

Comment,  
THE LEGAL STATUS OF FROZEN  
PRE-EMBRYOS WHEN A DISPUTE  
ARISES DURING DIVORCE

## I. Introduction

The freezers of United States fertility clinics are bulging with approximately 400,000 frozen embryos according to a survey released in May 2003.<sup>1</sup> The survey, conducted by the Society for Assisted Reproductive Technology and Rand Corp. of Santa Monica, California is the first national count ever done and revealed a number much larger than previously anticipated.<sup>2</sup> Of the nearly 400,000 about three percent were earmarked for research; two percent for destruction; two percent for donation to women; and one percent for quality-assurance studies.<sup>3</sup> The majority, about 87 percent, were reserved for ongoing fertility efforts.<sup>4</sup>

In this area the law has not kept up with science. Many unanswered questions remain regarding the legal status of frozen pre-embryos. This comment discusses the legal status of frozen pre-embryos in the context of a divorce. Part II gives a brief background on the in vitro fertilization (IVF) and cryopreservation process. Part III analyses the legal arguments made on the legal status of frozen pre-embryos and how the few courts that have faced this issue have ruled. Part IV offers suggestions on what can be done to minimize the conflict in the event of a future divorce dispute. This section also looks at what an attorney can do for the client after he or she is already in the midst of a dispute.

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<sup>1</sup> Rick Weiss, *400,000 Human Embryos Frozen in U.S.*, Washington Post (2003), available at <http://www.washingtonpost.com>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## II. Background

In vitro fertilization is a way for infertile couples to conceive a child of their own.<sup>5</sup> The medically accepted definition of infertility is the inability to conceive after one year of intercourse without contraception.<sup>6</sup> Under this definition, infertility could be the result of impatience rather than inability to conceive a child.<sup>7</sup>

A woman usually produces only a single egg each month capable of fertilization.<sup>8</sup> The IVF process involves the use of medication to stimulate the ovaries to produce more than a single egg.<sup>9</sup> The woman then undergoes a surgical procedure to remove the eggs from her ovaries.<sup>10</sup> The number of eggs obtained at follicle aspiration is difficult to predict because the response of the ovary to the medication varies.<sup>11</sup> Because a major test for egg quality is its capacity to be fertilized, and the quality is difficult to determine before fertilization, sperm is placed with all the eggs.<sup>12</sup>

It is believed that transferring three embryos optimizes the chance for pregnancy.<sup>13</sup> Even when only one to three eggs are transferred to the woman's uterus, over 75% of the time only a single baby results.<sup>14</sup> Transferring more than three embryos increase the risk of multiple pregnancy (twins, triplets, etc.) without increasing the overall chances of pregnancy.<sup>15</sup>

If more embryos are produced than are transferred, a couple may choose the option of cryopreservation.<sup>16</sup> The cryopreservation process consists of freezing the embryos in liquid nitrogen at

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<sup>5</sup> Rachel Polinger-Hyman, *Erecting Women: Contracting Parenthood From Marriage to Divorce*, 2 HOUS. J. HEALTH L. & POL'Y 241 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The Center for Allied Reproductive Science available at [http://www.ivf-et.com/fact\\_embryo.html](http://www.ivf-et.com/fact_embryo.html)

<sup>9</sup> *Id.*

<sup>10</sup> Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000).

<sup>11</sup> The Center for Allied Reproductive Science available at [http://www.ivf-et.com/fact\\_embryo.html](http://www.ivf-et.com/fact_embryo.html)

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

-276 degree Celsius.<sup>17</sup> It is not recommended that unfertilized eggs be frozen for later use.<sup>18</sup> While cryopreservation of sperm has been available for decades, the freezing of an egg produces problems.<sup>19</sup> The egg is larger with a high water content and is prone to ice crystal damage.<sup>20</sup> World wide there has been only about sixty babies born using cryopreserved, unfertilized eggs.<sup>21</sup>

When a couple decides to use the frozen embryos in an attempt to achieve pregnancy the embryos are thawed and examined to determine if they are medically appropriate (viable and normally developing) for transfer.<sup>22</sup> The transfer process is the same for a frozen embryo as for a "fresh" embryo obtained in the IVF process.<sup>23</sup> The length of time that a frozen embryo may retain its viability is unknown.<sup>24</sup>

### III. The Legal Arguments

#### A. Embryo as Life

Only one court has come to the conclusion that life begins at conception.<sup>25</sup> That decision came from the trial court in *Davis v. Davis*.<sup>26</sup> Mary Sue Davis and Junior Davis married in 1980.<sup>27</sup> Mary Sue became pregnant but unfortunately suffered a tubal pregnancy which resulted in the removal of her right fallopian tube.<sup>28</sup> This tubal pregnancy was followed by four others during the course of the marriage and Mary Sue decided to have her left fallopian tube ligated, thus leaving her unable to conceive a child

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<sup>17</sup> *Id.*

<sup>18</sup> <http://www.savemyeggs.com/introduction.htm>

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The Center for Allied Reproductive Science at [http://www.ivf-et.com/fact\\_embryo.html](http://www.ivf-et.com/fact_embryo.html)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000).

<sup>26</sup> *Davis v. Davis*, 1989 WL 140495 (Tenn. Cir. Ct. sep 21, 1989)

<sup>27</sup> *Davis v. Davis*, 842 S.W.2d 588 at 591

<sup>28</sup> *Id.*

naturally.<sup>29</sup> In vitro fertilization became the couple's only option in their attempt to become parents.<sup>30</sup>

It was not explained to the Davis' how cryopreservation would change the nature of IVF for them.<sup>31</sup> Also, there is no indication that the couple ever considered the ramifications of storage beyond the few months it would take to transfer the remaining pre-embryos if that became necessary.<sup>32</sup> No agreement existed between the couple and the clinic or Mary Sue and Junior.<sup>33</sup>

When Junior Davis filed for divorce in February of 1989 a dispute arose concerning the remaining seven cryopreserved pre-embryos.<sup>34</sup> Mary Sue requested control of the frozen embryos to have them implanted in an effort to become pregnant.<sup>35</sup> Junior wanted to leave the embryos frozen until he decided if he wanted to become a parent outside the bounds of marriage.<sup>36</sup>

The trial court determined that life began at conception and concluded that the pre-embryos were "children in vitro."<sup>37</sup> The court, using the doctrine of *parens patriae*, held that it was in the best interest of the children to be born rather than destroyed and awarded custody to Mary Sue.<sup>38</sup> The Court of Appeals and the Supreme Court of Tennessee overruled this holding determining that the embryos were not "persons," but "potential life."<sup>39</sup> Both decisions are discussed below.

The state of Louisiana has the most comprehensive and restrictive law regarding in vitro fertilization.<sup>40</sup> Louisiana statute explicitly states that "an in vitro fertilized human ovum exists as

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 588

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 593

<sup>38</sup> *Id.*

<sup>39</sup> See *Davis v. Davis*, 1990 WL 130807 and *Davis v. Davis*, 842 S.W.2d 588.

<sup>40</sup> Peter E. Malo, *Deciding Custody of Frozen Embryos: Many Eggs Are Frozen Who Is Chosen?* 3 DEPAUL J. HEALTH CARE L. 307 (2000)

a juridical person.”<sup>41</sup> As a juridical person, the human ovum is recognized as a separate entity apart from the medical facility or clinic where it is stored.<sup>42</sup> As to ownership of the pre-embryo, Louisiana statutory law states that an in vitro fertilized human ovum is a “biological human being which is not the property of the physician. . . , the facility. . . , or the donors of the sperm and ovum.”<sup>43</sup> Even though the donors do not own the pre-embryos, they still owe them a high duty of care.<sup>44</sup>

Because the pre-embryo is recognized as a person, Louisiana forbids its intentional destruction.<sup>45</sup> Should the donors decide to renounce their parental rights, the pre-embryo must be made available for adoptive implantation.<sup>46</sup> The donors may renounce their parental rights in favor of another married couple, but the other couple must be willing and able to receive the pre-embryo.<sup>47</sup> Any disputes between parties regarding the pre-embryo are to be resolved using “the best interest of the in vitro fertilized ovum” standard.<sup>48</sup>

The state of Missouri asserts that “the life of each human being begins at conception,” and “unborn children have protectable interests in life, health, and well being.”<sup>49</sup> The statute goes on to state the term “unborn child” “shall include all unborn child or children. . . from the moment of conception until birth *at every stage of biological development.*”<sup>50</sup> This language has been challenged, but was allowed to stand by the United States Supreme Court at least with respect to tort and probate law.<sup>51</sup> Although the Missouri statute does not specifically speak to frozen pre-embryos, considering the state’s high respect for life, it can be inferred that they would be protected as well.

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<sup>41</sup> LA R.S. 9:123

<sup>42</sup> LA R.S. 9:124

<sup>43</sup> LA R.S. 9:126

<sup>44</sup> LA R.S. 9:130

<sup>45</sup> LA R.S. 9:129

<sup>46</sup> LA R.S. 9:130

<sup>47</sup> *Id.*

<sup>48</sup> LA R.S. 9:131

<sup>49</sup> Mo. Rev. Stat. 1.205.1

<sup>50</sup> Mo. Rev. Stat. 1.205.3 (emphasis added)

<sup>51</sup> Webster v. Reproductive Health Services, 409 S.Ct. 3040 (1989)

### B. *Embryo as Property*

The most often cited case for the proposition that pre-embryos are property is *York v. Jones*.<sup>52</sup> Although not a dispute between a divorcing couple, it is the first decision of its kind to recognize a property right in human cells and also to state that the embryo was the property of the gamete providers.<sup>53</sup> This case involved a dispute between the parents of a pre-embryo and the fertility clinic where the pre-embryo were being stored.<sup>54</sup> Steven and Risa York were residents of New Jersey when they first consulted the Jones Institute.<sup>55</sup> However, during the course of their treatment the Yorks moved to California.<sup>56</sup> After they moved to California the Yorks returned to the Jones Institute on four separate occasions to undergo the in vitro fertilization process.<sup>57</sup> Prior to the last attempt in May of 1987 the Yorks signed a consent form that outlined the procedure for cryopreservation of the pre-embryos and the couple's rights in the frozen pre-embryos.<sup>58</sup> During the last procedure six eggs were retrieved from Risa and fertilized with David's sperm.<sup>59</sup> Five of the six pre-embryos were transferred to Risa's uterus and the one remaining pre-embryo was cryogenically preserved.<sup>60</sup>

A year after the pre-embryo was frozen the Yorks sought to have the pre-embryo transferred from the Jones Institute to a fertility clinic in California.<sup>61</sup> At the California clinic a doctor would thaw the pre-embryo and insert it in Risa's uterus using IVF.<sup>62</sup> The Yorks arranged for the transportation of the pre-embryo and wrote to the Jones Institute indicating their intent to

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<sup>52</sup> *York v. Jones*, 717 F. Supp. 421 (1989).

<sup>53</sup> Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000).

<sup>54</sup> *York v. Jones*, 717 F. Supp. 421 (1989).

<sup>55</sup> *Id.* at 423

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 424. The consent form explained that if more than five eggs were retrieved during the procedure the remaining fertilized eggs could be cryopreserved.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

transfer the pre-embryo to California.<sup>63</sup> Dr. Muasher, on behalf of the Jones Institute, refused the request for transfer in a letter dated June 18, 1988.<sup>64</sup> The Yorks brought suit against the Jones Institute for custody of their pre-embryo arguing that the Institute's continued control over the pre-embryos is contrary to the language of the Cryopreservation Agreement.<sup>65</sup> The Jones Institute, relying on other language within the agreement, argued that because there was no established protocol for a transfer of the pre-embryo to another clinic, the Yorks proprietary rights in the pre-embryos were limited to three specific "fates" enumerated in the agreement.<sup>66</sup>

The court began its analysis by stating that a bailor-bailee relationship had been created between the Yorks and the Jones Institute when the Cryopreservation Agreement was signed.<sup>67</sup> The court stressed that the essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor.<sup>68</sup> The court found the requisite elements of a bailment present in this case as the Institute had possession of the pre-embryo, recognized their duty to account for the pre-embryo in the Cryopreservation Agreement, and consistently referred to the pre-embryo as the property of the Yorks in the agreement.<sup>69</sup> The court essentially found that the Yorks

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<sup>63</sup> *Id.* at 424

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The agreement stated in pertinent part: "we may withdraw our consent and discontinue participation at any time without the prejudice and we understand our pre-zygotes will be stored only as long as we are active IVF patients at The Howard and Georgeanna Jones Institute For Reproductive Medicine or until the end of our normal reproductive years. We have the principle responsibility to decide the disposition of our pre-zygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both."

<sup>66</sup> *Id.* The agreement stated that should the Yorks no longer wish to attempt to initiate pregnancy they may chose one of three fates for the pre-embryo. The pre-embryo may be: 1) donated to another infertile couple, 2) donated for approved research investigation, 3) thawed but not allowed to undergo further development.

<sup>67</sup> *Id.* at 425

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

possessed a property interest in the pre-embryo and also a right to immediate possession.<sup>70</sup>

Another case in which the court based its decision on who “owned” the pre-embryos is *Cahill v. Cahill*.<sup>71</sup> Patrick D. Cahill and Deborah J. Cahill were married in 1993.<sup>72</sup> The couple, while living in Michigan, had difficulties conceiving and sought in vitro fertilization services from the University of Michigan.<sup>73</sup> The Cahills entered into a contractual relationship with the University.<sup>74</sup> The doctors at the University harvested a number of ova from the wife and six ova were subsequently fertilized with the husband’s sperm so as to become zygotes.<sup>75</sup> Three of the six zygotes were implanted into Mrs. Cahill’s uterus and the remaining three were frozen and placed in the University’s storage facilities.<sup>76</sup> Mrs. Cahill gave birth on November 11, 1995 to triplets of which one male child survives.<sup>77</sup>

The parties separated in 1996 and Mr. Cahill filed for divorce in Mobile, Alabama, where he was living at the time.<sup>78</sup> Mrs. Cahill, now living in Florida, filed a counterclaim seeking an award of the frozen zygotes located in the storage facility of the University.<sup>79</sup> Evidence presented at trial indicated that neither party could unilaterally obtain the zygotes from the University due to various documents the parties had executed before beginning the in vitro fertilization procedure.<sup>80</sup> The trial ordered both parties to produce a copy of the contract that was signed with the University regarding the zygotes for the Court’s review.<sup>81</sup> Neither party produced a signed copy of the agreement, however Mr. Cahill supplied the Court with a blank agreement form used by the University and stated that it was the same as the form

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<sup>70</sup> Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000).

<sup>71</sup> *Cahill v. Cahill*, 757 So.2d 465 (Ala. Civ. App. 2000).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 466

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 466

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*



contract signed by the parties.<sup>82</sup> The contract form contained the following pertinent language: “[The wife] and [the husband] agree that all control and direction of our [zygotes] will be relinquished to the Physicians of the Department of Obstetrics and Gynecology under the following circumstances: 1. A dissolution of our marriage by court order. . . 4. At any time by our/my election. 5. If we/I have not remained in contact with IVF Program for a period of time exceeding three years.”<sup>83</sup>

The trial court relying on the contact language ruled that the zygotes were not the property of either Mr. or Mrs. Cahill.<sup>84</sup> The trial court’s ruling stated that according to the only evidence presented, the University of Michigan appeared to be the current owner of the zygotes.<sup>85</sup>

Mrs. Cahill appealed the trial court’s award of the zygotes to the University of Michigan.<sup>86</sup> The Alabama Court of Civil Appeals stated that the trial court did not make an award of the zygotes to the University of Michigan, but reasoned that based on the evidence presented, the University “appeared” to be the owner of the zygotes.<sup>87</sup> The court in affirming the trial court’s decision stated that for particular property to be subject to being awarded to either party in a divorce proceeding, it must be demonstrated that the property is property of the marriage.<sup>88</sup> The trial court’s decision in effect left the issue to be litigated between the parties and the University of Michigan.<sup>89</sup>

Classifying the pre-embryo as property belittles the potential for life that pre-embryos possess<sup>90</sup> and does nothing to determine how to solve disputes between divorcing couples. Considering the pre-embryo as marital property would allow them to be disposed of in a property settlement, but if the parties do not agree as to that disposition, the courts are still going to have to decide the issue. The property distinction would do nothing to help

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<sup>82</sup> *Id.* at 466

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 467

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 468

<sup>89</sup> *Id.*

<sup>90</sup> Kate W. Lyon, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695 (2000).

guide judges in making the decision as to which party takes “possession” of the pre-embryo.

### *C. Embryo as Potential Life*

The Supreme Court of Tennessee in the *Davis* case described above<sup>91</sup> ultimately decided that pre-embryos “are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life.”<sup>92</sup> By the time the *Davis* case reached the Supreme Court the parties’ positions had shifted.<sup>93</sup> Both parties had remarried and Mary Sue no longer wanted to use the pre-embryos for herself, but wanted to donate them to a childless couple.<sup>94</sup> Junior was opposed to donation and still wanted the pre-embryos discarded.<sup>95</sup>

The court stated that the essential issue in this case was whether the parties would become parents.<sup>96</sup> The court stated that the right of “procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation.”<sup>97</sup> To resolve the dispute between the parties the court considered “the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”<sup>98</sup> The court stated that the burden of unwanted parenthood on Junior, “with all of its possible financial and psychological consequences,” was more significant than Mary Sue’s burden of knowing that the IVF procedures she underwent were futile and that the pre-embryos to which she contribute genetic material would never become children.<sup>99</sup>

The court held that disputes involving the disposition of pre-embryos produced by IVF should be resolved first by looking to the preference of the progenitors.<sup>100</sup> If there is a conflict between the parties, and there is a prior agreement concerning dis-

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<sup>91</sup> *Davis v. Davis*, 842 S.W.2d 588

<sup>92</sup> *Id.* at 597

<sup>93</sup> *Id.* at 590

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 597

<sup>97</sup> *Id.* at 601

<sup>98</sup> *Id.* at 603

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 604

position, the prior agreement should be carried out.<sup>101</sup> If no agreement exists the interests of both parties must be considered in making a decision.<sup>102</sup> The court did state that “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 the use of the pre-embryos in question.”<sup>103</sup>

The court’s decision in the Davis case stating that if a prior agreement exists it should be presumed valid and should be enforced as between the parties had a significant impact on later decisions concerning the disposition of frozen embryos.

#### D. Contract Enforcement

The high court of New York used a pure contract analysis in deciding *Kass v. Kass* stating “the subject of this dispute may be novel but the common-law principles governing contract interpretation are not.”<sup>104</sup> This case involved four consent forms provided by the hospital and signed by both the husband and the wife.<sup>105</sup> The relevant part of the consent forms stated that if the couple no longer wished to initiate pregnancy or were unable to make a decision regarding the disposition of the pre-embryos the “frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.”<sup>106</sup>

On June 7, 1993, barely three weeks after signing the consent forms, the couple drew up and signed an uncontested divorce agreement.<sup>107</sup> The agreement stated that the five frozen pre-embryos should be disposed of in the manner set out in the consent forms and that neither party would lay claim to custody of the pre-embryos.<sup>108</sup> However, on June 28, 1993 Maureen Kass informed the hospital of her marital problems by letter and ex-

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) at 180.

<sup>105</sup> *Id.* at 175

<sup>106</sup> *Id.* at 176

<sup>107</sup> *Id.* at 177

<sup>108</sup> *Id.*

pressed her opposition to the pre-embryos being released or destroyed.<sup>109</sup> When Maureen commenced the divorce action she requested sole custody of the pre-embryos so that she could undergo another implantation procedure.<sup>110</sup> Steve Kass opposed any further attempts by Maureen to achieve pregnancy and counterclaimed for specific performance of the parties agreement to permit the IVF Program to retain the pre-embryos for research.<sup>111</sup>

The trial court granted Maureen custody of the pre-embryos and “directed her to exercise her right to implant them within a medically reasonable time.”<sup>112</sup> The court reasoned that Maureen had exclusive control of the pre-embryos just the same as a pregnant woman has exclusive control over a non-viable fetus.<sup>113</sup> The appellate court reversed concluding that the same right to privacy and bodily integrity were not implicated before implantation occurs.<sup>114</sup> The court also concluded that when parties to a IVF procedure have themselves determined the disposition of any unused pre-embryos, their agreement should control.<sup>115</sup>

The Court of Appeals of New York using the principles of contract interpretation determined that the informed consents signed by the parties “unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF Program,” and thus affirmed the appellate court decision.<sup>116</sup>

Another case involved Becky and David Litowitz who were married in 1982.<sup>117</sup> They had one child together before their marriage, however, shortly after the birth of their son, Mrs. Litowitz had to under a hysterectomy and was unable to give birth naturally or be an egg donor.<sup>118</sup> The Litowitzs sought help at the Center for Surrogate Parenting in California where they

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 180

<sup>117</sup> *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002)

<sup>118</sup> *Id.* at 262

contracted with an egg donor.<sup>119</sup> The egg donor contract was between the “intended parents” (David as the natural father and Becky as the intended mother) and the egg donor and her husband.<sup>120</sup> The “intended parents” were described as a “married couple” who intend to utilize the donated eggs and David’s sperm to carry “a pregnancy to term though third party assisted reproduction.” Any children born were to be the children of the “intended parents.”<sup>121</sup> The contract also stated: “all eggs produced by Egg Donor pursuant to this Agreement shall be deemed the property of the Intended Parents and as such, the Intended Parents shall have the sole right to determine the disposition of said egg(s).<sup>122</sup> In no event may the Intended Parents or any other party use the said eggs without express written permission of the Egg Donor.”<sup>123</sup>

The Litowitzs also signed additional agreements with the Loma Linda University of Gynecology & Obstetrics Medical Group, Inc. before beginning the IVF process.<sup>124</sup> These agreements included consent for cryopreservation of pre-embryos following IVF.<sup>125</sup> The consent form provided: “We agree that because both the husband and the wife are participants in the cryopreservation program, that any decision regarding the disposition of our [pre-embryos] will be made by mutual consent.<sup>126</sup> In the event we are unable to reach a mutual decision regarding the disposition of our [pre-embryos], we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our [pre-embryos].”<sup>127</sup> The agreement also contained a provision stating that under certain conditions any unused frozen pre-embryos would be thawed and not allowed to develop.<sup>128</sup> The listed circumstances did not include dissolution of the marriage.<sup>129</sup> However, it did provide for the pre-embryos

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 263

<sup>121</sup> Litowitz v. Litowitz, 10 P.3d 1086 at 1088 (Wash. App. 2002)

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1089

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

to be thawed and not allowed to develop if the couple had not used them in five years.<sup>130</sup>

Five pre-embryos were produced.<sup>131</sup> Two pre-embryos were cryogenically frozen and the other three were implanted into a surrogate which resulted in the birth of a daughter.<sup>132</sup> The Litowitzs had separated by the time their daughter was born in January 1997.<sup>133</sup>

At trial Mrs. Litowitz asked that the pre-embryos be awarded to her so she could implant them in a surrogate mother and bring them to term.<sup>134</sup> Mr. Litowitz, however, wanted the pre-embryos to be put up for adoption.<sup>135</sup> The trial court using a best interests of the child analysis awarded the pre-embryos to Mr. Litowitz “with orders to use his absolute best effort for adoption to a two-person family outside of Washington and, obviously, considering the donor in that as required.”<sup>136</sup> The court stated the decision had “very little to do with property, very little to do with constitutional rights, everything to do with the benefit of the child.”<sup>137</sup>

The Court of Appeals of Washington affirmed the trial court’s decision holding that the contracts signed by the Litowitzs did not require either by express or implied terms that Mr. Litowitz continue with the family plan after dissolution.<sup>138</sup> The court further held that Mr. Litowitz’s right not to procreate compelled an award of the pre-embryos to him.<sup>139</sup> The court relying on the Davis decision, concentrated on a constitutional right to procreate and the right to avoid procreation.<sup>140</sup> The court reasoned that because Mrs. Litowitz did not contribute any gametes to the pre-embryos she did not have a constitutional right to pro-

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<sup>130</sup> *Id.*

<sup>131</sup> Litowitz v. Litowitz, 48 P.3d 261 at 264

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 264

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 265

<sup>139</sup> *Id.*

<sup>140</sup> Litowitz v. Litowitz, 10 P.3d 1086 at 1092

create.<sup>141</sup> Mr. Litowitz, however, was progenitor and therefore did have a constitutional right not to procreate.<sup>142</sup>

The court was not persuaded by Mrs. Litowitz's argument that allowing Mr. Litowitz to put the pre-embryos up for adoption would expose her to potential liability to the egg donor.<sup>143</sup> The contract with the egg donor did state that the intended parents could not allow any other party to use the eggs without the express written permission of the egg donor.<sup>144</sup> However, the court stated that this language did not prevent Mr. Litowitz from donating the pre-embryos to another couple.<sup>145</sup> At most, Mr. Litowitz may have to get the written permission of the egg donor before donating the pre-embryos.<sup>146</sup> The court stated that this may not even be necessary because the contract provision deals with ownership and disposition of eggs.<sup>147</sup> The eggs no longer exist. They have been fertilized and are now pre-embryos and nothing in the contract controls the disposition of the pre-embryos.<sup>148</sup>

The Supreme Court of Washington held that it was not necessary for the court to engage in a legal, medical, or philosophical discussion whether the pre-embryos were "children."<sup>149</sup> Although the court agreed with Mrs. Litowitz that the egg donor contract gave her and Mr. Litowitz equal rights to the eggs even though she was not a progenitor, the court stated that the egg donor contract did not relate to the pre-embryos that resulted from subsequent fertilization.<sup>150</sup> The court based its decision solely on the contractual rights of the parties under the pre-embryo cryopreservation contract with the Loma Linda Center for Fertility and In Vitro Fertilization.<sup>151</sup> Under that contract the parties directed the pre-embryos be "thawed out and not allowed to undergo further development" and disposed of when the pre-

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1093

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Litowitz v. Litowitz*, 48 P.3d 261 at 271

<sup>150</sup> *Id.* at 267

<sup>151</sup> *Id.* at 271

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embryos had been maintained in cryopreservation for five years after the initial date of cryopreservation unless the Litowitzs requested to extend for an additional period of time.<sup>152</sup> The court's record did not indicate if the pre-embryos were still in existence, but the five year period had elapsed and neither party had requested an extension.<sup>153</sup> In reversing the Court of Appeals, the court does not come out and say the pre-embryos are to be thawed and not allowed to develop, but that is the essence of the decision.

The dissent states that even if the court is following a strict contract analysis the trial court decision should have been affirmed.<sup>154</sup> A provision in the contract with Loma Linda vested the trial court with exclusive discretion to determine appropriate disposition of the pre-embryos if the parties could not agree.<sup>155</sup> Justice Sanders points out that the parties were unable to agree and did petition the court for appropriate disposition, strictly in accordance with this contract provision.<sup>156</sup> He believes the clause of the contract regarding the disposal of the pre-embryos is not applicable because its stated contingencies concern either a mutual decision of both parties not to produce a child, death of both parties, or the clinic ceasing its in vitro and cryopreservation program.<sup>157</sup> Justice Sanders goes on to state "one thing the parties obviously did not intend was to destroy the whole object of the contract, the pre-embryos, simply because this litigation was prolonged beyond five years. . ."<sup>158</sup>

All contracts regarding the disposition of pre-embryos are not enforced as illustrated in the case of *A.Z. v. B.Z.*<sup>159</sup> Married in 1977, the couple had difficulty conceiving a child and underwent IVF treatment from 1988 through 1991.<sup>160</sup> The clinic required the parties to sign consent forms for the relevant procedures before any eggs would be retrieved from the wife.<sup>161</sup>

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 272

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 274

<sup>159</sup> *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000)

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1053



The only form that required both the husband and wife to sign was those entitled "Consent Form for Freezing of Embryos."<sup>162</sup> The form required the couple to decide the disposition of the pre-embryos on certain listed contingencies.<sup>163</sup> One of the contingencies was "[s]hould we become separated."<sup>164</sup> The form provided the options for donating or destroying the pre-embryos, but also provided a blank line that permitted donors to write in additional alternatives. The form also stated that the donors may change their minds regarding any disposition provided that both donors convey that fact in writing to the clinic.<sup>165</sup>

The husband was present when the first form was completed by the wife in 1988.<sup>166</sup> Both husband and wife signed the form when it was completed.<sup>167</sup> The form, filled out by the wife, stated that if they "[s]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant."<sup>168</sup> The couple signed six additional consent forms from 1989 to 1991.<sup>169</sup> Each time after signing the first consent form in 1988, the husband signed a blank consent form that was then filled in by the wife.<sup>170</sup> The words written in each consent form were substantially similar to the words in the first consent form signed in 1988.<sup>171</sup>

The probate judge concluded that the agreement was unenforceable because of "changed circumstances" occurring in the four years since the last consent form was signed in 1991.<sup>172</sup> The changed circumstances included the birth of twins as a result of the IVF procedure, wife obtaining a protective order against husband, and husband filing for divorce.<sup>173</sup> The judge concluded that "[n]o agreement should be enforced in equity when intervening events have changed the circumstances such that the

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1054

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 1054

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

agreement which was originally signed did not contemplate the actual situation now facing the parties.”<sup>174</sup> The judge balanced the interests of the parties and determined that the husband’s interest in avoiding procreation outweighed the wife’s interest in having additional children.<sup>175</sup> He granted a permanent injunction in favor of husband.<sup>176</sup>

The Supreme Judicial Court of Massachusetts, transferring the case on its own motion, affirmed the probate court holding that the consent form’s purpose was to define the donors’ relationship as a unit with the clinic and not to create a binding agreement between the husband and wife.<sup>177</sup> The court listed several reasons why it believed the consent form did not amount to the minimum level of completeness required to enforce it in a dispute between the husband and wife including: the agreement contained no time limiting provision, the agreement used the word “separated” and this is divorce, and the consent form was signed in blank by the husband.<sup>178</sup> The court went on to hold that even if the couple had entered into an unambiguous agreement regarding the disposition of the pre-embryos, it would not enforce an agreement that would compel one donor to become a parent against his or her will.<sup>179</sup> In a footnote however, the court stated that it expressed no view on whether an unambiguous agreement concerning the disposition of pre-embryos could be enforced over the objection of one donor when such agreement contemplated destruction or donation of the pre-embryos for research or implantation in a surrogate.<sup>180</sup>

Another case in which the prior agreement of the parties was held to be unenforceable is *J.B. v. M.B.*<sup>181</sup> J.B. and M.B., married in 1992, had difficulty conceiving a child due to J.B.’s endometriosis and a blockage in one of her fallopian tubes.<sup>182</sup> This difficulty lead the couple to attempt to conceive and bear a

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<sup>174</sup> *Id.* at 1055

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1056

<sup>178</sup> *Id.* at 1057

<sup>179</sup> *Id.* at 1057

<sup>180</sup> *Id.* at 1058

<sup>181</sup> *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. 2000)

<sup>182</sup> *Id.* at 615

child through IVF.<sup>183</sup> The fertility clinic's consent form described the IVF procedure and also contained language discussing the control and disposition of the pre-embryos. The form stated that "the control and disposition of the pre-embryos belongs to the Patient and her Partner."<sup>184</sup> The consent form included an attached agreement that stated in relevant part, "I, J.B. (patient), and M.B. (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF program under the following conditions: 1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues. . ."<sup>185</sup>

The couple separated in September 1996 after the birth of a daughter in March of the same year.<sup>186</sup> J.B. wanted the remaining eight frozen pre-embryos to be discarded, while M.B. demanded a judgment compelling his wife "to allow the eight frozen embryos currently in storage to be implanted or donated to other infertile couples."<sup>187</sup> J.B. stated that she made the decision to go through IVF when she and M.B. were married and intended to remain married.<sup>188</sup> She also denied that she and M.B. had ever had any discussions regarding the disposition of the frozen pre-embryos.<sup>189</sup> M.B. on the other hand stated in a cross motion that he and J.B. had agreed prior to undergoing IVF procedures that any unused pre-embryos would not be destroyed, but would be used by J.B. or donated to infertile couples.<sup>190</sup>

The trial court in granting J.B.'s motion for summary judgment found that the reason for the parties' decision to attempt IVF – to create a family as a married couple – no longer existed.<sup>191</sup> The court was not persuaded by M.B.'s argument that the couple undertook IVF to create life.<sup>192</sup> The court concluded that because M.B. was "fully capable of fathering a child," and

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183 *Id.*

184 *Id.*

185 *Id.* at 616

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

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.* at 711

192 *Id.*

because he wanted control of the pre-embryos “merely to donate them to another couple,” J.B.’s interest was greater and she should prevail.<sup>193</sup>

The appellate court began its analysis by concentrating on the fundamental right to procreate and the right not to procreate.<sup>194</sup> The court however did not decide the case on constitutional grounds.<sup>195</sup> It concluded “that a contract to procreate is contrary to New Jersey public policy and is unenforceable.<sup>196</sup> The Supreme Court held that the better rule was to enforce agreements entered into at the time IVF is begun, subject to the right of either party to change his or her mind up to the point of use or destruction of any stored pre-embryos.<sup>197</sup>

The Supreme Court concluded that the consent form in this case did not manifest a clear intent by the parties regarding the disposition of the pre-embryos.<sup>198</sup> The consent form did state that the pre-embryos would be relinquished to the clinic in the event of divorce, however, it also carved out an exception that permitted the parties to obtain a court order directing the disposition.<sup>199</sup> They took this language to mean that if a party changed his or her mind the agreement was not enforceable and the court would make the final decision.<sup>200</sup> The court agreed with the Supreme Court of Tennessee and held that the party wishing to avoid procreation should usually prevail and ordered the pre-embryos destroyed.<sup>201</sup>

The state of Florida has enacted legislation requiring couples and the treating physician to enter into written agreements that provide for disposition of the pre-embryos in the event of divorce, death, or any other unforeseen circumstances.<sup>202</sup> Absent a written agreement, any remaining eggs or sperm remain under

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 712

<sup>197</sup> *Id.* at 720

<sup>198</sup> *Id.* at 713

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 716 and 720

<sup>202</sup> F.S.A. § 742.17

control of the donor, but decision making authority of pre-embryo resides jointly with couple.<sup>203</sup>

In determining if contracts regarding the future disposition of frozen pre-embryos will be enforced it seems to depend on the disposition itself. If the contract calls for the pre-embryos to be donated for research or thawed and not allowed to develop the contract will be enforced even if one party changes his or her mind. However, if the contract specifies that one party to the agreement is to have the custody of the pre-embryos and one party changes his or her mind the contract will not be enforced.

## IV. What Can Be Done?

### A. Encourage Clients to Mediate Disputes

Conflicts such as the one discussed in this comment often produce intense emotional feelings for the parties involved on both sides. How a person defines whether a frozen pre-embryo is property, a person, or something in between often depends upon the individuals own religious beliefs and values.<sup>204</sup> One way lawyers can help their clients deal with the emotional impact of a dispute is to encourage them to consider mediation.

Mediation provides an opportunity for the parties to express their positions without the detrimental effects of litigation.<sup>205</sup> The couples involved in a dispute regarding the “custody” of frozen pre-embryos often must maintain a relationship after the litigation has ended because they have other children that they share. It would be very difficult to maintain a relationship with the other party if one felt that he or she was forced into litigation that ultimately resulted in the destruction of a pre-embryo that the first party already thought of as a child. Mediation will allow the couple to craft their own solution, and thus feel better about the outcome.

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<sup>203</sup> *Id.*

<sup>204</sup> See generally *J.B. v. M.B.*, 751 A.2d 613 (discussing husband asserting that his religious convictions regarding preservation of the pre-embryos should take precedence over wife’s more limited interests)

<sup>205</sup> Beth Sherman, *Third Party Visitation Statutes: Society’s Changing Views About What Constitutes a Family Must Be Formally Recognized By Statute*, 4 CARDOZA ONLINE J. CONFLICT RESOL. 5 (2002)

Value conflicts may present special challenges, however this should not deter parties from using approaches such as mediation to resolve the dispute.<sup>206</sup> In her article *Cross Cultural Conflict Resolution: Finding Common Ground in Disputes Involving Values Conflicts*, Ann L. MacNaughton identifies four tools she has found useful in managing value conflicts.<sup>207</sup> These tools are: 1) preliminary analysis and assessment, 2) early negotiation of ground rules, 3) reframing the strategies, and 4) use of appropriate neutrals.<sup>208</sup>

Meditation would allow the parties to lay their feeling out to each other. Each side would then have a better understanding of the other's position in the dispute. The mediation session could also generate options that the couple had never thought of before. These options could include one party terminating their parental rights and allowing the other party to bring the pre-embryo to term or agreeing to put the embryo up for adoption and allowing another family to raise the child.

#### B. *Embryo Adoption*

Embryo adoption is an option for couples with excess frozen pre-embryos in storage. It should also be an option that is considered when couples are divorcing and a dispute over the frozen pre-embryos arises. This option was considered and rejected by some of the parties in the cases discussed above. However, there is now more awareness and information regarding embryo adoption. It may very well be an option of which more couples will begin to take advantage.

One of the first agencies to facilitate embryo adoptions was Nightlight Christian Adoptions.<sup>209</sup> Nightlight's program for frozen embryos is called the Snowflake Adoption Program.<sup>210</sup> This agency conducts its program as a traditional child adoption pro-

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<sup>206</sup> Ann L. MacNaughton, *Cross Cultural Conflict Resolution: Finding Common Ground in Disputes Involving Values Conflicts*, 33 WILLAMETTE L. REV. 747 (1997)

<sup>207</sup> *Id.* at 756

<sup>208</sup> *Id.*

<sup>209</sup> Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution of a Temporary Fix*, 68 BROOK. L. REV. 853 (2003)

<sup>210</sup> *Id.*

gram.<sup>211</sup> According to Snowflakes, this differs from embryo donation done by fertility clinics in that “the receiving family does not have a home study prepared, the genetic families are anonymous and there is not contact between the families even through an intermediary” in an embryo donation.<sup>212</sup>

Embryo adoption provides great benefits for both the genetic and adopting parents.<sup>213</sup> Couples who are faced with the dilemma of what to do with extra pre-embryos after in vitro fertilization has been successful and they have the number of child they desire now have a better option. For people who believe life begins at conception, and are uncomfortable with the idea of the pre-embryos being used for research or thawed and not allowed to develop, this may be the only option.<sup>214</sup> When one party in a divorce wants to allow the pre-embryo to develop and the other party does not want to be a parent, embryo adoption is a viable option for the couple. The party not wanting the pre-embryo destroyed will be able to know that the pre-embryo will have a chance at life. The party not wanting to be a parent will be relieved of the responsibility of parenthood by signing away all rights upon adoption of the pre-embryo.

Nightlight Christian Adoptions insists it is not encouraging the creation and freezing of embryos for adoption purposes but trying to provide a solution to a problem that already exists.<sup>215</sup> It is Nightlight’s hope that as people are made aware of the program they will in fact limit the number of embryos they create so that there is not a surplus.<sup>216</sup> The U.S. Congress has taken steps to educate Americans about the existence of embryos available for adoption by authorizing a million dollar grant from the Secretary of Health and Human Services to conduct a public awareness campaign.<sup>217</sup> Nightlight was one of three recipients of the

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<sup>211</sup> Frequently Asked Questions, Snowflakes Embryo Adoption Program, available at <http://www.snowflakes.org/FAQs.htm>

<sup>212</sup> *Id.*

<sup>213</sup> Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution of a Temporary Fix*, 68 BROOK. L. REV. 853 (2003)

<sup>214</sup> *Id.*

<sup>215</sup> Frequently Asked Questions, Snowflakes Embryo Adoption Program, available at <http://www.snowflakes.org/FAQs.htm>

<sup>216</sup> *Id.*

<sup>217</sup> Embryo Adoption Awareness Campaign available at <http://www.embryooption.com/aboutlegframework.asp>

grant awards and received \$506,875 for its proposed projects which include creation of a web site and a four-part video series for the general public, the medical community and prospective donating and recipient couples.<sup>218</sup>

As mentioned above, the state of Louisiana requires by statute any pre-embryo renounced by the genetic parents to be made available for adoptive implantation.<sup>219</sup> The state of Oklahoma has also passed a statute regarding embryo adoption.<sup>220</sup> The statute requires written consent by the husband and wife receiving the pre-embryo and that the consent be “executed and acknowledged by both the husband and wife, by the physician who is to perform the technique, and by a judge of the court having adoption jurisdiction” in the state.<sup>221</sup> The genetic parents of the pre-embryo must also give written consent to the physician performing the procedure.<sup>222</sup> Any child that is born as a result of the embryo transfer is considered for all intents and purposes the same as a legitimate child of the couple that received the pre-embryo.<sup>223</sup>

## V. Conclusion

In the end we are back where we started with no clear answers on the legal status of frozen pre-embryo suspended in time in liquid nitrogen. The few states that have dealt with this issue have rendered inconsistent decisions.<sup>224</sup> Ideally, the lawmakers would realize that this is an area where the law has not kept up with science and enact legislation to give the courts guidelines in making these decisions. However, that has only happened in a few states.<sup>225</sup> In the majority of states the best an attorney can

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<sup>218</sup> *Id.*

<sup>219</sup> LA R.S. 9:130 *supra* note 45

<sup>220</sup> 10 Okl. St. Ann. § 556

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Kass v. Kass*, 696 N.E.2d 174 (holding a contact between the parties to be binding) and *A.Z. v. B.Z.*, 725 N.E.2d 1051 (holding a contract between the parties was not binding)

<sup>225</sup> LA R.S. 9:123 (stating that a fertilized human ovum exists as a judicial person) and F.S.A. § 742.17 (requiring a written agreement that provides for the disposition of pre-embryos in the event of divorce)



do is to advise the client to have a contract with the physician and the fertility clinic that states the true intentions of the parties in the event of divorce and hope the courts will up hold the contract if the couple later divorce.

Of course this assumes the client will come to an attorney before the procedure, which does not often happen. In this case it is best to encourage the client to try to work out the dispute without involving the court. With the uncertainty of the law in this area and the emotional impact of this issue, the parties are better suited to find an acceptable resolution for both sides than the court. During the dispute resolution session the parties, with the help of a third-neutral, could generate options they had not explored before such as embryo adoption.

Melinda Troeger

