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J.B. v. M.B.: New Evidence that Contracts Need To Be Reevaluated as the Method of Choice for Resolving Frozen Embryo Disputes

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J.B. and M.B. were married.[1] The couple discovered early in the marriage the difficult fact that J.B.'s endometriosis and resultant blockage of one of her fallopian tubes would prevent her from becoming pregnant.[2] Refusing to abandon their efforts toward a much-wanted pregnancy, the couple contracted with a fertility clinic to attempt in vitro fertilization ("IVF").[3] This procedure is one of science's most notable miracle-working technologies. A woman is hormonally stimulated to produce multiple egg cells that are then extracted from her body and combined in a petri dish with a man's sperm.[4] Successful fertilization results in embryos.[5] Good quality embryos are either returned to the woman's body for implantation[6] or

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1. J.B. v. M.B., 751 A.2d 613, 615 (N.J. Super. Ct. App. Div. 2000), *aff'd in part and modified in part*, 783 A.2d 707 (N.J. 2001).

2. *Id.* No infertility problems were attributable to M.B. *Id.*

3. *Id.*

4. J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001); *see* GODWIN I. MENIRU, CAMBRIDGE GUIDE TO INFERTILITY MANAGEMENT AND ASSISTED REPRODUCTION 110 (2001).

5. *See* STEPHEN R. BAYER ET AL., THE BOSTON IVF HANDBOOK OF INFERTILITY: A PRACTICAL GUIDE FOR PRACTITIONERS WHO CARE FOR INFERTILE COUPLES 80 (2002). The *J.B.* court uses the term "preembryo," defined as "a medically accurate, if awkward, term for a zygote, or fertilized egg, that has not been implanted in a uterus; the embryo proper develops only after implantation." *J.B.*, 751 A.2d at 614 n.1. "Preembryo," however, does not appear to be a scientific term. It is, rather, a popular term commonly used to refer to the embryo from the first to the fourteenth days of development, before the embryonic axis appears. *Glossary*, *in* THE ETHICS OF REPRODUCTIVE TECHNOLOGY 347, 348 (Kenneth D. Alpern ed., 1992). Furthermore, "preembryo" has been criticized as a politically loaded term that is used to reduce an embryo's human character. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 55 n.1 (1999) (citing Richard A. McCormick, *Who or What Is the Preembryo?*, KENNEDY INST. ETHICS J. 1, 1 (1991)). Because the stage of development of the embryo is not relevant to the procreational autonomy analysis, this Recent Development uses the term "embryo," which refers to a zygote at any stage of development prior to becoming a fetus. *See Glossary*, *supra*, at 348.

6. BAYER ET AL., *supra* note 5 (At the embryo transfer stage, "good quality embryos are usually between 6–10 cells in development."). Although ovarian stimulation for IVF treatment aims to retrieve many oocytes to increase the chances of conception, MENIRU, *supra* note 4, at 123, the number of embryos that may be implanted at once is limited by the risk of multiple pregnancies that would have to be selectively terminated to protect the health of the pregnant mother and developing fetuses. *Id.* at 136–37 & tbl.8.6 (providing a table listing potential consequences of multiple pregnancy); *see* Coleman, *supra* note 5, at 60 n.19.

stored at -196° C for possible future use.[7] The IVF procedure proved successful for J.B. and M.B. and yielded a healthy baby girl four years after their wedding date.[8]

Despite the romantic veneer suggested by the initial facts of this couple's story, undisclosed problems stirred within the marital relationship and caused the couple to separate only six months after their daughter's birth.[9] Separation led to divorce.[10] Although most matters surrounding the divorce were decided by a property settlement, one major question was left unresolved between the couple: who was to get custody of the frozen embryos?[11]

Society demands an answer to this question. More and more married couples are employing IVF procedures in their efforts to conceive.[12] Advances in reproductive technology are making the

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7. The process of freezing embryos for potential future use is termed "cryopreservation." *Glossary*, *supra* note 5, at 347. Cryopreservation has several advantages. *See generally* MENIRU, *supra* note 4, at 232 (explaining how the availability of cryopreservation technology has expanded the scope of infertility treatment and made such treatment more convenient). Cryopreservation helps ensure that the woman will not have to endure the hormonal injections, bodily changes, and cell extraction procedure more than once. *See* Coleman, *supra* note 5, at 60. This benefit is significant because, for a large proportion of couples, conception through IVF requires multiple attempts. *See* MENIRU, *supra* note 4, at 142. For a detailed description of the various hormonal and other regimens that women must endure for conventional IVF treatments, see generally *id.* at 118–30, 134–35 (outlining the various physical procedures the woman must endure up until the point of the egg cell extraction, including injections of powerful hormones, ultrasound scans, blood tests, and ultimately a surgical procedure by which egg cells are aspirated from both ovaries through a needle that pierces the vaginal wall and punctures ovarian follicles where they are located). Cryopreservation eliminates these additional physical burdens attributable to IVF and thereby reduces the time and financial cost necessary to promote pregnancy. Coleman, *supra* note 5, at 60–61. Even more consequential, cryopreservation allows individuals to have genetically related children after they become infertile. *See id.* at 61. Although Professor Coleman describes this benefit only with respect to women's infertility, *id.*, cryopreservation gives assistance to infertile males as well. For example, IVF can be combined with intracytoplasmic sperm injection ("ICSI") technology, in which each egg cell is injected with a single sperm cell to offer patients with extremely severe sperm defects a success rate similar to that obtained with standard IVF using healthy semen. Gordon Baker et al., *Assessment of the Male and Preparation of Sperm for ARTs*, *in* HANDBOOK OF IN VITRO FERTILIZATION 99, 100 (Alan O. Trounson & David K. Gardner eds., 2d ed. 2000).

8. *J.B.*, 783 A.2d at 710.

9. *Id.*

10. *Id.*

11. *Id.* at 711. Seven embryos remained in storage. *Id.* at 708.

12. More than 100,000 frozen embryos are currently being stored in IVF clinics across the United States. Susan B. Apel, *Disposition of Frozen Embryos: Are Contracts the Solution?*, 27 VT. B. J. 29, 29 (2001). This number is growing at a rate of 18.8% per year. *Id.* Furthermore, research is demonstrating that the viability of frozen embryos is longer than the two year period estimated twenty years ago. *Id.* Today scientists believe that frozen embryos can remain viable for at least ten years. *Id.*

procedure more effective and less costly to infertile couples.[13] Furthermore, the current ten to fourteen percent infertility rate among Americans[14] is expected to rise as more women marry later in life and decide to forego having children during their most fertile years.[15] These factors combined with the astonishing fifty percent divorce rate foreshadow that the United States is bound to experience increasing amounts of litigation over the custody of frozen embryos.[16]

Dispositional contracts occupy center stage in these custody debates.[17] For instance, J.B. and M.B. entered into a contract with the Cooper Center for In Vitro Fertilization, P.C., at the time of the IVF procedure.[18] J.B. alleged that a term within the contract

13. *See* MENIRU, *supra* note 4, at 117 (stating that IVF is proving more efficient and cost effective than some traditional medical remedies, such as tubal surgery, in certain classes of patients).

14. *See* BAYER ET AL., *supra* note 5, at 1–2 (citing a recent survey in which 10.5% of women in the reproductive age group were infertile); Paul W. Zarutskie, *Evaluation of the Infertile Couple*, *in* OFFICE GYNECOLOGY 488, 488 (Morton A. Stenchever ed., 2d ed. 1996) (stating that although most studies focus only on female infertility, a more realistic estimate of infertility is that approximately 13.9% of couples who desire children have a problem with conception); *see also* Esther M. Schonfeld, Note, *"To Be or Not to Be a Parent?" The Search for a Solution to Custody Disputes Over Frozen Embryos*, 15 TOURO L. REV. 305, 308 (1998) (stating that more than one in eight married couples in the United States are infertile).

15. *See* Zarutskie, *supra* note 14, at 489; Apel, *supra* note 12, at 29 (stating that the time it takes to attempt pregnancy, determine infertility, seek counseling, and finally undergo IVF procedures also contributes to delays in childbearing). As an alternative to the cryopreservation of embryos, a woman in these situations may seek to cryopreserve her own unfertilized egg cells. Ideally, this technique would preserve her individual ability to have genetically related children in the future, yet avoid social, moral, and legal complications that may arise from her male partner's ties to their frozen embryos if he and she separate. Jillian M. Shaw et al., *Cryopreservation of Oocytes and Embryos*, *in* HANDBOOK OF IN VITRO FERTILIZATION, *supra* note 7, at 373, 374. Unfortunately, this alternative is not practically feasible. Oocyte freezing is rarely performed because of the very poor prospects of achieving a pregnancy with frozen oocytes. *Id.* at 374.

16. Shaw, *supra* note 15, at 374.

17. In all four cases reaching states' high courts that have decided the fate of frozen embryos after a couple's divorce, the existence and enforceability of dispositional contracts were pivotal factors. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–59 (Mass. 2000) (upholding an injunction prohibiting former wife from using embryos on the basis that former husband's and wife's dispositional contract was unenforceable); J.B. v. M.B., 783 A.2d 707, 714–17 (N.J. 2001) (resorting to balancing husband's and wife's interests in control of embryos where parties' dispositional contract was unenforceable); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) (enforcing the parties' agreement to donate their pre-zygotes for research); Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992) (stating that if the parties had executed a written agreement specifying what disposition should be made of any unused embryos, that factor might have influenced or controlled the result of the parties' litigation).

18. *J.B.*, 783 A.2d at 710.

expressly provided for the disposition of the embryos in the event of divorce:[19]

> I, [J.B.] (patient), and [M.B.] (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF Program under the following circumstances:
>
> > 1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues . . . .[20]

Will this or any other dispositional contract be enforced by the courts as between spouses like J.B. and M.B.? The New Jersey Supreme Court is the most recent of only a handful of state courts that have provided any guidance as to the answer to this question.[21] The courts have consistently examined these cases of first impression against the same public policy backdrop, yet they have reached entirely different conclusions.[22] Specifically, all four courts reaching the issue have emphasized the need to protect *procreational autonomy*,[23] the right of individuals to be left alone with respect to their decisions to procreate or bear children. Two of the four courts found contracts to be the answer,[24] while the most recent two courts to decide the question,

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19. In a certification filed with a motion for summary judgment on the embryo issue, J.B. alleged that she and M.B. decided to attempt conception using the IVF procedure during a time when they were married and intended to remain married. *Id.* She emphasized that she endured the IVF process and agreed to preserve the embryos according to their mutual plan to raise a family as a married couple. *Id.* In contrast, M.B. alleged in his certification that before the couple began the IVF treatments, he and J.B. had discussed the procedure's moral and ethical repercussions, especially in the context of M.B.'s religious beliefs as a Catholic. *Id.* He further alleged that it was J.B.'s idea to donate the embryos to infertile couples, as she had known about other individuals in her workplace who were having difficulty conceiving. *Id.* at 710–11.

20. J.B. v. M.B., 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000), *aff'd in part and modified in part*, 783 A.2d 707 (N.J. 2001).

21. Only a few state statutes have addressed the issue even indirectly. *See* FLA. STAT. ANN. § 742.17 (West 1997) (stating that couples must execute a written agreement providing for disposition of frozen embryos in the event of death, divorce, or other unforeseen circumstances); LA. REV. STAT. ANN. §§ 9:121–9:133 (West 2000) (classifying a pre-zygote as a "juridical person" that must not be intentionally destroyed or given up for adoption); N.H. REV. STAT. ANN. §§ 168-B:13 to 168-B:15, 168-B:18 (2001) (requiring couples to undergo medical exams and counseling and setting a fourteen-day limit for maintenance of ex utero pre-zygotes).

22. *See infra* notes 53–104 and accompanying text.

23. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–59 (Mass. 2000); *J.B.*, 783 A.2d at 715–16; Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588, 600–01 (Tenn. 1992). *See generally infra* notes 27–41 and accompanying text (discussing the origin and meaning of procreational autonomy).

24. *See Kass*, 696 N.E.2d at 180; *Davis*, 842 S.W.2d at 597.

including the court deciding *J.B. v. M.B.*,[25] essentially found contracts to be the enemy.[26]

This Recent Development discusses America's interest in procreational autonomy in light of fertility technology and analyzes the disparate methods courts have developed to protect such autonomy in the line of case law ending with *J.B. v. M.B.* It posits that *J.B. v. M.B.* and prior decisions too quickly dispensed with the contracts method of resolving disputes. By eliminating a test that is most capable of protecting parties' rights to procreational autonomy, these judicial oversights threaten those rights.

The right to procreational autonomy that cases deciding embryo disposition disputes seek to advance derives from the United States Constitution. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[27] According to the United States Supreme Court, the Fourteenth Amendment's Due Process Clause offers substantive protections of rights beyond those enumerated in the Bill of Rights.[28] In this vein, the right to privacy has been deemed a "constitutional right," despite the fact that the right is nowhere mentioned in the Constitution.[29] In his dissenting opinion in *Olmstead v. United States*,[30] Justice Brandeis defined this right of privacy as a right "against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[31] The right to procreational autonomy derives from this constitutional right to be left alone.

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25. 783 A.2d 707 (N.J. 2001).

26. *See id.* at 719; *A.Z.*, 725 N.E.2d at 1057.

27. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992).

28. *Id.* at 847–49.

29. Despite the lack of precise language within the document itself, as early as 1891 the Supreme Court recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, 410 U.S. 113, 152 (1973) (citing Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). Later, the Court determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. *Id.* at 152–53. This determination opened the door to a liberal construction of this right by expressly rejecting the idea that such liberty was substantively limited by the Bill of Rights or the specific state practices that existed at the time of the Fourteenth Amendment's adoption. *Casey*, 505 U.S. at 834.

30. 277 U.S. 438 (1928).

31. *Id.* at 478 (Brandeis, J., dissenting). The constitutional right to privacy extends to two kinds of interests: " 'the individual interest in avoiding disclosure of personal matters' " and " 'the interest in independence in making certain kinds of important decisions.' " *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (quoting Whalen v. Roe, 429 U.S. 589, 599–600 (1977)). "The latter decisions have encompassed 'matters relating to marriage, procreation, contraception, family

Various opinions of the United States Supreme Court discuss the right to be free from governmental interference with procreational decisions.[32] In *Skinner v. Oklahoma*,[33] the Court struck down a statute that authorized the sterilization of certain categories of criminals. The Court described the right to procreate as "one of the basic civil rights of man"[34] and stated that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[35] Later, in *Eisenstadt v. Baird*,[36] the Court stated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[37] Similarly, in *Carey v. Population Services International*,[38] the Court held that the decision whether or not to beget or bear a child is "fundamental" to individual autonomy.[39] Finally, the "reproductive freedom cases," including *Roe v. Wade*,[40] firmly established the principle that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood.[41]

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relationships, and child rearing and education.' " *Id.* (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).

32. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *see also* J.B. v. M.B., 783 A.2d 707, 715 (N.J. 2001) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

33. 316 U.S. 535 (1942).

34. *Id.* at 541.

35. *Id.*

36. 405 U.S. 438 (1972).

37. *Id.* at 453.

38. 431 U.S. 678 (1977).

39. *Id.* at 685.

40. 410 U.S. 113 (1973).

41. *See Carey*, 431 U.S. at 701–02 (extending constitutional protection to the sale and distribution of contraceptives); *Eisenstadt*, 405 U.S. at 443 (holding that the same freedom to use contraceptives was guaranteed to unmarried couples under the Equal Protection Clause); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the Constitution does not permit a state to forbid a married couple to use contraceptives). *But see* Heather A. Smith, *A New Prescription for Abortion*, 73 U. COLO. L. REV. 1069, 1070–71 (2002) (describing how these limits may abate under political pressure). The scope of such limits to states' ability to interfere with procreational decisions may significantly narrow upon a change in the makeup of the Supreme Court. *Id.* at 1070. Three current Supreme Court Justices—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—have already stated that they would overturn *Roe v. Wade*. *Id.* (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part)). In addition, President Bush has recently taken actions to afford more rights to developing fetuses, arguably in an effort to chip away at the holding of *Roe v. Wade*. *Id.* at 1070–71. These actions include signing an executive order overturning the Clinton administration's policy of giving federal funding to certain family planning groups that offer abortion or abortion counseling, and more recently, declaring that a developing

The State of New Jersey has assumed a similar stance with regard to its own constitution. The privacy right of autonomy, although not expressly mentioned, is "fairly implicit"[42] in Article 1, Paragraph 1 of the New Jersey State Constitution.[43] Accordingly, the Supreme Court of New Jersey has "found: 'The right of privacy . . . extend[s] to a variety of areas, including sexual conduct between consenting adults; the right to sterilization; and even the right to terminate life itself.' "[44] In *State v. Saunders*,[45] the New Jersey Supreme Court indicated that it believed in a more expansive scope of protections offered by the constitutional right of privacy than what was articulated in the United States Supreme Court decision handed down in the same year, finding that the right to privacy is not confined to "decisions whether or not to beget or bear a child."[46] The court was even more explicit when it established the standard for reviewing the state statute at issue. Liberated from considerations of federalism, the court demanded a stronger and more persuasive showing of public interest than the Supreme Court would require before allowing the state to forbid sexual conduct.[47] According to the court, the right of privacy under New Jersey state law ensures citizens that the government's ability to regulate private personal behavior is sharply limited.[48]

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fetus should be entitled to government-funded health insurance under the Children's Health Insurance Program. *Id.* The latter action represents the first time that a federal program has defined childhood as beginning at conception. *Id.* at 1071. Such actions erect plausible obstacles to persons asserting their rights to make decisions involving their embryos without governmental interference.

42. Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 26 (N.J. 1992) (Pollock, J., concurring) (citing C. Willard Heckel, *The Bill of Rights*, *in* II CONSTITUTIONAL CONVENTION OF 1947 1336, 1339 (1951)); *see* State v. Saunders, 381 A.2d 333, 337 (N.J. 1977) (noting that both the United States and New Jersey Constitutions have been construed to include the right to privacy); United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 777 A.2d 950, 970 (N.J. Super. Ct. App. Div. 2001) (holding that all people have the right to privacy under Article I, Paragraph I of the New Jersey Constitution).

43. "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, ¶ 1.

44. Right to Choose v. Byrne, 450 A.2d 925, 933 (N.J. 1982) (citations omitted).

45. 381 A.2d 333 (N.J. 1977).

46. *Id.* at 338 (citing *Carey*, 431 U.S. at 685). This interpretation is consistent with the court's decision in In re *Quinlan*, 355 A.2d 662 (N.J. 1976), in which it held that as a matter of state constitutional law, the important right to privacy was broad enough to encompass the freedom to make a personal choice as to the continuance of artificial life-support mechanisms. *See Saunders*, 381 A.2d at 339.

47. *Saunders*, 381 A.2d at 341.

48. *Id.* at 339.

Federal and state cases thus emphasize not only the existence of the right to procreational autonomy, but also its worthiness of protection under the law. Because an embryo's value lies solely in its potential to develop into a genetically related child, the right of individuals to be left alone by the government with respect to their decisions about the fate of their embryos falls within the scope of the protected right to procreational autonomy.[49]

But the right to procreational autonomy encompasses two distinct rights: the right to procreate and the right not to procreate.[50] When these rights are pitted against each other, which one should prevail? Although the prevailing right in abortion cases would simply be the one that the woman claims under the reasoning of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[51] the existence of IVF technology adds a new dimension to this problem. In this dimension, the state and society's interests in protecting women's bodily integrity prima facie are not affected to the same degree by the decision awarding control of the embryos' fate to either of the disputing parties as they are by the woman's decision whether to abort her pregnancy. Courts therefore find themselves in uncharted territory when they are charged with the duty to formulate a method to protect parties' rights to procreational autonomy in frozen embryo disputes.

The New Jersey Supreme Court thus was a pioneer of sorts, in that it set out to prescribe the best method for protecting parties' procreational autonomy in the context of frozen embryo disputes in the absence of legislative guidance. J.B. wished to have the frozen embryos destroyed after the divorce, while M.B. wanted to preserve them for future implantation, either by another woman with whom he might develop an intimate relationship or by another infertile couple. Although the case was one of first impression in New Jersey, the state's supreme court did have the benefit of the opinions of a few of its sister states. Tennessee was the first jurisdiction to consider facts similar to those of *J.B. v. M.B.* In *Davis v. Davis*,[52] the fate of seven

49. *See* Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

50. *Id.* at 601.

51. 505 U.S. 833 (1992). In holding that a provision that requires a wife to notify her spouse before she may get an abortion was unconstitutional, the United States Supreme Court recognized its prior holding that " '[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between [the husband and wife], the balance weighs in her favor.' " *Id.* at 896 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976)).

52. 842 S.W.2d 588 (Tenn. 1992).

frozen embryos stored in a fertility clinic in Knoxville was at issue.[53] During a "happier period in their relationship," a married couple attempted to take advantage of the IVF procedure after the surgical removal of both of the woman's fallopian tubes rendered her unable to become pregnant naturally.[54] The couple's sixth attempt at conception through IVF finally succeeded in producing viable embryos, some of which were frozen, but the parties divorced before more than one attempt at implantation could be performed.[55] The Davises disagreed as to who should control the embryos. At the time of the case's hearing in the Tennessee Supreme Court, the wife wanted the authority to donate the eggs to an infertile couple, while the husband wanted them destroyed.[56]

The couple had never entered into a contract that even feigned to decide the disposition of the embryos in these circumstances.[57] Because of the lack of an agreement, the court attempted to balance the husband's right *not* to procreate against the wife's right *to* procreate.[58] The court considered the following factors: (1) the husband's prior experiences with divorced parents and his resulting concern for the psychological obstacles a child with divorced parents may face; (2) the husband's "vehement opposition to fathering a child that would not live with both parents;" and (3) the burden on the wife of knowing that the lengthy IVF procedures she underwent were futile.[59] The court decided that the husband's interest in avoiding parenthood outweighed the wife's interest in donating the embryos.[60] Recognizing that the wife's emotional burden of knowing that the IVF procedure was futile and that the genetic material that she contributed would never become children was not "insubstantial," the court nevertheless concluded that her interest in donation was not as significant as the husband's interest in avoiding parenthood.[61] If the wife were allowed to donate the embryos, the husband "would face a lifetime of either wondering about his parental status or knowing

53. *Id.* at 598.
54. *Id.* at 591.
55. *Id.* at 591–92.
56. *Id.* at 590. At the outset of the litigation, the wife wanted to have the embryos implanted in her own uterus, but by the time the case reached the supreme court, she and the husband had both remarried, and she had changed her position. *Id.* at 589–90.
57. *Id.* at 592.
58. *Id.* at 603–05.
59. *Id.*
60. *Id.* at 604.
61. *Id.*

about his parental status but having no control over it."[62] Although the court mentioned that the case would be closer if the wife were seeking to use the embryos herself—but only if she could not achieve parenthood by any other reasonable means—it did not attempt to enumerate all the factors that should be considered in the balancing-of-the-interests analysis.[63] Nor did it attempt to prioritize the facts of the case at issue that it used in its own analysis.[64]

Despite the absence of any agreement proposing to govern control of the frozen embryos, the *Davis* court devoted a large portion of its opinion to the discussion of the enforceability of such contracts.[65] Ostensibly in accordance with the principle that both the male and the female donors, having provided the gametic material giving rise to the embryos, "retain decision-making authority as to their disposition," the court concluded that dispositional contracts should be enforced.[66] The court's own initiative in professing its affirmative opinion on the enforceability of contracts arguably indicates its intention to encourage parties to enter into contracts. Essentially, the court advertised to IVF patients, their partners, and IVF clinics a notice that they could rely upon the enforceability of any contracts they entered into proposing to control the disposition of their frozen embryos. But although the court promoted contracts on the basis that parties retain decision-making authority as gamete-donors,[67] and that this decision-making authority is dictated by the existence of the right to procreational autonomy,[68] it did not justify its approval of contracts in terms of the positive and negative rights to reproduce. As indicated earlier, procreational autonomy encompasses both a right to procreate and a right not to procreate.[69] The *Davis* court expressly acknowledged the existence of these distinct rights in the application of its balancing test,[70] yet it did not

62. *Id.* In both the husband's and the court's views, donation of the embryos had the potential of "rob[bing the husband] twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited." *Id.*

63. *Id.* at 604.

64. *Id.* at 603–04.

65. *See id.* at 597–98.

66. The court advocated the enforcement of such agreements in the event of divorce as well as other contingencies, such as the death of one of the parties. *Id.* at 597.

67. *Id.* at 597.

68. *Id.* at 602.

69. *See supra* note 50 and accompanying text.

70. *Id.* at 603 (noting that where the dispute over conflicting interests of constitutional import is to be resolved by balancing the parties' interests, "the issue centers on the two aspects of procreational autonomy—the right to procreate and the right to avoid procreation").

articulate how contracts furthered the rights, nor did it explain how contracts offered protection superior to that offered by the secondary balancing test. In fact, the *Davis* court's dictum, in attempting to encourage contracts, actually muddled the distinction between the two separate reproductive freedoms and thereby triggered the contract method's ultimate demise.[71]

New York cemented Tennessee's dictum into its own law. In *Kass v. Kass*,[72] another married couple used IVF to overcome the woman's inability to become pregnant due to her prenatal exposure to diethylstilbestrol.[73] No pregnancy resulted, and the couple decided to divorce.[74] Five embryos remained frozen.[75] Unlike the couple in *Davis*, the New York couple had entered into a detailed, seven-page contract with the IVF clinic specifically providing that any extra frozen embryos were to be donated to the IVF clinic for research purposes in the event the parties could not agree as to their disposition.[76] The New York Court of Appeals, following *Davis*'s lead, held that such contracts should be presumed to be valid and binding[77] without justifying its conclusion with a thorough analysis of how each party's right to procreational autonomy would be preserved. The court saw value in contracts' general ability to reduce litigation costs, encourage parties to think thoroughly about the possible contingencies of IVF and cryopreservation, and minimize misunderstandings.[78] The central question—how contracts affect parties' procreational autonomy—was only answered summarily. Contracts "maximize procreative liberty by reserving to the

71. *See infra* notes 137–38 and accompanying text.

72. 696 N.E.2d 174, 175 (N.Y. 1998).

73. *Id.*

74. *Id.* at 177.

75. *Id.*

76. *Id.* at 176–77. The Consent Form provided:

> The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes. THESE IMPORTANT DECISIONS MUST BE DISCUSSED WITH OUR IVF PHYSICIAN AND OUR WISHES MUST BE STATED... ON THE ATTACHED ADDENDUM NO. 2-1, STATEMENT OF DISPOSTION. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM.

Id. at 176. The Addendum indicated the couple's desire to release the embryos to the IVF Program for biological research in the event of their disagreement. *Id.* at 176–77.

77. *Id.* at 180. In the opinion of the court, the enforcement of contracts would encourage parties to think carefully through possible contingencies in advance. *See id.*

78. *Id.* The court also noted that this certainty was necessary for the effective operation of IVF programs. *Id.*

progenitors the authority to make . . . [the] personal, private decision" of whether or not to procreate.[79]

Although the Tennessee and New York courts explicitly endorsed contracts as the better method of dispute resolution,[80] their failure to analyze how contracts actually preserve procreational autonomy undermines contracts' credibility as valuable protectors of true autonomy. Nothing substantial was established in the case law to refute the notions that refusal to honor contracts causes no real injury. The failure to analyze how the positive right to reproduce is compromised by not enforcing contracts was especially detrimental to the contract method's continued existence.

The Massachusetts case of *A.Z. v. B.Z.*[81] exhibited this detrimental effect. As in *Kass*, a husband and wife entered into a contract with an IVF clinic providing that if the spouses became "separated," their frozen embryos were to be given to the wife for implantation.[82] Massachusetts's high court, however, found that the contract did not manifest the husband's and wife's mutual consent to a disposition scheme in the event that a disagreement arose between them.[83] Rather, because of the wording and the circumstances surrounding the execution of the document, the court found that the agreement was merely enforceable between the IVF clinic and the "donors" as a unit.[84] More importantly, however, the court proclaimed that even if the faults of execution and ambiguity within the document could be cured, any contract that would compel an individual to become a parent against his or her contemporaneous objection is unenforceable.[85] This conclusion rested on the court's

79. *Id.*

80. *See supra* notes 66 & 77 and accompanying text.

81. 725 N.E.2d 1051 (Mass. 2000).

82. *Id.* at 1054.

83. *Id.* at 1056.

84. *Id.* at 1056–57. The court found that the primary purpose of the agreement was to explain to the donors the benefits and risks of freezing the embryos and provide the *clinic* with guidance for disposition of the embryos. *Id.* The court further reasoned that the lack of a duration provision in the consent form precluded its enforcement because the court would not assume that the donors intended the consent form to govern four years after it was executed, especially in light of the fundamental change in their relationship. *Id.* Although the court reasonably could have ended its analysis at this point, it went on to note that the consent form used the term "should we become separated" without defining "become separated." *Id.* at 1057. Because divorce legally ends a couple's marriage, the court would not assume that the consent form's provision for "separation" was intended by the parties to govern in the legally distinct instance of divorce. *Id.* This analysis seems result-oriented because the parties, who were without legal counsel at the time of signing, most likely were not made aware of the legal differences between divorce and separation.

85. *Id.* at 1057.

finding that there existed a public policy against contracts to enter into intimate familial relationships.[86] The court reasoned that enforcing dispositional contracts would be tantamount to using the law as a mechanism for forcing parenthood and would invade an individual's right to privacy.[87] By equating the right to privacy with the right *not* to reproduce, this court completely ignored the parallel right *to* reproduce in its criticism of the contract method.[88] This analysis conflicts with the court's express recognition of the opposing right in the balancing test that was ultimately applied, but completely harmonizes with the analysis of contracts performed in *Davis* and *Kass*.[89] In the absence of an enforceable contract in *A.Z.*, the probate court's decision to permanently enjoin the wife from "utilizing" the frozen embryos, a decision that rested on the court's balancing of the husband's right to avoid procreation against the wife's right to procreate,[90] remained effective.[91]

Thus, *A.Z. v. B.Z.* represents a pivotal point in the courts' approach to custody disputes. The balancing-of-the-interests test was proffered as the sole test to be applied in every instance of a custody dispute over embryos. The court easily dispensed with the contract analysis. With no rationale recognized in prior decisions linking contracts to the preservation of the positive right to reproduce, the court did not confront a counterargument to its public policy justification for abolishing contracts in all circumstances.[92]

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86. *Id.* at 1059.

87. *Id.* at 1057–58.

88. The court cited numerous instances in which agreements "that bind individuals to future family relationships" have been held to be unenforceable. *Id.* at 1058–59 (citing MASS. ANN. LAWS ch. 207, § 47A (Law Co-op. 1994) (abolishing a cause of action for the breach of promise to marry); MASS. ANN. LAWS ch. 210, § 2 (Law Co-op. 1994) (mandating that no mother may agree to surrender her child "sooner than the fourth calendar day after the date of birth of the child to be adopted" regardless of any prior agreement); R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) (holding that a surrogacy agreement in which the surrogate mother agreed to give up the child upon birth is unenforceable unless the agreement contained a reasonable waiting period during which the mother could change her mind); Capazzoli v. Holzwasser, 490 N.E.2d 420, 421 (Mass. 1986) (holding a contract requiring an individual to abandon a marriage is unenforceable); Gleason v. Mann, 45 N.E.2d 280, 283–84 (Mass. 1942) (concluding that a woman's promise never to marry unless she married a certain man was invalid as a general restraint on marriage)). The court "glean[ed]" from these statutes and judicial decisions that prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions." *Id.* at 1059.

89. *See supra* notes 65–79 and accompanying text.

90. *A.Z.*, 725 N.E.2d at 1055.

91. *Id.* at 1051.

92. *See supra* note 86 and accompanying text.

Against this background of law and theory, the New Jersey Supreme Court evaluated the facts of *J.B v. M.B.* Because the language of the Cooper Center's consent form provided that in the event of divorce the embryos would be relinquished to the clinic "*unless the court specifies who takes control and direction of the tissues*,"[93] the court held that the form did not unambiguously manifest the parties' intentions to control disposition in the event of the parties' divorce.[94] Instead, the parties merely agreed that on their divorce the court would direct their decision of control and disposition.[95] In the absence of an agreement governing the dispute, the court resorted to the default balancing-of-the-interests analysis.[96] Understanding from *Davis* that a balancing-of-the-interests test weighs the right *to* procreate against the right *not* to procreate,[97] Chief Justice Poritz announced the court's position that " 'ordinarily, the party wishing to avoid procreation should prevail' "[98] and awarded custody to J.B.[99]

As in *Davis*, the court was not content to limit its decision to the specific matter before it.[100] Instead, it set out to define the policy of the state with regard to the enforceability of dispositional contracts in general. Noting various benefits of contracts that had been recognized in previous decisions,[101] such as the certainty they provide IVF patients and clinics[102] and their ability to reduce litigation costs,[103]

93. J.B. v. M.B., 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000) (internal quotations omitted) (emphasis added by the court), *aff'd in part and modified in part*, 783 A.2d 707 (N.J. 2001).

94. J.B. v. M.B., 783 A.2d 707, 713–14 (N.J. 2001).

95. *Id.* at 714–15.

96. *Id.* at 716–17.

97. *See id.* at 716.

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

99. *Id.* at 720.

100. *See supra* note 65 and accompanying text.

101. *J.B.*, 783 A.2d at 719 (citing Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998), and Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), as pointing out persuasive reasons for enforcing disposition agreements).

102. *See id.* at 719 (recognizing that contracts help guide parties undertaking IVF procedures and fulfill the need for agreements between the participants and the clinics performing the procedures). In *Davis*, the parties testified that although the clinic personnel described the process of cryogenic preservation, "no one explained the ways in which it would change the nature of IVF for them." Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992). As a result, "there was no discussion . . . concerning disposition in the event of a contingency such as divorce." *Id.* Enforcing contracts and thus encouraging their execution would help to prevent such uninformed action on the part of the participating spouses. As the court in *Kass* summarized, contracts should "minimize misunderstandings." Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

the court found that these benefits were not outweighed by the "public policy concerns that underlie limitations on contracts involving family relationships."[104] The court contrived a hybrid rule: agreements entered into at the time IVF began are enforceable, subject to the right of either party to change his or her mind about disposition, provided that the clinic is notified of such change of mind in writing at any time before the point of use or destruction of any stored embryos. If either party changes his or her mind about

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Contracts provide certainty for the IVF clinics as well. As the number of cryogenically frozen embryos stored at these clinics continues to increase, *see supra* note 12, the demand for an efficient method to determine with certainty what to do with these valuable bundles of cells becomes more pressing. Clearly drafted and reliably enforceable contracts promote efficiency by enabling clinics to decide the fate of the preembryos without court action. *See, e.g.*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (discussing a couple who sued a clinic for not relinquishing their embryo upon their demand); Del Zio v. Presbyterian Hosp. of N.Y., No. 74 Civ. 3855, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 14, 1978) (discussing a couple who brought a tortious conversion of personal property claim and a claim for intentional infliction of emotional distress against a physician for destruction of a couple's frozen embryos).

103. *J.B.*, 783 A.2d at 719. Parties who enter into enforceable contracts would benefit from the lessened costs of litigation compared to those anticipated as a consequence of the balancing-of-the-interests approach. Litigation would be limited to ordinary issues surrounding the validity and ambiguity of an agreement executed between the parties according to the maxims of contract law. As demonstrated in *Davis* and *J.B.*, the balancing-of-the-interests method requires the court to delve into matters such as the parties' religious incentives, their ability and probability of future conception with or without the use of the embryos, and their expected financial and emotional responses to a particular custody decision. *See id.* at 716–17 (attempting to weigh the fact that the husband already had a child and had capacity to father additional children, and the potential physiological and emotional burdens on the wife that would result from possible use or donation of embryos against the husband's desire to have a child using his wife's egg, and the slight impairment of husband's potential to have more children that would be caused by prohibiting him to use the frozen embryos); *Davis*, 842 S.W.2d at 604 (stating that if the wife sought to use the preembryos herself, the court would have balanced the husband's prior experiences with divorced parents and his resulting "vehement opposition to fathering a child that would not live with both parents," against the practicability of adoption for the wife and her capacity to conceive future children without the use of the embryos). These subjective matters do not fit neatly into an objective analytical framework and can increase the length, complexity, and cost of litigation.

104. *J.B.*, 783 A.2d at 719. As in *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058–59 (Mass. 2000), the court cited decisions and statutes that restricted contracts to enter into familial relationships to exemplify the public policy against the enforcement of a contract permitting implantation of embryos. *See J.B.*, 783 A.2d at 717–18. (citing N.J. STAT. ANN. § 2A:23-1 (West 2000) (abolishing the cause of action for breach of contract to marry); N.J. STAT. ANN. § 9:3-46 (West 2000) (prescribing that private placement adoptions may be approved over the objection of a parent only if that parent has failed or is unable to perform "the regular and expected parental functions of care and support of the child"); *In re* Baby M, 537 A.2d 1227, 1245–46 (N.J. 1988) (prohibiting an agreement requiring a surrogate to surrender her parental rights); Sees v. Baber, 377 A.2d 628, 636 (N.J. 1977) (disfavoring private placement adoptions)).

disposition before it is too late, the court would employ a balancing-of-the-interests analysis of the parties' rights.[105] This melting-pot rule proposes to offer certainty to parties because in the large majority of cases the agreements will control. The rule also promises not to increase litigation because when the balancing-of-the-interests analysis is invoked, the party choosing not to become a biological parent will almost certainly prevail.[106]

For all practical purposes, though, this test will never result in the enforcement of a contract that provides for the exercise of one partner's positive right to reproduce against the objection of the other partner. To unilaterally bar the other partner's right, the objecting partner need only notify the clinic in writing sometime prior to the instant at which the embryos will actually be implanted or donated. *J.B.* therefore sharply limits the contracts approach to custody disputes in New Jersey, to the point of extinguishing it altogether as Massachusetts's high court did in *A.Z.*[107] The *J.B.* court did so without considering whether failing to enforce a contract providing for donation or implantation under any circumstances will ever unnecessarily infringe on a person's positive right to procreation, a right that the court expressly recognized as worthy of protection.[108]

This Recent Development does not contend that the positive right to reproduce is the better right. Instead, it criticizes the recent failure of courts to address the implications of their decisions on *both* of the rights at issue in custody disputes over frozen embryos, and the consequential abolition of the contracts method of resolution without satisfactory justification. In the context of reproductive rights, positive rights should be distinguished from negative rights.[109] An

105. *J.B.*, 783 A.2d at 719–20.

106. *See id.* at 719.

107. The method by which *J.B. v. M.B.* restricted contracts is problematic. Instead of promoting certainty, this rule promotes deception. For example, a wife may consent to allow her husband to retain control of extra embryos in the event of divorce at the time of the IVF procedure, fully intending to secretly notify the clinic that she changed her mind the next day, giving the husband a false sense of security that he can rely on his wife's legal consent. This deception can be especially harmful if the husband agreed to follow through with the procedure so long as he would always be guaranteed custody.

108. *J.B.*, 783 A.2d at 719.

109. ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 3 (1995). Negative rights obligate others to refrain from interfering with the rights bearer. *Id.* Positive rights impose an obligation on others to act. *Id.* In the context of reproductive rights, some commentators contend that these rights are parallel and symmetrical, while others, such as Christine Overall, contend that the positive right to reproduce and the negative right not to reproduce are asymmetrical: the positive right should be limited because its exercise affects other persons' lives, but the right not to reproduce is an absolute right. *Id.* at 4–5.

individual's positive right to reproduce affects several other people's lives, potentially including those of the other genetic parent,[110] the surrogate parent,[111] the nurturing or custodial parent,[112] and the relatives of the individual exercising his positive right.[113] If the positive right to reproduce is absolute, an individual may have the right to be provided with every available means by which he or she can potentially reproduce.[114] This could feasibly include the rights to government funding for expensive reproductive services and free access to surrogate mothers.[115] On the other hand, the exercise of an individual's negative right to reproduce also has drastic consequences, in that it may infringe upon other individuals' rights to bodily integrity,[116] their own positive rights to reproductive freedom,[117] and

110. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992), recognized a husband's interest in avoiding biological parenthood, noting that if the embryos that consisted of his genetic material were donated against his will, he would suffer a lifetime of wondering about his parental status or knowing about his parental status but having no control over it. *Id.* Even though someone unknown to either party would gestate the embryos, the court decided that this "technological fact" did not alter the fact that their genetic parenthood would have a "profound impact" on their lives. *Id.* at 603.

111. A surrogate mother may suffer psychological damage from the act of surrogacy. BLANK & MERRICK, *supra* note 109, at 119. Many women regret the decision to release the child they bore to the sperm and egg donors. *Id.* Their families are torn by the difficulty inherent in explaining the situation to the surrogate's own natural children. *Id.* They are treated as mere "incubators" for genetic parents, and any action on their part to develop a relationship with the child is met with severe conflict. Surrogacy is criticized for commoditizing women, and the notion that a woman's body can be "rented" does a disservice to women's efforts as a class to be valued for their intellectual capacities, and not their reproductive capabilities. *Id.* at 118–19.

112. Exercising one's positive right to reproduce may render another legally or morally responsible for supporting the resulting child. *See* UNIF. PARENTAGE ACT § 5 (superseded 2000), 9B U.L.A. 407–08 (2001) (stating that husband's consent to the artificial insemination of a woman with a donor's sperm will qualify the husband as the "natural father" of the child for legal purposes).

113. *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 265–66 (Mass. 2002) (holding that, absent express legislative directive, posthumously conceived children are not "automatically barred from taking under their deceased donor parent's intestate estate").

114. BLANK & MERRICK, *supra* note 109, at 99.

115. *See id.*

116. *See* Christine Overall, *Frozen Embryos and "Father's Rights": Parenthood and Decision-Making in the Cryopreservation of Embryos*, *in* REPRODUCTION, ETHICS AND THE LAW: FEMINIST PERSPECTIVES 178, 192 (Joan C. Callahan ed., 1995) (arguing that an infertile woman's bodily integrity is compromised if she is denied the right to use her frozen embryos to reproduce, because she must undergo the entire IVF procedure again to extract ova and attempt fertilization in order to reproduce, and that forcing the woman to undergo IVF with another partner overlooks the painful, physically trying, and emotionally and mentally taxing ordeals she endured to participate in the IVF program); *see also infra* note 133 (discussing IVF procedures and how a woman's right to bodily integrity affects cases involving disputes over such procedures).

117. *See* Overall, *supra* note 116, at 192.

even their rights to be born.[118] As reproduction is so basic to human existence and so relevant to family structure,[119] cases confronting competing interests of reproductive freedom cannot dispense with a thorough analysis of the repercussions of their decisions for *both* rights contributing to reproduction: the right to reproduce and the right not to reproduce.

Generally, where two ex-spouses dispute the fate of their embryos, the enforcement of a contract can have two results for the person *against* whom it is enforced: the contract may either force that individual to potentially become a parent against his or her will, or force him or her to forego the chance to reproduce.[120] When couched in terms of the effects of forcing a person to do something against that person's will, these contracts might give the impression that they will infringe upon individuals' procreational autonomy. A deeper analysis of the contracts, however, reveals that they can preserve individuals' fundamental rights.

Enforcement of a contract awarding a wife custody of embryos where the husband does not want to become a father arguably does not violate the husband's right not to procreate. A husband has already decided to *reproduce* at the time he entered into the contract.[121] He has voluntarily released his sperm and had it transferred into a petri dish with a woman's egg cells.[122] If his right not to procreate means he is allowed to control the destiny of his sperm after release, the right would conflict with the well-accepted notion that a donor at a sperm bank cannot reclaim his semen after it has been used by a recipient couple.[123] The husband cannot now claim that he will suffer injury from the knowledge that he is a biological parent. Voluntarily agreeing to conjoin his sperm with another's egg estops him from complaining about the psychological burden of his decision.[124] Further, the husband cannot claim that he will be injured by the parental responsibilities that might materialize

118. According to some views, the embryo represents a semi-person that has a right to be protected because it might be born after transfer. *See* Davis v. Davis, 842 S.W.2d 588, 596 (Tenn. 1992).

119. BLANK & MERRICK, *supra* note 109, at 7–8.

120. Both of these results are mere "chances" as the present state of reproductive technology does not yet guarantee the successful birth of a child. But such lack of certainty in the outcomes should not extensively diminish the significance of either contract, as the success rates of reproductive technologies currently present very viable chances and continue to advance rapidly.

121. *See* Overall, *supra* note 116, at 182–83.

122. *See id.*

123. *Id.*

124. *But see supra* note 110.

if the wife gets custody.[125] If the agreement manifests the parties' intentions to allow the wife to donate the embryos, then the husband will have no such parental responsibilities.[126] His parental identity will be anonymous, and he will have no rearing obligations.[127] If the agreement allows the wife to implant the embryos herself, then it is possible that the husband will have legal obligations to provide support for the child that was conceived during marriage.[128] The state's interest in protecting the resulting child, however, outweighs any violation of his right not to reproduce.

Similarly, a contract awarding a husband custody where the wife does not want to become a parent does not violate the wife's right not to reproduce. The wife, by willingly enduring the IVF procedures and consenting to the union of her egg with her husband's sperm, is estopped from complaining about the burdens of genetic parenthood. The legal implications of parenthood would not be an issue if the contract called for donation of the embryos, and if she does incur legal obligations attached to parenthood, these are not taxes on her procreational freedom. These implications are instead society's insurance for the children's interest and represent fully ascertainable risks mutually assumed by the parents who agreed to prolong the embryos' viability past the point of the couple's divorce.[129]

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125. *See* Overall, *supra* note 116, at 182–83.

126. *See* UNIF. PARENTAGE ACT § 5 (superseded 2000), 9B U.L.A. 407–08 (2001).

127. C.M. v. C.C., 377 A.2d 821, 824 (N.J. Juv. & Dom. Rel. 1977) ("By donating his semen anonymously, the donor impliedly gives it without taking on [the responsibilities of fatherhood]."); *see* UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 355 (2001) ("[D]onors are eliminated from the parental equation."); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 631 (2002) (explaining that, for the purposes of the new UPA model legislation, anonymous sperm donors are presumed to have no interest in the rights and obligations of paternity).

128. Courts have typically dealt with questions of parental rights and responsibilities where assisted reproduction technologies are involved using traditional family law concepts. *See* Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691, 697 (1999). In cases involving artificial insemination with donor sperm ("AID"), where the husband who sought to avoid child support obligations would challenge his paternity, courts have treated the AID child like natural children in the same circumstances—they have relied on the equitable doctrines of laches and estoppel to hold that a mother's husband was the child's legal father. *Id.* Courts that held that such a child was illegitimate still imposed support obligations. *Id.* (citing Gursky v. Gursky, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding that child was illegitimate but husband was still liable for child's support based on his consent to AID)).

129. Women's rights to procreational autonomy should not extend further than men's in this context, even though women may delay their right to choose to become a parent in the abortion context. *Roe v. Wade* and its progeny protect a woman's right to privacy during gestation of a fetus, *see supra* note 51, but this protection is justified by the

On the other side of the spectrum are contracts that force an individual to forego a chance at reproduction. In completely avoiding analysis of the separate rights at stake, the courts failed to recognize that these contracts may have significantly different effects on a party's right to reproductive freedom depending on whether that party is male or female. A contract awarding a wife custody of embryos where the husband wants to become a father imposes a very minimal restraint on the husband's right to reproduce. If the husband is still fertile, he can accomplish reproduction through natural means by finding another partner. If he has sub-normal fertility, he can again seek assistance including ICSI[130] at a fertility clinic. Such a remedy imposes on him an arguably minimal physical burden of masturbation for the production of a semen sample. A man who was fertile at the time the embryos were created but has subsequently lost his fertility may not be able to accomplish genetic parenthood. In this instance, enforcement of the contract would appear to infringe upon the husband's right to reproduce. But the alternative would be a much greater injustice. A court, by awarding custody to the husband in this instance, would contravene a contract to which the husband expressly agreed, disregard the woman's right to not reproduce, and encourage surrogacy,[131] because the man would still need another woman's consent to implant unrelated embryos into her uterus to accomplish the pregnancy.[132] These consequences should not be endured when the man who entered into the contract exercised his freedom to contract by imposing a limitation on the potential of his own embryos to become his future genetically related children.

On the other hand, the enforceability of a contract awarding the custody of the embryos to the husband is more dubious where the wife wants to become a mother. If the wife were the fertile partner in the relationship and remains fertile at the time the custody decision is made, she can resort to natural means for procreation, and thus, like the man in the same circumstances, only sacrifices the chance to reproduce *with a particular person.* Conversely, where the wife is

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woman's right to preserve her bodily integrity, a right that is not at issue when her decision to release her gametes has resulted in an embryo that is *outside* of her body.

130. *See supra* note 7.

131. For an abbreviated explanation of the negative consequences attributable to surrogacy, see *supra* note 111.

132. In addition, because the embryos' viability is limited, LYNDA BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY 191 (1998) (estimating the viability of cryopreserved embryos to be between two and ten years), no opportunity may exist for most men to find a truly altruistic surrogate mother.

infertile, her right to become a parent is much more restricted by the contract's enforcement than where the parties' roles are reversed. Her bodily integrity is severely compromised. Unlike the man whose physical burden in being forced to undergo IVF and ICSI again with a new partner amounts to an act of masturbation, the woman must undergo extensive hormonal stimulation and a surgical procedure to extract her ova.[133] The cost and physical burdens that such remedies present presumably will erect practical barriers to many women's exercise of their rights to reproduce.

As a final permutation in the analysis, a contract proposing to force a woman to implant embryos in her own uterus against her will should never be enforced. The woman has "an absolute right to seek termination of any resulting pregnancy, at least within the first trimester,[134] [therefore,] ordering her to undergo a uterine transfer would be a futility."[135] Further, requiring her to undergo the physical procedure necessary for implantation and impliedly requiring her to carry the embryos to term would flout her right to privacy and autonomy.[136]

Human ingenuity once again has planted the roots that support an entirely new area of jurisprudence. IVF facilitates the creation of new life—and new rights. What shield will the courts use to protect those rights implicated in custody disputes over frozen embryos? We as citizens can only hope that they will choose carefully. Contracts may be the most effective legal device to guard against unconstitutional violations of citizens' cherished rights to procreational autonomy, but recent courts have cast this device aside without examining it closely enough to measure its true value. The

133. *See* MENIRU, *supra* note 4, at 118–19 (noting that among other physical burdens involved in the IVF procedure, women patients must endure several hormonal injections, ultrasound scanning procedures, blood tests, a period of fasting, and a surgical procedure to retrieve their egg cells, while their male partners' physical involvement is generally limited to the production of a semen sample, which does not have to be generated on demand at the clinic). In *Davis*, for example, Mary Sue Davis underwent a total of six months of subcutaneous injections necessary to shut down her pituitary gland, forty-eight days of intermuscular injections necessary to stimulate her ovaries, and five anesthetizations to carry out the couple's six attempts at IVF. *See* Davis v. Davis, 842 S.W.2d 588, 591–92 (Tenn. 1992). Despite the existence of these "hard facts," the court expressly concluded that even though "it is fair to say that women contribute more to the IVF process than men," none of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions are applicable. *Id.* at 601.

134. *Davis*, 842 S.W.2d at 596 n.21.

135. *Id.*

136. *See id.* at 597 n.20 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) (invalidating the requirement that a woman have the written consent of her spouse as a prerequisite to abortion)).

first courts that confronted the issue promoted contracts to protect citizens' rights to procreational autonomy, but used the wrong logical beams to support their stance. Specifically, *Davis* and *Kass* missed the mark in saying that contracts advance procreational autonomy in that they protect the right of *parties* to be left alone by the government with *their* private decisions,[137] and protect *their* right to retain decision-making authority with respect to their embryos.[138] In the context of custody disputes over frozen embryos, *their* respective rights are pitted against each other. Any support for a method of protecting the right to procreational autonomy must be couched in terms of the separate and opposing rights—the right to procreate and the right not to procreate. The blurring of these two rights by *Davis* and *Kass* undermines the support for the very method they promoted. Society's vital interest in human reproduction demands reevaluation of contracts as the shield of choice.

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137. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) (noting that contracts "maximize procreative liberty by reserving to the progenitors the authority to make . . . [the] personal, private decision" of whether or not to procreate); *Davis*, 842 S.W.2d at 602 (stating that procreational autonomy "dictates that decisional authority rests in the gamete-providers alone," and "no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision").

138. *See Davis*, 842 S.W.2d at 597 (stating that enforcing contracts is "in keeping with the proposition that the progenitors . . . retain decision-making authority" as to the disposition of their embryos); *see also* text accompanying *supra* notes 66–68 (discussing courts willingness to enforce contracts on the basis of parties' retention of decision-making authority as gamete-donors).