

Fall 2015

Is Personhood the Answer to Resolve Frozen Pre-Embryo Disputes?

Erica Steinmiller-Perdomo

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the [Other Law Commons](#)

Recommended Citation

Erica Steinmiller-Perdomo, *Is Personhood the Answer to Resolve Frozen Pre-Embryo Disputes?*, 43 Fla. St. U. L. Rev. 315 (2017) .
<https://ir.law.fsu.edu/lr/vol43/iss1/7>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

IS PERSONHOOD THE ANSWER TO RESOLVE FROZEN PRE-EMBRYO DISPUTES?

ERICA STEINMILLER-PERDOMO*

I. INTRODUCTION.....	315
II. CURRENT TREATMENT OF PRE-EMBRYOS.....	318
A. <i>First Impression for Treatment of Pre-Embryos</i>	319
B. <i>Major Cases and Mixed Models</i>	322
1. <i>Enforcing Prior Agreements</i>	323
2. <i>Refusing to Enforce Agreements</i>	324
C. <i>State Legislation Concerning IVF</i>	326
D. <i>European Laws Governing IVF</i>	328
III. PROBLEMS WITH CURRENT TREATMENT OF PRE-EMBRYOS.....	329
A. <i>Lack of Uniformity of Model</i>	330
B. <i>Lack of Uniformity of Status</i>	332
IV. RESOLUTION.....	334
A. <i>State's Authority to Regulate</i>	334
1. <i>State May Regulate Due Process and Equal Protection Rights</i>	334
2. <i>State Has Compelling Interest at Viability</i>	335
3. <i>Pre-Embryo Protection Is Consistent with Other Fetal Protections</i>	337
B. <i>Legislative Proposal and Implications</i>	338
V. DEFENDING THE PROPOSITION.....	341
VI. CONCLUSION.....	343

I. INTRODUCTION

Sofia Vergara and her ex-fiancé, Nick Loeb, created and stored several pre-embryos with the intention of using them to start a family together. Since then, the two have separated and now dispute the fate of the pre-embryos they created. Should the pre-embryos be considered persons, property, or something else? Should they be afforded the right to life because one party wants them to develop or should they be discarded because one party no longer wants to procreate? Who should decide? The lack of regulation in the area of assisted reproductive technology leaves these sensitive disputes in the hands of courts and raises many questions. This Note will provide an answer.

In vitro fertilization (IVF) is a process typically used by couples¹ trying to overcome infertility.² The IVF process involves the fertiliza-

* J.D. 2015, *cum laude*, Florida State University College of Law. I would like to thank my parents, Phil and Esperanza Steinmiller, for loving and supporting me; and Professor Mary Ziegler for challenging me to think about the legal implications of assisted reproductive technology and guiding me through the writing process.

1. The use of the term “couples” is not meant to create a distinction regarding sexual orientation or marital status of the parties.

2. Melissa Conrad Stöppler, *In Vitro Fertilization*, EmedicineHealth, http://www.emedicinehealth.com/in_vitro_fertilization/article_em.htm (last visited Feb. 27, 2016). Infertility is the inability of a couple to become pregnant after one year of unprotected sex without using birth control methods. *Id.* Infertility affects nearly 6.1 million people in the United States, yet less than five percent of infertile couples utilize IVF treatment. *Id.*

tion of a woman's eggs by a man's sperm in a laboratory to create a pre-embryo.³ Once a pre-embryo is created, it is implanted into the uterus of either the genetic mother or a surrogate in hopes of achieving pregnancy and childbirth.⁴ Couples are typically advised to fertilize multiple pre-embryos and implant several pre-embryos into the woman's uterus at one time to increase chances of pregnancy.⁵ Many couples choose to cryogenically preserve the remaining pre-embryos they produce.⁶ Cryogenic preservation involves freezing and storing pre-embryos for future use. These frozen pre-embryos may be thawed and transferred into a woman's uterus to develop, donated to another infertile couple, discarded, implanted when pregnancy is unlikely, donated for research, or kept frozen indefinitely.⁷ Deciding to freeze pre-embryos may provide several benefits to a couple seeking to procreate, such as reducing the cost of undergoing additional procedures to extract eggs, increasing the likelihood of achieving childbirth by making pre-embryos available for implantation at a later time, or allowing a couple to postpone procreation until they are ready to have children.⁸ However, the option of freezing pre-embryos opens the door for couples' circumstances to change by, for example, having their desired child and not needing to utilize the remaining pre-

3. *Id.* The egg and sperm create a one-cell zygote, which undergoes successive equal divisions until it is composed of eight cells. *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992). "While this entity is not technically an embryo because it has not been permitted to develop beyond an eight-cell entity, the majority of courts and scholars refer to these cells as preembryos." Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 395 n.4 (2005) (citing *Davis*, 842 S.W.2d at 594).

4. Stöppler, *supra* note 2.

5. Nivin Todd, *Infertility and In Vitro Fertilization*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization?page=2> (last visited Feb. 27, 2016). According to a 2009 report by the Center for Disease Control and Prevention (CDC) on IVF in the United States: "Pregnancy was achieved in an average of 29.4% of all cycles (higher or lower depending on the age of the woman)," and "[t]he percentage of cycles that resulted in live births was 22.4% on average (higher or lower depending on the age of the woman)." *Id.* According to the Society for Assisted Reproductive Technology (SART), in 2012 the percentage of cycles resulting in pregnancies in women under 35 years of age was 46.7%, and the percentage of cycles resulting in live births was 40.7%. *Clinic Summary Report*, SART, https://www.sartcorsonline.com/rptCSR_PublicMultiYear.aspx?ClinicPKID=0 (last visited Feb. 27, 2016).

6. David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1063 (2003).

7. See Amy Demma, *How Do I Make a Decision About My Remaining Embryos? What Are My Options?*, RESOLVE FOR THE JOURNEY & BEYOND (2013), <http://www.resolve.org/family-building-options/donor-options/how-do-i-make-a-decision-about-my-remaining-embryos.html>; Todd, *supra* note 5.

8. See Fotini Antonia Skouvakis, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN. ST. L. REV. 885, 886, 888 (2005); Todd, *supra* note 5.

embryos or no longer wishing to pursue procreation.⁹ This lapse of time gives rise to litigation regarding the treatment and disposition of pre-embryos.

Since IVF was introduced in the United States in 1981,¹⁰ there have been a handful of cases responsible for developing precedent to guide disputes over pre-embryos. These cases have attempted to characterize the legal status of pre-embryos as persons, property, or human tissue deserving “special respect.”¹¹ The legal status determines the decision-making authority of the parties, IVF providers, and courts over the pre-embryos, as well as the options for dispute resolution.¹² To resolve these pre-embryo disputes courts have adopted conflicting methods, including enforcing contracts, choosing not to enforce prior agreements in favor of contemporaneous mutual agreement, or balancing the parties’ respective interests.¹³ There is no consensus among jurisdictions regarding a preferred standard; thus, courts have been free to select from a patchwork of models in order to resolve cases.

The discontinuity regarding the legal status of pre-embryos and models for dispute resolution is further complicated by the risks that accompany developing IVF technology.¹⁴ Accordingly, this is an area

9. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

10. Todd, *supra* note 5.

11. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); Skouvakis, *supra* note 8, at 887.

12. Upchurch, *supra* note 3, at 396.

13. *In re Marriage of Witten*, 672 N.W.2d 768, 776-79 (Iowa 2003) (describing the three methods of analysis courts have suggested to resolve disputes over pre-embryos).

14. The practice of implanting numerous pre-embryos can lead to a higher rate of multiple births, which may increase health risks for the mother and the baby. Todd, *supra* note 5. According to the SART, as of 2012 the percentage of live births involving multiple children in women under thirty-five years of age was 30.6%. *Clinic Summary Report*, *supra* note 5. WebMD reports that 63% of live births are single babies, and 37% are twins, triplets, or more. Stöppler, *supra* note 2. Multiple births may result in a higher risk of miscarriage, anemia, hemorrhaging, and early labor, as well as the birth of weaker, underweight babies. Daily Mail Reporter, *IVF Couples Told Mothers and Babies Put at Risk from Multiple Embryo Implant*, DAILYMAIL.COM (May 13, 2011, 7:03), <http://www.dailymail.co.uk/health/article-1386622/IVF-couples-warned-aiming-twins-puts-mother-babies-risk.html>.

Aside from risks associated with childbirth, the IVF procedure can be strenuous for women. The process involves daily injections of hormones to stimulate production of multiple eggs, as well as frequent blood tests, and transvaginal ultrasounds. Stöppler, *supra* note 2. After stimulation, the eggs are removed by insertion of a needle through the woman’s vagina into the ovary. *Id.* Three to five days later, the woman must undergo a procedure to transfer the fertilized pre-embryo to her uterus through the cervix with a catheter. *Id.* After the transfer, the woman must continue to take hormone injections. *Id.* Moreover, risks of the surgical procedure may include damage to organs, and injections may cause ovarian hyperstimulation syndrome (OHSS). *Id.*

Furthermore, this process is prohibitively expensive. According to the American Society of Reproductive Medicine, the average cost of a cycle in the United States is \$12,400. Todd, *supra* note 5. The average cost of IVF treatment resulting in the live birth of a child is \$41,132. Georgina M. Chambers et al., *The Economic Impact of Assisted Reproductive*

of law that warrants regulation. Government regulation of the legal status of pre-embryos, the contracts between parties and IVF providers, and the extent to which IVF may be used by parties seeking to procreate would promote continuity and respect for life. Couples entering into this process would benefit from clarity concerning parental responsibilities and predictability regarding dispute resolution;¹⁵ and resulting pre-embryos would benefit from the opportunity to develop.

Currently, Florida law has not settled on a legal status for pre-embryos or determined a model for resolving disputes between parties about frozen, stored pre-embryos. The divergent methods that have been applied in different jurisdictions lead to unsatisfactory resolutions and call for legislative action. This Note will present a framework for Florida, or any state, to adopt regarding the treatment of pre-embryos in IVF. Part II will summarize the relevant cases and various methods courts have applied in order to resolve pre-embryo disputes. Additionally, Part II will consider legislation enacted by other states and countries. Part III will address the problems that arise with the current treatment of pre-embryos in disputed cases. Part IV will advocate for Florida to enact legislation that treats a pre-embryo as a life¹⁶ that should be accorded personhood rights. Part IV will also establish the authority of Florida to regulate in the area of IVF and propose legislation that would provide a favorable framework to resolve disputes. Part V will establish that personhood for pre-embryos would not infringe on individuals' reproductive rights and would not conflict with current precedent, while addressing likely objections to the proposed framework. Part VI will conclude that Florida should recognize personhood for pre-embryos to facilitate dispute resolution and to respect life.

II. CURRENT TREATMENT OF PRE-EMBRYOS

Some courts, state legislatures, and foreign lawmakers have already addressed the treatment of pre-embryos in assisted reproduction disputes. Some courts have taken a position on what legal status should be accorded to pre-embryos, while others have glossed over any specific articulation of a legal status and simply considered the progenitors' rights. Some states and countries have enacted legislation to guide parties entering into IVF, while most others have not

Technology: A Review of Selected Developed Countries, 91 FERTILITY & STERILITY 2281, 2291 (2009).

15. See Upchurch, *supra* note 3, at 397.

16. Throughout this Note, the pre-embryo may be referred to as "potential life" or a "life." Both terms refer to the pre-embryos at issue; however, while most courts denote the pre-embryo as a "potential life," I will refer to the pre-embryo as a "life" where my view is expressed.

legislated on the issue. There has not been a consensus regarding the treatment of pre-embryos by the majority of courts and governments. This Part will summarize the major cases that have dealt with pre-embryo disputes, the different frameworks courts have employed, and laws of several states and foreign countries that govern the treatment of pre-embryos.

A. *First Impression for Treatment of Pre-Embryos*

The first case to resolve a dispute over pre-embryos was *York v. Jones* in 1989. In this case, a couple sought to have their frozen pre-embryos transferred from a medical college in Virginia to California, and it was disputed whether the couple retained control of their pre-embryos.¹⁷ The U.S. District Court for the Eastern District of Virginia regarded the issue as a property dispute and resolved this case based on the bailor-bailee relationship between the Yorks and the medical college.¹⁸ The court considered that “[t]he 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,”¹⁹ which would require the medical college to release the pre-embryos to the Yorks. Thus, they were able to transfer the pre-embryos to another institute for the purpose of pursuing pregnancy.²⁰

The court in *York* took for granted the status of the pre-embryo as property, so the court did not present potential frameworks or analyze competing legal interests in the resolution of this dispute. This case was also distinct from most pre-embryo cases, which involve disputes between couples over disposition of the pre-embryos they have jointly created. The first case to consider such a dispute and articulate a standard to provide guidance for future courts in resolving pre-embryo disputes was *Davis v. Davis* in 1992.

Davis involved a dispute between Mary Sue Davis and Junior Davis over the disposition of seven frozen pre-embryos following the couple’s divorce.²¹ The couple had trouble bringing a child to term and, after pursuing adoption without success, began the process of IVF.²² Mary Sue underwent several unsuccessful IVF procedures to transfer pre-embryos into her uterus.²³ The couple then decided to cryogenically preserve the pre-embryos but did not make an agree-

17. *York v. Jones*, 717 F. Supp. 421, 424 (E.D. Va. 1989).

18. *Id.* at 425.

19. *Id.* (citing 8 AM. JUR. 2D *Bailments* § 178 (1980)).

20. *Id.*

21. *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

22. *Id.* at 591.

23. *Id.*

ment about storage or disposition of the frozen pre-embryos in the event of “contingencies.”²⁴ The lack of foresight about contingencies was precisely the issue in this case. Following the couple’s divorce, Mary Sue still wanted to implant the pre-embryos to bear children, but Junior preferred to leave them frozen until he decided whether or not he wished to become a parent.²⁵

There was a dispute in the trial court regarding the semantics of the pre-embryos at issue.²⁶ Because this was a case of first impression, there was no guidance for the court in determining how the pre-embryos should be treated, or what terminology was appropriate. “[S]emantical distinctions are significant in this context, because language defines legal status and can limit legal rights.”²⁷ Ultimately, the trial court held that “human life begins at the moment of conception” and invoked the doctrine of *parens patriae* to find for the best interest of the child and award custody of the pre-embryos to Mary Sue.²⁸

The Court of Appeals reversed this decision, finding that awarding custody to Mary Sue would violate Junior’s constitutional right not to procreate and that “there [was] no compelling state interest to justify [] ordering implantation against the will of either party.”²⁹ The appellate court remanded for the trial court to resolve this case under the view that the parties had joint control over the disposition.³⁰

The Supreme Court of Tennessee reviewed the case to give more guidance on this developing area of law. By this point, the parties’ views had changed; Mary Sue sought to donate the pre-embryos to another couple, while Junior wanted to discard them.³¹ The court declared that there was no statute or common law precedent to guide the decision and presented various models that medical-legal scholars and ethicists proposed regarding the treatment of pre-embryos:

Those models range from a rule requiring, at one extreme, that all embryos be used by the gamete-providers or donated for uterine transfer, and, at the other extreme, that any unused embryos be automatically discarded. Other formulations would vest control in the female gamete-provider—in every case, because of her greater physical and emotional contribution to the IVF process, or perhaps only in the event that she wishes to use them herself. There are also two “implied contract” models: one would infer from enroll-

24. *Id.* at 592.

25. *Id.* at 589.

26. *Id.* at 592-93.

27. *Id.* at 592.

28. *Id.* at 594.

29. *Id.* at 589 (second alteration in original).

30. *Id.*

31. *Id.* at 590.

ment in an IVF program that the IVF clinic has authority to decide in the event of an impasse whether to donate, discard, or use the “frozen embryos” for research; the other would infer from the parties’ participation in the creation of the embryos that they had made an irrevocable commitment to reproduction and would require transfer either to the female provider or to a donee. There are also the so-called “equity models”: one would avoid the conflict altogether by dividing the “frozen embryos” equally between the parties, to do with as they wish; the other would award veto power to the party wishing to avoid parenthood, whether it be the female or the male progenitor.³²

The court conceded that each of these models would provide a bright-line rule, but it declined to adopt any.³³ The court then discussed the legal status of the pre-embryo, noting that the status dictates the decision-making authority of the parties, and the scope of the decision-making authority is crucial to how courts will resolve these cases.³⁴ The court considered three ethical positions set out by the American Fertility Society. The first view asserted that the pre-embryo is a human being at the time of fertilization and should be accorded rights of a person.³⁵ Under this view, all pre-embryos would have the opportunity for implantation and development, and any action that would harm the pre-embryo would be prohibited.³⁶ The second view asserted that the pre-embryo is nothing more than human tissue and should not receive protection from any action.³⁷ The third view asserted that the pre-embryo deserves special respect because of its potential for human life, while recognizing that the pre-embryo is not yet a fully formed individual warranting the protection of personhood.³⁸ The court rejected both extremes, refusing to recognize personhood or give the pre-embryo a property status.³⁹ Thus, the court concluded that pre-embryos “occupy an interim category that entitles them to special respect because of their potential for human life.”⁴⁰ Based on this status, both Mary Sue and Junior had decision-making authority regarding the disposition of the pre-embryos.

The court then set up a framework for resolving pre-embryo disputes. First, the court would presume valid and enforce any agreement regarding disposition of pre-embryos in the event of contingen-

32. *Id.* at 590-91 (footnotes omitted).

33. *Id.* at 591.

34. *Id.* at 597.

35. *Id.* at 596.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 597.

40. *Id.*

cies such as death of either or both parties, divorce, changes in financial situation, or abandonment of IVF altogether.⁴¹ However, the parties would retain the ultimate decision-making authority and be able to modify initial agreements with mutual consent.⁴² If the parties could not agree on modification, the initial agreement would be enforced.⁴³ If there was no prior agreement, the court would balance the parties' interests, weighing the interests of the parties in seeking procreation or avoiding procreation.⁴⁴ Under this balancing test, courts would place greater weight on the rights of the party wishing to avoid procreation so long as the other party had alternate means of achieving parenthood.⁴⁵

In this case, since there was no agreement concerning disposition, and the parties were at an impasse, the court balanced Junior's right to avoid procreation and Mary Sue's right to procreate.⁴⁶ The court held that the burden on Junior—of unwanted fatherhood or having his pre-embryos develop into children and potentially grow up in a single-parent home—was greater than the burden on Mary Sue—of having undergone invasive IVF procedures and losing the opportunity to have her pre-embryos develop into children for another couple.⁴⁷

B. Major Cases and Mixed Models

Since *Davis*, many courts have used the decision as a starting point for their analyses in resolving pre-embryo disputes. However, most cases have included prior agreements between the parties, unlike *Davis*, and thus the courts have focused more on the enforceability of pre-embryo agreements. In cases involving such prior agreements, courts have either enforced them or refused to enforce them, often in favor of the party wishing to avoid procreation. Additionally, many courts have not characterized the legal status of the pre-embryos, choosing to defer to the status set out by any IVF agreement or declaring that the status does not have much of an effect on the parties' decision-making authority over the pre-embryos. Moreover, courts have commonly weighed the parties' respective

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 603. On a rare occasion, in *Reber v. Reiss*, this framework led to an outcome in favor of the party seeking procreation. 42 A.3d 1131 (Pa. Super. Ct. 2012). In *Reber*, the Superior Court of Pennsylvania granted the ex-wife possession of the pre-embryos. *Id.* at 1142. The court considered that she endured chemotherapy for breast cancer and that she believed she was incapable of having children. *Id.* at 1132-34. Thus, the court concluded that under the balancing test her right to procreate outweighed the ex-husband's right to avoid procreation. *Id.* at 1142.

46. *Davis*, 842 S.W.2d at 603.

47. *Id.* at 604.

interests even where there was a prior agreement, contrary to what *Davis* suggests. By doing so, the majority of courts have ruled in favor of the party wishing to avoid procreation, regardless of the model adopted.

1. *Enforcing Prior Agreements*

In *Kass v. Kass*, an issue arose before the New York Court of Appeals involving the disposition of five frozen pre-embryos of a divorced couple.⁴⁸ Unlike in *Davis*, this couple had entered into a contract at the outset of the IVF process.⁴⁹ The Kass couple agreed that upon divorce or other contingency the pre-embryos would be donated to the IVF program for research purposes.⁵⁰ The agreement specified that legal ownership of the pre-embryos was to be determined in a property settlement in the event of a dispute.⁵¹ When the couple divorced, the ex-wife wished to have the pre-embryos implanted to achieve pregnancy,⁵² while the ex-husband sought specific performance of the agreement.⁵³ The court expressed that it had no cause to decide whether the pre-embryos deserved special respect, as the *Davis* court did, because the parties' authority over the pre-embryos was established by the agreement.⁵⁴ Following the *Davis* framework as applied to contract enforcement, the court held that the agreement signed by the parties plainly reflected their joint intention to donate the pre-embryos to the IVF program and should be enforced.⁵⁵

Similarly, in *Roman v. Roman*, the Texas Court of Appeals applied the *Davis* framework to enforce a prior agreement between a couple which provided for the pre-embryos to be discarded in the event of divorce.⁵⁶ The court did not independently analyze the status of the pre-embryos but accepted the status conferred by the contract that identified them as the joint property of the couple.⁵⁷ The court reasoned that written embryo agreements are valid and enforceable so long as the parties have the opportunity to withdraw consent to the terms of the agreement.⁵⁸

48. 696 N.E.2d 174 (N.Y. 1998).

49. *Id.* at 175.

50. *Id.* at 177.

51. *Id.* at 176.

52. *Id.* at 175.

53. *Id.* at 177.

54. *Id.* at 180.

55. *Id.* at 175.

56. 193 S.W.3d 40, 54-55 (Tex. App. 2006).

57. *Id.* at 51.

58. *Id.* at 48.

In *Litowitz v. Litowitz*, the parties were required to petition the court for instructions about the disposition of the pre-embryos when they could not reach an agreement.⁵⁹ The Supreme Court of Washington enforced the cryopreservation contract providing that the pre-embryos be thawed out and not allowed to develop.⁶⁰ In this case, the court enforced the contract over the objection of both parties, who each sought procreation; the ex-husband wished to donate the pre-embryos to an adoptive couple, and the ex-wife sought to implant them in a surrogate.⁶¹

Finally, in *Szafranski v. Dunston*, the Illinois Court of Appeals considered the various approaches available for a dispute over pre-embryos between a girlfriend and boyfriend.⁶² The court held that the best approach was to honor the parties' own mutually expressed intent in a prior agreement as valid and binding.⁶³ The court stated that, had it decided to balance the parties' interests, the outcome would have been in favor of the girlfriend because she had no alternate means of conceiving a child due to chemotherapy.⁶⁴ It dually noted that, had it adopted the contemporaneous mutual consent approach, the case would have come out in favor of the boyfriend because he would have withheld consent to implantation of the pre-embryos.⁶⁵ Thus, *Szafranski* is another rare case in which the party seeking to procreate prevailed.⁶⁶

2. *Refusing to Enforce Agreements*

In *A.Z. v. B.Z.*, the Supreme Judicial Court of Massachusetts declined to enforce a consent form wherein a couple mutually agreed that the remaining frozen pre-embryos should be returned to the ex-wife for implantation in the event of separation.⁶⁷ The court considered that *Davis* and *Kass* presumed prior agreements to be valid and enforceable, but it reasoned that the consent form did not express the mutual intention of the parties regarding disposition and thus was not an enforceable contract.⁶⁸ Moreover, the court declared that even if the couple entered into an unambiguous pre-embryo agreement, it would not enforce the contract against the will of either party for

59. 48 P.3d 261, 264 (Wash. 2002).

60. *Id.* at 268.

61. *Id.* at 264.

62. 993 N.E.2d 502, 514 (Ill. App. Ct. 2013).

63. *Id.*

64. *See id.* at 505-06, 514.

65. *Id.* at 514.

66. *Id.* at 504.

67. 725 N.E.2d 1051, 1054, 1059 (Mass. 2000).

68. *Id.* at 1055-56.

public policy reasons.⁶⁹ The court did not consider the legal status of the pre-embryo but rested the decision on the parties' rights to enter into familial relationships.⁷⁰

Similarly, in *J.B. v. M.B.*, the Supreme Court of New Jersey refused to enforce both an oral agreement between the parties regarding disposition of pre-embryos, as well as the consent form signed by the parties.⁷¹ The ex-husband claimed that the parties discussed and agreed that the pre-embryos would be utilized by them or another infertile couple, consistent with his religious views; however, the ex-wife denied that such an agreement existed.⁷² The court ruled in her favor based on her interest to avoid procreation and held that a "formal, unambiguous memorialization of the parties' intentions would be required to confirm their joint determination."⁷³ The consent form relinquished the pre-embryos to the IVF program if dissolution of marriage occurred, but the form was found to be too ambiguous to manifest mutual intent about disposition.⁷⁴ The court declared that agreements entered into at the commencement of IVF should be enforced, subject to either party changing his or her mind about disposition, and if there is disagreement about disposition, the interests of both parties must be evaluated.⁷⁵

Finally, in *In re Marriage of Witten*, the Supreme Court of Iowa considered whether the parties' agreement was enforceable where one party changed his or her mind.⁷⁶ Initially, the court analyzed whether pre-embryos had the legal status of children for purposes of applying a best interest of the child standard.⁷⁷ The court held that the standard did not fit this case because the issue was not the custody of children, but rather who had decision-making authority over the pre-embryos.⁷⁸ This court, like in *J.B.*, held that it would be a violation of public policy to enforce an agreement regarding disposition of pre-embryos when a party changed his or her mind.⁷⁹ Furthermore, public policy concerns about imposing unwanted

69. *Id.* at 1058.

70. *Id.* at 1059.

71. 783 A.2d 707, 714, 719-20 (N.J. 2001).

72. *Id.* at 710.

73. *Id.* at 714.

74. *Id.* at 713.

75. *Id.* at 719.

76. 672 N.W.2d 768, 773 (Iowa 2003).

77. *Id.* at 775.

78. *Id.* at 776 (noting that *Davis* held that pre-embryos were neither "persons" nor "property" for purposes of determining the parties' decision-making authority about disposition).

79. *Id.* at 781. "Only when one person makes known the agreement no longer reflects his or her current values or wishes is public policy implicated." *Id.* at 783.

parenthood would be implicated by the application of the balancing approach, which left this emotional, personal decision up to courts.⁸⁰ In support of the contemporaneous mutual consent approach, the court asked, “[A]t what time does the partners’ consent matter?”⁸¹ It reasoned that under this approach, the parties’ current views should replace original agreements because compelled parenthood imposes an unwanted identity on a person—forcing them to redefine their lives, their place in the world, and their legacy⁸²—while acknowledging that “mandatory destruction of an embryo can have equally profound consequences, particularly for those who believe that embryos are persons . . . [as] loss of a child . . . can lead to life-altering feelings of mourning, guilt, and regret.”⁸³ Accordingly, the court concluded that when couples cannot reach a contemporaneous mutual agreement, the pre-embryos are to remain frozen.⁸⁴

C. State Legislation Concerning IVF

Various jurisdictions have adopted different frameworks for deciding pre-embryo disputes. Most IVF treatments occur at private clinics that usually require a couple seeking IVF to indicate their decision regarding disposition on the clinic’s informed consent form.⁸⁵ However, the cases summarized above demonstrate how states differ on the enforcement of such agreements. While many state courts have addressed the issue, there has been relatively little state legislation in this area. Some states have enacted legislation addressing IVF, but none has answered the question of custody of the pre-embryos in the event that a couple divorces or cannot reach an agreement on disposition.⁸⁶

Florida has enacted legislation requiring that a commissioning couple enter into an agreement concerning disposition prior to IVF treatment. Section 742.17, *Florida Statutes*, regarding disposition of eggs, sperm, or pre-embryos, provides:

A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the

80. *Id.* at 779.

81. *Id.* at 777 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 91 (1999)).

82. *Id.* at 778 (citing Coleman, *supra* note 81, at 96-97).

83. *Id.*

84. *Id.* (citing Coleman, *supra* note 81, at 110-12).

85. Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One’s Mind*, 12 DUKE J. COMP. & INT’L L. 75, 81 (2002).

86. *Id.* at 82.

commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.

(1) Absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm.

(2) Absent a written agreement, decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.

(3) Absent a written agreement, in the case of the death of one member of the commissioning couple, any eggs, sperm, or preembryos shall remain under the control of the surviving member of the commissioning couple.⁸⁷

While providing that the pre-embryos remain under the control of the parties and that the parties have joint decision-making authority, this statute does not recognize a status for pre-embryos. Furthermore, this statute leaves unclear how a case would be resolved if a couple failed to reach an agreement about disposition, and it does not identify the binding nature of the agreement between the parties.⁸⁸

New Hampshire has enacted legislation regulating gestational surrogacy so that a gestational surrogate does not have any rights to the child and must agree to carry the child to term.⁸⁹ New Hampshire legislation identifies contingencies, such as divorce, only to say that a change of marital status would not have any effect on an agreement with a gestational surrogate.⁹⁰

Louisiana is the only state that has enacted strict regulations regarding the status of pre-embryos, recognizing them as juridical persons⁹¹ with certain rights granted by law.⁹² Because a pre-embryo is considered to be a person under Louisiana law, the State prohibits intentional destruction of a pre-embryo by a natural person, physician, or clinic after the pre-embryo has been allowed to develop for a short period wherein the cells begin to divide.⁹³ Furthermore, Louisiana provides that IVF patients seeking treatment owe pre-embryos a high duty of care, and if they no longer wish to become parents at some point prior to implantation, the pre-embryos should be donated

87. FLA. STAT. § 742.17 (2015).

88. Shapo, *supra* note 85, at 82.

89. N.H. REV. STAT. ANN. § 168-B:13 (2014).

90. *Id.* ("The marriage or partnership of a gestational carrier after she executes a gestational carrier agreement does not affect the validity or the terms of the gestational carrier agreement, and her spouse or partner shall not be a parent of the resulting child.")

91. LA. STAT. ANN. § 9:129 (2015).

92. § 9:121.

93. *See* § 9:129.

to another couple for implantation and adoption.⁹⁴ Finally, Louisiana lawmakers anticipated disputes over custody of pre-embryos and enacted legislation requiring courts to resolve cases in the best interest of the “in vitro fertilized ovum,”⁹⁵ a byproduct of the best interest of the child standard.

D. *European Laws Governing IVF*

Many countries in Europe have regulated IVF to various degrees; the United Kingdom, for example, provides loose regulation, while other countries criminalize acts that are common in the practice of IVF. In the United Kingdom, the primary concern with regard to IVF regulation is consent by the parties.⁹⁶ The Human Fertilisation and Embryology Act of 2008 (HFEA) does not prohibit any form of destruction or impose any marital status restriction on commissioning couples.⁹⁷ Furthermore, HFEA provides that frozen pre-embryos will be discarded ten years after their creation, unless both parties consent to continued storage.⁹⁸

France prohibits the creation of pre-embryos for research purposes and imposes strict regulations on the use of pre-embryos for research.⁹⁹ Additionally, France prohibits surrogacy¹⁰⁰ and limits IVF access to married or committed heterosexual couples for infertility treatment.¹⁰¹ The Bioethics Law of 2004 is one of several laws regulating IVF in France.¹⁰² It sets out the values of “(i) respect for the dignity of the human embryo; (ii) respect for all stages of life; and (iii) respect for human rights.”¹⁰³ However, this law does not include specific provisions about the destruction of pre-embryos created for IVF purposes.¹⁰⁴

The German Act on the Protection of Embryos, among other things, prohibits fertilizing more than three eggs in one cycle, trans-

94. § 9:130.

95. § 9:131.

96. See Shapo, *supra* note 85, at 98; Memorandum from White & Case LLP to the Center for Reproductive Rights 31 (Feb. 25, 2009), http://www.federa.org/pl/dokumenty_pdf/invitro/jbf_European_laws_governing_in_vitro_fertilization%5B2%5D.pdf [hereinafter Memorandum].

97. Memorandum, *supra* note 96, at 33-34.

98. *Id.* at 34.

99. *Id.* at 8.

100. *Id.* at 9.

101. *Id.* at 8. IVF is only available if a couple is infertile, if there is a risk of transmitting a disease through natural reproduction, or if a party anticipates medical procedures would affect fertility. *Id.*

102. *Id.* at 6.

103. *Id.* (footnote omitted).

104. *Id.* at 8.

ferring more than three pre-embryos to a woman's uterus per cycle, and fertilizing more eggs than are planned to be implanted in one cycle.¹⁰⁵ German law prohibits creating a pre-embryo for any reason other than to cause pregnancy and restricts IVF methods to married couples.¹⁰⁶ Furthermore, German law generally does not allow for cryopreservation of pre-embryos; however, in limited cases where surplus pre-embryos are stored, German courts have not decided whether destruction of pre-embryos is prohibited by the Act.¹⁰⁷ Punishment for violating restrictions ranges from monetary fines to three years in prison.¹⁰⁸

Italian law is similar to German law in many respects. Italy limits the number of pre-embryos that can be created to three, requiring contemporaneous implantation, which may reduce the likelihood of conception per cycle.¹⁰⁹ Additionally, Italy limits IVF access to "stable" heterosexual couples.¹¹⁰ Furthermore, it prohibits cryogenic preservation, except in limited cases where transfer is delayed because of health reasons.¹¹¹ In such cases, the law provides that implantation should occur as soon as possible and imposes monetary fines or prison sentences for the violation of any provision.¹¹² Italy also grants rights to the pre-embryos as conceived persons.¹¹³

France, Germany, and Italy provide more stringent regulation to promote respect for life at all stages, protect the intentions of the parties entering into IVF, and prevent people from utilizing the process for reasons other than procreation. The laws ensure that the results of IVF procedures match the parties' intentions when seeking treatment. When there is no regulation to support such values, problems may arise that are harmful to pre-embryos and individuals engaging in IVF.

III. PROBLEMS WITH CURRENT TREATMENT OF PRE-EMBRYOS

Currently, the law does not offer one answer as to how courts should treat pre-embryos, but many. Yet the very nature of IVF makes the need for more meaningful regulation apparent. IVF procedures produce many more pre-embryos than a couple intends to use

105. *Id.* at 11; see Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1458 (2008).

106. See Memorandum, *supra* note 96, at 12, 18.

107. *Id.* at 18.

108. *Id.* at 12.

109. *Id.* at 22-23.

110. *Id.* at 23; see Rao, *supra* note 105, at 1458-59.

111. Memorandum, *supra* note 96, at 22-23.

112. *Id.* at 23-24.

113. See *id.* at 22.

for immediate implantation, and excess pre-embryos may be stored for an indeterminate amount of time.¹¹⁴ The preservation of pre-embryos carries the practice of IVF into unknown future circumstances, allowing time for parties to change their minds, opinions, and desires.¹¹⁵ Regardless of whether couples create agreements that anticipate future disposition, the availability of indefinite storage can lead to heated litigation when commissioning couples disagree about the disposition of the pre-embryos they have created.¹¹⁶

The current models for resolution of pre-embryo disputes lead to harmful outcomes for various parties involved because litigation transfers the decision to have a child to the court. Judicial interference is particularly damaging given the deeply moral and personal questions at stake in pre-embryo disputes, including individual interests in procreating and differing beliefs about when human life begins.¹¹⁷ Worse, courts have not adopted a national, uniform standard for resolving disputes or for understanding the legal status of pre-embryos; therefore, people entering into IVF cannot have clear expectations regarding their interest in the pre-embryos and the result of possible disputes. The trend is for courts to adopt whichever model will avoid procreation, so one or both parties are nearly always deprived of the right to procreate, and the pre-embryos themselves are nearly always deprived of the right to life.

A. *Lack of Uniformity of Model*

Inevitably, pre-embryo disputes involve many moving parts: deeply emotional and personal decisions that will affect the parties' futures, state interests in potential life, rapidly advancing technologies, and ethical considerations.¹¹⁸ Such factors make it difficult for courts to resolve these disputes and lead to the inconsistent application of available models to resolve cases. The line of cases dealing with pre-embryo disputes has established a set of models including the contractual approach, contemporaneous mutual consent, and balancing of interests. As *Szafranski* indicates, the outcome of pre-embryo disputes rests almost entirely on the approach the

114. See Tamar Lewin, *Industry's Growth Leads to Leftover Embryos, and Painful Choices*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html?emc=eta1> ("The embryos with the greatest chance of developing into a healthy baby are used first, and the excess are frozen; a 2002 survey found about 400,000 frozen embryos, and another in 2011 estimated 612,000. Now, many reproductive endocrinologists say, the total may be about a million.")

115. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998).

116. See *id.*

117. See *In re Marriage of Witten*, 672 N.W.2d 768, 779 (Iowa 2003); *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992).

118. See *id.* at 591.

court adopts, and courts are at liberty to choose which outcome-determinative approach to apply.¹¹⁹ The variety of approaches and divergent positions taken by different jurisdictions leaves little guidance for courts facing similar cases in the future.

The lack of uniformity and clarity limits predictability in the resolution of disputes. Yet predictability is often necessary to allow couples and IVF providers the opportunity to plan for future disposition, calculate potential liability, and anticipate the outcome of disputes.¹²⁰ When courts may choose whether to enforce prior agreements or to determine the parties' intentions and balance interests, parties remain uncertain about which model a court will apply in the event of a dispute. This uncertainty may cause people to be more hesitant about entering into pre-embryo agreements or to have less confidence that their interests will be protected later because courts have a tendency to employ whichever approach leads to avoiding procreation, regardless of whether it is consistent with either or both of the parties' interests. For example, the court in *Kass* deemed it appropriate to enforce a prior agreement favoring donation of the pre-embryos for research;¹²¹ the court in *A.Z.* refused to enforce the prior agreement without both parties' subsequent consent, favoring non-use of the pre-embryos;¹²² and the court in *Litowitz* chose to enforce a prior agreement to discard the pre-embryos, even when both parties desired that the pre-embryos be implanted and develop.¹²³

The potential threat to parties' right to procreate is also evident in the balancing of interests model. For example, *Davis* makes conclusions about the burdens that would be endured by each party if the right they were seeking to exercise was infringed, while maintaining that "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."¹²⁴ The court sympathized with Junior Davis's plight of not wanting to be a genetic father, even though its rationale for according more weight to Junior's rights than Mary Sue's was tenuous considering the intense IVF procedures that Mary Sue underwent.¹²⁵ The

119. See *Szafranski v. Dunston*, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013).

120. See *id.* at 515 (citing the recommendation by the American Medical Association that parties enter into prior agreements about the disposition of pre-embryos in the event of changes in circumstances, which would require parties to consider their desires and contemplate the consequences of the IVF process).

121. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

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

123. *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002).

124. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992).

125. *Id.* at 591. "We are not unmindful of the fact that the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men." *Id.* at 601. For Mary Sue, this process included numerous injections in spite of her fear of needles, aspiration procedures

court stated, "While this is not an insubstantial emotional burden, we can only conclude that Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood."¹²⁶ The court did not consider any personal reasons that Mary Sue might have had for desiring not to destroy the pre-embryos. Moreover, the court assumed that Mary Sue should be equally as comfortable with adoption after she was able to create pre-embryos of her own as she was before she was given the unique opportunity to exercise her procreative freedom.¹²⁷ This case illustrates a clear risk that courts might arbitrarily balance interests to align with the more sympathetic party and decline to protect equivalent constitutional rights equally.

Employing a uniform approach to resolve disputes would protect parties' mutual interests, guarantee predictability of outcomes, preserve parties' fundamental rights, and prompt more careful consideration in contracting before entering into IVF.

B. Lack of Uniformity of Status

In addition to a lack of uniformity among courts' selection and application of dispute resolution models, there is no consensus regarding the legal status of pre-embryos. Even though *Davis* asserted that granting pre-embryos special respect was the most widely held view and the most appropriate view to adopt,¹²⁸ this view has not been uniformly applied. Many courts do not analyze the independent status of the pre-embryo, while others operate as if it is property or a person. When the legal status of the pre-embryo is not uniformly defined, parties and providers are uncertain about which rights are implicated and which interests attach at the time a pre-embryo is created. This may lead to injury when parties feel that their expectations are hindered or their rights are violated. To avoid such problems, there should be a uniform legal status for pre-embryos; however, there are disadvantages to characterizing pre-embryos as property or giving them special respect.

Under a property view, the potential for life of the pre-embryo is not considered, nor are the constitutional interests of the commissioning couple in that life.¹²⁹ When pre-embryos are considered property, essentially all that matters to resolve disputes is contract interpretation, enforceability of contracts, and marital property

to retrieve her eggs, procedures to transfer the pre-embryos to her uterus, and the trauma of receiving negative pregnancy tests after undergoing this procedure. *Id.* at 591-92.

126. *See id.* at 604.

127. *Id.*

128. *Id.* at 596-97.

129. *See* Upchurch, *supra* note 3, at 401.

law.¹³⁰ These models could be very complicated because enforcement of a contract between parties could implicate procreation, even without explicit recognition of the potential for life. Moreover, while marital property law might ease dispute resolution by dividing the pre-embryos equally between both parties, it could equally violate one or more parties' interests because a party could choose to utilize or destroy a pre-embryo, exercising a procreative liberty without consent. Under a property view, parties would not be able to make an argument about infringement of their procreative freedom or about the potential for life.¹³¹ Furthermore, if pre-embryos are viewed as any other human tissue, it is impossible to limit the actions that can be taken, including methods of destruction, research, and experimentation,¹³² thereby devaluing the life at issue.

Davis asserted that this potential for life converts the nature of the pre-embryo to a hybrid characterization as human tissue that should be accorded special respect.¹³³ This status aims to promote greater respect for the pre-embryo than for other human tissue because of its "potential to become a person and because of its symbolic meaning for many people."¹³⁴ It does not, however, accomplish this purpose in any practical manner because the status does not have the effect of granting any more respect to the pre-embryo. The resolution of most cases, even when this status is assumed, is still that the pre-embryo is destroyed. *Reber* and *Szafranski* are the only cases to accord more respect to pre-embryos; yet the results in those cases had little to do with respect for the pre-embryos. In *Reber* and *Szafranski*, the courts balanced the parties' interests in favor of the women seeking to procreate because they did not have alternate means of exercising their procreative rights.¹³⁵

Under *Davis*, the recognition of special respect was a means of establishing the parties' fundamental privacy and procreative rights in relation to the pre-embryo, while leaving the status of the pre-embryo essentially the same. The special respect status triggers procreation interests, allowing parties to contract around disposition. It grants couples "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law," which is distinct from a true property interest.¹³⁶ Yet, in applying the special respect

130. *Id.*

131. *Id.*

132. *Davis*, 842 S.W.2d at 596.

133. *Id.* at 597.

134. *Id.* at 596.

135. *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. App. Ct. 2013); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

136. Upchurch, *supra* note 3, at 404 (quoting *Davis*, 842 S.W.2d at 597).

status and the interests vested by it, pre-embryos have actually been treated “more as property than as a person.”¹³⁷

As evidenced by the cases employing property or special respect statuses, “courts have been unable to articulate a status for the embryo that provides for a workable solution to the dispute while simultaneously preserving respect for the unique attributes of the embryo.”¹³⁸ For this reason, granting pre-embryos the legal status of persons might be the best approach to create a uniform status and establish an effective model for dispute resolution. Under the personhood approach, the party seeking procreation would nearly always receive custody of the pre-embryo,¹³⁹ and the pre-embryo would be accorded legal rights.

IV. RESOLUTION

To solve the problems that arise in pre-embryo disputes, Florida should enact legislation to establish that a pre-embryo has the legal status of a person. This legal status would grant pre-embryos constitutional protections, alter the decision-making authority of commissioning couples, require regulation of IVF providers, and provide better guidance for courts in resolving disputes. Additionally, this status would solve the problems with pre-embryo disputes by providing predictability to the parties involved and helping them anticipate future responsibilities and potential liabilities before entering into IVF.

A. State's Authority to Regulate

The starting point of this analysis is where the State derives its power to regulate in the area of assisted reproductive technology, and IVF more specifically. Before this question can be answered, the right to use IVF must be located within U.S. Supreme Court precedent.

1. State May Regulate Due Process and Equal Protection Rights

Many scholars assume that the right to use IVF flows from the fundamental right to procreate.¹⁴⁰ The Supreme Court articulated the fundamental right to procreate in *Skinner v. Oklahoma*¹⁴¹ and placed that right within the privacy interest of an individual in *Eisenstadt v.*

137. *Id.* at 405.

138. *Id.* at 397.

139. *See id.* at 402 (explaining that for a court to find for the party who does not wish to implant the embryo, “the court would have to find that being given the possibility to develop into a fetus and eventually be born as a human being would not be in the best interest of the embryo”).

140. Rao, *supra* note 105, at 1459.

141. 316 U.S. 535, 541 (1942).

Baird.¹⁴² In *Eisenstadt* the Court stated, “If 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.”¹⁴³ This precedent establishes that the government may intrude on the right to privacy by regulating IVF when it is warranted. Additionally, *Eisenstadt* may support the proposition that the right to use IVF does not fall within the scope of privacy rights. The right to privacy prohibits intrusion; thus government regulation intended to prevent access to certain technologies, without delving into personal matters, would not necessarily infringe on privacy.¹⁴⁴

Under the view that there is no constitutional right to procreate using IVF, “the government [is] completely free to regulate the field of fertility treatments.”¹⁴⁵ Radhika Rao has proposed the idea that there is no general right to utilize IVF, but any restriction must be equally applied to confer an equal right, in the absence of an absolute right.¹⁴⁶ Therefore, “a law banning or limiting [IVF] would not necessarily infringe the constitutional guarantee of equality.”¹⁴⁷

2. State Has Compelling Interest at Viability

If individuals have no constitutional right to use IVF, the State remains free to regulate and protect pre-embryos. However, even assuming that there is a fundamental right to procreate using IVF, the State may still have room to regulate. The relevant line of cases wherefrom a state derives the power to regulate IVF begins with *Roe v. Wade*.¹⁴⁸ In *Roe*, the Supreme Court established that a fetus is not a constitutional person and should not be granted independent rights and protections as a person.¹⁴⁹ *Roe* established a woman’s right to choose to have an abortion as falling under her fundamental right to privacy.¹⁵⁰ In addition, *Roe* established that the State can regulate to advance its interest in potential life at viability.¹⁵¹

With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful

142. 405 U.S. 438, 453 (1972).

143. *Id.*

144. Rao, *supra* note 105, at 1465.

145. *Id.* at 1459.

146. *Id.* at 1460.

147. *Id.* at 1467.

148. 410 U.S. 113 (1973).

149. *Id.* at 158, 161-62.

150. *Id.* at 153.

151. *Id.* at 163-64.

life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.¹⁵²

Florida similarly recognizes that the constitutional right to privacy protects a woman's right to choose an abortion;¹⁵³ but a compelling interest in protecting potential life attaches at the point of viability of the fetus.¹⁵⁴ Therefore, "[l]egislation that infringes on the right to privacy will be invalidated unless it can survive the compelling state interest test."¹⁵⁵

Davis applied the privacy rights accorded by *Roe*—and correspondingly by Florida—to the IVF context. *Davis* declared that there is no constitutional basis for considering the pre-embryo as a person because the "Supreme Court explicitly refused to hold that the fetus possesses independent rights under law."¹⁵⁶ However, the court noted that *Roe* and *Webster v. Reproductive Health Services* confirm a compelling state interest in potential life at the point of viability¹⁵⁷—when the fetus is capable of meaningful life outside the mother's womb.¹⁵⁸ Notably, the point of viability in abortion cases is distinct from viability in the IVF context. In IVF, a pre-embryo is inherently capable of meaningful life outside its mother's womb because it is created outside the mother's womb and has the potential to fully develop outside of the mother's womb if implanted in another woman's body. The argument for viability in IVF, then, is different than the understanding in the *Roe* line of cases, where viability was

152. *Id.*

153. *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001).

154. *See* *Burton v. State*, 49 So. 3d 263, 265 (Fla. 1st DCA 2010) ("The state's interest in the potentiality of life of an unborn fetus becomes compelling," so as to potentially overcome the mother's constitutional right to refuse medical intervention, "at the point in time when the fetus becomes viable,' defined as 'the time at which the fetus becomes capable of meaningful life outside the womb, albeit with artificial aid.'" (quoting *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989))); *see also In re T.W.*, 551 So. 2d at 1192-93 (holding that the State's interest in maternal health becomes compelling at the end of the first trimester so as to overcome women's privacy interests in abortion).

155. *Thomas v. Smith*, 882 So. 2d 1037, 1044 (Fla. 2d DCA 2004); *see also Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) ("When analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny," under which the State bears the burden of "demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.").

156. *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992).

157. *Id.*

158. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

inextricably linked to the biological mother's body. This difference provides a basis for the State to regulate as of the time a pre-embryo is created.

The decision in *Roe* rested heavily on infringement of a woman's bodily integrity and the burdens of unwanted motherhood.¹⁵⁹ In the same vein, *Roe's* progeny considered how the development of a life would affect the mother and possibly infringe on her reproductive freedom and bodily integrity. However, IVF presents concerns distinct from the bodily integrity argument in *Roe* and the cases that followed.¹⁶⁰ With IVF, the mother's bodily integrity is not necessarily implicated by the process after the pre-embryo has been created. A woman may decide not to go through with implantation and donate the pre-embryo to a third party, relinquishing any undesired parental status by allowing for adoption. Therefore, the State's compelling interest in the potential life of pre-embryos attaches at the time of fertilization in the laboratory, which signals their viability.

3. *Pre-Embryo Protection Is Consistent with Other Fetal Protections*

Recognizing that the State has a compelling interest in protecting a pre-embryo as of the time of fertilization is consistent with Florida's recognition of greater fetal protections in other areas of the law. For example, Florida grants protection in its fetal homicide laws, providing that the "unlawful killing of an unborn child . . . shall be deemed murder."¹⁶¹ Section 1.01(3), *Florida Statutes*, provides: "The word 'person' includes individuals, *children*, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."¹⁶² The use of the term "children" in the murder statute connotes a status of personhood that extends to fetuses in this context; the statute makes no indication that the term is intended to apply only to fetuses after the point of gestational viability.¹⁶³ Therefore, Florida's fetal homicide law recognizes that the State has a compelling interest in potential life, which gives the State authority to regulate before the point of gestational viability.

159. *See id.* at 153.

160. *See Rao, supra* note 105, at 1467-68.

161. FLA. STAT. § 782.09(1) (2015).

162. § 1.01(3) (emphasis added).

163. Gestational viability refers to the viability of a fetus in the mother's womb. This is a distinct concept from viability of a pre-embryo, which I argue, begins at fertilization because of the pre-embryo's potential for full development outside of the biological mother's womb.

Florida identifies varying degrees of protection for potential life, which allows it to assert personhood in the context of fetal homicide laws without compromising abortion rights. Similarly, the court in *Davis* recognized that potential life may receive varying degrees of protection. The court noted that while a viable fetus is not accorded protection against wrongful death, it is awarded some protection in the abortion context unless the mother's life is at risk and greater protection in a criminal context involving attack or homicide.¹⁶⁴ It is clear from such protections that Florida has an important interest in protecting human life, which becomes a compelling interest in certain contexts, like fetal homicide laws, and should become compelling in the IVF context. The State's interest in fetal personhood in criminal laws creates room to carve out pre-embryo personhood that does not contradict the State's position on abortion.

The State has authority to regulate IVF, even under various understandings of the right to procreate. Under the position that there is no fundamental right to assisted reproduction and that IVF does not constitute government intrusion into a person's body, the State may regulate IVF freely. Under the notion that there is a fundamental right to procreate using IVF, the State's interest must be compelling in order to justify infringement. The reason the State's interest is compelling in IVF is because of the nuanced understanding of viability in this context, which occurs at the time of fertilization in the laboratory. From this point, the State may regulate IVF in the interest of protecting human life.

B. Legislative Proposal and Implications

Florida should utilize its authority to regulate in the field of IVF and create a law that grants pre-embryos the legal status of persons, similar to the Louisiana statute that identifies pre-embryos as human beings.¹⁶⁵ This law would complement Florida's current legislation mandating that couples enter into an agreement with the physician prior to commencing IVF treatment;¹⁶⁶ however, it would alter this agreement in several respects. First, all agreements would have a clause recognizing the status of pre-embryos as persons and explicitly implicating the right to procreate.¹⁶⁷ Second, agreements would mimic the laws of Germany and Italy, providing that a maxi-

164. *Davis v. Davis*, 842 S.W.2d 588, 594-95 (Tenn. 1992).

165. LA. STAT. ANN. § 9:121 (2015) (defining "human embryo").

166. See FLA. STAT. § 742.17 (2015); see also discussion *supra* Section II.C.

167. There is discord among courts as to when the right to procreate is implicated. One view acknowledges that the right to procreate attaches at the point when the parties agree to fertilize the egg and create the pre-embryo; the opposing view sees the right to procreate as an ongoing choice initially implicated by the creation of the pre-embryo. Upchurch, *supra* note 3, at 408-09.

mum of three pre-embryos be fertilized at one time and requiring implantation of all fertilized pre-embryos at the same time. Third, the agreement would preclude the destruction of pre-embryos and only allow cryogenic preservation in exceptional circumstances. Finally, since section 742.17, *Florida Statutes*, does not provide guidance as to the enforceability of this agreement between parties, new legislation would ensure enforcement of prior agreements between the parties.

The American Medical Association (AMA) recommends that parties engage in serious discussions and consider all consequences before undergoing IVF.¹⁶⁸ Heeding this caution, couples commencing IVF treatment should regard this process very seriously and only enter into it with full willingness to become a parent. The clause identifying the pre-embryos as persons would cause the right to procreate to attach at the point that the parties agree to create any pre-embryos. The Ethics Committee of the American Fertility Society suggests that “[a] person’s liberty to procreate or to avoid procreation is directly involved in most decisions involving pre-embryos.”¹⁶⁹ The agreement between the parties and with the physician is the first decision involving pre-embryos. The action of providing genetic material pursuant to this agreement, with the intention that childbirth will result, is a direct exercise of an individual’s procreative liberty. Beyond this point, there should be no question of the donor’s liberty to exercise their procreative rights because of the manifest intent to procreate with knowledge that the procedures will likely result in conception and the birth of a child. This intent and knowledge would be sufficient to establish parental rights at the time the parties enter into the agreement. To this effect, proceeding with treatment would seriously limit the possible outcomes for a couple that later changes their mind regarding disposition. Because parties can waive constitutional rights via contract,¹⁷⁰ entering into the IVF agreement would preclude parties from later asserting a right not to procreate with regard to the disposition of any pre-embryos they created.

The limitation on the number of pre-embryos produced, the requirement of implantation, and the prohibition of cryogenic preservation would significantly speed up the IVF process. It would render IVF off limits to couples seeking to preserve pre-embryos for potential future use and postponement of reproduction, except in cases where imminent physical conditions would render someone infertile, as in *Reber* and *Szafranski*.¹⁷¹ These regulations would close the

168. See *Szafranski v. Dunston*, 993 N.E.2d 502, 515 (Ill. App. Ct. 2013).

169. *Davis*, 842 S.W.2d at 597.

170. *Szafranski*, 993 N.E.2d at 516.

171. *Id.* at 515; *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012).

window for couples' circumstances, values, and desires to change regarding the outcome of the IVF process and future disposition of pre-embryos. Inevitably, disputes would arise in some cases, which would lead courts to enforce contracts. The limitations on the creation and preservation of pre-embryos in this proposed legislation would require that disposition be limited to implantation by the commissioning couple or donation to an adoptive couple. Courts would be able to enforce contracts that satisfy either option chosen by the couple without balancing the interests and without contemporaneous mutual consent.

The AMA and courts have encouraged parties to make agreements about the disposition of frozen pre-embryos in the event of contingencies.¹⁷² Florida law establishes this as a requirement.¹⁷³ A contractual approach is beneficial both at the outset of the IVF process to memorialize the agreed intentions of the parties and at the dispute resolution phase to remove the court from making personal decisions for the parties.¹⁷⁴ Furthermore, it gives couples and IVF providers the certainty lacking in current dispute resolution models.

To answer the court's question in *Witten*,¹⁷⁵ under this legislation, the parties' mutual agreement at the time of contracting for IVF would be given greater deference than contemporaneous mutual consent—which, if achieved, would rarely give rise to litigation in the first place. Weighing consent at the time that parties agree to use IVF and contribute their genetic material for fertilization would provide the advantages of: 1) binding the parties to previous obligations despite changes in priorities or values; 2) guaranteeing that the outcome represents a meeting of the minds between the parties¹⁷⁶—possibly the only agreement between the parties throughout the course of the process and subsequent dispute; and 3) ensuring that this personal decision is one made by the parties, not a far-removed court.

This framework would lead to different outcomes than the current trend, not solely because of the certainty that prior agreements would be enforced, but because of additional considerations in a balancing of interests approach. Following *Davis*, courts have found a way to nearly always side with the party avoiding procreation. The interests, however, would look different under this proposed legislation because the right to procreate would already be exercised,

172. *Szafranski*, 993 N.E.2d at 506, 515.

173. FLA. STAT. § 742.17 (2015).

174. *Szafranski*, 993 N.E.2d at 506.

175. “[A]t what time does the partners’ consent matter?” *In re Marriage of Witten*, 672 N.W.2d 768, 777 (Iowa 2003).

176. Although, there has been concern over coercion and potential undue influence because of the close relation of the parties.

and the State would have an interest in protecting pre-embryos. Additionally, a pre-embryo's right to life may arise in the analysis if the court decided to balance all the parties' interests or if the court employed the best interest of the child standard.¹⁷⁷

One additional consideration regarding contract enforcement is that contracts should be enforced unless they violate public policy.¹⁷⁸ The court in *Witten* considered whether public policy favored the position that a party who agrees to enter into IVF may not later change his or her mind to become a parent.¹⁷⁹ The court pointed out that there was no state statute on point, but the "morals of the times"—based on precedent of other state courts that considered the issue—weighed in favor of the party avoiding procreation.¹⁸⁰ The court, therefore, determined that there was no public policy to favor using the pre-embryos over either party's objection.¹⁸¹

Conversely, in Florida, there is an existing statute requiring couples to enter into an agreement prior to commencing IVF. This mandatory contracting furthers public policy and promotes established societal interests. In addition, there is no federal or Florida precedent that would be violated by recognition of personhood for pre-embryos or regulation of IVF. Florida's compelling interest in protecting human life at the point of viability supports the proposition that the "morals of the times" call for legislation that promotes life. In regard to the proposed framework, public policy supports enforcing agreements and maintaining the legal status of pre-embryos as persons.

V. DEFENDING THE PROPOSITION

There are several notable objections to address in defense of this proposal. Initially, critics might point out that recognition of personhood of a pre-embryo violates long-standing precedent established with *Roe* and subsequent cases. As Part IV explains, recognition of personhood may be reconciled with *Roe* because IVF arises outside of

177. LA. STAT. ANN. § 9:131 (2015); see also discussion *supra* Section II.C.

178. See *Witten*, 672 N.W.2d at 779-80 ("The term 'public policy' is of indefinite and uncertain definition, and there is no absolute rule or test by which it can be always determined whether a contract contravenes the public policy of the state; but each case must be determined according to the terms of the instrument under consideration and the circumstances peculiar thereto. In general, however, it may be said that any contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy. We must look to the Constitution, statutes, and judicial decisions of the state, to determine its public policy and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy." (quoting *Liggett v. Shriver*, 164 N.W. 611, 612-13 (Iowa 1917))).

179. *Id.* at 780.

180. *Id.*

181. *Id.*

the privacy context of bodily integrity. Additionally, some may argue that regulating the decision-making authority of parents would constitute government intrusion into privacy rights given that parenting and family matters are subsumed in the fundamental right to privacy.¹⁸² However, the Fertility Society stated that the gamete providers should have the ultimate authority to make decisions regarding pre-embryos “in the absence of specific legislation.”¹⁸³ Accordingly, where there is legislation, such as that proposed here, it is reasonable that parents’ decision-making authority may be regulated. Moreover, a state may justifiably impact procreative autonomy through a public policy statement that describes the need for action.

Another objection may be that this status would hinder IVF treatment. *Davis*, for example, makes several sweeping statements that recognition of pre-embryos as persons would “doubtless” have the effect of outlawing IVF programs in Tennessee,¹⁸⁴ and that under this view, an agreement about disposition would “obviously” be unenforceable in the event of disagreement.¹⁸⁵ This Note rejects the *Davis* court’s assertions. IVF would not be outlawed, or rendered obsolete, because this treatment would still provide a fruitful means of procreation for people even without allowing for freezing, destruction, or donation to research. Storing, destroying, or researching pre-embryos does not further the purpose of IVF because these actions do not lead to the creation of a child; therefore, eliminating them would not frustrate IVF treatment. Moreover, this legislation would promote advances in IVF technology to find more effective means of achieving successful pregnancy and childbirth without long-term preservation of pre-embryos. Furthermore, an agreement between parties would still be enforceable so long as the language in the agreement was restricted to implantation in one of the parties or an adoptive parent.

Yet another possible objection is that limiting the number of pre-embryos created may increase costs and decrease the likelihood of resulting pregnancy, burdening the right to procreate. The right to procreate, however, would not be infringed by equally applied regulation because no one seeking to procreate would be automatically prevented from exercising this right. Regulation would instead pro-

182. See *D.M.T. v. T.M.H.*, 129 So. 3d 320, 335 (Fla. 2013) (holding that a person’s fundamental liberty interest in parenting is specifically protected by the state constitution’s privacy provision); *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004) (holding that there is a constitutionally protected interest in preserving the family and raising one’s children).

183. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); see also *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. Ct. App. 2006) (holding that parties may mutually agree on disposition of frozen, stored pre-embryos before entering into IVF).

184. *Davis*, 842 S.W.2d at 595.

185. *Id.* at 597.

mote the right to procreate because having a child, the only intended result of the IVF process, would be the only outcome possible in the event of successful treatment. Couples seeking solely to postpone reproduction would be limited to freezing eggs and sperm separately. While this may be less successful to treat infertility, there is no fundamental right to postpone reproduction; such regulation would not be a violation of an individual's right to procreate, but a limitation on the specific means of procreation.

VI. CONCLUSION

This Note presents a framework for IVF regulation that Florida, or any state, may adopt to prevent disputes about the disposition of pre-embryos and resolve disputes that inevitably arise, while promoting respect for human life. If the proposed legislation were adopted, other areas of IVF would need to be considered that are beyond the scope of this Note. One example is the question of how to deal with potentially millions of frozen, stored pre-embryos if they were to be considered human beings.¹⁸⁶

This Note advocates that public policy is served by recognition of personhood for pre-embryos and that Florida has a compelling interest in protecting potential life that extends to pre-embryos in the IVF context by virtue of their viability. In addition to this interest, Florida should consider that establishing the legal status of pre-embryos would prevent courts from choosing among outcome-determinative approaches that involve balancing individual's equal rights in seeking procreation and avoiding procreation. Additionally, this personhood model would clarify IVF providers' and progenitors' rights with regard to pre-embryos and encourage couples to anticipate near-certain parenthood resulting from the IVF process. This is consistent with the purpose of IVF, as people seeking treatment do so solely with the intention of creating a child. Accordingly, Florida should enact legislation to establish the legal status of pre-embryos as persons to promote continuity in IVF and protect life.

186. See Lewin, *supra* note 114 (noting that there are perhaps a million frozen pre-embryos currently stored in the United States).