contract.

Generally, it is necessary that IVF contracts remain enforceable and still governed by contract law because a valid contractual relationship should still exist between the couple and the IVF clinic. In the event the parties get into a dispute with the IVF clinic, the original agreement should still be presumed valid and the terms in the contract should be referenced in the dispute.¹¹⁴

Additionally, disputes regarding the IVF contract may arise between the parties that do not deal with the disposition of the frozen embryos. For example, a couple could sign an IVF contract that states the frozen embryos will remain frozen indefinitely and also determines that one of the parties would be solely responsible for paying the storage fees in the event of the divorce. At the time of the divorce, the couple still agrees that the embryos should remain frozen, however, the party that originally agreed to pay the storage fees now wants to split the costs equally. This change of heart does not affect the enforcement of the IVF contract because it is not a change of heart regarding the ultimate outcome of the embryos, but rather a financial obligation of one of the parties. As a result, the contract should still be upheld, enforced, and governed by the rules of contract law.

¹¹³ J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

¹¹⁴ For an example of a dispute between a couple and an IVF clinic, see generally *NJ couple sues fertility clinic, saying wrong sperm used to conceive child*, ABC7 (Sept. 12, 2019), <https://abc7ny.com/society/couple-says-fertility-clinic-used-wrong-sperm-to-conceive-baby/5532537/> [<https://perma.cc/2TWH-D2S4>].

Furthermore, because the Contemporaneous Consent Approach still honors the principles of contract law, the standard defenses that accompany contract law are also available during disputes as safeguards to the process. For example, IVF contracts may be voided in cases of fraud¹¹⁵ or duress.¹¹⁶ More commonly, an IVF contract would be voidable if it goes against public policy.¹¹⁷

Contracts that address frozen embryo disposition, however, are not typical contracts. They have the potential to implicate private, familial decisions. Consequently, it is rational that the contract law defenses, particularly the public policy defense, are not enough to ensure all of the parties' interests are protected. Generally, relying on a public policy defense as the argument in favor of non-enforcement is a risky matter. The discretion of the court plays a key role in determining what does and does not violate public policy.¹¹⁸ This leaves much room for different courts to come up with different rules, thus contributing to the lack of uniformity when a dispute arises. This lack of uniformity occurs because judges in different jurisdictions may weigh factors differently in determining what violates public policy. For example, there is no consensus among courts whether forcing parentage on a party by awarding one party the embryos over the other party's objection pursuant to an IVF agreement violates public policy. A Texas court in *Roman v.*

¹¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981) (“When A Misrepresentation Makes a Contract Voidable . . .”).

¹¹⁶ *Id.* § 177 (“When Undue Influence Makes a Contract Voidable . . .”).

¹¹⁷ *Id.* § 178 (“When A Term Is Unenforceable On Grounds Of Public Policy . . . (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. (2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. (3) In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.”).

¹¹⁸ *Id.*

*Roman*¹¹⁹ favored the husband's right not to procreate, and ordered the embryos to be destroyed.¹²⁰ This court refused to force parentage on the husband.¹²¹ However, in *Terrell v. Torres*,¹²² an Arizona court held that the right of a mother to have a child outweighed the right of a father not to become a parent, and awarded the mother the embryos.¹²³ The *Terrell* court did not believe forcing parentage on a party violates public policy.¹²⁴

Additionally, there is no consensus among courts whether discarding embryos violates public policy. For example, in Louisiana, if an IVF contract called for the destruction of the unused embryos or the donation of the embryos to research, a judge would determine that the contract violates public policy because it would be in direct contravention of the Louisiana statute.¹²⁵ However, in the case of *Litowitz v. Litowitz*,¹²⁶ a Washington court held that the frozen embryos should be discarded pursuant to the existing IVF contract, thus indicating that discarding embryos does not violate public policy.¹²⁷

Accordingly, there is no absolute certainty how a court will rule when the contract law public policy defense is argued because the decision is ultimately under the discretion of the court. Thus, the contract law public policy defense alone only leads courts further away from uniformity in their decisions, leaving parents vulnerable to the court's discretion.

B. Acknowledging the Potential Change of Heart

At the time of signing an IVF contract, many couples do not contemplate divorce.¹²⁸ Much can change in the lives of the parties

¹¹⁹ *Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006).

¹²⁰ *Id.*

¹²¹ *Id.* at 55.

¹²² *Terrell v. Torres*, 438 P.3d 681 (Ariz. Ct. App. 2019).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ LA. REV. STAT. ANN. § 9:122 (2017); LA. REV. STAT. ANN. § 9:129 (2017).

¹²⁶ *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

¹²⁷ *Id.* at 271.

¹²⁸ See Preville, *supra* note 33, at 89–90; Mayes, *supra* note 14 (“When a couple comes in for IVF, the last thing they want to think about is divorce or separation.”).

between the time of freezing the embryos and the court action, including the dissolution of their marriage. Parties could have vastly different views on the disposition of the embryos at the time of the IVF contract enforcement. Thus, it is far more likely one or both of the parties will have a change of heart.¹²⁹

Under contract law, only intent at the time of the agreement is binding.¹³⁰ Intent at the time of enforcement has no bearing on the contract. Because of the unique interests at stake, however, allowing a change of heart is more necessary in frozen embryo disposition disputes. In practice, the mutual assent of the parties requirement necessitates both parties' agreement to the disposition at the time of enforcement before any final disposition of the embryos takes place.¹³¹ Thus, the court will not enforce the prior agreement if a party has a change of heart and no longer agrees to the disposition from that prior agreement.¹³² Neither party is allowed to use the frozen embryos, donate the frozen embryos to another patient or to research, or destroy the frozen embryos without both the creators of the frozen embryos giving contemporaneous mutual consent.¹³³

Having the additional safeguard of mutual assent of the parties at the time of enforcement also acknowledges that IVF contracts dealing with the disposition of frozen embryos are not typical contracts. IVF contracts have the potential to implicate private, familial decisions and views that may drastically change over time. There is more at stake in IVF contracts regarding lifechanging personal issues, and thus the additional safeguard of mutual assent

¹²⁹ See Preville, *supra* note 33, at 91 (“One study has shown that as many as 71% of couples change their preferences for disposition from their initial preferences before treatment.”); see also Mayes, *supra* note 14.

¹³⁰ See CAL. CIV. CODE § 1636 (“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed *at the time of contracting*, so far as the same is ascertainable and lawful.”); *Gould v. Bank of New York Mellon*, 123 F. Supp. 3d 197 (D. Mass. 2015) (“[t]he requisite intent, for an enforceable contract, is the intent to be bound by the contract’s terms at the moment of the formation of a contested agreement.”).

¹³¹ Coleman, *supra* note 19, at 110.

¹³² *Id.*

¹³³ *Id.*

at the time of enforcement should be in place to reflect and protect the parties' potential changed interests and views.

In fact, many states have enacted statutes which require waiting periods for highly emotional, private familial decisions, recognizing that views or feelings in these situations can be highly subject to change.¹³⁴ For example, Iowa's adoption statute provides a seventy-two-hour waiting period after the birth of a child before biological parents may individually release their parental rights.¹³⁵ These statutes which allow for potential changes of heart in highly emotional, familial decisions are widespread throughout the United States.¹³⁶

C. Protecting Procreative Liberty by Preventing Forced Parentage

During a dispute over frozen embryos, multiple complicating and competing factors and interests of the parties may be present at the time of enforcement. For example, a party may be infertile and unable to have any biological children without the frozen embryos¹³⁷ or a party may have strong religious views in opposition to discarding or donating the embryos.¹³⁸ While these claims are valid and may at first seem to weigh in favor of awarding that party the

¹³⁴ See, e.g., ALA. CODE § 26-10A-13 (2017) (requiring a five-day waiting period after the birth of the child before parents may relinquish their parental rights); MASS. GEN. LAWS CH. 210, § 2 (2017) (requiring a four-day waiting period after the birth of the child before parents may relinquish their parental rights); MINN. STAT. § 259.24 (2017) (requiring a three-day waiting period after the birth of a child before parents may relinquish their parental rights).

¹³⁵ IOWA CODE § 600A.4(2)(g) (2017).

¹³⁶ See, e.g., ALA. CODE § 26-10A-13 (2017) (requiring a five-day waiting period after the birth of the child before parents may relinquish their parental rights); MASS. GEN. LAWS CH. 210, § 2 (2017) (requiring a four-day waiting period after the birth of the child before parents may relinquish their parental rights); MINN. STAT. § 259.24 (2017) (requiring a three-day waiting period after the birth of a child before parents may relinquish their parental rights).

¹³⁷ See *Reber v. Reiss*, 42 A.3d 1131, 1137 (Pa. Super. Ct. 2012).

¹³⁸ See *J.B. v. M.B.*, 783 A.2d 707, 710 (N.J. 2001).

embryos, paramount interests exist: procreative liberty and the right to not become a parent.¹³⁹

While the right not to become a parent is not a constitutionally protected fundamental right,¹⁴⁰ there are still areas of life that courts are hesitant to reach because they are too personal or private.¹⁴¹ The view that the decision to become parents is one of those private, personal areas, and should rest solely in the hands of the parties, not the courts, has emerged.¹⁴² This notion, that parties themselves should be the final decision-makers in their own procreation, is encompassed by the concept of procreative liberty.¹⁴³ A court forcing parentage on a party is in direct contravention of the concept of procreative liberty because forced parentage takes the decision-making power away from the parties and leaves it to the discretion of the court. Even if a party is able to legally and financially absolve himself or herself from any responsibility toward the potential child, thus avoiding legal parentage,¹⁴⁴ a court awarding a party the frozen

¹³⁹ For a discussion on the right not to become a parent as an inalienable right, compare Coleman, *supra* note 19 with Pachman, *supra* note 49.

¹⁴⁰ For a discussion on why the right not to become a parent is not a constitutionally protected fundamental right, see generally, Pachman, *supra* note 49.

¹⁴¹ *Miller v. Miller*, 78 Iowa 177, 642 (1889) (“It is of the genius of our laws, as well as of our civilization, that matters pertaining so directly and exclusively to the home, and its value as such, and which are so generally susceptible of regulation and control by those influences which surround it, are not to become matters of public concern or inquiry.”); *Doe v. Doe*, 365 Mass. 556 (1974) (holding that there is a hesitancy for courts to become involved in intimate questions of family life).

¹⁴² See generally Christina C. Lawrence, *Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Preembryos*, 52 CASE W. RES. L. REV. 721 (2002) (proposing an inalienable rights approach to IVF contract interpretation and enforcement).

¹⁴³ For a more in-depth discussion on procreative liberty and forced parentage, see generally Coleman, *supra* note 19; see also Lawrence, *supra* note 142.

¹⁴⁴ Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 615 (1998) (“[i]f the non-consenting party simply wants to avoid having custody or financial responsibility, a court could convert the party’s status from being the parent of a frozen embryo to being an ‘egg donor’ or ‘sperm donor’ without the custody or financial obligations of parenthood”).

embryos over the other party's objections still forces biological parentage on a party.¹⁴⁵

Both the Pure Contractual Approach and the Balancing Test Approach have the potential to implicate a party's procreative liberty by forcing parentage. While courts implementing the Pure Contractual Approach have typically held that forcing parentage on a party would violate public policy,¹⁴⁶ not all Pure Contractual Approach courts follow the same logic, particularly because the public policy defense is so discretionary as discussed earlier. For example, in *Szafranski v. Dunston*,¹⁴⁷ the Illinois Appellate Court enforced a frozen embryo oral contract between Jacob Szafranski and his ex-girlfriend Karla Dunston.¹⁴⁸ Karla had been recently diagnosed with cancer when she decided to begin the IVF and cryopreservation process with Jacob.¹⁴⁹ Both parties knew the chemotherapy treatments would make her infertile.¹⁵⁰ The couple had an attorney draft an agreement awarding Karla the use of the embryos, but the couple never signed the agreement.¹⁵¹ At the time of the dispute, Jacob no longer wished to become a parent and wanted to bar Karla from using their embryos.¹⁵² The court, however, held an oral contract existed between the parties.¹⁵³ Despite Jacob's change of heart, the court enforced their oral contract by allowing Karla use of the embryos.¹⁵⁴ Thus, this implementation of the Pure Contractual Approach implicated procreative liberty by forcing parentage.

¹⁴⁵ For a discussion on the impacts of forced biological parentage, *see* Coleman, *supra* note 19, at 81–82.

¹⁴⁶ *See, e.g.*, *Kass v. Kass*, 91 N.Y.2d 554 (N.Y. 1998) (favoring one party's right not to procreate); *Roman v. Roman*, 193 S.W.3d. 40 (Tex. Ct. App. 2006) (favoring one party's right not to procreate).

¹⁴⁷ *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015).

¹⁴⁸ *Id.* at 1164.

¹⁴⁹ *Id.* at 1136.

¹⁵⁰ *Id.* at 1136.

¹⁵¹ *Id.* at 1139.

¹⁵² *Id.* at 1141.

¹⁵³ *Id.* at 1149.

¹⁵⁴ *Id.* at 1164.

The Balancing Test Approach has also implicated the right not to become a parent in practice. For example, in *Reber v. Reiss*¹⁵⁵ the Pennsylvania Superior Court weighed Andrea Lynn Reiss's right to have a biological child over her ex-husband, Bret Reber's right not to become a parent.¹⁵⁶ Reiss and Reber began their IVF and cryopreservation journey when Reiss was first diagnosed with cancer, and Reiss began chemotherapy treatments that would make her infertile.¹⁵⁷ Over two years later, Reber filed for divorce and wanted the embryos destroyed because he no longer wished to become a parent.¹⁵⁸ The court used the Balancing Test Approach and determined Reiss's right to have biological children outweighed Reber's right not to become a parent.¹⁵⁹ Thus, this implementation of the Balancing Test Approach implicated the ex-husband's procreative liberty by forcing parentage.

The emotionally charged facts of both *Szafranski v. Dunston*¹⁶⁰ and *Reber v. Reiss*¹⁶¹ may seem to weigh in favor of the Pure Contractual Approach or the Balancing Test Approach because the outcomes appear justified. The main inquiry, however, is not whether the courts were justified in their decisions, but whether courts generally should have the power to implicate procreative liberty by forcing parentage on a party.

When implementing the Contemporaneous Consent Approach, a change of heart by one of the parties ceases a court's ability to enforce any prior agreement.¹⁶² Thus, this approach will not infringe upon procreative liberty through a court forcing parentage on a party. This lack of enforceability of the contract, however, does not always mean the party who wants the embryos in one of these highly emotional situations has lost his or her ability to ever be awarded the embryos. Under the Contemporaneous Consent Approach, the parties are still free to come to a subsequent mutual agreement that

¹⁵⁵ See *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

¹⁵⁶ *Id.* at 1141.

¹⁵⁷ *Id.* at 1132.

¹⁵⁸ *Id.* at 1133.

¹⁵⁹ *Id.* at 1142.

¹⁶⁰ *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015).

¹⁶¹ *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

¹⁶² *Coleman*, *supra* note 19, at 110.

awards one party the embryos in those more emotionally charged cases. In this situation, though, a court enforcing this mutual agreement is not forcing parentage on a party because it is the couple who has jointly decided to award the embryos to one party.

D. Applying a Tested Approach

The final strength of this approach is that it has been tested. Although first proposed in the literature,¹⁶³ this approach came to fruition in Massachusetts in 2000,¹⁶⁴ in Iowa in 2003,¹⁶⁵ and in Missouri in 2016¹⁶⁶ through their state courts. Many of the approach's strengths and weaknesses have been evidenced through case law in these states.¹⁶⁷ For example, one of the issues arising from the Contemporaneous Consent Approach is the possibility that the embryos will remain in storage indefinitely.¹⁶⁸ Because of the high storage costs of frozen embryos, a question may arise concerning who is responsible for paying these storage fees. A court in Iowa, however, addressed this issue and established a solution when implementing this approach in *In re Marriage of Witten*.¹⁶⁹ The court held that the party with the change of heart, thus responsible for the potentially indefinite storage, would also be responsible for the fees associated with storage.¹⁷⁰

While many scholars have suggested novel statutory approaches to address frozen embryo disposition,¹⁷¹ the Contemporaneous

¹⁶³ See generally Coleman, *supra* note 19 (first proposing the requirement of contemporaneous mutual consent of the parties at the time of IVF contract enforcement).

¹⁶⁴ *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

¹⁶⁵ See *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

¹⁶⁶ *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

¹⁶⁷ See *id.*; *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016).

¹⁶⁸ Potentially indefinite storage is discussed further in Section IV.

¹⁶⁹ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

¹⁷⁰ *Id.* at 783.

¹⁷¹ See, e.g., *Zizzi*, *supra* note 22 (proposing a state statute requiring parties to enter into contracts before beginning IVF and courts should enforce those contracts); *El-Zein*, *supra* note 13 (suggesting parties obtain outside, separate counsel to create IVF contracts and courts should enforce those contracts); *Frazier*, *supra* note 13 (suggesting keeping embryo disputes out of courtrooms).

Consent Approach has already been applied in courts and proven effective in application.¹⁷² States that have yet to establish an approach do not need grapple with the complications and obstacles that accompany entirely novel solutions to the same degree because examples of successful application of this approach are evidenced in the case law of states already implementing the approach.

VI. DRAWBACKS OF THE CONTEMPORANEOUS CONSENT APPROACH AND POTENTIAL SOLUTIONS

While the Contemporaneous Consent Approach maintains additional safeguards to the process, courts will have to address the drawbacks to the approach and certain situations in which further safeguards to the approach must be present. First, with this approach, there is the chance the parties may never come to a mutual decision.¹⁷³ These disputes arise because the parties cannot agree on the disposition of their embryos. Thus, requiring an agreement before any final disposition of the embryos may be ordered by a court could result in never reaching any conclusion for the embryos.¹⁷⁴

First, the potential for indefinite storage may suggest the embryos will exist in “legal limbo” indefinitely. There are many incentives throughout the process, however, that make it likely the parties will to come to a mutual decision. Primarily, most parties prefer to have a quicker divorce and not prolong the process.¹⁷⁵ Further, many IVF clinics have policies that, after a certain point of non-use, frozen embryos will be thawed and discarded, or donated to research for administrative and feasibility reasons.¹⁷⁶ Finally, storage costs range between \$300 to \$1,200 a year.¹⁷⁷ Thus, in the

¹⁷² See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

¹⁷³ Amanda West, *Reproductive Freedom or Forced Procreation: An Analysis of Minnesota Statutory Law Dealing with the Parentage of Frozen Embryos after Divorce*, 34 *HAMLIN J. PUB. L. & POL’Y* 259, 269–70 (2013).

¹⁷⁴ *Id.*

¹⁷⁵ See Preville, *supra* note 33, at 91.

¹⁷⁶ John A. Robertson, *Ethical and legal issues in cryopreservation of human embryos*, 47 *FERTILITY AND STERILITY* 371, 375 (1987).

¹⁷⁷ See 2 Dana Shilling & Barbara Detkin, *L. Desk Book* § 14.11 (2019).

absence of a mutual agreement, leaving the embryos stored indefinitely may not be the most cost-efficient option for couples already going through an expensive divorce. Not only do these factors possibly create an end point for the dispute, but they also create incentives for parties to come to a mutual agreement.

Second, another drawback that accompanies potentially indefinite storage occurs if one party dies during the time of indefinite storage. On one hand, the surviving party could argue that his or her rights now outweigh any of the rights of the deceased, or that the deceased no longer has rights in the frozen embryos.¹⁷⁸ On the other hand, the estate of the deceased would argue in favor of respecting the last wishes of the deceased.¹⁷⁹ The latter argument most aligns with the understanding of wills, intestate succession, and posthumous procreation, which maintains that the deceased party's wishes should be respected and honored post-mortem.¹⁸⁰ If a court chooses to respect the last wishes of the deceased, the court may also allow the surviving party to override the last wishes of the deceased upon the showing of extreme, or extraordinary changed circumstances.¹⁸¹

The third and final drawback of the approach is that parties entering into IVF contracts may rely on their IVF contracts, making major life decisions on the assumption the contract will be enforced by a court. For example, a couple may agree to freeze their embryos so the woman can focus on her career at that time, but still have the opportunity to have biological children at a later time. The couple then signs a contract stating she will be awarded the embryos in the event of a divorce. Thus, the woman proceeds with her plans of pursuing her career with the confidence, should anything happen, she would be awarded the embryos and still have the opportunity to have biological children of her own. Years later, at the time of the divorce, however, the husband has a change of heart and no longer wants his wife to be awarded the embryos. The Contemporaneous

¹⁷⁸ John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1047 (1994).

¹⁷⁹ Coleman, *supra* note 19, at 113.

¹⁸⁰ Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 943 (1997).

¹⁸¹ Coleman, *supra* note 19, at 114.

Consent Approach would honor this change of heart, and not force parentage on the husband despite the contract. In this situation, however, the woman made major life decisions relying on the enforceability of the contract. The notions of fairness and equity in contract law suggest the woman's reliance should be dispositive to the court, and the contract should be enforced if no other remedy is appropriate.¹⁸² Under the Contemporaneous Consent Approach, however, the woman's reliance has no effect on the enforceability of the IVF contract. While there are no perfect solutions to this drawback, there is an option to mitigate some of the consequences that accompany reliance on IVF contracts.

To address this drawback, under the Contemporaneous Consent Approach, drafters of the IVF contract should make parties aware that the disposition of the frozen embryo provision in their IVF contract may be unenforceable at the time of divorce. Placing unenforceable clauses in contracts is often done in other family law contracts.¹⁸³ For example, parties often place child custody provisions in prenuptial and separation agreements despite their inability to be enforced by a court.¹⁸⁴ In practice, drafters of the contract are required to put the parties on notice that if a dispute arises, the provisions will not be enforced despite those provisions being in the contract. This unenforceability principle can be applied

¹⁸² RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. LAW INST. 1981) (“Enforcement by Virtue of Action in Reliance (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.”).

¹⁸³ See Ariel Baniowski, *Unenforceable Custody and Support Provisions in Separation Agreements*, LIVESAY & MYERS (Mar. 28, 2017), <https://www.livesaymyers.com/unenforceable-custody-support-provisions-separation-agreements/> [<https://perma.cc/28JK-QSR6>] (“[A] provision in a separation agreement may state that ‘In the event either of the parents of the children were to die, the surviving grandparents shall receive visitation with the children every other weekend.’ Unfortunately, such a provision would be unenforceable.”).

¹⁸⁴ *Id.* (“[A] provision [in a prenuptial agreement] may read ‘In the event the mother [the primary physical custodian] moves more than 30 miles from the father’s current residence [the minority custodian], primary physical custody shall automatically transfer to the father.’ A provision like that is unenforceable.”).

to IVF contracts so that any reliance on the IVF contract would be unjustified. Thus, parties would be less likely to make major life decisions on the assumption the contract would be enforced at the time of divorce.

Although the Contemporaneous Consent Approach has its drawbacks, it is still the appropriate method of IVF contract interpretation and enforcement for states still looking for guidance. Since the approach is only implemented in a few states, there have not been many opportunities for courts to address all of the drawbacks that come with the approach. As more states adopt this approach, however, many of the drawbacks listed above may be encountered. Once these issues arise with higher frequency, it will allow courts to develop creative solutions such as the proposed solutions above for other courts to follow.

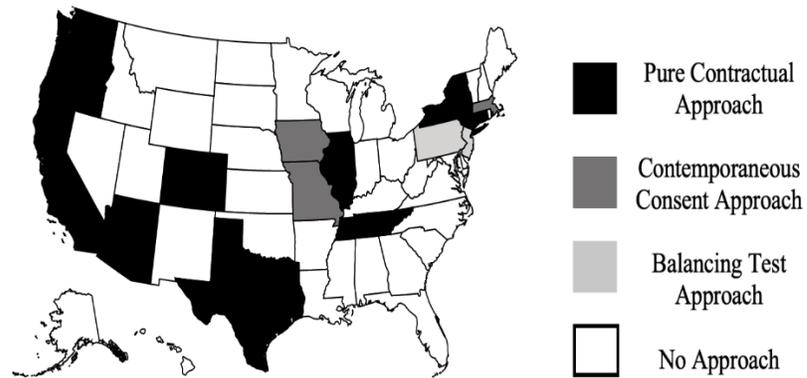
VII. CONCLUSION

Assisted Reproductive Technology has rapidly expanded in ways that many courts are continuing to grapple with. The legal and ethical implications of ART are vast, and courts have struggled to remain uniform in their decisions during frozen embryo disputes. Although many states have addressed through case law or statute what will happen during a frozen embryo disposition dispute, many states have yet to address the issue at all. This lack of clarity and uniformity leaves couples pursuing IVF in those states vulnerable and subject to significant uncertainty regarding the disposition of their frozen embryos, even when they sign contracts.

States looking for guidance should adopt the Contemporaneous Consent Approach. This approach is the most protective of all of the competing interests at stake because it offers an additional safeguard to the Pure Contractual Approach, honors parties' potential for a change of heart, and protects the procreative liberty of the parties. Although the approach has its weaknesses, as more states adopt this method of IVF contract interpretation and enforcement, courts will be able to develop creative solutions to mitigate many of the drawbacks. All things considered, with the Contemporaneous Consent Approach, couples pursuing IVF can feel confident that their contracts will be honored, absent a change of heart, while their

rights and interests are protected throughout their entire IVF journeys.

Appendix A: United States Map of Judicial IVF Contract Interpretation and Enforcement Approaches¹⁸⁵



¹⁸⁵ Tennessee: *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); New York: *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); Massachusetts: *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); New Jersey: *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); Washington: *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); Iowa: *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003); Texas: *Roman v. Roman*, 193 S.W.3d 40 (Tex. Ct. App. 2006); Oregon: *In re Marriage of Dahl & Angle*, 194 P.3d 384 (Or. Ct. App. 2008); Pennsylvania: *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012); Illinois: *Szafanski v. Dunston*, 34 N.E.3d 1132 (Ill. App. Ct. 2015); California: *Findley v. Lee*, No. FDI-13-780539 (Cal. Super. Ct. Jan. 11, 2016); Missouri: *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. 2016); Colorado: *In re Marriage of Rooks*, 429 P.3d 579 (Colo. 2018); Arizona: *Terrell v. Torres*, 438 P.3d 681 (Ariz. App. Ct. 2019); Connecticut: *Bilbao v. Goodwin*, No. 20078, 2019 WL 5607809 (Conn. Nov. 5, 2019).