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WHY THE LEGAL CLASSIFICATION OF CRYOGENICALLY PRESERVED PRE-EMBRYOS MATTER

Tara Carlin¹

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I. INTRODUCTION

The rapid growth of assisted reproductive technology (ART) has created an increase in the number of pre-embryos that exist in the world outside of the female body. With the numerical increase in pre-embryos in existence, comes the question of how to legally classify these pre-embryos and what the effects of possible classification will have on existing areas of law. Should they continue to be treated as property? Should we apply the same principles as embryos that are implanted in a woman's body? Do we give them the legal status of a person or child? These questions are complex and can be sensitive as they are often explored through both a legal and moral lens.

This note explores the inherent problem with legally classifying pre-embryos as property. Unlike traditional property, distribution of pre-embryos to one genetic parent over the other presents a direct conflict between one person's right to procreate and the other person's choice not to become a genetic parent. This note explores and critiques state legislative and court responses to this conflict that give pre-embryos a status other than property. Ultimately, this note concludes that classifying pre-embryos as property is only way to protect the constitutional rights of both men and women.

II. BACKGROUND

A. History of In Vitro Fertilization

While still a relatively new practice, “today, well over a quarter million babies are born each year across the world thanks to in vitro fertilization (IVF).”² Since 1996 “the number of [ART] procedures

² John Buster, *Fertility Treatment's Storied History and Promising Future*,

WOMEN AND INFANTS (Apr. 23, 2018), <https://fertility.womenandinfants.org/blog/fertility-treatment-history-future> (Dr. John Buster, a leading American ART researcher in the 1970s wrote “[a]t first the subject of intense

reported to CDC and the number of infants born from ART procedures have approximately tripled.”³ Women and couples no longer face infertility problems alone. They are turning to modern medicine and technology to preserve their ability to have genetically related children or to give them that ability if it does not exist in the first instance. As of 2014, IVF accounted for approximately 99.0% of ART procedures performed in the United States.⁴ IVF requires fertilizing eggs outside of the body in a petri dish and transferring the fertilized eggs into a woman’s uterus in an attempt to create a pregnancy.⁵ The woman seeking pregnancy may not be the ovum provider or the woman who intends to parent a child or children produced by the procedure.⁶ Today, the process of IVF involves a two-week cycle of fertility drugs and procedures, including the retrieval of eggs from a woman’s ovaries.⁷ In order to retrieve the

controversy and public outcry, these miraculous children once deemed “test tube babies” are now relatively commonplace.”).

³ Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance - United States*, 2014, MMWR (Feb.10, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5829717/> (20,597 infants were born from 64,036 ART procedures in 1996 while 56,028 infants were born from 169,568 ART procedures in 2014.).

⁴ *Id.*

⁵ See generally Aniket D. Kulkarni et al., *Fertility Treatments and Multiple Births in the United States*, THE NEW ENGLAND JOURNAL OF MEDICINE 2218-2225 (Dec. 5, 2013).

⁶ *Reber v. Reiss*, 42 A.3d 1131 at n.2 (quoting 17 Joanne Ross Wilder, West's Pennsylvania Law Family Practice and Procedure § 26:3 (7th ed. 2008)). This process naturally allows for a woman, other than then the egg donor to carry the embryo to term. *Id.*

⁷ See Sunderam, *supra* note 3.

eggs, the women must be given an intravenous anesthetic while doctors insert a catharized needle through her vaginal wall and into her ovaries.⁸ After retrieval, the eggs are fertilized with sperm in a petri dish in a laboratory, creating pre-embryos.⁹ Once the pre-embryos, or fertilized eggs, are created, clinicians select “the most viable” for transfer into the uterus.¹⁰ If an embryo attach to the woman’s uterine wall, she becomes pregnant.¹¹

Louise Brown, born in Britain in 1978, was the first ever child born as a result of IVF.¹² The United States was quick to follow and in 1981, the first U.S. born IVF baby entered the world.¹³ Now, over forty

⁸ Tessa R. Davis, *Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction*, 107 KY. L.J. 373, 380 (2019).

⁹ See Tian Zhu, *In Vitro Fertilization*, EMBRYO PROJECT ENCYCLOPEDIA (Jul. 22, 2009), <https://embryo.asu.edu/pages/vitro-fertilization>. In vitro is Latin for “in glass.” *Id.*

¹⁰ See Sunderam, *supra* note 3. The embryos, “. . . that appear morphologically most likely to develop and implant.” *Id.*

¹¹ *Id.*

¹² Buster, *supra* note 2 (Louise Joy Brown became the first person to ever be born as a result of ART to parents who would have been unable to conceive naturally, due to the mother’s deformed fallopian tubes).

¹³ Sunderam, *supra* note 3 (almost three years after the first ART birth in the US, a UCLA team of researchers were successful at transferring embryos from one woman to another, marking the first successful transfer of human embryos); Buster, *supra* note 2.

years after the birth of Louise Brown, the birth of children conceived in petri dishes is no longer rare enough to make newspaper headlines.¹⁴

Medical professionals have disagreed about the number of viable pre-embryos that can safely be transferred into a woman's uterus as part of an IVF cycle because of concerns that transferring too many pre-embryos can lead to multi-fetal pregnancies that create risks for the pregnant person and the fetuses she carries.¹⁵ While that golden number continues to be debated, what is most relevant to the issue addressed in the present note is that fact that IVF frequently results in an excess number of pre-embryos---meaning more pre-embryos than will be transferred to a patient's uterus. Pre-embryos may be created, but not transferred into a woman's uterus for a variety of reasons. Some couples get divorced or separate during the process, others only want a certain number of children but create a greater number of embryos and others pre-screen the embryos for specific defects and choose not to implant them.

In situations where pre-embryos are not going to be used to create babies, most fertility centers and clinics will leave those pre-embryos cryogenically frozen until the intended parents determine what

¹⁴ Laura Sanders, *40 Years After the First IVF Baby, A Look Back at the Birth of A New Era*, SCIENCE NEWS (July 25, 2018), <https://www.sciencenews.org/blog/growth-curve/40-years-ivf-baby-louise-brown> ("Louise was the first baby born as a result of in vitro fertilization, or IVF, a procedure that unites sperm and egg outside of the body. Her birth was heralded around the world, with headlines declaring that the first test-tube baby had been born. The announcement was met with excitement from some, fear and hostility from others. But one thing was certain: This was truly the beginning of a new era in how babies are created.").

¹⁵ Sunderam, *supra* note 3.

should be done with them.¹⁶ There are a number of options for what IVF patients can do with their unused pre-embryos; “[t]he patient usually has the choice of discarding or destroying the embryos, donating them for use by another infertile patient, or donating them for medical research.”¹⁷ Additionally, the persevered pre-embryos can remain frozen as long as their storage is paid for.¹⁸

The increase in the use and effectiveness of IVF has resulted in an increase in the number of frozen pre-embryos that exist in the world. This in turn has created a question of how these pre-embryos should be handled and what legal and moral status they should be given.¹⁹ Interestingly, there are very few laws that offer guidance or standards for couples or individuals making decisions about pre-embryo

¹⁶ Laura Beil, *What Happened to Extra Embryos After IVF*, CNN HEALTH (Sept. 1, 2009, 12:32 PM), <http://www.cnn.com/2009/HEALTH/09/01/extra.ivf.embryos/index.html>. Depending on state law and specific clinic practices, couples have a number of options for decided what to do with remaining embryos. *Id.* One option is to donate the embryos, either to another women or couple struggling with infertility or to medical research. *Id.* Alternatively, they can choose to allow the embryos to thaw. *Id.*

¹⁷ Rich Vaughn, *What to Do With Abandoned Embryos*, INTERNATIONAL FERTILITY LAW GROUP (Nov. 6, 2017, 4:07 PM), <https://www.iflg.net/abandoned-embryos/>.

¹⁸ *Id.*

¹⁹ *Id.*; Iris Waichler, *Embryo Donation: A Closer Look At This Family Building Option*, PATH 2 PARENTHOOD (June 6, 2016), <http://www.path2parenthood.org/blog/embryo-donation-a-closer-look-at-this-family-building-option>.

disposition.²⁰ In contrast to the lack of regulation for pre-embryos, almost every state in the United States has at least one law on the books regulating abortions.²¹ As scholars have pointed out, states have manifested a clear interest in regulating the destruction of an embryo that exists inside a woman's body. However, states do not seem to have an interest in regulating the destruction of embryos that exist in a laboratory.²²

Adding a layer to the already complex decision about pre-embryo disposition, the egg and sperm donors do not always agree on the best course of action. While not always the case in the practice of IVF, the cases that have been reported so far, the two people in dispute over

²⁰ See generally Margo Kaplan, *Fertility Clinics Destroy Embryos All the Time. Why Aren't Conservatives After Them?*, THE WASH. POST (Aug. 14, 2015), https://www.washingtonpost.com/opinions/fertility-clinics-destroy-embryos-all-the-time-why-arent-conservatives-after-them/2015/08/13/be06e852-4128-11e5-8e7d-9c033e6745d8_story.html?utm_term=.91a3791ee0d6.

²¹ *State Law and Policy*, GUTTMACHER INST. (Mar. 1, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

²² Kaplan *supra* note 20 ("Yet there are striking differences between my experience and that of a woman seeking an abortion. In Pennsylvania (where my fertility clinic is located), a woman seeking an abortion must receive state-directed counseling designed to discourage her from the procedure. She must then wait at least 24 hours until she can continue. In other states, women are forced to undergo unnecessary and invasive ultrasounds, watch or listen to a description of the ultrasound, and hear a lecture on how the embryo or fetus is a human life. Clinics in some states must provide them with medically inaccurate information on the risks of abortion. After all that, women often cannot have an abortion without waiting an additional one to three days, depending on the state.").

the embryos have been the genetic progenitors. Some couples that start fertility treatments together and produce frozen embryos end up separating, creating an issue regarding the fate of their pre-embryos.²³ Additionally, sometimes the choice shifts from the biological donors to the fertility clinic where the pre-embryo is stored.²⁴ In the event that donors effectively abandon their biological pre-embryos by stopping payments for their storage, dying, or moving to another address, does the clinic now have the right to do with the pre-embryos as they see fit? In an effort to head off disputes about the fate of pre-embryos, most modern day fertility clinics require that their patients execute written agreements describing how the frozen pre-embryos will be handled in the event of patient death, divorce, or separation.²⁵ While some clinics have taken the matter into their own hands by contracting around the issue of pre-embryo disposition, others have relied on existing state law classification of pre-embryos to handle such disputes.

When there is no contract detailing how a dispute over pre-embryos are to be resolved, often times disputes over the pre-embryos end up in court where judges are required to remedy the dispute and decide on the proper disposition of the pre-embryos. In order to make these decisions, judges much look at how the law classifies these pre-embryos. The legal status of pre-embryos has a dramatic effect on many issues relating to family law, constitutional law, abortion law and property law. If pre-embryos are given the legal status of a person and awarded all rights accorded to persons, the practice of family law would be drastically different. The hundreds of thousands of currently cryogenically frozen pre-embryos that exist in the United States would all

²³ See Vaughn, *supra* note 17.

²⁴ *Id.*

²⁵ *Id.*

be awarded personhood status and given the constitutional right to life and liberty. It would likely follow that the couples who created these pre-embryos would no longer get to decide what happens to them. Courts would need to consider the individual rights of the pre-embryos.

Additionally, the implication of granting personhood status to pre-embryos would essentially overturn the well-established and protected ability for a woman to have an abortion, should she so choose. Granting personhood status to a pre-embryo would be a devastating blow to women's privacy rights as the courts would have to equally consider a pre-embryo's right to life with a woman's right to choose. While there is not the same bodily autonomy issue at play here as there is when a woman is actually pregnant, granting personhood status would likely require a woman to still care for and maintain the storage of a pre-embryo she has no intention of implanting.

While granting personhood status to pre-embryos has many potentially devastating implications, defining pre-embryos as simple property also has negative effects on other areas of law, most notably, the area of disability rights. If pre-embryos are continued to be considered property under the law, donors will continue to be able to decide what happens to them, as with any other property they own; couples could choose to destroy pre-embryos based on genetic composition.

B. Reproductive Rights as a Fundamental Right

The Supreme Court has established that an individual's right to reproduce is a fundamental right.²⁶ As a recognized fundamental right, it should follow that any government regulation of that right is subject

²⁶ See generally *Planned Parenthood v. Casey*, 505 U.S. 833, 858 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

to strict scrutiny under the equal protection clause of the United States Constitution Fourteenth Amendment.²⁷ Rather than strict scrutiny, the Supreme Court has established an undue burden test to determine the validity of a government regulation of abortion.²⁸ The existing case law concerning reproductive rights has focused on an individual's right to prevent or terminate a pregnancy.²⁹ As time and technology progress, the question has now become whether this test is applicable to decisions regarding destruction of pre-embryos that exist in the context of IVF, rather than the termination of pregnancy in the abortion context. When the Court was deciding cases about access to birth control and abortion in the 1960s and 1970s, embryos that existed outside a woman's body were rare and experimental.³⁰ Reproductive technologies like IVF that allow for embryos to exist outside the context of pregnancy were not a subject considered by the Court at the time.³¹ Additionally, these cases were all about avoiding pregnancy or ending a pregnancy once they are created.³² Now that technology has progressed and fertility treatments, such as IVF, have become remotely common use, Courts must

²⁷ Theresa Miller-Sporrer, Note, *The Octo Mom Meets Constitutional Law: Testing the Constitutionality of Restricting Fertility Treatments*, 5 PITT. J. ENVTL. PUB. HEALTH L. 81, 82 (2011); U.S. CONST. amend. XIV, § 1.

²⁸ *Casey*, 505 U.S. 833 (holding that if a restriction is determined to impose an undue burden on a woman seeking an abortion, then the restriction is invalid).

²⁹ Miller-Sporrer, *supra* note 27, at 84.

³⁰ *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (the Supreme Court decided access to abortion.); *see also* *Griswold*, 381 U.S. at 479 (the Supreme Court decided issues surrounding access to birth control.).

³¹ *See generally* *Roe*, 410 U.S. 113 (1973); *see also* *Griswold*, 381 U.S. at 479.

³² *See generally* *Roe*, 410 U.S. 113 (1973).

determine if the same reasoning, logic and law in the context of conception apply as they do in the context of prevention and termination?

In 1942, the Supreme Court of the United States officially recognized an individual's right to reproduce for the first time ever.³³ *Skinner* laid the foundation for the Court to recognize reproductive rights.³⁴ The Court explicitly recognized that, "Marriage and procreation are fundamental to the very existence and survival of the race."³⁵ The Court went even further by stating that depriving an individual of his right to reproduce deprives him "of a basic liberty."³⁶

³³ Miller-Sporrer, *supra* note 27, at 83; Kimberley M. Mutcherson, Article: Making Mommies: Law, pre-implantation genetic diagnosis, and the complications of pre-motherhood, 18 COLUM. J. GENDER & L. 313, 342 ("[the Court in *Skinner*] did articulate the fundamental right to procreate and made clear that attempts to deprive individuals of such a right would be subject to an exacting level of constitutional scrutiny").

³⁴ *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (in *Skinner*, the Court struck down an Oklahoma statute that called for the sterilization of "habitual criminal" as defined as, "a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude." Under the statute, these criminals are given an trial at which, "[t]he court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health," then the court "shall render judgment to the effect that said defendant be rendered sexually sterile" by the operation of vasectomy in case of a male, and of salpingectomy in case of a female.")

³⁵ *Id.* at 541.

³⁶ *Id.* The Court's decision in *Skinner* did not overrule *Buck v. Bell*, in which the Court upheld a forced sterilization law. *Id.*

The right to rear children was extended to include the right to avoid conceiving children without significant government intervention.³⁷ The Supreme Court decided in *Griswold*, that the government's interest in regulating birth control, was not so compelling or necessary that it justified "[encroaching] upon a fundamental personal liberty."³⁸ The Court recognized that a couple has an implied fundamental right to privacy under the First Amendment to decide their own family planning measures.³⁹ Under this fundamental right to privacy, a couple's decisions regarding birth control is protected from government intrusion.⁴⁰ Eventually, this right to privacy regarding procreation was extended beyond just married couples to include unmarried couples who choose to use birth control or other contraception.⁴¹

III. "PROPERTY" UNDER PROPERTY LAW

The most common solution to the complex issue of pre-embryo status in the law is to treat them as property. Some lower courts have handled disputes over pre-embryos by giving these pre-embryos property status and applying property principles.⁴² Especially in the case of marriage dissolution, frozen pre-embryos appear to be equated to all

³⁷ See generally *Griswold*, 381 U.S. at 485.

³⁸ See generally *Griswold*, 381 U.S. at 497.

³⁹ *Id.* at 485; U.S. CONST. amend. I.

⁴⁰ Miller-Sporrer, *supra* note 27, at 85.

⁴¹ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁴² *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989).

other property obtained during the marriage in which the husband and wife have equal property interest.⁴³

The United States District Court for the Eastern District of Virginia recognized that the individuals from whom the sperm and egg came from have “property rights in the pre-zygote and have limited their rights as bailee to exercise dominion and control over the pre-zygote.”⁴⁴ Additionally, the Court validated the American Fertility Society finding that “donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines.”⁴⁵

A. Marital Property

The topic of pre-embryo status has come up most frequently during marital dissolution cases, during which courts are forced to determine whether preserved pre-embryos are marital property. The Missouri Court of Appeals held that frozen pre-embryos are “marital property of a special character” rather than children.⁴⁶ When there is no pre-procedure contractual agreement regarding frozen pre-embryos in the event of marriage dissolution, the court will require both parties’

⁴³ *McQueen v. Gadberry*, 507 S.W.3d 127, 148 (Mo. Ct. App. 2016); *see generally* *Kass v. Kass*, 91 N.Y.2d. 554, 559 (1998).

⁴⁴ *York*, 717 F. Supp. at 428 (a husband and wife underwent IVF which result in one unused embryo which was frozen as a pre-zygote at a facility in Virginia. The couple moved to California and wanted to have their frozen pre-zygote transfer to a research facility in California but the doctor at the Virginia facility refused to authorize the transfer).

⁴⁵ *Id.* at 426.

⁴⁶ *McQueen*, 507 S.W.3d at 148.

consent for any transfer, release, or use of the material.⁴⁷ The court defines marital property “[f]or purposes of Missouri's dissolution statutes . . . as all property acquired by either spouse subsequent to the marriage” and it defers to the Black’s Law library definition of property.⁴⁸

As the Tennessee Supreme Court did in *Davis v. Davis*, the Missouri Appeals Court in *McQueen v McQueen*, recognized that frozen pre-embryos “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.”⁴⁹ These findings indicate that courts are somewhat skeptical to just treat persevered pre-embryos as simple property.

The New York Court of Appeals gave great weight to the “Consent Form for Cryopreservation” in *Kass v. Kass*.⁵⁰ The form indicated that “[i]n the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement”.⁵¹ In other words, the court treated the cryogenically preserved pre-

⁴⁷ *Id.* (the court imposed almost identical restrictions as those used in pre-procedure contractual agreements); *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁴⁸ *Id.*

⁴⁹ *Id.* at 149; *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁵⁰ *Kass*, 91 N.Y.2d at 559.

⁵¹ *Id.* Again, the Court puts great emphasize on the contractual agreement regarding frozen embryos. In most of these cases, a contractual agreement will trump during marriage dissolution matters. This simplifies the complex classification issues of embryos by allowing a court to side step the issue entirely. *Id.*

embryos as marital property and as such, both genetic donors, or parties in the dissolution matter, are entitled to equal ownership.

The court in *Kass* went on to “unanimously [recognize] that when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.”⁵² By giving deference to the agreement, the court did not decide not have to decide “whether the pre-zygotes are entitled to “special respect”” as the Tennessee Supreme Court did in *Davis*.⁵³ Again, the court looks to *Davis* to support this decision “[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.”⁵⁴ This decision allows the Court to side step the complicated issue that the Court went on to address in *Davis*, regarding the status of cryogenically preserved pre-embryos. Additionally, the Court here continued to stress the importance of pre-fertility treatment disposition agreements that address any protentional disputes in the future.

The Tennessee Supreme Court concludes in *Davis* “that pre-embryos are not, strictly speaking, either “persons” or “property,” but occupy an interim category that entitles them to special respect because of their potential for human life.”⁵⁵ The Court goes on to say that the plaintiff in the case still has an “interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos, within the scope of policy set by law.”⁵⁶

⁵² *Id.* at 561.

⁵³ *Id.* at 565.

⁵⁴ *Id.* (citing to *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)).

⁵⁵ *Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

⁵⁶ *Id.* at 597.

B. Pre-embryos as Property

As the court precedents show, giving pre-embryos property status is perhaps the simplest way of handling disputes. It makes sense that courts are comfortable with this classification since it appears to fit nicely in established law. Logically, it makes sense to treat pre-embryos as marital property and address divisional issues along with all other material property.

When courts are forced to decide who has decision making authority or ownership over preserved pre-embryos, they have to decide whose right to become or not become a parent will prevail. When one parent wants to preserve the pre-embryos for implantation and the other parent wants them discarded, the prevailing parent forces the other parent to either become a biological parent or prevents them from becoming a biological parent. Additionally, the Court cannot respect both one donor's right to become a parent and the other donor's right not to become a parent. This conflict of rights does not exist when discussing true property such as houses and cars.

IV. DEFINING PRE-EMBRYOS NOT AS PROPERTY

As technology and scientific discovery advances, the law must adapt to the changing circumstances. With the creation, and increased use of artificial reproduction technology, like IVF, courts now face new questions regarding a person's right to parent or not parent and what can be done to protect those rights.

Given past precedent, it seems as though the Supreme Court is willing, in some sense, to recognize an individual's right to become a parent and subsequently raise those children with limited government

intervention.⁵⁷ The question now arises as to whether these precedents can be applied to reason that an individual also has a right not to become a parent or to become a parent using cryopreserved pre-embryos. Does precedent allowing people to make their own decisions regarding birth control and family planning recognize a right not to become a parent and, if so, would that right extend to someone who sought to prevent a former partner from using pre-embryos to create a child without contemporaneous consent from both parties? In the context of pre-embryos, the answer to this question can have a drastic effect on how the law should treat and classify those pre-embryos.⁵⁸ If intended parents who are genetic progenitors do not agree on whether or not to implant the pre-embryos, there becomes a conflict between one's right to become a parent and the other's right to not become a parent since one cannot occur without violating other.⁵⁹

Professor I. Glenn Cohen argues that the law should recognize and protect an individual's right to not become a genetic parent.⁶⁰ He applies this view to the context of cryopreserved pre-embryos that are being argued over by the genetic egg and sperm providers.⁶¹ In those

⁵⁷ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); *Griswold*, 381 U.S. at 479.

⁵⁸ A pre-embryo "is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus." Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances, 87 A.L.R.5th 253 at 2.

⁵⁹ *Kass*, 91 N.Y.2d at 559; *In re Marriage of Witten*, 672 N.W.2d at 768.

⁶⁰ I. Glenn Cohen, *Article: The Right Not To Be A Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1115-16 (2008).

⁶¹ *Id.* at 1118.

situations, Professor Cohen, “endorse[s] non-use as a general default rule.”⁶² In other words, an intended parent who does not wish to become a parent cannot be forced to by allowing the other party to go through with implantation. The distinguished professor recognizes “the advance waiver by contract of the right not to be a genetic parent” as an exception to this default rule.⁶³ While scholars like Professor Cohen are addressing the issue, state courts and legislatures are tackling the complexities of pre-embryo disposition disputes as well.

A. State Court Response

State courts are faced with the question of pre-embryo classification and disposition at an increasing rate as more couples turn to IVF to start or preserve their ability to have children. The general approach, used in Tennessee,⁶⁴ and New Jersey,⁶⁵ requires the court to balance the interest of the parties involved.⁶⁶ When applied to the facts of the case, the balancing test can come out in favor of the

⁶² *Id.* at 1187.

⁶³ It is now common practice for fertile clinic to contract prior to being IVF as to what will happen with un used embryos in the event of marriage dissolution. *Id.* at 1186.; *see also* Vaughn, *supra* note 17.

⁶⁴ *Davis*, 842 S.W.2d at 588 (Tenn. 1992).

⁶⁵ *J.B. v. M.B.*, 170 N.J. 9 (N.J. 2001) (the wife in a dissolution of marriage proceeding did not want to become a parent and the court found in her favor, stating that the frozen embryos must remain stored or be destroyed, but may be implanted).

⁶⁶ *Davis*, 842 S.W.2d at 588; *J.B.*, 170 N.J. at 9 (courts that use this approach consider the interest of the egg donor, usually the wife and the sperm donor, the husband. The interest of the pre-embryo is not considered in the balancing of interest test).

husband's interest as it did in Tennessee,⁶⁷ or in favor of the wife's interest as it did in New Jersey.⁶⁸ Given the current case law, it appears courts are more likely to decide in favor of the parent who does not seek to become a parent.⁶⁹ In other words, courts are giving more weight to a person's right not to become a biological parent by allowing another person to bring their biological child into existence. It appears that when courts apply the balancing interest approach, Professor Cohen's default rule prevails.⁷⁰

In *Reber v. Reiss*, the Pennsylvania Superior Court determined that a balancing of interest test is needed when pre-embryos are being disputed over in a dissolution of marriage proceeding.⁷¹ As the Court in *Reber* identifies, state courts have taken a number of different approaches to these types of cases in which a man and women are contesting the ownership of pre-embryos during a dissolution of marriage

⁶⁷ *Davis*, 842 S.W.2d at 588 (when the wife wanted to donate the pre-embryos to another infertile couple and the husband wanted the pre-embryos discarded, the Court found in favor of for husband's interest).

⁶⁸ *See J.B.*, 170 N.J. at 30 (the Court found in favor of the wife where the wife wanted the pre-embryos destroyed and the husband wanted to implant them via a surrogate.).

⁶⁹ *See Davis*, 842 S.W.2d at 604; *J.B.*, 170 N.J. at 30.

⁷⁰ *See Cohen*, *supra* note 60, at 1187. Professor Cohen's default rule is in favor of non-use of genetic material when one donor does not wish to become a parent. *Id.*

⁷¹ *Reber*, 42 A.3d at 1136.

proceeding.⁷² Some states, including Texas,⁷³ New York,⁷⁴ and Oregon,⁷⁵ defer to prior contractual agreements to determine disputes at the time of separation.⁷⁶ Other states such as Iowa, add an additional requirement of mutual consent on top of any prior contractual agreement.⁷⁷

The trial court in *Reber* applied the balancing of interest test to the fact of the case and found in favor of the wife who wanted to implant the disputed pre-embryos against the wishes of the husband who provided the sperm.⁷⁸ The Judge at the trial level concluded that, while "ordinarily the party wishing to avoid procreation should prevail, in our balancing of the facts unique to this case, we find that Wife's inability to achieve biological parenthood without the use of the pre-embryos is an interest which outweighs Husband's desire to avoid procreation."⁷⁹

⁷² *Id.* at 1134 ("In determining who should receive these pre-embryos, we find guidance in the case law from our sister states that have addressed similar issues. These jurisdictions have conducted three types of analyses: the contractual approach, the contemporaneous mutual consent approach, and the balancing approach.").

⁷³ *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. App. 2006).

⁷⁴ *Kass*, 91 N.Y.2d 554 at 565.

⁷⁵ *In re Marriage of Dahl & Angle*, 194 P.3d 834, 841 (Or. Ct. App. 2008).

⁷⁶ *Id.* at 840.

⁷⁷ *Reber*, 42 A.3d at 1135 (citing to *In re Marriage of Witten*, 672 N.W.2d at 768) ("the informed consent agreement allowed for the distribution of the pre-embryos only upon consent and agreement of both parties.").

⁷⁸ *Reber v. Reiss*, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2011).

⁷⁹ *Reber*, 42 A.3d at 1134.

A Colorado trial court considered a number of factors in balancing the interest of a husband and wife who froze pre-embryos during their marriage and did not agree on what to do with the frozen pre-embryos at the time of their divorce.⁸⁰ Those factors included:

“(1) the intended use of the pre-embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the pre-embryos to become a genetic parent him-or herself, or instead wants to donate them); (2) the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means; (3) the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment); (4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations; (5) a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and (6) other considerations relevant to the parties' specific situation.”⁸¹

Using these factors, the balancing test again favored the interest of the party who did not seek to become a parent, the husband in this case.⁸² On appeal, the Colorado Supreme Court deemed inappropriate, the factors used during the balancing of interest test at the trial level and

⁸⁰ *In re Marriage of Rooks*, 429 P.3d 579, 581 (Colo. 2018).

⁸¹ *Id.*

⁸² *Id.* at 585 (the wife appealed the trial court decision but, “the court of appeals...affirmed the trial court's judgment awarding the pre-embryos to Mr. Rooks under the balancing of interests approach”).

remanded the case with instructions to apply a new framework.⁸³ After addressing the underlying issues of the constitutional rights of the parents to procreate and relevant state statutes,⁸⁴ the Colorado Supreme Court lays out a specific process for addressing disputes over frozen pre-embryos during dissolution of marriage cases.⁸⁵

While reaffirming the use of a balancing of interest test in the absence of an express contractual agreement, the Court adopts a more narrow approach to determine party interests in light of the special property status of pre-embryos.⁸⁶ Factors that should be considered include, but are not limited to: (1) the intended use of the party who wants to preserve the pre-embryos, (2) the physical ability of party seeking to implant the pre-embryos,⁸⁷ (3) the parties original reason for pursuing IVF treatments, (4) the hardship imposed on the party who does not wish to become a parent, and (5) either parties bad faith or attempt to use the

⁸³ *Id.* at 586 (“[b]ecause the trial court and court of appeals considered certain inappropriate factors in attempting to balance the parties' interests here, we reverse the judgment of the court of appeals and remand the case with directions to return the matter to the trial court to apply the framework we adopt today”).

⁸⁴ *Id.* at 590 (the Court looked at the Colorado Probated Code that states that a parent-child relationship exists when child results in ART but recognized that this relationship is not formed in the event of divorce or withdrawn consent. The Court reasoned that this statutory language was proof of that the legislature did not require both parties to consent to implantation.)

⁸⁵ *In re Marriage of Rooks*, 429 P.3d at 581.

⁸⁶ *Id.*

⁸⁷ Physical ability in this context has been interpreted to mean the party's ability or inability to have a biological child without the use of the embryos in dispute. *Id.* at 593.

pre-embryos as leverage.⁸⁸ The Court goes on to explicitly say that the financial stability of the party seeking to take custody of the frozen pre-embryos and the number of children that party already has cannot be used as factors when considering what should happen with the pre-embryos.⁸⁹

While we will have to wait and see how the lower court applies these factors on remand, it seems as though the Colorado Supreme Court factors show more deference to the interest of the party seeking preservation or use. Unlike other state courts, which seem to put give great weight to a party's interest in not becoming a genetic parent, the Colorado Supreme Court's finding appears to abolish that presumption in favor of the party seeking destruction.

B. State Legislature Response

As evident in the discussion above, cases involving the disputes over frozen pre-embryos have been primarily dealt with on the state level. This is because state legislatures have been passing statutes addressing IVF and the preserved pre-embryos that result from the procedure.⁹⁰ Louisiana, New Hampshire, Florida and Virginia all have statutes that address pre-embryos created through IVF.⁹¹ Louisiana has the most extreme statute which places extreme restriction on the practice of IVF and grants pre-embryos created through IVF the same legal status

⁸⁸ *In re Marriage of Rooks*, 429 P.3d at 592-595.

⁸⁹ *Id.* at 594-595.

⁹⁰ Lyria Bennett Moses, *Article: Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 536-537.

⁹¹ *Id.*

as a person.⁹² Florida has prohibited the sale of these pre-embryos and require disposition agreements for pre-embryos in the event of death or divorce to be in place prior to the process.⁹³ Other states have addressed issues regarding length of store, HIV testing, inherence, patient selection and physician disclosures.⁹⁴

While courts are continuing to explore the classification and issues caused by the existence of frozen pre-embryos, state legislatures are also responding to the issue. The federal government has remained almost silent on the issues surrounding IVF, including the regulation of pre-embryos created in laboratories.⁹⁵ Some state legislatures have passed statutes that expressly define the legal status of frozen pre-embryos and specify how they can be transferred to someone else, released, or used in specific situations.

The Louisiana state legislature has also passed legislation regarding the classification of frozen pre-embryos.⁹⁶ The statute defines

⁹² *Id.*

⁹³ *Id.* at 537.

⁹⁴ *Id.* at 537 (“New Hampshire also has detailed laws regarding liability, the length of time that embryos can be stored in vitro, and patient selection . . . Virginia requires HIV testing for gamete donors, requires physicians to provide certain disclosures to patients, and states that an ART child born after a decedent's death may inherit.”).

⁹⁵ *Id.* at 540 (“The only direct federal regulation of IVF is found in the Fertility Clinic Success Rate and Certification Act of 1992, which effectively came into operation in 1996, when the Department of Health and Human Services began to fund its implementation.”).

⁹⁶ LA. REV. STAT. ANN. § 9:121 (2011); *see also* LA. REV. STAT. ANN. § 9:126 (2011) (“An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or

a human embryo as “an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child.”⁹⁷ The statute specifically identifies that the proper judicial standard in disputes over frozen pre-embryos “is to be in the best interest of the in vitro fertilized ovum.”⁹⁸ In the state’s definition, embryos are defined as having legal rights as a “juridical person.”⁹⁹ Under this classification, Louisiana actually allows preserved pre-embryos to sue or be sued just as if they are citizens of the United States.¹⁰⁰

the facility which employs him or the donors of the sperm and ovum. If the in vitro fertilization patients express their identity, then their rights as parents as provided under the Louisiana Civil Code will be preserved. If the in vitro fertilization patients fail to express their identity, then the physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A court in the parish where the in vitro fertilized ovum is located may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who caused in vitro fertilization to be performed, to protect the in vitro fertilized human ovum’s rights.”).

⁹⁷ LA. REV. STAT. ANN. § 9:121 (2011).

⁹⁸ LA. REV. STAT. ANN. § 9:131 (2011) (essentially the same standard that the trial judge used in the Arizona dispute).

⁹⁹ LA. REV. STAT. ANN. § 9:124 (“As a person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued. The confidentiality of the in vitro fertilization patient shall be maintained.”); additionally, LA. REV. STAT. ANN. § 9:123 provides that “[a]n in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb or at any other time when rights attach to an unborn child in accordance with law.” Moses, *supra* note 90, at 536-537.

¹⁰⁰ *Id.*

This ability to sue on their own behalf, is clearly indicative of a the legislature's intent to classify pre-embryos as persons and not as property.

In Louisiana, the legislature has responded to court rulings by passing regulations for IVF in which pre-embryos are classified as persons.¹⁰¹ In perhaps the most popular case regarding the status of frozen pre-embryos, the US District Court for the Eastern District of Louisiana decided a case pertaining to actress Sofia Vergara and her ex-husband Nick Loeb.¹⁰² As is usually the case when it comes to disputes over frozen pre-embryos, the couple underwent IVF treatment when they were engaged and the present dispute arose post-marriage dissolution.¹⁰³ Loeb originally brought suit on behalf of the two frozen pre-embryos against Vergara to allow him to “bring the embryos to term” without Vergara’s permission in California, where the fertility clinic was located.¹⁰⁴ With the help of some pro-choice lawyers, Loeb refiled for “full custody” of the pre-embryos in Louisiana, where pre-embryos have standing to sue as persons.¹⁰⁵ Loeb suit “claims Vergara is preventing the embryos— referred to as ‘Emma’ and ‘Isabella’— from

¹⁰¹ *Id.*

¹⁰² *Loeb v. Vergara*, 326 F. Supp. 3d 295, 299 (E.D. La. 2018) (Loeb originally filed suit in California but dismissed that suit and moved to Louisiana and subsequently filed another lawsuit on behalf of the embryos. As has been discussed, Louisiana has the strongest laws regarding frozen embryo use and perhaps offers the best chance for the parent looking to bring the embryos to life.).

¹⁰³ *Id.* at 299.

¹⁰⁴ *Loeb*, 326 F. Supp. 3d at 299; Rich Vaughn, *Vergara Embryo Suit Invoke Louisiana's One-of-a-Kind Personhood Law*, INT'L FERTILITY L. GRP. (Dec. 12), <https://www.iflg.net/vergara-embryos-louisiana-personhood-law/>.

¹⁰⁵ *See Vaughn, supra* note 104.

receiving ‘their expected inheritance.’”¹⁰⁶ This clear venue shopping will allow all donors seeking to bring pre-embryos into existence as humans, to essentially file in Louisiana where they can make a “best chance” argument under the state law.¹⁰⁷

Arizona has passed a law addressing the future of frozen pre-embryos during dissolution of marriage disputes.¹⁰⁸ The statute specifies that if a dispute arises, the frozen pre-embryos are to go to the spouse that provides the best chance of bringing the pre-embryos into existence as human beings.¹⁰⁹ This statute came to life after a particularly compelling marriage dissolution case was decided before an Arizona trial court.¹¹⁰ Ruby Torres and John Terrell underwent IVF treatments when Torres was diagnosed with aggressive breast cancer in 2014.¹¹¹ After cancer treatment, but before implantation of the pre-embryos, Torres and Terrell entered divorce proceedings, during which Torres expressed that she would like to implant the pre-embryos, however, Terrell refused.¹¹² The judge ordered the pre-embryos remain frozen until they can be donated to a couple or a woman that wants to

¹⁰⁶ *Id.*

¹⁰⁷ *See generally* Vaughn, *supra* note 104.

¹⁰⁸ *See generally* S.B. 1393, 53d Legis. Body, 2d Reg. Sess. (Ariz. 2018).

¹⁰⁹ *Id.*

¹¹⁰ Kelsey Gilmore, *Arizona Courts Decide Fate of Frozen Embryos*, THOMPSON REUTERS: LEGAL SOLUTIONS BLOG (July 30, 2018), <https://blog.legalsolutions.thomsonreuters.com/top-legal-news/arizona-courts-to-decide-fate-of-frozen-embryos/>.

¹¹¹ *Id.*

¹¹² *Id.*

implant them.¹¹³ Torres appealed the trial court's decision and the Arizona Court of Appeals found in her favor.¹¹⁴ The Court ruled that Torres' right to procreate outweighed Terrell's interest in not procreating.¹¹⁵ The Arizona Court of Appeals also noted that "the trial court erred when it placed heavy weight on the parties' inability to 'co-parent.'"¹¹⁶

V. POTENTIAL CHALLENGES TO LEGAL CLASSIFICATION OF PRE-EMBRYOS

Classifying pre-embryos that result from IVF as persons and granting them all the rights and privileges of persons will result in conflict with existing personhood rights and abortion law precedents.

A. Personhood Status

A person is somewhat easy to define in the law. The basic definition is a human being or a corporation.¹¹⁷ A person is awarded all rights and privileges granted to them in the US Bill of Rights. The term "life" is somewhat more complicated in the law. The question of when life begins is one that religious officials, scientist, and even Supreme Court Justices have had to address.

¹¹³ See generally Gilmore, *supra* note 110.

¹¹⁴ Dustin Gardiner, *Arizona Women Can Use Fertilized Embryos to Get Pregnant Without Ex's Consent, Court Rules*, AZCENTRAL (Mar. 18, 2019, 7:28 PM), <https://www.azcentral.com/story/news/local/arizona/2019/03/18/arizona-court-ruling-use-preserved-embryos-without-ex-husbands-consent-ruby-torres/3205867002/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See generally Person, BLACK'S LAW DICTIONARY (11th ed. 2019).

The New York Court of Appeals concluded “that disposition of . . . pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as ‘persons’ for constitutional purposes.”¹¹⁸

The negligent destruction of frozen pre-embryos is not actionable under the Arizona wrongful death statutes.¹¹⁹ The term "person" as used in the wrongful death statutes “include[s] a viable fetus, meaning the ability of a fetus to live outside the womb.”¹²⁰ A married couple underwent IVF and produced 10 pre-embryos which were cryogenically preserved at a Mayo clinic in Arizona.¹²¹ When couple transferred the pre-embryos to a different clinic, they were informed that only 5 were included in the transfer equipment.¹²² The couple brought a wrongful death suit, alleging that their five missing pre-embryos qualified as “persons” under the statute.¹²³ On appeal, the Arizona Court of Appeals made clear that frozen pre-embryos do not reach this threshold of personhood under the statute and defers to the legislature on the issue.¹²⁴

¹¹⁸ *Kass*, 91 N.Y.2d at 564.

¹¹⁹ *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 392 (Ct. App. 2005) (a married couple underwent IFV at a Mayo Clinic facility and the facility agreed to free and store ten of the couples pre-implanted embryos. The couple chose to undergo treatment at a different facility and wanted to transfer their 10 frozen embryos; however, only 5 embryos were transferred.).

¹²⁰ *Id* at 392.

¹²¹ *Id* at 389.

¹²² *Id.* at 390.

¹²³ *Id.*

¹²⁴ *Id* at 392.

The court further distinguishes frozen pre-embryos from a viable fetus, which has been considered a person under the wrongful death statute; “[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 makes it speculative at best to conclude that ‘but for the injury’ to the fertilized egg a child would have been born and therefore entitled to bring suit for the injury.”¹²⁵ Because of this uncertainty, egg and sperm owners cannot make a wrongful death claim for the destruction of frozen pre-embryos.¹²⁶

While not recognizing frozen pre-embryos as people, the court follows the *Davis* precedent by not recognizing the pre-embryos as just property either. The court also recognizes that “pre-embryos occupy an interim category between mere human tissue and persons because of their potential to become persons.”¹²⁷ Once again, the Court is walking the fine line between personhood and property by deferring to this arbitrary and ambiguous potential life category.¹²⁸

The Tennessee Supreme Court addressed the tension between declaring pre-embryos as people or as property as well; “as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born.”¹²⁹ This decision highlights the Court’s apprehension to grant personhood

¹²⁵ *Jeter*, 211 Ariz. at 392.

¹²⁶ *See generally* *Jeter*, *supra* note 120.

¹²⁷ *Id.*

¹²⁸ *Davis*, 842 S.W.2d at 597.

¹²⁹ *Id.* at 588.

to entities not yet living in the world; however, the Court does not go as far as defining pre-embryos as property.¹³⁰

The Supreme Court of Iowa addressed the issue of “whether . . . embryos have the legal status of children under [the Iowa] dissolution-of-marriage statute.”¹³¹ The Court notes that to determine the legal status of frozen pre-embryos in marriage dissolution cases is an issue of first impression, such that other courts have not authored opinions on the subject.¹³² As a case of first impression, the Court looks to statutory and legislative intent to decide the issue.¹³³ Ultimately the Court concluded that the child custody statute’s “best interest” test was inapplicable to frozen pre-embryos because the legislature intended the statute to apply to living children.¹³⁴ Pre-embryos cannot be considered living children in this context. Disputes over living children involve conversations about child support, custody, and visitation. Unlike disputes over living children, disputes over frozen pre-embryos requires courts to balance parental rights before either party has become a parent. It

¹³⁰ *Id.* (a divorcing couple was in a dispute over who would have “custody” of the embryos they froze while participating in IVF. The women, who was the egg donor wanted to implant the embryos, while the man, who was the sperm donor wanted them to remain frozen as he contemplated whether he wanted to be a father without being married to the child’s mother.).

¹³¹ *In re Marriage of Witten*, 672 N.W.2d at 774 (a husband and wife had seventeen frozen embryos in storage at the time they sought dissolution of their marriage. Both parties signed an agreement prior to treatment that required both parties consent before any embryos can be transferred, released or disposed of.).

¹³² *Id.*

¹³³ *Id.* at 774-776.

¹³⁴ *Id.*

logically follows that statutory language pertaining to child custody, would not be applicable to disputes over frozen pre-embryos.

As precedent indicates and scholars have concluded, pre-embryos do not qualify as persons and are therefore are not granted constitutional rights.¹³⁵ Courts have been clear that pre-embryos are not people under the Constitution.¹³⁶ Granting constitutional rights to pre-embryos or even fetuses, which have the capability of reaching viability and are therefore closer to personhood, would present conflicts with women's constitutional rights.¹³⁷ Following the courts holding in *Roe*, it would be impossible to grant a fetus or pre-embryos constitutional right to life while preserving the women's constitutional right to privacy.¹³⁸ The *Roe* Court specifically addresses the potential psychological and financial harms women would endure should they not have the choice to end a pregnancy.¹³⁹ Who is to say that requiring a woman to

¹³⁵ Cohen, *supra* note 60, at 1129 (“Preembryos lack even a rudimentary nervous system and thus clearly fail to meet any of the typical criteria for actual personhood: consciousness, the ability to have plans, the ability to feel pain, or even awareness of one’s surroundings.”).

¹³⁶ *Kass*, 91 N.Y.2d at 564.

¹³⁷ See generally *Roe*, 410 U.S. at 113; *Kass*, 91 N.E.2d at 556; *Davis*, 842 S.W.2d at 588.

¹³⁸ *Roe*, 410 U.S. at 113.

¹³⁹ *Id.* at 153 (“The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent . . . Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.”)

pay for the storage a care of a frozen pre-embryos she very well may never be able to carry does not also have a psychological and financial effect? If a women's right to terminate a pregnancy is protected under this right to privacy, so should a women's decision to no longer preserve pre-embryos.

Courts have made clear that determining the custody of a living child and determining who has decision making authority over pre-embryos is different. "The factors that are relevant in determining the custody of children in dissolution cases are simply not useful in determining how decisions will be made with respect to the disposition and use of a divorced couple's fertilized eggs."¹⁴⁰ A typical custody assessment does not work because it "would be premature to consider which parent can most effectively raise the child when the "child" is still frozen in a storage facility."¹⁴¹

While there is ambiguity as to the legal classification of pre-embryos and fetuses, Courts have held that they do not meet the threshold requirements for personhood status.¹⁴² Given this indication from the courts, existing constitutional and family law practices do not apply. Pre-embryos cannot and should not have constitutional rights, nor should they be given the status of children as they are not yet born.¹⁴³

B. Applicability of Abortion Law Precedent

The United States Supreme Court has established that a fetus is not a constitutional person and that a woman has a right as a

¹⁴⁰ *In re Marriage of Witten*, 672 N.W.2d at 776.

¹⁴¹ *Id.* at 775.

¹⁴² *Kass*, 91 N.Y.2d at 564; *Davis*, 842 S.W.2d at 588.

¹⁴³ *See supra* Parts IV and V.

constitutional person to terminate a pregnancy if she so chooses.¹⁴⁴ The Supreme Court has also expressly limited this right given the special potential life aspect of fetus.¹⁴⁵

The Court's decision in *Roe v. Wade*, recognizes the need to weigh the personal right to decide to terminate a pregnancy and the State's interest in regulation.¹⁴⁶ The Court wrote, "in assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."¹⁴⁷ The Court goes on to state that "the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman...and that it has still *another* important and legitimate interest in protecting the potentiality of human life . . . [e]ach [interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"¹⁴⁸

Rather than addressing the point at which life begins, the Court instead assesses the point at which these two distinct state interests become "compelling," such that they outweigh a woman's right to terminate a pregnancy.¹⁴⁹ A state's interest in potential life becomes compelling at the point when the fetus become viable.¹⁵⁰ The Court mapped its

¹⁴⁴ *Roe*, 410 U.S. at 163.

¹⁴⁵ *Casey*, 505 U.S. at 871-872.

¹⁴⁶ *Roe*, 410 U.S. at 154.

¹⁴⁷ *Id.* at 150 (emphasis added).

¹⁴⁸ *Id.* at 162-163 (emphasis added).

¹⁴⁹ *Roe*, 410 U.S. at 163.

¹⁵⁰ *Id.*

analysis on to the trimester framework of pregnancy and held that “almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.”¹⁵¹

In *Planned Parenthood v. Casey*, the Supreme Court again discussed the limits of the state's interest in potential life as exemplified by a fetus.¹⁵² While reaffirming their decision in *Roe*, the Supreme Court in *Casey* rejected the trimester framework of viability.¹⁵³ This holding no longer prohibits government regulation of abortions during the first trimester of pregnancy.¹⁵⁴ The *Casey* Court stressed that the State's interest in potential life begins when a fetus becomes viable, whenever that stage is reached.¹⁵⁵ The Court recognized that the advancement of science has allowed for the point of viability outside of the womb to be earlier and earlier in a pregnancy.¹⁵⁶

Based on its new articulation of state interest in a fetus, the Court upheld a number of restrictions the state of Pennsylvania instituted to further its compelling state interest in preserving fetal life after the point

¹⁵¹ *Casey*, 505 U.S. at 872.

¹⁵² *Id.*

¹⁵³ *Id.* at 870, 873.

¹⁵⁴ *Id.* at 872.

¹⁵⁵ *Id.* at 870.

¹⁵⁶ *Id.* at 860, 870.

of viability.¹⁵⁷ This discussion of viability becomes central to any conversation about pre-embryos and how we can or cannot regulate them. The more advanced scientific technology gets, the broader the definition of viability will become and therefore the government will have an easier time proving there is a compelling interest in regulation.¹⁵⁸ Therefore, due to the continued advanced of science, the concept of viability has become more crucial to the status of a pre-embryo.

Casey upholds most of the major principles established in *Roe*: “[1] recognition of the right of the woman to choose to have an abortion before viability . . . [2] confirmation of the State's power to restrict abortions after fetal viability,” while adding that “[3] the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”¹⁵⁹

In its opinion, the Court recognizes “constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁶⁰ The Court makes clear that the Constitution protects such rights and “places limits on a State's right to interfere with a person's most basic decisions about

¹⁵⁷ *Casey*, 505 U.S. at 877. A woman seeking an abortion must give her informed consent after a 24 hour waiting period and a minor seeking an abortion must have parental consent. *See generally Casey*, 505 U.S. 833.

¹⁵⁸ Advances in neonate care between 1973 and 1992 changed the point of viability for a fetus from 28 to 23 or 24 weeks. *Id.* at 860.

¹⁵⁹ *Id.* at 846. The *Casey* Court does not retreat from the *Roe* Court's finding that a fetus is not a constitutional person. *Id.*

¹⁶⁰ *Id.* at 851 (citing *Carey v. Population Services International*, 431 U.S. 685 (1977)).

family and parenthood.”¹⁶¹ This reasoning supports my argument that people should be able to freely make their decisions regarding what should happen to their unused pre-embryos as that is a decision regarding family.

While recognizing that past precedent protects the ability to make basic decisions regarding family life, the Court goes on to ultimately distinguish abortion decisions from this protection.¹⁶² Essentially, courts have been skeptical to consider the procreative decision to not have a child, as a basic decision about family. The Court in *Casey* rejects the trimester framework established in *Roe*, to allow for some regulation during the first trimester, before the point of viability.¹⁶³ The Court argues that a woman’s right to terminate during the first trimester does not mean “that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed.”¹⁶⁴ Ultimately, the Court established that there is a state interest in protecting a fetus before it reaches viability under the theory of protecting potential life.¹⁶⁵

Casey rejects the trimester framework and upholds a government interest in potential life.¹⁶⁶ In *Casey*, the Court allows for regulations of abortions that occur in the first trimester which as the Court has previously stated is before the fetus reaches the point of viability.¹⁶⁷

¹⁶¹ *Id.* at 849.

¹⁶² *Id.* at 851.

¹⁶³ *Casey*, 505 U.S. at 873

¹⁶⁴ *Id.* at 872.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 873

¹⁶⁷ *Id.*

Embryos that are not yet implanted inside a woman's uterus are also not yet at the point of viability as they cannot reach viability until they are implanted.¹⁶⁸

At the time that the Supreme Court considered, and decided *Roe*, reproductive technologies had not advanced into the vast field we have today.¹⁶⁹ It wasn't until later, in the 1970s, that Patrick Steptoe and Robert Edwards introduced in vitro fertilization (IVF), in which an egg is fertilized outside of a woman's body.¹⁷⁰ That being said, the arguments made in *Roe* were never intended to apply to pre-embryos. They apply to embryos that already exist inside a woman's uterus.¹⁷¹

Another major finding of *Roe* was that state interest in "preserving and protecting the health of [a] pregnant women" became a compelling interest at the end of the first trimester when, "mortality in abortion may be less than mortality in normal childbirth".¹⁷² Since pre-embryos exist entirely separate from a woman, there is never a choice between saving the health of the embryo and health of the mother, in the context of pregnancy and abortion complications. There is, of course a consideration of the woman's health and the health of the embryo at the time implantation is discussed, but not before.¹⁷³

¹⁶⁸ See generally *Casey*, 505 U.S. at 873.

¹⁶⁹ See generally Tian Zhu, *In Vitro Fertilization*, EMBRYO PROJECT ENCYCLOPEDIA (July 22, 2009), <https://embryo.asu.edu/pages/vitro-fertilization>.

¹⁷⁰ *Id.*

¹⁷¹ See generally *Roe*, 410 U.S. at 162-163.

¹⁷² *Roe*, 410 U.S. at 162-163.

¹⁷³ While a woman's physical health is not yet intertwined with an embryo that is not yet implanted, a woman's mental health could possibly be affected by a

Additionally, since pre-embryos exist outside of the woman's body, a bodily autonomy argument does not apply as it does when the embryo is implanted but rather applies to the women's right to choose what happens to her own body.¹⁷⁴ The Court in *Casey* wrote "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its reject."¹⁷⁵

I. WHY DOES THIS MATTER:

Given the complexity involved with legally defining pre-embryos, it is easy to lose sight of why it is so important. As this paper suggests, the preservation of a woman's right to the privacy to do with her own body as she wants and chooses is paramount. It's a right that many generations have fought for, and one that generations to come will fight to preserve. Elevating pre-embryos to the legal status of living persons will have a detrimental effect on this right.

If legislatures or courts decide to define a pre-embryo as a person with full rights and privileges awarded as such, women's rights will regress decades.¹⁷⁶ By elevating the status of a frozen fertilized egg, Congress would be devaluing the importance of a woman's right to

decision being made regarding the embryo. Restricting a woman from becoming a mother, or allowing someone else to carry her genetic material, will likely have an effect on her mental health.

¹⁷⁴ *Kass*, 91 N.Y.2d at 561 (all five justices of the New York Appellate Division agreed that "a woman's right to privacy and bodily integrity are not implicated before implantation occurs.").

¹⁷⁵ *Casey*, 505 U.S. at 873.

¹⁷⁶ Prior to *Roe*, a woman who obtained an abortion faced criminal charges. *Roe*, 410 U.S. at 117-121.

privacy. Granting personhood status to pre-embryos would create a great conflict between the pre-embryo's right to life and a women's right not to have a child. If a pre-embryo has a right to life at its creation, courts could force women to become mothers, even if just genetically to children they do not want. While it is a leap to say that courts could force a women to carry a pre-embryo created through IVF, it may not be a leap to say that courts will require that pre-embryo to be carried to term.

As has been discussed in this paper, multiple courts have acknowledged and discussed individuals right to procreate and become parents.¹⁷⁷ Some have recognized a person's interest in not becoming a parent in addition to their right to become a parent.¹⁷⁸ If a pre-embryo is given the right to life, just like any other legal person, it will create a direct conflict with these established parental rights.¹⁷⁹ Biology requires an egg and a sperm to create a pre-embryo.¹⁸⁰ Logically, science tells us that a pre-embryo's right to life cannot be protected without forcing a man and a woman to accept the role of biological parent. Even, if courts interpret this right to life to mean that pre-embryos cannot be destroyed, this still forces people to care for and financially provide for this life they do not want. As has been discussed, this would essentially strip the parent of their right not to be a parent in order to protect the pre-embryo's right to life.

If, as this paper suggest, pre-embryos remain legally defined as property and are not further regulated, the consequences are far less

¹⁷⁷ See *supra* Part IV.

¹⁷⁸ *J.B.*, 170 N.J. at 6; *Davis*, 842 S.W.2d at 588.

¹⁷⁹ Cohen, *supra* note 60 at 1123.

¹⁸⁰ Zhu, *supra* note 9.

severe than if pre-embryos were defined as people. While, defining pre-embryos as property is not a perfect solution, the legal consequences are less severe. Legislatures and courts are not stripping away rights when they award property value to pre-embryos, they are just choosing not to expand the definition of a person. If they were to expand this definition to include pre-embryos, the right of persons already included in that definition, men and women will be impeded upon. Defining pre-embryos as property does not require legislative bodies to provide regulations regarding pre-embryos as there is no ambiguity surrounding the division or ownership of property.

This is not to say that defining pre-embryos as property is a flawless solution.¹⁸¹ Clearly, this classification still requires courts to address disputes over such property where they are forced to balance the interests and rights of the man and women that created the pre-embryo. The difference in status means the difference between balancing the rights of two people and balancing the rights of a pre-embryo and each person. As seen in the case law discussed, balancing the interests of two parties is a complex issue that requires some couples to turn to the courts

¹⁸¹ As a strong advocate for disability rights, I would be remiss to not recognize the unfortunate effect classifying embryos as property will have on the disability population. As with any other property, couples who create embryos with their genetic material can decide to discard any embryos they do not want to bring to life as a person. Some believe this will create far fewer births of those embryos with genetic defects. This practice of culling embryos that will become people with disabilities is something that many find morally wrong, but it is not a legal wrong. While public policy considers morality, morality is far too subjective to drive our legal system. Ultimately, the consequences of defining an embryo as property are largely moral while defining embryos as persons raise great constitutional and legal issues.

during disputes.¹⁸² Adding an additional interest to the balancing test would further complicate an already complex assessment and lead to an even greater influx of court cases.

The increasing occurrences of disputes over cryogenically preserved pre-embryos has raised not only the question of their legal status, but also the question of whether legislatures should regulate practices regarding embryos. The United States currently does not have any federal laws regarding the regulation of pre-embryos, but many other countries do.¹⁸³ The United Kingdom has a 10-year storage limit on frozen embryos, while Brazil has a 3-year limit.¹⁸⁴ Other countries, such as Germany regulate the number of embryos that can be created at one time.¹⁸⁵ While these types of regulations on fertility treatments are not prevalent in the United States yet, some scholars have predicted that will soon change.¹⁸⁶

¹⁸² *J.B.*, 170 N.J. at 12; *Witten*, 672 N.W.2d at 776.

¹⁸³ BUZZFEED, *Follow This: "Whose Embryos?"* NETFLIX (Sept. 27, 2018), <https://www.netflix.com/watch/80241731?trackId=14277283&tctx=0%2C4%2C21fc673c-b168-4435-9c49-ad0c965cce67-89068338%2C%2C>; Moses, *supra* note 90, at 536-537 ("American law on IVF is complicated by the fact that it is largely state-based.").

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* Germany only allows for the creation of 3 embryos at a time. *Id.*

¹⁸⁶ "We live in a time of a largely hands-off approach in the arena of reproductive technology with the government abdicating any profound regulatory role to the market. This era will end as technology makes the fantastic attainable and as the alarms raised by bioethicists, conservative and liberal commentators, feminist philosophers, disability rights activists, and other interested

The problem with any future attempts to regulate pre-embryos produced through procedures like IVF will be where to draw the constitutional and moral lines.¹⁸⁷ Legislatures will have to decide whether the use of IVF is even within a person's fundamental right to parent.¹⁸⁸ One way to ensure an end to cryogenically preserved pre-embryos, is of course to stop creating them. However, it is unlikely legislative bodies will take such a drastic step. Putting an end to the practice of creating and preserving pre-embryos in a laboratory through IVF would likely be viewed as an unconstitutional infringement on procreative rights as many couples who cannot conceive naturally rely on this option to have biological children.¹⁸⁹ In order to regulate the practice, legislatures will be forced to consider "what pre-conception embryo screening decisions merit praise and what decisions merit condemnation."¹⁹⁰

VI. CONCLUSION

While there is currently no area of law which can properly encompass all the issues that now exist with the growth of reproductive technologies, property law best applies. Unused pre-embryos that result from fertility treatments like IVF, should be treated as property and should not be regulated by legislative bodies whose statutes are too susceptible to improper interpretation. As the growth and popularity of

parties ring louder. Eventually the clamor will be such that state legislatures and, perhaps, the federal government, will begin limiting the uses of reproductive technologies." Mutcherson, *supra* note 33, at 333.

¹⁸⁷ *Id.* Past battles over abortion regulation has shown us that that general public, and political elaborate care about the morality of laws, especially in the context of "potential" life. *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See generally Sunderam *supra* note 3.

¹⁹⁰ Mutcherson, *supra* note 33, at 333.

fertility treatments increase, issues regarding embryos will continue to rise as well; however, these are largely moral in nature rather than legal. The complex issue of the legal status of embryos that exist outside of a woman's body requires an in-depth exploration of several areas of law in order to properly address legal conflicts which arise. As the case law suggests, there is a tension between recognizing frozen pre-embryos as property and granting them full rights and privileges as a living being. While unfortunate, this tension will likely continue as technology progresses; this is due to the great moral and emotional response this topic generates, but that does not require a change in the law nor does it require further regulations.