University of Miami Law Review

Volume 46
Number 3 *Symposium: Gender and Law*

Article 9

1-1-1992

Frozen Embryos: Towards an Equitable Solution

Mario J. Trespalacios

Frozen Embryos: Towards an Equitable Solution

I. INTRODUCTION

Recent developments in medical technology offer childless couples alternatives to traditional coital reproduction or adoption. Unlike surrogacy or adoption, a new technique, the process of in-vitro fertilization ("IVF"),[1] allows a couple to have a complete genetic relationship with their offspring. The IVF procedure allows the four- or eight-celled product of IVF[2] to be implanted immediately. Since IVF

1. In-vitro fertilization is the procedure whereby a female oocyte is fertilized with a male sperm cell in a laboratory dish (hence "in vitro"—in glass). To commence the process, the woman undergoes hormonal treatment to stimulate her ovaries to produce multiple oocytes or ova. These ova are aspirated from the ovaries during an operation involving a laparoscopy. In order to be fertilized, the ova are then combined with sperm cells. This fertilized oocyte is allowed to grow to the four- or eight-cell stage, at which point the cells are introduced into the uterus of a woman for implantation. Ethics Committee, American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, FERTILITY & STERILITY, Sept. 1986, at 32s (Supp. 1).

2. The most technically accurate name for the four- or eight-celled structures is "pre-embryo." A conceptus becomes an embryo at the moment of implantation. Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, 2099 n.11 (Cir. Ct. Sept. 21, 1989), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992). However, there is no consensus on how to refer to the structure.

IVF physicians and patients prefer to call it an embryo. This term humanizes the agglomeration of cells and helps the patients identify with them. Andrea L. Bonnicksen, *Embryo Freezing: Ethical Issues in the Clinical Setting*, HASTINGS CTR. REP., Dec. 1988, at 26, 29.

> To clients, the embryo symbolizes hope and potential parenthood. It affirms the wife's femininity, the husband's masculinity, and the couple's potency. It is a

frequently yields more pre-embryos than needed for a single implantation, extra pre-embryos may also be cryogenically frozen and stored[3]—thus the pre-embryos' popular name, "frozen embryos." As a result of the potential delay between fertilization and implantation, however, frozen embryos are becoming the focus of legal debate.

The lapse between fertilization and implantation, facilitated by the freezing of the pre-embryos, allows biological donors to change their position about whether, when, and in whom implantation should take place. In fact, prior to the implantation of the pre-embryo,[4] the donors may have decided not to continue together as a couple.[5] These changes of position have led to controversy and litigation, focusing on the status of the pre-embryo and the rights of the men and women who participated in IVF,[6] only to later disagree about the future of

---

> powerful symbol with which clients establish emotional connection. . . . To physicians and scientists, the embryo is a collection of cells with distinct properties relating to its stage of development.

Id. at 29 (footnotes omitted).

This Comment will use the term pre-embryo, but will defer to the terminology used in the cases during their discussion. In some cases, the terminology employed by the court demonstrates the position it has taken with respect to the pre-embryos. In these instances the term used by the court will be set-off by quotation marks.

3. Increasingly, reproductive health centers are giving patients the option of cryogenically freezing and storing the pre-embryos created through the IVF process, in order to thaw them later for implantation. Bonnicksen, *supra* note 2, at 29. For a complete discussion of cryogenic preservation of human pre-embryos, see Alan Trounson, *Preservation of Human Eggs and Embryos*, FERTILITY & STERILITY, July 1986, at 1. Prior to the introduction of cryopreservation techniques, pre-embryos that were not implanted would have been discarded, because a maximum of three pre-embryos are placed in the uterus at one time in order to diminish the possibility of multiple pregnancies. John A. Robertson, *Decisional Authority over Embryo and Control of IVF Technology*, 28 JURIMETRICS J. 285, 287 (1988); Trounson, *supra*, at 4.

4. This Comment is distinguishable from articles that focus on the rights of the pre-embryos as separate entities. *See, e.g.*, Patricia A. Lagod & Martin L. Lagod, *The Human Preembryos, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, & Research Policy*, 5 HIGH TECH. L.J. 257 (1990); Marcia J. Wurmbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1098 (1986). Other articles more particularly examine the rights of the biological donors as affected by the pre-embryo. *E.g.*, Note, *Reproductive Techniques and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669 (1985).

This Comment does not advocate any particular disposition of the pre-embryos, and only introduces the rights of these entities. It instead explores the rights of the two genetic donors as to each other, when they are disputing the fate of the pre-embryo. To use Professor Robertson's categorization of approaches to pre-embryo conflicts, it examines the "array of reproductive and family interests that early embryos may serve." John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 453 (1990).

5. Following the scenario raised by the *Davis* case, the analysis offered here will assume the parties have decided to seek a divorce. *See Davis*, 59 U.S.L.W. at 2205. It is also potentially useful in resolving problems between couples who have never been married and have decided to separate before implantation of the pre-embryo.

6. It is irrelevant for purposes of the analysis whether or not the parties are married. The

the resulting pre-embryo.[7]

This Comment examines the respective rights of the biological donors, and analyzes the legal issues this debate raises. In addressing these issues, the Comment explores the two approaches adopted by courts adjudicating these disputes: first, that the pre-embryo is life entitled to state protection, and that implantation promotes its best interest;[8] and second, that the pre-embryo is subject to the property interests of its genetic donors, who alone should determine its disposition.[9] However, both approaches burden the rights of the more vulnerable party in this situation, namely the donor who has relied on the IVF procedure and wishes to implant the pre-embryo. This vulnerability arises because the courts' findings—determining joint interest and requiring mutual consent for the disposition of the pre-embryo—and the pre-embryo's limited viability often advantage the non-consenting party in negotiations with the party wishing to implant. Indeed, the non-consenting party's veto power makes the other party susceptible to coercion concerning other aspects of the dissolution proceeding. Consequently, this Comment proposes that courts apply a contract theory that avoids the inequitable results of applying either the pre-embryo-as-life or the pure property analysis approaches.[10]

Part II provides a brief background of the IVF procedures and the legal debate surrounding pre-embryos. Part III analyses and critiques existing opinions regarding pre-embryos in light of general legal doctrines. These opinions fail to grant appropriate redress to the party who wants to proceed with implantation. Part IV explores the gender-bias effects of the decisions. Finally, Part V proposes a detailed contractual framework, and explains how this framework may resolve disputes in the different possible scenarios that arise in pre-embryo litigation, while considering the needs of the vulnerable litigant.

---

crucial factor is that the parties at one point resolved and agreed to create a pre-embryo together. This serves to distinguish cases where one or both of the two gametes joined in the pre-embryo were donated anonymously.

7. In *Davis*, a divorce action, the wife argued that she should be allowed to implant the pre-embryos. Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, 2104 (Cir. Ct. Sept. 21, 1989), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992); *see also* Mark Curriden, *Frozen Embryos: The New Frontier*, ABA J., Aug. 1989, at 68. The husband asserted that the pre-embryos should not be implanted. *Davis*, 15 Fam. L. Rep. (BNA) at 2104; *see also* Curriden, *supra*, at 68; *infra* notes 38-40, 48-50 and accompanying text.

8. *See Davis*, 15 Fam. L. Rep. (BNA) at 2097; *see also infra* notes 43-46 and accompanying text.

9. York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); *see also Davis*, 59 U.S.L.W. at 2205.

10. *See* discussion *infra* notes 69-71.

II. THE PRE-EMBRYO

A pre-embryo is created through a complex procedure in which the biological parents of the pre-embryo donate female and male gametes, the ova and sperm, which are subsequently joined.[11] Sperm are usually harvested from males through ejaculation. If the sperm is deficient, hormonal techniques can be used to enhance sperm production.[12] The process for harvesting ova is more involved. To enhance ova production, the woman first undergoes hormonal stimulation of the ovaries.[13] Then, the ova are harvested through a surgical procedure.[14] Finally, the sperm and ova are combined to produce a pre-embryo.

This product is then allowed to grow to the four- or eight-cell stage, at which time it is inserted into the woman's body.[15] Several pre-embryos are inserted at one time to increase the chances of successful implantation. However, to reduce the risk of multiple pregnancies, no more than three pre-embryos are usually implanted.[16] The remaining pre-embryos are frozen, either to be implanted at a later date, if necessary, or to be discarded. If the pre-embryos do not successfully implant, the procedure is repeated. Under the current state of technology, approximately 50% of the cases achieve success.[17]

Although this Comment deals only tangentially with the interests of the pre-embryo,[18] the legal status of the pre-embyos is nonethe-

---

11. *See supra* note 1 and accompanying text.

12. Philip Elmer-Dewitt, *Making Babies*, TIME, Sept. 30, 1991, at 56, 60.

13. *Id.*

14. *Id.*; *see also supra* note 1 and accompanying text.

15. The pre-embryos are inserted either into the uterus, which has been hormonally stimulated to receive the pre-embryos, or into the fallopian tubes. Elmer-Dewitt, *supra* note 12, at 58.

16. *See* Robertson, *supra* note 3, at 287.

17. Trounson, *supra* note 3, at 6; Elmer-Dewitt, *supra* note 12, at 56, 63.

18. Discussions involving pre-embryos spark consideration of whether the pre-embryo is life, and if so, its legal status. Answers to these questions may have vast ramifications on the treatment of genetic donors. Legally and scientifically, it is beyond our ability to determine when life begins. *See* Roe v. Wade, 410 U.S. 113, 159 (1972). This Comment does not propose to solve that question. However, it touches upon some of the arguments both for and against declaring the pre-embryo legally cognizable life in dealing with the attendant ramifications the determination will have on the genetic donors' rights.

Pre-embryos provoke deep emotional responses in persons, the same way the abortion issue does. Bonnicksen, *supra* note 2, at 29; *see also* James Glieck, *The Vatican on Birth Science; Reproductive Help: Widespread and Unregulated*, N.Y. TIMES, Mar. 1, 1987, at A16 (discussing the controversy surrounding IVF and new reproductive technologies, and the Catholic Church's pro-life position, which has lead to its opposition of IVF). This is due in part to the parties' emotional investment in the pre-embryos. Bonnicksen, *supra* note 2, at 27. The words that people use to describe the pre-embryos often reveal the values they hold about the pre-embryo's personhood. A scientist may call the pre-embryo a cell mass. *Id.* at 29. An IVF parent may refer to it as an embryo or even a baby. *Id.* The latter term is less

less relevant. Should the courts find that the pre-embryo has legally cognizable life, then the legislatures and courts will have to determine the extent to which the pre-embryo is entitled to legal protection.[19] If, on the other hand, the courts determine that promoting implantation is paramount for the pre-embryo's best interests, then the donors' wishes become irrelevant. However, under the current state of the law, such a result would pose a practical problem, because the woman who donated biological material to the pre-embryo cannot be forced to undergo implantation. Such an imposition violates her right to privacy, bodily integrity, and procreative freedom.[20] It would also raise equal protection concerns, because such a decision would disproportionately affect female gamete donors. This problem would diminish, although not disappear, if instead the state required that any pre-embryo not desired by its biological donors be made available for implantation in other willing persons. Such forced donations of one's reproductive capacity may still impermissibly intrude upon the privacy rights of the biological donors.[21]

In many cases, however, recognition of the state's interest in the potential life of the pre-embryo is consistent with contract analysis. The main goal of the contract framework is to permit implantation whenever desired by either donor. The framework thus promotes the life potential of the pre-embryo with a minimum burden upon the rights of the genetic contributors.[22] If the pre-embryo is not declared

---

scientifically accurate but denotes the emotional stake the patients have in the success and survival of the pre-embryo. *Id.*

19. In Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), the United States Supreme Court upheld the constitutionality of a statutory scheme requiring, among other things, the determination of the viability of embryos before an abortion is performed, on the grounds that a state has an interest in the embryo once it reaches viability.

20. Privacy interests are founded on the Fourteenth Amendment. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The privacy interest is a liberty interest. *See* Roe v. Wade, 410 U.S. 113 (1972). However, the right to privacy is not absolute. For instance, interests in equality can outweigh the right to privacy. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 886-88 (1987) (interest in privacy, such as in enjoyment of private property, must yield when it conflicts with equality or causes discrimination).

21. For purposes of simplifying the analysis of the relationship between the biological donors, this Comment generally argues that the pre-embryo has no independent right to life, and that the state, acting on behalf of the pre-embryo, cannot outweigh the choice of the biological donors. *See infra* notes 63-64 and accompanying text.

22. At most, under the contract framework, the parties would have to determine whether to implant the pre-embryo in the physiological mother or a surrogate. This promotes the pre-embryo's interest—being implanted. There would be no forced implantation, but even the act of allowing the pre-embryo to be implanted in a stranger promotes the pre-embryo's potential life interest. If the decision to reproduce is made at IVF, then under the framework proposed here, to allow the pre-embryo to be implanted merely carries out this previous decision, even if it contravenes a unilateral recent one.

to be legally cognizable life,[23] however, then it will not be afforded constitutional rights or protections, and these considerations will not color the resolution of any dispute regarding its future.[24]

III. PRE-EMBRYO LITIGATION

Few cases in the United States have addressed the pre-embryos issue.[25] In *Davis v. Davis*,[26] a trial court determined that pre-embryos have "life" and therefore are entitled to state protection.[27] However, the Tennessee Court of Appeals reversed this determination.[28] In doing so, it rejected the argument that pre-embryos are entitled to state protection,[29] and instead applied a property analysis, holding that the biological donors had joint control over them.[30] The Tennessee Supreme Court affirmed the Court of Appeals' decision. It determined that the genetic donors had decisionmaking authority over the pre-embryos, and that control over the disposition of the pre-embryos was subject to a judicial balancing of the right to procreate and the right not to procreate.[31]

Another case, *York v. Jones*,[32] used a similar proprietary approach. *York* involved a dispute between biological donors and the fertility clinic where their pre-embryo was stored. The United States District Court for the Eastern District of Virginia declared that the

---

23. Generally, the question of whether the pre-embryo is life or not has been considered beyond the scope of the courts. *See Roe*, 410 U.S. at 163.

24. *See id.* (noting that the right of the state to intervene past the first trimester of pregnancy is based on "important and legitimate interests in the health of the mother," not on a determination of whether fetus is life; the pre-embryo, the precursor of fetus in development, also falls outside the state's interest).

25. To date, there have been five opinions in the United States dealing with pre-embryos: the three *Davis* opinions (Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097 (Cir. Ct. Sept. 21, 1989), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992)); York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), and Del Zio v. Columbia Presbyterian Hosp., No. 74 Civ. 3588 (S.D.N.Y. Nov. 9, 1978) (unpublished opinion).

26. 15 Fam. L. Rep. (BNA) at 2097.

27. *Id.* at 2103 ("The Court finds and concludes that by whatever name one chooses to call the seven frozen entities—be it pre-embryo or embryo—those entities are human beings; they are not property.").

28. *Davis*, 59 U.S.L.W. at 2206.

29. *Id.*

30. *Id.* The court stated:

> On the facts of this case, it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological, if not the legal consequences of paternity against his will. Jointly, the parties share an interest in the seven fertilized ova.

31. Davis v. Davis, No. 34, 1992 WL 115574, at *10 (Tenn. June 1, 1992).

32. 717 F. Supp. 421 (E.D. Va. 1989).

biological donors had contractual property interests in the pre-embryo, relying on language in an agreement the donors had entered into with the IVF center.[33] Thus, as demonstrated by these cases, several different approaches and results are employed in pre-embryo litigation. Because of this analytical diversity, it is helpful to examine these cases more fully, and explore the repercussions of their holdings on the procreative rights of men and women.

A. *Overview of the* Davis v. Davis *Litigation*

Mary Sue and Junior Davis were married for nine years, during which they made several fruitless attempts to have a child. After natural conception proved impossible, the Davises attempted IVF six times, with no success.[34] The Davises then tried adoption without success.[35] Subsequently, they decide to re-attempt the IVF method. This time, they used the pre-embryo cryopreservation option;[36] seven of the pre-embryos from their last IVF attempt had been frozen and were eligible for this medical procedure.[37]

Shortly thereafter, Junior Davis filed for divorce. The future of the pre-embryos became a central issue in the divorce case.[38] At trial, Mary Sue Davis argued that the pre-embryos were life, that they represented her best opportunity to bear a child, and that she should be allowed to implant them.[39] Junior Davis denied that the embryos were cognizable as "life,"[40] and claimed they were joint property. Junior further argued that his reproductive rights would be violated if the court forced unwanted fatherhood upon him.[41]

In deciding this difficult case, the trial court formulated the issue

---

33. *Id.* at 425.

34. *Davis*, 15 Fam. L. Rep. (BNA) at 2098. Because of five previous tubal pregnancies, Mary Sue was forced to undertake surgical treatment "which rendered her incapable of natural conception." *Id.*

35. *Id.*

36. *See id.* Cryoperservation is a process whereby the pre-embryo is frozen in liquid nitrogen. *See* Wurmbrand, *supra* note 4, at 1083; *see also Davis*, 15 Fam. L. Rep. (BNA) at 2098 n.3.

37. *Id.* Nine ova were orginally fertilized, producing acceptable zygotes. Two of the zygotes were unsuccessfully implanted in Mrs. Davis, leaving seven pre-embryos for possible future use. *Id.*

38. *See* Davis v. Davis, 59 U.S.L.W. 2205, 2205 (Tenn. Ct. App. Sept. 13, 1990).

39. *Divorce Case Raises a New Issue: Status of Fertilized Eggs*, N.Y. TIMES, Aug. 8, 1989, at A1; *see also* Curriden, *supra* note 7, at 68.

40. Curriden, *supra* note 7, at 68.

41. *Davis*, 15 Fam. L. Rep. (BNA) app. B at 2108. Junior Davis asserted that if the choice was whether Mary Sue Davis or an anonymous donor should implant the pre-embryos, he preferred Mary Sue to implant them. If a child did result from the implantations, he would attempt to establish a parent-child bond with it and would seek to support and obtain custody of the child. *Id.*

as whether the Davises had already produced a "*human being* to be known as their child."[42] The court answered this question affirmatively, holding that the "seven frozen entities" were human beings, that life begins at the moment of conception, and that, therefore, the Davises had accomplished their goal of creating human life.[43] Applying the doctrine of parens patriae,[44] the court found that the state had an interest in the protection of the "life" contained in the preserved pre-embryos.[45] In order to promote the pre-embryos' interests, the court then awarded Mary Sue Davis temporary custody so that she could implant, and reserved jurisdiction on the issues of support, visitation, and permanent custody, pending live birth of the pre-embryos.[46]

B. *Pre-Embryo as Life*

In *Davis*, the trial court declared that pre-embryos were life.[47] At the trial, the Davises differed sharply over how the pre-embryos should be treated: Mary Sue Davis wanted to implant the pre-embryos, while Junior Davis wanted them to be declared property subject to joint control, and sought the authority to prevent implantation.[48] However, by the time the case went to appeal, Mary Sue Davis' situation had changed. She no longer wished to implant the pre-embryos; she wanted to donate them to a childless couple. At that time, Junior Davis still sought the authority to block any implantation attempt.[49] Then, after the Tennessee Court of Appeals rendered its decision, Junior Davis shifted his position as well. Because his present wife apparently could not have children, he now wished to have the pre-embryos implanted in a surrogate to provide a child for his new marriage.[50] At this point, despite all this litigation, the pre-

42. *Id.* at 2103 (emphasis added). Even at this early stage of its opinion, the circuit court characterized the pre-zygotes as human beings.

43. *Id.* In its amicus brief, the ACLU argued on appeal that this finding was totally inapposite to the holdings in *Roe* and its progeny. Amicus Brief of American Civil Liberties Union Foundation of Tenn. at 4, *Davis* (No. E-14496).

44. *Davis*, 15 Fam. L. Rep. (BNA) at 2103. Parens patriae refers to the traditional role of the state as a legal guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

45. *Davis*, 15 Fam. L. Rep. (BNA) at 2103-04.

46. *Id.* at 2104.

47. *Id.* at 2103.

48. *Id.* app. B at 2108. The court's summary of Junior Davis' testimony at trial indicates that he did not "want exclusive control over the embryos, he insisted that he and Mrs. Davis should jointly decide about their disposition." *Id.*; *see also supra* notes 40-41 and accompanying text.

49. *See* Mark Curriden, *Joint Custody of the Frozen Seven*, ABA J., Dec. 1990, at 36.

50. *Id.* By the time litigation had reached the Tennessee Supreme Court, Junior Davis no

embryo's fate was still undecided.[51]

In achieving its result, the *Davis* trial court ignored the rights and interests of the parties before it, instead focusing on whether the pre-embryos were human life. In so doing, it placed the pre-embryos' interests first. Declaring that even at the four-cell stage the pre-embryo is "human," and "life," the court held that pre-embryos are human beings, fully differentiated and indistinguishable from embryos.[52] Thus, the court concluded the pre-embryos were not property.

Following this determination, the court applied the parens patriae doctrine,[53] equating that doctrine with the "best interest of the child" doctrine.[54] Because the viability of the pre-embryos is two years, and longer preservation would be "tantamount to the destruction of these human beings,"[55] the trial court concluded that the state can act to protect their best interest and allow Mrs. Davis to implant.

In reaching this holding, the court barely considered the arguments for and against a determination that pre-embryos are life. The court ignored the fact that pre-embryos are at a much earlier stage of development than fetuses, which are subject to abortions. In addition, the court overlooked several contraceptive methods which prevent the implantation of fertilized ova more developed than the pre-embryo.[56] The court thus ignored the anomaly created by its decision: pre-embryos, protected as wards of the state in this early stage, have no such protection later in development.

Neither did the court address its determination's ramifications for the procreative rights of men and women. The court relied on some factual evidence and recent advances in genetic technology to

---

longer wanted anyone to implant the pre-embryos, readopting his posture in the trial court. *See Davis*, No. 34, 1992 WL 115574, at *1.

51. By this time, ironically, it is possible that the Davises' pre-embryos have exceeded their storage life. They have been in storage since 1988, before the initiation of the divorce action. Pre-embryos have not been proven to have any viability beyond two years of cryopreservation. *Davis*, 15 Fam. L. Rep. (BNA) at 2104.

52. The term "differentiation" means either that the cells are different from the cells of its parents or that the cells are changing to assume their ultimate function to become an organ. *Id.* at 2101. The court uses the former definition to support its assertion that the cells are highly differentiated, a pivotal assertion in declaring the cells independent life. *Id.* at 2102.

53. *See* Curriden, *supra* note 49, at 34; *see also supra* note 44.

54. *Davis*, 15 Fam. L. Rep. (BNA) at 2104.

55. *Id.*

56. The intra-uterine device and the "morning after" pill, a birth-control pill designed to void the conceptus in the woman's body, are examples of contraceptive methods designed to prevent pregnancy by thwarting the implantation of the fertilized ova in the uterus. MERCK, SHARP & DOHME RESEARCH LAB., MERCK & CO. INC., THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1737 (15th ed. 1987).

support its findings, but failed to distinguish contrary but equally convincing evidence.[57] Both sides presented testimony about whether the pre-embryos were life. One expert proposed that the pre-embryos were alive because they contained the requisite and distinct chromosomes that comprise a genetically distinct human life.[58] Three other experts testified that the pre-embryos represented the potential for life, but were not sufficiently developed to be human life. However, the court declined to adopt the latter view, reasoning that because the experts' notes frequently referred to the cells as embryos, the pre-embryo label was invalid.[59] The court also rejected the argument that pre-embryos, because of the possibility that they will never successfully implant or survive, have an even weaker claim on being labeled life than embryos.[60]

The court also refused to apply *Roe v. Wade*,[61] contending that *Roe* only applied to abortion cases.[62] This superficial distinction is unconvincing. The court reached such a conclusion without explaining how the pre-embryos differ from the embryos and fetuses the Supreme Court considered in *Roe*. The *Davis* court failed to recognize that its determination that the pre-embryos are human directly conflicted with the Supreme Court's pronouncement in *Roe* that during the first trimester of pregnancy the state does not have a right to decide when life begins and may conflict with a woman's reproductive freedom. In fact, in *Roe*, the Supreme Court itself declined to determine when life begins,[63] and instead determined that a woman's right of bodily integrity is superior to the state's rights in protecting the embryo in the first trimester of pregnancy.[64]

Because of its determination that the pre-embryos are human beings, entitled to state parens patriae protection, a significant ramification of *Davis* is that it establishes the pre-embryos as entities with legally cognizable rights. These rights will necessarily compete and

---

57. In appendix B of the opinion, the court summarizes all of the testimony offered at trial. *Davis*, 15 Fam. L. Rep. (BNA) app. B at 2107-12.

58. *See id.* at 2111-12 (testimony of Dr. Lejeune).

59. *Id.* at 2121-22.

60. Experts at the trial testified that, unlike embryos, which are cell-masses implanted in the uterine wall, pre-embryos are not implanted, may never successfully implant, and may not even survive once they do implant. Therefore, the experts concluded, pre-embryos had less of a claim to the title "live" than embryos. The trial court rejected this position. *Id.* at 2101.

61. 410 U.S. 113 (1972). *Roe v. Wade* is the United States Supreme Court's landmark abortion decision in which the Court held that a woman has the right to seek an abortion in the first trimester of pregnancy. *See id.* at 163.

62. *Davis*, 15 Fam. L. Rep. (BNA) at 2103.

63. *Roe*, 410 U.S. at 159.

64. Although the *Davis* trial court bestowed state protection on the pre-embryo, under *Roe*, the court could not prevent the pre-embryo's distruction in a subsequent abortion.

detract from the rights of the biological donors implied from *Roe*.[65] This is already demonstrated in *Davis*. Junior Davis argued that he had a right not to reproduce.[66] The court never addressed this argument, which implies that Junior's procreative rights were irrelevant to its determination. As the case was resolved in the trial court, Mary Sue appears victorious because she received custody of the pre-embryos, as she desired. However, a decision based on the rationale that pre-embryos have a right to life is at least equally dangerous to the procreative rights of women. Should Mary Sue change her mind about implanting the pre-embryos, there would still be a precedent holding that the pre-embryos are life. As their biological mother, she may be held to have a duty to implant. However, as long as *Roe* remains good law, presumably a court could not actively order Mary Sue Davis to implant, which creates an inherent paradox in the court's decision. Furthermore, the court might mandate adoption in the best interest of the child, even where both donors agree that they do not want the pre-embryos implanted, effectively ignoring the rights of both parties to decide whether to procreate once a frozen pre-embryo exists.[67]

C. *Pre-Embryo as Property*

1. THE *DAVIS* APPEAL

The Tennessee Court of Appeals reversed the circuit court decision.[68] The appellate court's opinion had two principle aspects: first, it rejected the trial court's pre-embryo-as-life approach; and second, it adopted a property analysis.[69] The court demonstrated its reformulation of the analysis by its rephrasing of the issue as "who is entitled to *control* seven of Mary Sue's ova fertilized by Junior's sperm through

65. *See infra* notes 81-83 and accompanying text.

66. *Davis*, 15 Fam. L. Rep. (BNA) app. B at 2108.

67. If the duty to the pre-embryos is extended to parallel the duty to one's children, the *Davis* court's determination could lead to a virtual "parade of horribles." Does the court's determination create in Mary Sue an obligation to implant some pre-embryos, or all seven? If the first or second implantations are successful, will Mary Sue be forced to implant the remaining pre-embryos because it is in their best interest? Will the court order adoption of the remaining pre-embryos?

68. Davis v. Davis, 59 U.S.L.W. 2205, 2206 (Ct. App. Sept. 13, 1990) *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992).

69. *Id.* The court of appeals did not openly embrace a property methodology. However, it phrased its decision as an award of "joint control" over the pre-embryos, and determined that the parties "share an interest" in the pre-embryos. *Id.* at 2206. These terms are borrowed from property law. For an example of this type of property analogy, see York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), discussed in Part III.C.2. *Cf.* Curriden, *supra* note 49 (discussing the "joint custody" approach).

the in-vitro fertilization process."[70] The court answered this question by holding that "the parties share an interest in the seven fertilized ova" and awarding the parties joint control.[71]

The Tennessee Court of Appeals rejected the trial court's conclusions as contrary to existing constitutional law.[72] Discrediting the trial court's creation of state interests in pre-embryos, the court of appeals catalogued the caselaw and statutes that addressed causes of action for "persons," emphasizing the absence of any pre-born entity on the list.[73] The court concluded that the pre-embryos, as yet unborn, are not entitled to state protection.[74] However, the court's property analysis, combined with its attempt to balance the parties' rights, is even less capable of safeguarding the interests of the party wanting to implant than the paternalistic approach adopted by the circuit court.[75]

The Tennessee Court of Appeals based its determination that the pre-embryos are not entitled to state protection on two principles: first, there is no precedent for extending the protection of the state to the pre-embryos;[76] and second, mandating implantation would contravene the constitutional procreative rights of the two biological donors.[77] In essence, the court of appeals reasoned that the trial court, by holding that the pre-embryos are life, was unjustifiably "order[ing] Junior to bear the psychological, if not the legal, consequences of paternity against his will."[78]

However, the conclusion of the Tennessee Court of Appeals about the fundamental rights involved is inaccurate and overbroad. The court found that "it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological if not the legal consequences of paternity against his will."[79] The appellate court thus equated Junior's procreative freedom with Mary Sue's right not to be forced to implant. In doing so, the court failed to recognize that the right to resist implana-

70. *Id.* at 2205 (emphasis added).

71. *Id.* The court of appeals cited York v. Jones, 717 F. Supp. at 421, for the proposition that the parties have an interest in the pre-embryos.

72. *Davis*, 59 U.S.L.W. at 2206.

73. *Id.*

74. *Id.*

75. *Cf.* Lori B. Andrews, *My Body, My Property*, HASTINGS CTR. REP., Oct. 1986, at 10 (applying property concepts to the analysis of the use of body parts).

76. *Davis*, 59 U.S.L.W. at 2206.

77. *Id.*

78. *Id.*

79. *Id.*

tion involves two distinct interests: procreational freedom,[80] and bodily integrity. Junior's claim involved only the former. Furthermore, certain cases may also implicate a woman's constitutional right to procreate. If such a right exists, then the court's analysis does not promote equality among the hypothetical holders of these rights.

The decision of the Tennessee Court of Appeals in *Davis* also neglects the dual nature of the rights stemming from *Roe*, and mistakenly equalizes the concept of forced fatherhood with forced pregnancy.[81] In *Planned Parenthood v. Danforth*,[82] the United States Supreme Court established that a married woman's decision to have an abortion prevails over any desire the man may have regarding the matter. Similarly, a husband cannot force his wife to undergo an unwanted abortion.[83] *Planned Parenthood* thus implies that the woman's dual choices outweigh the man's single, procreative interest.

In a situation such as the one presented by *Davis*, the true rights that the court must balance are the parties' countervailing procreative rights.[84] The Tennessee Court of Appeals' opinion in *Davis* rests partially on the assumption that permitting Mary Sue to implant would violate Junior's procreative rights.[85] It fails to recognize that allowing him to prevent her from implanting would infringe Mary Sue's procreative rights.[86] Instead, the court assumed Mary Sue's procreative rights would not have been affected. However, by Mary Sue's own assertion, she was not giving up her procreative rights; she wanted the pre-embryos turned over to a third party for implantation.[87] This is still an attempt, albeit an attenuated one, to exercise a right to procreate.[88] Furthermore, nothing in the rationale of the decision turns on

---

80. Procreational freedom, for purposes of this Comment, refers to a person's right to procreate should he or she so choose, unimpaired by the partner's decision or influence.

81. For examples of this dual nature of rights, see Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating regulations which restrict availability of contraceptives to unmarried couples); Griswold v. Connecticut, 381 U.S. 479 (1965) (state cannot criminalize use of contraceptives by married couple).

82. 428 U.S. 52 (1976).

83. *Id.*

84. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidation of state ban on commercial distribution of non-prescription contraceptives); *Eisenstadt*, 405 U.S. at 438.

85. *See supra* note 77 and accompanying text.

86. Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 380-81 (1985); Wurmbrand, *supra* note 4, at 1097 (asserting that the right to abortion is a function of the right to bodily autonomy, not the right to destroy a pre-embryo which is not attached to the body); Ronald Smothers, *Embryos in a Divorce Case: Joint Property or Offspring?*, N.Y. TIMES, April 22, 1989, at 1 (reporting that Mr. Davis did not desire compelled fatherhood; Mrs. Davis struggled for her last chance at motherhood).

87. *See Divorce Case Raises a New Issue: Status of Fertilized Eggs*, *supra* note 39, at A11.

88. "While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others." Roe v. Wade, 410 U.S. 113, 171 (1972) (Rehnquist, J.,

the change in Mary Sue's litigious posture. Arguably, this decision would apply even if Mary Sue still wanted to implant the pre-embryos herself. Thus, by merely considering Junior Davis' procreative rights, *Davis* did not balance both parties' procreative rights, did not achieve a balance of their constitutional rights, and did not reach an equitable solution.

Davis' second flaw is in its treatment of the pre-embryos purely as property. It is difficult to determine whether the opinion reaches its determination under a constitutional law approach, or whether it applies a property law analysis that happens to address constitutional law concerns. The court of appeals similarly declared that Mary Sue and Junior "share an interest" in the pre-embryos, using property law terminology.[89] However, the court merely asserted a property law analogy without explaining why it is appropriate.

By awarding joint control over the pre-embryos, *Davis* guaranteed a stalemate any time either spouse alone wants to make a decision or exercise dominion over the pre-embryo. As a result, the award of joint control inherently places the party who wants to implant at a disadvantage,[90] since he or she must persuade or bribe the other donor to consent. This advantage for the donor opposing implantation increases due to the "biological timeclock"—the limited viability of the pre-embryos.[91]

Furthermore, by granting joint "control," the Tennessee Court of Appeals seemed to treat the pre-embryo under the principles of joint custody, instead of the proprietary principles to which it claimed to adhere. Upon divorce, the court usually divides joint property, and each former spouse has full control over some share.[92] Under this analysis, the court of appeals apparently treated the pre-embryos as children of a divorce instead of as property.[93]

---

dissenting) (citations omitted). Mary Sue cannot assert the right of others to procreate, even by having pre-embryos donated to others.

89. Citing York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), for the property terminology, the Tennessee Court of Appeals correctly redirected the focus from the pre-embryos to the couple who donated the genetic material to create them. However, the court failed to consider the contractual rights prong of the *York* opinion. *Davis*, 59 U.S.L.W. at 2205; *see also supra* note 70 and accompanying text. *York* broke the deadlock between the parents and the IVF center by basing its decision on the existing contract, which referred to the pre-embryos as property. *See infra* part III.C.2.

90. *See supra* notes 70-71.

91. Pre-embryos have limited viability, estimated to end at around two years. *See supra* note 55 and accompanying text.

92. Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, 2103 (Cir. Ct. Sept. 21, 1989), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992).

93. Some writers confused or interpreted *Davis*'s "joint control" holding as awarding joint custody. Curriden, *supra* note 49, at 36.

The joint custody analogy is further misplaced because joint custody assumes that both parents are acting with the best interest of the child in mind.[94] However, by making the biological donors share responsibilities about pre-embryo decisions, one donor effectively bears the entire burden.[95] In reality, such joint custody grants a veto power to one parent over the other's child-rearing decisions.[96] Several legislatures have recognized this, and after first promulgating joint custody, have receded from that position, and now award joint custody after divorce only when the parental relationship is conciliatory.[97]

Whatever the benefits of joint custody between fit parents, the Tennessee Court of Appeals' decision in *Davis* produces all of the criticized ill effects of joint custody with none of the benefits. It grants one donor veto power, forcing the other donor to bribe the non-consenting party in order to do anything with the pre-embryo. This is especially catastrophic when the donors have irreconcilable views that the pre-embryo should not be used by the other, a stalemate which is particularly tragic because of the pre-embryos' short-term viability.[98] In fact, the "joint control" determination virtually assures that the pre-embryo will not be implanted. Thus, regardless of the court's position as to the pre-embryo's personhood, the court's award not only countervenes the policies behind joint custody, but also eviscerates the state's interest, albeit attenuated in this case, in potential life.[99]

Ironically, after the appeal, Junior Davis expressed a wish to have the pre-embryos implanted.[100] Yet, this possibility may now be foreclosed to him because of the court's focus on his right to prevent procreation and its accompanying "joint control" solution. Mary Sue

---

94. Burton S. Blond, *In the Child's Best Interests—A Better Way: The Case For Presumptive Joint Custody in Missouri*, 52 U.M.K.C. L. REV. 567, 568 (1984); Daniel R. Mummerg, *Whose Child is it Anyway? Awarding Joint Custody over the Objection of One Parent*, 15 FORDHAM URB. L.J. 625, 631 (1987).

95. Mummerg, *supra* note 94, at 626.

96. Thus, if the parents cannot agree, neither parent can act for the child. Chamberlin, *Joint Custody: Its Legislative and Judicial Evolution*, TRIAL, Apr. 1989, at 23, 26.

97. *Id.* at 24; *see, e.g.*, CAL. CIV. CODE § 4600(d) (West Supp. 1989) (repealing statute prefering joint custody).

98. *See* Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, app. B at 2110 (Cir. Ct. Sept. 21, 1989) ("[T]he longest human pre-embryos have been stored and remain viable has been for an approximate two-year period."), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992); *see also supra* note 55 and accompanying text. *But see* Wurmbrand, *supra* note 4, at 1098 (maximum length of storage of pre-embryos is ten years, for policy reasons).

99. *See supra* note 19.

100. *See* Curriden, *supra* note 49, at 36.

may never agree to have Junior use the pre-embryos. Therefore, it appears that the appellate court's decision in *Davis* is just as inequitable as the circuit court's decision. In contrast, as will be demonstrated below, a contract-oriented approach seeking to protect the more vulnerable party will best achieve an equitable result, as well as most closely conform to the intent of the parties, even where the parties shift positions as kaleidoscopically as they did in the *Davis* litigation.

2. *YORK V. JONES*

The property analysis used by the Tennessee Court of Appeals in *Davis* parallels that of *York v. Jones*,[101] which resolved a dispute between biological donors and an IVF center. However, there is a significant difference—the property concepts used by the court in *York* were rooted in the IVF contract that was central to the dispute.

Steven and Riza York signed a cryopreservation agreement with the Howard and Georgeanna Jones Institute for Reproductive Medicine,[102] detailing the Institute's procedures, policies, and the Yorks' rights.[103] Thereafter, the Yorks underwent IVF treatment, and one pre-embryo was cryogenically preserved and stored by the Institute. The Yorks then wished to transfer the pre-embryo to another center, but the Institute refused.[104] The Yorks then sued the Institute for, among other things, breach of contract.[105] The Institute filed a motion to dismiss the Yorks' complaint, arguing that the

101. 717 F. Supp. 421 (E.D. Va. 1989).

102. *Id.* at 423.

103. *Id.* at 424. The Cryopreservation Agreement provides in pertinent part:

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

Id. (emphasis added).

104. *Id.* at 422.

105. The Yorks filed a complaint in four counts: breach of contract, quasi-contract, detinue, and an action under 42 U.S.C. § 1983 (1988), seeking declaratory, injunctive, and compensatory relief. *Id.* at 423.

Yorks' options regarding the disposition of the pre-embryo were limited to those outlined in the agreement.[106] The District Court for the Eastern District of Virginia denied the Institute's motion to dismiss.[107] Focusing on the agreement's continuous reference to the pre-embryo as the Yorks' property,[108] the district court found that the Yorks had a property interest in the frozen pre-embryo created from their gametes.[109]

The *York* opinion rests on findings that under the York Institute agreement, the pre-embryos were the York's property, and that the Yorks and the Institute had entered into a bailor-bailee relationship regarding that property.[110] The Institute was in lawful possession of the pre-embryo that had been entrusted to it, and it had the "duty to account for the thing as the property of another."[111]

The written agreement between the Yorks and the Institute facilitated the resolution of their dispute. The parties had sufficiently structured their transaction in that document to guide the court.[112] Hence, a contract analysis was obviously appropriate. Indeed, the property law terminology in the parties' own document promoted the court's use of property analysis.[113] Unfortunately, however, courts face a more difficult task in a situation, like that of the Davises, where there is no written evidence of the parties' intent when they undertook the IVF process. Donor solidarity also simplified the scenario in *York*. Both spouses were pursuing the same end—they wished to procreate together. In contrast, the Davises were disputing the fate of their reproductive product among themselves.

D. *Pre-Embryos as Neither Persons nor Property*

The most recent pronouncement on the rights and status of donors is the Tennessee Supreme Court's opinion in *Davis v. Davis*.[114] After the Tennessee Court of Appeals granted the Davises joint cus-

106. *Id.* at 425. Further, the Institute argued that any property interest the York's had in the pre-embryo was limited by the Virginia Human Research Statute. *Id.* The Institute argued that because the Statute regulated all uses and procedures for and with pre-embryos, the Yorks' request could not be entertained unless it fell within the Statute. *Id.*

107. *Id.* at 427, 429. The district court determined that the complaint contained a sufficient allegation of a cause of action to withstand a motion to dismiss.

108. *Id.* at 425, 426; *see also supra* note 97.

109. *York*, 717 F. Supp. at 429.

110. *Id.*

111. *Id.*

112. *See* Bonnicksen, *supra* note 2, at 28. Most centers require these agreements. Some appear as consent forms, while others provide more practical data to the patient. *Id.*

113. *York*, 717 F. Supp. at 425.

114. No. 34, 1992 WL 115574 (Tenn. June 1, 1992).

tody over the frozen pre-embryos, Mary Sue Davis appealed to the state supreme court, challenging the decision's constitutionality.[115] The Tennessee Supreme Court affirmed the court of appeals' result, but on a different basis.[116] Although the court's decision did not rest on a contract analysis, the court did briefly review the analysis proposed by the contract theory.

The court first acknowledged that the Davises have an ownership-like interest in the pre-embryo, at least to the extent that they have decisionmaking authority over it.[117] The court then asserted that any determination about whether donors could enter into enforceable IVF agreements required establishing the locus of the donors' decisionmaking authority.[118] As donors, the Davises retained such authority over the pre-embryo because they donated the genetic material of which the pre-embryo was composed.[119] On this basis, the court presumed that IVF agreements should be enforced as between the donors.[120]

However, the Tennessee Supreme Court did not decide the case under contract theory because there was no initial agreement between the Davises.[121] Instead, it recharacterized the issue before it as "whether the parties will become parents."[122] The court's constitutional analysis began by an exploration of the right to privacy, both in the United States Constitution[123] and the Tennessee Constitution.[124] The court emphasized that the original foundation for such a right was the need to keep government from intruding into "intimate questions of personal and family concern."[125] The court concluded that it must balance two rights of procreational autonomy asserted by the litigants: "the right to procreate and the right to avoid

115. *Id.* at *1.

116. *Id.* at *1, *16.

117. *Id.* at *9. The Tennessee Supreme Court stated as much, even after it admonished the appellate court awarding joint custody of the pre-embryos and implying that the pre-embryos are property. *Id.* at *7.

118. *Id.* The court did express its reluctance to address the enforcement of agreements, asserting that it was not necessary to its result. *Id.*

119. *Id.* at *9.

120. *Id.* However, the Tennessee Supreme Court recognized that the donors also bear the ability to modify, by subsequent written agreement, their initial written IVF agreement. *Id.*

121. *Id.* at *10. The court did acknowledge the argument that by undergoing IVF the parties impliedly agreed to procreate. *Id.* The court rejected this theory because there was no evidence in the record that, in entering into an implied agreement, the Davises considered and planned for contingencies such as the one they were facing. *Id.*

122. *Id.*

123. *Id.* at *11.

124. *Id.*

125. *Id.*

procreation."[126]

Curiously, although the court began its analysis by acknowledging that women contribute more to the IVF process than men, it did not weigh this consideration as a factor in the balancing test it proposed. Instead, the court summarily concluded that the woman's contribution must be seen as "entirely equivalent" to the man's because the parties' contributions "must be viewed in light of the joys of parenthood . . . or the relative anguish of a lifetime of unwanted parenthood."[127]

The remainder of the opinion was comprised of a rather thin and formalistic delineation of factors the court weighed in the balance. The court stated that it was considering "the burdens imposed on the parties by solutions that would have the effect of disallowing the exercise of individual procreational autonomy with respect to these particular pre-embryos."[128] However, the court began its balancing by considering the effect that *not* procreating would have on the parties. It slighted any "sweat equity" Mary Sue Davis had in the pre-embryos, while it gave inordinate weight to Junior Davis' reluctance to procreate due to his family history of being the child of divorced parents.[129] This disparity is highlighted by the dicta that indicates this burden on Junior Davis could be overcome by Mary Sue only if she sought to implant the pre-embryos in herself *and* had no other mean of achieving parenthood.[130] The opinion seems to place a thumb on the scale on the side of the party seeking to avoid procreation, described as the party who "obviously has the greater interest."[131] The Tennessee Supreme Court's formula thus does not account for relative vulnerability. In contrast to the solution proposed by this Comment, which favors the party seeking implantation,

126. *Id.* at *14. The court, relying on *Roe*'s trimester analysis, *see* Roe v. Wade, 410 U.S. 113 (1973), decided that the state has no interest in the pre-embryo. *Davis*, 1992 WL 115574, at *14. The court reasoned that if the state's interest does not commence until the embryo has passed significant developmental stages, *id.* at *17 n.27, then it can have no interest in a pre-embryo in an earlier stage of development.

127. *Id.* at *14. This assertion flies in the face of concerns over equitable results. The court offered no justification for summarily leveling a possible factor that would weigh heavily in the woman's favor.

128. *Id.* at *15.

129. *Id.* at *16.

130. *Id.* The last criteria the court used to justify blocking Mary Sue's attempts was disingenuous. The court acknowledged earlier in the opinion that Mary Sue could not conceive, *id.* at *3, unless she again underwent the painful IVF process, *id.* at *16. This seemed irrelevant to a court striving to save Junior Davis from possible future psychological trauma.

131. *Id.* at *17.

the Tennessee Supreme Court's solution frustrates implantation.[132]

IV. GENDER-BIAS IMPLICATIONS

The courts' treatment of the parties' procreative rights in pre-embryo litigation uses gender-neutral language. Like most superficially gender-neutral law, it has tacit gendered effects. As the *Davis* litigation illustrates, the courts' rationales work a hardship upon the party who wants to implant the pre-embryo. Because of the woman's physical investment in IVF, she will probably be the one who wants to proceed with implantation.[133]

The property analogy and the courts' allocation of joint control to the donors effectively ensures the right to veto implantation. It ignores the parties' countervailing rights to procreate. Therefore, to determine which of these conflicting rights are at stake in a pre-embryo situation, we need to determine the constitutional status of each.[134]

The United States Supreme Court has never defined procreative rights.[135] The Supreme Court cases that have addressed procreative rights all involved the right not to procreate. Conceptually, however, the right of procreative freedom is exercised when one makes a decision to bear a child, or to refrain from bearing a child. Such a right seems rooted in the right to privacy.[136] It is only logical to assume that the person who is seeking to implant the pre-embryo has the affirmative right to procreate, which is equally affected by a court's decision. To enforce one party's rights necessarily denies the other party's rights in a situation where one party wants to procreate and the other does not. This causes a conflict of the parties' equal personal liberty interests, and to enforce the interests of one would be to deprive the other.[137] Instead, the court should seek to achieve equity

132. *Id.* In weighing the interests of the parties disputing the pre-embryos disposition, the court stated that "[o]rdinarily, 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 preembryos in question." *Id.*

133. The woman has a greater physical investment in the pre-embryo because the process that culminates in the harvesting of ova is far more physically arduous than the donation of sperm. *See supra* note 1. Note, however, that her ability to carry the embryo to term is not a consideration because she cannot be compelled to do so against her wishes. *See* discussion *supra* note 20 and accompanying text.

134. For an exposition of procreative rights and their development by the courts, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10 (2d ed. 1988).

135. Note, *supra* note 4, at 674-75, 685 (indicating that no court has ruled on whether the constitution defines procreative rights).

136. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (basing holding to invalidate state criminalization of married couple's use of contraceptives on right to privacy).

137. Professor Fineman has proposed basing the outcome of similar conflicts on the relative

between the parties.[138]

The Tennessee Supreme Court's *Davis* opinion is an example of gender-biased analysis. The court purported to resolve pre-embryo disputes by balancing constitutional considerations of procreating and not procreating.[139] However, the court unjustifiably discounted the woman's "sweat equity" contribution to the pre-embryo.[140] Instead of giving weight to Mary Sue Davis' tangible past performance, the Tennessee Supreme Court focused on Junior Davis' possible psychological conflicts, which he foresaw based on his impressions of the past.[141] It is a disservice to negate a woman's contribution because only she can produce the ova for a pre-embryo, especially when her tangible contribution is negated in favor of an intangible fear.

In the pre-embryo cases, the party who opposes implantation has already freely given the necessary genetic material. The parties exercised their right to procreate when they decided to undergo IVF procedures. No further action is required from the non-consenting party. Thus, the non-consenting party's rights would not be impinged if the court focuses on the point in time when the parties entered into the IVF agreement.[142]

However, the party opposing implantation is essentially asking to be relieved of that earlier exercise of the right to procreate. At the time they first contemplated IVF, both parties were in agreement. Now they are not. The party opposing implantation argues that, because of the serendipitous existence of a frozen pre-embryo in storage, the first exercise of the right to procreate should not be taken into account; rather, the court should uphold only their second, more recent decision not to procreate. They are asking a court to enforce that second decision by legally denying the other party access to the pre-embryo.

Because the rights to procreate or not are equally balanced ini-

---

needs of the parties. Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789. Although Professor Fineman addresses financial need, her method applies equally when weighing the parties' emotional and psychological needs.

138. *See id.*

139. *Davis*, 1992 WL 11574, at *14.

140. *Id.*

141. Junior Davis asserted that should the pre-embryo fabricated with his genetic material be successfully implanted and delivered, he would be torn by paternal feeling towards the child, and would be worried that the couple parenting the child would someday divorce. *Id.* at *16.

142. If the woman is the non-consenting party, the court would not force her to bear the child. *See supra* note 20 and accompanying text. Rather, the court would appoint a willing surrogate for the pregnancy. Therefore, by focusing on the parties' consent at the time they donated the biological material, a court order of implantation would not affect or infringe on the bodily integrity rights of either of the parties.

tially, the attempt to balance procreative rights does not help the courts reach a determination in these cases.[143] However, because the parties' rights do not remain balanced, the courts need not decide constitutional rights by happenstance. Even though both parties' have constitutional interests at stake, their claims at the time of dispute are not and should not be considered equal. While the man and the woman both possess the right to procreate or not procreate, when these rights in the woman are added to her right of bodily integrity, together they outweigh the man's right not to procreate. Thus, a more equitable alternative to the formalistic equality approach would be to balance the equities based on need.[144]

This balancing of the equities would protect the most vulnerable party in the dispute, who, because of the limited time span of pre-embryo viability, is undoubtedly the genetic donor who wishes to implant the pre-embryos. The most vulnerable party may be the person who has suffered psychological, emotional, or physical duress or impediment and is unable or unwilling to repeat the IVF process.[145] The courts' formalistic use of equality allows the party who does not want implantation to occur to win simply by objecting. Therefore, courts only achieve an equality of result based on need by weighing the needs of both parties. In weighing the equities between the most vulnerable party and the party opposing implantation, courts should take into account the possible child support obligations which may result from a live birth. Understandably, someone who is unwilling to have offspring may be unwilling to pay for their support.[146] However,

143. In the primary IVF decisionmaking stages, the rights of the parties are balanced because the willing participation of both donors is required for the IVF procedure.

144. *See* Fineman, *supra* note 137.

145. An example of a cause of disability is a man with a low sperm count, or a woman who has experienced removal of her ovaries. Wurmbrand, *supra* note 4, at 1082. This party could be the woman because of the lengthy and painful nature of the procedure for inducing growth and harvesting ova. Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, app. B at 2110 (Cr. Ct. Sept. 26, 1991) (testimony of Mary Sue Davis), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992); Robertson, *supra* note 4, at 476 n.95 (asserting that a woman's efforts in the IVF process give her a "sweat equity" interest in the pre-embryo). Although the woman's considerations apparently lead to a gender-biased result, it must be emphasized that this Comment focuses on equality of result, not formalistic equality as has been the goal in other familial disputes. *See* Fineman, *supra* note 137. Equality of result takes into account the different factors the parties bring to any situation. *Id.* at 792. This is contrasted with formalistic equality, which declares that something is done to promote equality although equality may not truly be the result. *Id.* at 797 n.24.

146. Child support, an attendant responsibility of having children, is enforced by the state and is supported by strong policy considerations. These policies can be traced to two underlying concepts: 1) the parent is responsible for maintaining his children; and 2) the state should not be financially burdened for the maintenance of children who have parents capable of providing for them. However, courts must balance the state's interest in enforcing child support against the important state interest in promoting life. *See* TRIBE, *supra* note 134,

the issue may be premature at this point because of the low success rate of IVF;[147] despite implantation, no child may ever be born. As a result, these arguments should be given minimal weight.[148]

On the other hand, several factors indicate that the courts should favor the party wishing to implant. Vulnerable litigants usually seek to implant because they have fewer, if any, procreative alternatives available. As in *Davis*, the purpose of IVF is usually to avoid a woman's damaged fallopian tubes from foreclosing the possibility of bearing children because she cannot achieve conception through intercourse.[149] When parties turn to IVF because the woman cannot conceive in a conventional way, the court should consider her particular interests in its analysis.

The woman makes a greater investment in creating the pre-embryo. Preparation for extraction of the female gamete is more onerous than that required for the extraction of the male gamete. The woman must undergo hormonal stimulation to encourage production of multiple ova. The ova must then be surgically aspirated. Only

---

§ 15-10, at 1345 n.59; Wurmbrand, *supra* note 4. If the state does not want to place the pre-embryo in an all-or-nothing situation, it must adopt an alternative method by balancing the state policies in tension.

The federal government has expressly stated its preference for life regardless of the availability of child support. The Hyde Amendment, which prohibits federal funding of abortion for welfare mothers, implicitly reflects this policy; it assumes that if the woman is too poor to fund an abortion she will also be too poor to support her child without government help. *See* H.R.J. Res. 662, 95th Cong., 1st Sess (1977). At least for the federal government, a chance at life is a more important consideration than child support. Likewise, to resolve the dispute over the pre-embryo in a manner calculated to allow it the greatest opportunity at life while not imposing an unwanted child support obligation on one party, the government may treat the parent objecting to implantation as an anonymous donor of the genetic material, divested of any further rights, interests, or obligations in it. A program in which pre-embryos are anonymously donated to surrogates for implantation and/or adoption could achieve this result.

Should the parties seek a divorce after a child is born from the implantation, they would be unable to avoid child support obligations. The court could adopt an anonymous donor analysis and release the non-consenting parent, but the foundation for this position is not persuasive because the donor will always be known and identifiable.

147. States' policies concerning child support fail to rise to the level of state action. *See* Robertson, *supra* note 3, at 286.

148. Several approaches exist to the child support dispute. The first option is to place upon the non-consenting party the obligation of support if the parties agreed from the beginning to undergo the IVF procedure and achieve implantation and birth. In this case, the parties did not provide for a future disposition of the pre-embryo in the event they no longer wished to continue with the IVF process. Robertson, *supra* note 4, at 460. The scholars who advocate this result rest their arguments on the fact that the party who is now withdrawing consent for implantation would not have undergone IVF without an expectation that a child would result, and that child would require support. *Id.* at 466.

149. However, if a man has fertility problems, and he wishes to implant in a surrogate, he is the most vulnerable party in that scenario and should be allowed to use the pre-embryo to implant.

ejaculation is necessary for harvesting the male gametes. In addition, one purpose behind cryogenic freezing and storage of the pre-embryos in this situation is to avoid the woman having to repeatedly undergo ova harvesting procedures every time implantation is to be attempted.[150] The court should consider this background in its consideration of the equities, and its most effective means of doing so is under a contract framework.

V. THE CONTRACT FRAMEWORK

This Part explores an alternative theory that utilizes contract principles to resolve disputes between biological donors in a more equitable, though not formalistically equal manner. In so doing, the contract framework focuses on the rights and duties of the biological donors with respect to each other.[151]

The contract framework makes several assumptions. First, it assumes that courts prefer to address the rights of the parties, rather than the rights of the pre-embryo,[152] given the uncertainty of the constitutional position on the right to procreate, the uncertainty of the pre-embryo's status, and the current division in popular opinion regarding abortion and reproductive technologies.[153] The contract framework assumes that it does not deprive any party of their constitutional rights, and is therefore not invalidated by constitutional procreative rights concerns.[154] Finally, the framework assumes that the pre-embryo's best fate is to be implanted.[155]

The framework does not propose that the pre-embryos are property per se. Rather, it focuses on the interests of the genetic donors with respect to each other, collaterally promoting implantation,

---

150. *See* Wurmbrand, *supra* note 4, at 1084 (cryopreservation avoids necessity of repeated ova harvesting).

151. Professor Robertson considers whether contractual agreements entered into between the biological donors and IVF centers should also be binding in disputes between the donors themselves. Robertson, *supra* note 4, at 464-70. The goal of Professor Robinson's analysis is to determine who owns, or has a property interest, in the pre-embryos. *Id.* at 454. In contrast, the analysis here focuses on the legal relationship of the biological donors vis-á-vis each other, irrespective of their rights or interests in the pre-embryo.

152. *See, e.g.*, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (noting that decision concerning future children cannot be made by employer and must be left to parents); Davis v. Davis, 50 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990) (declining to adopt position that pre-embryo is life), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992).

153. Certain restrictions on a woman's abortion decisions are unconstitutional. TRIBE, *supra* note 114, § 15-10, at 1350.

154. The contract framework would also be unacceptable if it violated the constitutional protections of procreation.

155. Under the proposed framework, the pre-embryo would thus be implanted in all cases except those where both parties do not want the pre-embryo implanted.

which is arguably in the best interest of the pre-embryo.[156] Finally, under the contract framework, all solutions and outcomes must work equitable results for the more vulnerable party seeking to implant.

A. *The Framework*

The main premise of the contract framework assumes that the biological donors mutually decided to undergo IVF, thereby entering into a contract, either explicitly or implicity, with each other[157] to create pre-embryos for the purpose of implantation, with the ultimate goal of achieving live births.[158]

1. EXPRESS CONTRACT

Under contract theory, ideally parties would unequivocally express the intent and scope of their agreement in a written contract at the time they first attempt IVF. IVF procedures can easily implement written agreements by including the necessary clauses into informed consent agreements. Although this agreement is intended to

156. This framework has been implicitly adopted by the district court in York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), and commentators, *see* Robertson, *supra* note 3, at 285.

157. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1979) provides, "An agreement is a manifestation of mutual assent on the part of two or more persons." Where, as here, both parties have mutually consented to undergo the IVF process, they have created an agreement between themselves. It is possible to find that a contractual relationship exists between the parties even if they are married at the time the contract is created. E. ALLAN FARNSWORTH, CONTRACTS § 5.4, at 343 (1st ed. 1982) (noting that spouses may validly contract to alter the incidents of their relationship, so long as not otherwise contrary to public policy). Moreover, agreements between spouses to undergo IVF are enforceable, and not void for public policy reasons. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 189-190 (1979). Further, these contracts do not generally fall under the Statute of Frauds because they have already been preformed. *See id.* § 110 (Statute of Frauds generally forbids enforcement of contracts which are not going to be performed within one year). Of course, the parties are free to alter the provisions of their agreement as long as the ensuing contract adheres to established laws.

158. *See* Robertson, *supra* note 4, at 466; Robertson, *supra* note 3, at 297-98 (noting that overriding the agreement of IVF collaborators interferes with their reproductive choice, and protecting collaborators from later disappointments by not enforcing their agreement is paternalistic). Although Robertson addresses agreements with surrogates, the same policy considerations are applicable here, between IVF collaborators. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. a (1979) A promise, between the donors to exchange genetic material to create a pre-embryo is synonymous with an agreement between parties to create a pre-embryo for the purpose of implantation.

Professor Robertson argues the advantages of "joint advance instructions" for disposition of pre-embryos in the face of any eventuality. Robertson, *supra* note 4, at 463. While Robertson focuses on the propriety of the couple's decisional authority over the pre-embryos, *id.* at 450, the agreements also dictate the course of action between the couple, *id.* at 464. Under Professor Robertson's theory, the agreements between the IVF center and the couple should be binding between the donors themselves for three reasons: (1) the right to reproduce and avoid reproduction includes the right to give binding advance instructions; (2) all parties benefit by the ability to rely on future instructions; and (3) it minimizes disputes over disposition. *Id.* at 464-65.

memorialize the agreement between the biological donors and the IVF center, it can be expanded to cover the contingencies that arise between the donors themselves.

To establish their intent unequivocally, the parties should include in their agreement a statement that the initiation of the IVF procedure is an expression of the parties' decision to exercise their right to procreate. The agreement should further provide for the disposition of the pre-embryo in situations where one or both donors dies or becomes disabled, the donors divorce, or the donors no longer wish to continue with the IVF process. Possible provisions might include permitting a designated party to proceed with implantation, discarding the pre-embryos, or donating them for implantation and parenting by third parties. In the case of divorce, the parties may want to provide for a division of the pre-embryos.

The process of negotiating and executing these agreements would alert the donors of the possibility that their positions may change between in-vitro fertilization and the time of implantation. These agreements could then provide the courts with evidence of the parties' original intentions to facilitate resolving disputes arising after IVF.[159]

2. IMPLIED CONTRACT

In the absence of an express contract, courts may find the elements of an implied contract in the dealings of the parties that led to the storage of the pre-embryos. Those dealings indicate the terms of the parties' agreement, which may help the courts resolve later disputes. The court can assume that the parties agreed to carry the IVF procedure through to implantation,[160] because IVF serves no useful purpose other than the harvesting of the materials that compose the pre-embryo to be implanted.[161] Furthermore, the parties mutually performed in furtherance of this intent—they both provided gametes for the IVF procedure.[162] Their mutual intent at the time of IVF is

159. *See supra* notes 107-11 and accompanying text.

160. Robertson, *supra* note 4, at 467 ("[T]he parties have created and stored these embryos on the condition that they will be transferred to a uterus . . . .").

161. Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, 2099 (Cir. Ct. Sept. 21, 1989) (finding undergoing IVF exclusively serves purpose of creating children), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992). Wurmbrand, *supra* note 4, at 1079-80 (IVF popular new procedure to help childless couples have children).

162. RESTATEMENT (SECOND) OF CONTRACTS § 18 (1979) defines the manifestation of mutual assent as requiring each party to either make a promise or begin or render performance. In IVF, the parties perform by donating their sperm and ova. The man's performance had been rendered. He donated his sperm, and no further action is expected of him. However, in this case, Mary Sue Davis has begun her performance by donating her ova. Under the parties' agreement, her performance would include carrying the child to term.

demonstrated by the physical, financial, and emotional investment of both parties in committing to IVF.[163]

Thus, through the bilateral exchange of promises to complete the IVF process by the exchange of gametes for the engineering of a pre-embryo, the parties create a contract whether or not they have signed a written agreement.[164] Moreover, any contract between the parties would terminate with the end of pre-embryo viability. The contract is thus for a definite term, defined by the viability span of the pre-embryos.[165] Once the parties create the pre-embryo, they have performed that part of the contract, and they can only modify the remainder of the contract by their mutual consent. Thus, under contract principles, the consent of one party to attempt procreation and the reliance of the other party on the agreement become the determining factors in allowing either party to implant, even if the other later seeks to withdraw consent.[166]

There are, however, two apparent obstacles to the implementation of the contract framework. The first involves the ambiguity of the implied intent. The analysis thus far assumes that the intent implied from the parties behavior is to implant and attempt to have a child. Arguably, however, the parties exclusively intended to have children as a couple. If continuation of their marriage is a material term, then the question becomes whether divorce frustrates the contract as to that term, or impairs the entire contract.

In *Davis*, the Tennessee Supreme Court dismissed the possibility that Mary Sue and Junior Davis entered into an implied contract to

---

"The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (1979). Clearly, under this definition, the performance of both parties in giving the genetic material is a manifestation of their assent to the IVF agreement.

163. Bonnicksen, *supra* note 2, at 26, 27. Both parties have already acted in reliance on their implied IVF agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1979) ("Action in reliance on an agreement may make a contractual remedy appropriate.").

164. *See* RESTATEMENT (SECOND) OF CONTRACTS § 3 (1979) ("An agreement is a manifestation of mutual assent on the part of two or more persons); *see also supra* note 158.

165. *See* Davis v. Davis, 15 Fam. L. Rep. (BNA) 2097, app. B at 2107 (Cir. Ct. Sept. 21, 1989), *rev'd*, 59 U.S.L.W. 2205 (Ct. App. Sept. 13, 1990), *aff'd*, No. 34, 1992 WL 115574 (Tenn. June 6, 1992).

166. We cannot know whether the decision to proceed with IVF extinguishes the procreative rights of the non-consenting party because we do not (according to the definition of procreation) know if a party has procreated until a child is born. *See* BLACK'S LAW DICTIONARY 1086 (6th ed. 1990) (defining procreation as "[t]he generation of children"); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 148 (1979) (proposing that, while unperformed, duties under a contract may be discharged by oral agreement). However, here the party still seeking to implant is demonstrating, at least implicitly, that there has been no such discharge.

reproduce using IVF, due to such ambiguous intent.[167] The court noted that there was no record evidence that the parties considered the pre-embryos' disposition in case of eventualities other than pregnancy, and that there was no record evidence that Junior Davis "intended to pursue reproduction outside the confines of a continuing marital relationship with Mary Sue."[168] However, the court's reasoning was flawed. The fundamental premise of the parties' agreement in undergoing IVF was to create pre-embryos. The sole purpose of creating pre-embryos was to facilitate their growth and development into children. If there was no evidence that the parties discussed other possibilities, then the agreement did not encompass such possibilities, but the court should not have fashioned terms to address them. Even if Junior Davis did not intend to continue with IVF after divorce, Mary Sue Davis did not share his intention.[169] Under contract principles, Junior Davis' unexpressed intention was his own misunderstanding.[170] If Junior knew of Mary Sue's desire, and was aware that his own desires would conflict with hers in the face of a divorce, then the court should have used Mary Sue's meaning in defining the terms of their agreement.[171] If Junior had no reason to know Mary Sue would desist in the face of divorce, while knowing he would oppose implantation in the face of divorce, then the court should not have fashioned terms to protect his feelings while frustrating Mary Sue's intentions.

The second obstacle to the contract framework involves constitutional concerns. Under *Roe*, a woman may not be forced to implant and carry a fetus to term.[172] This would be true even if she had previously agreed to have a baby. However, in equity, this does not mean that the object of the contract, implantation, must be frustrated. A woman who changes her mind about implanting should not be per-

---

167. Davis v. Davis, No. 34, 1992 WL 115574, at *10 (Tenn. June 6, 1992).

168. *Id.*

169. Mary Sue indicated that she was not sure what her reaction would be in the face of divorce, but she was committed to the idea of being a mother and would have gone ahead with IVF. *Id.* at *17 n.10.

170. The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

(b) that party has no reason to know the meaning attached by the other, and the other has reason to know the meaning attached by the first party.

RESTATEMENT (SECOND) OF CONTRACTS § 20(2) (1979).

171. *See id.* cmt. d (noting that a party should be bound to an agreement "by a merely negligent manifestation of assent, if the other party was not negligent").

172. Under Roe v. Wade, 410 U.S. 113 (1973), a woman may legally abort a fetus. A woman's right to terminate pregnancy implies the right to prevent pregnancy by refusing implantation of a pre-embryo. *See* Davis v. Davis, No. 34, 1992 WL 115574, at *17 n.21 (Tenn. June 6, 1992).

mitted to prevent the male donor from fulfilling the contract by implanting with another woman for his benefit.[173] The contract would have been frustrated only as to implantation by the original party. The opportunity to implant would not be entirely frustrated, however.

B. *Practical Applications of the Framework*

There are several different factual scenarios in which the contract framework can apply: (1) one party wants to implant and the other does not; (2) both parties want to implant; (3) both parties want to implant, but the woman does not want the pre-embryo implanted in herself, and the parties cannot agree on a surrogate; (4) neither party desires implantation, but one or both do not want the pre-embryo donated for adoption or implantation; and (5) neither party wants implantation, and neither has any further use for the pre-embryo. The contract framework, applied to each case, allows the court to tailor the result to the given situations, and allows the party who wants to implant to do so.[174]

In the first scenario, one party wants to implant the pre-embryo, and the other party opposes.[175] This is the *Davis* scenario.[176] Under the contract framework, the prior implied consent of the party now opposing implantation, coupled with the right to procreate of the party seeking to implant the pre-embryo, outweighs the dissenter's right not to procreate. Unlike *Davis*, the court would not have to resort to the constitutionally infirm solution of determining when life begins in order to reach its result. By applying the contract framework, the court in *Davis* would have ordered compliance with the terms of the contract in order to protect Mary Sue's reliance interest. Mary Sue would have been allowed to implant the pre-embryo.

Mary Sue's later decision not to implant would not frustrate the contract. On appeal, Mary Sue wanted to allow a third person to implant the pre-embryos. Junior opposed this course of action. Because each party would be proposing a term in conflict with the

173. Robertson, *supra* note 4, at 466.

174. *See generally* Robertson, *supra* note 4. Robertson argues that these agreements should be enforced against the party who has changed his/her mind. This implicitly assumes that the most vulnerable party will want to implant. If the most vulnerable party does not want to implant the pre-embryos, the other party should be permitted to implant them if so desired.

175. This scenario can arise whether the man or the woman is opposed to implantation. Although the *Davis* scenario is used for the purpose of discussion, the analysis applies equally in situations where the man seeks to implant and the woman does not want implantation to occur.

176. *See* Robertson, *supra* note 4.

original contract provisions, it would be an ineffective attempt to modify the original contract, and the contract would stand.[177]

Under contract principles, courts resist modifing the terms of the parties' agreement.[178] Under such an analysis, the Tennessee Court of Appeals in *Davis* would not have ordered joint control. The court instead would have stated that both parties still have interests in the pre-embryo in compliance with the terms of the agreement, and the pre-embryo will not be implanted at this time. However, the duration of the contract—the time of pre-embryo viability—is not over. Therefore, either party may perform in compliance with the contract until that time. This point reveals the true advantage of the contract framework in contrast with the joint control solution. The parties, in a joint-control framework, are frozen in their positions. The parties cannot implant unless they both agree. Each party can block the other's attempt to get out of the conundrums "until the fertility clinic decides they no longer want to keep them and tells the Davises to come and pick up the damn things."[179] The only possible outcome, barring agreement between the two parties who are now divorced and separately remarried, is that the litigation will stop when the pre-embryos are no longer viable. As a result of the court's grant of veto power to each party, the struggle for control of the pre-embryo may develop into a contest of one-upsmanship between the parties, with resources going to pay legal fees rather than rebuilding the parties' lives after the divorce. By contrast, the contract framework would allow Junior Davis the opportunity to implant with a surrogate if he desires. Absent the appellate court's order, the parties' attempt at modification of the contract would be ineffective. The original contract would bind Junior Davis.

The next scenario is one where, although the couple may be separated, they still desire to give the pre-embryo a chance to be implanted. They may wish to see the pre-embryo implanted in a surrogate, or an adoptive mother. However, the fact that each parent has alternate preferences is irrelevant as long as they are in agreement. In this case, in accordance with the contract, implantation, absent physiological reasons to the contrary, should be attempted in the natural mother. Usually, she will be the most vulnerable party, unable to conceive by other means. The man may be able to have children without recourse to these pre-embryos. This result should be

177. *Id.* at 466.

178. *See* 4 WILLISTON ON CONTRACTS § 610A at 513 (2d ed. 1957) ("[I]t is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make.").

179. *See* Robertson, *supra* note 4, at 466.

amenable to both parties because both desire implantation to achieve a live birth.

If the parties want to implant but the woman does not want the pre-embryo implanted in herself, and the parties cannot agree upon a surrogate, then following the contract framework, the pre-embryo will not be implanted. The identity of a surrogate need not be a material term, as long as the parties do not insist on a surrogate who may be completely unacceptable to the other party, such as a new wife. However, this is an instance where the court may need to look at additional facts to achieve an equitable result. The central fact then becomes why the woman does not want the pre-embryo implanted in herself. Indeed, this fact supplies the context for the ensuing decision-making process. If the reason is a medical inability to carry to term, then the court examines whether the man is trying to obstruct performance by unreasonably refusing to agree on a surrogate. The parties to the contract should be expected to act in good faith and deal fairly. If this is not the case, then the man is in breach and the pre-embryo should be implanted in the woman's chosen surrogate. Additionally, since both parents want to procreate, the procreative rights are not implicated in this decision.

The final scenario occurs when neither party has any further desire to implant the pre-embryo, and neither party has a preference about its disposition. The parties' voluntary determination rescinds the contract and further negates any involvement of their reproductive rights. Accordingly, the parties implicitly consent to any action taken with the pre-embryos. The IVF center may then adopt provisions, subject, of course, to state regulation,[180] which would allow abandoned pre-embryos to be adopted,[181] or alternatively allow the use of the pre-embryos for medical research. This IVF center arrangement is not at odds with the state's interest in promoting life. Moreover, in a *Davis* situation, where there is no agreement with the IVF center, the state is free to effectuate its preference for life by mandating adoption of the pre-embryo. Both gamete providers would be treated as anonymous donors, avoiding any rearing or support responsibility.[182]

However, it is possible that one or both parties will not want the pre-embryo donated for implantation or experimentation. If both

180. *See* Robertson, *supra* note 3 (commenting on necessity of IVF centers to adopt procedures for donation of undesired frozen pre-embryos).

181. Most centers provide for adoption in cases where neither party wants the pre-embryo. *See* Bonnicksen, *supra* note 2; *see also supra* note 102.

182. *See* John A. Robertson, *Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 980 (1986); Wurmbrand, *supra* note 4, at 1095.

parties oppose procreation, there is a strong presumption that the parties' rights not to procreate should be protected.[183] For the state to force implantation would be repugnant to present Supreme Court decisions that limit state interference in procreative rights.[184]

VI. CONCLUSION

The contract framework does not purport to resolve the myriad complex issues surrounding human reproduction. Instead, this framework attempts to resolve disputes between donors by reference to the parties' relationship, rather than by reference to unresolved legal issues with far-reaching moral, social, and political implications. The parties in these cases have already undergone enormous stress and expense. Prolonged, complex litigation benefits no one.

The contract framework presented here seeks to maximize benefits for all the parties involved. It provides the courts a reference for weighing the equities of the litigants, and provides the litigants the security that their concerns are being addressed and weighed by the court. This framework is a flexible solution that allows the facts of each case to be weighed independently on its merits. Our jurisprudential tradition prefers focusing upon the parties' voluntary actions rather than imposing a normative solution based upon values to which neither of the affected parties necessarily adheres. In the end, this flexibility should permit equitable results in most cases.

The contract framework seeks to maximize the benefits of the parties' agreements, while simultaneously avoiding any unnecessary change in the different areas of consitutional law surrounding this issue. By promoting flexibility of results, as well as opportunities for implantation of pre-embryos, the framework provides a fair and efficient way to resolve the issues between the parties who are most intimately affected.

MARIO J. TRESPALACIOS

183. On the contrary, the Supreme Court is upholding contraceptive rights based on the individual's privacy rights, which include the right to prevent procreation with contraceptives.

184. *See supra* notes 61-64 and accompanying text; *see also* Wurmbrand, *supra* note 4, at 1095.