KING SOLOMON’S SOLUTION TO THE DISPOSITION OF EMBRYOS: RECOGNIZING A PROPERTY INTEREST AND USING EQUITABLE DIVISION

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Then the king said, “Bring me a sword.”
So they brought a sword for the king.
He then gave an order: “Cut the living child in two and give half to one and half to the other.”
When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice.1

I. INTRODUCTION

In biblical times, procreation was arduous. However, times have changed. Modern technology has enabled women, who were once unable to bear children, to be graced with the gift of a child. Unfortunately, this gift has come with a price. Modern technology has greatly complicated legal disputes, such as divorce and child custody. As demonstrated by the following hypothetical, emotions run high when technology enters the procreational arena, especially in divorce agreements and court decisions.

After three years of marriage, a husband and wife found they could not conceive a child. They visited countless doctors and explored various treatment routes. After all other avenues failed, the husband and wife resorted to in vitro fertilization (IVF). The clinic they used did

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1. 1 Kings 3:24–25, 28 (NIV).
not require a disposition agreement before receiving treatment.\textsuperscript{2} The couple underwent IVF multiple times, producing seventeen embryos, which were to remain frozen until implantation. Unfortunately, the couple was still unable to conceive, causing a great strain in their marriage. The stress of not being able to conceive caused the couple to fight and resulted in the husband filing for divorce.

During the divorce settlement, a heated debate ensued. The couple agreed on the disposition of all their assets, except one—the frozen embryos. The wife wanted to keep the embryos for use at a later date, still wanting to have a child with or without her husband. The husband, on the other hand, wanted the embryos destroyed, as he did not want to be forced to become a father. Since they could not come to an agreement, the couple resorted to the court system to fight over the disposition. The judge is now faced with a difficult decision: Should the wife be able to keep the embryos for future implantation or should the husband be able to have them destroyed? Who should get the embryos?

When divorce and IVF combine, a complex legal battle develops. When a couple that used IVF divorces, the court must decide who should get the remaining embryos. This article asserts that embryos should be considered property. The elements of ownership, possession, use, and exclusion, otherwise known as the bundle of sticks, are present.\textsuperscript{3} American law has taken an expanded view of property in the past and should continue to do so with embryos.\textsuperscript{4} Recognizing a property interest will create uniformity and promote judicial efficiency. Property is a well settled area of law that can be easily applied to embryos.\textsuperscript{5} During divorce proceedings, the frozen embryos will be considered marital assets and will be divided during distribution. By treating the embryos as a form of marital property, both parties would essentially get to choose what to do with their portion of the embryos. Lastly, by acknowledging a property right in the embryos, the sensitive area of procreation is avoided. The embryo decision will be made on a neutral ground and intense emotions can be avoided.

\textsuperscript{2} It should be noted that many of the cases discussed below contained consent agreements and further some clinics may require the couple to sign an agreement. See generally Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding, absent a prior agreement, the interests of the parties must be weighed); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (holding that the consent agreement signed by the parties unequivocally manifested their mutual intention that the pre-zygotes were to be donated for research to the IVF program).

\textsuperscript{3} See infra notes 153–164 and accompanying text.


\textsuperscript{5} See infra note 58 and accompanying text.
In order to understand what couples are experiencing, Part II of this article will give a brief overview of the process of IVF. Next, Part III will explore how the courts have treated the disposition of embryos in the past through the procreation, contractual, and property theories. Part IV will explain the property interest theory and why it should be applied to frozen embryos. Lastly, Part V will examine potential shortcomings of the property interest theory.

II. IN VITRO FERTILIZATION (“IVF”)

Approximately ten to fifteen percent of the reproductive-age population is considered infertile.6 However, only a small percentage of couples actually reach the stage of IVF, a method that helps infertile couples conceive.7 IVF is often an avenue of last resort due to the cost and complexity of the procedure.8

IVF requires a female to undergo extensive hormone therapy using fertility drugs, which will help produce multiple eggs.9 She will also have numerous ultrasounds and blood tests to determine when the best time to obtain the eggs from her body is.10 The ideal time for IVF is right before ovulation, when the eggs are prepared for fertilization.11 The male, on the other hand, has a very simple procedure, merely donating his sperm.12

At the optimal time, the doctor will perform an ultrasound and extract the eggs by inserting a needle into the vagina.13 Doctors describe this procedure as involving “mild discomfort.”14 After retrieval, the doctor will then join the sperm and egg in a laboratory dish to create embryos.15 Approximately two days after retrieval, the doctor

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7. Id. (stating that about three percent of infertile couples choose IVF, generally after trying to conceive naturally).
8. Id.
9. See id. (stating the production of multiple eggs increases the availability of multiple embryos for transfer, thereby increasing the probability of conception); see also Georgia Reproductive Specialists Infertility 101, http://www.ivf.com/ivffaq.html (last visited Oct. 7, 2008) [hereinafter IVF.com].
10. IVF.com, supra note 9.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
will implant the embryos into the woman’s womb using a special catheter.\textsuperscript{16}

The patient will know within thirteen days if she is pregnant and whether the IVF was successful.\textsuperscript{17} If the patient does not become pregnant, the couple must wait two to three menstrual cycles before trying IVF again.\textsuperscript{18} With the help of IVF, the patient has about a twenty percent chance in a given month to become pregnant.\textsuperscript{19} The process of cryopreservation allows any unused embryos to be frozen.\textsuperscript{20} This process eliminates the need for additional egg retrieval procedures.\textsuperscript{21} The frozen embryos, created through cryopreservation, are the matters that are in dispute in these legal proceedings.\textsuperscript{22}

\section*{III. EMBRYOS AND THE COURT SYSTEM}

IVF has not been addressed by much of the legal and legislative world. For example, only Florida,\textsuperscript{23} Louisiana,\textsuperscript{24} and New Hampshire\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{16} IVF.com, \textit{supra} note 9.
  \item \textsuperscript{17} \textit{Id}.
  \item \textsuperscript{18} \textit{Id}.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{21} J.B., 783 A.2d at 709.
  \item \textsuperscript{22} See generally Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
  \item \textsuperscript{23} FLA. STAT. § 742.17 (2007). The Florida statute requires a written disposition agreement providing for divorce, death or any other unforeseen circumstance. \textit{Id}. Interestingly, the statute provides that in the absence of an agreement and in the event of the death of a spouse, the embryos remain in the control of the surviving spouse. \textit{Id}. This control provision seems to imply a property interest theory. \textit{See} Donna A. Katz, Note, \textit{My Egg, Your Sperm, Whose Pre-embryo? A Proposal for Deciding Which Party Receives Custody of Frozen Pre-embryo}, 5 VA. J. SOC. POL’y & L. 623, 637 n.86 (1998) (stating the Florida statute takes a property approach).
  \item \textsuperscript{24} LA. REV. STAT. ANN. §§ 9:121–9:133 (2008). The Louisiana statutes specifically dispel a property interest theory. It treats embryos as unborn children, thereby all circumstances must be examined in the best interest of the child. \textit{Id}.
  \item \textsuperscript{25} N.H. REV. STAT. ANN. § 168-B:15 (2008). The New Hampshire statute states that no embryo will remain frozen beyond 14 days after fertilization of the embryo, therefore preventing this type of litigation. \textit{Id}.
\end{itemize}
have statutes providing for the disposition of frozen embryos. Further, there are only a few reported cases involving this scenario. Courts have struggled to define an appropriate judicial response and even to determine the appropriate body of substantive law to use as precedent. Although courts have examined this issue, not one has expounded a trouble-free solution.

A. The Procreation Approach

The case that laid the foundational framework for the procreational standpoint is Davis v. Davis. In Davis, the couple divorced, and the husband and wife each wanted different paths for the embryos. The wife wanted the embryos implanted in order to have a child; only later, after remarrying, she changed her mind and urged the court to donate the embryos to a childless couple. On the other hand, the husband urged the court to destroy the embryos.

The Tennessee Supreme Court held that, absent a prior agreement, the interests of the parties must be weighed. The court stated that normally the party who did not want to procreate should triumph if the other party can conceive without using the subject embryos.

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When King Solomon was confronted with competing reproductive claims, he responded by trying to assess the true nature of each claimant’s interest. His draconian order was a sleight of hand, designed to ferret out the strength of each woman’s attachment to the baby. In our modern-day frozen embryo disputes, however, the courts are not following Solomon’s wise example. Rather than sensibly probe and analyze the reproductive interests at stake, courts are indulging in their own biases.

Id. at 218.


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

31. Id. at 589.

32. Id. at 590.

33. Id.

34. Id. at 604.

35. Id.
court declared that the embryo is not a “human being” and it should be placed into a special interim category because of its potential for human life.\textsuperscript{36}

The \textit{Davis} framework, as set out by the court, contains a step-by-step analysis.\textsuperscript{37} First, the court looks to the preferences of the parties.\textsuperscript{38} If there is a dispute between the preferences, their prior agreement concerning disposition should control.\textsuperscript{39} If no prior agreement exists, then the relative interests of the parties’ procreational rights should be examined.\textsuperscript{40} In summary, the court will award the embryos to the party who does \textit{not} want to procreate.\textsuperscript{41}

The Supreme Court of New Jersey affirmed the procreational standpoint set out in \textit{Davis}.\textsuperscript{42} In \textit{J.B. v. M.B.}, the wife had suffered a miscarriage early in their marriage.\textsuperscript{43} Upon examination, doctors discovered the wife had a condition that prevented her from becoming pregnant; therefore, the couple resorted to IVF.\textsuperscript{44} Before receiving treatment, the couple signed a consent form stating the couple “relinquished all control, direction, and ownership of their pre-embryos . . . under certain circumstances.”\textsuperscript{45} When the parties decided to divorce, the husband wanted to preserve the embryos to use with either another woman or to donate to another couple, while the wife sought destruction of the embryos.\textsuperscript{46}

The Supreme Court of New Jersey found that the parties did not enter into a binding agreement.\textsuperscript{47} The court distinguished this case from \textit{Kass v. Kass},\textsuperscript{48} which is discussed below, by showing that the language in the consent form was purely conditional.\textsuperscript{49} Then the court examined

\textsuperscript{36} \textit{Davis}, 842 S.W.2d at 597.
\textsuperscript{37} \textit{Id.} at 604.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 709.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 710. One of the “certain circumstances” was the dissolution of their marriage by court order. \textit{Id.} However, if the couple agreed upon disposition, they could still have rights to the embryo. \textit{Id.}
\textsuperscript{46} \textit{Id.} at 710 (standing as the only case where the husband sought possession).
\textsuperscript{47} \textit{Id.} at 713–14 (identifying the consent form did not manifest the true intent of the parties, which is a necessary element of a binding contract (citing Garfinkel v. Morristown Obst’cs & Gyn. Assocs., 773 A.2d 665 (N.J. 2001)).
\textsuperscript{49} \textit{J.B.}, 783 A.2d at 713. The consent form stated that upon dissolution of marriage the clinic would retain control of the embryos, unless the court makes a determination. \textit{Id.} Because of this conditional language, the parties in \textit{J.B. v. M.B.} sought a determination from
the relative interests of the parties, and whether the parties retained the capacity to conceive a child.\textsuperscript{50} The court specifically followed \textit{Davis v. Davis} and the procreational standpoint.\textsuperscript{51} The Supreme Court of New Jersey reasoned that courts should enforce consent agreements, but “subject to the right of either party to change his or her mind,” thereby notifying the clinic in writing of the change.\textsuperscript{52} After weighing both interests, the court found the wife’s right to prevent implantation outweighed the husband’s right to procreation.\textsuperscript{53} The embryos were subsequently destroyed.\textsuperscript{54}

Applying the procreational approach to the aforementioned hypothetical would result in the party not wanting to procreate being awarded the embryos.\textsuperscript{55} The husband has the controlling decision in the disposition, due to fact he does \textit{not} want to procreate and be a forced into parenthood. If the requesting party is infertile, the procreational theory forces her to undergo IVF or other alternative procedures again in the future to reproduce.\textsuperscript{56}

However, the procreational approach is wholly inadequate and inappropriate for the disposition of embryos because it allows one party to control the decision to procreate. Under this approach, the court weighs a person’s right to procreate with the other’s right not to have a child, ultimately finding that the right not to procreate triumphs.\textsuperscript{57} Taking these aspects into account tends to “compound [the] issue of the court. \textit{Id.} Conversely, the \textit{Kass} consent form, discussed below, was unambiguous, unconditional, and expressed the true intent of the parties. \textit{Compare J.B.}, 783 A.2d 707, \textit{with Kass}, 696 N.E.2d at 174.

\textsuperscript{50} \textit{J.B.}, 783 A.2d at 711, 717 (noting the husband’s procreational right to have a child was not lost because he already had one child conceived through IVF and he could have a child with another woman or surrogate).

\textsuperscript{51} \textit{Id.} at 716 (“We agree with the Tennessee Supreme Court that ‘[o]rdinarily, the party wishing to avoid procreation should prevail.’”) (quoting \textit{Davis v. Davis}, 842 S.W.2d 588, 604 (Tenn. 1992)).

\textsuperscript{52} \textit{Id.} at 719.

\textsuperscript{53} \textit{Id.} at 720.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{See supra} Part I.

\textsuperscript{56} \textit{See Davis v. Davis}, 842 S.W.2d 588, 604 (Tenn. 1992) (noting that adoption is often cited as a way to end this battle). \textit{See also} Susan Frelich Appleton, \textit{Adoption in the Age of Reproductive Technology}, 2004 U. CHI. LEGAL F. 393, 404, 434 (discussing favoritism of married couples over single women in the adoption process); \textit{cf. Katz}, \textit{supra} note 23, at 651–52. (explaining that adoption agencies are hesitant to award single, unmarried or somewhat older women a child, and perhaps as a result, IVF is most often used by 30-50 year olds).

\textsuperscript{57} \textit{See Davis}, 842 S.W.2d at 604 (stating that generally the party who did not want to conceive should prevail if the opposing party can conceive without the use of embryos).
women’s rights of bodily integrity.” The courts adhering to this view have erroneously relied on abortion jurisprudence to further their cause. There is no constitutional evidence that the right not to procreate outweighs the right to procreate. In fact, the constitutional evidence is quite the contrary.

An unqualified right to an abortion does not exist. Planned Parenthood v. Casey expressly held that a State may regulate and place restrictions on abortions, as long as it does not unduly burden the woman’s decision and place substantial obstacles in her path. Further, the United States Supreme Court has upheld statutes containing parental notification, waiting periods, and a ban against partial-birth abortions. Obviously, if the State may restrict and regulate in this area, the right is not as broad as these courts have interpreted it to be. It is not the trump suit in a deck of cards: the right not to procreate should not trump the right to procreate.

Conversely, the right to procreate is fundamental under our Constitution. Justice Douglas wrote: “Marriage and procreation are fundamental to the very existence and survival of the race.”

59. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 874 (1992) (stating that Roe v. Wade, 410 U.S. 113 (1973), did not declare an unqualified right to an abortion). Chief Justice Rehnquist wrote “[t]he Court in Roe reached too far when it analogized the right to abort a fetus to the rights involved in Pierce, Meyer, Loving, and Griswold, and thereby deemed the right to abortion fundamental.” Id. at 953 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
60. Id. at 874 (O’Connor, J., majority).
64. Ellen Waldman & Marybeth Herald, Eyes Wide Shut: Erasing Women’s Experiences from the Clinic to the Courtroom, 28 HARV. J.L. & GENDER 285, 313 n.143 (2005) [hereinafter Eyes Wide Shut] (“One might legitimately ask why legislatures and courts alike are undercutting a woman’s right to terminate an unwanted embryo in utero while at the same time staunchly defending a non-gestating individual’s right to destroy an embryo that is desperately wanted by another genetic contributor.”).
66. Id.
the Supreme Court has stated, “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

The Court places the right to procreate on a pedestal and gives it an importance, which the right to an abortion does not receive. Thus, the courts utilizing the procreational approach have infringed on a woman’s fundamental right to procreate. If any exists, the right to procreate should be the trump card.

Also, abortion and IVF, are distinguishable. For example, Roe v. Wade was decided based on a woman who was already pregnant, whereas with IVF, a traditional notion of conception has not yet been achieved. In IVF, only an embryo is involved, not a child nor a fetus, because the courts have held that an embryo is not a child. In Casey, Chief Justice Rehnquist noted the differences, stating “[u]nlike marriage, procreation, and contraception, abortion ‘involves the purposeful termination of a potential life.’ The abortion decision must therefore ‘be recognized as sui generis, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.’” Additionally, under abortion jurisprudence, spousal consent requirements are unconstitutional, as placing a substantial obstacle in the path of a woman. Abortion jurisprudence denies husbands the constitutional right to intrude on their wife’s decision to have an abortion, whereas with IVF, courts have allowed the person who does not want to procreate, including the husband, to

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68. Compare Skinner, 316 U.S. at 535 (holding that procreation is a fundamental right), with Roe, 410 U.S. at 113 (holding that the right to abortion is not absolute).
69. Roe, 410 U.S. at 120; cf. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (erroneously relying on Roe to come to a determination even though Mrs. Davis was not pregnant).
70. See Davis, 842 S.W.2d at 597 (discussing that embryos are not living, but instead have potential for life); cf. Roe, 410 U.S. at 150 (using the terms “fetus” and “embryo” distinctively, and not in an interchangeable manner).
72. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) (holding a written spousal consent requirement for obtaining an abortion is unconstitutional because it would infringe upon a woman’s right to have an abortion, which was guaranteed by Roe); see Casey, 505 U.S. at 895 (holding a spousal notification requirement for obtaining an abortion places an undue burden on a woman’s decision).
dominate the decision.\footnote{Compare \textit{Casey}, 505 U.S. at 833 (holding that spousal notification requirement for obtaining an abortion places an undue burden on a woman’s decision), \textit{with Davis}, 842 S.W.2d at 604 (holding that the husband’s interest in not wanting to procreate outweighs a wife’s interest in procreating).} Thus, the procreational standpoint’s reliance on abortion jurisprudence is misguided.

Procreational rights should only be examined where procreation has occurred.\footnote{Contra \textit{Berg}, supra note 58, at 166 (“\textit{w}hen an embryo has been created through the consensual actions of the gamete providers, those providers have ‘procreated,’ or at least begun the process of procreation since it does not appear to be a single point in time event.”).} “Moreover, stretching the concept of procreative liberty to cover decisional authority over embryos may undermine its use in other, more appropriate, contexts,” such as abortion.\footnote{\textit{See id. (“Although the concept has been applied in the abortion context, that area may be better served by an analysis of bodily integrity than procreative liberty.”).}} “In contrast, the use of a property framework may lead to additional protections of individual rights since the courts may accord greater deference to specific property rights of progenitors than to their general liberty rights.”\footnote{Id. at 167.} Also, “[d]espite the concern some courts articulate that a ‘party will have been forced to become a biological parent against his or her will,’ there is no right to avoid biological parenthood if you have willingly participated in procreative activities.”\footnote{Id. at 169 (quoting \textit{J.B. v. M.B.}, 783 A.2d 707, 718 (N.J. 2001)). “In other words, the right in question is really a right protecting against unwilling procreation, not unwilling parenthood once procreation has occurred, despite the rhetoric used. Likewise, a man who finds his partner has conceived after traditional intercourse cannot claim he has a right not to be a parent.” \textit{Id.}} Both parties willingly consented to forming the embryos. “Property theory would function as a mechanism to allocate rights and interests even in the absence of a valid and enforceable contract.”\footnote{\textit{Id.} at 192.}

Moreover, the procreational standpoint “has a disproportionately negative impact on women.”\footnote{\textit{Eyes Wide Shut}, supra note 64, at 320; \textit{see Judith F. Daar, Assisted Reproductive Technologies & Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties}, 25 A.M. J.L. & MED. 455 (1999) (arguing that not granting infertile women the same rights as fertile women to embryos at the same level of development is a violation of equal protection).} If a male decides he does not want to procreate, even after contributing to the creation of an embryo, then he effectively is being allowed to control the female’s ability to have a child.\footnote{\textit{See, e.g., Kass v. Kass}, 696 N.E.2d 174 (N.Y. 1998) (where the wife desired possession). \textit{But see \textit{J.B.}, 783 A.2d at 707 (where the husband sought possession).}} Further, the courts utilizing the procreational approach have ignored other important aspects of procreation and parenthood.
Most fundamentally, [the courts using a procreational approach] fail to realize that parental identity flows from the assumption of a nurturing, caretaking role, rather than the stark fact of genetic connection. In linking psychological parenthood to consanguinity, rather than to the physical acts of caretaking, the frozen embryo judges adopt a particular vision of family ties. This view under-cuts and trivializes traditional female contributions and dictates outcomes that fail to recognize the importance of nurturance—an activity still primarily undertaken by women—in the construction of parental identity and parent-child bonding.\footnote{Eyes Wide Shut, supra note 64, at 310–11.}

Therefore, the courts should abandon this paternalistic theory for a more gender neutral approach.

Lastly, the procreational theory ignores the time and money spent on IVF. If, after being denied the embryos, a wife still wants to bear a child, she will have to endure the cost and pain of IVF again. IVF is an expensive procedure.\footnote{For example, Mr. and Mrs. Davis spent approximately $35,000 for six treatments of IVF. Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992).} It generally costs on average $8,000 to $12,400 per cycle.\footnote{Peter J. Neumann, Should Health Insurance Cover IVF? Issues and Opinions, 22 J. HEALTH POL’Y & L. 1215, 1221 (1997) (noting in addition that often many cycles are required); cf. ASRM, supra note 7 (stating that the average cost per cycle is $12,400).} Most likely, a woman, recently divorced, will not be able to afford this and have to forgo procreation.\footnote{Cf. Warner Haas, Women and Poverty in America, ASSOCIATED CONTENT, Oct. 30, 2006, http://www.associatedcontent.com/article/77072/womenandpovertyinamerica.html?cat=47 (noting that single women are the most prone to fall below the poverty line).} This waste of resources has no place in our society. Therefore, courts should look to other methods of disposition, such as a property interest theory.

\section*{B. The Contractual Approach}

Another theory that has been used by courts to resolve embryo disputes is the contractual approach, embracing basic contract theories. In Kass v. Kass, the couple signed a consent agreement with the hospital for IVF services.\footnote{Kass, 696 N.E.2d at 176–77.} The wife underwent retrieval five times, and on nine different occasions had embryos implanted.\footnote{Id. at 175–76.} She became pregnant twice, unfortunately ending in a miscarriage and an ectopic pregnancy,
Later that year, the couple even tried to use a surrogate, which failed to produce a pregnancy. The couple then decided to dissolve their marriage. In their uncontested divorce settlement, the couple stated that the embryos should be disposed of in “the manner outlined in [the] consent form.”

Subsequently, the wife initiated a lawsuit requesting sole possession of the embryos. The trial judge awarded possession to the wife, reasoning that the female has the “exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus.” However, on appeal this decision was reversed, stating a woman’s right to privacy and bodily integrity are not implicated before implantation occurs. The court also declared that the consent agreement signed by the couple will control. The court held that the agreement will be presumed valid and binding, and will therefore be enforced. The court wrote:

As they embarked on the IVF program, appellant and respondent—‘husband’ and ‘wife,’ signing as such—clearly contemplated the fulfillment of a life dream of having a child during their marriage. The consents they signed provided for other contingencies, most especially that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. These parties having clearly manifested their intention, the law will honor it.

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87. Id. at 176. Cf. National Library of Medicine and the National Institute of Health, Medline Plus, Ectopic Pregnancy, http://www.nlm.nih.gov/medlineplus/ency/article/000895.htm (last visited Oct. 9, 2008) (explaining that women who have had IVF have an increased risk of developing an ectopic pregnancy, which occurs when the baby starts to form outside the uterus, such as in a fallopian tube).
88. Kass, 696 N.E.2d at 177.
89. Id.
90. Id.
91. Id.
92. Id. This reasoning followed Roe v. Wade, where the Court held that the right of privacy protected by the Constitution is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Roe, 410 U.S. at 153.
93. Kass, 696 N.E.2d at 179. This statement is somewhat ironic in light of the procreational approach’s heavy reliance on abortion jurisprudence.
94. Id. at 177–78 (reasoning that the parties clearly expressed their intent when signing the agreements and consent forms).
95. Id. at 180 (suggesting that in some circumstances agreements may be unenforceable for public policy reasons, although the wife did not raise the argument in this instance).
96. Id. at 182.
However, the contractual approach was expressly rejected by the Supreme Court of Iowa in *In re Marriage of Witten.*\(^97\) In *Witten,* the couple tried IVF several times, none of which resulted in a pregnancy.\(^\text{98}\) When the trial commenced, seventeen embryos remained frozen at the clinic.\(^99\) The parties signed an embryo storage agreement, stating that the transfer and disposition of the embryos will only be made by the written consent of both parties.\(^\text{100}\)

When the parties decided to divorce, the wife requested possession of the embryos for future implantation.\(^\text{101}\) The wife testified that she would allow her ex-husband to choose to exercise parental rights or, in the alternative, terminate all parental rights.\(^\text{102}\) However, the husband did not want the embryos destroyed, nor did he want his wife to have them.\(^\text{103}\) The trial court enjoined both parties from transferring and disposing of the embryos without the other’s consent.\(^\text{104}\)

On appeal, the court analyzed whether embryos should be considered children.\(^\text{105}\) The court concluded that an embryo is not a child and the child custody statute is not suitable to determine the disposition of embryos.\(^\text{106}\) Further, the court held that “it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos.”\(^\text{107}\) The court expressly rejected the contractual approach used by the *Kass* court.\(^\text{108}\) The court noted that “any contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public

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97. *In re Marriage of Witten,* 672 N.W.2d 768 (Iowa 2003).
98. Id. at 772.
99. Id.
100. Id. (stating an exception, that upon the death of one of the parties, the other party will retain disposition power, thus taking into account inheritance and arguably supporting the property interest theory).
101. Id.
102. Id. at 772–74 (arguing that the Iowa child custody statute applied in favor of the wife, but in the alternative, that her right to procreate should override any consent agreement signed by the parties); see also *Iowa Code* § 598.1 (2005) (looking first to the best interests of the child before determining custody).
103. *Witten,* 672 N.W.2d at 773.
104. Id.
105. Id. at 775–76.
106. Id. at 775 (concluding that it was premature to consider the embryo a child).
107. Id. at 781 (noting the court has been reluctant to get involved in personal issues and in matters so close to the home, the court will not intrude).
108. See id. at 782 (noting that contracts are enforceable unless one party changes their mind about the disposition of the embryo).
policy." The trial court’s order enjoining the couple from disposition without written consent of the other party was affirmed.

Another case expressly rejecting the contract theory is *A.Z. v. B.Z.*, in which a husband and wife had difficulties conceiving a child after the removal of a fallopian tube that was damaged from an ectopic pregnancy. The couple underwent IVF and stored their extra embryos in the clinic. Ultimately, the couple gave birth to twin daughters through the use of IVF. Both had signed numerous consent forms at the clinic, stating the embryos would be returned to the wife for future implantation. Interestingly, the wife, without the husband’s permission, had one of the embryos thawed and implanted. As a result, their marriage suffered and the husband filed for divorce. In regards to the frozen embryos, the family court ordered a permanent injunction preventing the wife from using them, noting that many changes had happened in their lives since the signing of the consent forms. The trial court held that no agreement should be enforced when intervening events have changed the circumstances.

On appeal, the court held that the consent form’s primary purpose was to explain the risk of IVF and determine disposition at the time of the procedure. The court further explained that even if the couple had entered into an unambiguous agreement regarding disposition, the court “would not enforce an agreement that would compel one donor to become a parent against his or her will.” Forced procreation is not

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109. *Witten*, 672 N.W.2d at 780.
110. *Id.* at 785 (explaining that written consent is necessary if the parties cannot come to a mutual decision).
111. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052–53 (Mass. 2000) (noting that subsequently, due to another ectopic pregnancy, her other fallopian tube had to be removed).
112. *Id.* at 1053.
113. *Id.*
114. *See id.* at 1054 (describing that the husband signed the forms, after which the wife wrote in that the embryos should be returned to her).
115. *Id.* at 1053 (explaining further that the husband learned of the implantation when he received a notice from his insurance company regarding the procedure).
116. *Id.*
117. *A.Z.*, 725 N.E.2d at 1053–55 (discussing after the twin girls were born, the wife obtained a protective order against the husband, likely prompting the husband to file for divorce, after which the wife sought to thaw the embryos for implantation).
118. *Id.* at 1055.
119. *Id.* at 1056–57. The consent form did not state the couple intended the form to govern as a binding agreement for future disposition of their embryos. *Id.* Further, there was no set time period for the consent form. *Id.* at 1056–57. Lastly, the consent form did not define “become separated,” which the court did not assume meant divorce. *Id.*
120. *Id.*
an area amenable to judicial enforcement.”121 Prior agreements to enter into familial relationships should not be enforced because they violate public policy, hence enhancing the “freedom of personal choice in matters of marriage and family life.”122 “This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.”123 Enforcing the form would force the husband to become a parent against his will, thus the Court has thereby adopted the procreational approach.124

In the aforementioned scenario, the couple did not sign a consent agreement.125 In the absence of a binding contract, a court adopting a contractual approach will most likely follow the procreational approach by weighing the wife’s interest against the husband’s.126 The court would then revert back to the procreational approach, consequently exhibiting the same downfall discussed above.127 However, if our hypothetical couple had signed consent forms, the courts are split in how they treat these forms.128 Therefore, depending on the jurisdiction, the consent form may or may not be enforced. Because of this uncertainty, courts should apply the property interest theory.

Furthermore, the contractual approach promotes judicial instability. Depending on the jurisdiction, the judge, and the circumstances, the prior written agreement may or may not be enforced. Further, if the agreement granted the wife possession, it is likely the trial court would not enforce the contract.129 This penalizes the couple for taking any precautions before initiating IVF. Also, if the court finds the agreement invalid, the courts will resort to the procreational approach, exhibiting the same downfall as discussed above.130

121. Id. at 1058.
122. Id. at 1059 (quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (noting that choice in marriage and family life is one of the constitutionally protected liberties)).
123. A.Z., 725 N.E.2d at 1059.
124. Cf. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (discussing that when an agreement does not exist, the procreational rights of the parties must be examined and the embryos will go to the party who does not wish to procreate).
125. See supra Part I.
126. See A.Z., 725 N.E.2d at 1055 (analyzing the rights and interest of each party where no binding contract existed); see also Davis, 842 S.W.2d at 597 (setting out a framework of how to analyze the parties rights under a procreational approach when there is not a binding contract).
127. See discussion supra Part III.A.
129. See A.Z., 725 N.E.2d at 1051.
130. See discussion supra Part III.A.
Florida’s statute expressly requires a written consent agreement before embarking on the IVF journey. However, should a couple be forced to decide disposition twenty years before their divorce? Circumstances, the parties’ beliefs and desires, as well as our society’s perceptions can change. Can a contract truly take into consideration all of these factors, especially at a time when emotions are at a high? Additionally, an infertile couple is often willing to go to any extent to have a child, including signing an informed consent agreement. As shown by the litigation in this area, these agreements clearly do not embody the true intent of the parties.

One commentator criticized the contractual approach as insufficiently protecting the individual and societal interests at stake:

First, decisions about the disposition of frozen embryos implicate rights central to individual identity. On matters of such fundamental personal importance, individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs. Second, requiring couples to make binding decisions about the future use of their frozen embryos ignores the difficulty of predicting one’s future response to life-altering events such as parenthood. Third, conditioning the provision of infertility treatment on the execution of binding disposition agreements is coercive and calls into question the authenticity of the couple’s original choice. Finally, treating couples’ decisions about the future use of their frozen embryos as binding contracts undermines important values about families, reproduction, and the strength of genetic ties.

Therefore, due to these aspects, courts should refuse to adopt the contractual approach.

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131. FLA. STAT. § 742.17 (2007). But cf. Ellen A. Waldman, Disputing over Embryos: Of Contracts and Consents, 32 ARIZ. ST. L.J. 897, 936 (Fall 2000) (“Unfortunately, Florida’s statute says nothing about the process or form such agreement should take.”).

132. BETH COOPER-HILBERT, INFERTILITY AND INVOLUNTARY CHILDLESSNESS 32 (1998) (noting that infertile couples “feel at odds with society, betrayed by nature, their bodies, and each other”).


C. The Property Approach

The only case embracing the property interest theory is York v. Jones.\textsuperscript{135} In Jones, the couple wanted to transfer their frozen embryos to another facility, moving the embryos from Virginia to California.\textsuperscript{136} The Virginia clinic refused to consent to the transfer of the embryos.\textsuperscript{137} The couple had undergone IVF at the Virginia clinic four different times, none of which resulted in pregnancy.\textsuperscript{138}

The couple had signed an agreement determining the fate of their embryos if they no longer wished to attempt to initiate pregnancy.\textsuperscript{139} The clinic argued that the patient could only pick one of three fates for the embryos listed in the agreement, none of which took into account a couple still wanting to become pregnant using another facility.\textsuperscript{140} However, the Court held that the agreement created a bailor/bailee relationship between the couple and the clinic, which is governed by contract and property principles.\textsuperscript{141} No formal contract is needed to form a bailor/bailee relationship:

Rather, all that is needed ‘is the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment . . . .’ The essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. The obligation to return the property is implied from the fact of lawful possession of the personal property of another.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{136} \textit{Id.} at 422.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 423–24.
\item \textsuperscript{139} \textit{Id.} at 424. This agreement gave three options to the patient if they decided not to initiate pregnancy: 1) donate to another couple, 2) donate for approved research investigation, and 3) thawed, but not allowed to undergo further development. The agreement did not provide for any transfer options. \textit{Id.} The problem, however, was that the couple still wanted to initiate pregnancy, but in a different facility. \textit{York}, 717 F. Supp. at 427. The court noted that the three fates were inapplicable because of this fact. \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 425.
\item \textsuperscript{141} \textit{Id.} A “bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust. Inherent in the bailment relationship is the requirement that the property be returned to the bailor” 8A AM. JUR. 2d Bailments § 1 (2007) [hereinafter Bailments].
\item \textsuperscript{142} \textit{York}, 717 F. Supp. at 425 (quoting Crandall v. Woodard, 143 S.E.2d 923, 927 (Va. 1965)).
\end{enumerate}
\end{footnotesize}
The Court emphasized that the agreement fully recognized the couple’s property right in the embryos.\textsuperscript{143} In the aforementioned hypothetical, the court would recognize a property interest in the embryos under the property interest approach.\textsuperscript{144} Since a valid property interest is present, the family court could distribute the property according to the state’s divorce property disposition statute.\textsuperscript{145} The embryos would be on the same level as other property, such as homes, cars and possessions.\textsuperscript{146} The next section will fully analyze this approach.\textsuperscript{147}

IV. THE PROPERTY INTEREST SOLUTION

As shown above, the courts have taken different approaches in dealing with the disposition of embryos.\textsuperscript{148} While some courts have analyzed these types of cases through procreational rights, and others have applied contractual theories, neither expounds a trouble free solution.\textsuperscript{149} The approach that should be adopted is the property interest theory.

A. Recognizing a Property Interest

Property interests have historically been examined as a bundle of sticks: the rights to use, possess, dispose, and exclude.\textsuperscript{150} The right to exclude has been described as the most important stick in

\textsuperscript{143} See id. (referring to the embryos as “property” throughout the opinion).
\textsuperscript{144} See supra Part I.
\textsuperscript{145} See discussion infra Part IV.C.
\textsuperscript{146} Id.
\textsuperscript{147} See discussion infra Part IV.
\textsuperscript{148} See discussion supra Part III.
\textsuperscript{150} See United States v. Craft, 535 U.S. 274, 278 (2002); see also Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). “Property has been described by one court as the unrestricted and exclusive right to a thing, the right to dispose of it in every legal way, to possess it, use it, and to exclude everyone else from interfering with it.” 63C AM. JUR. 2D Property § 1 (2006) [hereinafter Property].
\textsuperscript{151} “Use” is defined as “[t]he application or employment of something.” BLACK’S LAW DICTIONARY 1577 (8th ed. 2004).
\textsuperscript{152} Possession is “[t]he fact of having or holding property in one’s power; the exercise of dominion over property.” Id. at 1201.
\textsuperscript{153} Disposition is “[t]he act of transferring something to another’s care or possession, especially by deed or will.” Id. at 505.
\textsuperscript{154} To exclude is “to prevent others from making, using, selling or offering for sale” one’s property. Id. at 1351.
“[P]roperty’ refers not to a particular material object” but to these rights in the object. 156  “Thus, the rights themselves, not the object, constitute the property interests.” 157  Therefore, property is merely a collection of rights, and applying property interests to embryos is merely asserting those rights. 158

Arguably, the bundle of sticks is present in embryos. The couple has the right to use the embryos. They can have the embryos implanted now or at a future date. The couple also has an undeniable right to exclude others from using their embryos. Further, even though the clinic normally possesses the embryos, the couple has a right to possession, as demonstrated in York v. Jones. 159  They can request possession at any time. The clinic only has a bailor/bailee relationship with the couple and has a duty to release the embryos. 160  Lastly, the couple has a right to dispose of the embryos if they so choose. Therefore, there are valid property interests in embryos and these interests should be recognized by the law. 161

Moreover, John Locke’s Labor Theory could be applied to embryos to create a property interest. 162  John Locke’s theory states that a man owns his body and the labor that the body exerts. 163  When a man adds his labor to an un-owned object, the labor enters the object, .

155.  See Kaiser Aetna, 444 U.S. at 176.
156.  Property, supra note 150, at § 1. However, “[n]ot every interest that one may have in a particular object is necessarily to be classed as property, although in a given instance that interest may constitute a valuable right. Thus, one may have an insurable interest in property although such interest is not properly classifiable as property.” Id. at § 2. If a property right is not recognized in the embryo, there may still be an “insurable interest” left. Id. Thus, this interest could be recognized by the family court and be considered a marital asset.
157.  Rameden, supra note 4, at 380 (defining property as an aggregate of rights which are guaranteed and protected by the government). This could also be the counter-argument to someone hesitant to treat embryos as property because of an embryo’s potential for life. The embryo is not actually property, the court is merely asserting property rights.
158.  Id. at 379–80; see also Texas Co. v. Hauptman, 91 F.2d 449, 451 (9th Cir. 1937) (stating property is “the sum of all the rights and powers incident to ownership”).
160.  Id. at 425 (noting a bailor/bailee relationship between the parties).
161.  Berg, supra note 58, at 186. Professor Berg, Case Western Reserve University School of Law, has suggested that property law should be the appropriate basis because:
   (1) it provides a conceptually better fit than the competing procreative liberty framework; (2) it is normatively compelling, based the application of property theories; (3) it provides a descriptively accurate explanation for many of the courts’ actions in embryo disposition cases (despite some of those same courts’ unwillingness to use the term “property”); and (4) it allows courts to draw on an existing framework of property law to resolve disputes.
162.  See JOHN LOCKE, TWO TREATISES ON GOVERNMENT 295 (London 1821) (1690).
163.  Id.
making it his own. Locke stated that a landowner who worked a piece of land had a natural right to it. John Locke’s Labor Theory has been used in other contexts, such as news disposition and publication and the ownership of one’s name, to achieve property status. Here, the couple used their own bodies and labor to create the embryo. The labor then entered the embryo, making it the couple’s own. Thus, a property interest emerged in the embryo.

B. Implications of the Property Interest Theory

Once a property interest has been recognized, courts should treat embryos as embodying such to create uniformity and judicial efficiency. “Thus, rights regarding embryo disposition [would] mirror legal rights to disposition of other personal property.” When applying a property framework, the court is allowed “to draw on a vast array of established rules for resolving disputes.” Property law is well settled and has been around for centuries. This foundation will lead to greater predictability in decisions. For example, under a property framework, if a party dies, the other can inherit the embryos for future use. “A general rule that embryo control will follow inheritance rules may lead some people to make arrangements for disposition when they otherwise would have failed to do so.” Further, the York v. Jones court treated embryos as property, setting the groundwork for other courts to follow its example.

A property interest theory would create “a more descriptively accurate representation of the issues involved in embryo disputes, as well as a more appropriate normative framework under which to resolve

164. Id.
165. Id.
167. See generally Uproar Co. v. Nat’l Broad Co., 8 F. Supp. 358 (D. Mass. 1934). “In each of these ‘cutting edge’ cases, the courts either explicitly or implicitly recognized the contribution of effort (Locke’s Labor Theory) involved in creating something of value or recognized Hegel’s personhood theory.” Rameden, supra note 4, at 383.
168. See discussion supra Part II.
169. Berg, supra note 58, at 163.
170. Id. at 170.
172. Predictability is one of the main criticisms of the contractual approach. See discussion supra at Part III.B.
174. See Berg, supra note 58, at 207.
disagreements.”

By looking at the property interests involved, the sensitive area of procreation can be avoided. As seen above, the procreational approach allows the court to consider inappropriate factors that tend to compound issues of a woman’s bodily integrity.

By keeping these factors out of the equation, the decision is made on a more neutral playing field. No one procreational right trumps the other. The embryos need not be labeled as children, or even a life. Using the property interest approach will keep intense emotions out of the courtroom.

By recognizing a property interest, embryos will be considered marital assets during the divorce proceeding and the issue will be disposed of in family court. This will preserve valuable docket time and space in the state civil court system. In essence, by using the property interest approach, the embryos will be placed on the same level as homes and cars. The family court can easily dispose of the issue by equitably dividing the embryos among the parties, along with other marital assets. Both parties may receive multiple embryos in their property settlement.

One main concern of the courts has been the financial consequences for the dissenting spouse. There are several routes States can take to sever the ties between parent and child. First, the couple could sign an agreement that would sever any parental ties with the other’s embryos. The State should accept this agreement as binding and sever ties. This would not force one to become a legal parent of the child if they prefer to forego parental rights. This would

175. Id. at 218.
176. See discussion supra at Part III.A.
177. The court in Witten took this approach. See In re Marriage of Witten, 672 N.W.2d 768, 775 (Iowa 2003) (taking a property approach). Further, recognizing embryos as a property interest does not automatically imply children are property. The embryo and child are at two different stages of development; the embryo has no human characteristics. See infra note 194 and accompanying text.
178. See infra Part IV.C.
179. See Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (stating the husband “would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.”).
180. This would also prevent one party from seeking child support from the other in the future. If the husband wanted to support the child, the option is still available. But see McClish v. Lee, 633 So. 2d 56, 57 (Fla. Dist. Ct. App. 1992) (“Clearly, parties to a marriage cannot, as a matter of law and public policy, contract away the child’s right to support. This principle is so well established that it needs no citation of authority.”); Huckaby v. Huckaby, 393 N.E.2d 1256, 1259 (Ill. App. Ct. 1979) (observing that a father may not be contractually relieved from child support); Rosener v. Mitchell, 637 S.W.2d 381, 382 (Mo. Ct. App. 1982) (emphasizing that the court will not be bound by an agreement waiving child support).
exclude the person from any legal ramifications of the child, such as child support. In effect, one parent would be fully “adopting” the resulting child if pregnancy results, stripping the other of any legal rights to him or her.181

In essence, the situation would be analogous to the person going to the sperm bank and having an anonymous donor. “Generally, anonymous semen donors are shielded from the rights and responsibilities, including child support, of parenthood while the married or unmarried donee is protected from the donor’s assertion of parental rights.”182 Further, mere existence of a biological connection does not warrant constitutional protection.183 If a father fails to come forward and seek a role in a child’s life, he does not have a constitutionally protected relationship with the child.184 Here, the spouse who is present in the child’s life has the constitutionally protected relationship. States should choose to adopt this approach and not force the other gamete donor to pay child support.

Also, States could draft legislation providing for the termination of parental rights after the disposition of the embryos. Texas has drafted such legislation and other States should follow suit.185 The Texas statute states that if a marriage is dissolved before implantation occurs, the ex-spouse is not the parent of the resulting child, unless the ex-

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181. 2 AM. JUR. 2D Adoption § 1 (2006) (noting that when parents put their child up for adoption with an agency, they relinquish all legal rights to the agency). Adoption has been defined “as the creation of a legal relationship of parent and child between persons who were not so related by nature or law, whereupon the person adopted becomes the legal heir of his or her adopter, and the rights and duties of domestic relation with the adoptee’s natural parents are terminated.” Id.

182. Estes v. Albers, 504 N.W.2d 607, 609 (S.D. 1993) (noting that an agreement waiving child support was void because it was not secured by adequate consideration or approved by a court).

183. Compare Troxel v. Granville, 530 U.S. 57, 75 (2000) (recognizing a right to guide and control one’s child), with Lehr v. Robertson, 463 U.S. 248, 261 (1983) (“Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”), and Michael H. v. Gerald D., 491 U.S. 110 (1989) (refusing to recognize a natural father’s parental rights where a child was born to an adulterous relationship and where the mother’s husband was willing to be the child’s parent). Thus, the court implicitly held that a custodial parent relationship may trump a biological relationship. Cf. McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989) (rejecting a sperm donor’s claim for parental visitation rights); In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 ( Ct. App. 1998) (holding that even though neither party was biologically related to the child, the couple were the lawful parents given their role as her intended parents).

184. Lehr, 463 U.S. at 261.

spouse consents.\textsuperscript{186} Legislation of this sort would be in the best public interest of the State. It would curb disgruntled ex-spouses from attempting to get custody of the child after the fact or the parent from trying to obtain child support in the future. It would insulate the parties from unwanted litigation involving the child.

There is much debate concerning whether embryos should be considered property.\textsuperscript{187} Embryo disposition raises the questions of what is considered a life and when does it begin. The same arguments made in the abortion debate are likely to seep into the embryo dispute. For pro-life advocates, terming embryos as property seems unthinkable. Pro-lifers will argue that life begins at conception.\textsuperscript{188} However, the United States Supreme Court has never taken the position that life begins at conception.\textsuperscript{189} Since a fetus can be aborted because it is not a life, certainly it follows that an embryo can be disposed of or treated in a manner that does not recognize it as a life.

Although it possesses some potential for developing into a full human being, this capacity is very limited . . . . [I]t is a ball of cells no bigger than the period at the end of this sentence . . . . It has no organs, it cannot possibly think or feel, and it has none of the attributes thought of as human.\textsuperscript{190}

Further, the \textit{Kass} court stated that “a woman’s right to privacy and bodily integrity are not implicated before implantation occurs,” implying that the anti-abortion arguments are inapplicable.\textsuperscript{191}

Moreover, “‘property’ refers not to a particular material object but to the right and interest in an object.”\textsuperscript{192} “Thus, the rights themselves, not the object, constitute the property interests.”\textsuperscript{193} As discussed above, the parties are merely asserting rights over the embryo; the embryo itself is not property. If the court would move to a property interest

\begin{footnotes}
\item 186. Id.
\item 188. See, e.g., Catechism of the Catholic Church ¶ 2319 (1993) (“Every human life, from the moment of conception until death, is sacred because the human person has been willed for its own sake in the image and likeness of the living and holy God.”).
\item 189. See, e.g., Roe, 410 U.S. at 113.
\item 190. Ronald M. Green, \textit{The Ethical Considerations}, SCI. AM., Nov. 24, 2001, at 48.
\item 191. Kass v. Kass, 696 N.E.2d 174, 177 (N.Y. 1998). The court also declared that embryos are not “persons” for constitutional purposes. \textit{Id.} at 179. This is further proof that the procreational approach erroneously misapplied abortion jurisprudence.
\item 192. \textit{Property}, supra note 150, at § 1.
\item 193. Rameden, \textit{supra} note 4, at 380 (defining property as an aggregate of rights which are guaranteed and protected by the government).
\end{footnotes}
theory, there will be opposition at first, but it would subside in the future. Society would get accustomed to the concept and eventually accept it. The law needs to catch up with technology; the embryo debate is a prime example.

C. Equitable Distribution of Marital Property

As stated above, once the embryo is recognized as property, it can be disposed of through the different property distribution theories of the States. A large majority of the States divides other marital property assets equitably: why not embryos?

State distribution statutes are classified as either separate property or community property. The District of Columbia and forty-one States are separate property jurisdictions, which use equitable distribution as a means to divide marital property. A small minority, constituting nine States, still use community property statutes.

The community property system originated in Europe and was brought to this country by French and Spanish settlers. Under the community property system, the husband and wife own assets and earnings in equal undivided interests. All property acquired during the marriage, unless acquired through gift, devise, or descent, is considered community or marital property. A divorce effectively terminates the community.

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194. Divorce is a purely statutory proceeding, and the “court’s jurisdiction to grant divorce exists only by virtue of statute.” 24 AM. JUR. 2D Divorce and Separation § 6.
195. One author suggests that once recognized as property, the facility should keep the embryos until the parties come to a mutual agreement. Berg, supra note 58, at 206.
197. Id.
199. DUKEMINIER, ET AL, supra note 198, at 417. It was spread by the “Germanic tribes after the fall of Rome.” Id.
200. Id.
201. Id. at 418.
202. 15A AM. JUR. 2D Community Property § 22 (2008); Patricia Dillon Laub, 1981 Ohio Supreme Court Decision Survey: Family Law, 51 U. CIN. L. REV. 186, 199 (1982). However, [i]n strict common-law jurisdictions, no property rights arise by virtue of the marriage relationship alone; ownership of property depends on title. Therefore, if marital property is recorded in the husband’s name alone, the wife could not receive that property on divorce. The common-law title system does not provide
“Therefore, there is no community property after the spouses divorce, because there is no longer any common enterprise to which each spouse is contributing.”

The separate property system, on the other hand, has transpired from the common law of England. Under this system, the husband and wife separately own all property that each one acquires and each individual has autonomy over their earnings. Since each spouse owns his or her own property, equitable distribution has emerged to take into account differences in wages. Equitable distribution emerged from the idea that the couple entered into a voluntary partnership or joint enterprise when they married. It takes into account that both spouses contribute differently to the marriage—one may be the breadwinner, while the other may be the home-maker. Equitable distribution looks beyond whose name is on the title of the property.

The goal of equitable distribution is the financial separation of the parties. The assets do not need to be divided equally—just equitably, justly, or fairly. It is widely accepted “that it is better for all parties if there is enough property to make each spouse self-sufficient without the need for continuing contact through support awards.”

any economic reward for the non-working wife’s contribution to family assets. In response to inequities in the common-law title system, the majority of common-law jurisdictions now require equitable distribution of marital property on divorce.

Id. at 199-200.

203. 15A AM. JUR. 2D Community Property § 105 (2008).

204. Id.

205. DUKEMINIER, ET AL., supra note 198, at 417 (The system is “based on the husband’s autonomy and the effacement of the wife.”).

206. Id.

207. See Dillon Laub, supra note 202, at 200.

208. Lee R. Russ, Annotation, Divorce: Equitable Distribution Doctrine, 41 A.L.R. 4th 481 (1985). See generally Payson v. Payson, 552 S.E.2d 839 (Ga. 2001) (holding a property interest brought to the marriage by one of the marriage partners is a non-marital asset and is not subject to equitable division since it was in no sense generated by the marriage); see also In re Marriage of Smith, 427 N.E.2d 1239 (Ill. 1981) (holding that the theory of marriage advanced by the statute was one of equal partnership). This is somewhat ironic because of the roots of the separate property system.

209. Cosgrove, supra note 196, at 254-55.


211. Id. See generally Wilson v. Wilson, 404 So. 2d 76, 78 (Ala. Civ. App. 1981) (holding that the “division of property does not have to be equal, but only equitable”).

212. Russ, supra note 208, § 2(a). See generally In re Marriage of Lay, 512 N.E.2d 1120 (Ind. Ct. App. 1987) (holding that the goal of the court should be “to settle the financial affairs of the marriage so a parting of the ways may be final financially as well as otherwise”).
courts use a three-step analysis to divide the property.213 The court must first identify the property—separate property or marital property.214 Then, the court performs a valuation of the subject property, and lastly, divides the property equitably.215

Statutes enacted in each state provide standards for classifying marital property and what is subject to equitable distribution.216 Some statutes include a presumption that any property obtained during the marriage is marital property.217 For example, the New York statute states that marital property is “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held.”218 However, this presumption can be overcome by showing that the property is within an exception listed within the statute.219 The separate property exceptions listed in the New York statute are:

(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
(2) compensation for personal injuries;
(3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
(4) property described as separate property by written agreement of the parties.220

Equitable distribution should be applied to frozen embryos, pursuant to the theory that a property interest is present. At the time of the procedure, the couple is considered a partnership because divorce proceedings have not been commenced. Further, both parties contributed to the embryos, with their egg and sperm. In essence, this is property that was acquired during the term of the marriage and should be considered marital property.

214. Russ, supra note 208, § 5(a).
215. Id.
218. N.Y. DOM. REL. LAW § 236.
219. GREGORY, supra note 216, at 2-12.
220. N.Y. DOM. REL. LAW § 236.
Courts can apply the equitable division three-step analysis to embryos.221 First, the family court would identify the property.222 Embryos would be marital property since they were obtained during the duration of the marriage. Next, the family court would perform a valuation of the property.223 Valuation has the potential to be a complex procedure. However, courts can simplify this process by looking to the amount of money the couple invested in the IVF process. This amount could be shown by receipts, bank statements, or records of the clinic. It would be a definite value to work with. By relying on the money expended, the court can sidestep emotional issues. Divorces are already emotional, and there is no need to further intensify these emotions. The last step would be to equitably divide the embryos between the spouses.224 Each spouse could be awarded multiple embryos, depending on the settlement.

Moreover, if a spouse does not want future use of the embryos, the other spouse could be awarded all remaining embryos. For example, this would be analogous to a spouse not wanting the home and allowing the other to retain title. This mutual decision would be included in the divorce settlement or order. The couple should also incorporate the agreement, noted above, to dissolve parental ties.225

V. POTENTIAL SHORTCOMINGS OF THE PROPERTY INTEREST APPROACH

As with any solution, the Property Interest Approach is not trouble free. Some people, especially pro-life supporters, will cringe at the thought of treating embryos as property, and will likely fight any effort to further the Property Interest Approach. However, the courts have explicitly rejected the argument that an embryo is a life.226 If a fetus can be destroyed, certainly it follows that an embryo, which is at an earlier stage in development, does not deserve more protection. Further, recognizing a property interest does not automatically imply that children are or should be property. In fact, recognizing a property interest allows at least one party to procreate, thereby honoring and showing the importance of children and child birth.

222. Id.
223. Id.
224. Id.
225. See discussion supra Part IV.B.
226. See Davis v. Davis, 842 S.W.2d 588, 594–95 (Tenn. 1992); see also In re Marriage of Witten, 672 N.W.2d 768, 775 (Iowa 2003).
Some will argue that this proposition would essentially be a reverse procreational approach. The party not wanting to procreate would be overridden. The party wanting to procreate could then have a child and force parenthood on another. However, as set out above, the parties could sever legal ties between the child and the parent. The dissenting party would only be a biological or genetic link, essentially a sperm donor. Potential criticisms of this approach are going to focus upon forced procreation. However, “there is no right to avoid biological parenthood if you have willingly participated in procreative activities.” Further, procreational rights do not actually play a part in the decision—the disposition is only decided using a property framework.

VI. CONCLUSION

The courts should recognize a valid property interest in embryos. All the rights, recognized as the bundle of sticks, are present. Property is a well-settled body of law and could be easily applied to this area. If courts or States choose the property interest theory, family courts could easily dispose of the embryos using equitable distribution. This would promote uniformity and judicial efficiency. Since the partner would not have to endure IVF again, valuable time and money would be saved. Further, the procreational rights of the parties will not control the decision, thereby making the disposition less emotional.

State legislatures and courts should adopt the Property Interest Approach. Like King Solomon, the government will then be administering justice.

Then the king said, “Bring me a sword.”
So they brought a sword for the king.
He then gave an order: “Cut the living child in two and give half to one and half to the other.”

. . . When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice.

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227. See discussion supra at Part IV.B.
228. Berg, supra note 58, at 169.
229. 1 Kings 3:24–25, 28 (NIV).