

THE DEEP FREEZE: A CRITICAL EXAMINATION OF THE RESOLUTION OF FROZEN EMBRYO DISPUTES THROUGH THE ADVERSARIAL PROCESS

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I. INTRODUCTION

Shortly prior to her marriage to David Litowitz, Becky Litowitz had a hysterectomy, rendering her unable to achieve pregnancy and give birth to a child.¹ While Becky and David already had a child, they wanted to have more children during their marriage.² To fulfill their dreams of expanding their family, Becky and David resolved to use artificial reproductive technology (ART).³ Becky and David underwent in vitro fertilization (IVF) therapy, during which eggs received from a donor were combined with David’s sperm to create five embryos, two of which were cryogenically preserved.⁴

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1. *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002) (en banc), *amended by In re of Marriage of Litowitz*, 53 P.3d 576 (2002).

2. *Id.*

3. *Id.*

4. *Id.* At the point of cryopreservation, the sperm and ovum have joined to create a one-cell zygote. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 441 (1990). This zygote is “a new and unique genome” created from the

Three of the Litowitzes' embryos were implanted in a surrogate mother who became pregnant with the Litowitzes' daughter.⁵ Prior to their daughter's birth, however, Becky and David separated.⁶ During dissolution of marriage proceedings, David requested that the trial court permit him to donate the two remaining cryogenically preserved embryos to another couple who could use the embryos in the hopes of parenting any resulting children.⁷ Becky, however, asked the court to award the embryos to her so that she could have them implanted in a surrogate and raise any resulting children herself.⁸ Despite the protests of both Becky and David, the *Litowitz* court strictly interpreted a cryopreservation contract signed by Becky and David when they first began IVF treatment and concluded that the embryos were to be thawed and discarded.⁹

Becky and David's story is not unique.¹⁰ Rather, it exposes the difficulties courts face in resolving disputes between progenitors who no longer agree about whether to use cryogenically stored embryos to achieve parenthood. "Custody" disputes over these embryos raise several interesting questions: Should an embryo dispute ever be resolved in a manner that is contrary to the decisions of both progenitors? Are constraining principles of contract interpretation applicable in such disputes? Is the progenitor's inability to have future biological children relevant in resolving the dispute over the embryos? What significance, if any, does the biological connectivity between the progenitor and any resulting children have in the resolution of the dispute? This Article posits that difficulties in arriving at satisfactory answers to these questions lie in the adversarial process itself.

Under an adversarial model, the court must assign a legal status to the embryo. Such a determination is imperative, as it will determine the progenitors' and the court's authority over the embryo and dictate the possible options for resolution of the dispute. For example, should the court determine that the embryo is human life, its au-

heredity contribution of both gamete donors. *Id.* After several cell divisions, the zygote becomes an "undifferentiated aggregate of two, four, six, or eight cells." *Id.* It is at this point that it is cryogenically preserved. *Id.* at 443; *see also* *Davis v. Davis*, 842 S.W.2d 588, 592 (Tenn. 1992). While this entity is not technically an embryo because it has not been permitted to develop beyond an eight-cell entity, the majority of courts and scholars refer to these cells as preembryos. *See Davis*, 842 S.W.2d at 594. This Article will refer to these entities as "embryos" or "frozen embryos."

5. *Litowitz*, 48 P.3d at 262.

6. *Id.* at 264.

7. *Id.*

8. *Id.*

9. *Id.* at 268-71.

10. *See, e.g., In re Marriage of Witten III*, 672 N.W.2d 768 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

thority to direct the destruction of the embryo will be significantly limited. By contrast, a determination that the embryo is purely property provides the court and the progenitors with more latitude in arriving at possible options for disposition of the embryo. While the adversarial model promotes such determinations, courts have been unable to articulate a status for the embryo that provides for a workable solution to the dispute while simultaneously preserving respect for the unique attributes of the embryo.

The adversarial model also encourages predictability of resolution in future disputes. As the frequency of litigated embryo disputes has increased, the demand for predictable resolutions has also risen.¹¹ Those engaged in providing ART treatment advocate for predictability to eliminate any threat to the provision of IVF services by uncertainty in liability from thawing the embryos.¹² Progenitors also advocate for predictability in the resolution of embryo disputes to provide them with clear direction when they decide to undergo IVF treatment.¹³

Predictability in the resolution of embryo disputes has the advantages of providing progenitors and IVF service providers the ability to plan for future disposition options and calculate potential liability. The approaches currently adopted by courts to create such predictability, however, are based on overly simplistic assumptions of the progenitors' interests and a limited examination of their intent to engage in IVF.

To meet the demand for predictability in embryo disputes, courts have adopted two general tests. The first of these tests, known as the procreation rights test, relies upon assumptions of the progenitors' interests in procreation and parenthood to determine to which progenitor to award the embryo. This approach is premised on the assumption that the primary underpinning of parenthood is the genetic connection between the child and the parent. Courts utilizing this approach have relied on this assumption to uniformly award the embryo to the progenitor seeking to avoid its use on the basis that the progenitor would become an unwilling parent given his or her biological connection to any resulting child. While promoting predictability, this assumption of parenthood does not provide an accurate basis on which to uniformly award the embryo to the progenitor seeking to avoid its use. The alternative approach adopted by courts is similarly flawed. Known as the contract rights model, the second general test utilized by courts resolves the dispute according to the

11. See *Kass*, 696 N.E.2d at 179.

12. See generally John A. Robertson, *Pre-commitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 991-93 (2001).

13. See *Kass*, 696 N.E.2d at 179 (noting that there is a "need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes").

intention of the parties as evidenced in any express agreements between them. While attempting to provide a bright-line guide for the courts, this approach is difficult to apply.

This Article critically examines the resolution of embryo disputes under an adversarial model. The focus on the adversarial model permits a deeper evaluation of the inherent limitations of the process itself and an exploration of new paradigms to resolve frozen embryo disputes. This Article provides a substantial framework for the issues underlying the embryo dispute itself—namely the status of the embryo and the role and interests of the progenitors. Building on this framework, this Article exposes the often rigid and overly simplistic approaches currently utilized by courts in resolving embryo disputes, and it advocates that such approaches have led to problematic interpretations of the right to parenthood and procreation. Finally, this Article provides an alternative, case-by-case analysis for embryo disputes and suggests that, ultimately, an adversarial dispute resolution model that permits flexible decisionmaking by the progenitors be utilized in embryo disputes.

Part II of this Article begins with an introduction of the legal statuses currently ascribed to the embryo and examines the ramifications of these different treatments. Further, Part II explores the recognized authority of the progenitors over the embryo. Part III provides an in-depth discussion of the two predominant approaches utilized by the courts to resolve embryo disputes between progenitors.

Part IV of this Article turns to a discussion of the failures of the current legal framework in fully realizing the true nature of the right to parenthood and procreation in resolving embryo disputes. Overall, Part IV of the Article critiques the role the adversarial model plays in reinforcing overly simplistic notions of parenthood and procreation and provides a legal framework for courts to better determine the true interests of the progenitors in resolution of the embryo dispute. Part IV.A begins by critically examining the court's reliance on the primacy of biology in understanding the right to parenthood and procreation. Part IV.B continues the examination of the right to parenthood and procreation by exploring the court's reliance on prior expressions of intention to parent or procreate.

Finally, this Article turns to a discussion of an alternative dispute resolution model to resolve embryo disputes in Part V. This Part begins with a discussion of the advantages of an alternative dispute resolution model. Part V concludes with a discussion of the ramifications such a model would have on the recognition of the legal status of the embryo, the progenitors' roles in the resolution process, and the progenitors' interests in procreation and parenthood.

II. EXAMINING THE BUILDING BLOCKS OF THE DISPUTE: THE EMBRYO AND THE PROGENITORS

In order to examine the adversarial process as a means of resolving embryo disputes, the contours of these disputes must first be examined. The roles and interests of those involved in these disputes shape the role of the court in arriving at its determination of whether to award decisional authority over the embryo to a party and, if so, to whom. This Part of the Article will examine the role of the primary entities involved in embryo disputes—the embryo itself and the progenitors.

A. *The Legal Status of the “Frozen Embryo”*

As ART improves, more couples are undergoing infertility treatments with the hope of starting a family. Recent studies suggest that approximately five to six million American couples are currently pursuing various forms of ART.¹⁴ One of the most predominant and controversial forms of ART is IVF. During IVF treatments, female and male gametes are joined in a laboratory setting and are allowed to divide into an eight-cell embryo that is then cryogenically preserved so that it may be implanted in a female uterus at a later date.¹⁵ New advances in IVF procedures have permitted these embryos to be stored for longer periods of time.¹⁶ As a result, hundreds of thousands of cryogenically preserved embryos are currently being stored in fertility clinics in the United States.¹⁷ Legal disputes over the “custody” of these embryos are on the rise—a trend that likely will continue as

14. Wendy Wendland, *Adopting Frozen Embryos; More Hope for Infertile Couples*, CHI. TRIB., Jan. 15, 2001, at 3; Wendy Wendland-Bowyer, *Frozen Hope: A Few Fertility Clinics Will Place Available Embryos with Childless Couples*, DET. FREE PRESS, Dec. 19, 2000, at 6F. The United States Department of Health and Human Services, Centers for Disease Control and Prevention recently reported that approximately 9.3 million women are using infertility services. NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, SERIES NO. 23, VITAL AND HEALTH STATISTICS 19, 7 (1997).

15. Robertson, *supra* note 4, at 443.

16. Recent successful use of cryogenically preserved embryos have led IVF providers to speculate that embryos can be cryogenically stored for ten to twelve years and still be viable for implantation and impregnation. Pacific Fertility Center Lab Frequently Asked Questions, http://www.infertilitydoctor.com/lab/lab_faqs.htm (last visited Mar. 16, 2006). The increased potential for use of these embryos increases the possibility that the progenitors will not continue to remain in agreement as to their appropriate disposition. *See generally* American Society for Reproductive Medicine, *Disposition of Abandoned Embryos*, <http://www.asrm.org/Media/Ethics/abandon.html> (last visited Mar. 16, 2006).

17. It is now believed that the original estimates of the number of embryos in a cryogenic state were grossly underestimated. Recent estimates suggest that there are approximately 400,000 embryos in cryogenic storage in the United States. LAW & HEALTH INITIATIVE, RAND, *HOW MANY FROZEN HUMAN EMBRYOS ARE AVAILABLE FOR RESEARCH?* 1 (2003), <http://www.rand.org/publications/RB/RB9038/RB9038.pdf>; *see also* Sheryl Gay Stolberg, *Some See New Route to Adoption in Clinics Full of Frozen Embryos*, N.Y. TIMES, Feb. 25, 2001, at A1 (discussing the number of embryos available for donation).

cryopreservation techniques improve, allowing embryos to be stored and remain viable for significantly longer periods of time.¹⁸

The legal status of these frozen embryos is controversial.¹⁹ However, because the legal status of the frozen embryo will dictate the framework for the court's analysis, such a determination can prove to be a watershed decision in disputes that arise among the individuals who orchestrated the creation and preservation of the embryo.²⁰ Moreover, an examination of the legal status of frozen embryos within current legal disputes provides insight into the role of the court in resolving frozen embryo disputes and in framing the relevant issues to be resolved under an adversarial framework.

Currently, there are three predominant characterizations of the legal status of a frozen embryo—property,²¹ property deserving of special respect,²² and human life.²³ Gametes, the sperm and ovum used to create the embryo, are typically considered to be a form of property under the law.²⁴ This designation is significant because it permits the gamete donors to “decide at their sole discretion the dis-

18. See Pacific Fertility Center Lab Frequently Asked Questions, *supra* note 16 (discussing recent successful use of embryos after more than a decade in cryogenic storage).

19. See *Davis v. Davis*, 842 S.W.2d 588, 594-97 (Tenn. 1992) (discussing the controversy over whether an embryo is a person or property); Robertson, *supra* note 4, at 450-54 (discussing various ways to characterize the legal nature of the embryo).

20. See *Davis*, 842 S.W.2d at 594-97; Robertson, *supra* note 4, at 450-54; see also Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 81-82 (2002) (discussing the basis of the authority progenitors have over frozen embryos). But see *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998) (holding that because the embryo dispute could be resolved by looking to the parties' prior written directive, determination of the legal status of the embryo was not required). Arguably, however, the conclusion by the *Kass* court—that the status of the embryo was not relevant to the embryo dispute given the binding nature of the progenitors' prior contract—would not have been permitted in a state that gives the embryo the status of personhood. See, e.g., LA. REV. STAT. ANN. §§ 9:121, :123 (West, Westlaw through 2005 Regular Sess. Acts) (defining a human embryo as an “in vitro fertilized human” giving it the capacity of a jurisdictional person). See *infra* pages 401-04 for a discussion of the implications of characterizing the embryo as human life.

21. See, e.g., *York v. Jones*, 717 F. Supp. 421, 424-27 (E.D. Va. 1989).

22. *Davis*, 842 S.W.2d at 597.

23. § 9:123.

24. See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993). See generally Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107; Donna M. Gitter, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material*, 61 WASH. & LEE L. REV. 257 (2004); Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305 (1993); Jill Madden Melchoir, Comment, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921 (2000); Donna M. Sheinbach, Comment, *Examining Disputes over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive If Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV. 989 (1999).

position of [the embryos], provided such disposition is within medical and ethical guidelines.”²⁵

A few courts have held that frozen embryos are similar to gametes and have treated them as the joint property of the progenitors. For example, the Eastern District of Virginia in *York v. Jones* concluded that a clinic that had refused to release an embryo to its progenitors was unlawfully converting the couple’s property.²⁶ The understanding that an embryo is property of the individuals that are genetically related to it is also evident in the language of consent forms used in ART clinics. These consent forms often state that if the progenitors should divorce, marital property laws govern the disposition of the frozen embryo.²⁷

The characterization of embryos as “property” has significant ramifications for the resolution of embryo disputes. Such a characterization would imply that embryo disputes are best resolved under traditional contract and property law principles.²⁸ Accordingly, under this view, the only issues germane to the resolution of the embryo dispute are those of contract interpretation, traditional challenges to enforceability of contracts, and consideration of marital property law.²⁹ Any argument the parties have regarding their interest in the embryo because of its potential to develop into a human being is likely to be construed as irrelevant to the issue of ownership of the embryo.³⁰ For these reasons, most courts are reluctant to characterize embryos as mere property under the law.³¹

In stark contrast to the approach taken by the *York v. Jones* court, the Louisiana Legislature has adopted legislation that deems frozen embryos to be “persons.”³² However, under this statute, embryos lose

25. *York*, 717 F. Supp. at 426 n.5 (quoting THE ETHICS COMM. OF THE AM. FERTILITY SOC’Y, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 89S (1986)).

26. *Id.* at 426-27; see Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1144-45 (1997) (discussing *York*).

27. See generally Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 918-32 (2000) (critically examining informed consent forms utilized during IVF treatments).

28. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409-10 (1990); Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 939 (1999).

29. *Kass v. Kass*, 696 N.E.2d 174, 179-81 (N.Y. 1998); see also Sara D. Petersen, Comment, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065 (2003) (advocating that embryo disputes be resolved under traditional notions of contract law).

30. See *Kass*, 696 N.E.2d at 178-79.

31. *Davis v. Davis*, 842 S.W.2d 588, 596-97 (Tenn. 1992).

32. LA. REV. STAT. ANN. § 9:123 (West, Westlaw through 2005 Regular Sess. Acts); see also Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science*

the status of person if they fail to develop within thirty-six hours of in vitro fertilization.³³ Further, the statute directs courts confronted with a dispute regarding the embryo that the appropriate judicial standard to resolve the dispute is “in the best interest of the in vitro fertilized ovum.”³⁴

The implications of the Louisiana statute have not been developed or discussed by subsequent caselaw. Presumably, under the statute, disputes over frozen embryos would mimic custody disputes between parents of born children, in which the court makes a determination of primary custody based on the consideration of several factors designed to assess the “best interest of the child.”³⁵

It is difficult to imagine any court construing the Louisiana statute in a way that awards an embryo to a progenitor who did not wish to implant the embryo. To do so, the court would have to find that being given the possibility to develop into a fetus and eventually be born as a human being would not be in the best interest of the embryo.³⁶ This kind of a determination might be subject to the same public policy challenges that traditionally have been asserted against wrongful life claims.

Wrongful life claims require the plaintiff to show that had his mother been properly informed of his disability by a treating physician, she would have aborted him.³⁷ Courts largely have rejected these claims on the grounds that such showings undermine the “sanctity and preciousness of human life”³⁸ and force the court to attempt to “weigh the value of being versus nonbeing.”³⁹ It is likely that the same public policy challenge would be applicable in embryo disputes if the court were required to apply the standard of “best interest of the embryo” since the court would be forced to weigh the value of being versus nonbeing. Consequently, the Louisiana statute appears to either put the court in an unworkable paradigm or create

of *Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825, 837-38 (1999) (discussing the Louisiana legislation).

33. § 9:129.

34. § 9:131.

35. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1755-56 (1993) (discussing the “best interest of the child” standard and noting the difficulties associated with applying this test in child custody disputes).

36. See § 9:131.

37. 1 DAN B. DOBBS, *THE LAW OF TORTS* § 291 (2001).

38. *Willis v. Wu*, 607 S.E.2d 63, 68 (S.C. 2004). *But see* Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All but One?*, 64 MO. L. REV. 29, 30-33 (1999) (arguing that courts and legislatures should reconsider their refusal to recognize an action for wrongful life, due to the claim's similarity to wrongful birth and wrongful death, which are more widely recognized).

39. *Hester v. Dwivedi*, 733 N.E.2d 1161, 1164 (Ohio 2000) (quoting *Bowman v. Davis*, 356 N.E.2d 496, 499 n.3 (Ohio 1976)).

the net effect of mandating courts to award an embryo to a progenitor wishing to become a parent using the IVF process over the objection of the progenitor who, at the time of the dispute, no longer wishes to become a biological parent.

Similar to the designation of an embryo as property, the designation of an embryo as a person has significant legal ramifications. Arguably, the only proper analysis for courts to follow in resolving disputes over embryos that are considered “persons” is something similar to the best interest of the child test.⁴⁰ While no court has expressly considered it, the only other appropriate analysis may be to view the embryo as a person without legal decisionmaking capacity, making a guardianship arrangement appropriate. Given that there is no child-in-being at the time of the dispute and the fact that, in most disputes, at least one progenitor is opposing implantation of the embryo, either approach would be very difficult to apply.⁴¹

The legal status of “personhood” would also arguably give the embryo its own protected rights.⁴² This could possibly have the effect of outlawing,⁴³ or at least rendering impractical,⁴⁴ the work of most IVF clinics. For these reasons, no other jurisdiction has adopted the approach followed by the Louisiana Legislature and characterized embryos as “persons.”⁴⁵

The most accepted characterization of the frozen embryo is that of “property deserving special respect,” a characterization first an-

40. See §§ 9:123, :131; *Davis v. Davis*, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, 1990 WL 130807, 59 USLW 2205 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

41. With no child in existence, it would be difficult to assess the factors of the best interest of the child test, which largely rely on looking at the relationship between the child and parents and the special needs of the child. See Woodhouse, *supra* note 35.

42. In *Roe v. Wade*, the United States Supreme Court concluded that “the unborn have never been recognized in the law as persons in the whole sense.” 410 U.S. 113, 162 (1973); see *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring) (“No Member of this Court has ever suggested that a fetus is a ‘person’ within the meaning of the Fourteenth Amendment.”).

43. *Davis*, 842 S.W.2d at 595 (noting that vesting embryos with the status of person “would doubtless have . . . the effect of outlawing IVF programs in the state”).

44. This status could hamper the work of IVF clinics because it could require IVF clinics to provide storage for the embryos indefinitely. Also, the IVF clinic could arguably be subject to lawsuits brought by the guardians of the embryos if the embryo is damaged, wrongfully implanted in another person, or disposed of by the clinic. See *Miller v. Am. Infertility Group*, No. 02L7394 (Cook County, Ill., Cir. Ct. Feb. 18, 2005) (on file with Cook County Court) (order ruling that progenitors had a wrongful death claim for the destruction of their embryos by an IVF clinic); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1 (2003) (discussing the implications of a recent decision concerning wrongful implantation).

45. As of the publishing of this Article, no legislature has adopted a similar approach to that taken by the Louisiana Legislature. An Illinois court, however, recently followed similar reasoning in a wrongful death claim brought by progenitors against a clinic that destroyed their frozen embryos. See *Miller v. Am. Infertility Group*, No. 02L7394 (Cook County, Ill., Cir. Ct. Feb. 18, 2005) (on file with Cook County Court).

nounced by the Tennessee Supreme Court in *Davis v. Davis*.⁴⁶ The court in *Davis* examined the nature of a frozen embryo and, relying on the ethical standards established by The American Fertility Society, espoused that an embryo's unique capability of becoming human life upon implantation and gestation distinguished it from pure property.⁴⁷ By contrast, such potential is not recognized as being present in individual gamete cells, justifying separate treatment for frozen embryos.⁴⁸

The "special respect" status is a unique hybrid characterization. Unlike the status of pure "property," the status of "special respect" does not provide the progenitors a "true property interest."⁴⁹ Rather, it provides them "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."⁵⁰ Flowing from this characterization of the embryo are two concepts—progenitors should be able to create contracts concerning the use or disposition of the embryo, and the creation of the embryo triggers the progenitors' constitutional interests in procreation.⁵¹

The status of special respect is distinct from the status of personhood because it does not view the embryo as possessing unique interests itself.⁵² Moreover, if the embryo is not viewed as a person, courts resolving embryo disputes are not confined to engage in analytical endeavors generally found in family law disputes such as the best interests of the child test.⁵³

Unlike the designations of "property" and "person," the characterization of embryos as "property deserving special respect" does not provide a clear legal framework for the court. This characterization allows the courts to remove the dispute from the realm of property law⁵⁴ while at the same time avoid legal presumptions of family and the best interest of the child test traditionally utilized in family court.⁵⁵ However, beyond these distinguishing characteristics, it is

46. 842 S.W.2d at 597.

47. *Id.* at 596-97.

48. *See id.* (distinguishing statutes addressing the disposition of human organs from embryo disputes because human tissues and organs do not have the ability to develop into independent human life like an embryo); *see also supra* note 24 and accompanying text (discussing the legal status of gametes).

49. *Davis*, 842 S.W.2d at 597.

50. *Id.*

51. *Id.* at 597-98.

52. *Id.* at 595.

53. *See id.* at 597. *But see* LA. REV. STAT. ANN. § 9:123 (West, Westlaw through 2005 Regular Sess. Acts) (classifying an in vitro fertilized human ovum as a jurisdictional person).

54. *Davis*, 842 S.W.2d at 597 (explaining that the progenitors did not have a true property interest in the embryos).

55. *Id.* at 594-97.

unclear whether the designation of special respect status provides embryo disputes any special consideration.

While some courts have adopted one of the bright-line approaches to the determination of the status of the embryo, viewing it as either property or person, the majority of courts dealing with embryo disputes have adopted the hybrid special respect status.⁵⁶ The ambiguous nature of this status has permitted courts to avoid addressing or defining the aspects of special respect due to the embryo. As a result, those courts recognizing the special respect status of embryos have actually treated the embryo more as property than as a person.

Treatment of the embryo more as property than as a person under the special respect designation is evident in the potential resolutions entertained by courts utilizing this view of the embryo. Courts using this approach entertain the possibility that the embryo should be discarded or used for research purposes.⁵⁷ Such options likely are not possible if the embryo is viewed as having more characteristics of personhood rather than property, as personhood may provide the embryo with a right to be implanted and the opportunity to develop into a human being.⁵⁸ Further, courts that adopt the special respect view of embryos affirm the concept that the progenitors can freely contract for sole control over the embryo.⁵⁹ Parents of born children, however, cannot contract away rights to visitation or support of their children if such an agreement would not be in the best interest of the children, as these rights are considered vested in the children.⁶⁰ Because such contracts *are* permitted in the context of embryo disputes, this suggests that the embryo is being viewed less as a potential life and more as property. Further, agreements between progenitors regarding the disposition of the embryo are not subjected to potential court oversight as is provided for when parents make agreements concerning custody, visitation and support pertaining to a born child.⁶¹ The reluctance of the court to intercede on behalf of the embryo or conceive of court oversight for such arrangements supports the view of the embryo as property-like.

56. Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-Embryo, or Pre-Zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R. 5TH 253, 261-62 (2004).

57. See *Davis*, 842 S.W.2d at 597 (explaining that the progenitors can agree to direct the disposition of their embryos in any manner consistent with the law).

58. See *id.* at 595-97; Robertson, *supra* note 4.

59. *Davis*, 842 S.W.2d at 597. Under this view, progenitors have the ability to control the embryo like other forms of property.

60. *White v. Laingor*, 746 N.E.2d 150, 154 (Mass. 2001) (finding parents' agreement to exchange parental rights for reduction in child support payments to be unenforceable, as there was no determination that the agreement was in the child's best interests).

61. See, e.g., *id.*

Some courts have argued that a determination of the status of the embryo is not necessary for resolution of the embryo dispute.⁶² Specifically, those courts employing a pure contract model have reasoned that a determination of the legal status of the embryo is unnecessary because the progenitors' contract will be enforced regardless of the embryo's legal status.⁶³ As discussed above, however, the very recognition of the progenitors' authority to contract for the disposition of the embryo without court oversight implicitly emphasizes the property-like nature of the embryo.⁶⁴ Therefore, despite statements to the contrary, resolution of the embryo dispute under principles of contract law necessitates a property-based view of the legal status of the embryo.

B. The Legal Role of the Progenitors in the Frozen Embryo Dispute

Another key aspect of embryo disputes is the recognized role and interest of the progenitors. To gain a full understanding of the impact the litigation process has on the resolution of embryo disputes, an examination of the progenitors' interests and of the nature of their authority over the embryo is imperative. Further, a consideration of the relationship between the progenitors and their expectations from the IVF process is important to fully examine the effect of the adversarial process on the resolution of disputes between the progenitors.

Progenitors each contribute their genetic material towards the creation of the embryo.⁶⁵ Because each progenitor has a genetic link to the embryo, each is recognized as having a stake in the outcome of the disposition of the embryo.⁶⁶ At the point most embryo disputes enter litigation, the progenitors no longer agree whether and under what circumstances the embryo should be utilized or disposed. Often,

62. *Kass v. Kass*, 696 N.E.2d 174, 179-81 (N.Y. 1998).

63. In *Kass*, the court determined that it was not presented with this issue because such a determination was only relevant to resolve this issue of the constitutional rights of the parties and whether these rights dictated a particular result. *Id.*

64. See *supra* note 25 and accompanying text for a discussion of the treatment of gametes as property and an analysis of such treatment for embryos.

65. Other parties who are not themselves progenitors may have a stake in an embryo dispute. Typically, such individuals are recognized as parties to the dispute because they have acquired the use of another's gametes through donation and have a contractual right to the genetic material that has been used to create the embryo. *Litowitz v. Litowitz*, 48 P.3d 261, 267 (Wash. 2002) ("Petitioner did not produce the eggs used to create the preembryos . . . [and] has no biological connection to the preembryos and is not a progenitor. Any right the petitioner may have to the preembryos must be based solely upon [the egg donor] contract."). While there are clear points of overlap in situations where a party at interest is not a true progenitor and the analysis presented in this Article could apply in those cases, the Article focuses on the disputes between two genetic progenitors.

66. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). The biological connection provides the basis for the recognition of decisionmaking authority over the embryo in each progenitor. *Id.*

their decisions are limited to allowing the embryo to be used by either of them for implantation, permitting the embryo to be thawed and discarded, donating the embryo to another individual or couple, or possibly donating the embryo to research.⁶⁷

One area in which courts resolving embryo disputes disagree is the nature of the interests of the progenitors. For some courts, the primary recognized interest is the progenitors' interest in procreational autonomy.⁶⁸ This interest is invoked in the embryo dispute because the decision regarding the disposition of the embryo is central to the choice to procreate.⁶⁹ It is not clear, however, whether all courts agree as to the nature of this interest and the impact of the resolution of the embryo dispute on this interest. Further, while various commentators have recognized that the progenitors may have other significant interests in the embryo dispute, universally courts have confined their analysis to the interests of procreation and parenthood.⁷⁰ Other interests that have been rejected as irrelevant to the resolution of an embryo dispute include a progenitor's interest in the following: preserving what he or she may believe to be human life,⁷¹ ensuring that the resolution of the dispute reflects any unequal physical contributions made by a progenitor in the creation of the embryo,⁷² and rendering a resolution which is consistent with the best interest of any child that may result from the implantation of the embryo.⁷³

Among those courts that view the primary interest involved in the embryo dispute as being the progenitors' right to procreation, there is disagreement about whether this interest is better attributed to each

67. Some of the progenitors' choices may be limited because of regulation on use of stem cell research and human embryos. See Baum, *supra* note 24, at 130-40; Gitter, *supra* note 24, at 338-43.

68. *Davis*, 842 S.W.2d at 600-03.

69. *Id.*

70. Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 402 (1986) (arguing that women have a strong interest in determining the disposition of the embryo given their privacy rights in gestating children); Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1066-69 (1996) (arguing that both progenitors have a significant interest in assuring that their individual physical contributions made in creating the embryo are considered in any determination regarding the disposition of the embryos); Jennifer Marigliano Dehmel, Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1399-1402 (1995) (concluding that the woman progenitor has a strong interest in the embryo given that she would gestate the embryos in the future, and therefore, her choice regarding the disposition of the embryos should prevail); Donna A. Katz, Note, *My Egg, Your Sperm, Whose Preembryo? A Proposal for Deciding Which Party Receives Custody of Frozen Preembryos*, 5 VA. J. SOC. POL'Y & L. 623, 667-74 (1998) (arguing that progenitors who have relied on an assurance that the embryos would be utilized and are now no longer able to conceive biological children have a significant interest in disposition decision).

71. *J.B. v. M.B.*, 783 A.2d 707, 711 (N.J. 2001).

72. *Davis*, 842 S.W.2d at 601.

73. *In re Marriage of Witten III*, 672 N.W.2d 768, 774-75 (Iowa 2003).

progenitor individually or to the progenitors jointly. The contemporaneous mutual consent model purports to recognize this interest as an individual interest of each of the progenitors.⁷⁴ According to proponents of this model, to permit either party to override the decision of the other would undermine each progenitor's individual interest in procreation.⁷⁵ In practice, however, this model supports the view of the right to procreation as a mutual endeavor by both progenitors.

Those who advocate for the contemporaneous mutual consent model argue that, to preserve the individual rights of each progenitor, neither progenitor should be permitted to make a decision regarding the use of the embryo without the support and acquiescence of the other progenitor.⁷⁶ However, by requiring any decision regarding the disposition of the embryo to be mutually agreed on by the progenitors at the time the embryo is to be implanted or otherwise disposed, the contemporaneous mutual consent model treats the right to procreation as a joint interest of the progenitors.

On the other end of the debate, some courts view and treat the interest in procreation as an individual right vested in each progenitor.⁷⁷ For these courts and advocates, the decision to procreate is very closely linked to the individual progenitor's identity.⁷⁸ Under this interpretation, the interest in procreation implicates issues such as personal autonomy.⁷⁹ Therefore, for courts utilizing this understanding of the progenitors' interest in procreation, each progenitor's choice is considered and examined separately.⁸⁰

Another emerging trend of disagreement is with the point at which the interest in procreation is realized. For some courts, the recognized interest in procreation is an interest connected with the use of each progenitor's gametes.⁸¹ Under this theory, the decision to procreate is made by each progenitor when he or she agrees to undergo the IVF therapy and consents to the use of his or her genetic material to create the embryo.⁸² Therefore, for these courts, the primary focus in resolving an embryo dispute is the progenitor's decision at the beginning of the IVF treatment—or at least the progenitor's decision at the time the embryo is created.⁸³ Other courts disagree with this characterization of the nature of the interest in pro-

74. *Id.* at 777; see Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 81 (1999).

75. *Witten III*, 672 N.W.2d at 778; see Coleman, *supra* note 74, at 81-110.

76. Coleman, *supra* note 74, at 81-110.

77. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-59 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 716-17 (N.J. 2001); *Davis*, 842 S.W.2d at 598-603.

78. *A.Z.*, 725 N.E.2d at 1057-59; *J.B.*, 783 A.2d at 716-17; *Davis*, 842 S.W.2d at 598-603.

79. *Davis*, 842 S.W.2d at 598-603.

80. *A.Z.*, 725 N.E.2d at 1057-59; *J.B.*, 783 A.2d at 716-17; *Davis*, 842 S.W.2d at 598-603.

81. See *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

82. *Id.*

83. *Id.*

creation. These courts reason that the right to procreation is an ongoing choice that is initially triggered when the progenitor agrees to utilize his or her genetic material to create the embryo and continues at least until the point the embryo is implanted with the intention that it become a child.⁸⁴ This is an important distinction because it provides for different models of resolution and different views of the progenitor's authority over the embryo.

For those courts that view the interest in procreation as being fully realized when the embryo is created and cryogenically preserved, the embryo dispute is resolved by upholding the intention of the progenitors as that intention was expressed when the embryo was created.⁸⁵ This permits the progenitors' true procreational choice to be executed by the court. By contrast, for those courts that view the interest in procreation as a continuing interest that is not fully realized until the embryo is implanted, embryo disputes are resolved by permitting the progenitors to make contemporaneous decisions about the disposition of the embryo.⁸⁶ Under such an approach the progenitor is not bound by his or her previous choice to create the embryo. Rather, the progenitor is empowered to make a choice regarding procreation that is consistent with his or her current state of mind at the time that the embryo is to be implanted or otherwise disposed.⁸⁷

In addition to the recognized interests of the progenitors, the role the progenitors play in orchestrating the creation of the embryo also informs the embryo dispute resolution process. The embryo disputes that are at the center of this Article are between progenitors who each actively participated in the creation of the embryo through the donation of genetic material.⁸⁸ As such, the progenitors usually are involved in some relationship during the IVF process.⁸⁹ Unlike donors who waive their rights to their gametes and any resulting embryos generated in the IVF process,⁹⁰ progenitors are typically invested in the process to the extent that the progenitors still perceive

84. *In re Marriage of Witten III*, 672 N.W.2d 768, 777-79 (Iowa 2003).

85. *Kass*, 696 N.E.2d at 180.

86. *Witten III*, 672 N.W.2d at 777-79.

87. *Id.* at 782-83.

88. See *supra* note 65 and accompanying text for a discussion of what constitutes a progenitor and the overlap in interests between progenitors and those who orchestrate the formation of the embryo.

89. In all cases discussed in depth in this Article, the couple was married during IVF treatments. *Witten III*, 672 N.W.2d at 772; *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 709 (N.J. 2001); *Kass*, 696 N.E.2d at 175; *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992).

90. UNIF. PARENTAGE ACT § 5 (1973) ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.").

a potential role in the bearing or rearing of any child that results from the IVF process.⁹¹

Because progenitors are typically involved in relationships during the IVF process, some scholars have suggested that any prior directives regarding eventual disposition of the embryos that were entered into by the progenitors at the time of the IVF process should be highly suspect.⁹² Some have argued that because most progenitors are involved in relationships during IVF treatments, they may be subject to coercion and feel compelled to agree to an arrangement for disposition of the embryos that would not otherwise be agreed to by both.⁹³

In addition to the potential for coercion, progenitors involved in relationships during IVF may also be induced to rely on the other progenitor's assent to an eventual disposition for the embryos.⁹⁴ Some progenitors choose to undergo IVF because they are facing a medical condition that may make them less likely to be able to have biological children in the future.⁹⁵ In some instances, a progenitor has undergone IVF to create frozen embryos because the progenitor was going to have or already had part of his or her reproductive system removed, rendering it impossible to create biological children in the future.⁹⁶ A later dispute regarding disposition of such embryos puts these progenitors in a situation in which they may lose the opportunity to *ever* utilize the embryos to create biologically related children.

These situations, in which the progenitor has relied on a fellow progenitor's agreement to create embryos to his or her detriment, have engendered academic debate over whether embryos in such situations should be awarded to the reliant progenitor under a theory similar to equitable estoppel.⁹⁷ Under slightly different reasoning, the *Davis* court recognized that a progenitor who is no longer able to conceive biologically related children should be awarded the embryos if the progenitors disagree about their disposition.⁹⁸

Under any approach, the possibility of coercion and the progenitors' expectations from participation in the IVF process might play a role in the legal strategies they use during resolution of the embryo dispute. Even if these issues do not directly affect the court's deci-

91. Coleman, *supra* note 74, at 97-104.

92. *Id.* at 102-04; Judith F. Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29 J.L. MED. & ETHICS 197, 201-02 (2001).

93. Coleman, *supra* note 74, at 102-04.

94. *Id.* at 102-04.

95. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 175 (N.Y. 1998) (discussing the difficulty the progenitor had in conceiving based on "prenatal exposure to diethylstilbestrol (DES)").

96. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1052 (Mass. 2000) (noting that progenitor's left fallopian tube was removed as a result of prior ectopic pregnancy).

97. Robertson, *supra* note 28, at 414-16; Katz, *supra* note 70, at 662-65.

98. Davis v. Davis, 842 S.W.2d 588, 603-05 (Tenn. 1992).

sionmaking process, these issues do suggest that the roles progenitors play in the IVF process itself impact the progenitors' expectations from the dispute resolution process.

Another aspect of the progenitors' roles in the IVF process that is relevant to the dispute resolution process is the extent to which each progenitor has made contributions toward the creation of the embryo. While it is clear that each progenitor physically contributes genetic material toward the creation of the embryo, the level of physical commitment of each progenitor is not equal.⁹⁹ The female progenitor typically undergoes months of hormone injections and a difficult and painful procedure in which eggs are harvested.¹⁰⁰ By comparison, the female progenitor's physical contribution is much more significant than the counterpart contribution of the male progenitor.¹⁰¹ The disparity in physical labor has led some to advocate for a presumption in favor of the female progenitor's preference in determining the disposition of frozen embryo disputes.¹⁰² While courts have universally rejected this approach, many recognize the disparity in physical labor on the part of the progenitors.¹⁰³

III. CURRENT JUDICIAL RESOLUTIONS OF FROZEN EMBRYO DISPUTES

A. *Balancing Interests in Procreation*

One predominant approach used by courts and scholars to resolve disputes over frozen embryos is the procreative rights model.¹⁰⁴ Under this paradigm, the court weighs the interests of both gamete providers and decides whether the individual seeking implantation or destruction of the embryo has the greater constitutionally protected interest.¹⁰⁵

The first court to utilize this balancing test was the Tennessee Supreme Court in *Davis v. Davis*.¹⁰⁶ In *Davis*, the progenitors, Mary Sue Davis and Junior Davis, pursued IVF procedures during the course of their marriage.¹⁰⁷ The IVF treatments generated the creation of several embryos that were cryogenically preserved.¹⁰⁸ Mary

99. See generally Robertson, *supra* note 4, at 441-46 (reviewing the biological steps of early embryos and noting the "woman's interest in her bodily integrity and other competing interests may take priority over concern for an early embryo and even more developed fetuses").

100. *Davis*, 842 S.W.2d at 601-02; Robertson, *supra* note 4, at 441-46.

101. *Davis*, 842 S.W.2d at 601-02.

102. Andrews, *supra* note 70, at 403 (arguing that women have a strong interest in determining the disposition of the embryo given their privacy rights in gestating children).

103. See, e.g., *Davis*, 842 S.W.2d at 601-02.

104. *Id.* at 603-04; see also *J.B. v. M.B.*, 783 A.2d 707, 719-20 (N.J. 2001).

105. *Davis*, 842 S.W.2d at 603-04.

106. 842 S.W.2d 588.

107. *Id.* at 591.

108. *Id.* at 592.

Sue and Junior, however, later divorced without using or otherwise disposing of all of their embryos.¹⁰⁹ During the divorce proceedings, the issue arose as to which progenitor should be awarded “custody” of the embryos.¹¹⁰ Initially, Mary Sue sought to have control over the embryos as she intended to use them to become pregnant.¹¹¹ Junior sought to leave the embryos cryogenically preserved so that he could “decide[] whether or not he wanted to become a parent outside the bounds of marriage.”¹¹² By the time the dispute reached the Tennessee Supreme Court, both progenitors had remarried and had changed their minds as to what should be done with the embryos.¹¹³ Mary Sue no longer wanted to use the embryos herself.¹¹⁴ Instead, she sought to have the embryos donated to another childless couple.¹¹⁵ Junior opposed donation and sought to have the embryos discarded as he did not want to permit a biologically related child to be raised in a single-parent home and he could not guarantee that any couple receiving the embryos through donation would remain married.¹¹⁶

In attempting to resolve this dispute, the *Davis* court explained that disputes between progenitors over the control of frozen embryos should be resolved according to the express written prior directives of the progenitors.¹¹⁷ Mary Sue and Junior, however, had not entered into any express prior directives when they underwent IVF treatments.¹¹⁸ Therefore, the *Davis* court determined that the issue of who should be awarded control of the embryos would be best resolved by an examination of the Davises’ constitutional rights to privacy.¹¹⁹

109. *Id.*

110. *Id.* at 589. The *Davis* court described the dispute as one over custody, a term characteristic of disputes over live children. While the court relied on this term, it did not use the best interest of the child test typically utilized in custody disputes because it found that embryos are deserving of special status and are not persons. *Id.* at 589-90.

111. *Id.* at 589.

112. *Id.*

113. *Id.* at 590.

114. *Id.*

115. *Id.*

116. *Id.*

Junior Davis is vehemently opposed to fathering a child that would not live with both parents. Regardless of whether he or Mary Sue had custody, he feels that the child’s bond with the non-custodial parent would not be satisfactory. He testified very clearly that his concern was for the psychological obstacles a child in such a situation would face, as well as the burdens it would impose on him. Likewise, he is opposed to donation because the recipient couple might divorce, leaving the child (which he definitely would consider his own) in a single-parent setting.

Id. at 604.

117. *Id.* at 597 (“We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.”).

118. *Id.* at 598.

119. *Id.* at 598-603.

In examining the constitutional rights of progenitors who have created embryos through IVF procedures, the *Davis* court acknowledged that the “individual freedom in dispute is the right to procreate” and that “the right of procreation is a vital part of an individual’s [constitutional] right to privacy.”¹²⁰ The *Davis* court recognized that central to the right to procreation are “two rights of equal significance—the right to procreate and the right to avoid procreation.”¹²¹

In deciding how to balance these equal yet opposing interests, the *Davis* court examined the “positions of the [progenitors], the significance of their interests, and the relative burdens that [would] be imposed by differing resolutions.”¹²² A significant burden recognized by the *Davis* court as being intertwined with the interest of procreation or avoiding procreation is the interest in becoming a parent or in avoiding “unwanted parenthood.”¹²³ Awarding decisional authority over the embryos to Junior, the *Davis* court concluded that the burden of unwanted parenthood was more significant than Mary Sue’s interest in wanting to donate the embryos to another couple.¹²⁴ The *Davis* court explained that if the embryos were donated to another couple, Junior “would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.”¹²⁵ As a result, if a child resulted from the donation, Junior would be twice robbed—“his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.”¹²⁶ In comparison, the *Davis* court viewed Mary Sue’s burden as less significant because she was not attempting to use the embryo to achieve parenthood for herself. Further, she would be able to “achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing” through future IVF procedures.¹²⁷

While the procreational rights test was posed by the *Davis* court as a “balancing” test wherein both gamete providers possess equal interests to “custody” of the embryo, no court using this test has ever awarded decisional authority over the embryos to the gamete provider who is interested in allowing the embryos to be implanted.¹²⁸ Typically courts reason that the interests in not becoming a parent, even only biologically, outweigh any interest in becoming a parent

120. *Id.* at 600.

121. *Id.* at 601.

122. *Id.* at 603.

123. *Id.*

124. *Id.* at 604.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*; see *J.B. v. M.B.*, 783 A.2d 707, 783 (N.J. 2001); Daar, *supra* note 92.

through the implantation of the embryos.¹²⁹ The only recognized exception to this outcome is if the gamete provider who is interested in allowing the embryos to be implanted wishes to use the embryos himself or herself and is unable to become a parent through any other means, possibly even including adoption.¹³⁰ Under these limited circumstances, the courts have recognized that the interest of the progenitor wishing to use the embryos to achieve parenthood may outweigh the interests of the progenitor seeking to avoid their use for implantation.¹³¹

Utilizing a similar approach, the Supreme Court of New Jersey in *J.B. v. M.B.*¹³² awarded disputed frozen embryos to the progenitor seeking to have them discarded.¹³³ J.B. and M.B. underwent IVF treatment during their marriage.¹³⁴ As a result of the IVF treatment process, the couple created several embryos that were cryogenically preserved.¹³⁵ From these embryos, J.B. was able to achieve pregnancy and give birth to the couple's daughter.¹³⁶ Shortly after the birth of their daughter, J.B. and M.B. decided to divorce.¹³⁷ J.B. sought a court award permitting the embryos to be discarded.¹³⁸ Conversely, M.B. sought to have the embryos remain in storage to be used for later implantation or donation to another infertile couple.¹³⁹

Noting that J.B. and M.B. failed to enter into a "formal, unambiguous memorialization of [their] intentions" at the time they underwent the IVF procedures,¹⁴⁰ the *J.B.* court concluded that the appropriate analysis for resolution of their claims to the embryos would be to balance their respective procreational rights.¹⁴¹ Unlike the court in

129. *Davis*, 842 S.W.2d at 603-04.

130. See Jennifer L. Medenwald, Note, A "Frozen Exception" for the Frozen Embryo: The *Davis* "Reasonable Alternatives Exception," 76 IND. L.J. 507 (2001) (discussing application of the exception in *Davis*). The *Davis* court noted:

Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

Davis, 842 S.W.2d at 604. This situation, however, has never been presented before a court.

131. Note however, some argue that there is no true exception and courts may be reluctant to ever order a person to become a parent regardless of the circumstances.

132. 783 A.2d 707.

133. *Id.* at 719-20.

134. *Id.* at 709.

135. *Id.* at 710.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 714.

141. *Id.* at 714-17.

Davis, however, the court in *J.B.* determined that the conflict between the progenitors' interests in procreation and in avoiding procreation were "more apparent than real."¹⁴² The *J.B.* court explained that M.B.'s right to procreate was not lost if the embryos were destroyed because he was "already a father and [was] able to become a father to additional children, whether through natural procreation or further in vitro fertilization."¹⁴³ According to the *J.B.* court, J.B.'s interest in avoiding procreation would "be lost through attempted use or through donation of the preembryos" because "[i]mplantation, if successful, would result in the birth of her biological child and could have life-long emotional and psychological repercussions."¹⁴⁴

B. Parenthood by Contract

Another approach to resolving embryo disputes that is advocated by courts and scholars is the contractual theory approach. This approach has two predominant variations—the prior directives approach¹⁴⁵ and the contemporaneous mutual consent approach.¹⁴⁶ Under either of these variations, the focus for the court is the intention of the parties as to the disposition of any embryos that should remain after a triggering event such as the death of a progenitor or the separation or divorce of the progenitors.

1. Enforcement of Prior Directives

The first variation to be recognized by the courts on the contractual theory was the enforcement of prior directives approach.¹⁴⁷ To understand this contractual theory, it is important to first understand how such contracts are formed. While the majority of progenitors do not enter into agreements regarding the disposition of any embryos created during IVF treatment should they later no longer wish to continue jointly in treatment,¹⁴⁸ most progenitors sign informed consent forms prior to undergoing treatment in the IVF process.¹⁴⁹ On most informed consent forms, the progenitors are asked to indicate what they intend to do with any embryos that remain in a

142. *Id.* at 716.

143. *Id.* at 717.

144. *Id.* The *J.B.* court explained, "[J.B.'s] fundamental right not to procreate is irrevocably extinguished if a surrogate mother bears J.B.'s child. We will not force J.B. to become a biological parent against her will." *Id.*

145. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002). See generally *Shapo*, *supra* note 20; *Waldman*, *supra* note 27.

146. *In re Marriage of Witten III*, 672 N.W.2d 768 (Iowa 2003). See generally *Coleman*, *supra* note 74.

147. *Kass*, 696 N.E.2d at 174; *Litowitz*, 48 P.3d at 261.

148. See *Waldman*, *supra* note 27, at 918 (noting that most courts and scholars promoting a contract-based approach to resolving embryo disputes are forced to treat informal consent forms as contracts between the progenitors).

149. See also *id.* at 918-33; *Daar*, *supra* note 92, at 201-02.

cryogenic state on the happening of a trigger event. Several trigger events include the following: death of a progenitor, divorce, separation, incapacitation of a progenitor or any other event which renders either of the progenitors unable to jointly determine the disposition of the embryos.¹⁵⁰ These consent forms, while an agreement between the progenitors and the IVF clinic, have been utilized by courts as express prior directives of the progenitors as to their respective rights against each other.¹⁵¹

The first court to adopt this approach to resolve an embryo dispute was the Court of Appeals of New York in *Kass v. Kass*.¹⁵² Like the progenitors in *Davis* and *J.B.*, Maureen and Steven Kass underwent IVF treatments during their marriage with the intention of creating embryos to be used by them to achieve parenthood.¹⁵³ After several embryos were created and preserved cryogenically, they divorced.¹⁵⁴ During the divorce proceedings, Maureen Kass sought an order to obtain control over the embryos to use them to achieve parenthood.¹⁵⁵ At the time of the dispute, the only way by which Maureen could achieve genetic motherhood would be through the use of the embryos.¹⁵⁶ Steven Kass opposed Maureen's action, arguing that the embryos should be donated to the IVF program for approved research purposes.¹⁵⁷

The *Kass* court reasoned that the best analytical framework to resolve embryo disputes between progenitors would be the one that involved the least interference by the court.¹⁵⁸ Therefore, the *Kass* court explained that the intention of the progenitors, as is evidenced in their prior directives, should be the directive to the court.¹⁵⁹ Accordingly, the *Kass* court concluded that progenitors' prior agreements regarding the disposition of embryos are "presumed valid and binding, and [are to be] enforced in any dispute between" the progenitors.¹⁶⁰

The *Kass* court explained that the use of prior directives avoided the lack of clarity and predictability created by the procreative rights model and simplified what would otherwise be protracted litigation

150. See Coleman, *supra* note 74, at 109-17 (discussing possible options for disposition of an embryo).

151. *Kass*, 696 N.E.2d at 180; *Litowitz*, 48 P.3d at 268-69.

152. 696 N.E.2d 174.

153. *Id.* at 175.

154. *Id.* at 177.

155. *Id.*

156. *Id.* at 175-77.

157. *Id.* at 177.

158. *Id.* at 180. The *Kass* court noted that "[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice." *Id.*

159. *Id.* at 180-81.

160. *Id.* at 180.

in a very private and highly emotional aspect of the progenitors' lives.¹⁶¹ In addition, the *Kass* court opined that advance directives "maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."¹⁶² The *Kass* court, however, also recognized shortcomings of its contractual rights model. Placing such weight on prior directives, like those contained in informed consent forms, might lead to enforcement of agreements made without much thought to the future.¹⁶³ The "uncertainties inherent in the IVF process itself are vastly complicated by cryopreservation, which extends the viability of pre-zygotes indefinitely and allows time for minds, and circumstances, to change."¹⁶⁴ The *Kass* court, however, explained that it is for this reason that prior directives should be enforced.¹⁶⁵ Otherwise, "[a]dvance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree."¹⁶⁶

In an attempt to determine the Kassess' intention, the *Kass* court reviewed the informed consent forms Maureen and Steven Kass signed while undergoing various phases of the IVF process.¹⁶⁷ Despite Maureen's objections, the *Kass* court concluded that the informed consent forms "unequivocally manifest[ed] [the Kassess'] mutual intention that in the present circumstances [of their divorce] the pre-zygotes be donated for research to the IVF program."¹⁶⁸

Following a similar rationale but with more unusual results, the Supreme Court of Washington, in an en banc decision, enforced a prior directive against the contemporaneous objection of both parties entitled to claim "custody" of the embryos.¹⁶⁹ In *Litowitz v. Litowitz*, Becky and David Litowitz brought an action to resolve issues of custody over embryos created during their marriage.¹⁷⁰ By the time of the action, the Litowitzes successfully achieved pregnancy through the use of embryos created during their marriage from David's genetic material and genetic material from an egg donor.¹⁷¹ They, however, separated prior to the birth of their daughter and eventually

161. *Id.* The *Kass* court explained that prior advance directives "are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable." *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 180-81.

168. *Id.* at 181.

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

170. *Id.* at 262.

171. *Id.*

filed for divorce.¹⁷² During the dissolution proceedings, Becky petitioned the court to permit her to utilize the embryos for implantation in a surrogate mother.¹⁷³ David opposed Becky's use of the embryos but did not wish the embryos to be discarded. Rather, he sought to have the embryos donated to a childless couple.¹⁷⁴

Relying on *Kass*, the *Litowitz* court determined that the dispute should be resolved in a manner consistent with the contractual rights of the parties.¹⁷⁵ Examining the cryopreservation contract entered into by Becky and David at the time of the IVF treatments, the *Litowitz* court concluded that the Litowitzes had agreed that their embryos "be thawed but not allowed to undergo further development."¹⁷⁶ The court also found that the contract provided for cryopreservation of the embryos for five years, at the end of which the embryos "would be thawed but not allowed to undergo any further development" unless the Litowitzes requested participation for an additional period of time and the Center agreed.¹⁷⁷ Because more than five years had passed and neither party had requested an extension of the contract, the *Litowitz* court concluded that the IVF clinic was directed by the Litowitzes, under the cryopreservation contract, to discard the embryos.¹⁷⁸

While the *Litowitz* court relied on the contract theory analysis espoused in *Kass*, the *Litowitz* decision is very different from that of *Kass*. Unlike the court in *Kass*, the *Litowitz* court upheld the contract in the face of the objections from *both* individuals who had a right to claim an interest to the embryos.¹⁷⁹ While both decisions focus on the need to uncover and enforce the intention of the progenitors at the time of the IVF treatment, the *Litowitz* court did so without regard to the fact that both of the individuals who had orchestrated the creation of the embryos¹⁸⁰ had changed their position with respect to the appropriate use of the embryos.¹⁸¹ Such an approach fails to recognize change in intention by *both* parties and seems contrary to the princi-

172. *Id.* at 264.

173. *Id.*

174. *Id.*

175. *Id.* at 267. The *Litowitz* court concluded, while Becky was not herself a progenitor, under the egg donor contract she and David had equal rights to the eggs. *Id.* at 268. The court also noted, however, that the egg donor contract "does not relate to the preembryos which resulted from subsequent sperm fertilization of the eggs." *Id.* As a result, the court concluded that the present dispute over the embryos must be resolved under the cryopreservation contract entered into at the time of the IVF treatments—a contract to which both Becky and David were parties with equal interests. *Id.* at 268-69.

176. *Id.* at 268 (citing Answer to Petition for Review, app. at 14-16).

177. *Id.*

178. *Id.* at 269, 271-72.

179. *Id.*

180. Becky was not herself a progenitor. *Id.* at 268. The court's analysis, however, is equally applicable to cases between progenitors.

181. *Id.* at 271.

ple recognized in *Kass* that “[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.”¹⁸²

2. *Challenges to the Enforcement of Prior Directives*

After the *Kass* decision, several courts criticized the contract theory approach as a means for resolving embryo disputes. In *A.Z. v. B.Z.*, the Supreme Court of Massachusetts rejected the enforcement of a prior directive.¹⁸³ Examining informed consent forms signed by the progenitors upon their commencement of IVF treatments, the *A.Z.* court concluded that the forms did not represent the clear intention of the parties as to the proper disposition of their embryos should a dispute later arise between them.¹⁸⁴

Despite finding that there was no written agreement that clearly expressed the intention of the progenitors, the *A.Z.* court critically examined the question of whether prior directives should *ever* be enforced by courts in embryo disputes.¹⁸⁵ It concluded that “even had the [progenitors] entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, [it] would not enforce an agreement that would” have permitted the use of a frozen embryo for implantation by one progenitor over the objection of the other.¹⁸⁶ The *A.Z.* court explained that such an agreement “would compel one donor to become a parent against his or her will.”¹⁸⁷ Because “forced procreation is not an area amendable to judicial enforcement,” the *A.Z.* court concluded that enforcement of prior directives would violate public policy.¹⁸⁸ To support its conclusion, the court cited other contracts pertaining to familial relationships that are unenforceable as against public policy, including promises to marry and promises to surrender children for adoption prior to birth.¹⁸⁹

While the *J.B.* court eventually applied the procreative rights balancing test to resolve the embryo dispute before it, the *J.B.* court also rejected the contract rights approach for reasons similar to those provided by the court in *A.Z.*¹⁹⁰ While acknowledging the clarity and

182. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

183. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000).

184. *Id.* at 1056-58.

185. *Id.* at 1057-58.

186. *Id.* at 1057. The *A.Z.* court first concluded that the informed consent agreement signed by the parties was ambiguous and did not reflect the true intention of the parties. *Id.* at 1056-58. The court further considered, however, whether it would enforce an informed consent agreement that had been unambiguous. *Id.*

187. *Id.* at 1057.

188. *Id.* at 1058.

189. *Id.*; see Waldman, *supra* note 27, at 932-39 (discussing challenges to contracts within the confines of familial relationships).

190. *J.B. v. M.B.*, 783 A.2d 707, 718-20 (N.J. 2001).

predictability that enforcement of prior directives provides, the *J.B.* court determined that such agreements should not be enforced if a progenitor has changed his or her mind.¹⁹¹ The court explained “agreements [that] compel procreation over the subsequent objection of one of the parties . . . are violative of public policy.”¹⁹² “[B]y permitting either party to object at a later date to provisions specifying a disposition of preembryos that that party no longer accepts,” the *J.B.* court concluded that “public policy concerns that underlie limitations on contracts involving family relationships are protected.”¹⁹³

3. *Contemporaneous Mutual Consent Approach*

The most recent approach to the resolution of embryo disputes has arisen out of some of the criticisms to the contract theory approach. Adopted by the Supreme Court of Iowa in *In re Marriage of Witten III*, the contemporaneous mutual consent model is premised on the assumption that the court should resolve embryo disputes in a manner consistent with the mutual will of the progenitors.¹⁹⁴

The contemporaneous mutual consent model, similar to the contract theory approach, is based on the concept that the progenitors have an equal right to control the disposition of the embryo.¹⁹⁵ It is distinct from the contractual rights approach, however, in that the court does not resolve the embryo dispute in accordance with the parties’ prior directives.¹⁹⁶ Rather, the court focuses on the progenitors’ current intention with respect to the disposition of the embryos.¹⁹⁷ The *Witten* court explained that this shift in focus is necessary because individuals involved in IVF treatments are more likely to make decisions based on “feeling and instinct [rather] than rational deliberation”¹⁹⁸ and the “erroneous prediction of how [one] will feel about the matter at some point in the future can have grave repercussions.”¹⁹⁹

Advocates of this model explain that decisions regarding the disposition of embryos can impact personal identity.²⁰⁰ For example, because parenthood is “an important act of self-definition,” permitting use of the embryo over a progenitor’s objection “imposes an unwanted identity on the individual, forcing her to redefine herself, her place in

191. *Id.* at 719.

192. *Id.*

193. *Id.*

194. 672 N.W.2d 768, 777-78, 783 (Iowa 2003); see Coleman, *supra* note 74, at 110.

195. *Witten III*, 672 N.W.2d at 777.

196. See *id.* at 779-83 (discussing and rejecting an approach that binds parties to a prior agreement).

197. *Id.*

198. *Id.* at 777 (quoting Coleman, *supra* note 74, at 98).

199. *Id.* at 778.

200. See Coleman, *supra* note 74, at 95-97.

the world, and the legacy she will leave after she dies.”²⁰¹ Permitting an embryo to be discarded over the objection of a progenitor “can have equally profound consequences,” such as “life-altering feelings of mourning, guilt, and regret.”²⁰² Those who support this model advocate that such results can be avoided while still maintaining respect for the authority of the progenitors by preserving the status quo until the parties can reach a mutual agreement as to the disposition of the embryo.²⁰³

The *Witten* court adopted such an approach.²⁰⁴ Refusing to enforce the progenitors’ prior agreements and rejecting a procreative rights balancing test, the *Witten* court concluded that in “a situation in which one party no longer concurs in the parties’ prior agreement with respect to the disposition of their frozen embryos, but the parties have been unable to reach a new agreement that is mutually satisfactory,” the court will not resolve the dispute.²⁰⁵ Until the parties are able to reach a consensus, the *Witten* court directed that the party opposing destruction of the embryo was responsible for fees necessary to maintain the embryos in a cryogenic state.²⁰⁶

IV. DEFINITIONS OF PARENTHOOD AND PROCREATION IN FROZEN EMBRYO DISPUTES

Like in most family law contexts, the resolution of embryo disputes necessitates the utilization of assumptions regarding parenthood and familial relationships. Traditional legal presumptions of family and parenthood, however, are not readily applicable in the context of frozen embryo disputes because the potential child will not be realized unless and until the embryo is implanted.²⁰⁷ As a result, new legal presumptions regarding familial associations are being developed within the context of frozen embryo disputes. This Part will examine the courts’ reliance on assumptions of parenthood and procreation to support the promotion of one gamete provider’s interest over another. Further, this Part will critique the assumptions of parenthood and procreation relied upon in the resolution of frozen embryo disputes, challenging the utility and accuracy of such assumptions.

201. *Id.* at 97.

202. *Id.*

203. *Id.* at 112.

204. *Witten III*, 672 N.W.2d at 783.

205. *Id.*

206. *Id.* (quoting Coleman, *supra* note 74, at 112).

207. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000).

A. *The Role of Biology in Parenthood and the Right to Procreation*

In decisions resolving embryo disputes, a primary underlying assumption involves a question about the nature of parenthood. The current tests utilized by courts in conflicts over embryos rely on the assumption that the most fundamental aspect of parenthood is a biological connection between the parent and the child.²⁰⁸ This assumption is most visibly present in the procreative rights approach.

Under the procreative rights model, the court weighs the interests of the progenitors in procreation²⁰⁹ and awards the embryo to the progenitor whose interests will be most affected by a decision regarding the use of the embryo.²¹⁰ Every court that has applied this test has found that balance to favor the progenitor wishing to avoid procreation. To justify tipping the balance in this manner, courts have reasoned that the implantation will force the progenitor into parenthood because he will feel a connection to the resulting child solely because of his biological connection to the child.²¹¹ The *Davis* court explained that the biological connection creates such a compelling sense of parenthood that, even assuming all other parental responsibilities could be terminated, the progenitor wishing to avoid procreation would still bear the burden of forced parenthood because he would have the knowledge that his biologically related children exist.²¹²

The supremacy of the biological connection in defining the nature of parenthood is also cognizable in the exception created under the procreative rights model.²¹³ While the procreative rights model considers the balance of interests to tip in favor of the progenitor seeking to avoid use of the embryo, the balance will tip in favor of the progenitor seeking to use the embryo in a narrow set of circumstances.²¹⁴ Known as the *Davis* exception, the balance of interests will tip in favor of the progenitor who intends to use the embryo himself or herself if the use of the embryo is the only way in which the

208. See, e.g., *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

209. While the courts utilizing the procreative rights test classify the progenitors' interest as that of procreation, the actual interest being addressed in these decisions is that of parenthood. See *Davis*, 842 S.W.2d at 603.

210. See, e.g., *J.B.*, 783 A.2d at 719-20; *Davis*, 842 S.W.2d at 603-04.

211. See, e.g., *Davis*, 842 S.W.2d at 603-04.

212. *Id.*

213. *Id.* at 604.

Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.

Id.

214. *Id.*

progenitor will be able to achieve biological parenthood.²¹⁵ The recognition of the dominance of the progenitor's interest in seeking to use the embryo, however, occurs only when the progenitor is unable to achieve biological children through any means other than through the use of the embryo; it does not apply when the progenitor wishing to use the embryo intends to donate it to another couple.²¹⁶

While the procreative rights model gives primary consideration to the role the biological connection plays in defining the concept of parenthood, the inconsistent and incomplete results yielded under this model, which are created by the courts' reliance on biology, expose the flaws with such an assumption. First, under the traditional balance, the biological connection is considered the genesis of all other aspects of parenthood.²¹⁷ While the courts rely on this principle to award the embryo to the individual seeking to avoid implantation, the contrary result also seems to be justified by the same principle. The progenitor wishing to implant the embryo for his or her own use will also feel the same compelling sense of parenthood should the embryo be used to create a child. Therefore, the biological connection does not seem to assist in the overall decision as to which progenitor to award the embryo. Second, the reliance on biology is undermined by the fact that not all progenitors wishing to permit the embryo to be implanted intend to participate in a parent-child relationship with any resulting child. For example, the *Davis* exception was not applied in the *Davis* case, as the progenitor favoring use of the embryos for implantation wanted to donate the embryos to a childless couple and did not intend to have a parent-child relationship with any child that was born from the embryo.²¹⁸ This suggests that the courts' reliance on the per se connection between biological relationship and parenthood is not as compelling as the courts posit.²¹⁹

215. *See id.*

216. *Id.*; *see* Medenwald, *supra* note 130, at 519-20 (discussing the application of the *Davis* exception).

217. *Davis*, 842 S.W.2d at 603 (noting that the "interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood" and concluding that use of the embryos over the objection of a progenitor would "impose unwanted parenthood on [that progenitor], with all of its possible financial and psychological consequences").

218. In *Davis*, Mary Sue opposed the destruction of the embryos and instead advocated the donation of the embryos to an infertile couple. *Id.* at 604. Because Mary Sue sought to donate the embryo to another couple and had no intention of becoming a parent herself, the court determined that her interests in the embryos were outweighed by Junior's interest in avoiding the inevitable parental connection he would feel if the embryos were ultimately permitted to be implanted. *Id.*

219. The *Davis* court noted that the "impact that this unwanted parenthood would have" should be considered in light of the circumstances of the particular case. *Id.* at 603. Turning to the specific facts of the *Davis* case, however, the court's reasoning appears to provide a much broader rule that is universally applicable to embryo disputes. *Id.* at 604 ("Ordinarily, the party wishing to avoid procreation should prevail."). This broader rule was adopted by the *J.B.* court, suggesting that, in reality, the courts are applying a per se

Further, the reliance on biology as the underpinning of parenthood is belied by other areas of family law. The presumption applied in the context of frozen embryo disputes—that the parent-child bond is primarily biological—clearly contradicts the presumption applied in the context of child custody disputes—that the parent-child bond matures and develops into a relationship that is more than a purely biological connection. In contested custody disputes, courts examine the strength of the parent-child relationship in assessing which parent to award primary custody of the child.²²⁰ The court never presumes that a parent-child relationship exists based on a mere biological relationship with the child but rather examines the closeness of the connection between the parent and child.²²¹ Additionally, the necessity of child support enforcement mechanisms undermines the

rule regarding the biological connection and parenthood. *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (“Because ordinarily the party choosing not to become a biological parent will prevail, we do not anticipate increased litigation as a result of our decision.”). For a discussion of the limitations of the connection between biology and parenthood, see Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 149-56 (2000).

220. See Woodhouse, *supra* note 35 (discussing the application of the best interest of the child test in custody disputes). In the majority of custody disputes over live children, both parents do have a biological connection. However, the fact that the court does not assume that a strong parent-child relationship exists between the child and each of his parents suggests that such an assumption in an embryo dispute is misplaced. While most courts applying the best interest of the child standard in a custody dispute presume that a connection to both parents is in the best interest of the child, this is a different inquiry. I do not intend to challenge the accuracy of this presumption, rather I intend to question the *per se* connection between biology and parenthood that is relied on by the courts in embryo disputes.

221. One prevalent theme in family law is the recognition of the role and importance of bonding in the development of the parent-child relationship. Hurwitz, *supra* note 219, at 158-67. Scientific studies have long supported the importance of a close, or bonded, relationship between a parent and child in the healthy development of children. *Id.* at 166. Some scientific research even suggests that parent-child bonding can exist between a pregnant mother and her gestating fetus. *Id.* at 159-60. Courts, relying on scientific and social research, often examine the “closeness” of the bond between a parent and child when making child custody and visitations determinations.

While scientific studies may recognize a parent-child bond in prebirth interaction between an expectant mother and her fetus, the parent-child bond recognized in family law contexts is typically limited to a recognition that the parent-child bond is not created solely out of a biological connection, but rather is developed and intensified with time and interaction. *Id.* at 158-67. This is evident through the best interest of the child test employed by courts in custody disputes. Under the best interest of the child test, the court examines several factors to determine which parent to award custody. *Id.* at 169-74 (discussing the application of the best interest of the child test in IVF cases). One factor in this test is the strength of the parent-child bond. *Id.* at 172-74. The court examines the relationship between the child and each parent to determine whether the child has a close, bonded relationship with each and whether a stronger bond exists with one. *Id.* The fact that the court examines the child’s relationship with each parent under the best interest of the child test suggests that the parent-child bond is not primarily biological. *Id.* While each parent is biologically related to the child, the court does not presume that a parent-child bond exists nor is particularly strong. *Id.* Rather, the court examines each parent-child relationship with an expectation that one relationship likely is more developed than the other. *Id.*

presumption that a biological connection with a child will necessarily engender feelings of parental connection to a child.²²² While an individual gamete provider may oppose implantation of an embryo out of a concern that he or she will recognize a parental connection with the child simply because of a biological connection, the divergent treatment of biology in these other areas of family law undermines the strong reliance on biology in embryo disputes.

The adversarial model exacerbates the courts' over-reliance on the primacy of biology in defining parenthood. Under the procreational rights model, the court must decide which of the progenitors has the stronger interest in the embryo.²²³ Therefore, the court must attempt to identify and define the nature of the right to procreation. The right to procreation, however, has never been clearly defined by the United States Supreme Court.²²⁴ It has been viewed by most courts as having several potential component parts: the right to bear children,²²⁵ the right to raise children,²²⁶ and the right to companionship with one's children.²²⁷ Aspects of parenthood that extend beyond the genetic connection between the parent and the child, however, are very difficult to assess when the child has yet to be born or even gestated. Therefore, most courts faced with the difficult task of trying to weigh an individual progenitor's interests in his or her cryogenically preserved embryos focus on one aspect of procreation that is most readily observable and definable—the genetic connection between the progenitor and the embryo.

To avoid the necessity of reliance on biology, embryo disputes should be resolved under an alternative model of dispute resolution that does not require the balancing of the progenitors' procreational interests. Under an alternative dispute resolution model, the progenitors will be able to address their true interests in the embryo and decide whether they believe they possess feelings of compelled parenthood that courts currently reason exists with a biological connection. Moreover, an alternative dispute resolution model will permit the parties to consider other interests they may possess in the resolution of their embryo dispute which are not readily connected with their interest in procreation.

222. See generally Erika M. Hiester, Note, *Child Support Statutes and the Father's Right Not to Procreate*, 2 AVE MARIA L. REV. 213 (2004).

223. See *Davis*, 842 S.W.2d at 603-04.

224. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 366-69 (1991) (discussing the Supreme Court's interpretation of the right of procreation).

225. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977).

226. *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000).

227. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ."); see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

B. The Role of Intention in Parenthood and Procreational Autonomy

Unlike the procreational rights balancing test which focuses on the constitutional interests of the progenitors, the contract theory approach focuses on the intention of the progenitors to resolve the embryo dispute.²²⁸ For courts utilizing the contract theory approach and the contemporaneous mutual consent model, the embryo dispute primarily raises issues of personal autonomy and self-identity.²²⁹ Specifically, the decision to utilize the embryo is viewed as a choice to pursue parenthood or identify oneself as a parent.²³⁰ Because, under this model, the embryo dispute is laden with choices of autonomy and self-identity, the progenitors' intended use or disposition of the embryo forms the basis for the court's resolution.²³¹

For the contract theory approach, the challenge to personal autonomy arises when the court injects its judgment into the embryo dispute by denying enforcement of the prior directives.²³² The characterization of the decision to utilize or dispose of the embryo as one implicating personal autonomy or self-identity does not, however, sufficiently account for the true nature of the decision. While the decision to direct the use of one's own gametes is an independent choice clearly linked to personal autonomy, decisions regarding embryos are not so clearly linked to such an interest.²³³ The embryo, unlike gametes, is the combined genetic creation of two individuals.²³⁴ Each individual's sense of personal autonomy is linked to his or her own genetic, gametic contribution.²³⁵ The embryo, however, is an entity separate from the person of each progenitor.²³⁶ It is not an extension or a part of the person of the progenitor. Because the embryo is not associated with the person of either progenitor, the connection between personal autonomy—a theory resting on the ability of the individual to control his or her own person—and the decision regarding disposition of the embryo is not as strong as the contract theory suggests.²³⁷

228. *Kass v. Kass*, 696 N.E.2d 174, 179-81 (N.Y. 1998).

229. *In re Marriage of Witten III*, 672 N.W.2d 768, 780-82 (Iowa 2003); *Kass*, 696 N.E.2d at 180.

230. See Coleman, *supra* note 74, at 114-19.

231. *Witten III*, 672 N.W.2d at 780-82; *Kass*, 696 N.E.2d at 180 (“To the extent possible, it should be progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.”).

232. See *Witten III*, 672 N.W.2d at 780-82; *Kass*, 696 N.E.2d at 180.

233. Hurwitz, *supra* note 219, at 153-54 (discussing the distinction between claims of ownership over gametes and claims of ownership over embryos).

234. *Id.*

235. *Id.* See generally Robertson, *supra* note 4, at 457-60.

236. Hurwitz, *supra* note 219, at 153-54.

237. *Id.* at 153-56. I do not intend to suggest that there are no contexts in which notions of privacy and personal autonomy can be raised when an embryo has been created. In the context of abortion, the gestating mother has a recognized privacy interest which will

The contemporaneous mutual consent model adds an additional complexity into the personal autonomy analysis, creating more tension for this justification. The contemporaneous mutual consent approach shares disdain for the court's interference in the embryo dispute.²³⁸ In addition to the challenge to personal autonomy by the court, the contemporaneous mutual consent model views the progenitors, acting through the prior directive, as limiting each other's personal autonomy.²³⁹ Under this model, the prior directive gives a progenitor ultimate "veto" power over the other progenitor should he or she change his or her mind when the time for the disposition event arises.²⁴⁰ Because this model is premised on the idea that both progenitors should maintain control over the embryo until the time of the disposition, the use of the prior directive by one progenitor to bind the other to a prior decision is considered a challenge to the personal autonomy of the progenitor who no longer concedes to the original decision.²⁴¹

This additional premise for the use of personal autonomy is problematic. The contemporaneous mutual consent model's attempt at eliminating another's ability to veto a decision appears to be consistent with traditional notions of personal autonomy. Specifically, one should be able to make decisions about one's person without challenge from another.²⁴² However, the proffered resolution of this veto power itself links the decisions of the progenitors together. To resolve the embryo dispute, the contemporaneous mutual consent model *requires* both parties to come to an agreed upon resolution for the embryo before the court will be empowered to act.²⁴³ Therefore, the individual's decision is once again linked to the decision of another, undermining reliance on notions of personal autonomy as a justification for the use of the parties' intention to resolve embryo disputes.

The contract theory and contemporaneous mutual consent approaches also rest on the principle that the decision regarding disposition of the embryo triggers notions of self-identity.²⁴⁴ Namely, these approaches presume that the decision to utilize the embryo permits

permit her to abort an embryo or fetus. This interest, however, is triggered because of the gestating mother's interest in her own body and not her interest in the gestating embryo or fetus. *See* Davis v. Davis, 842 S.W.2d 588, 597 n.20 (Tenn. 1992) (distinguishing a couple's agreement regarding an abortion from a couple's agreement regarding the disposition of preembryos).

238. *See In re Marriage of Witten III*, 672 N.W.2d 768, 781 (Iowa 2003).

239. *See id.* at 782-83.

240. *See id.*

241. *See id.*; Coleman, *supra* note 74, at 95-98.

242. Coleman, *supra* note 74, at 95-98.

243. *Witten III*, 672 N.W.2d at 782-83.

244. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); *see also* Coleman, *supra* note 74, at 95-98.

the progenitor to attempt to define himself or herself as a parent.²⁴⁵ The characterization of the embryo dispute as principally based upon the progenitors' ability to control their self-identity is similarly flawed.

Self-identity is the ability of the individual to define himself or herself. In the embryo dispute, however, the progenitor is not redefining his personal identity. Rather, he is attempting to redefine his identity in relation to another—that is, through a parent-child relationship.²⁴⁶ Because the relationship needs to be completed to create this new identity, the issue is less that of self-identity and more that of relational identity.²⁴⁷

Recognizing this as a relational concept raises the issue of whether intention should drive the resolution of the embryo dispute. Under a purely self-identity rationale, the intention of the individual to define himself would logically form the basis of the court's focus.²⁴⁸ Because the progenitor is attempting to define himself in a way which cannot occur through his will alone because this definition requires the existence of a legally recognized parent-child relationship, arguably the focus should not rest solely on his intention.

Further, because the way that the progenitor is attempting to define himself requires a parent-child relationship, the court should consider the extent to which intention actually plays a part in creating this relationship.²⁴⁹ Recent disputes regarding custody of children born through collaborative IVF therapy²⁵⁰ have caused courts to look more closely at the role of intention in creating a legally recognizable parent-child relationship.²⁵¹ Historically, intention has not played a primary role in determining parentage.²⁵² In fact, legal responsibilities to offspring have been historically enforced despite lack of intention to assume a parent-child relationship.²⁵³ While it may ultimately

245. See *Kass*, 696 N.E.2d at 180; *Coleman*, *supra* note 74, at 95-98; see also *Hurwitz*, *supra* note 219, at 140-49 (discussing the role of intention in determining parenthood in cases of collaborative reproduction).

246. *Hurwitz*, *supra* note 219, at 140-49.

247. *Id.*; see *Radhika Rao*, *Reconceiving Privacy: Relationship and Reproductive Technology*, 45 UCLA L. REV. 1077, 1116-21 (1998) (reasoning that the right to privacy, in the context of artificial reproduction, should be considered a relational rather than individual right).

248. See generally *Hurwitz*, *supra* note 219.

249. See *id.* at 146-49; see also *Hill*, *supra* note 224, at 413-18.

250. Collaborative IVF therapy involves more than two individuals. It may involve the use of genetic material from donors such as an egg donor or sperm donor or the use of a surrogate.

251. See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Cal. Ct. App. 1998) (examining the effect parental intent had in creating legislative default rules).

252. *Hurwitz*, *supra* note 219, at 142.

253. *Id.* ("Many people who become parents unintentionally assume the rights and responsibilities of legal parenthood either voluntarily or by court order."). See generally *Heister*, *supra* note 222 (discussing enforcement of mandatory child support provisions where children are born out of coital reproduction).

be determined that the contract theory model's primary reliance on intention does provide the best analysis for resolution of embryo disputes, the justification for the use of intention should be further examined.

While it is clear that courts resolving embryo disputes under the contract theory model prioritize the progenitors' decision regarding the use of the embryo, the adversarial system fails to fully reveal the progenitors' intentions. First, the context in which embryo disputes arise complicate the courts' ability to discover the progenitors' intention with respect to the disposition of their embryos. The majority of progenitors do not create written agreements regarding the disposition of their embryos when they undergo IVF treatments.²⁵⁴ This requires courts to find intent from informed consent forms.²⁵⁵ The use of such forms is problematic because most progenitors perceive these as agreements with the IVF clinic and not as binding agreements between each other.²⁵⁶ Further, the majority of informed consent documents are entered into without the advice of counsel and are generic forms which do not explicitly address the many possible contingencies that may face the progenitors during the IVF treatment process.²⁵⁷

Second, intention is a transmutable concept. Courts struggle with when to consider intent—when the IVF process begins or when the disposition event is to take place.²⁵⁸ Issues such as whether to consider evidence outside of the contract raise similarly complicated questions that have not been uniformly resolved.²⁵⁹ Because of the private nature of any agreements between progenitors, usual rules of contract interpretation may not provide assistance in examining these agreements.

Given the difficulties courts face in assessing the progenitors' intent, an alternative dispute resolution model should be considered. Unlike courts, which are bound by principles of contract interpretation and rules of evidence, other models of dispute resolution do not have the same limitations. Further, an alternative dispute resolution model which permits the progenitors to define relevant issues and determine the role their intention should play in determining the disposition of the embryo truly empowers the progenitors as the deci-

254. See Waldman, *supra* note 27, at 922-26.

255. See *id.* at 922-23.

256. Daar, *supra* note 92, at 198 (quoting *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056 (Mass. 2000), where the Massachusetts Supreme Judicial Court held that the consent form "was intended only to define the donors' relationship as a unit with the clinic"); Waldman, *supra* note 27, at 921-22.

257. Waldman, *supra* note 27, at 922-26.

258. Compare *In re Marriage of Witten III*, 672 N.W.2d 768, 779-83 (Iowa 2003), with *Kass v. Kass*, 696 N.E.2d 174, 179-82 (N.Y. 1998).

259. See *Witten III*, 672 N.W.2d at 779-83; *Kass*, 696 N.E.2d at 179-82.

sionmakers. At the heart of the contract theory model is the rationale that progenitors should be autonomous and enabled to define themselves through relationships. A model of dispute resolution that has less restrictive rules of contract interpretation will provide the progenitors with the ability to make such an autonomous decision.

V. A NEW PARADIGM: THE RESOLUTION OF FROZEN EMBRYO DISPUTES UNDER AN ALTERNATIVE DISPUTE RESOLUTION MODEL

Unlike the adversarial process, alternative dispute resolution models provide for more flexible decisionmaking.²⁶⁰ This flexibility permits parties to consider issues not central to recognized legal interests in the dispute and to arrive at creative solutions not available under the adversarial process.²⁶¹ In the context of embryo disputes, the rigidity of the adversarial model generates overly simplistic tests to resolve disputes between progenitors over the embryo.²⁶² This Part considers whether the previously identified shortcomings of the adversarial model can be remedied through an alternative dispute resolution model.

A. Reframing the Legal Status of the Embryo

Because the legal status of the embryo dictates the legal rights of the progenitors and frames the relevant issues to be considered in reaching a resolution to the embryo dispute, the court must resolve this issue before rendering a judgment under an adversarial model. As discussed in Part II, *supra*, the majority of courts entertaining embryo disputes has resolved that the embryo is property deserving of special respect.²⁶³ In practice, this status attributes more property-like characteristics to the embryo than personhood characteristics.

The more difficult question is whether the treatment of the embryo as “property-like” has any significance. Most would agree that there is something inherently objectionable about defining an embryo as pure property. The embryo, while not human life,²⁶⁴ represents the potential for new human life and is a reminder of our collective humanity.²⁶⁵ Professor John Robertson explains that because of these

260. See generally Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 429-31 (1986).

261. EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 4 (1997).

262. See *supra* Part III.

263. See *supra* text accompanying notes 56-64.

264. But see LA. REV. STAT. ANN. § 9:123 (West, Westlaw through 2005 Regular Sess. Acts) (attributing personhood to the embryo).

265. Robertson, *supra* note 4, at 447 (“Precisely because the early embryo is genetically unique and has the potential to be more, it operates as a powerful symbol or reminder of the unique gift of human existence.”).

attributes, the embryo serves as a “symbol” of human life.²⁶⁶ Thus, as a symbol of life, the embryo deserves special respect or treatment by courts and legislatures.²⁶⁷

Collectively, we may agree that the relatively hollow designation of frozen embryos as a special form of property is the best solution given the difficulties with assigning a legal status to the embryo and the ramifications of any designation as pure property or personhood. The more troubling aspect of the “special respect” designation, however, is that it is set against a backdrop of highly emotionally charged individual beliefs about the nature of the origin of human life.²⁶⁸ Some progenitors are likely to be of the opinion that the embryo is human life and would strongly oppose any solution to the embryo dispute which is premised on the assumption that the embryo is property, especially those solutions which would result in the destruction of the embryo.²⁶⁹

Recognition of individual beliefs about the nature of the embryo, however, is not possible under an adversarial model of dispute resolution. In an adversarial model, the court must determine the nature of the rights of all those involved in the dispute before attempting to adjudicate the dispute.²⁷⁰ Because the nature of the progenitors’ rights is linked the status of the embryo, the court must attribute, either explicitly or implicitly, a legal status to the embryo. At a minimum, the court must reject those designations that would conflict with the determination it reaches regarding which progenitor is to be awarded the embryo.²⁷¹ For example, while a progenitor may individually believe that the embryo is human life, the court must reject such a determination if it is to award the embryo to another progenitor who seeks to have the embryo discarded.²⁷² Future embryo disputes would be resolved under this legal precedent, requiring the court to enforce its prior determination of the legal status of the embryo even in the face of disagreement by both progenitors.

Because the adversarial model requires a determination of the legal status of the embryo but has failed to provide a meaningful status for embryos generally and has constrained individual views of the embryo, a new model of dispute resolution should be considered to resolve embryo disputes. Embryo disputes should be resolved through a form of dispute resolution that is not dependent upon a

266. *Id.* (“Because it stimulates consciousness of the human community more directly and efficiently than other human tissue, it deserves special consideration even if it is not itself a moral subject or rights-holder.”).

267. *Id.*

268. Coleman, *supra* note 74, at 107-09; see Robertson, *supra* note 4, at 444-50.

269. Robertson, *supra* note 4, at 444.

270. See BRUNET & CRAVER, *supra* note 261, at 4.

271. See discussion *supra* Part II.A.

272. *Id.*

general determination of the embryo's legal status. Rather, these disputes should be resolved under a model that permits the progenitors to introduce their personal notions about the nature of the embryo as they determine the appropriate disposition of the embryo.²⁷³ By providing progenitors with a model of resolution that permits them to express their own personal opinions about the nature of the embryo, true "special respect" is afforded to the embryo. After all, it is the progenitors who likely will use the embryo to achieve a pregnancy and will be charged with the responsibilities associated with parenthood.²⁷⁴ Enabling progenitors to define the nature of the embryo and attribute to it those characteristics of personhood or property the progenitors find deserving promotes the embryo as a symbol of potential humanity and optimizes the social desire to accord respect to the perpetuation of humanity.

In addition to permitting progenitors the opportunity to introduce their individual beliefs regarding the nature of the embryo into the dispute resolution process, the rejection of an adversarial model of resolution for embryo disputes will minimize the effect of precedent on future cases.²⁷⁵ As no legal determination of the status of the embryo is needed to resolve the dispute, there is no precedential impact to the resolution of any individual embryo dispute. Different progenitors can resolve the embryo dispute without regard to resolutions in prior embryo disputes by other progenitors.

Finally, searching for a new dispute resolution model to resolve embryo disputes recognizes the symbolic nature of the embryo on a societal level. By recognizing the need to depart from traditional adversarial models of dispute resolution, the embryo is truly provided "special respect."

B. Correcting Presumptions of the Progenitors and the Right to Parenthood and Procreation

The adversarial process limits the scope of relevant interests involved in the embryo dispute to those consistent with current notions of constitutionally protected interests in privacy.²⁷⁶ Because a court, under an adversarial model, is bound to render its decision in a

273. See BRUNET & CRAVER, *supra* note 261, at 4 (discussing the advantages of alternative dispute resolution models). In this Article, I do not promote any particular model of alternative dispute resolution (ADR). While I recognize that some forms of ADR, such as mediation, might provide the most optimal means of resolving embryo disputes, this Article takes the important first steps of analyzing the shortcomings of the adversarial model in the context of embryo disputes and laying the groundwork for the selection of the most optimal form of ADR.

274. See Coleman, *supra* note 74, at 104-09 (arguing that there is social utility in resolving embryo disputes in a manner that "promote[s] the value of parental responsibility").

275. BRUNET & CRAVER, *supra* note 261, at 6-10.

276. See Hill, *supra* note 224, at 366-69.

manner consistent with constitutional notions of the right to procreation, it may not consider the individual progenitor's interests in the embryo dispute which are inconsistent with these recognized privacy interests.

The recognition of the progenitor's interest in procreation, while assisting courts to frame the dispute, has not provided for uniformity in the resolution process. As discussed above, there are varying interpretations of the nature of the interest in procreation and the point at which the interest is implicated.²⁷⁷ The majority of the conflicting interpretations of the right to procreation in embryo disputes can arguably be traced back to the difficulties with framing the legal status of the embryo and the inability of the court to answer clearly the question of what is the origin of human life.²⁷⁸

In addition to these limitations, focusing on the interest in procreation limits consideration of other interests the progenitors may have in the resolution of the embryo dispute. Some interests, such as an individual progenitor's belief that the embryo is human life or that the embryo should be awarded based on the significance of the physical contribution or emotional attachment to the embryos, are interests closely held by the progenitors that will not be considered by the court under an adversarial model.²⁷⁹ The court must reject these interests because they have no legal basis.²⁸⁰ Other interests, such as one progenitor's reliance on the other progenitor's agreement to undergo IVF, are too difficult for the court to assess.²⁸¹

An additional limitation of the adversarial process is its failure to recognize and adjust to the possible tensions created by the prior relationship of the progenitors and their decision to undergo IVF treatment. As discussed above, it is difficult for a court to pinpoint, after the relationship between the progenitors has deteriorated, the basis for each progenitor's decision to undergo IVF.²⁸² Because the decision to undergo IVF treatment may be emotionally charged, it may be the product of coercion by the partner progenitor.²⁸³ Further, progenitors turning to IVF treatment because of a life event that may eliminate future ability to achieve genetic parenthood²⁸⁴ may have relied on the promise of a partner progenitor to continue IVF treatment

277. See discussion *supra* Part II.B.

278. See discussion *supra* Parts II.A-B.

279. *J.B. v. M.B.*, 783 A.2d 707, 712 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 601-02 (Tenn. 1992).

280. *J.B.*, 783 A.2d at 712, 719; *Davis*, 842 S.W.2d at 601-02.

281. *In re Marriage of Witten III*, 672 N.W.2d 768, 779-81 (Iowa 2003); see Coleman, *supra* note 74, at 123-25 (discussing challenges to reliance arguments presented in embryo disputes).

282. Coleman, *supra* note 74, at 123-25.

283. *Id.* at 102-04.

284. See, e.g., *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998); *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002).

until pregnancy is achieved. Courts that award an embryo to one progenitor over the objection of the other without recognition of these potential issues do so in spite of possible coercion and without any weight given to the reliance of the progenitors on the completion of the IVF process.

Because the adversarial model fails to fully address the interests a progenitor has in the embryo dispute and fails to account for the emotional aspects of the progenitor's procreative choice, a different model of dispute resolution should be considered for embryo disputes. Under a different form of dispute resolution, the parties may direct the disposition of the embryo in light of the nature of their interests in the dispute as they perceive them to be. For example, a progenitor may consider her interests in procreation, parenthood and personal autonomy in addition to other interests.²⁸⁵ Moreover, the progenitors can determine which interest they consider to be of primary importance in the determination of what to do with the embryos in dispute. For example, the progenitor may have strong religious beliefs and would consider the destruction of the embryo an immoral act.²⁸⁶ While the court does not consider these interests directly because they are not traditionally considered to be implicated in decisions pertaining to embryos, the parties can choose to make decisions regarding the embryo that are consistent with other interests they may feel take precedence—such as religious beliefs or inability to conceive biological children in any other way.²⁸⁷

Further, by freeing the embryo dispute from the confines of the interest in procreation, the individual progenitor's ability to make personal decisions regarding procreation will be better protected. The interest in procreational autonomy will be better served because the progenitors will be empowered as the decisionmakers and they will maintain the control over the embryo—the creation from their genetic material.

VI. CONCLUSION

Given the nature of the dispute and the issues to be resolved, the adversarial model is a particularly ineffective form of dispute resolution for embryo disputes. To render its decision, the court must first define the legal status of the embryo and identify the appropriate role of the progenitors. The courts, as is reflected in the divergent interpretations of the legal status of the embryo and the progenitors' interests, however, do not easily arrive at these determinations.

285. See *Kass*, 696 N.E.2d at 174.

286. Coleman, *supra* note 74, at 87-88.

287. BRUNET & CRAVER, *supra* note 261, at 4 (explaining that one of the advantages of alternative dispute resolution is that "the parties control the result, which can be completely inconsistent with prevailing substantive legal rules").

While consistently reiterating the need to recognize special respect for the embryo and the equality of the progenitors' rights to control the disposition of the embryo, the adversarial model fails to provide such recognition to either the embryo or the progenitors. Rather, the adversarial model interposes a primarily property-like view of the embryo, despite the progenitors' individual beliefs about the nature of the embryo. The adversarial model also removes the decisionmaking authority from the progenitors while simultaneously promoting the interest of the progenitor seeking to discard the embryo over the interest of the other progenitor.

In addition to defining the legal status of the embryo and the roles of the progenitors, the adversarial model requires the parties' relevant interests in the dispute to be identified and considered. The embryo dispute, unlike other property disputes, implicates the complex interest in procreation. Forced to evaluate the progenitors' right to procreation in the unique setting of an embryo dispute, courts have failed to provide consistent or accurate interpretations of the interest in procreation and the relationship of this interest to the interest in parenthood.

The failings of the adversarial model can be remedied by resolving embryo disputes under an alternative dispute resolution model. By rejecting the rigid framework of the adversarial model, the progenitors can be permitted to control and define the relevant issues and interject their own understandings of the nature of the embryos and their interests in their disposition. Further, an alternative dispute resolution model would be more consistent with the current principles understood by the courts in the adversarial model because the embryo will be accorded respect by permitting the progenitors to control its disposition in a manner consistent with their interests.