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FAMILY LAW—STATES SHOULD CREATE A HEIGHTENED STANDARD OF REVIEW FOR CONTRACTS THAT DETERMINE THE DISPOSITION OF FROZEN EMBRYOS IN CONTESTED DIVORCE CASES

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FAMILY LAW—STATES SHOULD CREATE A HEIGHTENED % STANDARD OF REVIEW FOR CONTRACTS THAT DETERMINE THE DISPOSITION OF FROZEN EMBRYOS IN CONTESTED DIVORCE CASES %

Stacie L. Provencher[*]

While in vitro fertilization ("IVF") presents an opportunity to become parents for a couple facing infertility or experiencing medical issues that may ultimately result in infertility, it also presents the possibility for a legal dispute should the couple separate in the future. The contracts that the parties enter into with the fertility clinic, and with each other, at the beginning of the IVF process are long, complicated documents that are often not well explained nor well understood. Because the parties do not necessarily understand the rights that they are each giving up under these contracts or contemplate how forfeiting these rights may affect each in the future, there can be legal disputes if a couple separates. Since many states have not addressed embryo disputes at the time of divorce through legislation, this issue has to be decided by state appellate courts when the issue arises. In 2018–2019, three state appellate courts were tasked with determining the correct way to handle the disposition of embryos as a matter of first impression.

This Note examines the way courts have decided to handle the disposition of embryos[1] *in contested divorces. There are three approaches taken across the country: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach. This Note considers whether contracts with fertility clinics should be*

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1. Courts use the terms "embryo" and "pre-embryo" interchangeably to describe the cryogenically frozen embryos created during the IVF process. For the reader's ease, this Note will use the term "embryo" regardless of the phrase a specific state court uses.

examined by courts more critically than contracts are reviewed generally. This Note argues that states deciding this issue as a matter of first impression should move away from blanket enforcement of contracts. This objective can be accomplished by employing a heightened standard of contract review before enforcing agreements, and instead using the balancing of interests approach in the event the clinic contracts fail to meet this heightened standard in a way that protects the interests of the parties.

INTRODUCTION

Disputes over frozen embryos are becoming increasingly more common during divorce proceedings.[2] In fact, in 2018 alone, multiple parties have pending appeals concerning the court-ordered disposition of frozen embryos pursuant to divorce judgments in state appellate courts throughout the country.[3] This increase in legal disputes over embryo disposition may be the result of new technology that permits frozen embryos to remain viable longer and the increased capability of women to gestationally carry a child at a more advanced age.[4] Because of these technological advances, the number of frozen embryos cryogenically stored throughout the United States has increased.[5] Recent estimates suggest that there may be more than 620,000 frozen embryos currently kept in storage.[6] Additionally, as a result of medical advances in cancer treatment, women who have frozen embryos to protect their fertility potential post-cancer treatment are now living to have the opportunity to bring those embryos to term.[7]

Although the vast majority of litigation is resolved before trial, some complex and heavily contested cases require resolution by way of a trial.[8]

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2. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 378 (2013).

3. *See In re* Marriage of Rooks, 429 P.3d 579 (Colo. 2018); Terrell v. Torres, 438 P.3d 681 (Ariz. Ct. App. 2019); Bilbao v. Goodwin, 217 A.3d 977 (Conn. 2019).

4. *See Grants and Funding*, U.S. DEP'T OF HEALTH AND HUM. SERV., https://www.hhs.gov/opa/about-opa/embryo-adoption/grants-and-funding/index.html [https://perma.cc/V2MW-35VE].

5. *See id.*

6. *Id.*

7. *See* Terrell, 438 P.3d at 684; Reber v. Reiss, 42 A.3d 1131, 1132–33 (Pa. Super. Ct. 2012).

8. *See generally* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005). *But see* Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer: An Empirical Study of Divorce Cases*, 12 J. L. & FAM. STUD. 57, 66 (2010) (noting that there are many divorce cases in which litigants are not able to handle their action pro se given the complexity of the issues).

If the control of frozen embryos remains unresolved at the time of the divorce proceeding, the fate of those embryos is then subjected to the discretion of the courts.[9] Because family law is largely state dependent, each state has the ability to determine its own legal doctrines, although a state can certainly look to other jurisdictions for persuasive authority.[10] Currently, state courts use three different approaches for the purpose of determining the disposition of frozen embryos: the contract approach,[11] the balancing of interests approach,[12] and the contemporaneous mutual consent approach.[13] Each approach has strengths and weaknesses.[14] However, recent cases highlight problematic aspects of the contract approach.[15] While many state courts generally favor the enforcement of contracts, the family law forum has provided some exceptions in which contracts are not enforced unless they include the requirements of an issue-specific, heightened contract standard.[16] Prenuptial agreements, postnuptial agreements, parenting agreements, adoption contracts, and surrogacy contracts are all considered using a more critical standard of review than typical contracts.[17]

Generally, in a divorce case, there is a dichotomy between persons and property.[18] Courts can enter orders concerning custody of persons

9. *Id.*

10. Joseph A. Carroll, *Family Law Is Not Civil: The Faulty Foundation of the Domestic Relation Exception to Federal Jurisdiction*, 52 FAM. L.Q. 125, 125–26 (2018); *see also* Santosky v. Kramer, 455 U.S. 745, 770–71 (1982) (Rehnquist, J., dissenting) ("If ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.").

11. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 590–91 (Tenn. 1992).

12. *See, e.g.*, Reber, 42 A.3d at 1134.

13. *See In re* Marriage of Witten, 672 N.W.2d 768, 777 (Iowa 2003).

14. *See infra* Part II.

15. *See, e.g.*, Terrell v. Torres, 438 P.3d 681, 697 (Ariz. Ct. App. 2019) (Cruz, J., dissenting). Ruby Torres did not foresee that her husband would file for divorce and compromise her ability to have biological children post-cancer. *Id.* The record suggests that she would not have engaged in the creation of embryos using her then-fiancé's sperm if she could have foreseen this as a potential issue. *Id.*

16. *See* Forman, *supra* note 2, at 395.

17. Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 85 (2018); *see* Forman, *supra* note 2, at 395.

18. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence,* 10 J. L. & FAM. STUD. 337, 338–39 (2008); Margaret Ryzner, *An Empirical Study of Property Divisions at Divorce*, 37 PACE L. REV. 589, 600–02 (2017).

(children) and the division of property.[19] Courts use different standards in making decisions concerning these different areas.[20] Despite the emotional attachment an individual may have to an embryo to which they are biologically related, under existing domestic relations law, embryos are not treated the same as live children,[21] and the court lacks the jurisdiction to enter custody orders.[22] Some courts struggle with the concept of treating embryos as property.[23] Overall, most courts treat embryos as a special category of property—one that is not truly property.[24]

While parties may not anticipate a future embryo dispute when they begin the IVF process at a fertility clinic, recent high profile cases are exposing the complicated nature of these disputes.[25] The embryo dispute between Sofia Vergara and her ex-fiancé[26] has garnered national media attention.[27] The Colorado appeal of *In re Marriage of Rooks* was the subject of publications on a national level.[28] People were upset when they

19. Debele & Crockin, *supra* note 17, at 75; Kohm, *supra* note 18, at 338–39; Ryzner, *supra* note 18, at 600–02.

20. Kohm, *supra* note 18, at 338–39; Ryzner, *supra* note 18, at 600–02.

21. *In re* Marriage of Witten, 672 N.W.2d 768, 774–76 (Iowa 2003).

22. Waltenburg v. Waltenburg, 270 S.W.3d 308, 316 (Tex. App. 2008) (discussing that the requirements in place for the determination of the home state of a minor child make clear that the intention of the Uniform Child Custody Jurisdiction and Enforcement Act was not to address custody of fetuses).

23. *See* Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992). In this case the trial court found that the embryos were persons from the moment of conception and awarded custody to the wife so she would be permitted the opportunity to bring the embryos to term. *Id.*

24. *See id.* at 597 (holding that the embryos are not strictly persons or property but "occupy an interim category that entitles them to a special respect because of their potential for human life"); Appellant's Opening Brief at 18, Terrell v. Torres, 438 P.3d 681 (Ariz. Ct. App. 2019) (No. 1 CA-CV 17-0617 FC), 2018 AZ App. Ct. Briefs LEXIS 123 (stating Arizona accords a special status to frozen embryos rather than just treating them as property to be equitably distributed under the state statute); Bilbao v. Goodwin, 65 Conn. L. Rptr. 357, 2017 WL 5642280 at *2 (Conn. Super. Ct. 2017) ("The embryos are not purely property, nor are they persons, but they are deserving of respect."); McQueen v. Gadberry, 507 S.W.3d 127, 158 (Miss. 2016) (finding the embryos to be "marital property *of a special character*" (emphasis added)). *But see* Reber v. Reiss, 42 A.3d 1131, 1132 (2012) (stating that the parties and trial court agreed the embryos were property subject to equitable distribution).

25. Debele & Crockin, *supra* note 17, at 85.

26. Of note, Sofia Vergara was not married to her partner, so her legal dispute did not occur within the parameters of divorce law.

27. *See, e.g.*, Shari Puterman, *Sofia Vergara Loses 'Custody Battle' Over Frozen Embryos*, USA TODAY (June 27, 2018, 3:14 PM), https://www.usatoday.com/story/life/people/2018/06/27/sofia-vergara-custody-battle-frozen-embryos-nick-loeb/739250002/ [https://perma.cc/CF5R-M9F6].

28. *See, e.g.*, Ariana Eunjung Cha, *Court to Weigh if One Parent has the Right to Use Frozen Embryos if the Other Objects*, WASH. POST (Jan. 9, 2018, 12:01 AM),

learned that the Arizona trial court resolved the embryo dispute in *Terrell v. Torres* by ordering the embryos to be donated to a third party.[29] Amidst the outcry, the Arizona state legislature resolved to address the problem by passing a statute creating an official policy instructing the courts how to handle the disposition of embryos in a contested divorce.[30] Despite (and perhaps as a direct result of) these recent high-profile cases, the public legal discourse is only just beginning.[31] From this discourse, a serious question arises: do couples starting the IVF process truly comprehend the potential legal consequences of freezing their embryos?[32]

Additionally, since only a small number of cases and states have addressed the disposition of embryos during a divorce, there is no widespread predictability regarding dispute resolution.[33] While states generally prefer to enforce contracts, many cases have not involved valid contracts regarding the disposition of the embryos in the event of a divorce, and there has not been much guidance as to what makes an embryo disposition contract enforceable. In the event of no contract or an invalid contract, courts have chosen to use the balancing of interests test. The recent decision by the Colorado Supreme Court tried to remedy this predictability problem for the citizens of Colorado.[34] The Court found that if an agreement with the clinic regarding disposition of embryos is clear and enforceable,[35] then the court should enforce the terms of that agreement.[36] However, if there is no clear, enforceable agreement for the

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https://www.washingtonpost.com/national/health-science/court-to-weigh-if-one-parent-has-the-right-to-use-frozen-embryos-if-the-other-objects/2018/01/08/f675edc2-f491-11e7-beb6-c8d48830c54d_story.html?utm_term=.6a589970cf46 [https://perma.cc/F8TZ-GJKA].

29. *See* Ariana Eunjung Cha, *Under New Arizona Law, Custody of Disputed Embryos Goes to Whoever Will Help Them 'Develop to Birth'*, THE SEATTLE TIMES (July 18, 2018, 7:29 PM) [hereinafter "Custody of Disputed Embryos"], https://www.seattletimes.com/nation-world/under-new-arizona-law-custody-of-disputed-embryos-goes-to-whoever-will-help-them-develop-to-birth/; Chris Gros, *Judge Orders Cancer Survivor to Donate Embryos Created with Ex-Husband*, ABC15 ARIZONA (last updated Sept. 1, 2017, 11:01 PM), https://www.abc15.com/news/region-phoenix-metro/central-phoenix/judge-orders-cancer-survivor-to-donate-embryos-created-with-ex-husband [https://perma.cc/56X6-23LH].

30. Custody of Disputed Embryos, *supra,* note 29.

31. Debele & Crockin, *supra* note 17.

32. *Id.*

33. *See infra* Part I.

34. *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

35. The Colorado Supreme Court provided no guidance on what would make a contract clear and enforceable. It remains undetermined whether this analysis would be controlled by Colorado contract law generally. *See generally In re* Marriage of Rooks, 429 P.3d 579 (Colo. 2018).

36. *Rooks*, 429 P.3d at 581.

court to implement, then trial courts must consider a number of factors.[37] The analysis of this decision may provide new guidance to other state courts when crafting their own balancing tests. In the absence of guidance from the Colorado legislature in the form of a statute, the Colorado Supreme Court had no option but to create its own test. The clear guidelines of the balancing test in the *Rooks* decision could inform other state courts on determining how to balance interests as a matter of first-impression.[38] The Colorado Supreme Court changed the balancing test approach from a simple analysis, weighing one party's right to procreate against the right of the other party not to be forced into parenthood, to a multi-factor test that considers, among other factors, the reasons why the parties began IVF and the intentions of the parties if awarded the embryos.[39] However, it remains the prevailing trend to try to use the parties' contract whenever possible.

Part I of this note discusses the current status of the law concerning embryo disposition upon divorce. Part II argues that state courts should avoid blanket enforcement of fertility clinic contracts, and instead only enforce contracts that provide additional protections for the parties in the event of a dispute. When fertility contracts do not meet these heightened contract standards or do not exist, then courts should use the balancing of interests approach, which should consider the parties' wishes at the time they signed a contract with the fertility clinic.

I. THREE CURRENT APPROACHES FOR JUDICIAL DECISION-MAKING

37. *Id.* Here, the court delineated a number of factors that the trial court should consider, as well as a number of factors that would be improper for consideration including:

> (1) the intended use of the pre-embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the pre-embryos to become a genetic parent him- or herself, or instead wants to donate them); (2) the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means; (3) the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment); (4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations; (5) a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and (6) other considerations relevant to the parties' specific situation.

Id.

38. *Id.*

39. *Id.*

CONCERNING EMBRYO DISPUTES

There are three established approaches that state courts use in determining the disposition of frozen embryos: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach. The contract approach provides that the court enforce the parties' agreement with the fertility clinic at the time of divorce.[40] The balancing of interests approach provides that the court consider various factors, such as the parties respective interests in procreating or not procreating, and weigh the factors to determine an equitable result.[41] The contemporaneous mutual consent approach provides that the court takes no action and instead orders the embryos to remain in their current form (cryogenically frozen) until such a time that the parties are able to agree on a disposition for the embryos—for example destroying, donating, or implanting the embryos.[42] These three approaches are discussed further below.

A. ! *The Contract Approach*

The contract approach provides that an agreement between spouses that was entered into when the embryos were created and cryostored will be presumed valid and enforced as to the disposition of the embryos at the time of a dissolution of marriage.[43] The belief is that these agreements "should be presumed valid and should be enforced as between the progenitors."[44] A perceived advantage of the contract approach is that it "reserve[es] to the progenitors the authority to make what is in the first instance, a quintessentially personal, private decision," and it avoids litigation in "personal matters of reproductive choice."[45] However, the contract approach requires a party to actively rescind the contract should he or she no longer agree to the terms.[46] Three states who use the strict contract enforcement approach are Tennessee, New York, and Texas, as discussed below.

40. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
41. *Rooks*, 429 P.3d at 581.
42. *In Re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).
43. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
44. *Id.*
45. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).
46. *See* Finkelstein v. Finkelstein, 162 A.D.3d 401, 403-04 (N.Y. App. Div. 2018).

1. Tennessee

The Tennessee Supreme Court addressed the disposition of frozen embryos at the time of divorce in the 1992 decision of *Davis v. Davis*.[47] Mary Sue Davis and Junior Lewis Davis disagreed[48] about what to do with their frozen embryos at the time of their divorce trial.[49] Mary Sue asked that the embryos be awarded to her.[50] She intended to use them to conceive post-divorce.[51] In contrast, Junior Lewis sought an order that the embryos would remain frozen until he was able to decide if he wished to become a parent outside of marriage.[52] The Tennessee Supreme Court ultimately held that when resolving embryo disputes, the court should first consider the current wishes of the parties and the prior agreement of the parties.[53] If there is no prior agreement, then the court should balance the parties' interests.[54] When balancing interests, the party wishing to avoid procreation should prevail, unless one party has no reasonable possibility of achieving parenthood by any other means.[55] If that party has no other means of achieving parenthood, then the award of the embryos for purposes of use by one party should be considered.[56] In this case, since the husband wished to avoid procreation, his interests prevailed over the wife's, and he was awarded the embryos.[57]

2. New York

New York has had two appellate decisions concerning the disposition of embryos.[58] New York dealt with embryo disposition as a matter of first

47. Davis, 842 S.W.2d 588.

48. The parties also disagreed about the disposition of the embryos at the time the case reached the Tennessee Supreme Court, however, their positions had changed by this point. *Id.* at 590. Instead, Mary Sue had remarried and wished to donate the embryos to a childless couple, while Junior Lewis opposed donation and instead requested that the embryos be discarded. *Id.*

49. *Id.* at 589.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 604.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See generally* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Finkelstein v. Finkelstein, 162 A.D.3d 401 (N.Y. App. Div. 2018).

impression in *Kass v. Kass*.[59] More recently, New York has affirmed the contract approach of *Kass* in *Finkelstein v. Finkelstein*.[60]

a. *Kass v. Kass*

The New York Court of Appeals, the highest state court in New York, determined that a fertility clinic contract should be enforced in the event of a divorce in the 1998 case of *Kass v. Kass*.[61] That court determined that the clinic consent form signed by the Kasses manifested the parties' joint decision to donate the embryos in the event they became divorced.[62] The New York Court of Appeals found that these agreements with clinics did not inherently violate public policy.[63] Since the agreement manifested the agreed-upon wishes of the parties, there was no reason for the court to consider any additional information.[64] The court took the position that since the parties made the informed decision to engage in the contract with the clinic, the court should enforce that contract.[65]

b. Finkelstein v. Finkelstein

In *Finkelstein v. Finkelstein*, the New York Supreme Court, Appellate Division, an intermediate appellate court, determined that Yoram Finkelstein's written revocation of consent constituted a valid withdrawal of consent and was also enforceable as part of the contract.[66] During the pendency of the Finkelsteins' divorce, Yoram Finkelstein sought an order from the trial court to prevent Bat-El Yishay Finkelstein from unilaterally implanting the frozen embryo to conceive.[67] When the court granted less stringent relief than requested, Yoram Finkelstein first executed and had notarized a pre-printed form entitled "Notice of Disposition of Frozen Sperm/Testicular Tissue," which included a handwritten note indicating he was revoking his consent for the use of his genetic material, including the embryo created with Bat-El Yishay Finkelstein.[68] He also, on the same day, signed a second notarized statement indicating he was revoking his consent for the use of his genetic material, including the embryo created

59. *Kass*, 696 N.E.2d at 174.
60. *Finkelstein*, 162 A.D.3d at 401.
61. *Kass*, 696 N.E.2d at 182.
62. *Id.* at 181.
63. *Id.* Neither party made an argument that the agreements violated public policy. *Id.*
64. *Id.*
65. *Id.*
66. *Finkelstein*, 162 A.D.3d at 401.
67. *Id.*
68. *Id.*

with Bat-El Yishay Finkelstein.[69] When the effects of Yoram's revocation of consent for the disposition of the embryo was ultimately considered by the New York appeals court, the court determined that the contract approach established in *Kass* necessitated a finding that the revocation was valid.[70] Since the revocation documents, when taken in conjunction with the original contract, made the intention of the parties clear, the court must carry out the plain purpose of the agreement.[71]

3. Texas

The Texas Court of Appeals decided that the contract enforcement approach was required for embryo disposition under Texas's public policy in the 2006 case of *Roman v. Roman*.[72] The parties in that case suffered from long-term infertility issues and failed attempts at artificial insemination before ultimately beginning IVF.[73] The parties executed a contract with the fertility clinic indicating that the embryos would be stored until the clinic determined there were appropriate conditions to transfer the embryos to the wife's uterus, and both parties agreed and consented to such transfer.[74] The parties indicated in this document that they wished for the embryos to be discarded in the case of divorce.[75] The contract contained a provision that the parties could withdraw their consent to the disposition of the embryos and remove themselves from the program.[76] Ultimately, no embryos were implanted and the husband filed for divorce.[77]

The trial court awarded the embryos to the wife, but the Texas Court of Appeals overturned the trial court since its order was inconsistent with the parties' contract.[78] The court asserted that "allowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and the interests of the

69. *Id.* at 402.

70. *Id.* at 403.

71. *Id.* at 403–04.

72. Roman v. Roman, 193 S.W.3d 40, 50 (Tex. 2006); *see infra* Section II.E.

73. *Roman*, 193 S.W.3d at 42.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 43. The husband withdrew his consent the day before the scheduled implantation. *Id.* The parties were scheduled for implantation again after that, but the clinic required that the parties complete counseling first, which was not finished before the husband filed for divorce. *Id.*

78. *Id.* at 49.

parties."[79] The court determined that a contract satisfying these criteria does not violate public policy, and therefore should be enforced, and ordered that the embryos be discarded.[80]

B. ! *The Balancing of Interests Approach*

The balancing of interests test requires the court to consider certain factors and weigh the competing interests of the parties against each other.[81] State courts have differed in deciding which factors can be appropriately considered by the court when making this equitable determination.[82] The balancing of interests test provides the fact-finder with full discretion to perform this analysis and determine the outcome of the disputed embryos.[83] Since there is full discretion and the test only provides a framework for making the decision about the disputed embryos, outcomes are unpredictable.[84] Further, the appropriate factors for the court to consider when making its determination have only been created by state common law.[85] This common law balancing of interest test differs from a property distribution or custody analysis, in which courts are often given guidance from the legislature concerning which factors it is required to consider in its decision.[86] The courts of New Jersey, Pennsylvania, and Colorado all have used the balancing of interests approach.

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79. *Id.* at 50.

80. *Id.*

81. *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

82. *See, e.g.*, *id*.

83. *See, e.g.*, *id.*

84. *Rooks,* 429 P.3d at 581.

85. *Id.*

86. *Compare* CONN. GEN. STAT. § 46b-81 (2019) ("In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.), *and* CONN. GEN. STAT. § 46b-56 (2019)("In making or modifying any order [concerning custody, care, education, visitation and support of children], . . . the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests.), *with* the balancing of interests test in *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

1. New Jersey

In the 2001 case of *J.B. v. M.B.*, the New Jersey Supreme Court determined that fertility clinic contracts cannot be enforced when one party changes his or her mind and that, instead, in these situations, a balancing of interests test should be applied.[87] The court determined that these clinic consent forms are a necessary part of the assisted reproduction process due to the widespread use of IVF and fertility clinics.[88] The court believed that there would be few cases when the agreement would cease to exist at a later point and another approach would be needed. It stated that in those limited situations, the correct approach would then be the balancing test.[89] Because the court believed that ordinarily under the balancing of interest test the party wishing to avoid parenthood will prevail, the court did not anticipate additional litigation as a result of its decision.[90] Additionally, in an attempt to limit future disputes regarding embryo disposition, the court encouraged clinics to model their agreements in a certain way.[91]

> Principles of fairness dictate that agreements provided by a clinic should be written in plain language, and that a qualified clinic representative should review the terms with the parties prior to execution. Agreements should not be signed in blank, . . . or in a manner suggesting that the parties have not given due consideration to the disposition question.[92]

This statement by the New Jersey court highlights a concern with strictly enforcing clinic agreements. These considerations are discussed further in Part II.

2. Pennsylvania

In the 2012 case of *Reber v. Reiss*, the Pennsylvania Supreme Court determined that the balancing of interests test is the appropriate test in the absence of an enforceable agreement.[93] In this case, the court construed the agreement with the clinic to be one about the storage of the embryos, rather than one between the parties determining the ultimate disposition

87. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012).

of any remaining embryos in the event of divorce.[94] The court then balanced the wife's interests in procreating using the remaining embryos with the husband's interest in avoiding unwanted procreation by way of those embryos.[95] This court affirmed the trial court's determination that the balancing of interests tipped in favor of the wife and affirmed the award of the embryos to the wife.[96] In this case, an important factor was that the wife had no ability to have biological children without the use of the disputed embryos.[97]

3. Colorado

In the 2018 decision of *In re Marriage of Rooks*, the Colorado Supreme Court decided that when determining the disposition of contested embryos during a divorce proceeding, courts should first look to a preexisting agreement of the parties.[98] In the absence of an agreement on the subject, judges should use the balancing of interests test.[99] Importantly, the Colorado Supreme Court was very clear as to what factors could and could not be considered by the trial court when applying the balancing of interests test.[100] The Colorado trial court's decision was

94. *Id.* at 1136.

95. *Id.* at 1137–40.

96. *Id.* at 1142.

97. *Id.* at 1137.

98. *In re* Marriage of Rooks, 429 P.3d 579, 592 (Colo. 2018).

99. *Id.*

100. *Id.*

> Thus, we hold that a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce. In the absence of such an agreement, a court should seek to balance the parties' interests when awarding the pre-embryos. In so doing, a court should consider (1) the intended use of the pre-embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the pre-embryos to become a genetic parent him- or herself, or instead wants to donate them); (2) the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means; (3) the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment); (4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations; (5) a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and (6) other considerations relevant to the parties' specific situation. However, a court should not consider whether the spouse seeking to use the pre-embryos to become a genetic parent can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude implantation of the pre-embryos. Finally, a court should not

overturned since it only balanced the competing interests of a parent seeking to be impregnated with an embryo against the interests of the parent who wished not to become a parent.[101] Since the Colorado trial court only performed a limited balancing analysis, the case was remanded to the trial court with instructions to apply the balancing framework put in place by the Colorado Supreme Court.[102]

While the Colorado Supreme Court expressed that judges should first look to any pre-existing agreements of the parties, it also created a balancing test with clearly established factors that produced a predictable framework.[103] This balancing test considers each party's intentions for the embryos at the time of disposition.[104] Additionally, it considers whether a party is physically able or unable to conceive biological children without the embryos.[105] It also considers the circumstances behind the decision of the parties when they decided to begin IVF.[106]

Under the Colorado decision, unlike the previous balancing tests instituted in other states, the ability to adopt or otherwise parent non-biological children cannot be considered when determining the disposition of the embryos.[107] Additionally, unlike other states, the fact that a party already has genetic children cannot be a sufficient legal justification not to award the embryos to that party.[108]

C. *The Contemporaneous Mutual Consent Approach*

The contemporaneous mutual consent approach contemplates that "no transfer, release, disposition, or use of the embryos can occur without

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> consider whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.

Id.

101. *Id.* at 583, 595.

102. *Id.* at 583, 595. The trial court has not had a hearing on the remand issue as of the writing of this Note. In January of 2019, Mandy Rooks filed a Petition for Certiorari to the Supreme Court of the United States. Petition for Writ of Certiorari, In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018) (No. 18-959). The issues of the petition are: (1) "[w]hether extracorporeal embryos created during marriage are people or a property" and (2) "[w]hether classifying extracorporeal embryos as property and permitting one spouse to discard or donate them to a third party violates the religious rights of the other spouse who believes the embryos are ensouled." *Id.* The Supreme Court declined to take certiorari of this matter. Rooks v. Rooks, 139 S.Ct. 1447 (2019).

103. *Rooks*, 429 P.3d at 581.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

the signed authorization of both donors."[109] When the parties are unable to reach an agreement, the status quo remains in effect.[110] Practically, this results in the embryos being stored indefinitely unless both parties agree to the destruction of the embryos.[111] Because of this practical reality, the court usually orders that any expense associated with maintaining the frozen embryos be borne by the person opposing destruction.[112] Since this approach provides for the embryos to continue to exist in storage indefinitely, there is no closure for the parties and they remain legally, and perhaps emotionally, entangled.

1. Iowa

In the 2003 decision of *In re Marriage of Witten*, the Iowa Supreme Court refused to strictly enforce clinic contracts, and instead indicated that agreements should be followed subject to the individual parties' right to change their minds.[113] It held that clinic agreements do not inherently violate public policy.[114] The Court went on to say:

> Only when one person makes known the agreement no longer reflects his or her current values or wishes is public policy implicated. Upon this occurrence, allowing either party to withdraw his or her agreement to a disposition that person no longer accepts acknowledges the public policy concerns inherent in enforcing prior decisions of a fundamentally personal nature.[115]

Since the *Witten* case dealt with a party who withdrew consent to the original clinic agreement, the Iowa court had to address what approach to take when the contract analysis was inconsistent with public policy and, therefore, could not be applied.[116] Because the court found the contract approach only to be appropriate when neither party changed his or her mind, and opined that the balancing test "substitutes the court as decision maker," the court determined the proper approach was the contemporaneous mutual consent approach.[117]

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109. *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 783.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

2. Missouri

The Missouri Court of Appeals affirmed the trial court's order of contemporaneous mutual consent.[118] The order stated that "no transfer, release, or use of the frozen [pre-]embryos shall occur without the signed authorization of both."[119] The court took the position that this prevented unwarranted governmental intrusion into an intimate decision and left the decision concerning the embryos to the parties alone.[120]

II. IT IS TIME TO MOVE AWAY FROM A STRICT CONTRACT + ENFORCEMENT APPROACH AND TOWARD A HEIGHTENED CONTRACT + STANDARD +

Given the high number of embryos currently being cryogenically stored, the recent rise in embryo-based appeals, and the large number of states that have not yet addressed embryo disposition in contested divorce cases, it seems likely that there will be future instances of embryo disputes in which states are required to make decisions, either by statute or through case law. Since it is important to institute an approach that contemplates that people can change their minds when circumstances change, this Note argues against a strict enforcement of contract. The ideal approach must consider the proposition that parties may agree to a disposition when beginning IVF treatment without fully understanding the long-term consequences of that decision.

This Part argues that fertility clinic agreements should not be enforceable contracts absent certain protections that ensure the parties understand the long-term consequences of their decision. Additionally, it argues that there are situations in which contract enforcement at the time of divorce creates an unequitable result that separates it from most other contracts.[121] This Note likens the heightened standards of other family law contracts—specifically prenuptial and post-nuptial agreements, and surrogacy contracts—to the fertility clinic contracts. If fertility clinic contracts are subject to judicial enforcement, then they should also be required to have more stringent protections in place for the parties in order to be enforceable. Absent a contract that is consistent with protections for the parties at the time of execution and remains equitable in the event of the divorce, courts should use the balancing of interests approach. Finally, this Part considers whether the current state statutes or the ABA Model

118. McQueen v. Gadberry, 507 S.W.3d 127, 158 (Mo. Ct. App. 2016).

119. *Id.*

120. *Id.* at 157.

121. *See infra* Section II.B.

Act truly address the concerns that state courts have had relating to the strict enforcement of contract.

A. *It Currently Remains Unclear if Standard Fertility Clinic Contracts Are Truly Enforceable Contracts*

Several of the cases discussed previously found public policy reasons to question the enforceability of fertility clinic contracts.[122] These clinic consent forms are complicated documents that may limit the parties' ability to fully understand their contents.[123] While the argument for contract enforcement is that the parties are subject to informed consent before signing the fertility contract, there is reason to question whether the information given to the parties results in a level of understanding that truly constitutes informed consent.[124] The argument that the parties are subject to informed consent assumes that the parties are making an independent, informed decision regarding the disposition of embryos.[125] Infertility puts tremendous emotional strain on the parties and the marital relationship,[126] so the decision may not be an independent, informed decision, and instead may be a coerced or single-minded decision.[127]

Additionally, these clinic forms are extensive—they are not just short agreements regarding the disposition of embryos.[128] They contain an overwhelming amount of information for the parties to read, process, and

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122. *See supra* Part I.

123. Forman, *supra* note 2, at 379.

124. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

125. *See id.*

> At the same time, we recognize that life is not static, and that human emotions run particularly high when a married couple is attempting to overcome infertility problems. It follows that the parties' initial "informed consent" to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.

Id.

126. *See id.*

127. *See* Roman v. Roman, 193 S.W.3d 40, 53 (Tex. App. 2006) (noting that the wife "testified that she would have signed anything to move forward because her goal was to have a child"); *see also* Brief for Plaintiff-Appellee at 1, Bilbao v. Goodwin, 217 A.3d 977 (Conn. 2019) (SC 20078), 2018 WL 9536783. *But see* Brief for Amicus Curiae, American Academy of Matrimonial Lawyers, Connecticut Chapter, at 10 n.8, Bilbao v. Goodwin, 217 A.3d 977 (Conn. 2019) (SC 20078), 2019 WL 4228566 ("embryo creation agreements as a whole do not pit one spouse against the other and instead represent them joining together in a future familial endeavor").

128. Forman, *supra* note 2, at 379.

understand.[129] The forms contain "highly technical language in densely packed, single-spaced documents, that may not even clearly delineate different topics."[130] Additionally, even when clinic personnel address the parties' concerns about a lengthy consent, it is still one of many medical forms a patient must complete prior to treatment.[131] This is contrary to the court's assumption when enforcing a contract that parties make informed decisions to partake in these contracts.[132]

Further, parties often execute these forms without "due consideration of the ramifications."[133] In fact, it is not uncommon for parties to fill out some parts of the form and leave other parts of the form blank for the other party to complete.[134] Because these documents are presented as "form contracts drafted by or on behalf of the physicians or clinics, these forms are invariably poorly written and frequently fatally ambiguous and confusing."[135]

Furthermore, the forms are presented at or before the commencement of treatment, at a time the parties are emotionally and mentally fragile, and perhaps desperate to move forward and have a child.[136] This is a time when the parties are "psychologically and emotionally ill-equipped to consider the options for disposition."[137] Since these people are focusing on having a child, it is unrealistic to expect them to carefully consider worst-case scenarios and how they should be handled.[138]

The parties are also unlikely to ask any questions about the legal considerations of the documents that they are signing.[139] The facts of some state appellate cases show that there are occasions when at least one

129. *Id.* *See Consent for Cryopreservation and Storage of Embryos*, CTR. FOR ADVANCED REPROD. SERV., https://www.uconnfertility.com/uconn/wp-content/uploads/2015/02/2-Consent-for-Cryopreservation-of-Embryos2015.pdf [https://perma.cc/G7SQ-2FU7] (for an example of a clinic consent form) [hereinafter *Consent*].

130. Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms are not the Answer*, 24 J. AM. ACAD. MATRIM. L. 57, 67 (2011); *see, e.g.*, *Consent*, *supra* note 129.

131. *Id.*

132. *See* Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998).

133. Forman, *supra* note 2, at 379.

134. *Id.*; *see, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000).

135. Forman, *supra* note 2, at 379.

136. *Id.*

137. *Id.*

138. Forman, *supra* note 130, at 70. Generally, when the parties are planning on having a child together, they are not contemplating their relationship ending or one of the parties dying. *Id.*

139. *Id.* at 75.

of the parties signs the clinic documents at home.[140] When the parties do review the document with a member of the fertility clinic staff, it is usually either with a doctor or a nurse coordinator.[141] It is likely that the questions asked of this medical staff member are of a medical nature, not a legal one.[142] There is usually no legal consultant involved to answer any legal questions the parties may have.[143] These forms do not indicate that the parties should consult a lawyer for independent legal advice concerning the form or any legal rights that are affected by the execution of the form.[144] Additionally, since the medical and contract provisions are combined in these clinic consent forms, there are many different types of information that the parties are asked to process at once.[145]

Some courts, like the Connecticut trial courts, have found that standard clinic consent forms do not constitute valid contracts.[146] In *Mate v. Mate*, a case of first impression in Connecticut, the trial court found that such forms were not consistent with the contract standards required by Connecticut law.[147] In that case, the wife asked to be awarded the embryos, while the husband asked for destruction of the embryos, or, in the alternative, a finding that any children born from those embryos are not children of the relationship.[148] A major issue the Connecticut trial court had with the form is that this "contract" is more of a "check the box" questionnaire than a "carefully considered and drafted understanding."[149] These pro forma documents do not capture the nuances that the court would find relevant—for example, not allowing the couple to specify different dispositions depending on the outcome of IVF.[150]

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140. *Id.*

141. *Id.* at 76.

142. *Id.*

143. Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition* 68 AM. U. L. REV. 515, 564 (2019); *see* Forman, *supra* note 130, at 76.

144. *See, e.g.*, *Consent*, *supra* note 129.

145. Terrell v. Torres, 438 P.3d 681, 685 (Ariz. Ct. App. 2019).

146. Bilbao v. Goodwin, 65 Conn. L. Rptr. 357, at *3 (2017) (No. HHD FA-16-6071615-S), *rev'd*, 217 A.3d 977 (2019). The Connecticut Supreme Court has since overturned the trial court's decision. Bilbao v. Goodwin, 217 A.3d 977 (Conn. 2019).

147. Mate v. Mate, FBTFA 156048231, 2016 WL 6603254 at *8 (Conn. Super. Ct. Sept. 23, 2016).

148. *Id.* at *6. It should be noted that a finding that children born from embryos awarded after a contested divorce are not children of the marriage is consistent with the Uniform Parentage Act's intention. *See* Uniform Parentage Act, §§ 706–07 (2017).

149. *Mate*, 2016 WL 6603254 at *8.

150. Forman, *supra* note 130, at 78.

Additionally, in cases where one party was to receive the embryos in the event of a divorce, this Connecticut trial court believed that there was a lack of consideration for this concession.[151] As a general rule, courts require several contractual elements to be present in an agreement before it can be construed as valid and enforceable.[152] There must be offer and acceptance—a meeting of the minds—the consent of each party to the terms, consideration, and the "execution and delivery of the contract with the intent that it be mutual and binding."[153] Further, there are clearly established defenses to defeat contracts, such as duress and unconscionability.[154] The Connecticut trial court in *Mate* determined "[a]n order that balances both [parties'] interests and is in conformity with our public policy is most appropriate."[155] In the only other Connecticut trial court case addressing embryo disposition at the time of divorce, the judge followed the *Mate* decision and also applied the balancing of interests test, holding that the standard clinic consent form does not constitute an enforceable contract under Connecticut law.[156]

Similarly, the Massachusetts Supreme Judicial Court held a clinic consent form was not enforceable in *A.Z. v. B.Z.*[157] The court found the

151. *Mate*, 2016 WL 6603254 at *8. When the Connecticut Supreme Court overturned the trial court in *Bilbao*, it articulated that the consideration was the mutual exchange of promises and contribution of genetic material. Bilbao v. Goodwin, 217 A.3d 977, *989 (Conn. 2019).

152. Forman, *supra* note 130, at 103.

153. *Id.*

154. *Id.*

155. *Mate*, 2016 WL 6603254 at *18. The court awarded the embryos to the wife with the following conditions: (1) wife would be solely responsible for all costs associated with maintaining the embryos and would hold harmless and indemnify the defendant; (2) if and when the wife decides to conceive a child using the embryos, she is to give the husband ninety days written notice by in-hand service by a process server before implantation; (3) upon notice, the husband shall have the option of terminating any parental rights through the appropriate court, with the wife being responsible for all costs; (4) the wife shall not object to the husband's termination of parental rights request; and (5) in the event any future court orders the father to financially support any future child, the wife shall indemnify and hold harmless the husband for any expense, including reasonable legal fees. *Id.*

156. Bilbao v. Goodwin, 65 Conn. L. Rptr. 357, at *3 (2017) (No. HHD FA-16-6071615-S), *rev'd*, 217 A.3d 977 (2019). In this case, the order that followed the Connecticut balancing of interests approach, consistent with public policy, was an order that "[t]he embryos shall be the property of [the wife]." *Id.* at *4. The wife did not want more children or to have the embryos created using her eggs be donated to strangers. *Id.* The husband already had six children. *Id*. It was unlikely that the parties would reconcile. *Id.* Additionally, the wife's interest in the control and management of her eggs—which were used in the creation of the embryos—outweighs any interest the husband may have in donating them to a stranger. *Id.*

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

clinic form to be flawed for several reasons.[158] First, its main purpose was to define the donor's relationship with the clinic and it did not indicate it was acting as a binding agreement on the parties.[159] Second, there was no duration provision in the form and a substantial amount of time had passed between the time the parties signed the consent form and the time of the parties' divorce action.[160] Third, the form used the phrase "[s]hould we become separated" and did not define what the term "separated" meant.[161] Fourth, the consent form was legally insufficient under Massachusetts General Laws, since "it did not contain provisions for custody, support, and maintenance, in the event that the wife . . . gives birth to a child."[162] Additionally, there was an issue as to whether the husband actually consented to the provisions regarding the disposition of embryos upon separation, since the evidence suggested that the husband signed blank consent forms and allowed the wife to complete them.[163] In any case, the court determined that even if these flaws did not exist and the contract was unambiguous, the court could not enforce an agreement compelling one party to become a parent against his or her present objection because forced procreation goes against public policy.[164]

Additionally, agreements with fertility clinics can certainly leave room for different interpretations and disputes regarding facts and understandings between the two parties. Such disputes show there was not a mutual understanding of the terms of the agreement when the agreement was reached. This was part of the issue in *In re Marriage of Dahl & Angle.*[165] The wife's position at trial was that

> when she and husband signed the agreement, they had intended to use the embryos to create a child for themselves as a married couple and did not intend to use the embryos if they were no longer married. She further stated that they had discussed what would happen to any embryos that were not used by them and had agreed that they would donate the embryos to a facility for scientific research. Her understanding of the agreement was that, if she and husband disagreed on the disposition of the embryos, she would have sole and exclusive right to direct [fertility clinic] to transfer or dispose of the embryos.

158. *Id.* at 1056.
159. *Id.*
160. *Id.* at 1056–57.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *In re* Marriage of Dahl & Angle, 194 P.3d 834, 837 (Or. Ct. App. 2008).

> She opposed having the embryos donated to another woman for implantation.[166]

On the contrary, the husband's position at trial was that he

> denied having initialed or read the [fertility clinic] agreement, and stated that he had signed the last page of the document without a notary present and without having seen the rest of the document. He said that he believed that the "embryos are life," and opposed their destruction or donation to science because "there's no pain greater than having participated in the demise of your own child." Accordingly, he wished to have the embryos donated to others who were attempting to conceive. He testified that he would do "everything" to protect wife's and J's confidentiality related to the donation of the embryos, but acknowledged that he could not guarantee their anonymity.[167]

Ultimately, the court did not find the conflicting testimony compelling enough to disregard the contract, so the court enforced the contract as written.[168]

A lack of clarity in the drafting of contracts generally can lead to dispute and possibly litigation. Unclear drafting in embryo disposition contracts specifically presents different interpretations with serious ramifications. These agreements should be written in plain language[169] so that the parties understand and structure in a way that eliminates the possibility for multiple reasonable interpretations.

Multiple reasonable interpretations of an embryo disposition contract led to different interpretations by the Arizona intermediate appellate court and the Supreme Court of Arizona in the case of *Terrell v. Torres.*[170] In that case, the court of appeals read the paragraph under the "Divorce or Dissolution of Relationship" provision to provide the court with discretion to award the embryos to one party or to direct the donation of the

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166. *Id.*

167. *Id.*

168. *Id.* at 842.

> Husband does not argue that the agreement itself is ambiguous or invalid for public policy reasons. Rather, he asks that we award possession of (and decision-making authority over) the embryos to him, because his belief that the embryos are life and his desire to donate the embryos in a way that would allow 'his offspring to develop their full potential as human beings' should outweigh wife's interest in avoiding genetic parenthood.

Id. at 841.

169. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).

170. Terrell v. Torres, 456 P.3d. 13, 17 (Ariz. 2020). See Part II.E.4 *infra* for discussion of the trial court decision and the statute enacted while the appeal was pending.

embryos.[171] The Arizona Supreme Court overturned that court's decision, determining the proper interpretation of the contract was to read that provision in conjunction with the provision requiring contemporaneous consent to create a pregnancy.[172] The fact that two appellate courts, consisting of highly educated and experienced judges, differed in their interpretation of a contract demonstrates the likelihood that individuals without extensive education and experience in contract drafting could have different understandings of a contract. Given that the parties are signing a sophisticated agreement with long-term ramifications, the parties should understand how their rights are being affected. A higher level of scrutiny or additional protections would ensure that parties understand how their interests are being affected by an embryo disposition agreement.

There is evidence that parties are likely to change their opinions regarding embryo disposition over time.[173] When parties are dealing with infertility, they experience significant stress, which increases the likelihood of selective perception.[174] When parties initially sign the agreement regarding the disposition of embryos, the embryos do not yet exist, so they are not a real or tangible concept for the parties.[175] When they make the decision, the parties do not know whether they will need all of the embryos to have a successful pregnancy.[176] Since these embryos are an abstract concept, couples experience a low level of conflict over embryo disposition before undergoing IVF.[177] This greatly differs from the high emotional conflict regarding the decision for the disposition of the embryos after the parties have undergone IVF treatment.[178] Parties often support donation of the unused embryos to research or another infertile couple before having a successful birth of a child.[179] However, once the parties have had a successful birth, then they often perceive the unused embryos to be their child's siblings and struggle with the idea of giving the embryos away.[180] Proponents of the contract approach argue that the ability to subsequently amend the contract or revoke consent

171. *Terrell*, 456 P.3d at 15.
172. *Id.* at 16.
173. Forman, *supra* note 2, at 387.
174. *Id.* at 389.
175. *Id.* at 390.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 391.
180. *Id.*

allows the parties the flexibility needed to adapt the agreement to changing circumstances and to address new concerns.[181] It is important that parties have the ability to amend the contract or revoke their consent after they initially sign the agreement and that the clinics permit such modifications.

B. *Strict Enforcement of Contract Creates the Opportunity for an Inequitable Result—One That Would Be Deemed Unconscionable in the Context of a Prenuptial or Postnuptial Agreement.*

The use of the contract approach at times results in what is arguably an unequitable result.[182] One possible consideration when determining if a result is truly equitable is the future ability of both parties to have children. When courts employ the balancing test, they look to see if the parties have already had children, and if the parties still have the ability to have children in the future, either biologically or by way of adoption.[183] Because a person with a history of illness, such as cancer, has a harder time adopting, the court should consider if the person has no biological way to have a child other than the embryos.[184] Additionally, someone who is older is less likely to be selected as a parent in the private adoption system than a younger parent.[185] Also, a single parent has a harder time adopting than a married couple.[186] This reality puts older women who have survived cancer at a distinct disadvantage.[187] These women attempt

181. Terrell v. Torres, 438 P.3d 681, 685 (Ariz. Ct. App. 2019).

182. *See* Melissa B. Herrera, Note, *Arizona Gamete Donor Law: A Call for Recognizing Women's Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN'S LAW J. 119, 141 (2019). Herrera argues that women should presumptively win all embryo disputes as a result of their superior genetic contribution. *Id.* Because women undergo a more intense and invasive procedure in egg extraction than men undergo in sperm collection and because women lose their fertility at menopause while men retain their fertility indefinitely, the women should have a superior property claim in embryos that result from their eggs. *Id.*

183. *See In Re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018); Davis v. Davis, 842 S.W. 2d 588, 604 (Tenn. 1992).

184. Reber v. Reiss, 42 A.3d 1131, 1139 (Pa. Super. Ct. 2012).

185. *Id.* However, the Pennsylvania Superior Court stated:

> There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to [a party], it does not mean that such options should be given equal weight in a balancing test. Adoption is a laudable, wonderful and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child.

Id. at 1138.

186. *Id.* at 1139.

187. *Id.*

to preserve their fertility by undergoing egg extraction and freezing embryos in advance of any cancer treatments that could ruin their fertility.[188] If medical advances help these women survive, but the trials of cancer cost them their marriage, it should not also cost them their only chance of having a child. If the court is trying to create an equitable result, then denying embryos to these women cannot be deemed equitable.[189] It could discourage women from freezing their eggs in the form of embryos with their husband's sperm.[190]

Since these clinic agreements regarding embryos deal with the disposition of property upon divorce, similar to a prenuptial or postnuptial agreement, perhaps the clinic agreements should have similar contract standards applied to their enforcement.[191] These clinic agreements are an agreement between two people in an intimate relationship regarding the disposition of "property" in case of a divorce.[192] Therefore, perhaps, similar to prenuptial and postnuptial agreements, there should be clear defenses to the enforcement of the embryo contract if one party no longer wishes to be bound by the agreement.[193]

The most applicable of the nuptial agreement contract defenses is the idea of unconscionability at the time of enforcement.[194] The Uniform Premarital Agreement Act specifically addresses unconscionability.[195] Per the Act, a nuptial agreement is unconscionable at the time of execution if one party lacks the necessary information to understand the full financial picture of the other party.[196] Additionally, an agreement is unconscionable at the time enforcement is sought if it leaves one party in such a poor situation that the person has no financial alternative but to seek public assistance.[197] Some states have expanded the defense of unconscionability. For example, Arkansas courts can find an agreement

188. *See, e.g.*, Appellant's Opening Brief, Terrel v. Torres, *supra* note 24, at 3–4.

189. *See generally id.*

190. *See generally id.*

191. *See generally* J. Thomas Oldham, *Would Enactment of the Uniform Premarital and Marital Agreements Act in All Fifty States Change U.S. Law Regarding Premarital Agreements?*, 46 FAM L. Q. 367 (2012).

192. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

193. *See generally* Oldham, *supra* note 191.

194. *See id*. *But see* Ziegler, *supra* note 143 (arguing that unconscionability does not apply to embryo contracts because embryo disputes do not relate to money or relative contribution).

195. Amberlynn Curry, Comment, *The Uniform Premarital Agreement Act and Its Variations Throughout the States*, 23 AM. ACAD. MATRIM. L. 355, 357 (2010).

196. *Id.*

197. *Id.* at 358.

unconscionable if the party did not voluntarily and knowingly waive his or her property rights *after consulting with counsel*.[198]

The unconscionability at the time the agreement is sought defense could be a possible defense to enforcement of an embryo contract. One can argue that the decision not to award the embryos to a party who has no other way to have genetically-related children is unconscionable.[199] If the destruction of the embryos could take away that party's only opportunity to have his or her own biological children, then the agreement may be unconscionable. The provisions of premarital agreement statutes have provided specific contract defenses for arguing against enforcement of those contracts.[200] Similarly, creating statutes with clearly delineated defenses against the enforcement of embryo agreements would create a unique, heightened contract standard for embryo contracts.

In the alternative, such protections could be created through common law.[201] The potential need for a heightened standard was mentioned by the Connecticut Supreme Court in *Bilbao v. Goodwin.*[202] The Court noted that intimate partner agreements generally warrant "special scrutiny" because parties "tend to be less cautious" when contracting with an intimate partner than with others and because events may occur prior to a divorce that "go beyond their contemplation at the time they entered into the agreement."[203] However, such issues did not arise in the *Bilbao* case so these statements only amount to dicta.[204] Therefore, the Court did not explicate this standard beyond saying that they "recognize that these circumstances could arise in other cases."[205] In their amicus curiae brief for this case, the Connecticut Chapter of the American Academy of Matrimonial Lawyers advocated that

> "while an embryo disposition contract should be considered presumptively valid and enforceable, that presumption can be rebutted by a party seeking to avoid enforcement of the agreement if that party

198. *Id.* at 360.

199. *See Unconscionable Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An agreement that no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept.").

200. *See generally Oldham*, *supra* note 191.

201. For example, in Connecticut, a heightened standard of review for postnuptial agreements was created by way of common law. *See generally* Bedrick v. Bedrick, 17 A.3d 17 (Conn. 2011).

202. Bilbao v. Goodwin, 217 A.3d 977, 989 n.6 (Conn. 2019).

203. *Id.*

204. *Id.*

205. *Id.*

> proves by clear and convincing evidence that the circumstances of the parties have changed so significantly since the parties entered into the agreement that enforcement of the agreement would work an injustice. This standard is akin to the 'unconscionability at the time enforcement is sought' standard for prenuptial and postnuptial agreements."[206]

However, the Chapter did not advocate for a possible defense of unconscionability at the time of execution because in its opinion the same concerns of transparency and disclosure do not exist.[207] It remains unknown how the Connecticut courts would address a matter when enforcing the embryo disposition agreement would create an unconscionable result, but these comments suggest that Connecticut would potentially use a heightened standard of contract review.

C. ! *Unlike Prenuptial Agreements and Surrogacy Contracts, There is No Statutory Guidance in Place for a Clinic Contract to Be Enforceable.*

In addition to creating subject-specific defenses, states have created statutory schemes with heightened standards for prenuptial agreements and surrogacy contracts. State legislatures are able to provide criteria for permissible contracts through the passage of these statutes.

The contract approach is arguably similar to the enforcement of prenuptial agreements.[208] Both prenuptial agreements and embryo contracts involve parties making decisions concerning future rights before engaging in a new legal relationship: marriage or embryo creation. Under the contract approach for embryo disposition, one party may seek enforcement of the contract at the time of divorce. However, unlike prenuptial agreements, there are no statutorily provided grounds for contesting or seeking enforcement of embryo contracts.[209]

There are several articulated grounds to contest a prenuptial agreement. There are requirements of advisement from counsel before signing, equity at the time of execution, an absence of duress at the time of execution, and adequate disclosure at the time of execution.[210] Additionally, as discussed above, some jurisdictions require that the

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206. Brief for Amicus Curiae, American Academy of Matrimonial Lawyers, Connecticut Chapter, at 10, Bilbao v. Goodwin, 217 A.3d 977 (Conn. 2019) (SC 20078), 2019 WL 4228566 (citation omitted).

207. **Id.* at 10 n.8.

208. **See generally id.*

209. **See generally id.*

210. **See generally id.*

agreements not be unconscionable at the time of divorce.[211] Postnuptial agreements follow similar standards. Enforceability of postnuptial agreements requires fair and full disclosure, equity at the time of signing, and the agreement cannot be unconscionable at the time of divorce.[212] Postnuptial agreements are reviewed carefully when enforcement is at issue, since the parties have a relationship of mutual confidence and trust.[213] The close relationship of a married couple entering into a postnuptial agreement greatly differs from the arms-length transaction of most contracts.[214] In fact, this relationship between married spouses even differs from the relationship of parties about to enter into a prenuptial agreement.[215]

Similarly, the parties are married and engaged in a relationship of mutual confidence and trust when they enter into an embryo contract. These parties are not engaged in arms-length negotiations. In fact, they are arguably in an even more intimate relationship than married parties entering into a post-nuptial agreement. The parties entering into an embryo contract are beginning the intimate act of conceiving a child together. There is plenty of cause for concern that these parties are not making independent decisions.

Some states have recognized a similar need for requirements for surrogacy contracts and enacted statutes to regulate the enforceability of those surrogacy contracts. New Hampshire enacted a statute outlining the criteria for an enforceable surrogacy contract.[216] This statute requires that surrogacy agreements be in writing, executed in advance of the commencement of any medical procedures intended to impregnate the surrogate, and executed with the surrogate and future parents having independent legal counsel advising them.[217] The agreement must contain provisions concerning the obligations of the surrogate and the obligations of the couple.[218] Finally, the agreement must contain provisions concerning what to do in the event of a breach of the contract and who has decision-making power in the event of a pregnancy termination.[219]

211. *Id. See supra* Section II.B.
212. *See generally Oldham, supra* note 191.
213. *Id.*
214. *Id.*
215. *Id.*
216. N.H. REV. STAT. ANN. § 168-B:11 (2019).
217. *Id.*
218. *Id.*
219. *Id.*

Delaware has also enacted a statute applicable to surrogacy contracts containing similar provisions.[220] The Delaware statute requires that the agreement be in writing and executed in advance of the implantation of the embryos in the surrogate.[221] Delaware also requires that the surrogate and future parents each be advised by independent counsel.[222] However, the Delaware statute also requires that the carrier and the prospective parents sign a written statement that they have received information concerning the "legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational carrier agreement."[223]

California also has similar requirements for a surrogacy agreement.[224] Again, the agreement must be in writing, and the carrier and potential parents need to execute the agreement after consultation with independent counsel.[225] California also has an additional requirement beyond those imposed by New Hampshire and Delaware; California requires the agreement to be witnessed and notarized (or witnessed by an equivalent method of affirmation).[226]

States should enact statutes that provide similar necessary requirements for embryo agreements to be enforceable. These requirements should be similar to surrogacy contracts, such as requiring the documents to be witnessed or requiring legal consultation, or they could be completely unique to embryo contracts. These protections would ensure the parties receive independent legal counsel and understand the consequences of the agreement that they are signing.

D. ! *States Should Adopt a Heightened Contract Standard, Rather than the Balancing of Interests or Contemporaneous Mutual Consent Approach*

Instead of attempting to enact statutes providing articulated criteria to protect the interests of parties under the contract approach, should states instead employ another approach? While some courts are hesitant to enforce embryo contracts, there are important critiques of the other approaches. The balancing of interests approach demands that the court look at the individual facts and circumstances and perform an analysis as

220. *DEL. CODE ANN. tit. 13, § 8-807 (2019).
221. **Id.*
222. **Id.*
223. **Id.*
224. *CAL. FAM. CODE § 7962 (West 2018).
225. **Id.*
226. **Id.*

to which interests outweigh other interests.[227] This results in virtually no predictability. Generally, the party who does not wish to procreate has the strongest interest and the other party's interest in procreation does not outweigh this.[228] However, this approach leaves room for the court to account for various factors.[229] The court can consider the desires of the party at the time of the creation of the embryos and at the current time.[230] It can consider whether the parties already have children.[231] It can consider if the parties have the ability to have children, biologically or otherwise, beyond the embryos in question.[232] While no case has done so yet, this approach has the capacity to account for changes in a party's religious or moral beliefs.[233] If a party has a change in their religious or moral beliefs and no longer agrees with destroying the embryos, the judge could consider this.[234] This approach mimics the way that courts normally distribute property in divorces when there is not a prenuptial agreement or postnuptial agreement.[235] Normally, courts have a list of statutory factors that they are to consider.[236] They then perform an analysis using those factors to divide the property.[237] The high volume of cases resolving property distribution has led to some predictability; however, there are so few embryo disposition cases that there would likely be no real predictability.

Courts often only employ the balancing of interest approach when they lack the enforceable contract.[238] Courts often are forced to use the balancing of interests approach even though they would use the contract approach if they had a valid contract.[239] By forcing the court to make

227. *In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

228. *See In re* Marriage of Dahl & Angle, 194 P.3d 834, 841 (Or. Ct. App. 2008).

229. The factors for the trial court to consider vary by state. *See, e.g.*, *Rooks*, 429 P.3d at 581; Bilbao v. Goodwin, 65 Conn. L. Rptr. 357, 2017 WL 5642280 at *4 (Conn. Super. Ct. 2017).

230. *Rooks*, 429 P.3d at 581.

231. *Bilbao*, 2017 WL 5642280 at *3.

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

233. Since the factors vary by state, a state has the ability to select which factors a trial court should consider.

234. The court or legislature for each state has the capacity to control which factors that state's balancing of interest tests consider. *See, e.g.*, *Rooks*, 429 P.3d at 581. The Colorado Supreme Court made the decision to exclude certain factors from consideration that other states had as a part of their balancing of interest tests. *Id.*

235. *See, e.g.*, CONN. GEN. STAT. § 46b-81 (West 2013).

236. *Id.*

237. *Id.*

238. *See supra* Section I.A.

239. *See supra* Section I.A.

decisions concerning the embryos under the balancing of interests test, the court must take part in unwarranted governmental intrusion into an intimate decision that is normally not subject to state involvement.[240] Recent decisions in other types of family law matters suggest the beginning of a trend that removes the actual decision-making from the court and instead the court awards decision-making power to one of the two parties.[241] In the embryo dispute context, this could mean that the court would award the embryos to one party or the other, but would not provide instruction such as "awarded to party A to destroy."

Similarly, courts have criticized the contemporaneous mutual consent approach because it does not realistically end the dispute between the parties.[242] It effectively keeps the parties intertwined since the practical result is that the embryos remain frozen until they are no longer viable.[243] If the parties were able to reach an agreement regarding the disposition of their embryos, they would not be seeking an order on the disposition of those embryos from the court at the time of divorce.

Since the shortcomings of the contract enforcement approach could be remedied through a heightened contract standard, this new standard should be the preferred approach. If a contract does not meet heightened standards or is ambiguous, then the balancing of interests test should be the preferred test. Since this is asking the government to become involved in an intimate part of the parties' lives, it should not be preferred over contract enforcement with heightened scrutiny. Contract enforcement with a heightened standard of review provides for people to control, or at the very least influence, the future disposition of their embryos. If the contract does not meet heightened standards, then the intentions of the contract should still be an important factor under the balancing of interests test.

E. *Is Resolving the Doctrinal Dispute by Statute the Answer?*

Nationwide, the lack of state statutes providing the courts with guidance for determining the ultimate disposition of embryos has created uncertainty for both parties and the judiciary.[244] Instead, judges have been required to create common law that decides the individual state policy for

240. McQueen v. Gadberry, 507 S.W.3d 127, 157 (Mo. Ct. App. 2016).

241. *See, e.g.*, Nicaise v. Sunderam, 418 P.3d 1045 (Ariz. Ct. App. 2018) (holding that the court can award decision-making powers in a legal custody action but that the court cannot substitute its own judgment for the judgment of the parties).

242. *See In re* Marriage of Rooks, 429 P.3d 579, 581 (Colo. 2018).

243. *Id.*

244. *See supra* Part I.

determining embryo disposition.[245] However, some states have tried to address the problem through legislation.[246]

1. Florida

Florida's embryo disposition statute greatly restricts, if not altogether removes, the court's ability to award the embryos to either party.[247] Florida requires physicians and parties to enter into written agreements concerning the disposition of embryos in case of divorce, death, or any other unforeseen circumstance.[248] It goes on to state that "[a]bsent a written agreement, decisionmaking [sic] authority regarding the disposition of preembryos shall reside jointly with the commissioning couple."[249] This means that a judge cannot apply a balancing test to award the embryos to one party over another.[250] Of note, the precise language of the statute gives clear expectations to the parties (and the clinics) that contracts that make clear the desired intention of the parties upon divorce are necessary under all circumstances.[251] Additionally, it makes it clear to the judiciary that the parties are expected to agree in advance by way of contract, and if they cannot, then the parties are given joint decision-making power.[252] It appears that the intention of this statute is to create a policy of contract enforcement, and absent a contract, a policy of contemporaneous mutual consent.[253]

2. Texas

The Texas legislature passed a statute requiring that both parties consent to becoming the legal parents of a child conceived by way of IVF if the implantation occurs after divorce.[254] The statute says that "[t]he consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos."[255] The statute's intention is

245. *Id.*

246. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318.03 (2018); FLA. STAT. ANN. § 742.17 (West 2018); TEX. FAM. CODE ANN. § 160.706 (West 2017).

247. FLA. STAT. ANN. § 742.17 (West 2018).

248. *Id.*

249. FLA. STAT. ANN. § 742.17(2) (West 2018).

250. FLA. STAT. ANN. § 742.17 (West 2018).

251. *Id.*

252. *Id.*

253. *See id.* As of the writing of this Note, there are no decisions interpreting this provision of the statute.

254. TEX. FAM. CODE ANN. § 160.706(a) (West 2017).

255. TEX. FAM. CODE ANN. § 160.706(b) (West 2017).

to make clear that these agreements are enforceable unless the party actively withdraws his or her consent.[256]

3. Model Act

The ABA Model Act attempts to create a template for alternative reproductive technology legal issues, including the disposition of embryos upon divorce and embryo contracts with clinics.[257] However, the Model Act only provides limited guidance on what provisions an embryo contract should have.[258] The Model Act says the contract needs to be in writing and needs to include a desired disposition upon death or divorce.[259] The Model Act also indicates that the parties have the right to rescind their agreement at any time and provides a process for rescinding the agreement.[260] But that is where the guidance ends. There are not additional protections that would create a heightened contract standard.[261]

4. Arizona

The Arizona legislature took a unique approach to solving the dispute concerning how to award embryos at the time of divorce by passing a law guiding courts concerning how to resolve embryo disputes.[262] The legislature passed this new law while there was an appeal of the issue pending in the Arizona Court of Appeals.[263] The new statute requires judges to award the embryos to the spouse who intends to develop the embryos to birth.[264] If both spouses express an intention to develop the embryos to birth, and both spouses provided gametes for the embryos, then the judge should resolve the dispute in the manner that provides the best chance to develop the embryos to birth. [265] If both spouses express an intention to develop the embryos to birth, but only one provided the gametes for the embryos, then the judge should award the embryos to the party who provided the gametes.[266]

256. *See id.*

257. MODEL ACT CONCERNING ASSISTED REPRODUCTION § 501 (AM. BAR ASS'N 2019).

258. *Id.* at § 501.

259. *Id.*

260. *Id.*

261. The requirements of the model act do not reach the heightened requirements of prenuptial agreement and surrogacy contracts. *See supra* Section II.C.

262. *See* Cha, *supra* note 29.

263. *Id.*

264. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

265. *Id.*

266. *Id.*

The passage of this statute was a reaction to the trial court's decision concerning the embryos in *Terrell v. Torres*.[267] John Joseph Terrell and Ruby Torres chose to create embryos as a result of Torres' aggressive bilateral breast cancer diagnosis.[268] Before beginning treatment, she took efforts to preserve her ability to have children in the future by way of IVF.[269] Initially, Terrell did not want to participate in the IVF procedure, but changed his mind after Torres found another possible donor.[270] Terrell testified that he contributed his sperm as a favor to Torres, but he also thought they could have a child together eventually.[271]

The parties signed a clinic consent form and checked-off and initialed a provision asking that in the case of a divorce, "[a] court decree and/or settlement agreement will be presented to the Clinic directing use to achieve a pregnancy in one of us or donation to another couple for that purpose."[272] There was an additional provision in the clinic consent form that said "[e]mbryos cannot be used to produce pregnancy against the wishes of the partner" and used the example of divorce saying that the embryos could not be used to create a pregnancy "without the express, written consent of both parties."[273] Terrell signed the clinic form relying on the mutual consent provision of the document; he did not intend for Torres to use the embryos without his consent, only for her to use the embryos with him.[274] In fact, he did not expect that she would live to have children, so he did not expect that she would use the embryos at all, regardless of his relationship with her.[275]

Ultimately, Torres survived her cancer, but the testimony showed it would be a "miracle" for her to have biological children without the frozen embryos.[276] Additionally, adoption was not an option for Torres because

267. *See* SB 1393: Parental Right to Embryo, CTR. ARIZ. POL'Y, https://www.azpolicy.org/bill/sb-1393-parental-right-to-embryo/ [https://perma.cc/X722-72C4]; Cha, *supra* note 29.

268. Appellant's Opening Brief, *supra* note 24, at 3.

269. *Id.* at 3–4. While Torres could have just frozen her eggs, she chose IVF because frozen embryos have a better chance to develop into children than frozen eggs. *Id.* at 7.

270. *Id.* at 4. The parties were not yet married at the time the procedure took place. *Id.*

271. *Id.*

272. Appellee's Response Brief, Terrell v. Torres, 438 P.3d 681 (Ariz. Ct. App. 2019) (No. 1 CA-CV 17-0617), 2017 WL 7736721.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

she would likely be unable to qualify due to her medical history.[277] In their Proposed Resolution Statements before the trial, Terrell indicated he wanted the embryos destroyed and Torres indicated she wanted them awarded to her, with Terrell having no liability or involvement unless he chose to do so.[278] If the court did not award Torres the embryos, then she would have had them donated per the contract.[279] The court ultimately decided that the embryos would be placed for donation by the clinic to a third party or another couple.[280] The trial court determined that Terrell's right not to be compelled to be a father outweighed Torres' right to procreate and have a biologically related child.[281] Torres appealed the trial court decision to the Arizona Court of Appeals.[282] Instead of waiting for this legal dispute to be resolved through the appellate court, the Arizona legislature passed the statute discussed above.[283] However, since the new statute does not apply retroactively, it did not affect the result of the Torres case.[284]

The Arizona statute attempts to eliminate the concerns of forced parenthood by creating a situation in which the other party is not the legal parent of any child that develops from the embryos, unless he or she consents in writing to be the legal parent.[285] Absent the written consent, the other spouse has no legal rights or obligations associated with any

277. *Id.* Per Terrell's appellate brief, Torres offered no testimony at trial regarding her ability to use other options such as using donated embryos, using donated eggs and sperm to create new embryos, using eggs donated by a family member or anonymously to have a child biologically related to a new husband, or adoption as a couple or single mother. *Id.* at 29.

278. Appellant's Opening Brief, *supra* note 24, at 8. Critically, when the trial court obtained a copy of the parties' IVF contract it found that there was a clear indication that the parties did not want the embryos to be destroyed and ordered the parties to sign the necessary documents to continue preserving the embryos. *Id.* When the parties were subsequently ordered to submit briefs on embryos as property in Arizona, Terrell changed his proposal to the embryos being awarded to him so that he could prevent Torres from transferring them to another facility that would allow her to achieve pregnancy or in the alternative, allow the embryos to remain in storage indefinitely until the parties were able to agree on their disposition. *Id.*

279. *Id.* at 12.

280. *Id.* at 13. This award is one of the two issues that were appealed in the action.

281. *Id.* at 12.

282. Terrell v. Torres, 438 P.3d 681 (Ariz. Ct. App. 2019). The decision of the courts of appeals was subsequently overturned by the Arizona Supreme Court, which affirmed the trial court's decision. Terrell v. Torres, 456 P.3d 13, 18 (Ariz. 2020). See Part II.A. *infra* for further discussion of this decision.

283. Cha, *supra* note 29.

284. *Id.*

285. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

potential child.[286] However, the approach of this statute seems to only consider the legal consequences and ignores the emotional or moral problems associated with forced parenthood.[287] In an attempt to dissuade support for the legislation, the president of the national infertility group Resolve wrote a letter to the Arizona House of Representatives indicating that it could be "exceedingly painful" to have biological children born against one's wishes.[288] In a case like the one of *Terrell v. Torres*, the non-legal-parent party would know who is raising their biological children and may potentially see the legal parent party or the children in their everyday life.[289] Therefore, there is a potential moral dilemma if the person becomes aware that his or her children are in an unsafe or unhealthy situation.[290] Additionally, since spouses are often part of the same social circle, it is likely that family members and social contacts would be around the child and know information about the child.[291]

Even though Arizona created a framework with predictable results through its legislation, Arizona abandoned the three approaches already in existence. An analysis that only considers the potential life of the embryo is not an approach that should become widespread.

CONCLUSION

There are some serious problems with the contract approach; however, enacting heightened contract standards can provide the protections for the parties necessary to make it the best approach for states forced to make such a decision. Strictly enforcing contracts without proper protections for the parties in place can result in inequitable results. Parties may not understand the rights they are implicating when they sign

286. *Id.* *See also* Uniform Parentage Act, §§ 706–07 (2017) (containing a similar provision to limit the legal obligations to parties who oppose the implantation of contested embryos).

287. *See* Cha, *supra* note 29. The state senator who introduced the bill stated that most people believe the embryos deserve a chance at life, which suggests that the intention for instituting this legislation was more grounded in an overall pro-life policy rather than addressing the situations of the individual couples. *Id.* The chair of the American Bar Association's committee on fertility technology believes the legislation to be flawed because it is an end-around to establish the personhood of embryos—an important goal of anti-abortion campaigners. *Id.* The potential ramifications for abortion law that may be caused by embryo decisions and law are outside the purview of this Note.

288. Cha, *supra* note 29.

289. Appellee's Response Brief, *supra* note 272, at 26.

290. *Id.*

291. *Id.* at 27.

the contract.[292] Some may not realize until it is too late, and there is nothing that the party can do to actively withdraw his or her consent from the contract. However, if states were to pass legislation or decide through case law that embryo contracts should be governed by a heightened contract standard, then it should alleviate all these concerns. The majority of states have not had a case that required them to select an approach, but it is likely that more states will encounter this problem in the coming years. This Note urges states that are encountering a case of first impression to seriously contemplate the problems with the contract approach unless there are additional protections in place. This approach, as it stands, does not allow for the court to disregard the agreement when the facts prevent enforcement from being the equitable result.[293]

The best approach for states to adopt is a contract standard with additional protections and required criteria, similar to a prenuptial or postnuptial agreement, or a surrogacy contract. If the fertility clinic contract does not have the necessary protections and requirements, or if the application of the contract creates an unconscionable result, then the court should apply a balancing of interests test. This should be a balancing of interests test that puts heavy weight on the wishes of the parties at the time the embryos were created. This would still allow for the enforcement of the clinic contract in all cases except the ones that have extreme facts and circumstances. Such an approach would create exceptions for the parties who have no other way to have children so that they still have the ability to do so. This would also mean that in the vast majority of cases, parties could not be forced into being parents against their wishes.

The best approach may be that the state legislatures begin proactively enacting statutes. These statutes can provide the requirements and protections for enforceable embryo disposition contracts. The absence of a preexisting statutory scheme may result in a situation like Arizona, in which people had a strong emotional reaction about the wife who lost her only opportunity to have children after her cancer treatment.[294] It tore at people's heartstrings and resulted in the passing of a new statute that requires the judge to award the embryos to whichever parent was more likely to bring the embryo to term as a baby.[295] It remains unknown what

292. *See supra* Part II.

293. *See id.*

294. *See generally* Cha, *supra* note 29.

295. *Id.*

unintended consequences could result from this emotion-based legislation and whether such a statute will withstand constitutional review.[296]

If states are proactive in enacting statutes providing requirements for these embryo disposition forms, then there would be set defenses to defeat the contracts in cases where there are agreements and guidance for the judiciary in cases where there is no preexisting agreement. As a direct result of clear guidelines, consent forms would be forced to evolve to be consistent with the requirements of these statutes, similar to the current state of prenuptial agreements.[297] Just as parties and their counsel ensure that their prenuptial agreements are consistent with the statutory requirements for enforceability, clinics would have to ensure that their embryo agreements meet the heightened contract standards. Parties would also be encouraged to seek independent legal counsel regarding these agreements. These additional protections would maintain the self-directing nature of the contract approach and also temper the criticisms of this approach.

296. *See generally* Catherine Wheatley, Note, *Arizona's* Torres v. Terrell *and Section 318.03: The Wild West of Pre-Embryo Disposition*, 95 IND. L. J. 299 (2020).

297. *See supra* Part II.