

DEFINING THE THIRD WAY—THE SPECIAL-RESPECT LEGAL STATUS OF FROZEN EMBRYOS

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INTRODUCTION

On November 25, 2017, Ms. Tina Gibson, a twenty-six-year-old, gave birth to Emma, a healthy baby girl, using assisted reproductive technology (“ART”).¹ While ART births are increasingly common, this one was special. The adopted embryo² implanted into Ms. Gibson was frozen (medically referred to as cryogenically preserved)³ for more than twenty-four years.⁴ In other words, Emma’s first potential for life began on October 14, 1992, when her now-mother was only eighteen months of age.⁵ Emma’s birth set a new record for the “longest-frozen embryo to come to birth.”⁶ This medical miracle enabled Ms. Gibson and her husband, who is infertile due to cystic fibrosis, to have a family.⁷

While ART has enabled women like Ms. Gibson to experience the miracle of life, not all stories have happy endings—especially in the field of ART. Over the last twenty years scientists have made—and they continue to make—significant advances. Additionally, the industry has put certain self-imposed restrictions and guidelines in place to ensure greater protections for women undergoing these procedures.⁸ Some of these guidelines came about

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¹ Marwa Eltagouri, *She Finally Had a Baby Naturally – with a 24-year-old Frozen Embryo.*, WASH. POST (Dec. 19, 2017), <https://www.washingtonpost.com/news/to-your-health/wp/2017/12/19/this-baby-was-born-from-an-embryo-frozen-24-years-ago>.

² When couples use ART to achieve a pregnancy, they often have frozen embryos remaining. These embryos can be donated for adoption so that other infertile couples, who are unable to use their own sperm or egg, may have them implanted and brought to life.

³ See Dr. Eva Littman, *Egg, Embryo and Sperm Freezing*, RED ROCK FERTILITY, <https://redrock-fertility.com/egg-sperm-embryo-freezing/> (last visited Nov. 28, 2018) (Cryopreservation is the method of “storing embryos at a very low temperature so that they can be thawed and used later.”). This Comment uses the more commonly accepted term “frozen embryo” in place of “cryopreserved embryo.”

⁴ Eltagouri, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See generally *Practice Committee Documents*, AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/news-and-publications/practice-committee-documents> (last visited Jan. 5, 2018).

as a result of public outcry in response to unregulated prior practices, such as the case of “Octomom.”⁹

Most often, frozen embryo cases come to the courts during divorce suits between progenitors. Due to the personal nature of ART, however, progenitors are less likely to seek legal recourse when frozen embryos are negligently destroyed and the harm caused by the clinic is shielded from the public eye.¹⁰ While suits regarding negligent destruction of frozen embryos and suits when progenitors stop paying storage fees are less common, they are not without their legal and societal implications.¹¹ When couples do turn to the judicial system, the courts are often ill-equipped to answer such legal questions in a manner that also considers the unique nature of ART and the accompanying emotions of the progenitors.

Unfortunately, American courts have not kept pace with the advancements happening in the field of ART. As such, the rights of progenitors and—as some argue, their frozen embryos¹²—have been inadequately protected. While case law remains slim, rights of progenitors and their frozen embryos depend largely on the state where the suit is filed¹³ and that state’s view of the legal status of frozen embryos: property, person, or an entity deserving “special respect.”¹⁴

This Comment addresses the current debate and lack of consistency regarding the legal status of frozen embryos. It argues that a defined legal status is needed, upon which the ART community and progenitors can consistently depend. Part I examines the current field of ART as it relates to frozen biological embryos. Part II provides an overview of the most commonly litigated and debated issues relating to in vitro fertilization (“IVF”) in

⁹ Radhika Rao, *How (Not) to Regulate ARTs: Lessons from Octomom*, 21 ALB. L.J. SCI. & TECH. 313, 313–14 (2011) (discussing Ms. Nadya Suleman, who gave birth to octuplets through IVF after her physician implanted 12 embryos into her uterus); see also Karen E. Schiavone, Comment, “*Doc Ock*” Should Knock Off the Knocking-Up: Using Dr. Michael Kamrava’s Treatment of Nadya Suleman as a Model for Tort Regulation in the Fertility Industry, 20 ALB. L.J. SCI. & TECH. 597, 605 (2010).

¹⁰ This is especially true where a clinic has negligently destroyed some frozen embryos, as many are created when a woman undergoes the medical process and can often still have a child with the other remaining embryos.

¹¹ See *infra* Parts III & IV.

¹² See *infra* Part II. There are differing views regarding whether frozen embryos have rights that need to be protected. Scholars who argue that frozen embryos have rights also believe life begins at the point of conception. This view deems a frozen embryo to have the legal status of a person.

¹³ *Human Embryo #4 HB-A v. Vergara*, No. 17-1498, 2017 WL 3686569, at *1 (E.D. La. Aug. 25, 2017) (case brought “by and through” trustee of legal trust set up on behalf of frozen embryo dismissed for lack of personal jurisdiction over Ms. Sofia Vergara); Jill Serjeant, *Actress Sofia Vergara Faces Lawsuit from Her Own Frozen Embryos: Human Embryo No. 4 HB-A v. Vergara*, 12 NO. 15 WESTLAW J. MED. MALPRACTICE 5, *1 (2016).

¹⁴ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

cases where couples seek to biologically reproduce.¹⁵ Part III examines the three possible legal statuses of a frozen embryo (i.e., human, property, or an entity deserving special respect), how the legal status varies among the states, and the implications of each type of legal status for progenitors and IVF facilities. Part IV analyzes the need for, and type of, defined legal status of frozen embryos suitable for widespread application.

I. BACKGROUND ON ASSISTED REPRODUCTIVE TECHNOLOGY

Approximately 6.7% of married women in the United States aged fifteen to forty-four are infertile,¹⁶ and an additional 12.1% suffer from impaired fertility.¹⁷ An estimated 12% (or 7.3 million) of American women in that age range have used infertility services.¹⁸ Due to the technological and scientific advancements in the assisted reproductive field, many who would otherwise be unable to conceive and carry a child are able to experience the miracle of life—even a woman over seventy years old.¹⁹

A. Terminology Regarding Assisted Reproductive Technology

Narrowly speaking, assisted reproductive technology is defined as “procedures[] in which eggs and sperm are handled in a laboratory to produce a pregnancy.”²⁰ ART procedures and related birth rates have been on the rise since the 1980s.²¹ In 2015, there were 231,936 ART cycles performed in the United States, which resulted in 60,778 live births (deliveries of one or more

¹⁵ *In Vitro Fertilization (IVF)*, SOC’Y FOR ASSISTED REPROD. TECH., <http://www.sart.org/topics/topics-index/in-vitro-fertilization-ivf> (last visited Sept. 15, 2017) (defining IVF as a form of ART through which an embryo is created outside the womb by fertilizing an egg in a petri dish). While not discussed in this Comment, there are separate legal interests and questions surrounding individuals who donate embryos, sperm, or eggs, and individuals born who will not be able to discover their biological donor parent. These interests should be further considered but are not the focus of this Comment.

¹⁶ *Infertility*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2016), <https://www.cdc.gov/nchs/fastats/infertility.htm>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Arshad R. Zargar & Ashley Welch, *Woman in Her 70s May Be Oldest Ever to Give Birth*, CBS NEWS (May 12, 2016, 3:23 PM), <https://www.cbsnews.com/news/woman-in-her-70s-may-be-oldest-ever-to-give-birth> (reporting elderly woman underwent IVF treatments to have a child).

²⁰ Marie E. Thoma et al., *Births Resulting from Assisted Reproductive Technology: Comparing Birth Certificate and National ART Surveillance System Data, 2011*, NAT’L VITAL STATISTICS REPORTS, Dec. 10, 2014, at 1, 1.

²¹ *Id.*

living infants) and 72,913 liveborn infants.²² Approximately 1.6% of all infants born in the United States each year are conceived through ART procedures.²³ However, not all procedures are performed with the immediate desire of creating a child. In fact, 45,779 of the ART cycles performed in 2015 were done with the “intent to freeze all eggs or embryos.”²⁴ And, according to the U.S. Department of Health and Human Services, “there are more than 620,000 cryo-preserved embryos in storage in the United States.”²⁵

IVF is a form of ART through which an embryo is created outside the womb by fertilizing an egg in a petri dish.²⁶ This process can combine a couple’s egg and sperm to create a biological child or, alternatively, a donor egg, sperm, or both may be used. If the egg is fertilized and cells begin to divide, the embryo, or pre-embryo,²⁷ will be placed in the woman’s uterus or cryogenically preserved.²⁸ IVF has proved to be the most successful ART, so it is the most frequently used technique.²⁹ Currently, “[a]pproximately 99 percent of ART cycles performed” are IVF procedures.³⁰

²² Assisted Reproductive Technology (ART) Data, CTRS. FOR DISEASE CONTROL AND PREVENTION (2017), https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&rdRequestForward=True&ClinicId=9999&ShowNational=1.

²³ Ima E. Nsien, *Navigating the Federal Regulatory Structure of Assisted Reproduction Technology Clinics*, ABA HEALTH ESOURCE (Sept. 27, 2018), https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2016-2017/november2017/reproduction.

²⁴ Figures from the 2015 Assisted Reproductive Technology National Summary Report, CTRS. FOR DISEASE CONTROL AND PREVENTION 2 (2016), https://www.cdc.gov/art/pdf/2015-national-summary-slides/art_2015_graphs_and_charts.pdf.

²⁵ *Embryo Adoption*, DEP’T OF HEALTH & HUM. SERV., OFFICE OF POPULATION AFF., <https://www.hhs.gov/opa/about-opa/embryo-adoption/index.html> (last visited Oct. 22, 2018).

²⁶ See SOC’Y FOR ASSISTED REPROD. TECH., *supra* note 15.

²⁷ Medically, the unimplanted fertilized egg is known as the pre-embryo. See Oxford Univ. Press, Oxford Dictionary of English (3d ed. 2010). Prior to these types of procedures, the term pre-embryo did not exist—rather, it is a somewhat political term used to take this stage of the embryo out of the reproductive/pro-life debates. M. Therese Lysaught et al., *On Moral Medicine: Theological Perspectives on Medical Ethics* 846 (3d ed. 2012). Legal scholars do not consistently make this distinction and instead refer to the pre-embryo as a “frozen embryo.” *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992) (clarifying that legal journals and the popular press commonly refer to “the cryogenically-preserved product of in vitro fertilization” as “frozen embryos”). This Comment follows the legal characterization and refers to the pre-embryo as a frozen embryo.

²⁸ SOC’Y FOR ASSISTED REPROD. TECH., *supra* note 15; *Cryopreservation and Storage*, SOC’Y FOR ASSISTED REPROD. TECH., <http://www.sart.org/topics/topics-index/cryopreservation-and-storage> (last visited Dec. 29, 2017).

²⁹ Richard Sherbahn, *Tubal Embryo Transfer (TET) Zygote Intra-fallopian Transfer (ZIFT)*, ADVANCED FERTILITY CTR. OF CHICAGO (1996), <http://www.advancedfertility.com/tetzift.htm> (“IVF techniques and IVF success rates have improved dramatically,” so some other more invasive procedures are now difficult to justify.)

³⁰ *Assisted Reproductive Technologies*, SOC’Y FOR ASSISTED REPROD. TECH., <http://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies> (last visited Sept. 15, 2017).

While IVF is the most common, other forms of ART remain,³¹ including gamete intrafallopian transfer,³² pronuclear stage tubal transfer,³³ tubal embryo transfer,³⁴ and zygote intrafallopian transfer,³⁵ in which the location of transfer, length of time between fertilization and implantation, and the material transferred differs.

B. *Advances in Reproductive Technology—Frozen Embryos*

In the United States, more than 1 million babies have been born due to IVF procedures.³⁶ However, the scientific process of creating life is not without its complications. For example, to obtain the women's oocytes/eggs, "super ovulation" is induced.³⁷ Ordinarily, a woman's ovaries will release one egg per month; superovulation allows for the harvesting of many eggs at one time. During this process, a woman takes fertility drugs to increase egg production.³⁸ Then, she will undergo follicular aspiration, an outpatient surgery where a thin needle is inserted into each ovary, removing the eggs one at a time.³⁹ Next, the spouse's (or a donor's) sperm will be mixed with the eggs in petri dishes—this is the insemination process.⁴⁰ If the sperm does in fact fertilize the egg, the cells will begin to divide.⁴¹ Typically, this process takes approximately three to five days.⁴² After adequate cell division, the embryos are implanted in a woman's uterus.⁴³ If an embryo implants itself in the lining

³¹ *Id.*

³² Hilary Gilson, *Gamete Intra-Fallopian Transfer (GIFT)*, THE EMBRYO PROJECT ENCYCLOPEDIA (Sept. 26, 2008), <https://embryo.asu.edu/pages/gamete-intra-fallopian-transfer-gift> (a medical process that places a man's sperm and woman's eggs in the woman's fallopian tubes through a catheter).

³³ J.L. Yovich et al., *Pregnancies Following Pronuclear Stage Tubal Transfer*, NAT'L INSTS. OF HEALTH (Nov. 1987), <https://www.ncbi.nlm.nih.gov/pubmed/3666189> (a medical process that involves IVF and transfers the pronuclear oocytes into a woman's fallopian tubes).

³⁴ Sherbahn, *supra* note 29 (an outdated process that involves removing eggs from a woman's body, fertilizing the eggs outside the body, and implanting the embryos into the woman's fallopian tubes the next day).

³⁵ *Id.* (an outdated process that removes a woman's eggs, fertilizes the eggs outside her body, and implants the embryos into the woman's fallopian tubes two days later).

³⁶ *SART Data Release: 2015 Preliminary and 2014 Final*, SOC'Y FOR ASSISTED REPROD. TECH., (May 1, 2017), http://www.sart.org/news-and-publications/news-and-research/press-releases-and-bulletins/SART_Data_Release_2015_Preliminary_and_2014_Final.

³⁷ *In Vitro Fertilization (IVF)*, N.Y. TIMES (Feb. 26, 2012), <http://www.nytimes.com/health/guides/surgery/in-vitro-fertilization-ivf/overview.html>, [<https://web.archive.org/web/20131123172839/http://www.nytimes.com/health/guides/surgery/in-vitro-fertilization-ivf/overview.html>].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ SOC'Y FOR ASSISTED REPROD. TECH., *supra* note 15.

⁴² N.Y. TIMES, *supra* note 37.

⁴³ *Id.*

of a uterus, a pregnancy results.⁴⁴ “One complete egg freezing, in vitro fertilization, and embryo transfer cycle costs approximately \$50,000, but costs may increase depending on factors such as how long the eggs are stored.”⁴⁵ A “fresh”⁴⁶ IVF cycle costs approximately \$17,000.⁴⁷ However, because the chance of a resulting pregnancy is only forty percent, it is typical that additional transfers of the remaining frozen embryo will be needed.⁴⁸ These additional transfers run about \$3,000 to \$5,000 per cycle.⁴⁹ Finally, the progenitors must also pay a yearly storage fee for their remaining frozen embryos ranging anywhere from \$350 to \$1,000 per year.⁵⁰

Multiple eggs are typically fertilized; while more than one embryo is often transferred into the woman in each procedure, there may still be additional remaining embryos.⁵¹ These embryos may be frozen for later implantation in the event the first implantation is not successful in producing a viable pregnancy or a subsequent pregnancy.⁵² The embryos may also be donated or “put up for adoption,” used for science, or thawed and destroyed.

Parents who go through IVF treatments typically experience emotional and physical strain, often coupled with feelings of anxiety.⁵³ The entire process—to retrieve the female’s eggs, inseminate with sperm, and transfer the blastocyst⁵⁴—takes approximately twenty-one days⁵⁵ and is undoubtedly filled with emotion for the expectant couple. It is not surprising that many couples become extraordinarily attached to their frozen embryos during this

⁴⁴ *Id.*

⁴⁵ Nicole M. Mattson, Comment, *On Ice: The Slippery Slope of Employer-Paid Egg Freezing*, 32 ABA J. LAB. & EMP. L. 255, 262 (2017) (cost of freezing eggs then thawing for insemination to create an embryo).

⁴⁶ “Fresh” is defined as IVF using an embryo that has never been frozen. Jennifer Ferson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 6, 2014, 3:00 PM), <https://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Embryo Storage Costs*, REPROTECH LTD., <https://www.reprotech.com/embryo-storage-costs.html> (last visited Jan. 5, 2018).

⁵¹ N.Y. TIMES, *supra* note 37.

⁵² SOC’Y FOR ASSISTED REPROD. TECH., *supra* note 15.

⁵³ Antje Eugster & Ad Vingerhoets, *Physiological Aspects of In Vitro Fertilization: A REVIEW*, 48 SOCIAL SCIENCE & MEDICINE 575, 578 (1999); Tanya Feliciano, Note, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 308–09 (1993).

⁵⁴ A blastocyst is “[a]n embryo which has developed to the point of having 2 different cell components and a fluid cavity[.] Human embryos from in vitro fertilization in cultures in an IVF lab, or developing naturally in the body, usually reach blastocyst stage by day 5 after fertilization.” Richard Sherbahn, *Blastocyst Embryo Grading Pictures and Photos from IVF, In Vitro Fertilization*, ADVANCED FERTILITY CTR. OF CHI., <https://www.advancedfertility.com/blastocystimages.htm> (last visited Jan. 5, 2017).

⁵⁵ See Richard Sherbahn, *Lupron IVF Protocol and Sample Calendar for In Vitro Fertilization*, ADVANCED FERTILITY CTR. OF CHI., <https://www.advancedfertility.com/sampleivfcalendar.htm> (last visited Jan. 5, 2017).

time as they anticipate future parenthood, often after long periods of unsuccessful natural attempts at pregnancy. Some clinics have reported this attachment as “abnormal,” with couples naming the frozen embryo and becoming depressed when the implantation does not result in a pregnancy.⁵⁶

II. CURRENT LEGAL CONTROVERSIES SURROUNDING FROZEN EMBRYOS

There is great medical and legal controversy about what happens to the frozen embryos that are abandoned.⁵⁷ There also are several cases determining the disposition of frozen embryos after divorce.⁵⁸ However, much less attention has been given to cases where the clinic’s or hospital’s negligence results in the loss or destruction of the frozen embryos awaiting parentally desired implantation.

A. *Abandoned Frozen Embryos*

Not all progenitors form a strong emotional bond with their frozen embryo like the scenario mentioned previously. Instead, some progenitors move away, fail to pay the storage fee, and lose contact with the clinic where their frozen embryos are stored. These frozen embryos are termed “abandoned embryos”—embryos whose progenitors are no longer in contact with the clinic and have not left a forwarding address or instructions for the future of the embryos (adoption, research, or disposal).⁵⁹ Some estimate that there are over 500,000 frozen embryos stored in the United States alone.⁶⁰ But, according to the Fertility Law Group, there could be as many as 600,000 to 4 million frozen embryos stored in the United States.⁶¹ Due to the nature of the IVF process, many eggs are harvested and inseminated for future implantation to increase progenitors’ chances of success. However, once a pregnancy occurs, there can be many frozen embryos that remain in storage, unused. “Some

⁵⁶ Feliciano, *supra* note 53, at 309.

⁵⁷ See, e.g., Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 407 (2013).

⁵⁸ See, e.g., McQueen v. Gadberry, 507 S.W.3d 127, 133 (Mo. Ct. App. 2016); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992); see also Tim Schlesinger, *Embryo Disposition upon Separation or Divorce*, ABA SCITECH LAW., Summer 2016, at 22, 24 (2016).

⁵⁹ Maggie Davis, Comment, *Indefinite Freeze?: The Obligations a Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006*, 15 J. HEALTH CARE L. & POL’Y 379, 380 n.11 (2012).

⁶⁰ Howell, *supra* note 57, at 409.

⁶¹ Rich Vaughn, *What to Do With Abandoned Embryos*, INT’L FERTILITY L. GROUP (Nov. 6, 2017, 4:07 PM), <https://www.iflg.net/abandoned-embryos>.

fertility clinics have so many embryos that they pay commercial storage firms to warehouse them indefinitely.”⁶²

This “indefinite freeze”⁶³ is controversial; according to some commentators, it is impractical, immoral, and highly costly.⁶⁴ As more embryos are stored, the cost of storage will likely increase.⁶⁵ As a result, progenitors will be more likely to stop paying the fees, which will place the storage costs on clinics, who are unable to destroy, donate, or adopt the embryos due to legal uncertainty regarding potential liability should progenitors return and wish to reclaim their frozen embryos.⁶⁶ Ultimately, this long-term storage fee will be put on future progenitors who wish to undergo IVF treatments.⁶⁷ There are also moral questions regarding the embryos themselves, each of which are genetically unique, human, and separate beings from the progenitors, with a potential for life.⁶⁸ As a solution to this ever-growing problem, some commentators argue that “[a]bandonment of preembryos should result in the forfeiture of the right to direct their fate—just as abandonment of children or property results in the forfeiture of rights.”⁶⁹ When progenitors’ rights are waived, the frozen embryo may then be put up for adoption to give it the best chance to achieve life.⁷⁰

While many IVF facilities do provide clauses in the contracts with progenitors regarding the fate of frozen embryos should the progenitors stop paying storage fees, it is unclear whether courts will uniformly enforce these clauses.⁷¹ The amount of liability to which clinics may be exposed will also depend a great deal on whether the frozen embryo is considered a person, property, or an entity deserving special respect.⁷²

⁶² Howell, *supra* note 57, at 409.

⁶³ See Davis, *supra* note 59, at 379–81; Charla M. Burill, Note, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals an Indefinite Solution*, 54 WAYNE L. REV. 1365, 1365–67 (2008).

⁶⁴ Davis, *supra* note 59, at 396–97.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.* at 389.

⁶⁹ Joshua S. Vinciguerra, Comment, *Showing “Special Respect”—Permitting the Gestation of Abandoned Preembryos*, 9 ALB. L.J. SCI. & TECH. 399, 419–20 (1999) (proposing that when progenitors abandon the frozen embryos, they waive their rights, and, because the frozen embryo is due “special respect,” it should be given the chance to come to life).

⁷⁰ *Id.*

⁷¹ Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 172–73 (2017).

⁷² Lynne M. Thomas, Comment, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY’S L.J. 255, 264 (1997) (“These questions regarding the legal rights and the status of such embryos must be addressed in order to provide guidance to couples and clinics that either already stored frozen embryos or plan to preserve embryos through cryopreservation techniques in the future.”).

B. *Fate of Frozen Embryos upon Progenitors' Divorce or Separation*

The legal status of frozen embryos has mostly been addressed by the courts regarding separation or divorce of progenitors. Progenitors will argue that they should be granted ownership or custody of the frozen embryos for purposes of bringing them to life or to ensure one progenitor is not forced to procreate against his or her wishes under the Fourteenth Amendment.⁷³

The most recent example is the suit between “Modern Family” actress Sofia Vergara and ex-fiancé Nick Loeb over the former couple’s frozen embryos.⁷⁴ In such cases, the state’s view of the frozen embryos’ legal status plays a determining role. For example, Mr. Loeb filed suit in Louisiana⁷⁵ solely because the state views frozen embryos as persons, with a “right to life.”⁷⁶ Other states, such as Tennessee,⁷⁷ have decided these cases by looking to the contract between the progenitors and the IVF facility. If the contract does not speak to the disposition of the embryos upon divorce, the court then employs a balancing test to “weigh the interests of each party to the dispute . . . in order to resolve that dispute in a fair and responsible manner.”⁷⁸ This is known as the special-respect legal status.⁷⁹ For example, in *Davis v. Davis*,⁸⁰ the Tennessee trial court held that frozen embryos are “human beings” and therefore awarded “custody” to Mrs. Davis, who wished to give the embryos a chance at life.⁸¹ In the aftermath of the *Davis* decision, many IVF clinics began including the future disposition of the remaining frozen embryos in the contract with progenitors.⁸²

⁷³ See, e.g., *McQueen v. Gadberry*, 507 S.W.3d 127, 143 (Mo. Ct. App. 2016).

⁷⁴ *Human Embryo #4 HB-A v. Vergara*, No. 17-1498, 2017 WL 3686569 (E.D. La. Aug. 25, 2017) (case brought “by and through” trustee of legal trust set up on behalf of frozen embryo dismissed for lack of personal jurisdiction over Ms. Sofia Vergara); Serjeant, *supra* note 13.

⁷⁵ This suit was subsequently dismissed for lack of personal jurisdiction over Ms. Vergara. *Human Embryo #4*, 2017 WL 3686569, at *7.

⁷⁶ For a further discussion of Louisiana’s personhood status of frozen embryos see *infra* Section III.A. See also LA. STAT. ANN. § 9:123, 129–30 (2006); Sarah A. Weber, Comment, *Dismantling the Dictated Moral Code: Modifying Louisiana’s In Vitro Fertilization Statutes to Protect Patients’ Procreative Liberty*, 51 LOY. L. REV. 549, 550 (2005).

⁷⁷ *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (implementing a balancing test to weigh the interests of progenitors in procreating, in which the party who wishes not to procreate will typically prevail).

⁷⁸ *Id.* at 591.

⁷⁹ *Id.* at 597 (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”) For further discussion of Tennessee’s special-respect legal status, see *infra* Section III.C.

⁸⁰ 842 S.W.2d 588 (Tenn. 1992).

⁸¹ *Id.* at 589.

⁸² See Schlesinger, *supra* note 58, at 23.

Despite this step forward, contract legal theory does not always solve the problem of the embryos' disposition. First, not all IVF clinics ask the progenitors for this information.⁸³ Second, many progenitors are not thinking about a future divorce when they sign this form.⁸⁴ And third, many progenitors view the contract as a consent form, not as a legally binding document that should be reviewed by a lawyer to understand forfeiture of future rights.⁸⁵ As such, while courts do look to the contract to determine the disposition of the frozen embryo, the outcome may not be in the best interests of the progenitors or the frozen embryo.

C. *Negligent Loss or Destruction of Frozen Embryos*

Finally, the negligent loss or destruction of frozen embryos is gaining litigation traction. However, these cases are often settled before a final court judgment because of their distinctly personal nature, and many of the progenitors whose embryos are no longer viable due to the clinic's alleged negligence are no longer able to conceive a biological child.⁸⁶ Additionally, such a suit may not be brought because IVF facilities harvest many eggs—often more than ten—through superovulation in order to increase the chances of the progenitor's success.⁸⁷ Because many frozen embryos are created and stored, some frozen embryos may still be viable, enabling the progenitors to have a biological child despite a clinic's negligence.⁸⁸ For example, one individual had three embryos implanted while the IVF facility had lost or destroyed four of the progenitors' other frozen embryos.⁸⁹ Under the current legal standards for deciding controversies involving frozen embryos, it remains unclear how this question would be answered, evidencing the need for greater legal clarity.

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ Fox, *supra* note 71, at 197–200.

⁸⁷ Richard Sherbahn, *Number of Eggs Retrieved and IVF Success Rates According to Female Age*, ADVANCED FERTILITY CTR. OF CHI., <https://www.advancedfertility.com/eggsregnancyrates.htm> (last visited Jan. 5, 2017).

⁸⁸ *Frisina v. Women & Infants Hosp. of Rhode Island*, No. CIV. A. 95-4037, 2002 WL 1288784 (R.I. Super. Ct. May 30, 2002).

⁸⁹ *Id.* at *1. The hospital later discovered it lost only two of the four embryos. *Id.* at *2. As of 2002, the two “found” frozen embryos remained in storage at the hospital. *Id.* For more information regarding *Frisina*, see *infra* Section III.B.3.

III. THE UNDERLYING QUESTION: WHAT IS THE LEGAL STATUS OF FROZEN EMBRYOS AND WHY DOES IT MATTER?

Approximately forty years after the birth of the first artificially conceived child,⁹⁰ and over thirty years after the first baby was born from a frozen embryo,⁹¹ there is still a lack of consensus regarding the legal status of frozen embryos. While there is disagreement over the precise quantity of frozen embryos stored in the United States,⁹² it is a significant number. This number will continue to rise, and the number of individuals who may find their frozen embryos gone when they return to the clinic for implantation will rise along with it. Regardless of which framework a state adopts—person, property, or special respect—legal clarity is needed for current and future progenitors and ART facilities.

While a few states have set forth a clear legal status for frozen embryos, the majority of states have yet to make such determinations.⁹³ The status of frozen embryos has religious, moral, and ethical implications that cause great division socially and legally, making it difficult for states to adopt any position regarding their legal status.⁹⁴ Deciding that frozen embryos have personhood legal status brings with it the political and religious issues related to abortion.⁹⁵ Alternatively, according to some commentators, deciding that frozen embryos are property is reminiscent of the *Dred Scott* decision and other

⁹⁰ The first baby to be born that was “conceived outside her mother’s womb” was Louise Brown. *Infertility and In Vitro Fertilization*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization#1> (last visited Jan. 5, 2018). She was born in 1978 in England. *Id.*

⁹¹ The first baby to be born from a frozen embryo was baby Zoe, born April 10, 1984, in Melbourne, Australia. *First Baby Born of Frozen Embryo*, N.Y. TIMES (Apr. 11, 1984), <http://www.nytimes.com/1984/04/11/us/first-baby-born-of-frozen-embryo.html>. The mother’s egg and father’s sperm were used to create the biological child through the IVF procedure. *Id.* The embryo was frozen for approximately two months prior to implantation. *Id.*

⁹² Compare Howell, *supra* note 57, at 409 (estimating there are over 500,000 frozen embryos stored in the United States), with Vaughn, *supra* note 61 (estimating there are between 600,000 and 4 million frozen embryos stored in the United States), and *Embryo Adoption*, *supra* note 25 (“[T]here are more than 620,000 cryo-preserved embryos in the United States.”).

⁹³ Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC’Y 25, 73–87 (2009).

⁹⁴ Lauren Russo, Comment, “*Microscopic Americans?*” *A New Conception of the Right to Recover for the Loss of a Pre-Embryo in Tort Law*, 2009 MICH. ST. L. REV. 789, 815 (2009).

⁹⁵ Ann Marie Noonan, Comment, *The Uncertainty of Embryo Disposition Law: How Alterations to Roe Could Change Everything*, 40 SUFFOLK U. L. REV. 485, 502 (2007) (“[If a frozen embryo or fetus is given the legal status of] human being[, it will be] entitled to the same constitutional protections and guarantees as every other human being. Thus, under the Fifth and Fourteenth Amendments, one could not ‘kill’ a fetus without first providing it due process of law. Under this theory, abortion could be outlawed in all circumstances.” (footnotes omitted)).

issues related to the sale of human body parts or illegal sex-trafficking.⁹⁶ This Part examines the legal statuses states have adopted respecting frozen embryos: personhood, property, and an entity deserving special respect.

A. *Frozen Embryos as “Person”*

Under the “embryo as person” theory, an embryo is given the same legal status as a human being.⁹⁷ Therefore, decisions regarding the future of a frozen embryo must be in the embryo’s “best interest.”⁹⁸ Only two states—Louisiana and New Mexico—treat a frozen embryo as “human” under state law.⁹⁹ Some scholars believe this is due to their largely religious populations.¹⁰⁰

In 1986, Louisiana became the first state to enact statutes pertaining to IVF.¹⁰¹ The Louisiana statutes grant frozen embryos the status of “juridical person”¹⁰² and ensure each frozen embryo has a chance at life by prohibiting destruction¹⁰³ and requiring donation of frozen embryos when the parents renounce their legal rights.¹⁰⁴ So far, the statutes prohibiting destruction and mandating adoption have not been challenged on constitutional grounds. It is unclear whether these statutes would be deemed unconstitutional under the application of an individual’s right to choose whether to procreate and whether states may wish to provide greater protections to the frozen embryos.¹⁰⁵

New Mexico has a statute similar to Louisiana’s that “implicitly vests frozen embryos with personhood status by prohibiting their destruction.”¹⁰⁶ While New Mexico has yet to explicitly define the status of a frozen embryo

⁹⁶ Russo, *supra* note 94, at 792 (“Granting an individual property rights in body parts raises the unseemly specter of *Dred Scott*, so much so that a court is unwilling to grant an individual property rights in another human being or in his or her own cells and tissues.”).

⁹⁷ Howell, *supra* note 57, at 411 (“[T]he frozen embryo is nothing less than human life, albeit at its earliest stage.”).

⁹⁸ *Id.*

⁹⁹ See LA. STAT. ANN. §§ 9:123, 129–30 (2006); N.M. STAT. ANN. § 24-9A-1(D) (2006).

¹⁰⁰ Howell, *supra* note 57, at 411 (arguing that the views of Professors Robert P. George and Christopher Tollefsen in favor of the personhood legal status largely mirror the views of the Roman Catholic Church); see also ROBERT GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 50 (2008).

¹⁰¹ LA. STAT. ANN. §§ 9:123, 129–30; see also Weber, *supra* note 76, at 550 n.1.

¹⁰² § 9:123; Weber, *supra* note 76, at 550.

¹⁰³ LA. STAT. ANN. § 9:129.

¹⁰⁴ *Id.* § 9:130.

¹⁰⁵ Jessica R. Hoffman, Comment, *You Say Adoption, I Say Objection: Why the Word War Over Embryo Disposition Is More than Just Semantics*, 46 FAM. L.Q. 397, 404 (2012) (arguing that statutes prohibiting destruction and mandating adoption would be unconstitutional). *But see* Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children’s Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 50 (2003) (suggesting whether this is constitutional is unclear and remains highly disputed).

¹⁰⁶ MARLENE A. PONTRELLI & J. SHOSHANNA EHRLICH, FAMILY LAW IN FOCUS 636 (2017).

as human, property, or entity deserving a special respect, it is likely the courts will find the embryo to be a human and determine cases in the “best interest” of the embryo. The New Mexico statute requires that IVF procedures “shall include provisions to ensure that each living . . . embryo is implanted in a human female recipient.”¹⁰⁷ Like the Louisiana statute, this state law will likely be challenged in the future because it mandates that the frozen embryos must be implanted. However, the statute does not specify in whom it must be implanted and leaves the door open to donation.

States that view frozen embryos as persons under the law place much greater liability on hospitals and clinics to regulate and follow best practices.¹⁰⁸ In some ways this is a good thing; however, it will likely raise the cost of IVF treatments so that such clinics can cover the increased liability costs.¹⁰⁹ Additionally, it has broader implications regarding the future of all embryos not subsequently implanted into a woman and how damages for the wrongful death of a frozen embryo will be calculated when it is unclear whether the embryo would have resulted in a pregnancy if implanted.¹¹⁰

When a legislature or court gives a frozen embryo personhood status, there are practical implications for each of the types of disputes outlined above: abandonment, divorce, and negligent destruction.

1. Abandoned Frozen Embryos

In regard to abandonment, a clinic will not be able to dispose of the frozen embryo regardless of whether the storage fees have been paid. Instead, these frozen embryos will likely continue to increase the cost of storage until embryo adoption becomes more widespread.¹¹¹ This would also likely increase the cost of IVF to future progenitors because the clinics will have to offset the cost of their increased liability.

2. Fate of Frozen Embryos upon Progenitors’ Divorce or Separation

In regard to divorce disputes, under this theory, the court would find in favor of a progenitor who wishes to bring the frozen embryo to life, implicating *Roe v. Wade*¹¹² and potentially conflicting with a settled matter of

¹⁰⁷ N.M. STAT. ANN. § 24-9A-1(D) (2006).

¹⁰⁸ Vinciguerra, *supra* note 69, at 402–04.

¹⁰⁹ Robert A. Clifford, *Liability of Fertility Clinics*, NATIONAL LAW REVIEW (Apr. 13, 2018), <https://www.natlawreview.com/article/liability-fertility-clinics>.

¹¹⁰ Only 40% of all implanted embryos actually result in a pregnancy. Uffalussy, *supra* note 47.

¹¹¹ Vinciguerra, *supra* note 69, at 400–01, 420.

¹¹² 410 U.S. 113 (1973).

law.¹¹³ An example of such a judicial decision is noted above in *Davis*, where a Tennessee trial court held that frozen embryos are “human beings” and therefore awarded “custody” to Mrs. Davis.¹¹⁴ However, the *Davis* court’s decision was later reversed by the Tennessee Court of Appeals, and when the case reached the state supreme court, a different theory of embryo status was adopted (see *infra* Section III.C.2).¹¹⁵

3. Negligent Loss or Destruction of Frozen Embryos

Lastly, in cases of an IVF facility’s negligent loss or destruction of frozen embryos, a progenitor could file suit under the state’s wrongful death statute as well as negligent infliction of emotional distress.¹¹⁶ There are some benefits to classifying the embryo as a person, including that it more accurately reflects the parental sentiments and emotional loss when the embryo is negligently destroyed.¹¹⁷ While the progenitor’s emotional loss may be compensated, her actual loss (the cost of the IVF procedures) is not compensated under this cause of action, as the damages account for the money the individual would have made in society had his life not been cut short.¹¹⁸

Therefore, the “personhood” legal status, while attempting to provide greater rights to frozen embryos, actually does a disservice to future frozen embryos and progenitors because it increases the cost of IVF (decreasing the number of individuals who will be able to afford the process), limits the amount an individual will be able to recover in damages, and conflicts with

¹¹³ Howell, *supra* note 57, at 412 (“*Roe v. Wade* and its progeny hold that a woman has a privacy interest in her own bodily integrity that includes the right to abort her non-viable fetus. Consequently, if an IVF female gamete donor subsequently refuses implantation, the state cannot compel her to go forward with the procedure. If a woman reluctantly consented to implantation, she could still abort the fetus; thereby frustrating the purpose of the Louisiana and New Mexico statutes.” (footnote omitted)); Lisa McLennan Brown, *Feminist Theory and the Erosion of Women’s Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL’Y & L. 87, 94 (2005) (“Those statutes and court decisions that recognize fetal personhood give rise to serious equal protection concerns. If the fetus is recognized as a person under the law, then the next logical step is to assume that this person has rights under the Fourteenth Amendment—rights that were denied expressly in *Roe*.”).

¹¹⁴ *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *11 (Tenn. Cir. Ct. Sept. 21, 1989), *rev’d*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990). *Davis* was later appealed to the Tennessee Supreme Court, which adopted the special-respect status of frozen embryos (discussed further *infra* Section III.C).

¹¹⁵ *Id.*

¹¹⁶ Negligent Infliction of Emotional Distress claims will not be viable forms of recourse in states that require a physical harm to the plaintiff, as the progenitor did not suffer a physical harm to her own body due to the clinic’s negligence. It is difficult to show this physical harm to the progenitors because the adults were likely unaware of the accident at the time the embryos were negligently destroyed or lost.

¹¹⁷ Russo, *supra* note 94, at 806.

¹¹⁸ *Id.* at 813.

settled Supreme Court procreation precedent.¹¹⁹ As such, this legal status does not provide an adequate solution to the various legal questions raised by IVF without upending other family law principles.

B. *Frozen Embryos as “Property”*

Three states (Virginia, Oregon, and Rhode Island) have determined cases concerning the status of the frozen embryos under the property theory, in which the embryos are the property of the progenitors and are subject to their control.¹²⁰ As such, the embryos can be the subject of a contract. For example, the progenitors are the bailor of the frozen embryos, and the IVF facility is the bailee, with a certain duty of care.¹²¹

Because the embryos are solely the property of the progenitors (not deserving of any “special respect” or “human” component), they may also be contracted for without raising any *Dred Scott*¹²² concerns or arguments related to the sale of body parts and tissue.¹²³ However, the property legal status is not free from criticism for this same point. A frozen embryo does have the potential to become a fully developed, living, breathing person. Such criticisms also include the creation of a market for frozen embryos.¹²⁴ As in other markets involving human body parts, organs, or tissues, a disproportionate number of donors are of a lower economic and educational level.¹²⁵ This argument has also been made against surrogate IVF arrangements.¹²⁶

If not specified in the state statute, courts first look to the contract between the progenitors and the medical entity to determine who has the superior property right over the frozen embryo when determining legal questions under the property legal theory.¹²⁷ As mentioned above, this raises concerns about the rights of progenitors and their frozen embryos, who may believe

¹¹⁹ See generally *Roe v. Wade*, 410 U.S. 113 (1973).

¹²⁰ Hoffman, *supra* note 105, at 409.

¹²¹ *York v. Jones*, 717 F. Supp. 421, 425–27 (E.D. Va. 1989).

¹²² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹²³ Nancy Scheper-Hughes, *The Market for Human Organs Is Destroying Lives*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/01/05/the-market-for-human-organs-is-destroying-lives/> (“In the watery slums of Manila, the obligation to sell a kidney for the financial sake of the family is being passed down from the father to his wife to their underage sons and daughters, whose bodies are seen as a family piggy-bank.”).

¹²⁴ See, e.g., I. Glenn Cohen and Eli Y. Adashi, *Made-to-Order Embryos for Sale—A Brave New World?*, 368 NEW ENG. J. MED. 2517 (2013).

¹²⁵ Scheper-Hughes, *supra* note 123.

¹²⁶ Alexandra Faver, *Whose Embryo Is It Anyway?: The Need for a Federal Statute Enforcing Frozen Embryo Disposition Contracts*, 55 FAM. CT. REV. 633, 641 (2017) (“The policy issues surrounding the enforcement of surrogacy contracts concerns [sic] . . . exploiting the surrogate, particularly when commercial surrogacy is involved.” (quotation omitted)).

¹²⁷ *York v. Jones*, 717 F. Supp. 421, 425–27 (E.D. Va. 1989).

they are signing a medical consent form, not a binding legal contract giving up future legal rights should future harm arise.

Virginia was the first state to hear a case regarding the competing property rights of the IVF facility and the progenitors.¹²⁸ In *York v. Jones*,¹²⁹ the U.S. District Court for the Eastern District of Virginia looked to the contract between the parents and the Virginia IVF clinic.¹³⁰ The Yorks underwent the IVF process at the Jones Institute in Norfolk, Virginia, where they signed various consent forms provided by the Institute.¹³¹ Sometime during the IVF process, the Yorks moved from New Jersey to California.¹³² The couple subsequently returned to Virginia, where Mrs. York underwent further IVF procedures.¹³³ During the last of the visits to the Jones Institute, five embryos were transferred to Mrs. York's uterus.¹³⁴ One last frozen embryo remained, which sparked litigation.¹³⁵ The Yorks sought to have the last remaining frozen embryo transferred to California, but defendant Dr. Jones and the hospital in Virginia would not permit the transfer.¹³⁶ The Yorks sued for breach of contract, breach of quasi-contract, and detinue (a court claim to recover wrongfully detained possessions).¹³⁷ In the hospital's Cryopreservation Agreement¹³⁸ with the Yorks, the "defendants consistently refer[ed] to the [embryo] as the 'property' of the Yorks."¹³⁹

The court denied Dr. Jones's motion to dismiss because the contract between the Yorks and the Medical College of Hampton Roads referred to the frozen embryo as property of the progenitors.¹⁴⁰ Further, the contract was valid because the doctor and medical facility had the right "to contract and be contracted with."¹⁴¹ Therefore, the Yorks were the true owners of the frozen embryo, and the IVF facility that was storing the embryo was merely the bailee.¹⁴² While the parties ultimately settled out of court, *York* was one of

¹²⁸ *Id.* at 422.

¹²⁹ 717 F. Supp. 421 (E.D. Va. 1989).

¹³⁰ *Id.* at 422.

¹³¹ *Id.* at 423.

¹³² *Id.*

¹³³ *York*, 717 F. Supp. at 423–24.

¹³⁴ *Id.* at 424.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 424–27.

¹³⁸ A cryopreservation agreement is a document signed by the medical provider and the parents of the frozen embryo as an agreement that the facility will cool and store the embryos at a low temperature to maintain the frozen embryos' viability for future implantation or other use. For an example of such a contract, see *Cryopreservation Agreement*, ALCOR, <https://www.alcor.org/Library/pdfs/signup-CryopreservationAgreement.pdf>.

¹³⁹ *York*, 717 F. Supp. at 425.

¹⁴⁰ *Id.* at 425–27.

¹⁴¹ *Id.* at 429.

¹⁴² *Id.* at 425–27.

the first cases to suggest that frozen embryos are property whose ownership rights can be set forth in a contract.¹⁴³

While *York* does address the relationship between the medical facility and progenitors, it does not have the same emotional component as cases of disposition on divorce or negligent destruction of the frozen embryo.¹⁴⁴ The Yorks merely wanted their single frozen embryo moved to a more convenient location after relocating from New Jersey to California.¹⁴⁵ Therefore, *York* should not be used as the model for scholars who argue frozen embryos are property, especially when arguing for broad application for all frozen embryo-related disputes.¹⁴⁶

1. Abandoned Frozen Embryos

Property legal status also does not provide adequate certainty regarding abandoned frozen embryos because “abandoned” in this sense does not necessarily equate to property law’s usage of “abandoned,” given that the frozen embryos remain in the physical possession of the fertility clinic, not the true owners.¹⁴⁷ If abandoned—in the property sense—the item must be found in a location that would imply the true owner has no intention to return and claim the property.¹⁴⁸ This is not possible because the frozen embryo is kept in storage with the IVF facility, not the true owner. Secondly, it is not clear how much time would need to pass with the progenitors not paying storage fees for a frozen embryo to legally become “abandoned” and, thus, become the property of the clinic. IVF facilities can provide for this in the contract, but, as stated previously, it is not clear how courts will enforce these clauses longer-term.

¹⁴³ Jennifer E. Chapman, *York v. Jones (1989)*, EMBRYO PROJECT ENCYCLOPEDIA (2013), <http://embryo.asu.edu/handle/10776/6279>.

¹⁴⁴ See *Frisina v. Women & Infants Hosp. of Rhode Island*, No. CIV. A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002) (recognizing an emotional element to the destruction of frozen embryos).

¹⁴⁵ *York*, 717 F. Supp. at 423–24.

¹⁴⁶ Hoffman, *supra* note 105, at 404 (“Linguistically, courts rarely choose the word property to classify embryos, however, in application, they often use property concepts to resolve embryo disputes. Consider the case, *York v. Jones* The court looked to the signed agreement and held that it created a bailor-bailee relationship from which the Yorks’ [sic] could recover under property theory.” (footnote omitted)).

¹⁴⁷ Property is abandoned when it is “intentionally and voluntarily relinquished, with no intent to reclaim.” JESSE DUKEMINIER et al., PROPERTY 109 (Aspen Casebook Series, 8th ed. 2014). Where the item is not abandoned, the law still works to protect the “true owners”—in this case, the progenitors.

¹⁴⁸ 1 AM. JUR. 2D Abandonment, Lost, and Unclaimed Property § 4 (2018) (“Abandoned property is that to which the owner has voluntarily and intentionally relinquished his or her interests without vesting ownership in any other person and with the intention of not reclaiming it or reassuming its ownership or enjoyment.” (footnotes omitted)).

Although no cases have been found related to this issue, it is likely to arise in the future as the number of stored frozen embryos increases and courts punt the issue of disposition to the future as in *McQueen v. Gadberry*¹⁴⁹ (discussed *infra* Section III.C.2). It is possible that, because frozen embryos do not fit within the traditional notions of abandonment in property law, some new classification or legal treatment is needed.

2. Fate of Frozen Embryos upon Progenitors' Separation or Divorce

Oregon held frozen embryos to be personal property under the state's divorce law in a dispute between progenitors.¹⁵⁰ The Oregon Court of Appeals was faced with the question of whether "a contractual right to dispose of embryos that have been created during a marriage and cryopreserved for potential later use constitute *personal property* under ORS 107.105(1)(f)."¹⁵¹ The court cited Webster's Third New International Dictionary, which defines property as "'something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing.'"¹⁵² The court found that while the couples' agreement with the embryo storage facility did not control what would constitute "personal property under ORS 107.105,"¹⁵³ it showed that the parties to the contract, the university (providing the storage services), and the couple (in the contract, the "clients") believed that the "husband and wife had the 'exclusive right to possess, use, enjoy, or dispose of' frozen embryos that were stored under the agreement."¹⁵⁴ Thus, the court held that because the clients had the contractual right to "possess or dispose of the frozen embryos," the frozen embryos constituted "personal property that is subject to a 'just and proper' division under ORS 107.105."¹⁵⁵

As such, frozen embryos would constitute property under Oregon law because the contract entered into by the clients and the storage facility referred to the frozen embryos in such a manner.¹⁵⁶ Regarding the "just and

¹⁴⁹ 507 S.W.3d 127 (Mo. Ct. App. 2016) (holding the frozen embryos would remain cryogenically frozen until the progenitors could come to a decision about their fate).

¹⁵⁰ *In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) (holding the frozen embryos were to be destroyed according to the couple's contract entered at the time "they underwent the IVF process").

¹⁵¹ *Id.* at 838.

¹⁵² *Id.* (quoting *In re Marriage of Masee & Masee*, 970 P.2d 1203, 1212 (Or. 1999)).

¹⁵³ *Id.*; see also OR. REV. STAT. § 107.105(1)(f) (2017) ("For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances.").

¹⁵⁴ *Dahl*, 194 P.3d at 838–39 ("[T]he agreement provides: 'CLIENTS represent and warrant that they have *lawful possession of and the legal right and authority to store* the Embryos under the terms of this Agreement.'").

¹⁵⁵ *Id.* at 839.

¹⁵⁶ *Id.* (referencing the storage agreement).

proper distribution”¹⁵⁷ of the property (the frozen embryos), the division of such property “gives rise to this level of deeply emotional conflict,” and “some properties are unique and personally meaningful” in a way that makes it more difficult to properly measure in “monetary (or equivalent) value.”¹⁵⁸ Because it is difficult to place a monetary value on frozen embryos due to their emotional value, the court should decide the issue based on evidence that “evinces the parties’ intent.”¹⁵⁹ Although the court briefly weighed the parties’ interests (including those of the father), the court ultimately found the contract between the couple and clinic answered the legal question.¹⁶⁰ Because in the contract the couple designated the “wife to be the decision maker regarding the embryos,” the parties’ intent for the future of the embryos was that of the wife’s preference—the destruction of the embryos.¹⁶¹

Property status of frozen embryos is beneficial to determining divorce disputes as well as wills and estates because of the clarity provided in a concrete legal status.¹⁶² However, one key concern of using property and contract law to determine the fate of the embryo is that progenitors often do not contemplate future divorce, separation, or death, when completing the IVF waiver, and not all forms include the questions.¹⁶³ Additionally, progenitors often have a change of opinion when subsequent events occur.¹⁶⁴

3. Negligent Loss or Destruction of Frozen Embryos

While the disposition of frozen embryos resulting from divorce or separation is certainly emotional, the loss or destruction of frozen embryos brings a different set of emotions and legal issues. The negligent destruction of property in *Frisina v. Women & Infants Hospital of Rhode Island*¹⁶⁵ recognizes the emotional component under property and contract theories. In *Frisina*, three different couples’ frozen embryos were negligently destroyed

¹⁵⁷ By law, the division of property by the court must be “just and proper in all the circumstances.” OR. REV. STAT. § 107.105(1)(f) (2017).

¹⁵⁸ *Dahl*, 194 P.3d at 841.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 842.

¹⁶² See A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 312–16 (1999).

¹⁶³ Schlesinger, *supra* note 58, at 23.

¹⁶⁴ *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *Dahl*, 194 P.3d at 842; Jessica L. Lambert, Comment, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529, 558–59 (2008) (“Though acknowledging the perceived unfairness of holding the couple to an agreement when one party has changed his or her mind, the New York Court of Appeals, in its 1998 decision of *Kass v. Kass*, emphasized that the advantages of enforcement would be lost if prior agreements were only upheld when both parties continued to agree.”).

¹⁶⁵ No. CIV. A. 95-4037, 2002 WL 1288784 (R.I. Super. Ct. May 30, 2002).

and thus could not be implanted in the future.¹⁶⁶ The first couple, the Frisinas, was told that only three of the nine frozen embryos were actually available for use.¹⁶⁷ However, the three that were available were not properly thawed and therefore not suitable for transfer.¹⁶⁸ The second couple, the Lamontagnes, had seven eggs successfully fertilized.¹⁶⁹ Of the seven fertilized eggs, four embryos were reported as “lost,” and the remaining three embryos were implanted.¹⁷⁰ However, it was later discovered that only two of the frozen embryos had actually been lost, so at the time of the court proceedings, two frozen embryos remained under the supervision of the IVF clinic in storage.¹⁷¹ The third couple, the Doyles, had six embryos frozen from a January 1992 procedure and five embryos frozen from a June 1992 procedure.¹⁷² In 1995, when the couple went to have the embryos implanted, they learned that the embryos from the June 1992 procedure had been “inadvertently destroyed.”¹⁷³ The court rejected the defendant’s motion for summary judgment for emotional distress based on the loss of personal irreplaceable property and allowed the suit to proceed only on the “physical loss” of the frozen embryos, rather than the emotional loss for the progenitors.¹⁷⁴ However, while the progenitors should be compensated for the cost endured through the IVF procedure and subsequent storage costs, this physical cost does not fully compensate progenitors for their time, pain, or emotional loss endured (not to mention legal fees).

The property approach increases the likelihood that a progenitor may be able to recover for the negligent destruction of frozen embryos because it allows individuals to recover for the cost of the IVF procedures and the cost of going through an additional subsequent procedure to create new embryos.¹⁷⁵ Under the tort and property theory of conversion,¹⁷⁶ although an

¹⁶⁶ *Id.* at *1.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Frisina v. Women & Infants Hosp. of Rhode Island*, No. CIV. A. 95-4037, 2002 WL 1288784, at *1 (R.I. Super. Ct. May 30, 2002).

¹⁷² *Id.* at *2.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *10, *13. The court then went on to discuss whether the couples assumed the risk for the negligent destruction of the frozen embryos because the hospital absolved itself of liability in the three contracts the couples were required to sign in order to undergo IVF treatments and store the frozen embryos. *Id.* at *11–13. However, because this was a motion for summary judgment, the court stated that “genuine issues of material fact” remained and denied the defendants’ summary judgment motion. *Id.* at *13.

¹⁷⁵ Russo, *supra* note 94, at 808.

¹⁷⁶ *Conversion*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining conversion as “[t]he wrongful possession or disposition of another’s property as if it were one’s own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another’s right, whereby that other person is deprived of the use and possession of the property”).

individual may recover the cost of the procedure, she is not able to recover for the emotional loss suffered due to the destruction of the embryo. However, if the court deems the frozen embryo to be “irreplaceable property,”¹⁷⁷ the progenitors may be able to obtain more in damages, although arguably it would not adequately compensate them for the loss of the potential to have a biological child.

Additionally, because clinics include provisions in the contracts couples sign when undergoing IVF procedures and subsequently storing the frozen embryos, it is possible that the couple may not be able to recover for the negligent destruction because they have contracted away that right.¹⁷⁸ Here, it would be up to the courts to find that clinics are in such a superior bargaining position in the contract that upholding such a clause would be unconscionable.¹⁷⁹ However, commentators suggest that courts may be more likely to enforce IVF agreements over other medical waivers because “the greater wealth and education assumed to typify fertility patients lessen the informational and power disparities between patients and providers, making the circumstances they contract under less one sided.”¹⁸⁰

Therefore, while a property legal status does provide greater clarity in terms of monetary compensation for procedures and known costs than a personhood legal status, it does not provide adequate certainty for broader legal questions arising from IVF and frozen embryo cases. The property legal status is focused on the progenitors’ tangible monetary loss and does not adequately compensate them for their emotional or physical loss.

C. *Frozen Embryo as an “Entity Deserving Special Respect”*

Tennessee was the first jurisdiction to hold that a frozen embryo has a legal status “deserving special respect.”¹⁸¹ In addition, four states¹⁸² have statutorily given “interim” status to frozen embryos, in which they deem frozen

¹⁷⁷ *Frisina v. Women & Infants Hosp. of Rhode Island*, No. CIV. A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002).

¹⁷⁸ Fox, *supra* note 71, at 172–73.

¹⁷⁹ *Id.* at 173 (“[R]eluctance to void such liability waivers is surprising given judicial concern about unaccountability in the medical profession.”).

¹⁸⁰ *Id.*

¹⁸¹ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (“We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”).

¹⁸² J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL’Y 241, 262 (2011) (“It appears that Maine, Massachusetts, North Dakota, and Pennsylvania statutorily recognize a special ‘interim’ status making embryos more than property but less than human and, while Tennessee has not codified such status, its Supreme Court held that ‘[Embryos are] not, strictly speaking, either “persons” or “property”, but occupy an interim category that entitles them to special respect because of their potential for human life.’” (alteration in original) (footnote omitted)).

embryos to be not fully human and not fully property; however, these statutes concern the sale of embryos for stem-cell research and the donors' decision-making rights regarding the destruction of the frozen embryo.¹⁸³ The Tennessee Supreme Court set forth a "balancing test" standard for the frozen embryo under the theory that they are not fully property or human, but have an "interim" legal status.¹⁸⁴

An interim legal status for frozen embryos would place them somewhere between personhood and property, where the parents have rights in the frozen embryos, but the frozen embryos are not the property of the parents in the sense that they could be bought or sold.¹⁸⁵ This interim status would also take into consideration the interests of the parents, the rights of the IVF facility, and the frozen embryos' potential for life. While a few states have begun to take up this interim legal status through the judicial system,¹⁸⁶ many of these cases are then remanded to the lower courts and, subsequently, settled by the parties, thus never reaching the state or U.S. Supreme Court.¹⁸⁷

1. Abandoned Frozen Embryos

The "entity deserving special respect" approach could be applicable to cases of abandonment; although it does not appear that a case for abandonment has been brought or is likely to be brought in states with this standard. Here, it is unlikely that the courts would move beyond the contract because the disposition of frozen embryos—should the progenitors cease paying storage fees—is largely provided for in the contract between progenitors and the clinic.¹⁸⁸ However, until such a case is brought, it remains unclear whether courts will find these contracts enforceable.¹⁸⁹ The frozen embryo retains its potential to be born regardless of whether its progenitors seek to have it thawed and implanted, so questions will arise if the fate of the frozen embryos upon abandonment is not provided for in the contract. Other parties do not have any "property" rights to the abandoned embryo and would have no

¹⁸³ This is the right to give consent for the destruction of the frozen embryo. See Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 567 (2003).

¹⁸⁴ *Davis*, 842 S.W.2d at 597 ("We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.").

¹⁸⁵ See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁸⁶ For example, the Arizona Court of Appeals has adopted this interim legal status. *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005) (citing *Davis*, 842 S.W.2d at 596–98).

¹⁸⁷ See, e.g., *id.*

¹⁸⁸ But see *Davis*, *supra* note 59, at 399 (regarding the lack of clarity for IVF clinics should the parties not sign an agreement on the disposition of frozen embryos upon abandonment).

¹⁸⁹ *Id.* at 398–99. But see *Fox*, *supra* note 71, at 173.

basis for a claim against the clinic or storage facility disposing of the abandoned embryo so long as the contract for storage was clear.

2. Fate of Frozen Embryos upon Progenitors' Divorce or Separation

Unlike the abandonment cases, legal disputes involving divorce or separation typically have an added emotional conflict. With the added emotions and broken expectation, disputes over the fate of frozen embryo are difficult to resolve. In 1992, the Tennessee Supreme Court became the first court to decide a case that truly hinged on the legal status of frozen embryos: person or property.¹⁹⁰ The progenitors were embroiled in a divorce proceeding and disputed who would retain the rights to the couple's frozen embryo.¹⁹¹ The trial court held that frozen embryos are "human beings" and therefore awarded "custody" to Mrs. Davis.¹⁹² Mr. Davis appealed to the Tennessee Court of Appeals, which found in favor of Mr. Davis because he had a "constitutionally protected right not to beget a child where no pregnancy ha[d] taken place."¹⁹³ The Court of Appeals remanded the case with an order to grant the progenitors with "joint control . . . and equal voice over [the frozen embryos'] disposition."¹⁹⁴

In the absence of a written agreement specifying the embryos' disposition at the time the progenitors underwent the IVF procedure and controlling Tennessee statute,¹⁹⁵ the court looked to legal scholarship.¹⁹⁶ The court ultimately decided against creating a bright-line rule and, instead, to "weigh the interests of each party to the dispute . . . in order to resolve that dispute in a fair and responsible manner."¹⁹⁷ This was the first case where giving embryos personhood status or making them the true property of an owner was thought to be too extreme.¹⁹⁸ The court instead settled on a middle ground:

We conclude that preembryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that [progenitors] have in the preembryos in this case is

¹⁹⁰ *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) (implementing a balancing test to weigh the interests of progenitors in procreating, in which the party who wishes not to procreate will typically prevail).

¹⁹¹ *Id.* at 589.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (first alteration in original).

¹⁹⁵ *Id.* at 590. There is still no such controlling statute that addresses the disposition or legal status of frozen embryos.

¹⁹⁶ *Davis*, 842 S.W.2d at 590 ("Those models range from a rule requiring, at one extreme, that all embryos be used by the gamete-providers or donated for uterine transfer, and, at the other extreme, that any unused embryos be automatically discarded.").

¹⁹⁷ *Id.* at 591.

¹⁹⁸ *Id.* at 597.

not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.¹⁹⁹

As such, the court used a balancing test to weigh the interests of the parties to determine the fate of the frozen embryos. The court held that the couple had an “interest in the nature of ownership” to make decisions regarding their disposition.²⁰⁰ Ultimately, the Tennessee Supreme Court upheld the Court of Appeals decision to award the former couple joint control—effectively resulting in the embryo being stuck in a frozen limbo.²⁰¹

More recently, in 2016, the Missouri Court of Appeals upheld a trial court’s finding that “frozen pre-embryos are marital property of a *special character*.”²⁰² As is common with most cases regarding frozen embryo disposition, Ms. Jalesia McQueen and Mr. Justin Gadberry disagreed about the fate of their two frozen embryos upon their divorce.²⁰³ Ms. McQueen wished to have the frozen embryos to implant in herself, so she could have more children with her ex-husband.²⁰⁴ Mr. Gadberry, on the other hand, wished the embryos to be destroyed, donated to science, “donated to an infertile couple,” or stored until the parties could come to an agreement.²⁰⁵ Ms. McQueen argued the frozen embryos were either persons under Missouri law or, if not persons, then property, and thus governed by the storage consent form that stated the frozen embryos would be the property of Ms. McQueen should the couple divorce.²⁰⁶ Mr. Gadberry argued that awarding the frozen embryo to Ms. McQueen would violate his constitutional right not to procreate against his wishes.²⁰⁷ The court, citing *Davis*, upheld the lower court’s decision that the embryos were entitled to “special respect.”²⁰⁸ Thus, the frozen embryos will remain cryogenically frozen until the parties agree to their disposition, as it “subjects neither party to any unwarranted governmental intrusion but rather leaves the intimate decision of whether to potentially have more

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 604.

²⁰² *McQueen v. Gadberry*, 507 S.W.3d 127, 132 (Mo. Ct. App. 2016)

²⁰³ *Id.* at 133.

²⁰⁴ *Id.* at 135.

²⁰⁵ *Id.* at 136.

²⁰⁶ *Id.* at 140, 151, 153. The court did not enforce the contract because the directive that the embryos would become Ms. McQueen’s property was signed after the document was notarized and handwritten by Ms. McQueen. *Id.* at 153. The trial court and appeals court questioned whether this language was added before or after Mr. Gadberry initialed the page. *Id.*

²⁰⁷ *Id.* at 133.

²⁰⁸ *McQueen*, 507 S.W.3d at 149 (“Though frozen pre-embryos may never realize their biologic potential, even if implanted, they are unlike traditional forms of property or external things because they are comprised of a woman and man’s genetic material, are human tissue, and have the potential to become born children. Accordingly, frozen pre-embryos are entitled to special respect.” (citation and footnote omitted)).

children to the parties alone.”²⁰⁹ The Supreme Court of Missouri denied Ms. McQueen’s subsequent appeal.²¹⁰

Despite Mr. Gadberry’s attorney’s wish that “this case provide[] a road map for other states struggling with the same question,”²¹¹ the *McQueen* case did not resolve the ultimate question of what to do with the frozen embryos. Instead, it has left them in storage and punted on the ultimate decision of their disposition.²¹²

In 2018, the Arizona legislature passed a law shifting the presumption to giving the frozen embryos to the party who wants to bring the embryo to life.²¹³ The law was inspired by *Terrell v. Torres*,²¹⁴ a case in which the lower court ruled that the female progenitor, Ms. Torres, could not use the eggs to become pregnant, but required the eggs to be put up for adoption.²¹⁵ The new Arizona law is not retroactive, so it had no bearing on *Terrell* but is likely to be challenged by those who think it shifts the balance too far in favor of the “personhood” argument for frozen embryos.

Similar to the *Davis* trial court in Tennessee, which was later overturned by the state supreme court in favor of a “special status,” these cases show interest in bringing the embryo to life, indicating that an embryo’s status could be closer to personhood than property in the modern legal framework.²¹⁶ Regardless, taken together, these cases do suggest that a frozen embryo cannot easily be classified solely as person or property, especially in cases involving disputes between progenitors.

As such, the courts have declared frozen embryos “special.”²¹⁷ The biggest criticism of the special-respect status is that it is merely a guise allowing judges to legislate from the bench.²¹⁸ Additionally, it has been criticized as a thin veil that allows courts to decide cases involving frozen embryos under property law, without having to call the embryos property.²¹⁹ While the special-respect status gives courts the flexibility to determine cases in a manner that does not have the same pitfalls as the property and

²⁰⁹ *Id.* at 157.

²¹⁰ *Id.* at 127.

²¹¹ Katie Mettler, *Frozen Pre-embryos: Life or ‘Marital Property’? Mo. Court Decides Tough Custody Case.*, WASH. POST (Nov. 17, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/11/17/ex-husband-in-frozen-embryo-dispute-cant-be-forced-to-become-a-father-mo-court-rules>.

²¹² *Id.*

²¹³ ARIZ. REV. STAT. ANN. § 25-318.03(A) (2018).

²¹⁴ No. 1 CA-CV 17-0617 FC, 2019 WL 1187283 (Ariz. Ct. App. Mar. 14, 2019).

²¹⁵ *Id.* at *1. The court ultimately ruled in favor of Ms. Torres, allowing her to use the embryos in an attempt to become pregnant. *Id.*

²¹⁶ Ariana Cha, *Ariz. Law Upends Debate over Embryos*, WASH. POST, July 9, 2018, at A1.

²¹⁷ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

²¹⁸ Mettler, *supra* note 211.

²¹⁹ Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2123 (2007) (“[D]espite the flexibility of the ‘property deserving special respect’ status, courts have tended to implicitly treat the embryo like property.”).

personhood legal statuses, this flexibility is also the special-respect status' greatest weakness. Progenitors and IVF facilities will not fully understand their potential legal rights and responsibilities, so long as courts call frozen embryos entities deserving special respect. It is time for courts to adopt clear rules that come with that status rather than only paying lip service to the term "special respect."

3. Negligent Loss or Destruction of Frozen Embryos

Negligent loss or destruction cases pose different facts than those in divorce or abandonment, but often are equally emotional in nature. In 2002, Arizona relied on the "special respect" verbiage in *Davis* to determine a suit by progenitors William and Belinda Jeter against an IVF facility for the loss of five embryos.²²⁰ The Jetters entered a contract with Mayo Clinic Arizona to store ten cryopreserved embryos.²²¹ When the couple sought to later have the frozen embryos implanted in Mrs. Jeter, they were informed that only two of the four vials contained embryonic fluid; thus, five embryos were "missing."²²² The Jetters sued Mayo Clinic Arizona for (1) the negligent loss of a potential child "under Arizona's wrongful death statutes"; (2) the negligent "Loss of Irreplaceable Property"; (3) "Breach of Fiduciary Duty, alleging that, because the organisms were potentially viable human beings, their custody was entitled to special respect and [the] highest standards of care"; and (4) "breach of a bailment contract."²²³ The trial court held in favor of Mayo Clinic Arizona and granted the defendants' motion for summary judgment on all counts.²²⁴ The Jetters appealed to the Arizona Court of Appeals.²²⁵

The court analyzed Arizona's wrongful death statute²²⁶ and the state Supreme Court's interpretation of the statute, which held in the context of wrongful death that the term "person" included "a viable fetus, meaning the ability of a fetus to live outside the womb."²²⁷ In following that decision, the court stated that "[u]nlike a viable fetus, many variables affect whether a fertilized egg outside the womb will eventually result in the birth of a child. This

²²⁰ *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1260 (Ariz. Ct. App. 2005)

²²¹ *Id.* at 1259.

²²² *Id.* at 1260.

²²³ *Id.* (quotations omitted) (alteration in original).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ ARIZ REV. STAT ANN. § 12-611 ("When death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.")

²²⁷ *Jeter*, 121 P.3d at 1262 (citing *Summerfield v. Superior Court*, 698 P.2d 712, 722-24 (Ariz. 1985)).

makes it speculative at best to conclude that ‘but for the injury’ to the fertilized egg a child would have been born.”²²⁸ As such, the Jeters could not bring a wrongful death suit for the five negligently lost or destroyed “three-day-old eight-celled” cryogenically frozen embryos.²²⁹ The court reasoned that such a decision to expand the wrongful death statute to include frozen embryos was “best left to the elected representatives of the people of Arizona, subject to constitutional restraints, not a court.”²³⁰

However, the court also noted that this decision does not make the embryos *de facto* property.²³¹ Instead, the court cited the Tennessee Supreme Court’s decision in *Davis* that “pre-embryos occupy an interim category between mere human tissue and persons because of their potential to become persons. Accordingly, such embryos are due varying degrees of special respect dependent on the issue involved.”²³² The court went on to remand the case for further consideration of the “negligent loss or destruction of the pre-embryos, breach of fiduciary duty and breach of a bailment contract.”²³³

Since *Davis* was decided in 1992, only two states’ lower courts—Arizona and Missouri—have started to adopt this interim legal status through the judicial system.²³⁴ When appealed, many of these cases are then remanded to the lower courts²³⁵ and often subsequently settled by the parties. As a result, there is a lack of consistency regarding how state courts will treat a frozen embryo, either treating it as a person or property without proper analysis and consideration given to the many competing interests, emotions, and inconcrete future expectations of the parties (progenitors, storage facilities, and the embryos). It appears the special-respect status is slowly gaining traction because it allows a judge to balance the interests in each specific case.²³⁶ Also, the increasing number of stored frozen embryos is no doubt likely to increase opportunities for courts to apply this approach as mechanical and human failures inevitably occur.²³⁷

²²⁸ *Id.* (citation omitted).

²²⁹ *Id.* at 1270.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 1271 (citing *Davis v. Davis*, 842 S.W.2d 588, 596–98 (Tenn. 1992)).

²³³ *Jeter*, 121 P.3d at 1276.

²³⁴ While *Findley v. Lee*, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016), does briefly discuss the legal status of frozen embryos, it does not “make a determination of embryos as ‘life’ or ‘property.’” Alyssa Yoshida, Note, *The Modern Legal Status of Frozen Embryos*, 68 HASTING L.J. 711, 728 (2017) (discussing *Findley*).

²³⁵ See, e.g., *Jeter*, 121 P.3d at 1276.

²³⁶ *Id.* at 1268.

²³⁷ There may be an increase in such negligent destruction cases, due to the recent destruction of frozen embryos in Ohio and California. See Ariana Eunjung Cha, *These Would-be Parents’ Embryos Were Lost. Now They’re Grieving—and Suing.*, WASH. POST (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving--and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4_story.html.

IV. THE NEED FOR A DEFINED SPECIAL-RESPECT LEGAL STATUS FOR FROZEN EMBRYOS

While some courts have adopted the special-respect status, there is still a lack of clarity regarding what the special-respect status entails and how it will be interpreted by future courts. As a result, courts and scholars alike continue to call on legislatures to establish clear policies related to causes of action dealing with frozen embryos.²³⁸ Legislatures have been reluctant to do so because of the moral, ethical, and political sensitivities imbedded therein.²³⁹ Because legislatures have failed to act to provide guidance, courts have been left with no choice but to continue to develop this body of law.

In the face of legislative inaction, courts are best equipped to provide much-needed clarity through common law. The special-respect legal status currently allows for balancing of various interests, but it fails to provide needed guidance for the ART industry and prospective progenitors. It is unclear how this balance will be weighed beyond divorce disputes, especially in light of the growing number of frozen embryos left in storage and the possibility that these progenitors may never reach a consensus about the embryos' final disposition.

Despite the special-respect legal status's noted problems, especially its lack of definition, it remains a better solution to progenitors and IVF facilities, as further discussed *infra* Section IV.A. However, a clear definition and application of the special-respect status is needed. This "improved" special-respect status should also consider societal interests when balancing the interests of progenitors and IVF facilities in disputes related to frozen embryos.²⁴⁰

A. *Special Respect's Superiority over Personhood and Property Approaches*

Even with its pitfalls and potential for subjectivity, the special-respect status has the greatest applicability to the array of current legal controversies regarding frozen embryos and remains the better solution compared to the property and personhood approaches.

Granting embryos personhood is fraught with many pitfalls. The greatest is the knowledge that not every embryo will result in a successful pregnancy, so the status of personhood (which would be typical of an infant) might be granted more frequently than the statistical likelihood that the frozen embryo would have resulted in a pregnancy and live birth upon

²³⁸ See, e.g., *Jeter*, 121 P.3d at 1270.

²³⁹ See *id.* at 1267.

²⁴⁰ For further discussion of the "improved" special-respect status, see *infra* Sections IV.B & C.

implantation.²⁴¹ Depending on the state's law, a frozen embryo could possibly have more legal rights than a fetus, should something prevent it from being born. Thus, it is possible the damages would be excessive or, worse, that a court would not grant damages where they are due. While the potential to grant wrongful death damages may seem like a positive aspect of the legal status to some, as it better compensates progenitors for their emotional loss, it will have a negative effect on future progenitors whose opportunity to use IVF could become more expensive. Thus, excessive compensation will likely have the unintended effect of decreasing the number of individuals who will be able to afford the miracle of life. This would have a negative effect on the ART industry and potentially deprive many couples of the opportunity to experience parenthood due to the likelihood of an increase in the cost of IVF to cover the industry's newfound liability.

Property theory on its own also is inadequate because it does not take into account the emotional and special nature of the embryos' potential to eventually come to life. Therefore, the courts are left with a conundrum: provide compensation for the loss of life or compensation for the costs associated with creating a potential life. Use of a legal standard for entities deserving special respect may not be perfect, but it does provide recognition for the special nature of the frozen embryos.

Currently, under *Davis* and subsequent decisions such as *McQueen*, courts hold that embryos are neither person nor property. Thus, they are due some level of "special respect."²⁴² This special respect has been applied by first looking to the contract.²⁴³ If the contract does not speak to the issue, the courts then balance the interests of the parties.²⁴⁴

In actuality, the courts typically balance the interests of the parties under property law. While the special-respect status gives courts the flexibility to determine cases in a manner without the same pitfalls as the property and personhood legal statuses, its vagueness and flexibility are also its greatest weaknesses. So long as courts call frozen embryos entities deserving special respect, while not adopting clear rules that come with that status, progenitors and IVF facilities will not fully understand their potential legal rights and liabilities.²⁴⁵

²⁴¹ Kym Campbell, *Misleading IVF Success Rates & the Numbers You Really Need to Know*, SMART FERTILITY CHOICES, <https://www.smartfertilitychoices.com/ivf-success-rates> (last visited Mar. 16, 2019).

²⁴² *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

²⁴³ *In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) (holding the frozen embryos to be destroyed according to the couple's contract which was entered at the time "they underwent the IVF process").

²⁴⁴ *Davis*, 842 S.W.2d at 597.

²⁴⁵ Lambert, *supra* note 164, at 540 ("Despite its popularity, this approach has been criticized as empty rhetoric because it fails to define what protections the embryo should receive.").

B. *States Should Adopt an “Improved” Special-Respect Standard*

A legal status for frozen embryos as entities deserving special respect should become its own legal standard, and the courts should apply it consistently by looking to the limited case law and applying the factors broadly to the various types of claims. As noted by Tim Schlesinger, the legal counsel for the respondent in *McQueen v. Gadberry*, “[t]he millions of couples undergoing fertility treatments (as well as the physicians and healthcare professionals) deserve to know the answer to these [legal status] questions before they spend years in litigation trying to find out.”²⁴⁶ While Mr. Schlesinger argues that legislatures need to act, this seems to be wishful thinking that may never come to fruition. For over twenty years, the legislatures have had ample time to address these legal questions, but they have avoided doing so. It is no longer sufficient to call on the legislature; the courts need to bring certainty to the states through common law.²⁴⁷

In particular, state courts should apply the special-respect status by first looking to the contract between the progenitors and IVF facility.²⁴⁸ If courts first look to the contract in all disputes regarding frozen embryo, the progenitors, who are predominately wealthier and more educated, will take greater care when completing the document.²⁴⁹ Also, knowing the courts will look to the contract, IVF facilities will have greater economic and social incentives to address these common legal questions in the contract. While IVF facilities are in the superior contracting position as drafter and provider of a desired service, the courts will still be able to void unconscionable or vague contracts. If the legal question is answered in the contract, then the dispute ends here.

However, should the contract not address the legal question or be void (for example, due to unconscionability, vagueness, or public policy), the courts should then employ a balancing test. This balancing test should be slightly different from that applied in *Davis* regarding divorce disputes, which considered the interests of the progenitors in procreating or not procreating.²⁵⁰ Instead, courts should look more broadly and consider the interests of the progenitors, the IVF facility, *and* society at large when conducting the balancing test.²⁵¹ By considering the interests of society, it is possible that

²⁴⁶ Schlesinger, *supra* note 58, at 25.

²⁴⁷ See, e.g., *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1270 (Ariz. Ct. App. 2005).

²⁴⁸ See, e.g., *Davis*, 842 S.W.2d at 590; *Dahl*, 194 P.3d 834, 842 (upholding the trial court’s order to destroy the frozen embryos according to the couple’s contract, which was entered into at the time “they underwent the IVF process.”).

²⁴⁹ Russo, *supra* note 94, at 815.

²⁵⁰ See, e.g., *Davis*, 842 S.W.2d at 597.

²⁵¹ Because this action is left to the state courts (not federal), the society interests here would be the interests of those individuals in the state.

less judicial activism or, conversely, judicial punting will occur.²⁵² In applying a balancing test the court would consider the progenitors' rights over the embryo, but also society's interest in limiting the number of frozen embryos that will be stored indefinitely, unavailable for donation or adoption. It will also consider society's interest in maintaining certain standards within the industry, avoiding future bad actors like Dr. Michael Kamrava, who implanted 12 embryos into "Octomom."²⁵³

Lastly, while some have argued that the federal government should speak to the status of frozen embryos, this legal question and its judicial solution are best left to the states.²⁵⁴ Divorce disputes, negligence, and medical malpractice cases are largely state issues. While it may be appealing to have a uniform legal status of frozen embryos across the states to eliminate jurisdiction shopping,²⁵⁵ this is common across many areas of the law and is not a valid excuse to infringe upon state sovereignty. Further, while arguably all states should adopt this legal standard, the states will still have the flexibility to interpret common law within their legal framework. Therefore, each state will apply this framework in a manner specific to their state. By including the interest of society in the balancing test, each state will be able to best reflect their laws and unique characteristics.

C. *The Improved Special-Respect Status's Broad Application to Current Top Legal Controversies Regarding Frozen Embryos*

Together, the contract plus balancing test approach provides the certainty of contract, and, when necessary, the benefits of a flexible balancing test that takes all interests into consideration. A balancing test, which takes society's interests into consideration, allows for broader applicability to the current and future legal questions that may arise regarding frozen embryos. Additionally, by taking society's interests into consideration, a divorce dispute will not be decided such that it perpetuates societal problems. For example, frozen embryos would not be held indefinitely until progenitors come to an agreement, which may never happen, at the expense of furthering

²⁵² This is evident in *McQueen*'s holding that embryos must remain in frozen status indefinitely until the parties reach an agreement. *McQueen v. Gadberry*, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) ("[T]o the extent the trial court's judgment denominates the frozen pre-embryos as marital property of a 'special character' and essentially provides the frozen pre-embryos are to remain in their status quo of being cryogenically preserved and stored until the parties both agree in writing as to another disposition, the judgment is consistent with the principle that frozen pre-embryos are entitled to a special respect.").

²⁵³ Schiavone, *supra* note 9, at 598.

²⁵⁴ Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257, 285 (2012) ("While ART is at its core a medical procedure, it is difficult to ignore the significant interstate movement of people, gametes and pharmaceuticals that are integral to the field.").

²⁵⁵ See, e.g., *Human Embryo #4*, 2017 at *7 (dismissed for lack of personal jurisdiction over Ms. Vergara).

society's problem of the ever-increasing number of indefinitely frozen embryos. There are also medical concerns, including uncertainty about the effects of long-term freezing on the future health of the child. This legal framework would supplement and give more credence to the special-respect legal status, while still providing courts the flexibility to look at the facts pertaining to each case and the ability to take into consideration the changing interests of progenitors, IVF facilities, and society over time—even as applied to more distinct legal questions reaching beyond the frozen embryo's classification.

1. Abandoned Frozen Embryos

As applied to suits regarding abandoned frozen embryos, the court should first look to the contract to determine its applicability to the facts. If it addresses the fate of the frozen embryos in the event the progenitor stops paying the storage fees and loses contact with the IVF facility, then there is no dispute. If the contract is unclear, then the court should apply a balancing test to determine what is in the best interest of the parties (the progenitors and the IVF facility) and society. One factor to weigh is how long the IVF facility should store the frozen embryo (i.e., a reasonable period of time).²⁵⁶ In this case, courts should consider the rights and interests of the parents, who are no longer in touch with the medical facility; the facility itself, which has an interest in freeing up storage space for future embryos; the abandoned embryos, which have a special status due to their potential for life; and society (including other future progenitors), which faces increased costs for cryopreservation storage and IVF in general. Where all other elements are equal, applying a test that benefits the greatest number of people and society at large could help bring stability and transparency to this area of the law. Otherwise, the IVF facilities may hold abandoned frozen embryos for fear of future liability should absent progenitors return and seek implantation. As a result, the costs of cryopreservation will likely soar, placing the procedure out of reach of many who could benefit.

2. Fate of Frozen Embryos upon Progenitors' Divorce or Separation

In the case of divorce, where a contract for ART services is not clear about the disposition of the remaining frozen embryos at the time of the couple's separation, most courts have left the issue to the future by leaving the embryos in storage until the parties can agree and awarding joint

²⁵⁶ This "reasonable period" would be for the courts to determine.

ownership.²⁵⁷ This type of case is the most difficult for courts to adjudicate because the controversy is personal between the two parties. However, it also has broader implications regarding storage and the ever-increasing quantity of frozen embryos in the United States.²⁵⁸ Eventually, storage could become a problem for society and the legal disputes between the parties may never end if the embryos are passed down through a will. This could create a situation where the issue lasts for generations. The balancing test should seek, where possible, to bring a resolution to the problem of indefinitely frozen embryos where the facts of the case allow.

3. Negligent Loss or Destruction of Frozen Embryos

In the case of negligent destruction of frozen embryos, providing frozen embryos with a legal status of an entity deserving special respect holds the most promise for bringing some justice to the progenitors who may have lost the opportunity to procreate. While the *Jeter* court noted the frozen embryos were not persons or property, but something else, when adjudicating the IVF facility's negligent loss and destruction of the couple's frozen embryos, the court merely used the terminology of the special-respect status,²⁵⁹ partially because the case was on appeal from summary judgment.²⁶⁰

Thus far, it does not appear that special-respect status has been clearly applied by the courts to cases involving the negligent destruction of frozen embryos. When this case does occur, however, the court should apply the special-respect legal status to the facts. The court should first look to the contract. Should the question not be answered in the contract or the contract is unconscionable,²⁶¹ the court should then apply a balancing test. Here, the balance would be between the progenitors, the IVF facility, and society. Societal interests include promoting greater oversight of and industry standards within ART to prevent future negligent mishandlings of frozen embryos. By taking societal interests into consideration, the hospital's interests in properly caring for and ensuring viability of frozen embryos will be strengthened.

With this legal framework, where more individuals may seek recovery, more suits will likely be brought. As a result, greater protections for the

²⁵⁷ *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992) (upholding the Court of Appeals decision to award the Davises joint control over their frozen embryo upon divorce); *McQueen*, 507 S.W.3d 127, at 157.

²⁵⁸ Some estimate that there are over 500,000 frozen embryos stored in the United States alone. Howell, *supra* note 57, at 409. Others estimate there could be as many as 600,000 to 4 million frozen embryos stored in the United States. Vaughn, *supra* note 61.

²⁵⁹ *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005).

²⁶⁰ *Id.* at 1260.

²⁶¹ This question of contract will be of extreme importance as many IVF facilities have claimed practically no liability should anything happen to the frozen embryo. Thus far, there have not been enough cases that question this contract language to determine whether the contract clause will be consistently applied.

progenitors will develop and IVF facilities will gain greater clarity about what they need to do to prevent liability. It is also likely that, because of the threat of increased litigation, IVF facilities will have a greater economic incentive to implement better safeguards to prevent negligent loss or destruction of frozen embryos. A clearer and more transparent legal framework will benefit ART providers, their clients, and society as a whole.

CONCLUSION

The benefits of ART have helped thousands of couples experience the joy of biological parenthood and resulted in much good for society. As its use continues to grow, undoubtedly the judicial system will face more cases. Through widespread adoption of a special-respect legal status and inclusion of society's interests in a balancing test, the common law related to disputes of frozen embryos (most notably, abandonment, divorce and negligent destruction) will continue to develop and become more transparent for all parties, including the IVF clinics and biological progenitors. Improving the balancing test of the current application of a special-respect doctrine by including the interests of society, in addition to the interests of the parties, may help prevent "punting" by courts that leave frozen embryos in an indefinite limbo.

Additionally, progenitors and IVF facilities will be better able to seek legal relief knowing there is a consistent application of the law within the specific state, as opposed to the uncertainty of not knowing which legal status the court will apply when asserting various causes of action. More individuals will be able to seek legal relief (whether through settlements or the courtroom) because litigation costs will decrease once people know the rules, the behavior of medical facilities will improve, and ART will not have to bear excessive liability costs.

As scientific advancements continue to be made in ART, more miracles of birth have come to the public eye—including the story of the Gibson family.²⁶² While ART doctors continue to self-impose industry standards in response to egregious medical and legal concerns,²⁶³ it is time for the state courts to step in and provide clearer answers to the many legal questions that remain unanswered—starting with the legal status of frozen embryos and the widespread application of the legal standard to the type of legal issues (abandonment, divorce, negligent destruction) affecting frozen embryos.

²⁶² Eltagouri, *supra* note 1.

²⁶³ For example, adding the disposition of frozen embryos upon separation or divorce in light of the *Davis* decision or guidelines for the number of embryos implanted in light of "Octomom." See *Practice Committee Documents*, AM. SOC'Y FOR REPROD. MED., <http://www.asrm.org/news-and-publications/practice-committee-documents> (last visited Jan. 5, 2018).