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NOTES

THE LEGAL DIMENSIONS OF IN VITRO FERTILIZATION:
CRYOPRESERVED EMBRYOS FROZEN IN LEGAL LIMBO

I. INTRODUCTION

The increased availability of in vitro fertilization has concerned many legal, philosophical, political, and scientific scholars for the past decade.¹ New legal and moral issues are a direct result of this advancement in reproductive technology; for the first time an American court has had to determine the legal status of cyropreserved embryos.² This Note will give an overview of the development of in vitro fertilization, the impact it has had on society, and will discuss the constitutional rights to both coital and noncoital reproduction. The first American case concerning in vitro fertilization and the disposition of frozen embryos, Davis v. Davis,³ will be discussed thoroughly, and alternative solutions concerning the rights of the donors as well as the embryos will be explored. The discussion will conclude by analyzing current legislation regarding innovative reproductive technology, and will recommend guidelines for future drafters of such legislation.

A. The Development of In Vitro Fertilization

On July 25, 1978, Louise Brown was the first baby to be born from extracorporeal in vitro fertilization.⁴ The technique, as perfected

³. Id.
⁴. Drs. Edwards and Steptoe were responsible for the birth of Louise Brown, the first "test tube baby." Sullivan, Woman Gives Birth to Baby Conceived Outside the Body, N.Y. Times, July 26, 1979, at A1, col. 5.
in England by Drs. Edwards and Steptoe,\textsuperscript{5} made scientific history. The birth of this "test tube baby" attracted wide media attention.\textsuperscript{6} Although the ultimate impact of this scientific advancement has yet to be known, the most obvious consequence of the process of \textit{in vitro} fertilization is that it tremendously increases the possibilities for infertile couples to have their own natural children.\textsuperscript{7} A couple who is diagnosed as infertile may be able to bring their own genetic offspring to term through the use of extracorporeal fertilization and subsequent implantation.\textsuperscript{8} An infertile couple also could have a child that is "half" theirs through the use of surrogate donors of either sperm or eggs.\textsuperscript{9}

Another possibility resulting from the advancement of \textit{in vitro} fertilization is that it provides one means by which gay men and women may have children.\textsuperscript{10} The process of fertilizing an egg extracorporeally also permits a vast array of experimentation with human embryos.\textsuperscript{11} Specifically, advances in genetic engineering may result from scientific

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5. "Human procreation can be accomplished through a variety of reproductive technologies that do not involve sexual intercourse." Note, \textit{The Need for Statutes Regulating Artificial Insemination by Donors}, 46 OHIO ST. L.J. 1055, 1055 (1985) [hereinafter Note, \textit{The Need for Statutes}]. Among these techniques are artificial insemination and \textit{in vitro} fertilization. The process of \textit{in vitro} fertilization involves extracting eggs from a woman and sperm from a man and then fertilizing the eggs in a culture dish. \textit{Id.} at 1055-58. The fertilized eggs, or human embryos, are then either implanted immediately in a woman's uterus or frozen in a cryoprotectant liquid solution for implantation at a future date. Kaplan, \textit{Fetal Research Statutes, Procreative Rights, and the 'New Biology': The Interstices of the Law}, 21 SUFFOLK U.L. REV. 723, 730 (1987). The process of \textit{in vitro} fertilization had been used on experimental animals for a number of decades before it was used for the birth of a human. Dickey, \textit{supra} note 1.


8. \textit{Id.} at 319.


use of in vitro fertilization. Although most of the results seem to be beneficial, some fear that manipulation or casual experimentation with human embryos could have negative consequences such as cloning or the creation of genetic hybrids.

These innovative reproductive techniques raise many social, moral, and legal questions. This Note will examine the most pressing: the legal status of an embryo and the rights of the respective donor-parents.

B. Legal Questions Raised by Cryopreservation of Embryos

Since the advent of cryopreservation of embryos, scholars have envisioned situations where a couple undergoing fertilization treatment will die and leave behind human embryos or where a couple divorces and disagrees over the disposition of frozen embryos. Scholars speculated that under such circumstances, it would be necessary for a third party to determine the fate of frozen human embryos.

In 1981, an American couple, the Rios, flew to Australia to undergo fertilization treatment. An anonymous couple donated three human embryos to the Rios. One embryo was implanted in Mrs. Rios in an attempt to impregnate her, and the other two were cryopreserved. The couple later died in a plane crash without having attempted implantation of the remaining embryos or having decided in advance the

12. Id. Genetic engineering is the process of manipulating the genes to have the desired outcome from the offspring. Id. at 1277-84. For example, if parents wanted a girl rather than a boy they could manipulate the genes to achieve this goal. Id. at 1281-82. More practically, genetic engineers may be able to remove genetically transmitted diseases. Id. at 1283 n.50.


14. Cryopreservation of embryos is the process of freezing living embryos in a fluid solution. Kaplan, supra note 5, at 730. At a later date, the temperature of the solution is increased to room temperature and the embryos are immediately implanted. Id.


16. Id. at 407.


18. Id.

19. Id. The two remaining embryos were "frozen" for possible use later. Id.
disposition of the embryos in the case of death. This tragedy exposed the various legal questions raised by the in vitro fertilization process. For the first time in any country, courts and legislatures were faced with the complex question of what to do with the "orphaned" frozen embryos. After much debate, the Australian legislature decided to donate the frozen embryos to an anonymous recipient. Although the decision of the Australian legislature is not legally binding in this country, it generated much curiosity as to how American legislatures would handle the situation created by these new reproductive techniques. Subsequently, the United States Congress held various House hearings on the legal implications involving the new reproductive techniques. However, no federal statutes were enacted.

Lacking statutory guidance, American courts have recently been faced with the difficult task of determining the fate of frozen embryos. In Maryville, Tennessee, Mary Sue Davis and Junior Davis, a couple married for nine years, tried repeatedly to have a child. During these years Ms. Davis suffered five tubal pregnancies. Under the advice of her physician, she undertook surgical treatment which rendered her incapable of natural conception. Still determined to have a child, the Davis' sought the assistance of Drs. King and Shivers, owners of a fertilization center. The couple participated in an in vitro fertilization program during which Ms. Davis experienced six unsuccessful attempts

20. Id. at 1030-31.
21. Id. at 1030-33.
22. Id. at 1032-33.
24. Id.; see also Human Embryo Transfer: Hearings Before the Subcommittee on Investigations and Oversight of the Committee on Science and Technology, 98th Cong., 2d Sess. 32 (1984) [hereinafter Human Embryo Hearings].
25. See Alternative Reproduction Hearing, supra note 25, at 133-37. Although the Select Committee proposed that legislative action should be taken, Congress has yet to pass any laws on the subject. Id.
27. Smothers, Embryos in a Divorce Case: Joint Property or Offspring?, N.Y. Times, Apr. 21, 1989, at A1, col. 5.
28. Id.
29. Davis, No. E-14496, slip op. at 3.
30. Id. at 4.
to bear a child and then temporarily suspended her *in vitro* fertilization treatment.\(^{31}\)

In 1988, Ms. Davis learned of cryopreservation, where the ova, which were aspirated and inseminated in the laboratory, could be frozen.\(^{32}\) Thus, some of the fertilized ova would be implanted and the remaining ones would be cryopreserved or "frozen" for future implantation.\(^{33}\) On December 8, 1988, Dr. Shivers extracted nine ova from Mary Sue Davis.\(^{34}\) The ova were fertilized with sperm from Junior Davis.\(^{35}\) Two days later, two of the embryos were implanted in Mary Sue, but did not result in pregnancy.\(^{36}\) The remaining seven embryos were placed in cryogenic storage for the purpose of future implantation.\(^{37}\)

In February of 1989, the couple filed for a divorce.\(^{38}\) Traditionally, divorce proceedings determine the equitable distribution of marital property and the custody rights of parents, according to state law.\(^{39}\) This marital dispute, however, was unique because the couple "owned" seven frozen embryos stored in the laboratory of Drs. King and Shivers.\(^{40}\) The Davis' divorce proceeding became the first case in American courts that considered the disposition of frozen embryos.\(^{41}\)

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) Id. The fact that the embryos can be stored for future implantation eliminates the need for the physically and emotionally painful procedure of extracting eggs from a woman each time *in vitro* fertilization is attempted. See Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1061, 1084 (1986) [hereinafter Note, *Frozen Embryos*].

\(^{34}\) Davis, No. E-14496, slip op. at 5.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. at 6.


\(^{40}\) Davis, No. E-14496, slip op. at 6.

\(^{41}\) Id. at 1.
II. CONSTITUTIONAL RIGHTS WITH RESPECT TO FROZEN EMBRYOS

A. Right to Childbearing and Procreation

The Supreme Court has consistently recognized individual autonomy in matters concerning childbearing. In *Meyer v. Nebraska*, the Court defined the "liberty" of the due process clause of the fourteenth amendment to encompass "establish[ing] a home and bring[ing] up children." The Court explained that "[family] liberty may not be interfered with [by] legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." For example, in *Pierce v. Society of Sisters*, the Court held that a statute which required students to attend public school rather than private school was unconstitutional. The Court has consistently upheld the right of individuals to make fundamental decisions that shape family life, without government interference. The Court has held that states cannot regulate whom to marry, whether and when to have children, and with what values to rear those children.

The right to family autonomy also encompasses procreation. In *Skinner v. Oklahoma*, the Court held a statute which mandated sterilization for "habitual criminals" was unconstitutional. In doing so, the Court announced that procreation is "one of the basic civil rights of man." Although *Skinner* was decided before *in vitro* fertilization was

42. Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a statute which prohibited any person, including married couples, to use any form of contraception); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (invalidating a statute which required students to attend public school, permitting them to attend private school).
43. 262 U.S. 390 (1923).
44. *Id.* at 399. In *Meyer*, the Supreme Court invalidated a statute which prohibited the teaching of any language other than English in private or public schools. *Id.* at 403.
45. *Id.* at 399-400.
46. 268 U.S. 510 (1925).
47. *Id.* The underlying rationale in *Pierce* was that the family should have autonomy with regard to matters concerning child rearing. *Id.* at 534.
48. *Id.*
49. *Id.*
50. 316 U.S. 535 (1942).
51. *Id.* at 541.
52. *Id.* *Skinner* overruled a previous Supreme Court decision, *Buck v. Bell*, which upheld a statute requiring certain habitual criminals and feeble minded people be sterilized. *See* *Buck v. Bell*, 274 U.S. 200 (1927).
possible, the fundamental constitutional right to have offspring announced in *Skinner* may be broad enough to encompass the right to noncoital procreation.

**B. Right Not to Procreate**

In 1965, the Supreme Court expanded privacy rights, with regard to autonomy in family matters, to include the right not to procreate. In *Griswold v. Connecticut*, the Court struck down a statute which prohibited the use of any contraceptive and counseling to use contraception. The right to contraception was extended to unmarried couples in *Eisenstadt v. Baird*, where Justice Brennan espoused an expansive view of procreative liberty. "If the right to privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

From *Eisenstadt* and *Griswold*, it is evident that couples, married or unmarried, have a right to autonomy in matters concerning reproduction. In 1973, the Court's ultimate expression of individual autonomy and procreative liberty was handed down in *Roe v. Wade*. In *Roe*, the Court held that the fundamental right of privacy is broad enough to encompass a woman's decision to terminate a pregnancy. Although *Roe* does not stand for the proposition that a woman has a right to terminate pregnancy whenever she wishes, the decision dramatically limits a state's right to regulate abortion.

Under this broad protection of procreative liberty, it could be argued that individuals have the constitutional right to choose any form of procreation, coital or noncoital, for the purpose of bearing a child. However, it does not necessarily follow that the state has no interest

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54. *Id.*
55. *Id.* at 485.
57. *Id.* at 453.
58. *Id.*
60. 410 U.S. 113 (1973).
61. *Id.* at 153, 155.
62. *Id.* at 155.
whatsoever in regulating noncoital procreation. For example, a state may have an interest in regulating fertilization centers for the purpose of protecting the donor's health and rights. A more difficult issue is whether a state may regulate in vitro fertilization on the grounds that it desires to protect the "potential life" of the human embryo.

C. The State's Interest in Protecting "Life"

In <i>Roe</i>, the Court determined that a woman may have an abortion until the third trimester of gestation, at which point the viability of the fetus provides the state legislatures with a compelling interest in protecting the life of a fetus. "[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may . . . regulate, and even proscribe abortion except where it is necessary . . . for the preservation of the life or health of the mother . . . "

<i>Roe</i> arguably stands for the proposition that the state does not have a compelling interest in protecting the life of a fetus until the fetus is considered viable. If the state does not have a compelling interest in protecting a fetus until viability, it follows that a state would not have a right to protect the potential life of a frozen embryo. A frozen embryo, normally consisting of eight cells, is substantially less developed than a fetus. Further, it would be inconsistent with the procreative liberties


Only medical facilities meeting the standards of the American Fertility Society and the American College of Obstetricians and Gynecologists and directed by a medical doctor licensed to practice medicine in this state and possessing specialized training and skill in <i>in vitro</i> fertilization also in conformity with the standards established by the American Fertility Society or the American College of Obstetricians and Gynecologists shall cause the <i>in vitro</i> fertilization of a human ovum to occur. <i>Id.</i>

65. The <i>Roe</i> Court defined viability as the "point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid." <i>Roe</i>, 410 U.S. at 160. Viability normally occurs at 24-28 weeks during gestation. <i>Id.</i>

66. <i>Id.</i> at 164-65.
67. <i>Id.</i> at 162-63. Alternatively, it may be argued that <i>Roe</i> does not stand for the proposition that the state has no compelling interest in protecting the fetus until viability, rather that the woman's right to terminate pregnancy outweighs the rights of a fetus. <i>Id.</i> at 162.
articulated by the Court for a legislature to mandate that a frozen embryo be implanted in a uterus in an attempt to bring it to term.68

However, it is also arguable that Roe does not preclude a finding that a state has a compelling interest in protecting the fetus even before viability.69 The Roe Court dealt with unwanted pregnancy and had to balance the interest in protecting fetal life against women's constitutional privacy rights.70 Applying this balancing test, the Supreme Court concluded that the mother's privacy rights outweighed the nonviable fetus' rights.71 Under this analysis of Roe, a state does have an interest in protecting life from the moment of conception. The state's interest in fetal life must simply be weighed against the rights of the woman involved. The frozen embryos could merit legal protection since they have potential life and are not "stored" within a woman's body. Thus, a mother's privacy rights could be found not to outweigh the state's interest in protecting the embryo. However, this analysis does not take into account the mother's interest in preventing implantation of the embryos in a surrogate mother, nor the psychological and emotional impact of unwanted offspring. Under this view, donor-parents could be forced to have biological offspring, despite the constitutional right not to procreate.72

The point at which a state may have a compelling interest in protecting potential life has been further clouded by the recent Supreme Court decision in Webster v. Reproductive Health Services.73 Although, in Webster, the Court did not hold that a state may constitutionally protect all fetal life, it upheld a statute which declares "the life of each human being begins at conception" and mandates that the statute be interpreted to provide the unborn with "all the rights and privileges, and immunities available to other persons, citizens, and residents of this state."74 In

68. Id. at 163 (for discussion of procreative liberties).
70. Roe, 410 U.S. at 120, 160-63.
71. Id. at 163.
72. See Robertson, Resolving Disputes Over Frozen Embryos 4-6 (May 17, 1989) (unpublished article).
74. Mo. Rev. Stat. § 1.205 (1989). In Webster, the Supreme Court did not rule on the constitutionality of this provision. The Court stated that, until the federal courts address the meaning of this provision of the statute, it was "not empowered to decide ... abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before
Webster, the Court upheld legislation that prohibited the use of any state funds for abortion and the use of state employed physicians in performing abortions. 75 Webster is significant because it implies a retreat from the Roe standard of protecting potential life only at the point of viability. 76 Further, by refusing to address or comment on whether state legislatures can declare "when life begins," Webster also signaled a retreat from absolute procreative liberty. 77

Neither Roe nor Webster address a crucial question raised by the advent of frozen embryos, that is, when life begins. Roe simply states that "[the Court] need not resolve the difficult question of when life begins." 78 In Webster, the Court intimates that a state may have a compelling interest in protecting a fetus from the moment of conception, but still does not specifically announce when life begins. 79 The question of when life begins is a vehemently debated topic among courts, legislatures, physicians, philosophers, and theologians. 80 Some scientists and doctors argue that embryos are "undifferentiated" cell masses that cannot be distinguished one from the other and do not resemble "unique individuals." 81 In coital reproduction there is a naturally high loss rate of embryos. 82 It is estimated that of the eggs that are fertilized, "between 40% and 78% . . . will fail to implant or, if implanted, will not
continue to grow and will be [naturally] aborted.' The potential life of an embryo is uncertain. Under current case law, a state's compelling interest in protecting potential life increases with the viability of a fetus. Scientific evidence demonstrates that the potential life for frozen embryos is minimal. A state should not have the same compelling interest in protecting the potential life of an embryo as it does a fetus because the natural survival rate for an embryo is minimal.

Moreover, it is argued that viability is a flexible time frame that should not be used to determine when life begins. One commentator argues that since intelligence is what distinguishes us from animal life, human life should be determined, at least for the purpose of state intervention, at the point of "fetal development when neocortical brain activity begins." The argument advances the theory that the existence of "[electroencephalograph waves (EEG)] is an understandable and accepted measure of brain death to the lay public, so can this same measure serve as a realistic and objective measure for defining the beginning of protected human life." Under this theory, a less flexible time frame of "when life begins" is established. It follows that an embryo, since it has no EEG, is not within the state's interest of protectable life.

83. Id. at 322.
84. Roe, 410 U.S. at 162-64.
85. "Nationally [in vitro fertilization's] so-called take-home baby rate is under 10 percent." Bowermaster, The Baby Maker, MANHATTAN, INC., Nov. 1989, at 84, 88. "[One physician, Dr. Rosenwaks of New York is] getting close to the natural conception rate, which is around 25%." Id.
86. It has been argued that viability is not a biologically fixed time. Neonatology technologies could advance the point of viability to earlier gestational ages. In Roe the Court stated that viability included the ability to live outside the mother's womb, including the "life sustained by artificial aid." Roe, 410 U.S. at 160 (emphasis added).
88. Id. at 1068. "Intelligence is the characteristic which makes the human species unique from all other creatures, and it is neocortical activity that endows human beings with higher intellectual functions. The human neocortex begins producing electroencephalograph (EEG) waves between the twenty-second and the twenty-fourth weeks of pregnancy." Id. at 1061.
89. Id. at 1061.
D. Rights of the Frozen Embryo

There is no consensus as to the proper approach to an embryo’s rights; the rights of embryos have been discussed in an array of cases ranging from tort actions to constitutional law questions. Some courts have even considered embryos to be property. Under this theory, it has been argued that the embryo is the property of the donors which should be divided under the state’s equitable distribution laws. It is unlikely, however, that this view will prevail when considering the disposition of embryos. One commentator summarizes the legal status of the embryo in regard to constitutional rights, criminal law protection, and civil law protection, by stating that "the property approach has not been accepted as a satisfactory framework within which to analyze the legal status of the embryo, but neither has the personhood approach been so accepted." The courts have not as yet accorded constitutional protection to frozen embryos and the Supreme Court has never considered the issue.

The common view is that embryos are closer to potential life than mere human tissue and should be treated with due respect. This view does not advocate that embryos should be treated as persons, but that the embryo deserves greater respect than accorded to human tissue. From

90. Del Zio v. The Presbyterian Hosp., No. 74 Civ. 3588, slip op. (S.D.N.Y. Nov. 14, 1978). In Del Zio, the plaintiffs alleged conversion in regards to the destruction of cyropreserved embryos. Id. at 5.


92. Del Zio, No. 74 Civ. 3588, slip op. at 7. The court upheld a verdict of conversion where a hospital destroyed cyropreserved embryos. Id. at 12; see also York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989). In York, the court held that a husband and wife were entitled to bring an action in detinue against a medical college to obtain possession of their cyropreserved human embryos. Id. at 427. The requirements for an action in detinue is that the plaintiff must have a property right in the thing sought to be recovered. Id.


94. HEW, supra note 13, at 44 ("[A] human embryo is entitled to profound respect; but this respect does not necessarily encompass the full legal and moral rights attributed to persons.").


96. See Andrews, supra note 15.


98. Id. "[W]e know intuitively that a human embryo is more valuable than a kidney and of much more symbolic importance regarding human life ..." Id.
a Judeo-Christian perspective, it is argued that "the embryo is from fertilization a human individual, a human life, without being a human person in the full moral sense. . . . Thus, the conceptus demands recognition, respect, and even protection." Under this philosophical view of the embryo, protection should be accorded. This view of the embryo prevails throughout ethical standards of the medical and legal profession. A review of the cases reveals that courts accord human embryos with more respect than mere property, but less respect than the rights of a born child. Presently, human embryos remain in legal limbo, suspended somewhere between the two extreme positions of being treated as property and being afforded the protection of human rights. In determining the rights of embryos, courts should balance the respective rights of the donor-parents, the embryos, and the state's right to protect potential life.

III. ANALYSIS OF THE DAVIS CASE

In Davis v. Davis, a Tennessee court was faced with determining the legal disposition of frozen embryos and the rights of their respective ova and sperm donors. In brief, the couple had seven frozen embryos stored at a fertility center. The couple filed for a divorce and disagreed about what to do with their embryos. The plaintiff, the donor-father, desired to prevent implantation of the frozen embryos, so that he would not be forced into parenthood after the divorce. The defendant, the donor-mother, wanted to proceed with

99. Cahill, supra note 80, at 349 (emphasis in original).
100. Id.


103. See Andrews, supra note 15.


105. Id.
106. Id. at 6.
107. Id.
108. Id.
the implantation of the frozen embryos despite the divorce. Unlike the situation in Australia where the embryos were left "orphaned," the Davis court had to determine the fate of the embryos with respect to the parents' disagreement.

A. Arguments for Implantation of the Embryos

Defendant Mary Sue Davis argued that the court should permit her to implant the embryos regardless of the divorce. Ms. Davis based her argument on two principles, property law and child custody law. Ms. Davis did not contend that the embryos were children in the traditional meaning of the word, however, she argued that the embryos had the potential of becoming human life and that this fact distinguished them from property. Ms. Davis requested that the court adopt a sliding scale approach, with property at one end of the spectrum and persons at the other end. Under this approach, the frozen embryos are "much closer to being 'property' than to being 'persons.'" Because the embryos are closer to property, they should be subject to the equitable distribution statute under Tennessee law. Ms. Davis argued that, under the equitable distribution laws, she should receive the embryos because her contribution to the "property" was much greater; the process of extracting eggs from a woman's body is much more discomforting than the man's sperm donation process.

The assertion that the embryos are property is based on analogies

109. Id.
110. See Saltarelli, supra note 17, at 1030-33.
112. Under the family laws of Tennessee, marital property must be distributed equitably, thus, the relevant issue is each party's contribution to the property. Tenn. Code Ann. § 36-4-121 (1989).
113. Under Tennessee child custody law, the focus is on the best interest of the child, when the adult and child are in conflict. Tenn. Code Ann. § 36-1-101 (1989). In this case, the issue is what is in the best interest of the embryos.
114. Defendant's Brief, supra note 111, at 13.
115. Id.
116. Id.
117. Id. at 13-14.
118. Id. at 16 (the property referred to is the human embryos).
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drawn from several cases. In *Del Zio v. Presbyterian Hospital*, a hospital refused to implant the frozen embryos in the mother and then destroyed them. The donor-parents brought suit against the hospital on grounds of conversion and intentional infliction of emotional distress. The jury was instructed by the court on both causes of action. The instruction on conversion implies that the court recognized that the embryos were property which could be converted; additionally, the jury based its verdict solely on conversion.

In asserting that the embryos were property, Ms. Davis also relied on the conclusions of the American Fertility Society, the leading medical organization involved with *in vitro* fertilization. Although the opinion of the American Fertility Society is not legally binding, it may be considered persuasive authority because the Society's opinion would be considered expert in the field of reproductive technology. From the language of the ethical statement it is evident that the American Fertility Society believes that the embryos are "property" in the sense that the donors should have the ultimate control of the disposition and implantation of the concepti. In contrast, however, the American Fertility Society does not conclude that the embryos are property in the traditional sense of the word, but that "the human embryo is entitled to profound respect." Thus, the ethical

120. Id. at 2-3.
121. Id. at 1.
122. Id. at 8.
123. Id.
124. Defendant's Brief, supra note 111, at 3.
127. Defendant's Brief, supra note 111, at 3. The ethical statement provides that "[t]he donors . . . have the right to decide at their sole discretion the disposition of these items, provided such disposition is consistent with the medical and ethical guidelines." Id. (quoting American Fertility Society, *Ethical Statement on In Vitro Fertilization*, FERTILITY & STERILITY, Jan. 1984, at 12, reprinted in Human Embryo Hearings, supra note 24, at 46).
statement advocates that the embryos should be given a higher status than mere property.\footnote{129} Reading both statements to be consistent with one another, it is unlikely that the Society desired that embryos be considered property to be distributed under equitable distribution laws. The Society has given no indication as to what should be done with the embryos when the donors disagree as to their disposition.

The typical view of property is that an owner has complete dominion and control over it, and may destroy it at will.\footnote{130} However, Ms. Davis argued that embryos are not typical property which may be destroyed at will, rather the embryos are to be treated with the utmost respect even though they are "property."\footnote{131} Legislation passed in Australia\footnote{132} and Louisiana\footnote{133} prohibits the intentional destruction of an embryo because of the death of the parents or for any other reason.\footnote{134} However, these statutes do not provide that embryos are to be treated as personal property.\footnote{135}

Ms. Davis argued that, according to the statutes in Louisiana, she would prevail because she was not seeking to intentionally destroy the embryos.\footnote{136} However, the Louisiana statute had never been subjected to constitutional scrutiny.\footnote{137} More importantly, the Louisiana statute

\begin{itemize}
\item \footnote{129} Id. at 10-11.
\item \footnote{130} Property is defined as "[t]hat dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. Black's Law Dictionary 1095 (5th ed. 1979)."
\item \footnote{131} Davis, No. E-14496, slip op. at 10-11.
\item \footnote{132} Infertility Act 1984, 1984 Vict. Acts no. 10,163.
\item \footnote{134} Defendant's Brief, \textit{supra} note 111, at 5-7; see Infertility Act 1984, 1984 Vict. Acts no. 10,163; La. Rev. Stat. Ann. § 9:129 (both statutes prohibit the intentional destruction of human embryos; however, the statutes do not address the question of what to do with the embryos in the case of divorce or disagreement).
\item \footnote{135} Id.
\item \footnote{136} Defendant's Brief, \textit{supra} note 111, at 6.
\item \footnote{137} Id. at 7. The Louisiana statutes could be attacked on various constitutional grounds. For example, if the state does not permit destruction of an embryo, it may be deemed unconstitutional because it is inconsistent with the present abortion laws. See La. Rev. Stat. Ann. § 40:1299.35.1 (West 1990). In essence, the Louisiana embryo statute does not permit donors to make a decision to terminate a "pregnancy" prior to implantation. See La. Rev. Stat. Ann. § 9:129. It would be inconsistent to allow a woman to implant an embryo but once the embryo has become a fetus permit her to terminate the pregnancy. However, assuming that the Louisiana embryo statutes are constitutionally valid, the defendant has persuasive authority to demonstrate that American legislatures that have considered the new reproductive technology do not
was mere persuasive authority and was not binding upon the Tennessee court. Tennessee had no statutes specifically regulating the care and disposition of embryos.

In addition to referring to Louisiana's statute, Ms. Davis also argued that Mr. Davis had already consented to the pregnancy by agreeing to fertilize her eggs. She reasoned that he could not revoke his consent at this point.\textsuperscript{138} When a woman becomes pregnant, the father cannot revoke his consent;\textsuperscript{139} it is not permissible for the father to force a woman to terminate a pregnancy.\textsuperscript{140} Similarly, a father cannot force a woman to carry a child to term.\textsuperscript{141} Only the woman, in conjunction with her physician, can make the decision to terminate her pregnancy.\textsuperscript{142} After the father has consented implicitly or explicitly and a woman is pregnant, the reproduction choice is left entirely to the woman.\textsuperscript{143} In Davis, the question was whether consent may be revoked after the fertilization of embryos, but before implantation.\textsuperscript{144} Ms. Davis argued that Mr. Davis had consented to the pregnancy, even though she was not pregnant and the embryos remained frozen.\textsuperscript{145} Because there was no agreement to terminate the embryos upon divorce, the court could have concluded that Mr. Davis had already consented to procreation and that his consent could not be revoked after the creation of fertilized embryos.

\footnotesize{permit intentional destruction of the human embryos.}

\textsuperscript{138} Defendant's Brief, \textit{supra} note 111, at 8. Ms. Davis acknowledged that couples should have a right to coital, as well as, noncoital reproduction. \textit{Id.} at 10. However, she contends that the plaintiff, her husband, had already consented to the reproduction of children by the fact that he consented to have the eggs fertilized and implanted in an attempt to impregnate her. \textit{Id.} at 8. Ms. Davis argued that the court should look to Mr. Davis' actions to determine his intentions. \textit{Id.} at 11. As the facts indicate, Mr. Davis repeatedly attempted to procreate. \textit{Id.} However, for a court to conclude that the plaintiff has already consented to the pregnancy where the woman is not actually pregnant may be contrary to a logical analysis.

\textsuperscript{139} Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69-72 (1976) (invalidating a Missouri statute requiring prior written consent of the spouse of the woman seeking to terminate a pregnancy).

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Id.} at 69.

\textsuperscript{142} Roe v. Wade, 410 U.S. 113, 162-64 (1973).

\textsuperscript{143} The woman has the ultimate control to abort or carry the child to term at least until the third trimester. \textit{See id.} at 162-67.

\textsuperscript{144} Davis, No. E-14496, slip op. at 6-7 (Tenn. Cir. Ct. Sept. 21, 1989) (WESTLAW, Allstates library).

\textsuperscript{145} Defendant's Brief, \textit{supra} note 111, at 14.
B. Arguments for both Donors' Consent before Implantation

The plaintiff, Mr. Davis, argued that the embryos should not be considered "persons" under the laws of the state and federal government, but are property in the sense that the donors should have the right to control their disposition. This argument is from the perspective of parental rights, including the constitutional right to control one's own reproductive life. Although this seems to be logical and is soundly based in precedent, this case is infused with many moral and ethical questions that may appeal to the emotions of a judge and jury, who might look for an alternative solution. Therefore, arguments based upon total control of the donor-parents may not prove certain.

Mr. Davis asserted that pre-embryos are not considered persons with an independent legal standing under the Constitution. In Roe, the Court held that a fetus is not a person within the meaning of the Constitution. Further, an embryo would have less rights than a fetus since it is "considerably less developed anatomically than a fetus." Therefore, Mr. Davis argued that because the embryos are not legal persons, their rights should not be considered and the rights of the donors, their rights should not be considered and the rights of the donors,
alone, should be at issue in this litigation.\textsuperscript{152}

Mr. Davis argued that just as both parties must consent before fertilization of the embryos, both parties must consent before implantation.\textsuperscript{153} He asserted that both parties in the case of in vitro fertilization have a fundamental right to control their reproductive life.\textsuperscript{154} Mr. Davis further argued that the rights of the donor-parents should outweigh any concern the state has in protecting the embryos, and pointed out that this is the position taken by a prominent legal scholar in the field of reproductive technology.\textsuperscript{155} The proper resolution of this dispute, in Mr. Davis’ view, requires a balancing test between rights of both donors to control their reproductive life.\textsuperscript{156} In the case where one of the donors wishes to avoid reproduction, the gender of the party should not be a controlling factor.\textsuperscript{157} Instead, the party who desires to avoid reproduction should always prevail.\textsuperscript{158}

A reasonable argument can be made that in the absence of joint agreement the party wishing to avoid reproduction should prevail over the party wishing to reproduce because their loss will be greater. Their loss is greater because the party who wishes to reproduce will have other opportunities to do so, while the party wishing to avoid reproduction has been irreparably injured.\textsuperscript{159}

It is recognized that either party could desire to avoid reproduction.\textsuperscript{160} Here, Mr. Davis desired to prevent Ms. Davis from

\textsuperscript{152} Id. at 4. Mr. Davis supported this argument by noting that the pre-embryos are not considered persons under Tennessee law. Id. at 2. He refers to the mandatory death reporting requirement, Tenn. Code Ann. § 68-3-504 (1989) and Tennessee’s criminal abortion statutes Tenn. Code Ann. § 39-15-201. Plaintiff’s Brief, supra note 146 at 2. From these two statutes it is evident that a fetus less than three months of age does not have the equivalent rights of a person under state law. Id.

\textsuperscript{153} Plaintiff’s Brief, supra note 146, at 4.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 6.

\textsuperscript{156} Id. at 5 (quoting Robertson, supra note 72, at 18).

\textsuperscript{157} Id. at 6.

\textsuperscript{158} Id. at 5.

\textsuperscript{159} Id. (quoting Robertson, supra note 72, at 18).

\textsuperscript{160} Id. (quoting Robertson, supra note 72, at 18).

\textsuperscript{161} Id. at 6.
having the embryos implanted, or transferred to a surrogate mother.\footnote{162} But it could easily be reversed and the donor-father could desire to have the embryos preserved and transferred to a surrogate mother even though the donor-mother desires to have the embryos disposed. The underlying argument is that the person desiring not to have offspring has a controlling interest, and that person's gender should not be considered by a court of law.\footnote{163}

This argument is further strengthened by an analogous statute, the Tennessee anatomical gift statute.\footnote{164} Under this statute, \textit{unanimous} consent from the next of kin is required when deciding whether to donate any of a decedent's organs.\footnote{165} Mr. Davis did not contend that organs are the moral equivalent of embryos, but that unanimous consent should similarly be required in cases of embryo disposition.\footnote{166} Therefore, under this view, Mr. Davis' refusal to consent to the implantation of the embryos should have prevented the court from disposing of them in a manner adverse to his will.

The argument to require both donors' consent before implantation of embryos is furthered by the irreparable psychological and financial damage that may occur when implantation of embryos produces unwanted offspring.\footnote{167} Tennessee divorce law is not capable of relieving the donor-father of any financial obligation or any custodial rights that may arise should the embryos be brought to term.\footnote{168} Further, the court cannot terminate any potential inheritance rights or prevent a child from "seeking out the [donor-father] in years to come in an effort to establish an emotional or psychological bond."\footnote{169} These considerations, coupled with the constitutional right to control reproductive life, weigh in favor of allowing the party who does not want the offspring to decide the fate of the embryos.

\begin{footnotes}
\item[163] Plaintiff's Brief, \textit{supra} note 146, at 5.
\item[165] \textit{ld.} § 68-30-103(c).
\item[166] Plaintiff's Brief, \textit{supra} note 146, at 4.
\item[167] \textit{ld.} at 4.
\item[168] \textit{ld.} at 6.
\item[169] \textit{ld.}.
\end{footnotes}
C. Comment on the Trial Court Opinion

1. The Question of "When Life Begins". — In Davis, the trial court was presented with the question of whether embryos are human life or whether they are property that may become human life. The court found that human life begins at conception. In its opinion, the court stated that the plaintiff and the defendant "have accomplished their original intent to produce a human being to be known as their child." Thus, it can be concluded that the court not only considered the embryos human life but it took a further protective step by referring to the embryos as children.

This raises the constitutional question of whether a court can decide at what point life begins. In Roe, the Supreme Court stated in dictum that "[w]e need not resolve the difficult question of when life begins . . . those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus; the judiciary, at this point in time in the development of man's knowledge, is not in a position to speculate as to the answer." The conclusion reached by the Davis trial court seems to be in violation of this principle; however, considering new scientific discoveries and a more recent Supreme Court decision the court's opinion may be valid.

First, the knowledge of the scientific community may shed light on the question of when life begins. Indeed, much of the trial court's opinion rested on expert testimony, particularly that concerning the recent discovery of DNA testing. In finding that the embryos are human

171. Id. at 2, 17.
172. Id. at 17.
174. DNA fingerprinting indicates that scientists may be able to tell the make up of a human from only a few cells. Davis, No. E-14496, slip op. at 13-14.
176. In Davis, expert testimony was provided to offer opinions to facilitate the court in determining when life begins. Davis, No. E-14496, slip op. at 7-15. Four of the experts testified that the embryos were life. Id. at 7. "[T]he human embryos are in 'being'; that is, in 'existence; conscious existence; as, things brought into being by generation . . . or living, alive." Id. at 8. Three other experts disagreed, stating that the embryos are not human life but simply have the potential for life. Id. Dr. Shivers and Professor Robertson were among the experts who testified that the embryos were not human life. Id. One of the their arguments for the opinion that embryos are not human life is that they are "undifferentiated cells." Id. "Undifferentiated cells" means that
life, the court relied heavily on the expert testimony of Dr. Lejeune, a specialist in human genetics.\textsuperscript{177} Dr. Lejeune produced evidence that the embryos are "especially differentiated," that is, a scientist could distinguish one zygote from another zygote.\textsuperscript{178} The process which Dr. Lejeune relies on is a highly technical DNA profiling, often referred to as "genetic fingerprinting."\textsuperscript{179} Dr. Lejuene testified that when the ovum is fertilized, or at the moment of conception, manipulation of the DNA molecules of human chromosomes provides a picture of the human who will develop from the embryo.\textsuperscript{180} He stated that "upon fertilization, the entire constitution of the [person] is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual."\textsuperscript{181}

In upholding the reliability of DNA profiling, the trial court relied on\textit{Andrews v. State of Florida}\textsuperscript{182} as persuasive authority.\textsuperscript{183} In\textit{Andrews}, the Florida District Court of Appeals upheld the reliability of "genetic fingerprinting" or DNA profiling as evidence to convict a suspect in a sexual battery case.\textsuperscript{184} The\textit{Andrews} court held that DNA profiling was scientifically sound and thus admissible into evidence.\textsuperscript{185} The\textit{Davis} trial court held that the test was valid evidence to determine whether embryos are differentiable cells.\textsuperscript{186} The fact that the trial court relied on scientific knowledge to determine when life begins may stand for the proposition, consistent with\textit{Roe}, that scientific knowledge has evolved to the point where the beginning of life can be determined scientifically.

Secondly, the trial court's conclusion that life begins at conception may rest on the Supreme Court's more recent decision in\textit{Webster v.}}
Reproductive Health Services. In Webster, the Supreme Court interpreted Roe's inconclusive definition of life as meaning that "a State could not 'justify' an abortion regulation otherwise invalid under Roe v. Wade on the ground that it embodied the State's view about when life begins." Webster upheld language in a statute which provided that "the life of each human being begins at conception," and that "[u]nborn children have protectable interests in life, health, and well-being." After Webster, it may be possible for a state to determine when life begins as long as it does not use the definition to regulate abortion that would otherwise be constitutionally protected under Roe.

The trial court noted that Webster "leaves open the door for a state to establish its compelling interest in protecting even potential human life by legislation declaring its public policy." Although the Tennessee legislature has not enacted legislation that indicates the state's policy of protecting potential life, the court held that the common law demonstrated the state's interest in protecting the unborn. To reach this conclusion, the court cited Smith v. Gore, a wrongful life action resulting from a failed tubal ligation, in which the discussion of public policy revealed that the state places a great value on human life.

Citing the Gore court's conclusion that Tennessee's policy is to greatly value human life, the Davis court held that it would extend this policy to include the protection of frozen embryos since there was not state legislation to the contrary.

2. The Trial Court Conclusion: Embryos Subject to Parens Patriae. —

The trial court held that the embryos are human life, not property. The court did not subject the embryos to property laws, specifically the
equitable distribution laws which are used to divide marital property, but rather, to child custody law and the doctrine of parens patriae. Under this doctrine, the court determined the fate of the embryos by examining what is in their "best interest." This doctrine is commonly used in deciding to whom to grant custody of children in divorce cases. The court took a position extremely protective of the embryos by treating and referring to them as "children." The court is of the opinion, finds and concludes that the age-old common law doctrine of parens patriae controls these children, in vitro, as it has always supervised and controlled children of a marriage at live birth in domestic relations cases in Tennessee. Because the donor-father objected to any implantation of the embryos, the court concluded that it is in the "best interest" of the embryos to grant custody to the donor-mother so that the embryos may be allowed the possibility of live birth and survival.

D. Criticism of the Davis Trial Court Decision

1. Unanswered Questions. — The rule laid down by the Davis trial court is to protect the best interest of the embryos. However, this rule leaves open a series of questions that will inevitably arise in future cases

197. TENN. CODE ANN. § 36-4-121 (1988).
198. Davis, No. E-14496, slip op. at 7. The court defined parens patriae as "the power of the sovereign to watch over the interests of those who are incapable of protecting themselves." Id. The doctrine of parens patriae is most commonly expressed as the "best interest of the child doctrine" and its sole objective is "justice for the child." Id. In the case of in vitro fertilization this might more accurately be stated as the best interest of the embryos doctrine. Id. at 19.
199. Id. at 20.
201. Davis, No. E-14496, slip op. at 20. The court repeatedly referred to the embryos as children throughout the opinion. Id. For example, "[t]he Court respectfully finds and concludes that it further serves the best interest of these children for Mrs. Davis to be permitted the opportunity to bring these children to term through implantation." Id. (emphasis added).
202. Id. at 19 (emphasis added).
203. Id. at 20.
204. Id.
concerning frozen embryos. For example, if the trial court's rule is followed, it may preclude the enforcement of donor's contracts regarding the disposition of embryos. A donor contract providing that the embryos shall not be implanted, in the case where both donors die, would be contrary to the best interest of the embryos and arguably unenforceable.

The *Davis* trial court rule, best interest of the embryos, may be difficult to determine in some instances. Is it always in the best interest of the embryos to have an opportunity for live birth? For example, if it is found that the embryos in question have genetic defects, such as a genetically transmitted disease or mental retardation, some courts may not consider it in the best interest of the embryos to be implanted for possible life.

In other circumstances, the psychological welfare of the embryo/child may be called into question. For example, if the donor-mother of the embryos desires to have the embryos thawed to die and the donor-father desires to have the embryos implanted in a surrogate in an attempt to bring the embryos to term, it may be considered in the best interest of the embryos to grant custody to the donor-father. The embryos would then be implanted in a surrogate mother. If the embryos are brought to term, it would raise further custodial questions and concern for the psychological well-being of the children. Further, if the embryos are implanted in the donor-mother and she becomes pregnant, the courts cannot force her to bring the embryos to term; she retains the option to terminate the pregnancy, until the point of viability. Thus, in a situation where the mother is likely to terminate a pregnancy, it is arguably not in the best interests of the embryos to implant them.

If the court truly wants to protect the interests of the embryos, it must assume the responsibility of finding a woman who will give the

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205. Scholars recognize that the disposition of the embryo should be left to the control of the donors. *Robertson*, *supra* note 72. Moreover, constitutional cases dictate personal autonomy in family matters. *See supra* notes 42-67 and accompanying text.

206. *Davis*, No. E-14496, slip op. at 20 (Tenn. Cir. Ct. Sept. 21, 1989) (WESTLAW, Allstates library). In *Davis*, the court acknowledged that the state's public policy was to protect life. *Id.* at 7. Since the embryos were considered life, they should be protected regardless of the circumstances. *Id.*

207. *See In re Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988). In *Baby M.*, the Supreme Court of New Jersey invalidated a surrogate mother contract because it was contrary to public policy. *Id.* at 434, 537 A.2d at 1246. The court expressed concern over the psychological well-being of the child. *Id.* at 441, 537 A.2d at 1250.

embryos the highest possibility for a successful birth. For example, if Woman X had only a one percent chance of bringing the embryos to term, but Woman Y has a fifty percent chance of bringing the embryos to term would the court have a right to grant the embryos to Woman X? It would certainly be in the best interest of the embryos to be implanted in a mother that would have a high success rate for birth. As demonstrated, application of the Davis rule, best interest of the embryos, will be difficult and in some situations violative of the donor's procreative liberty.

E. Comment on the Opinion of the Appellate Court

The appellate court modified the lower court decision on a number of grounds.209 While the trial court awarded "custody" of the embryos to Mary Sue Davis and directed that she "be permitted the opportunity to bring these children to term through implantation,"210 the appellate court awarded "joint custody" and directed that both parties "share an interest in [disposition of] the seven fertilized ova."211 It must be noted, however, that the factual context of the trial had changed by the time that the case had reached the appellate level; both Mary Sue and Junior had married other spouses and neither party wanted a child with the other as the parent.212

The most significant difference in the appellate court's opinion is that it recognized Mr. Davis' constitutional right not to procreate.213 By holding that the parents should be granted joint custody of the embryos the court, in effect, determined that both parties should have a say in the disposition of frozen embryos regardless of gender. "[D]eciding that Junior [Davis] may be required to become a parent against his will, [is] denying him the right to control reproduction."214 The decision recognized that both parties involved in the in vitro fertilization have a

212. Id. at 2.
213. Id. at 4.
214. Id.
constitutionally protected right to prevent procreation. Thus, while the trial court protected the rights of the embryos, the appellate court protects the constitutional rights of the donor-parents.

The appellate court also overturned the portion of the trial court decision which held that embryos were essentially human life. The court stated that "[t]here are significant scientific distinctions between fertilized ova" and an embryo in a mother's womb. Further, the court held that the Tennessee legislature does not accord the same protection to embryos as it does to viable fetuses.

F. Better Alternative Rule: Donor Consent as Implied Contract

The Davis trial court seems to have based its conclusion that the embryos should be granted to the mother on outmoded paternalistic notions that the mother should have custody of children. While the appellate court recognized the procreative liberty of the father, it never directly answered the question as to what should be done with the embryos in the case of disagreement. If the courts intended to grant custody of the embryos to the mother or to both parents jointly, it would have been more logical to hold that the donor-father had already consented to having a child when he underwent infertility treatment to fertilize the eggs. In effect the consent to fertilize the eggs would be regarded as creating an implied contract. This would leave the option for donors to explicitly form a contract in which the disposition of embryos was set out in advance. This rule would protect the procreative liberty of an individual and, at the same time, elevate the status of the embryo.

215. "[T]he court has clearly held that an individual has a right to prevent procreation. The decision whether to bear or beget a child is a constitutionally protected choice." Id. at 2 (quoting Carey v. Population Serv. Int'l., 431 U.S. 678 (1977)).

216. Id.

217. The trial court held that embryos were essentially human life based upon scientific evidence. See supra notes 170-95 and accompanying text.


219. Id. at 5.

220. In the Davis trial court decision, the fact that the woman was awarded custody of the children may reinforce the anti-feminist notion that the woman's role in society is to procreate. See WADLINGTON, WHITEBREAD & DAVIS, CHILDREN IN THE LEGAL SYSTEM 649 (1983). If the court determined that the consent of both parties was necessary before implantation, it may reinforce the notion that both men and women participate in the reproductive decisions of child bearing.
In the instant case, the donor-father consented to the technique of having the embryos frozen for the purpose of having a child. The court could have considered this consent to be irrevocable. Just as it is too late to revoke consent when a woman has become pregnant, it may be too late to revoke consent after a man has undergone the process of sperm donation for in vitro fertilization. If the Davis court had used the consent of Mr. Davis as a basis for granting custody of the embryos to Ms. Davis, then subsequent decisions by courts could have merely upheld the intent of the parties as an implied contract. However, this was not the route taken by either Davis court.

The Davis rule also rejects the notion that a couple who has several embryos frozen with the intent of having only one child will be able to terminate the life of the remaining embryos. Under the first Davis rule, if the donor-mother was successful on the first attempt of implantation to become pregnant and seven embryos remained, the donor-parents would not have the option to discard the remaining embryos, since that would not be in the embryo’s best interest. A possible result of the holding is that the state would have to take control of the embryos and place them for adoption. If a state were required to find a surrogate mother to bring the embryos to term, it would make the fertility treatment of cryopreservation considerably less attractive for couples; there would always be the possibility of unwanted offspring. Further, under the

The appellate court, on the other hand, did recognize that both parties have a voice in determining the fate of their embryos. Davis v. Davis, No. 180, slip op. at 5, 6 (Tenn. App. Sept 13, 1990) (WESTLAW, Allstates library). However, it may have been easier for the appellate court to reach this conclusion since Ms. Davis, the donor mother, no longer wished to have the embryos implanted. Id. at 3.


222. Id. at 20.

223. At the present time an embryo can only be frozen for two years. Therefore, it raises the question as to whether a woman who became impregnated by one embryo could leave the remaining embryos cryopreserved for a period longer than two years; in effect, intentionally destroying the embryos by omission. The Davis court stated “[T]he uncontroverted testimony is that to allow the parties’ seven cryogenically preserved human embryos to remain so preserved for a period exceeding two years is tantamount to the destruction of these human beings.” Davis, No. E-14496, slip op. at 24, 5 (Tenn. Cir. Ct., Sept. 21, 1989) (WESTLAW, Allstates library).

224. If the state were required to find the remaining embryos a surrogate mother, the donors would have the psychological burden of having a natural offspring somewhere in the world unbeknownst to them. The current Louisiana statute provides:

If the in vitro fertilization patients express their identity,
Davis trial court rule, if the donor-parents both died, the state could have the obligation of finding a surrogate mother for implantation if that were feasible and deemed to be in the embryos' best interest.

If the best interest doctrine is applied to embryos, a court could arguably apply this same doctrine to fetuses. For example, if medical technology were to advance to a point where the fetus could be removed from a mother and implanted into the uterus of another woman, a court could force a woman to have an unwanted fetus removed and implanted in the uterus of another woman who desires the baby. This would certainly be in the best interests of the fetus without imposing the unwanted burden of pregnancy upon the biological mother. The permutations of applying the best interest doctrine to embryos and fetuses are limitless. A court can never truly protect the best interests of an embryo in every situation without infringing upon the procreative liberties of a couple. To comport with the principles of procreative liberty as espoused by the Supreme Court, the Davis court should have based its decision on donor consent or implied contract. This would allow more flexibility and permit the parties to agree and contract in advance to reproducing by in vitro fertilization. While the appellate court recognized the donor-parents constitutional right not to procreate, it did leave open questions which may arise. Such a question could arise in a situation where the donor-mother wished to implant the embryos in an effort to bring them to term and the donor-father wished to give the embryos to a surrogate recipient. Assuming that both donor-parents did not want the embryos to be thawed or to "die," then, in this case, the disposition of the embryos would again be complicated because the parties could not agree upon disposition as required. Thus, the appellate court's decision would essentially leave the parties in the same predicament as they were before the case had been decided; that is, if the parties cannot agree upon disposition the embryos would be left to thaw and "die." Again, application of the implied contract rationale would provide for clearer guidance in resolution of these disputes.

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.

LA. REV. STAT. ANN. § 9:126.

225. See supra notes 42-64 and accompanying text.

226. Id.
III. CONCLUSION

A. Need for Reproductive Technology Legislation

The innovative reproductive technology of in vitro fertilization, specifically the cryopreservation of embryos, makes it necessary for state legislatures to determine the public policy with regard to frozen embryos. The rate of infertility is rising and as a result the demand for infertility treatment will also increase. It is imperative that the legislature act quickly to determine the legal status of an embryo and the rights of the respective donor-parents.

Constitutional procreative liberties, which protect individuals from unwanted offspring and the accompanying burdens, should be given great weight by the legislature. Keeping in tradition with the Constitution itself, the legislature should grant as much individual freedom as possible in drafting legislation concerning new reproductive techniques. If legislation is to be enacted, it should permit infertile couples to procreate and raise their own children and at the same time protect individuals from being forced into having unwanted children.

At the present time only one state, Louisiana, has legislation concerning the human embryo and reproductive technology. The Louisiana legislation defines the human embryo as a "juridical person." The statute provides that a human embryo is solely for the purpose of utero implantation and their sale for use and research is prohibited. Under the Louisiana scheme, a human embryo is not property and cannot be owned, nor can it be intentionally destroyed. Each state will eventually have to draft legislation

227. See Dickey, supra note 1, at 317.
228. See generally Bowermaster, supra note 85, at 84.
230. See supra notes 43-65 and accompanying text.
232. Id. § 9-125.
233. Id. § 9-122.
234. Id. § 9-126.
235. Id. § 9-129. Most importantly, the statute provides that in the case of disputes arising between any parties regarding the human embryo, the judicial standard for resolving such disputes is the best interest of the embryo. Id. § 9-131. These statutes have not been subjected to constitutional scrutiny by a court of law. There are numerous
regarding the reproductive technology, and each state will be forced to espouse its public policy regarding the legal status of an embryo.236

B. Proposal for In Vitro Fertilization Legislation

Legislatures should permit the donors to determine the fate of their embryos in the case of disagreement or death rather than subject the embryos to the doctrine of parens patriae.237 This proposal for legislation would permit couples to determine the fate of the embryos in the case of disagreement, eliminate the probability of potential disputes, and foster constitutionally protected rights.

1. Require an Agreement Before Cryopreserving Embryos. — Legislation should require that couples using cryopreservation to store embryos must enter into an agreement which states the fate of the embryos in the case of disagreement, death, or divorce.238 The legislation should also require that doctors counsel the donors so that any contract will not be void due to lack of mutual consent. The legislation should further provide for a waiting period for the couples to contemplate the contract provisions concerning disposition of the embryos before they actually consent, sign, and undergo fertilization and storage.

2. Determining the Policy of the State. — Legislation will have to determine the state's policy with regard to the legal status of embryos. The status of the embryo should be one of utmost respect: considerably higher than mere human tissue but less than the rights of a fully developed person. This standard would permit donors who have had a successful implantation to thaw the remaining embryos so that they would not be implanted into another woman's uterus.

3. Prohibit the Sale of Embryos. — Legislation should prohibit the sale of embryos. This provision will serve to elevate the status of the embryos. If embryos were permitted to be sold they could be regarded

236. See Note, Need for Statutes, supra note 5, at 1064-65.
237. See supra notes 196-203 and accompanying text (discussing the doctrine of parens patriae with respect to in vitro fertilization).
238. Robertson, supra note 72, at 7-8.
by the public as property, thus degrading their legal status. It will also prevent men and women from freezing embryos for the sole purpose of selling them, thereby creating a "market" for frozen embryos.

4. Limit the Number of Embryos that May Be Frozen. — Legislation should limit the number of embryos that a donor couple would be permitted to store by cryopreservation. By limiting the number of embryos that are stored for each donor couple, disputes will be reduced. More importantly, if a couple has a successful implantation and embryos remain, the number of embryos remaining would be small. Therefore, destruction of the remaining embryos would be similar to the ratio of embryo waste that takes place in natural reproduction.239

5. Relief from Parental Responsibilities. — Legislation should relieve the donors from all parental responsibilities that may arise in the case where a transferred embryo is brought to term. For example, if the donor couple agrees to place remaining embryos for adoption or if the donor couple agrees that, upon disagreement, one of the parties would have control of the embryos, the legislation should relieve the non-parenting donor from any financial burdens, custody, or inheritance which may arise if the embryos are brought to term.

The new reproductive technology of cryopreservation of human embryos raises multiple legal and moral questions. This Note has only touched the tip of the pyramid of questions which will result from disagreement in the disposition of frozen embryos. In suggesting legislation, this Note implies that the state may justifiably regulate the new technology. However, it advises that procreative liberty should be maintained in order to encourage these new reproductive techniques. This new technology should not be viewed as a threat, rather, it must be viewed as a beneficial means through which infertile couples may procreate children of their own.

Anthony John Cuva

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239. See generally Dickey, supra note 1, at 320.