

FROZEN PRE-EMBRYOS AND THE RIGHT TO CHANGE ONE'S MIND

HELENE S. SHAPO*

I. INTRODUCTION

Biological technology used for purposes of human reproduction has generated a number of issues involving contract law, genetic parenthood, and public policy. One such issue arises from disagreements about the fate of frozen embryos. This issue presents special challenges to the judicial process even though historically courts have had experience in applying reason to the most emotional of issues.

In recent decades, new methods of assisted reproduction using medical technology have enabled infertile couples to have a child who is biologically related to at least one parent. These technologies have also enabled individuals in same sex relationships and unmarried individuals to bear and raise children. Often labeled assisted reproductive technologies (ART), these techniques have become commonplace in modern, technologically sophisticated countries such as the United States, Israel, and the United Kingdom.

Disputes arising from the use of ART may involve couples or even three or more contestants. Among the ARTs that involve third parties are those utilizing artificial insemination of both married and unmarried women, sperm donation, and in vitro fertilization (IVF) involving egg or embryo donation. These techniques have required courts and legislatures to redefine the parent-child relationship—a task that becomes even more difficult when a child is brought into the world by a surrogate.¹ In the United States, most states have been slow to adopt legislation to resolve these issues; many states still have nothing more than their version of the 1973 Uniform Parentage Act,

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* J.D., University of Virginia. Professor of Law, Northwestern University School of Law. The author would like to thank Marshall Shapo and Susan Alexander for their able and helpful comments.

1. See generally Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997).

which includes only one section relevant to this issue: Section 5, on artificial insemination by donor (AID).²

This Article discusses the use of IVF by a husband and wife. This process involves the surgical removal of eggs from the wife and the in vitro fertilization of those eggs with the husband's sperm. Although this topic does not involve third parties to the conception of a child, like those attending uses of ART mentioned above, the legal issues involved are no less complex. Because IVF procedures may produce more fertilized eggs than can be implanted safely for gestation, a couple may leave unused pre-embryos³ at the IVF clinic to be frozen and stored. It has been estimated that tens of thousands of pre-embryos are frozen each year.⁴ This Article focuses on the legal issues that arise if the couple later divorces and one of them requests custody of the frozen pre-embryos, usually for future implantation either in the wife or in a surrogate, while the other wants them destroyed.⁵

These problems loom large for the couples involved, but the case law is also interesting for what it tells us about the importance of parenthood in the post-IVF world. In the United States, pre-embryo custody disputes have resulted in at least five reported cases in which courts have awarded the pre-embryos to the party opposing implantation.⁶ In doing so, the courts stopped the process the parties began

2. Uniform Parentage Act § 5, 9 B.U.L.A. 296 (1987).

3. The cases treating this topic identify the early-developed fertilized egg in different ways; some courts, for example, use the terms zygote or pre-zygote. See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) ("pre-zygotes"). Other courts use the term pre-embryo. See, e.g., *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. App. 2000) ("pre-embryos"); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) ("pre-embryos"); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000) ("pre-embryos"), *aff'd in part and modified in part*, 2001 WL 909294 (N.J. Aug. 14, 2001) ("pre-embryos"); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) ("pre-embryos"); see also Fla. Stat. Ann. § 742.17 (1997) ("pre-embryos"). I will use pre-embryo. For a discussion of the use of the various terms, see *J.B.*, 751 A.2d at 615, n.1.

4. See NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES 289 (1998) [hereinafter ASSISTED REPRODUCTIVE TECHNOLOGIES].

5. Because the courts are reluctant to classify frozen pre-embryos as property, they have not applied joint tenancy or tenancy in common analysis to the issue of their ownership. Instead, the courts have labeled pre-embryos as a separate category, neither person nor property, that deserves special respect because of its potential to develop into a person. See *Davis*, 842 S.W.2d at 597. Courts have not delineated the consequences of that label, although in *Hecht v. Superior Court*, the court's decision that a decedent's frozen sperm were a separate category of property allowed a probate court to assume jurisdiction over the sperm as property of the decedent. 20 Cal. Rptr. 2d 275, 283 (Cal. 1993).

6. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000), *aff'd in part*, 2001 WL 909294 (N.J. Aug. 14, 2001); *Kass v. Kass*, 696 N.E.2d

when they decided to create a new life. U.S. courts, however, have disagreed as to the reasons for their decisions and some of these courts have relied on questionable analogies that will be discussed later in this Article. In contrast, in *Nachmani v. Nachmani*,⁷ the Israeli Supreme Court in 1996 awarded a couple's frozen pre-embryos to the wife, Ms. Nachmani, who was childless, so that she could attempt to implant the frozen pre-embryos in a surrogate. Control over the pre-embryos was Ms. Nachmani's sole means of fulfilling her desire to become a mother to a biologically related child, as she could no longer produce eggs.⁸

Current United States case law offers some support for the view that where the couple's frozen pre-embryos represent the last chance for one party to become a biological parent, the court should award the pre-embryos to that person.⁹ In the United Kingdom, the comprehensive Human Fertilisation and Embryology Act (HFEA)¹⁰ requires that the couple, at the time of IVF treatments, agree to the disposition of their frozen pre-embryos. Both parties must consent to any change in that agreement. Furthermore, under the HFEA, the pre-embryos will be destroyed after a statutory time period.¹¹ The recently enacted Human Rights Act,¹² however, must now be taken into account in interpreting the HFEA and may complicate the law in the United Kingdom.

II. *NACHMANI V. NACHMANI*

In *Nachmani v. Nachmani*, a childless Israeli couple agreed to undergo IVF and then to contract with a surrogate in California to bear their child, because the wife could neither gestate nor carry the fetus to term.¹³ The couple did not sign an agreement with the IVF clinic regarding disposition of the embryos, although they did sign a

174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1991); *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. 2000).

7. 50(4) P.D. 661 (Isr.) [hereinafter *Nachmani II*].

8. *Id.*

9. See, e.g., *J.B.*, 751 A.2d 613; *Davis*, 842 S.W.2d 588.

10. Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.).

11. *Id.*

12. Human Rights Act, 1998, ch. 42 (Eng.).

13. Discussion of *Nachmani II* is available in Dalia Dorner, *Human Reproduction: Reflections on the Nachmani Case*, 35 TEXAS INT'L L. J. 1 (2000); see also Shulamit Almog, *Law Versus Justice*, 11 JUSTICE 35 (1996).

surrogacy agreement.¹⁴ The wife, Ruthi, went through medical treatments to extract eggs, which were the last eggs she could produce. Eleven eggs were fertilized with her husband's sperm and frozen for future implantation. The couple then separated. Danni, the husband, subsequently lived with another woman, and had two children in that relationship.¹⁵

Ruthi requested that the clinic release the frozen pre-embryos to her so that she could arrange for a surrogate mother, but Danni opposed the request and the clinic refused to release the pre-embryos. Ruthi then initiated litigation to obtain them.¹⁶ She was successful in the district court where the judge, seeming reproachful of Danni, held that he had breached his contract with his wife.¹⁷ Like a husband whose wife becomes pregnant from intercourse, the judge ruled, Danni could not withdraw his agreement to have a child once the fertilization had gone forward.¹⁸

A five-judge panel of the Supreme Court of Israel reversed the trial court, upholding Danni's fundamental right not to be forced to be a parent.¹⁹ The court stated that just as it could not force parenthood on a woman, it could not force it upon a man when the couple had used technology. The couple's agreement was unenforceable because its performance as originally contemplated was impossible. Until the embryos were implanted, the couple's joint agreement was required at every stage.²⁰

14. Surrogacy was legalized in Israel with the 1996 Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996, 1996 S.H. 1577, 176 (English translation on file with the Duke Journal of Comparative and International Law). The Surrogate Motherhood Agreements permits only gestational surrogacy; that is surrogacy in which the surrogate has no genetic connection with the child, but is impregnated with a pre-embryo conceived by IVF. The law provides administrative regulation of the surrogacy process. See Ruth Halpern-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313, 318-21 (1999) (for a description of the law's provisions).

15. See Almog, *supra* note 13, at 36.

16. Unlike the couples' status in the American cases, the Nachmanis were not divorced at the time of the litigation.

17. Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nachmani v. Nachmani and its Impact on Israeli In Vitro Fertilization Law*, 7 CARDOZO J. INT'L & COMP. L. 325, 329 (1999). An English translation of the *Nachmani* decisions has not been available, and thus, my analysis of these decisions is based on quotations in the preceding article. My analysis also draws upon Dorner, *supra* note 13; and Almog, *supra* note 13, at 39.

18. Evelyn Gordon, *Court: Fatherhood Cannot be Forced*, THE JERUSALEM POST, Mar. 31, 1995, at 20; SUSAN MARTHA KAHN, REPRODUCING JEWS 66 (2000); see also Chen, *supra* note 17, at 329.

19. *Nachmani v. Nachmani*, 49(1) P.D. 485 (Isr.) [hereinafter *Nachmani I*]; see Chen, *supra* note 17, at 330; KAHN, *supra* note 18, at 66.

20. Chen, *supra* note 17, at 334.

The Supreme Court reheard the case as a panel of eleven justices and, in a 7-4 decision, reversed the five-justice panel and awarded the fertilized eggs to Ruthi.²¹ Each justice wrote a separate decision. The majority viewed this case as one to which no statutes or precedents applied, and looked primarily to principles of justice and morality, and to the paramount value of life, rather than to contract law.²² Some of the majority justices stressed that successful implantation of the fertilized eggs was Ruthi's only chance to become a mother of biologically-related children.²³ According to one of the justices, the majority relied on a number of concepts including a balancing analysis, an "absolute approach to justice,"²⁴ requiring a decision in favor of creating life, and an understanding of justice as "that which does the least harm,"²⁵ requiring a decision in favor of Ruthi because the harm of denying her a chance of parenthood would be greater than the harm to Danni.²⁶ The balancing analysis took account of all of the relevant circumstances of the case, comparing the parties' good faith defense of their rights, the point at which Danni decided to contest Ruthi's access to the pre-embryos, Ruthi's reliance on Danni's representations, and her lack of available alternatives to achieve genetic parenthood.²⁷ The justices decided that the harm to Ruthi in denying her the chance to be a biological mother was greater than the harm to Danni of becoming a parent against his wishes.²⁸

Three of the justices in the minority would not have held Danni to the original oral agreement.²⁹ They interpreted the agreement as one the couple intended to fulfil as an intact family rather than one that could be enforced against Danni after he separated from his wife and began a new family.³⁰ According to these justices, Ruthi could not have relied on the agreement because she knew the pitfalls along the way from conception to birth, and knew that her husband's consent would be required at every step, as with the surrogacy arrange-

21. *Nachmani II*, 50(4) P.D. 661 (Isr.).

22. Rhona Schuz, *Israel*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW 1996*, at 237, 251 (1998). The majority justices did invoke estoppel principles. *Id.* at 252-54; *see also* Dorner, *supra* note 13, at 3 n.8; Chen, *supra* note 17, at 347.

23. Dorner, *supra* note 13, at 8.

24. *Id.* at 5.

25. *Id.*

26. *Id.* at 7-8.

27. *Id.* at 8.

28. *Id.*; *see also* Chen, *supra* note 17, at 342; KAHN, *supra* note 18, at 68.

29. Dorner, *supra* note 13, at 3.

30. *Id.*

ment.³¹ The fourth dissenting justice, reaching a conclusion similar to that reached in some American cases, also would have required Danni's consent in order to impose the obligations of parenthood on him.³² Approaching the issue as a matter of rights, this justice determined that Ruthi's right to pursue parenthood did not encompass the right to be a parent to a child conceived from Danni's sperm.³³

In the *Nachmani* decisions, the Israeli courts raised many of the same issues that have emerged in the American cases deciding the fate of frozen pre-embryos conceived in vitro by a couple who later divorces.³⁴ Both Israeli and American courts have concerned themselves with whether a court should enforce a couple's pre-conception agreement, whether a person can be forced to be a parent against his or her wishes, and whether one party's interest in becoming a parent outweighs the other party's interest in not becoming a parent. The American cases, however, have all reached opposite results than that reached in the final *Nachmani* decision. Furthermore, taken together, the American decisions reveal a lack of consensus as to the binding nature of a couple's pre-conception contract and the weight of the parties' interests in becoming or not becoming parents.

III. THE AMERICAN CASES

An important difference between the *Nachmanis*' contract and the contracts at issue in the American cases is that in *Nachmani* the only contract was the agreement between the couple to undergo IVF and to engage a surrogate mother. In the United States, IVF clinics often require a couple to sign informed consent forms before they begin IVF treatments.³⁵ Included in many of these forms is a section in which the couple must specify what should be done with their pre-embryos in a variety of future situations, including divorce.³⁶ The choices include destroying the pre-embryos, giving them to the clinic for research, donating them to another couple, and releasing them to one of the parties.³⁷ In two American cases, the couple who signed

31. *Id.*

32. *Id.*

33. *Id.*

34. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000), *aff'd in part*, 2001 WL 909294 (N.J. Aug. 14, 2001); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1991); *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. 2000). *See also* Dorner, *supra* note 13, at 5.

35. *But see, Davis*, 842 S.W.2d 588.

36. *See, e.g., Kass*, 696 N.E.2d 174.

37. *See id.*

the informed consent contracts chose to relinquish the pre-embryos if they divorced;³⁸ in one case the consent form would have given the pre-embryos to the wife.³⁹

A. Decision-Making Authority

One of the early issues that arose in this area of the law was whether only the couple—that is, the progenitors of the fertilized egg—should have the decision-making authority to determine the fate of the pre-embryos, rather than, for example, the IVF clinic or the couple’s doctor.⁴⁰ To date, no case law or statute has determined that the decision should be made by anyone except the progenitors, unless they cannot agree.

A difficult issue is how that decision should be made. At present, many IVF clinics require that a couple indicate their decision on the clinic’s informed consent form, which is essentially a document explaining the IVF procedures and its risks. Professor John Robertson, whose numerous articles about legal issues involved in reproductive technologies have been very influential, has characterized the signed form not only as a consent form and a prior directive to the clinic, but also as a document that is legally binding between the parties themselves, even though the status of the consent form was uncertain and unlitigated.⁴¹ Professor Robertson advocated holding the couple to their pre-IVF agreement, even in the face of changed circumstances, in order to maximize their procreative choice by allowing them, rather than the clinic, to decide the embryo’s fate; to provide “administrative convenience and efficiency;”⁴² and to minimize the costs of disputes.⁴³

This proposition was supported initially in dictum in *Davis v. Davis*⁴⁴ by the Tennessee Supreme Court, the first U.S. state court to

38. *See id.*; *see also J.B.*, 751 A.2d 613.

39. *See A.Z.*, 725 N.E.2d 1051.

40. *See* John Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990) [hereinafter Robertson, *Prior Agreements*]. Professor Robertson has suggested that it may be unconstitutional to deprive the progenitors of the decision-making authority over their embryos. *See* John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 458 (1990).

41. *See* Robertson, *Prior Agreements*, *supra* note 40, at 410. Professor Robertson cites no authority for the suggestion that the clinic’s consent form is binding as between the couple.

42. *Id.* at 416.

43. *Id.* at 418. Professor Robertson, however, would not enforce an agreement that the wife gestate the child if she later changed her mind. *Id.* at 419 n.37.

44. 842 S.W.2d 588 (Tenn. 1991).

decide the fate of frozen pre-embryos. In *Davis*, the parties had no prior agreement about disposition of the pre-embryos, but the court stated that if in fact the parties had agreed in the clinic's form to dispose of the pre-embryos in a certain way, the court would have enforced that agreement.⁴⁵ The court noted, however, that because the parties' initial agreement might not be "truly informed," they should be able to modify that agreement after they understood the difficulties involved in IVF and implantation, assuming both parties agreed to the modifications.⁴⁶ The *Davis* court awarded the pre-embryos to the husband based on the facts before it, using a balancing approach that will be discussed below.⁴⁷ The court's dicta, and Professor Robertson's article on prior agreements cited above, have attracted adherents in subsequent academic writing and in some case law.⁴⁸

Although some states have enacted legislation addressing IVF,⁴⁹ none has provided for custody of the pre-embryos if the couple divorces or cannot agree on a course of action.⁵⁰ Florida has passed legislation requiring that the couple and the treating physician "enter into a written agreement" to provide for the disposition of the couple's pre-embryos "in the event of divorce, the death of a spouse, or any other unforeseen circumstance."⁵¹ If the couple does not have a written agreement, the couple jointly retains decision-making authority over the pre-embryos.⁵² The statute does not clarify whether the contract is binding between the couple themselves, as compared with its force between the couple and their physician. Nor does it provide for the possibility that the couple will not agree concerning the disposition of the pre-embryos.

45. *Id.* at 597.

46. *Id.*

47. See text accompanying notes 130–141.

48. See, e.g., Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos*, 76 WASH. U. L. Q. 759, 773 (1998); Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 71, 74–75 (1999); Donna Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos*, 48 CATH. U. L. REV. 989, 1000–01 (1999); Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority Over Frozen Embryos*, 29 SETON HALL L. REV. 937, 949 (1999). For examples of case law, see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1055 (Mass. 2000) (citing *Davis* and *Robertson*); *J.B. v. M.B.*, 2001 WL 909294, at *7 (N.J. Aug. 14, 2001) (citing *Davis*); *Kass v. Kass*, 663 N.Y.S.2d 581, 597–98 (N.Y. App. Div. 1997) (citing *Davis* and *Robertson*); *Litowitz v. Litowitz*, 10 P.3d 1086, 1090 (Wash. 2000) (citing *Davis*).

49. See, e.g., N.H. § 168-B:13 et seq.; La. § 9:121–9:133; Tex. Fam. Code Ann. § 151.102(b).

50. Coleman, *supra* note 48, at 74–75.

51. FLA. STAT. ANN. § 742.17 (West 1997).

52. *Id.* § 742.17(2).

B. *Kass v. Kass*: Contractual Enforcement

The only court that has based its decision on the parties' contract with the clinic was New York's highest court in *Kass v. Kass*.⁵³ The Kasses were a childless couple who decided to undergo IVF and surrogacy. The clinic provided the couple with four complex consent forms, which included addenda.⁵⁴ Form 1 was comprised of twelve single-spaced, typed pages explaining the medical procedures the clinic would use.⁵⁵ The first addendum to that form required the parties to complete an Additional Consent Form for cryopreservation, consisting of seven single-spaced pages in two parts.⁵⁶ The first part explained that the extra pre-embryos would be frozen and released only with the consent of both parties.⁵⁷ In the event of divorce, the form provided that ownership of the pre-embryos "must be determined in a property settlement" and released only "by order of a court of competent jurisdiction."⁵⁸ This section concluded with language that said that because "the possibility of death or any other unforeseen circumstances" could result in a situation in which neither party would be able to determine the fate of the frozen pre-embryos, the couple must initial their choice of means of disposal.⁵⁹ That choice could be changed only by the couple signing a new statement. The Kasses initialed the option giving the pre-embryos to the clinic for research.⁶⁰

After the unsuccessful implantation of some of the pre-embryos in a surrogate, the couple decided to divorce. They drew up and signed, but never finalized, an agreement affirming that the frozen pre-embryos would be disposed of by the clinic and that neither party would claim custody.⁶¹ One month later, however, the wife requested sole custody in order to undergo a second implantation, although her previous pregnancies had all ended in miscarriages.⁶² After the parties divorced, the lower court gave custody of the five remaining pre-

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

54. *Id.* at 176.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 177.

61. *Id.*

62. *Id.*

embryos to the wife.⁶³ The lower court, like the district court in *Nachmani*, found no difference between in vitro fertilization and fertilization resulting from coitus (in vivo fertilization) with respect to the rights of the wife as the exclusive decision-maker.⁶⁴ The appellate division, however, reversed that decision.⁶⁵ The appellate division initially differentiated in vivo pregnancy and frozen pre-embryos on the grounds of the pregnant woman's right to bodily integrity, a right not at issue if the couple's pre-embryos were still frozen in the clinic.⁶⁶ Two judges of the court's 3-2 majority held that the couple's informed consent form controlled the disposition of the frozen pre-embryos; the third said that the consent form was ambiguous, but that the husband's interest in avoiding procreation was paramount.⁶⁷

The New York Court of Appeals affirmed the appellate division decision,⁶⁸ agreeing that the couple themselves should determine the fate of the pre-embryos. Because the couple had agreed to the manner of disposition in their consent form, the Court of Appeals said that it would enforce that agreement using general principles of contract interpretation.⁶⁹ The court agreed with Professor Robertson's reasoning that enforcement of advance directives will avoid litigation, maximize individual procreative liberty, and provide certainty.⁷⁰

Because the wife had not argued that the consent form was against public policy or that changed circumstances precluded its enforcement,⁷¹ the only issue before the Court of Appeals was whether the consent forms were ambiguous. Concluding that they were not, the court found that the forms "unequivocally manifest [the parties'] mutual intention" that the pre-embryos be donated for research, and that the couple intended the disposition to be made only by joint de-

63. *Kass v. Kass*, 1995 WL 110368, *1 (N.Y. Sup. Ct. Jan. 18, 1995).

64. *Id.* at *2.

65. *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997).

66. *Id.* at 587.

67. *Id.* at 591-92.

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

69. *Id.* at 180.

70. *Id.* The court disagreed with the conclusions in *Assisted Reproductive Technologies*, a report of a New York State Task Force on Life and the Law, that an embryo should not be implanted or destroyed if one of the progenitors disagrees. *Id.* at 179; see also ASSISTED REPRODUCTIVE TECHNOLOGIES, *supra* note 4. For explanation of this view, see Coleman, *supra* note 48, at 56. Mr. Coleman advocates an "inalienable rights approach" by which each progenitor has the right to change her mind. If one progenitor changes her mind and the couple cannot agree on their embryos' fate, the embryos would remain in storage, giving the couple more time to reach agreement. *Id.* at 111-12.

71. *Kass*, 696 N.E.2d at 180 n.4.

cision.⁷² The court regarded the parties' later divorce instrument as a reaffirmation of their original agreement.⁷³ Thus, the court enforced a long, technical, difficult-to-read consent form that the couple signed before the wife embarked on a series of expensive, intrusive, and painful hormonal treatments, and before the couple knew if they would produce extra pre-embryos that would be frozen. The result of the decision was to allow the clinic to use the couple's pre-embryos for research even after one of the progenitors withdrew her consent.⁷⁴

C. Parenthood by Contract

The final *Kass* decision, based solely on the couple's pre-treatment signed form with the IVF clinic, aligns with the concept of parenthood by contract adopted by some courts in ART litigation, and advocated by several academics.⁷⁵ This approach has been used to determine a child's legal parentage in cases in which more than two parties claim to be parents of a child who is already born or in gestation. For example, in a surrogacy arrangement, the surrogate may change her mind during pregnancy or after giving birth and decide to keep the child instead of giving the child up for adoption to the couple who contracted for her gestational services. Or, in another scenario, a man who donates sperm to an unmarried woman may want to establish his paternity against the wishes of the woman, who has decided to raise the child on her own. Some of the people seeking recognition as the parent may have no biological relation to the child, or

72. *Id.* at 181. The court supported this reading by pointing to the frequent use of the plural first person pronoun, as designating "shared understanding." *Id.* Of course, the pronouns were used by the clinic on a preprinted boiler plate form.

73. *Id.*

74. For criticism of this approach, see George J. Annas, *The Shadowlands—Secrets, Lies, and Assisted Reproduction*, 339 *NEW ENG. J. MED.* 935, 936–37 (1998). For criticism of the process by which the parties must sign dispositional choices within the clinic's informed consent forms, see Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 *ARIZ. ST. L.J.* 897 (2000). Professor Waldman does not disapprove of enforcing contracts that were "properly conceived and executed." *Id.* at 900. For an argument in favor of uniform state regulation of ART, including a nationally uniform consent agreement administered by IVF facilities, see Jennifer M. Stolier, Comment, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 *TUL. J. INT'L & COMP. L.* 459 (2001).

75. See, e.g., John Lawrence Hill, *What Does it Mean To Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 *N.Y.U. L. REV.* 353 (1991); Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 *DUKE L.J.* 524 (1994); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 *WIS. L. REV.* 297 (1990); Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 *YALE. L.J.* 187, 194 (1986) (referring to a parent as one whose "mental concept" initiated the procreation).

may not have been married to a person having a biological relationship to the child.

Advocates of parenthood by contract would determine a child's legal parentage by enforcing the parties' private preconception agreements. Thus, a child's parents would be those who brought about the child's birth, intending at the time of conception to become the child's legal parents. Advocates of this view aver that the concept of parenthood by contract encourages the parties to plan and negotiate in advance of pregnancy, and protects the parties' expectations.⁷⁶

Two decisions from California courts are the best known cases following this approach.⁷⁷ These cases did not involve frozen pre-embryos. Rather, the decisions endorsed parenthood by intent in difficult surrogacy cases where the state's Parentage Act⁷⁸ failed to determine the child's mother. The first of these cases, *Johnson v. Calvert*,⁷⁹ involved gestational surrogacy. A gestational surrogate is a woman who is not the genetic parent, but is impregnated with a pre-embryo conceived by IVF from the ova and sperm of a married couple, and who carries the child to term.⁸⁰ In *Johnson*, the surrogate decided to keep the child she carried.⁸¹ The court determined that both the surrogate, as the woman who gave birth to the child, and the wife, as the genetic parent, qualified as the child's mother under the Parentage Act.⁸² But, declining to hold that the child had two mothers, the court held that only the wife was the child's mother because she was the woman who had intended originally to be the legal parent.⁸³ She arranged and bargained for the surrogacy, and she originally held the "mental concept" of the child, all of which entitled her to be recognized as the child's parent.⁸⁴ The court used the surrogacy contract as evidence of the parties' intent.⁸⁵ Thus, the *Johnson* decision relied on contract law to determine a child's parents, and in doing so,

76. See the discussion in Shapo, *Matters of Life and Death*, *supra* note 1, at 1182–88.

77. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (*en banc*); *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

78. CAL. CIV. CODE § 7003(1) (West 1983) (current version at CAL. FAM. CODE § 7610(1) (West 1994)).

79. 851 P.2d 776 (Cal. 1993) (*en banc*).

80. See *id.* at 784 (use of that term); see also Shapo, *supra* note 1, at 1160–61.

81. *Johnson*, 851 P.2d at 778.

82. *Id.* at 782.

83. *Id.* at 783–84.

84. *Id.* at 782–83; see also Shapo, *supra* note 1, at 1176–80. The court took the phrase "mental concept" from *Stumpf*, *supra* note 75, at 194.

85. *Johnson*, 851 P.2d at 784.

changed the settled presumption that a child's mother is the woman who gives birth.⁸⁶

In the other California case, *In re Marriage of Buzzanca*, the court determined that the contracting wife was the mother of a child conceived by IVF from anonymous sperm and egg donors and implanted in a surrogate.⁸⁷ The child, who was in the custody of the contracting wife, had no known genetic parent and the surrogate did not claim the child.⁸⁸ The parenthood issue arose because the couple was divorcing and the husband contested the wife's claim for child support, arguing that the child was not a child of the marriage, a requirement for the court's jurisdiction to award child support.⁸⁹ The lower court held that the child had no parents.⁹⁰ The appellate court instead analogized Ms. Buzzanca to a husband who consents to AID, the artificial insemination procedure in which donor sperm is used.⁹¹ Under California's Parentage Act, the husband is the child's legal father, although not the biological one.⁹² According to the court's analogy to AID, the Buzzancas' arrangement and consent to the IVF procedure using a donor's egg cells and sperm, and to the surrogate's impregnation, made them the parents of the resulting child, analogous to the way that a husband who consents to the AID procedure becomes a parent to the wife's child.⁹³

Because in *Buzzanca* the wife became the mother by analogy to the husband in AID, but the surrogate was the mother under the Parentage Act, the court found itself presented with the same situation as that in *Johnson*—the child had two mothers under California law.⁹⁴ The court “broke the tie” in the same way as did the *Johnson* court; it held that Ms. Buzzanca was the legal mother because she arranged

86. Criticizing *Johnson*, see Annas, *The Shadowlands*, *supra* note 74, at 937 (“the traditional rule”); Alexander Morgan Capron, *Too Many Parents*, 28 HASTINGS CTR. REP., Sept.–Oct. 1998, at 22.

87. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

88. *Id.* at 282.

89. *Id.* at 293.

90. *Id.* at 282 (citation omitted).

91. *Id.* at 288.

92. *Id.* at 285–86. In this case, unlike the husband who consents to artificial insemination, Mr. Buzzanca did not consent to treatment on his wife. The Buzzancas never consented to the medical procedures involved in IVF and surrogacy, although they arranged them. Moreover, in contrast to a married couple's situation in AID, neither Mr. nor Ms. Buzzanca was biologically related to the child.

93. *Id.* at 288–89.

94. *Id.* at 288.

the child's birth, intending to become the legal parent, as demonstrated by the surrogacy contract.⁹⁵

In these surrogacy cases, the California courts used the parties' contract to determine parenthood of a child in situations in which no statutes or case law settled the dispute, and in which the court was in the unusual situation of determining who was the mother of an already born child. In the first case, two women, both biologically related to the child, claimed to be the child's mother; in the other, only the custodial adult, but no biologically related person, claimed maternity of the child. Unable to use the tactics of King Solomon, the courts chose the woman who had contracted to be the mother before the child was conceived, and who had not changed her mind in the interim.

Although critics question whether it is appropriate to use a contract model to determine a child's parents,⁹⁶ the New York Court of Appeals used that model in *Kass* for a different purpose.⁹⁷ In *Kass*, the court enforced a contract embodying the parties' pre-conception intent in a situation involving only the two progenitors of the fertilized eggs, handing down a decision that prevented a child from being born.⁹⁸ The court did not reach the issue of whether, in light of the changed circumstances, the contract should have been enforced.⁹⁹ Had the court carried through its reliance on Professor Robertson's analysis, however, it would have concluded that the parties had to be held to their pre-IVF agreement to discard their pre-embryos, even in the changed circumstances of their divorce, and even given the fact that the pre-embryos then provided Ms. Kass her only means of having a biologically related child. Professor Robertson has written that in such a situation, "[t]he risk of unfairness in enforcing embryo agreements does not override the advantages of legal certainty that accrues to couples and IVF programs from enforcing these agreements."¹⁰⁰ In addition, according to this view, enforcement of the contract provides another benefit: courts will avoid involvement in burdensome litigation requiring them to weigh the parties' competing

95. *Id.*

96. See, e.g., Capron, *supra* note 86, at 22; Annas, *supra* note 74; Coleman, *supra* note 48, at 5670; Esther M. Schonfeld, "To Be or Not To Be a Parent?" *The Search for a Solution to Custody Disputes Over Frozen Embryos*, 15 *TOURO L. REV.* 305, 325 (1998).

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

98. *Id.* at 181.

99. *Id.* at 180 n.4.

100. Robertson, *supra* note 40, at 420.

interests. Enforcement would also encourage the couple to bargain over potentially divisive issues and clarify their agreement.¹⁰¹

Professor Robertson's analysis seems to ignore the couple's intense emotional state at the time the clinic requires them to sign the consent form. At that time, rather than bargaining over divorce terms, the couple is far more likely to concentrate on the information in the forms explaining the difficulty of the procedures, the considerable expense involved, and their chances for success.¹⁰² That the couple would also rationally bargain and evaluate their options regarding provision for their pre-embryos post divorce seems implausible, and therefore a tenuous basis on which to enforce the consent form. Moreover, IVF clinics will not be disadvantaged if the couple's initial agreement is not enforced, as long as one party pays to keep the pre-embryos in storage and the clinic is notified if the couple's circumstances have changed since they signed the IVF consent.¹⁰³

D. American Cases: Rights-Based Analyses and Balancing

The *Kass* approach of enforcing the couple's pre-conception intent and holding them to the terms of the IVF clinic consent form has not been followed in other jurisdictions. Instead, other courts have engaged in the very sort of litigation regarding parenthood that the New York court sought to avoid.¹⁰⁴ These courts, however, also have reached the result of preventing gestation of embryos conceived by IVF.¹⁰⁵

In the two more recent cases that involved custody of frozen pre-embryos, the courts found in favor of the party seeking destruction of the pre-embryos, but not on the basis of the couple's contract.¹⁰⁶ In one case, the court held that the contract at issue, which would have given the pre-embryos to the party wishing to bring them to term, was unenforceable as against public policy.¹⁰⁷ To hold otherwise, the court

101. *Id.*

102. For example, the wife in *J.B. v. M.B.* stated that "[t]here were never any discussions between the Defendant [her ex-husband] and I [sic] regarding the disposition of the frozen embryos should our marriage be dissolved." 2001 WL 909294, at *2. (N.J. Aug. 14, 2001). Her statement, however, was disputed by her husband. *Id.* at *6.

103. See Coleman, *supra* note 48, at 111.

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

105. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 588 (Tenn. 1991).

106. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *J.B.*, 2001 WL 909294, at *11. These cases date from 2000 and 2001, respectively.

107. *A.Z.*, 725 N.E.2d at 1057-58.

decided, would amount to judicially enforced procreation.¹⁰⁸ In another recent decision, the New Jersey Supreme Court held that it would enforce an unambiguous agreement entered into at the time of the IVF treatments, but only if neither party had changed his or her mind.¹⁰⁹ A change of mind by either party would require notification in writing to the clinic.¹¹⁰ In both cases, the divorced couple already had children during the marriage.

In the Massachusetts case of *A.Z. v. B.Z.*,¹¹¹ the couple had signed a series of consent forms with a clinic. After the husband signed the consent form, the wife wrote in additional language stating that the embryos would be given to her for implantation if the couple “should become separated.”¹¹² Disagreeing with the New York court in *Kass*, the *A.Z.* court first determined that the consent form was intended to control only the relationship between the couple and the clinic, but not intended to be a binding agreement between the couple.¹¹³ Moreover, the court said that even if it enforced the terms of the consent form, the outcome dictated by the consent form would apply only if the parties separated and not if they divorced.¹¹⁴ The court added that even if the form applied, it could not conclude that the husband had consented to its terms because he had signed before the wife’s language was added.¹¹⁵

The court concluded that even if the consent forms could be construed to apply to the situation, the court would not have enforced them because to do so would violate the public policy of the state.¹¹⁶ The court did not balance the couple’s competing interests, but instead analyzed Massachusetts’s policy of distinguishing between agreements concerning family relationships, which implicate an individual’s liberty and privacy, and other contracts.¹¹⁷ The court interpreted the policy basis of Massachusetts law to suggest that an individual may reconsider the terms of intra-family agreements and will

108. *Id.*

109. *J.B.*, 2001 WL 909294, at *9.

110. *Id.*

111. *A.Z.*, 725 N.E.2d at 1054.

112. *Id.* at 1054.

113. *Id.* at 1056; *cf.* *Cahill v. Cahill*, 757 So.2d 465, 468 (Ala. Civ. App. 2000) (holding that frozen pre-embryos were not subject to the jurisdiction of a divorce court because they were not property and said that the issue was to be determined between the clinic and the couple).

114. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000).

115. *Id.*

116. *Id.* at 1057, 1058.

117. *Id.* at 1058–59.

not be bound by prior consent to enter into unwanted future family relationships: “Prior agreements to enter familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions.”¹¹⁸ The *A.Z.* court analogized to a type of agreement involving the birth of children: surrogacy agreements to give up the child for adoption to the commissioning couple.¹¹⁹ A Massachusetts statute provides that a parent cannot irrevocably consent to give a child for adoption until four days after the child’s birth.¹²⁰ As to surrogacy, a Massachusetts court had held that the policy behind the adoption statute applied and that a surrogacy agreement could not be enforced unless it granted the surrogate a waiting period in which to change her mind.¹²¹

Neither of these examples is directly analogous to the custody of frozen pre-embryos. They are examples of the law protecting biological parents who want to keep their child. Also, like the California surrogacy cases, they involve a decision to recognize parentage where more than two claimants seek recognition of their status as parents of a child who has already been born. The choice involving frozen embryos is not that of determining the child’s parent, but a choice between the child being born to a particular person or the child’s non-existence.¹²² Moreover, the court’s analogies highlight the importance the law has placed on protecting biological parents’ rights to change their minds in order to keep their child.

In the New Jersey case of *J.B. v. M.B.*, the court also ordered the destruction of the couple’s frozen pre-embryos.¹²³ The ex-wife wanted the frozen pre-embryos destroyed or used for research. The ex-husband wanted to donate them to another couple or to keep them frozen to use with a future spouse. The clinic’s consent form specified that if the parties divorced, their pre-embryos would be relinquished to the clinic, unless a court ordered otherwise. The ex-husband al-

118. *Id.*

119. *Id.* at 1059.

120. MASS. ANN. LAWS ch. 210, §2 (Law. Co-op. 1981).

121. *R.R. v. M.H.*, 689 N.E.2d 790, 796 (Mass. 1998). The surrogate was also the genetic mother of the child, which was conceived by AID. *Id.* at 791. The court also held that a surrogacy agreement is not enforceable if it provides for payment to the surrogate beyond pregnancy-related expenses. *Id.* at 797.

122. *Cf.* J.K. MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 219 (2d ed. 1998) (distinguishing AID from adoption).

123. 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000). At the time of this writing, this case was just decided by the New Jersey Supreme Court. *J.B. v. M.B.*, 2001 WL 909294 (N.J. Aug. 14, 2001).

leged, however, that the parties had agreed that the unused pre-embryos would be held and donated to another couple. The appellate court agreed with the ruling in *A.Z. v. B.Z.* that a contract to procreate was against public policy.¹²⁴ The New Jersey Supreme Court upheld the appellate court's decision and concluded that, like other agreements that involved entering into or terminating family relations, this contract should not be enforced against a now unwilling party.¹²⁵ However, both the appellate and supreme courts engaged in balancing the couple's interests and decided that the burden on the ex-wife in becoming a parent outweighed the burden on the ex-husband if the pre-embryos were destroyed.¹²⁶ An important basis for each court's decision was that the ex-husband was not unable to father a child with another woman,¹²⁷ and indeed was already a father.¹²⁸ This type of balancing analysis was first employed by a court in *Davis v. Davis*, the first case involving a divorced couple's dispute over custody of their frozen pre-embryos.¹²⁹

As noted above,¹³⁰ in *Davis*, the couple had no prior agreement concerning disposition of their pre-embryos. The Tennessee court decided in favor of the ex-husband, Junior Davis, who wanted the pre-embryos destroyed. The court based its analysis on the parties' right to procreational autonomy¹³¹ that it derived from the Fourteenth Amendment's constitutional right to privacy¹³² and the Tennessee constitution.¹³³ The court viewed procreational autonomy as including both the right to procreate and the right to avoid procreation.¹³⁴ Although state action is seemingly not involved in these cases, the court approached its task as a balancing of conflicting constitutional rights.¹³⁵ The Massachusetts and New Jersey courts, on the other

124. *J.B.*, 751 A.2d at 619.

125. *J.B.*, 2001 WL 909294, at *10.

126. *J.B.*, 751 A.2d at 620; *J.B.*, 2001 WL 909294, at *9.

127. *J.B.*, 751 A.2d at 619; *J.B.*, 2001 WL 909294, at *9.

128. *J.B.*, 2001 WL 909294, at *9.

129. 842 S.W.2d 588 (Tenn. 1992).

130. See text accompanying notes 44–46.

131. *Davis*, 842 S.W.2d at 600.

132. *Id.* at 598.

133. *Id.* at 598–99.

134. *Id.* at 601.

135. *Id.* at 603.

hand, approached the issue as a matter of public policy, not of constitutional rights.¹³⁶

In *Davis*, the court considered the couple's particular circumstances and decided that the strong negative emotional consequences to Junior Davis from unwanted parenthood outweighed his ex-wife's interests.¹³⁷ A significant element in the case was that his ex-wife, who had remarried, intended to donate the pre-embryos to another couple rather than use them herself. Junior Davis had had an unhappy childhood and lived in a home for boys after his parents divorced. He saw his father only three times after the divorce.¹³⁸ Had the former Ms. Davis donated the embryos, Junior Davis would have been forced to be the biological father of a child against his will and then to re-live his childhood traumas by losing all contact with his biological child. The court conceded that the case would have been more difficult if the ex-wife intended to use the pre-embryos herself and could not have achieved parenthood—that is, biological parenthood—any other way.¹³⁹ The court explained it would “ordinarily” rule for the party seeking to avoid procreation, but only “assuming that the other party has a reasonable possibility of achieving parenthood by means other than the pre-embryos in question.”¹⁴⁰ The case has been described as deciding that if the couple had no prior agreement for disposing of the embryos, the party that wants to destroy the embryos will prevail, unless the other party wants to implant the embryos and has no other way to reproduce.¹⁴¹

The situation was similar in *J.B.*, the New Jersey case.¹⁴² The ex-wife, who already had children, would have become a biological parent to a child her ex-husband wanted to donate to another couple, losing all parental rights to that child.¹⁴³ Moreover, her ex-husband

136. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *J.B. v. M.B.*, 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000). The New Jersey Supreme Court referred to United States Supreme Court jurisprudence, and its own decisions, involving the constitutional right of privacy as “a framework” for disputes over pre-embryos. *J.B. v. M.B.*, 2001 WL 909294, at *8 (N.J. Aug. 14, 2001).

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

138. *Id.* at 603–04.

139. *Id.* at 604.

140. *Id.*

141. See John A. Robertson, *Meaning What You Sign*, 28 HASTINGS CTR. REP., July–Aug. 1998, at 22; see also Schonfeld, *supra* note 96, at 325. It is not certain, however, whether the court would enforce that exception if the couple had a prior agreement to destroy the pre-embryos.

142. *J.B. v. M.B.*, 51 A.2d 613, 615 (N.J. Super. Ct. App. Div. 2000).

143. *Id.* at 620.

was already a father and was able to father children with another woman. Thus, he would not have been denied the right to procreate generally, only the more specific right to procreate from his ex-wife's fertilized eggs.¹⁴⁴ In *A.Z.*, the Massachusetts court took account only of the ex-husband's right not to be compelled to become a parent over his later objection.¹⁴⁵ It did not discuss his ex-wife's right to be a parent, perhaps because she already had two children.

These decisions manifest the deep importance that individuals and courts attach to the genetic connection between parent and child. Although reproductive technologies have been described as separating reproduction from sex, at least in the context of IVF and frozen pre-embryos, they have not diminished the importance of genetic parenthood by separating parenting from biology.¹⁴⁶ Indeed, couples undergo the invasive IVF procedures for the purpose of having their own biological children rather than adopting a child at the outset.¹⁴⁷

IV. THE BIOLOGICAL TIE

Feminists have criticized those who would determine parenthood by genetic connection alone because they impose a male model of parenthood and ignore the unique female contribution of gestation and childbirth.¹⁴⁸ However, the controversy between the relative importance of genetics and gestation is not involved in these claims of divorced spouses to their pre-embryos. The disputes discussed in this Article do not involve conflicting parental claims by more than the two parties to a child already born. Instead, these disputes involve a couple's conflicting claims to establish or avoid a future parental connection to a child genetically their own and the importance of that biological connection in relation to the parties' pre-conception agreements. In these cases, the courts use genetics both in the positive sense of a person's interest in becoming a biological parent, and

144. *Id.* at 619.

145. *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000).

146. *See, e.g.*, Shapo *supra* note 1, at 1093; Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J. 313, 314 (1999).

147. Susan Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child's Companionship*, 8 T.M. COOLEY L. REV. 273, 320-21 (1991) (discussing why couples undergo the stressful IVF procedures in order to have a child) and 274-78 (discussing the importance to parents, especially women, of a child's companionship).

148. *See, e.g.*, Halperin-Kaddari, *supra* note 146, at 322; Capron, *supra* note 86, at 23; Shapo, *supra* note 1, at 1166.

in the negative sense of an interest in not becoming a biological parent.¹⁴⁹

In *Nachmani*, the Israeli court awarded the pre-embryos to Ms. Nachmani so that she could have a child genetically her own.¹⁵⁰ Indeed, the court did not consider the alternative that Ms. Nachmani could adopt.¹⁵¹ The Tennessee,¹⁵² Massachusetts,¹⁵³ and New Jersey courts,¹⁵⁴ by comparison, awarded the pre-embryos to parties who would destroy the pre-embryos so that they would not be forced into genetic parenthood of a child raised by their ex-spouse, or donated to strangers. Yet, in the Massachusetts and New Jersey cases, the party wanting the pre-embryos for implantation already had a child or children.¹⁵⁵ In the Tennessee and New Jersey cases, the courts emphasized that they might not have ordered the pre-embryos destroyed if the party requesting custody wanted to bring the pre-embryos to term to raise themselves, and this was the party's only chance for genetic children.¹⁵⁶

Only the New York court decided on contractual grounds alone;¹⁵⁷ it did not consider that Ms. Kass was childless and, like Ruthi Nachmani, would not be able to have a biological child in the future without the pre-embryos. Moreover, the New York court never discussed the divorced couple's conflicting interests in parenthood. If the court had been concerned about Ms. Kass raising the child as a single parent or her ability to take responsibility for the child—that is, if the court was inquiring into the best interests of the child—it did not mention those concerns in its decision.

Two other recent decisions involving slightly different issues emphasize other courts' concern with the importance of biology and the right to procreate rather than with contract and pre-conception intent to determine parenthood.¹⁵⁸ In both of these cases, the couple already had one or more children. In one case, only one member of a di-

149. See Halperin-Kaddari, *supra* note 146, at 322.

150. *Id.* at 317–18 (citing F.H. 2401/95, *Nachmani II*, 50(4) P.D. 661).

151. Halperin-Kaddari, *supra* note 146, at 323.

152. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1991).

153. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058 (Mass. 2000).

154. *J.B. v. M.B.*, 51 A.2d 613, 620 (N.J. Super. Ct. App. Div. 2000).

155. *A.Z.*, 725 N.E.2d at 1052; *J.B.*, 751 A.2d at 615.

156. *Davis*, 842 S.W.2d at 604.

157. *Kass v. Kass*, 696 N.E.2d 174, 178–82. (N.Y. 1998).

158. *Litowitz v. Litowitz*, 10 P.3d 1086 (Wash. 2000); *In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999).

vorced couple had provided the gametes for frozen pre-embryos.¹⁵⁹ In the other case, a child was born after the couple divorced, but was conceived by IVF during their marriage.¹⁶⁰

In *Litowitz*, a Washington court held that an ex-husband alone had an interest in pre-embryos conceived by IVF from the husband's sperm and a donor's eggs.¹⁶¹ Ms. Litowitz, who had four children, two of them from the marriage to Mr. Litowitz, wanted custody of the remaining pre-embryos. The parties' consent form with the IVF clinic did not specify the fate of the pre-embryos if the parties divorced, and although Ms. Litowitz argued that the couple had an implied agreement to give her custody of the pre-embryos to arrange for their birth, the court would not imply an agreement between them to parent a child after divorce.¹⁶² Ms. Litowitz also argued that she had a right to the pre-embryos as their "intended parent."¹⁶³ The court did not even discuss this contention and never considered her interest in obtaining the pre-embryos. Because Ms. Litowitz had no genetic connection to the pre-embryos, and thus to any child that would be born from them, the court determined that she had no "constitutional right" to procreate.¹⁶⁴ In the court's view, the husband alone, as the genetic progenitor, had the "right to dispose of the pre-embryos as he chooses."¹⁶⁵ Thus, the court awarded the pre-embryos to the husband, based on his "right not to procreate,"¹⁶⁶ even though he planned to donate them to an out-of-state couple and would be the genetic parent of a child he would not know.¹⁶⁷

The second case in which biology proved paramount involved a Texas couple. In *O.G.M.*, a Texas court determined the parentage of a child conceived by IVF during the couple's marriage, but carried to

159. *Litowitz*, 10 P.3d at 1088.

160. *O.G.M.*, 988 S.W.2d at 974.

161. *Litowitz*, 10 P.3d at 1088.

162. *Id.* at 1091.

163. *Id.* at 1090.

164. *Id.* at 1092.

165. *Id.* at 1093.

166. *Id.*

167. This decision impliedly distinguished social from biological parents. According to the court, the psychological and financial aspects of parenting flow from long-term obligations, not from the brief act of conception, so that Mr. Litowitz would not become a parent against his will. *Id.* Mr. Litowitz's genetic tie endowed him as the biological parent and the sole decision-maker, but not necessarily as the child's social parent. In *Davis*, however, Junior Davis had argued convincingly that he did not want his ex-wife to give the pre-embryos to another couple because he then would be a parent to the children, but would not know them. *Davis v. Davis*, 842 S.W.2d 588, 603-4 (Tenn. 1991).

term and born after their divorce.¹⁶⁸ The couple disagreed as to whether, before they began IVF treatments, they had agreed that the husband would have paternity rights after the child was born.¹⁶⁹ The court, however, decided that the ex-husband was the child's legal father, not on the basis of whether the couple had agreed or not, but because of the ex-husband's biological paternity and his conduct after the child's conception.¹⁷⁰ The ex-wife argued that in prior cases of assisted conception all courts had determined parenthood by the parties' intent.¹⁷¹ The court, however, distinguished cases in which the courts had based parenthood on the parties' pre-conception intent, and did not consider that factor sufficient to overcome the husband's biological paternity.¹⁷² Moreover, the court noted that those cases did not involve determination of parenthood of a child conceived by IVF during marriage, but born after the parties divorced.¹⁷³

Thus, most American courts have relied on biology and not contract or intent in order to locate decision-making authority over pre-embryos. However, the courts have used biology in the negative sense by favoring individual autonomy and the right not to procreate over parental ties—the courts have favored the party who did not want to become the parent of a child born from pre-embryos conceived before the parties divorced.

In these difficult situations, American courts appear to be searching, unsuccessfully so far, for persuasive precedents and analogies. The courts have thus far rejected the analogy between frozen pre-embryos and in vivo pregnancy. Instead, the New York Court of Appeals relied on contract principles to bind a couple to their pre-conception contractual intent.¹⁷⁴ But the precedents for parenthood by contract have been cases that involve distinguishable issues. The Massachusetts and New Jersey courts have rejected the New York contractual approach and have decided that, as a matter of public

168. In re O.G.M., 988 S.W.2d 473, 474–75 (Tex. App. 1999).

169. *Id.*

170. *Id.* at 478.

171. *Id.* at 477.

172. *Id.* at 478. The cases the court distinguished involved either the parties' agreement about paternity of a child born by AID to an unmarried woman using a known donor's sperm, In re R.C., 775 P.2d 27 (Colo. 1989), or the maternity of a child gestated by a married woman, but conceived from donated ova and the husband's sperm, McDonald v. McDonald, 608 N.Y.S.2d 477 (1994), or the opposite situation in *Johnson*, the maternity of a child born to a surrogate, but conceived of the married couple's gametes, Johnson v. Calvert, 851 P.2d 776, 776 (Cal. 1993) (*en banc*).

173. *O.G.M.*, 988 S.W.2d at 478.

174. Kass v. Kass, 696 N.E.2d 174, 180–81 (N.Y. 1998).

policy, they will not force one of the progenitors into parenthood.¹⁷⁵ However, the body of law on which these courts relied involved statutes and cases that allow genetic parents and surrogates to change their minds and not give up a child for adoption even after the child has been born.¹⁷⁶ Indeed, these cases and statutes show the compelling pull of biological parenthood; they allow the biological parent to reconsider and to keep the child over the claims of contracting parties. The existing law on which these courts relied also involves more than two people who claim parenthood to the same child (the genetic parents and the potential adopters, or the surrogate and the commissioning couple). Thus, these cases do not provide a strong basis for the courts' decisions in favor of the party wishing to avoid parenthood.

V. UNITED KINGDOM LAW

The United Kingdom law regulating ART has been described as emphasizing the genetic nature of parenthood.¹⁷⁷ In 1990, the U.K. enacted comprehensive legislation, the Human Fertilisation and Embryology Act (HFEA).¹⁷⁸ The HFEA itself does not expressly cover the fate of unused frozen pre-embryos where the couple does not agree. Under the HFEA, however, unused frozen embryos will be destroyed after five years¹⁷⁹ unless both the “mother” and “father” consent to continue storage.¹⁸⁰

Under Schedule 3 of the HFEA, the parties must consent in writing to the use or storage of their embryos and must “be given a suitable opportunity to receive proper counseling about the implications of taking the proposed steps.”¹⁸¹ The Schedule permits the par-

175. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1055 (Mass. 2000); *J.B. v. M.B.*, 51 A.2d 613, 620 (N.J. Super. Ct. App. Div. 2000).

176. *A.Z.*, 725 N.E.2d at 1059; *J.B.*, 751 A.2d at 620.

177. Martin Johnson, *A Biomedical Perspective on Parenthood*, in *WHAT IS A PARENT?* 47, 64 (Andrew Bainham et al. eds., 1999). Professor Johnson was a member of the Human Fertilisation and Embryology Authority.

178. Human Fertilisation and Embryology Act, 1990, ch. 37 (Eng.) [hereinafter HFEA]. The HFEA recognizes a surrogate as the mother of the child she bears regardless of her genetic tie, and recognizes the husband of a woman who bears a child from AID as the father. Professor Johnson, however, explains the latter rule as designed to protect the genetic father, and the former rule as designed to discourage the use of surrogates because the commissioning couple loses control of their genetic material. Johnson, *supra* note 177, at 65–66.

179. HFEA § 14.

180. *Id.* § 2.

181. HFEA Schedule 3(3)(4)(a).

ties to vary or withdraw their consent, but both must agree.¹⁸² According to the current chair of the Human Fertilisation and Embryology Authority,¹⁸³ “[the] British attitude is very insistent on consent as the key to dignified and independent use of a person’s genetic material. The preservation of bodily integrity and control over one’s own genetic material is paramount.”¹⁸⁴ The result of one party having such control, however, is that the other party loses autonomy and control. If one party refuses to consent to use of the frozen embryo for implantation and prevents the other party from implanting the embryo and bearing the child, the latter party loses control over her genetic material. If the parties reach a stalemate, the embryo will be destroyed after the statutory maximum storage time without either party’s consent.

At least one commentator has criticized the HFEA’s requirement of dual consent,¹⁸⁵ recognizing that in the “turbulent emotional conditions of divorce,”¹⁸⁶ the parties will not always agree. Contrasting the husband’s increased decision-making rights over the frozen pre-embryo under the HFEA to his lack of rights over the fate of an implanted fetus, the author concludes that it is “both logical and pragmatically desirable to vest the ultimate disposal of an embryo in the person for whom it was intended: that is, the woman who was to carry it.”¹⁸⁷ The author would limit the husband’s consent to the original conception of the embryo and to its implantation in a woman other than his wife.¹⁸⁸

A new potential weapon against the HFEA’s consent requirement is the Human Rights Act of 1998 (HRA) which came into force in October 2000.¹⁸⁹ The HRA incorporates into U.K. law the European Convention for the Protection of Human Rights and Fundamental Freedoms and provides that those rights are now directly enforce-

182. *Id.*

183. The HFEA established the Human Fertilisation and Embryology Authority as an enforcement agent. HFEA § 41.

184. Ruth Deech, *The Legal Regulation of Infertility Treatment in Britain*, in CROSS CURRENTS 165, 175 (Sanford W. Katz et al. eds., 2000).

185. MASON, *supra* note 122, at 236.

186. *Id.*

187. *Id.*

188. *Id.* It has also been pointed out that, under the HFEA, if an embryo is recovered by lavage, that is, it is extracted from a woman’s uterus, the woman alone has the power to consent to its use. DEREK MORGAN & ROBERT G. LEE, BLACKSTONE’S GUIDE TO THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990 138 (1991).

189. Human Rights Act, 1998, ch. 42 (Eng.).

able in U.K. courts.¹⁹⁰ Specifically, Article 8 of the European Convention, concerning respect for an individual's private and family life,¹⁹¹ must now be considered in HFEA litigation. Thus, in the U.K., a person asking for custody of frozen embryos in order to bring them to term may claim that the HFEA is not compatible with Article 8's right to family life. However, the Article 8 right is not absolute. A public authority may interfere with this right by a decision "prescribed by law," that has a legitimate aim, and is "no more than is necessary in a democratic society" (i.e., it is proportional).¹⁹²

The English courts will have to interpret and reconcile a complex mixture of European and domestic law. It would appear, though, that in a suit by one progenitor to obtain frozen pre-embryos where the parties had previously agreed to their destruction, one party may argue that she has a right to a family through implantation of the pre-embryos. By contrast, the non-consenting party may claim that to become a parent against his or her consent violates Article 8's right to privacy. Article 8 analysis will then involve a "proportionality" inquiry or "doing no more than is necessary in order to achieve a particular end which is itself lawful and necessary."¹⁹³ The court will then have to balance the parties' conflicting rights.

The discussions in the diverse and interesting cases litigated involving the Human Rights Act, which have required the English courts to balance opposing rights, provide some guidance. An example, somewhat far afield, involves the actors Michael Douglas and Catherine Zeta-Jones. Having sold exclusive rights to photograph their marriage ceremony to one magazine, they sought an injunction against another magazine to prevent the publication of photos it had obtained from an unknown source.¹⁹⁴ The court viewed the case as a conflict between the European Convention's Article 10 right to free expression and Article 8 right to respect for privacy and family life.¹⁹⁵ The court said that neither article had presumptive priority over the

190. PAUL ASHCROFT ET AL., HUMAN RIGHTS AND THE COURTS 9 (Bryan Gibson ed., 1999).

191. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

192. ASHCROFT ET AL., *supra* note 190, at 27.

193. *Id.* at 26-27.

194. Douglas and Others v. Hello! Ltd., [2001] H.R.L.R. 26 (Eng. C.A.).

195. The Court of Appeals recognized a right of personal privacy in English law, which had not been clearly recognized before. See Nicole Moreham, *Douglas and Others v. Hello! Ltd.—The Protection of Privacy in English Private Law*, 64 MOD. L. REV. 767, 767 (2001).

other, but that each was subject to a rule of proportionality.¹⁹⁶ Because the couple had not had a private wedding and had sold their privacy, the court denied the injunction.

Re A,¹⁹⁷ a case decided just days before the HRA came into force, involved conflicting interests where an infant's life was at stake. Infant twins had been born conjoined. Their parents would not consent, on religious grounds, to a surgical separation that would save the life of one of the twins, but kill the other. Without the operation both twins would have died. The weaker twin depended for life on the other and the stronger twin, unable to sustain both their lives, would have died of heart failure within three to six months.¹⁹⁸ The court balanced both children's interests and ordered the separation operation without parental consent in order to save one child's life, viewing the decision as "the least detrimental choice,"¹⁹⁹ although it would hasten the death of the other child. Looking to the European Convention's Article 2(1) provision on protection of life,²⁰⁰ the court noted that had the HRA, and thus Article 2(1), been in force, it would have been required to balance its negative obligation to refrain from intentional deprivation of life and its positive obligation to protect the enjoyment of life.²⁰¹ The court chose its positive obligation to save a life.

Closer to the topic of ART is a recent case involving ART through artificial insemination, where the court decided against allowing a prisoner to provide sperm to inseminate his wife.²⁰² The prisoner relied on the Article 8 right to respect for private and family life. The court, however, said that imprisonment was "inconsistent with those rights"²⁰³ because family life was incompatible with the purposes of imprisonment. The court did note that in exceptional circumstances where deprivation would be disproportionate to the aim of imprisonment, the prison authorities had allowed artificial insemi-

196. *Douglas*, [2001] H.R.L.R. 26, at ¶ 50.

197. 1 Fam. 1 (Eng. C.A. 2001).

198. *Id.* at 15.

199. *Id.* at 62.

200. Article 2(1) of the European Convention on Human Rights (1950) provides, "Everyone's right to life shall be protected by law. . . ." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 191, at art. 2(1).

201. *Re A*, 1 Fam. at 1.

202. *Regina v. Sec'y of State for the Home Dept. ex parte Mellor*, [2001] E.W.C.A. Civ. 472 (Eng. C.A., Apr. 4, 2001), available at http://www.markwalton.net/2001/civil_mellor.asp? (last visited Nov. 20, 2001).

203. *Id.*

nation.²⁰⁴ Possibly, one of those circumstances could involve a situation in which the parties would no longer be able to reproduce after the prisoner had served his sentence.

In the background of this relatively undeveloped case law, the outcome of a dispute over frozen pre-embryos under U.K. law is uncertain. In HFEA litigation, a court must now consider the HRA and its attendant balancing of rights. One party's privacy right not to be a parent presumably would have no priority over the other party's right to become a parent and bring an embryo to life. A court will balance each party's interests, taking account of their individual circumstances.²⁰⁵ In at least one case, an English court, acting without the parents' consent, chose a child's life.²⁰⁶

VI. CONCLUSION

The Israeli Supreme Court in *Nachmani* staked out a different, arguably wiser, position than that adopted thus far by courts in the United States or embodied in U.K. legislation. Recognizing that there was no existing law on point, the majority in *Nachmani* approached the case in significant measure as a matter of expectations and justice. The majority in *Nachmani* viewed justice as requiring a decision that favors life; therefore the court permitted an attempt to vivify frozen embryos for a woman who had no other chance for genetic children. No American case except *Kass* has addressed a situation in which the last opportunity for genetic children was at stake. In *Kass*, the court's framing of the issue precluded the judges from considering it.²⁰⁷ Yet, that circumstance has been recognized in two American cases²⁰⁸ as a potentially decisive factor, and an English court has recognized the importance of protecting an infant's life even without parental consent.²⁰⁹

The American cases, although seemingly unanimous in outcome are, in fact, contradictory. The courts have disagreed about whether a couple is bound by the informed consent forms they signed with the

204. *Id.*

205. *See, e.g.*, *Guidera's Estate*, *Bingham v. Guidera*, 3 BUTTERWORTHS INT'L TRUST & ESTATE L. RPTR. 397 (N. Ir., Nov. 24, 2000).

206. *Re A*, 1 Fam. at 62.

207. *See generally* *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

208. *J.B. v. M.B.*, 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000), *aff'd in part*, 2001 WL 909294 (N.J. Aug. 14, 2001); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1991).

209. *Re A*, 1 Fam. 1 (Eng. C.A. 2001).

IVF facility.²¹⁰ Courts have also differed as to whether to impose a fixed rule that a person will not be forced to become a parent after he or she changes his or her mind about implanting frozen pre-embryos, or whether to balance the rights of each of the divorced persons, taking into account their individual circumstances.²¹¹ Courts have also differed as to the relevance of whether the parties are already parents or may be able to become parents with another partner.

It appears that courts will continue to walk an uncertain path without adequate analogies through the complex problems created by biology, technology, and human emotions. Although contract law seems to provide a bright-line solution, couples who embark on ART face special anti-contractual pressures. The usual premises of bargaining, efficiency, and rationality generally do not hold for people embarking on a program of IVF. Courts would do well to take account of specific facts, especially whether one or both of the parties already has biological children or would be able to have them in the future, as well as taking into account more general public policy considerations. And courts should ensure that any public policy they invoke takes into account the particular issues raised by a divorced couple's disagreement over their frozen pre-embryos. Individual autonomy works both ways. One party's holdout "right" not to be a parent and to dispose of pre-embryos becomes a veto—and perhaps a bargaining chip in divorce—over the other party's "right" to be a parent. One can only predict that courts will continue to search for a more coherent and equitable theory for some years to come.

210. See *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B.*, 751 A.2d 613; *Kass*, 696 N.E.2d 174.

211. See *A.Z.*, 725 N.E.2d 1051; *J.B.*, 751 A.2d 613; *Davis*, 842 S.W.2d 588.