COMMENTS

Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy

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The fertility industry in the United States is, for the most part, unregulated. The growing demand of infertile couples has quickly accelerated the status of assisted reproductive technology procedures such as in vitro fertilization from experimental to everyday clinical use. Although minimum standards and guidelines for fertility clinics have been produced by professional societies, clinics are not obligated to follow them, and there are no standard substantive guidelines available for them to follow. As legislatures have been slow to respond to the dilemmas created by reproductive technology, the response to these dilemmas has come from the courts that are compelled to react on a case-by-case basis. Courts in all fifty states are able to decide these issues on a case-by-case basis because national uniform policy does not exist. In contrast, comprehensive national legislation in England and Australia has effectively curtailed courtroom battles over frozen embryos.

This Comment focuses on the recent increase in litigation between divorcing couples in the United States over the disposition of frozen embryos and suggests that there is a need for uniform state regulation of the growing assisted reproduction technology market. A well-regulated regime would promote uniform contracts signed between IVF clinics and their clinics as per the disposition of any frozen embryos in the case of change of circumstance such as divorce or death. This Comment suggests that the U.S. would do well to follow the example set by countries such as England and Australia, and establish an independent commission to undertake a comprehensive review of the various issues raised by in vitro fertilization, and to draft legislation to be implemented by the states.

I. INTRODUCTION

People everyday around the world dream of having children to complete their families. They dream of the intensity of those first twenty-four hours spent with that perfect less-than-ten-pound bundle of newness that is their first child. Since the first child was conceived through in vitro fertilization (IVF) in England in 1978,[1] the use of IVF and related assisted reproductive technologies has grown considerably over the last two decades. In 1998, over 80,000 Assisted Reproductive Technology (ART) treatment cycles were carried out at 360 programs in the United States alone.[2] With the increasing use and availability of ARTs, conceiving via IVF is an accepted and in some cases, very expected route to achieve that dream. Hundreds of couples use IVF technologies every day.[3] However, the fantasy of a child to call your own comes with strings attached that many, including the courts, legislative, and regulatory bodies in the United States are not prepared to deal with. When those hopeful couples are signing contracts at IVF clinics to bring them closer to their dream, the last thing on their mind is the future of their marriage. Unfortunately, as the divorce rate remains steady, at between 40% and 50% for first-time married couples, it is inevitable that some of these marriages will not last.[4] In the twenty-first century, the world is seeing the repercussions of the inevitable intersection between the high rate of divorce and the high rate of IVF success. The agreements signed by these couples often are missing very pertinent provisions, such as, in the case of divorce, who owns the extra cryopreserved embryos sitting in storage at minus 195 degrees

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1. *See* JOSE VAN DYCK, MANUFACTURING BABIES AND PUBLIC CONSENT 62 (1995).

2. *See* U.S. CENTERS FOR DISEASE CONTROL, 1998 NATIONAL ART FERTILITY REPORT nat. summ. (2001), *available at* http://www.cdc.gov/nccdphp/drh/art98 (last visited Feb. 14, 2001) (reporting data from the 360 fertility clinics in operation in 1998 that provided and verified data on the outcomes of all ART cycles started in their clinics).

3. *See id.* In 1998, close to 30,000 babies were born in the United States alone as a result of ART cycles. 73.3% of those treatment cycles involved IVF, a process in which fertilization occurs "in vitro," in a laboratory dish rather than inside the woman's body. *Id.*

4. Provisional data for a twelve-month period ending November 1999 show that roughly half of all marriages end in divorce. *See* Centers for Disease Control and Prevention, Births, Marriages, Divorces, and Deaths: Provisional Data for November 1999, 48 NAT'L VITAL STATISTICS REP. 17 (Oct. 31, 2000). The current divorce rate is calculated somewhere between 40% and 50% for young first-time married couples. *See* Dr. Scott Stanley, *What Really Is the Divorce Rate?*, DIVORCE SUPPORT, *available at* http://divorcesupport.about.com/library/weekly/aa061699.htm (last visited Feb. 14, 2000).

centigrade,[5] and in the case of death, what should be done with the embryos whom no one claims as their own.

Although the United States is leading the litigation front on the issue of disposition of frozen embryos after divorce, many countries, as discussed below, are also struggling to face the challenges associated with ARTs[6] and the inability of the law and government to keep pace. Although the regulatory schemes put in place by some countries such as England and Australia are not perfect, they are well formulated and have managed, unlike the United States, to head off litigation between divorcing couples disputing ownership of frozen embryos. Such litigation is becoming more prevalent in the United States in the absence of uniform regulation over the contracts signed between IVF clinics and their clients. This comment suggests that the United States should follow the path taken by England and Australia and create an advisory committee to examine ART issues and propose solutions to today's and tomorrow's ART challenges. As it stands, U.S. state courts are addressing these issues one case at a time, and one state at a time. Moreover, as the discussion of U.S. case law below reflects, state courts are striking down embryo disposition agreements signed by couples contracting with IVF clinics. In refusing to enforce such contracts, the judiciary is destabilizing an unestablished, and therefore already unstable, area of law in the assisted reproductive arena. In an area of emerging technology such as assisted reproduction, where no single IVF program or single court can possibly predict the multitude of hairy legal issues that may arise in the coming years, it makes sense to appoint a group of experts to study and draft guidelines as to how to best implement the technology. Without uniform guidelines, inconsistencies will arise leading to increased litigation as each clinic attempts to draft stable IVF agreements, and each state court develops its own method of analyzing such disputes on a case-by-case basis. This approach is well illustrated by the committees of experts and scholars established to specifically study ARTs and to recommend legislation in England and Australia. These committees held extensive hearings with public input, culminating in the passage of legislation such as the 1985 Surrogacy Arrangements Act[7] and the 1990 Human Fertilization and Embryology

5. *See* Clifton Perry & L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 468 (1992).

6. In this Article, the term "ART" is used to designate the various technologies that utilize cryopreservation of embryos and sperm to assist reproduction. Typically, such technology is used in conjunction with in vitro fertilization. For a discussion of various types of reproductive technologies, *see Ethics Committee of the American Fertility Society, Ethical Considerations of Assisted Reproductive Technologies*, 62 FERT. & STER. 35 Supp. 1 (1994).

7. *See* Surrogacy Arrangements Act, 1985 (C. 49 Eng.).

Act[8] in Britain, and the Infertility (Medical Procedures) Act[9] by the State of Victoria in Australia in 1984.[10]

As seen below, the failure of U.S. state legislatures to adequately address the legal issues arising when parties using ARTs disagree as to disposition of cryopreserved embryos[11] has resulted in the judiciary facing complicated questions with far-reaching ethical, legal, and social implications. An overview of recent U.S. judicial decisions concerning divorcing couples' disagreement on the disposition of frozen embryos, reflects the pressing need for uniform regulatory measures.

II. BACKGROUND

Louise Brown, the first child conceived using IVF, was born in England on July 25, 1978.[12] Births of IVF children followed in Australia in 1980 and in the United States in 1981.[13] IVF involves the fertilization of an egg with a sperm in a petri dish and implantation of the resulting embryo in a woman's womb to achieve pregnancy.[14] Because the procedure is not guaranteed to be successful, it is routine procedure among IVF clinics to create extra embryos and freeze them for later use if the initial implantation is not successful.[15] Additionally, some parents preserve extra embryos in case they desire more children.[16] Cryopreservation, or the freezing of embryos for future use, has significantly improved the IVF process.[17] The first successful human

8. *See also* Human Fertilization & Embryology Act, 1990 (C. 37 Eng.).

9. Infertility Treatment Act, 1995 (Austl.).

10. JENNIFER GUNNING & VERONICA ENGLISH, HUMAN IN VITRO FERTILIZATION: A CASE STUDY IN THE REGULATION OF MEDICAL INNOVATION 33-41 (1993).

11. *See* Keith Alan Byers, *Infertility and in Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the in Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 289-313 (1997).

12. *See* VAN DYCK, *supra* note 1, at 62.

13 *See* ARTHUR L. WISOT & DAVID R. MELDRUM, NEW OPTIONS FOR FERTILITY 3 (1990). The first Australian birth was at the Royal Women's Hospital in Melbourne, Victoria, while the first birth in the United States took place at the Eastern Virginia Medical School in Norfolk, Virginia. *Id.*

14. *See* ANDREA BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 11-14 (1989).

15. *See id.* at 30-34.

16. *See id.*

17. *See* Michael S. Simon, Note, *"Honey, I Froze the Kids":* Davis v. Davis *and the Legal Status of Frozen Embryos*, 23 LOY. U. CHI. L.J. 131, 132 (1991). "Cryopreservation" is defined as the "maintenance of the viability of excised tissues or organs at extremely low temperatures." STEDMAN'S MED. DICTIONARY 416 (26th ed. 1995). Cryopreservation of embryos improves the chances of becoming pregnant because excess embryos can be saved and implanted later if the first IVF does not work. *See* Howard W. Jones, Jr., *Cryopreservation and Its Problems*, 53 FERTILITY & STERILITY 780, 783 (1990) ("With improved methods of stimulation in responsive patients, the expectancy of pregnancy from a single egg harvest, including cryopreservation, approaches 50%.").

birth from a frozen embryo was in 1983 in Australia.[18] The patient miscarried during her first attempt at IVF, but later gave birth to a child from a cryopreserved embryo stored as a precaution during the initial attempt at implantation.[19] Freezing embryos gives couples the ability to store embryos for multiple attempts at implantation, without the need for repeated hormonal treatment and painful laparoscopes.[20] The process also provides insurance against future possible damage to a woman's eggs or reproductive organs.[21]

III. STATUS OF FROZEN EMBRYO DISPUTES IN THE UNITED STATES

Five jurisdictions in the United States, including the highest courts of Tennessee, New York, and Massachusetts, and the appellate courts of New Jersey and Washington, have examined the question of whether a contract addressing embryo disposition is enforceable; three of these opinions were released in 2000.[22] In 1992, the Supreme Court of Tennessee, and in 1998 the Court of Appeals of New York, upheld the agreements signed by the parties regarding the disposition of frozen embryos.[23] However in 2000, the Supreme Judicial Court of Massachusetts and the Superior Court of New Jersey refused to enforce the agreements signed by the parties, holding that the contracts were either incomplete and unenforceable, or unenforceable due to public policy in that the contracts foisted parenthood on an unwilling individual.[24] The Court of Appeals of Washington, also forced to interpret an incomplete contract, awarded the embryos to the partner whose constitutional rights seemed to prevail based the particular facts of the case.[25] The following gives a brief summary of the five cases, highlighting each courts' approach to disputes over frozen embryos where the agreements regarding disposition of the embryos are either nonexistent, ambiguous, incomplete, or were so carelessly considered by the parties that the court was compelled to uphold them.

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18. *See* Lawrence J. Kaplan & Carolyn M. Kaplan, *Natural Reproduction and Reproduction-Aiding Technologies*, *in* THE ETHICS OF REPRODUCTIVE TECHNOLOGY 15, 27 (Kenneth D. Alpern ed., 1992).

19. *See id.*

20. *See id.*

21. *See id.*

22. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Kass v. Kass, 696 N.E.2d 554 (N.Y. 1998); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 751 A.2d 613 (N.J. 2000); Litowitz v. Litowitz, 10 P.3d 1086 (Wash. 2000).

23. *See Davis*, 842 S.W.2d at 588; *Kass*, 696 N.E.2d at 554.

24. *See A.Z.*, 725 N.E.2d at 1051; *J.B.*, 751 A.2d at 613.

25. *Litowitz*, 10 P.3d at 1086.

A. Davis v. Davis

Davis v. Davis[26] was the first judicial decision in this country to address a conflict over the disposition of frozen embryos.[27] *Davis* involved a divorcing couple who disputed the custody of seven frozen embryos created during the couple's marriage.[28] The ex-wife had initially sought custody for implantation into her body, but by the time the case reached the Tennessee Supreme Court, she wanted to donate the embryos to a childless couple.[29] The husband, citing his own experience being raised apart from his natural parents, wanted the embryos destroyed.[30] Although the couple had not signed any written agreement regarding the disposition of the embryos in the event of divorce, the Tennessee Supreme Court addressed the validity of such agreements to provide guidance for future cases.[31] The court concluded that "an agreement regarding disposition of any un-transferred [embryos] in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors."[32] In the absence of an advance agreement, the court held that the guiding principle for resolving disputes should be respect for the parties' procreative autonomy; in this case, the ex-husband's interests in not becoming a parent outweighed the ex-wife's interest in donating the embryos to another couple.[33] Procreative autonomy, the court concluded, includes "the right to procreate and the right to avoid procreation."[34]

B. Kass v. Kass

In *Kass v. Kass*, an agreement signed by the parties to donate the frozen embryos for research was upheld over the wife's objections.[35] Maureen and Steve Kass turned to an IVF program after their efforts at conception through artificial insemination failed.[36] Five embryos, created during the marriage, were stored in the IVF bank.[37] After

26. 842 S.W.2d at 588.
27. *See id.* at 589.
28. *See id.*
29. *See id.* at 590.
30. *See id.* at 603-04.
31. *See id.*
32. *See id.* at 597.
33. *See id.* at 604.
34. *See id.* at 601.
35. 696 N.E.2d 174 (N.Y. 1998).
36. *See id.* at 175.
37. *See id.* at 175-76.

divorcing, the Kasses disputed custody of these stored frozen embryos.[38] Mrs. Kass claimed sole custody because to her, the embryos represented her last remaining opportunity for genetic motherhood.[39] Mr. Kass objected to such a transfer of custody and argued that the burden of unwanted fatherhood should not be imposed on him unilaterally without his consent.[40] The Kasses signed an informed consent instrument with the IVF program in which they (1) authorized the retrieval of the eggs and (2) indicated their agreement to cryopreservation of any unused eggs.[41] A signed addendum to the consent form detailed the risks as well as the benefits of the IVF procedure.[42] They further specified that, in the event they were unable to make a decision regarding the disposition of the embryos, they would donate them to the IVF program for research purposes.[43] The court noted several policy reasons for upholding the agreement including: reducing litigation, preserving procreative liberty as expressed in the agreement, offering certainty to clinics and couples, and encouraging careful deliberation over such agreements.[44] The court explicitly did not address whether the contract violated public policy since the ex-wife did not raise that issue for review.[45]

C. A.Z. v. B.Z.

On March 31, 2000, the Massachusetts Supreme Judicial Court ruled in *A.Z. v. B.Z.*,[46] that a contract awarding custody of frozen pre-embryos[47] to the wife upon divorce was unenforceable because it violated public policy.[48] The court addressed the question of who legally controlled the frozen embryos. The court considered whether the embryos belonged to the forty-four year old wife, who wanted to try one last time to become pregnant, or to the father, her ex-husband, who did

38. *See id.* at 177.
39. *See id.*
40. *See id.*
41. *See id.* at 176-77.
42. *See id.*
43. *See id.*
44. *See id.* at 180.
45. *See id.* at 179 n.4.
46. 725 N.E.2d 1051 (Mass. 2000).
47. "Preembryo" is a medically accurate, if awkward, term for a zygote, or fertilized egg, that has not been implanted in a uterus; the embryo proper develops only after implantation. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942, 952 n.45 (1986). "The term 'frozen embryos' . . . is the term of art denoting cryogenically-preserved preembryos." *See* Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377 n.4 (1995).
48. 725 N.E.2d at 1051.

not want to have more children with his ex-wife. Again, the court ruled in favor of the parent who did not want the embryos implanted.[49]

In *A.Z. v. B.Z.*, the couple underwent several rounds of IVF treatment.[50] One round resulted in the birth of twin girls in 1991.[51] The collection cycle resulting in those births also produced additional pre-embryos that were cryopreserved.[52] The couple divorced in 1995, and the wife sought to enforce an agreement signed by both husband and wife granting her custody of the remaining frozen pre-embryos in the event of separation.[53] The court evaluated the agreement and found it incomplete in five respects.[54] First, the contract was intended as an agreement between the couple and the clinic regarding the risks of the procedure, and therefore, did not specifically state that it would govern the parties in case of dispute.[55] This ambiguity presents a deficiency in intent, as it is impossible to determine whether the husband and wife envisioned that the agreement would govern in a dispute between them.[56] The second, third, and fourth problems also involve the parties' intent. The agreements had no duration clause, and the court expressed an unwillingness to uphold the agreement so many years after the couple had singed it.[57] Furthermore, the agreement did not address the disposition of the embryos in the event a dispute arose in the context of divorce; rather the contract only addressed separation, which the court noted has a distinct legal meaning from divorce.[58] Moreover, since the husband signed a blank form that his wife subsequently completed, the agreement may not have expressed the husband's true intentions.[59] The final issue identified by the court was that the consent form was not a separation agreement that is binding on the couple in a Massachusetts divorce proceeding.[60] In conclusion, the court found that the form did not approach the minimum level of completeness needed to uphold it as an enforceable contract in a dispute between the couple.[61] The court explained that,

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49. *See id.* at 1059.
50. *See id.* at 1053.
51. *See id.*
52. *See id.*
53. *See id.* at 1052.
54. *See id.* at 1056-57.
55. *See id.* at 1056.
56. *See id.*
57. *See id.* 1056-57.
58. *See id.* 1057.
59. *See id.* at 1057.
60. *See id.*
61. *See id.*

> even had the husband and wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen pre-embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well established that courts will not enforce contracts that violate public policy.[62]

D. J.B. v. M.B.

On June 1, 2000, the Appellate Division of the Superior Court of New Jersey determined that an IVF contract by which a former husband and wife agreed to relinquish control and ownership of embryos to the IVF program if their marriage were to dissolve was unenforceable.[63] The parties were married in 1992, and were unable to conceive a child.[64] After contracting with an IVF center, the mother successfully gave birth in 1996.[65] With the couple's consent, several embryos not used were cryopreserved for future use.[66] The parties separated shortly thereafter.[67] The husband wanted to preserve the embryos for use, either with a woman with whom he might develop a relationship or for donation to an infertile couple.[68] The wife stated that she no longer wanted the embryos implanted in her, did not want defendant to retain them for his own use, and did not want them donated to anyone else.[69] The court ruled in favor of the mother and held the contract to be unenforceable.[70] The court noted that another's use of the embryos would result in impairment, and perhaps termination, of the woman's parental rights in the resulting offspring.[71] Such termination would be achieved initially by compelling her to become a biological parent against her will, and thus she would be forced to bear double insult to her reproductive rights.[72] The court agreed with the reasoning used by the Massachusetts court in *A.Z. v.*

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62. *See id.* at 1057-58.

63. *See* J.B. v. M.B., 751 A.2d 613 (N.J. 2000). On February 27, 1001, the former husband (M.B.) appealed to the New Jersey State Supreme Court. M.B. is an observant Roman Catholic who regards the embryos, human life and believes that they should be given a chance to live. He wants the embryos donated to another couple, or implanted in a future spouse. *See* Iver Peterson, *Fate of 7 Human Embryos Argued at High Court in Trenton*, N.Y. TIMES, Feb. 27, 2001, at A22.

64. *See J.B.*, 751 A.2d at 615.

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* at 619-20.

71. *See id.* at 620.

72. *See id.*

B.Z.,[73] and concluded that a contract to procreate is contrary to New Jersey public policy and is unenforceable.[74] The court noted that its decision was not contrary to *Davis* and *Kass* in that neither of those cases enforced a contract to procreate.[75] The court reasoned that recognizing the wife's constitutional right not to procreate would not impair her husband's constitutional right to procreate because he retains the capacity to father children, albeit not with his ex-wife's eggs.[76] The court emphasized that it was not deciding the case on constitutional grounds, but was instead using constitutional principles as a basis for the public policy reasons underlying its decision to not enforce the contract as signed by the parties.[77] The New Jersey court cited the Massachusetts court's reasoning that "agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions."[78]

E. Litowitz v. Litowitz

On October 17, 2000, the Washington Court of Appeals was asked to interpret the contract between the IVF clinic and its participants because it was missing a critical provision.[79] Unable to conceive, the Litowitz's contracted with a surrogate parenting center, an IVF clinic, and an egg donor.[80] The donated eggs were fertilized with David Litowitz's sperm, producing five embryos, two of which were implanted into the surrogate, and the remaining three were cryogenically frozen.[81] The IVF and the surrogacy resulted in the birth of a boy.[82] The Litowitz's soon separated.[83] While the wife requested the use of the

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73. *See id.* at 619. The Massachusetts court in *A.Z.* reasoned that,

> even had the husband and wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we concluded that forced procreation is not an area amenable to judicial enforcement. It is well established that courts will not enforce contracts that violate public policy.

See A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000).

74. *See J.B.*, 751 A.2d at 619.

75. *See id.*

76. *See id.* at 618-19. The court noted that the husband's sperm count was normal, and no infertility problems were attributed to him. *Id.* at 615.

77. *See id.* at 620.

78. *See id.* (citing A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000)).

79. *See* Litowitz v. Litowitz, 10 P.3d 1086 (Wash 2000).

80. *See id.* at 1088-89. After a hysterectomy, Becky Litowitz was unable to give birth naturally or to be an egg donor. *Id.* at 1088.

81. *See id.* at 1087-88.

82. *See id.* at 1088.

83. *See id.*

embryos, the husband stated that he preferred that the embryos be put up for adoption.[84] While the Litowitz's agreed under the IVF contract that in the event of death of both parents, or disagreement, that any unused frozen embryos would be thawed and not be allowed to develop, none of the listed circumstances included a marriage dissolution.[85] Both parties argued different interpretations of the missing contract provision, and in the end, the court used the *Davis* analysis, and decided that because the wife did not contribute any gametes to the embryos, that she had no constitutional right to procreate using those embryos.[86] The court held that the husband is allowed to exercise his right not to procreate in a limited way that allows the embryos to develop but avoids placing him in the unwanted parenting role.[87] Left to interpret a contract that did not contemplate a resolution for this specific issue, the Washington court relied on a balancing of interests test to determine that the husband's right not to procreate compels the court to award him the embryos.[88]

IV. ANALYSIS OF THE U.S. COURT DECISIONS

The overriding sentiment expressed throughout these opinions stretching over a ten-year period is that the courts are not willing to force people to procreate when they do not desire to do so. However, to protect this right, courts are striking down agreements signed by the parties.[89] The courts have moved from expressing their opinion in 1992 that "agreements regarding disposition of embryos . . . should be presumed valid and should be enforced as between the progenitors,"[90] to the more recent conflicting opinion that even when the contract is complete, it will not be upheld when it forces one to procreate.[91] The recent decisions holding that contract agreements regarding the disposition of frozen embryos should not be presumptively enforced challenges the notion that signed contracts reflect the parties' desires and should be upheld. Opponents of IVF contract enforcement respond that the parties could not possibly predict their desires should their circumstances change, as in the case of divorce.[92] However, proponents

84. *See id.*
85. *See id.* at 1089.
86. *See id.* at 1092.
87. *See id.* at 1092-93.
88. *See id.* at 1093.
89. *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 751 A.2d. 613 (N.J. 2000).
90. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).
91. *See* A.Z., 725 N.E.2d at 1051.
92. *See, e.g.*, Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 98-102 (1999).

of contract enforcement suggest that well-crafted agreements, which have been carefully considered by the signatories, are the best indication of the parties' intentions, and upholding them affirms people's freedom to enter into contracts creating a stable and safe market for those in need of assisted reproduction.[93] Without IVF legislation that creates guidelines for uniform contracts and requires procedural safeguards to ensure waivers are knowing and thoughtful, courts will continue to strike down these agreements as unenforceable, and will continue to make decisions on a state-by-state basis. When faced with the unsavory task of determining embryo ownership, courts would be greatly assisted if they could treat fertility clinics' informed consent and embryo disposition agreements as reliable documentation of each party's intent. Currently, thousands of frozen embryos are occupying space in the freezers of hundreds of U.S. IVF clinics.[94] Unless the question of embryo disposition upon change of party circumstance is considered and agreed upon by the courts, more disputes are certain to follow.[95]

V. U.S. LAW

U.S. law in this area, whether statutory or decisional, has evolved slowly and cautiously. While IVF has been available for over two decades and has been the focus of much academic commentary,[96] there is little law on the enforceability of agreements concerning the disposition of frozen embryos. Only a handful of states have adopted statutes touching on the disposition of stored embryos.[97] As such, the multibillion dollar fertility industry in the United States remains largely

93. *See* Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 964-65 (1999).

94. *See* ATHENA LIU, ARTIFICIAL REPRODUCTION AND REPRODUCTIVE RIGHTS 87-88 (1991).

95. *See id.* at 87-88.

96. *See, e.g.*, Coleman, *supra* note 92; Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. U. L.Q. 759 (1998); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990); Donna Sheinbach, *Examining Disputes over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive If Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV. 989 (1999).

97. *See, e.g.*, FLA. STAT. ANN. § 742.17 (West 1997) (requiring couples to execute written agreements providing for disposition in event of death, divorce or other unforeseen circumstances); N.H. REV. STAT. ANN. §§ 168-B:13, -B:15 (1994) (requiring the couple to undergo counseling and evaluation to determine their ability to "assume the inherent risks of the contract"). The New York and New Jersey legislators are currently considering bills that require execution of written advance directives for the disposition of frozen embryos by couples or individuals who enter in vitro programs or other assisted reproductive services, and also specify the content of those directives. *See* Ellen Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 936-37 (2000).

unregulated. Because people often equate the fertility industry with the abortion controversy, legislators tend to distance themselves from the developing issues in the field of reproductive technology. The few inroads made thus far, however, are attempts to catch up with medical technology as opposed to setting mandatory standards to prevent such problems from continuing to occur.

VI. AN INTERNATIONAL PERSPECTIVE

Although the fact patterns of the U.S. embryo disposition cases vary, there is sentiment throughout the opinions that indicates a general consensus among the state courts not to force parties to procreate against their will, regardless of whether a contract was signed to the contrary. However, U.S. courts, unlike the Israeli Supreme Court, have not been required to rule on the following particularly difficult to solve dispute. In September 1996, in a landmark decision on reproductive rights, the Israeli Supreme Court ruled that a childless woman, Ruti Nahmani, estranged from her husband, Danny Nahmani, could have the couple's frozen embryos implanted in a surrogate against her husband's wishes.[98] An eleven member panel of judges voted 7 to 4 that the right of the woman to be a mother outweighed the estranged husband's objections to fatherhood.[99] The decision ended a four-year legal battle for control of eleven embryos created in vitro when Mrs. Nahmani's last eggs were fertilized with her husband's sperm.[100] The couple had planned to implant the embryos in a surrogate, as Mrs. Nahmani underwent a hysterectomy in 1987 due to a cancerous growth found in her uterus.[101] The embryos represented her last chance to have a child since she was unable to produce more eggs, and adoption was not a viable alternative.[102] Shortly after the eggs were fertilized, but before they were delivered to the surrogate, Mr. Nahmani left his wife and moved in with another woman, with whom he has since had two children.[103]

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98. *See* Joel Greenberg, *Israeli Court Gives Wife the Right to Her Embryos*, N.Y. TIMES, Sept. 13, 1996, at A10.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See* Janie Chen, The Right to Her Embryos, *An Analysis of Nahmani v. Nahmani and Its Impact on Israeli in Vitro Fertilization Law*, 7 CARDOZO J. INT'L & COMP. L. 325, 360 (1999). As per section three of the Adoption of Children Law, adoption was not an option for Mrs. Nahmani since the Israel Health regulations prohibit single parents from adopting. Adoption of Children Law, 1981, 35 L.S.I. 360, (1980-81).

103. *See* Greenberg, *supra* note 98, at A10.

Without precedent, statutory law,[104] or a contract between the parties[105] to rely on, the court granted the embryos to Mrs. Nahmani, based on three factors: (1) the conflicting interests of the parties, (2) the parties' legitimate expectations, and (3) public policy.[106] The court's consideration of the first prong led to the conclusion that in balancing the couple's conflicting interests, the positive right to become a parent prevailed over the negative right of refusal.[107]

The court determined that no duty to become a parent was being imposed on Mr. Nahmani in that he willingly consented to the IVF process and was not forced to surrender his sperm to the clinic. The court found instead, that Mr. Nahmani was being denied the right to inhibit his wife from procreating.[108] The court next looked to the expectations of the parties, and held that Mrs. Nahmani relied on her husband's consent to the IVF process in undergoing the painful procedure to extract her remaining ova and fertilizing them with her husband's sperm.[109] The court noted that both husband and wife agreed to submit to the IVF process to have a child, and that to later allow Mr. Nahmani to "whimsically withdraw" would give him an unjust veto power over the IVF process.[110] The third prong relied on by the court was that maintaining legal stability and certainty throughout the IVF process was an important public policy issue.[111] The court determined that "the point of no return" was after both parties agreed to the IVF procedure, because allowing a one-sided veto to occur would destabilize a process that involved multiple parties—mother, father, surrogate, and medical institutions.[112]

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104. While Israel has placed controls on IVF and embryo use, namely placing conditions on the removal of ova, IVF procedures, cryopreservation, and limiting who can perform the procedure, there are no guidelines concerning the contracts signed at the outset of the procedure. *See* EMBRYO EXPERIMENTATION, 230-31 (Peter Singer et al. eds, 1990).

105. The Nahmanis did not have a signed contract specifying the terms of their consent to the IVF process, and as such had not considered the issue of embryo disposition upon divorce or separation. *See* Asher Felix Landau, *To Be or Not to Be a Parent*, JERLEM POST, Oct. 21, 1996, at 7. However, the court took the voluntary action of starting the IVF process as a verbal agreement to have children and a family together. *See id.*

106. *See* Janie Chen, *supra* note 102, at 340.

107. *See id.* at 341-42.

108. *See id.* at 344-45. The embryos were granted to Mrs. Nahmani on the condition that she agree not to claim money or aid from Mr. Nahmani on behalf of any children born from their embryos. *Id.*

109. *See id.* at 340-41.

110. *Id.*

111. *See id.* at 348.

112. *Id.* Janie Chen suggests that the majority opinion is flawed in that the opinion relied too heavily on the Jewish community's social, cultural, and religious practice of placing a preeminent value on potential life, rather than following the dissent's more rational approach by considering the case under existing law. *See id.* at 357. The *Nahmani* dissent looked to Israeli

VII. THE OUTCOME OF A NAHMANI FACT PATTERN IN A U.S. COURT

It is likely that in the not too distant future, a case similar to *Nahmani* will arrive on the doorstep of a U.S. state court.[113] And the question is, what will the court rely on to make its determination? So far, U.S. courts have not had to categorically determine which fundamental right is more sacred—the right of one spouse to biologically procreate over the objections of the other, or the right of the objecting spouse not to become a parent at the direct expense of the other's only chance to biologically procreate.[114] In this scenario, "allowing the person who does not wish to become a parent to play the trump card is to exercise an extremely powerful veto in the life of the other person when there initially was mutual consent."[115] This issue will not be easy to resolve. With these fundamental constitutional rights coming head-to-head, the court's decision making process would be greatly assisted if it could look with confidence to the contract signed by the parties prior to entering the IVF process. As the U.S. jurisprudence reflects, disposition of the embryos upon divorce or death of the couple is at times not agreed upon at all, or is agreed upon insufficiently. Contracts, when properly conceived and executed, can play a valuable role in clarifying the rights and obligations of all providers and purchasers of assisted reproduction technology.[116]

Creating enforceable and uniform contracts that address a wide range of unforeseeable issues that may arise in the IVF arena is not an easy task, and is best achieved through uniform legislation as done in a variety of areas of U.S. law. In the mid-sixties, the National Conference

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contract and surrogacy law, and determined that Mr. Nahmani's intent and consent did not exist under these circumstances. The dissent noted that when the couple consented to the IVF process, neither spouse was contemplating divorce or separation. Therefore, Mr. Nahmani's original intent to procreate could not be held to exist now that the circumstances of their marriage had changed. *See* Landau, *supra* note 105, at 7.

113. Women are marrying later in life than they have in prior generations. As a natural consequence, women are having children later in life, which in turn increases the need for ART procedures. A woman's supply of eggs is limited, and fertility decreases over time, while men can produce sperm throughout their adult lives. *See* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1063 (1996) (arguing that women have a greater interest in gaining the right to implant their frozen embryos because sperm are "cheap" and plentiful). Therefore older women who are divorcing are more likely to face a declining possibility of becoming a parent if they are not allowed access to their frozen embryos. *Id.* at 1066. Due to these consequences, U.S. courts are likely to soon face the directly opposing fundamental rights issues presented in the *Nahmani* case.

114. In the U.S. cases thus far, the party desiring to use the embryos did have other options available to them, unlike Mrs. Nahmani. Because other avenues of procreating were available to the U.S. litigants, the courts thus far have not determined that one's right not to procreate to the complete detriment of another's right to procreate, is a supreme right.

115. Colker, *supra* note 113, at 1069.

116. *See* Robertson, *supra* note 96, at 414.

of Commissioners of Uniform State Laws (NCCUSL) began to generate a code of uniform laws regarding marriage and divorce, which became known as the Uniform Marriage and Divorce Act (UMDA).[117] This assembling of experts was an attempt to organize ideas on subjects of national importance, which led to the drafting and proposal of uniform acts on numerous family law subjects.[118] Among the NCCUSL's impressive list of model acts is the Uniform Premarital Agreement Act (UPAA), which has been adopted and approved by over half of the states.[119] Part of UPAA's success in adoption by so many of the state legislatures is its "pre-packaged format"[120] that provides guidelines for the construction of such agreements. The Act provides guidelines as to the content of such agreements, the formalities that must be followed in creating them, and its enforcement issues addressed.[121] Similar methodology could be used to study and draft uniform legislation in the ART field.

VIII. BRITISH MODEL AS A BASIS FOR COMPARISON

As a front runner in the field of in vitro fertilization, Great Britain also led the field in probing the ethical, social, and legal implications of those technologies it helped develop.[122] The Department of Health and Social Security Committee of Inquiry into Human Fertilization and Embryology (Warnock Committee) was one of the first bodies in the world to examine these issues.[123] The Warnock Committee was specifically charged with examining the developments in human assisted reproduction technologies, including IVF and embryo possession and disposal.[124] The Committee, led by Dame Mary Warnock, consisted of members from Scotland, Wales, Ireland, and Great Britain.[125] The Committee had a very broad mandate that included the continued pursuit of knowledge, the identification of current and future areas of public concern and ethical problems, recommendations for oversight, and the

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117. *See* MARRIAGE & DIVORCE ACT §§ 101-309, 9A U.L.A. III (1998).

118. *See id.*; *see also* ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 135 (1969).

119. *See* UNIFORM PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987); *see also* JUDITH AREEN, FAMILY LAW 195-96 (4th ed. 1999).

120. *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127-28 (1993).

121. *See* UNIFORM PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987).

122. *See* Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 157 (1993).

123. *Id.*

124. *See* MARY WARNOCK, A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILIZATION & EMBRYOLOGY 4-7 (Basil Blackwell ed., 1985).

125. *See id.* at iv-v.

articulation of guiding principles and basic standards of practice in ART and human subjects research.[126] The Warnock Committee's intention was to create a broad regulatory framework using general propositions that would allow issues to be specifically addressed as they arose.[127] The findings of this committee were contained in a report that would shape the direction British policy would take on this issue.[128] The report urged that legislation regarding frozen embryos "must be foreseen and must be enacted quickly."[129] The committee drafted policy recommendations in general terms to allow for flexibility and adaptability in the face of future developments.[130] Acting upon the Committee's recommendations, Britain passed the Human Fertilization and Embryology Act of 1990 (HFEA), which regulates certain infertility treatments such as IVF through a licensing scheme operated by a new statutory body, the Human Fertilization and Embryology Authority (HUFEA).[131]

Several provisions of the 1990 Act were drafted in part to avoid the embryo disposition issues raised in the *Davis* case.[132] The British were troubled by several issues presented in the *Davis* case, specifically that there was no discussion between the Davises and the IVF center about the consequences of divorce occurring while embryos remained frozen, and that the Davises were not required to sign any agreement as to the terms of storage or disposition at the time the embryos were frozen.[133] The HFEA requires that all IVF participants give written consent specifying the use of their embryos, that they specify any conditions they want to place on their consent, and that they contemplate and agree to the disposition of embryos in the case of death, divorce, or change of circumstance.[134]

Additionally, the couple must specify the maximum period of storage time for embryos not immediately implanted, and the couple must be given the opportunity for counseling before consenting to the IVF process.[135] The Act mandated that in absence of direction from the donors, human embryos may only be stored up to a maximum of five

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126. *See* Lori P. Knowles, *Science, Policy, and the Law: Reproductive and Therapeutic Cloning*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 13, 20 (2000).

127. *See id.*

128. *See* WARNOCK, *supra* note 124, at vi-vii.

129. *Id*. at xiii.

130. *See id.* at 6-7.

131. BLACKSTONE'S GUIDE TO THE HUMAN FERTILIZATION AND EMBRYOLOGY ACT 1990, at 1 (Derek Morgan & Robert G. Lee eds., 1991).

132. *See id.* at 138.

133. *See id.*

134. *See id.* at 136-37.

135. *See id.*

years, and must be destroyed thereafter.[136] This provision met with a great deal of controversy when it was implemented for the first time. In July 1996, the five-year limit expired for some 3,300 unclaimed embryos, which were subsequently destroyed amid great media attention.[137] Various groups from other countries sought to "adopt" the embryos to prevent their destruction.[138]

A relatively recent British Court of Appeals decision stands as a prime example of the legal dilemmas that are mounting worldwide as a consequence of the law and the government trying to catch up with reproductive technology. In 1997, the British courts determined whether a woman should be given sperm taken from her dying husband to conceive their child posthumously.[139] Stephen Blood was about to die in intensive care and had reportedly discussed the idea of posthumous conception with his wife, Diana Blood.[140] Mr. Blood left no record of his intention because of his deteriorating condition and unexpected death.[141] While unconscious in the hospital, the physicians used an electro-ejaculation procedure to procure the sperm.[142] The HFEA Authority refused to allow Mrs. Blood to be inseminated because in the absence of any written agreement, and due to the unusual way in which the sperm was collected, there was sufficient doubt as to his intent to father a child.[143] The Court of Appeals confirmed that under British law written consent is required for the collection of sperm.[144]

As the *Ex parte Blood* case points out, the advancement of medical technology in the ART field will likely continue to challenge courts worldwide with new factual scenarios which legislators and committees have not yet addressed. However, the fact that the British courts have not ruled in a frozen embryo divorce case similar to *Nahmani* or *Davis*

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136. *See id.* The five-year maximum storage period was extended to ten years for couples who provided the in vitro storage clinics with their consent. *See* Human Fertilization & Embryology Act, 1990, *supra* note 8, § 14.

137. *See* Youssef M. Ibrahim, *Ethical Furor Erupts in Britain: Should Embryos Be Destroyed?*, N.Y. TIMES, Aug. 1, 1996, at A1.

138. *See id.*

139. *See* Regina v. Human Fertilization & Embryology Auth., 2 W.L.R. 806 (Eng. C.A. 1997) [hereinafter *Ex parte Blood*]. This case has prompted discussion in the British press as to the moral and ethical implications of allowing such a practice. *See* Melanie Phillips, *In the Brave New World of Embryo High Technology, the Father Need Play No Role Other than as a Gamete in a Test Tube*, OBSERVER, Jan. 26, 1997, at 2 (arguing that not only is the practice of posthumous conception generally offensive, but that it is completely inappropriate under the circumstances of this case).

140. *See Ex parte Blood*, 2 W.L.R. at 809, 821.

141. *See id.* at 806.

142. *See id* at 809.

143. *See id* at 806.

144. *See id.*

can be seen as a sign of successful and thoughtful government action. The British legislation has successfully impeded courtroom litigation over frozen embryos by ensuring that couples are counseled before consenting to the process, by requiring carefully considered written consent as to disposition of the embryos, and by requiring agreement over the maximum storage period of the frozen embryos.[145]

IX. AUSTRALIA

Although Australian courts have not yet litigated cases involving disagreement over the disposition of the embryos between divorcing spouses, they have dealt with insufficient IVF embryo disposition contracts in another context—death of the couple. Public awareness in Australia of the potential problems associated with the fate of frozen embryos was first raised in 1982 when two frozen embryos which were in storage in Victoria were orphaned.[146] A wealthy American couple from Los Angeles, Mario and Elsa Rios, wanted to conceive a child six years after their ten-year-old daughter's accidental death.[147] In Australia, Elsa underwent IVF at the Queen Victoria Medical Center using her own eggs but donor sperm.[148] She became pregnant, but then miscarried.[149] Two fertilized embryos were frozen for possible future use.[150] The Rios' subsequently died in a Chilean plane crash, leaving no instruction for the disposition of the frozen embryos.[151] Mario Rios's adult son adamantly contested the possibility that the embryos be given an opportunity to be born.[152] He was concerned that this would perhaps lead to a child who could later assert a right to his father's estate, valued at $7 million.[153] In Australia, the Committee to Consider the Social, Ethical, and Legal Issues Arising From In Vitro Fertilization, more commonly known as the Waller Committee, convened to decide the proper disposition of the

145. Unlike England, the United States does not regulate the number of years that clinics should retain frozen embryos. With no uniform policy to follow, U.S. clinics are facing an unprecedented dilemma as to what to do with hundreds of unclaimed embryos sitting in storage. The American Society for Reproductive Medicine is planning to survey its members to learn how many frozen embryos are out there. *See* Sheryl Gay Stolberg, *A New Way to Have Children: The Adoption of Frozen Embryos*, N.Y. TIMES, Feb. 25, 2000, at A1.

146. *See* THE ETHICS OF REPRODUCTIVE TECHNOLOGY, *supra* note 18, at 338-39 (1992).

147. *See id.*

148. *See id.* at 339.

149. *See id.*

150. *See id.*

151. *See* Andrea Michelle Siegel, Comment, *Legal Resolution to the Frozen Embryo Dilemma*, 4 J. PHARMACY & L. 43, 48 (1995).

152. *See id.* at 49.

153. *See id.*

Rios' embryos.[154] In 1984, the Waller Committee issued a report (Waller Committee Report) making several recommendations regarding the IVF process.[155] The report included suggestions that (1) the IVF patients be required to give written consent prior to their participation in the IVF process;[156] (2) IVF patients expressly provide for the disposition of any in vitro embryos in case of death or divorce;[157] (3) the embryos be thawed and discarded if, in the absence of an express agreement regarding the disposition of the embryos, the embryos cannot be transferred as originally intended;[158] and (4) in vitro embryos be given no independent rights or claims to inheritance.[159] The Committee determined it would be proper to destroy the embryos, as the embryos had no independent legal rights.[160] The Waller Committee Report resulted in the passage of the Infertility (Medical Procedures) Act by the State of Victoria in 1984, which was the first attempt in the world to regulate IVF and embryo experimentation.[161] The Act addressed issues such as medical procedures, facility approval, counseling requirements, consent requirements, disclosure requirements, and record keeping.[162] While the Act encompassed may of the Waller Committee's recommendations, the Victoria Parliament rejected the suggestion that embryos should be discarded in the event that implantation is not possible.[163] Instead, the Act requires that the embryos be made available to another couple.[164] Since the *Rios* case, Australian clinics insist on agreements specifying what should happen to embryos in the event of death or divorce.[165]

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154. *See* Simon, *supra* note 17, at 140-41.

155. *See* Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization, Report on the Disposition of Embryos Produced by In Vitro Fertilization (1984).

156. *See id.* § 2.7.

157. *See id.* § 2.14-.17. The couple's choices are not limited. They may discard the embryos, donate them to another couple, or donate them for research. *Id.*

158. *See id.* § 2.18.

159. *See id.* § 2.19.

160. *See* Siegel, *supra* note 151, at 49; Simon, *supra* note 17, at 141.

161. *See* Davidoff, *supra* note 122, at 157; *see also* Dan Fabricant, Note, *International Law Revisited:* Davis v. Davis *and the Need for Coherent Policy on the Status of the Embryo*, 6 CONN. J. INT'L L. 173, 184 (1990).

162. *See id.*

163. *See* Simon, *supra* note 17, at 141.

164. *See id.* In 1985, a California court settling the Rios' estate ruled that any children born from the frozen embryos would be barred from staking any legal claim to the Rios estate. At that point, the Victoria government agreed to permit implantation of the embryos. *Embryos Are to Be Used*, N.Y. TIMES, Dec. 5, 1987, at A35 col. 1. They have since remained frozen in Australia. *See* LIU, *supra* note 94, at 87.

165. *See* LIU, *supra* note 94, at 87.

In 1984, the State of Queensland also published a report dealing with IVF and new reproductive technologies.[166] The Queensland Report suggested that "in case of disagreement as to the disposition of an embryo[,] that matter should be determined through processes similar to those applicable in custody proceedings."[167] Queensland is the only body known internationally to recommend that procedures applicable in custody proceedings be employed when sperm and egg donors disagree on the disposition of the resulting embryo.[168] However, this argument was really a default rule, as the Committee accepted that the donors had the right and responsibility to make decisions prior to the collection of gametes as to the disposition of surplus embryos.[169]

In Victoria, a wife initiated proceedings in a magistrate's court seeking orders to require her husband to pay all of the costs associated with the parties' IVF program.[170] The wife desired to have the embryos implanted, but the husband opposed this because he believed it to be inappropriate for children to be born considering the breakdown of the marriage.[171] Although Australian courts, like British courts, have not litigated the precise issue of disagreement by a divorcing couple over frozen embryos, they have nevertheless been provoked by other circumstances to address the need for uniform embryo disposition agreements between IVF providers and their clients. The creation of the Waller Committee, and the subsequent passage of the Infertility Act, has created well thought-out legislation to regulate the IVF process. It is likely that a frozen embryo divorce case has not reached the Australian courts due specifically to this legislation. By requiring that couples give written consent to the process, receive counseling, and expressly agree to the disposition of the embryos in case of death or divorce, the legislature ensures that Australian couples carefully weigh and consider the contract before signing.

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166. *See* Fabricant, *supra* note 161, at 182 n.54 (citing the Queensland Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization, and Other Related Matters (1984)).

167. *See id.* at 191 n.119.

168. *See id.* The Committee suggests that in case of disagreement as to the disposition of an embryo the matter should be determined though processes similar to those applicable in custody proceedings. If these are inappropriate (for example, when death occurs of the biological parents of a frozen embryo and no direction has been given as to the disposition of the embryo) that matter should be determined through processes similar to those applicable in case of adoption. *Id.* (quoting Queensland Report, *supra* note 166, at 91-92).

169. *See id.*

170. *See In the Marriage of A and B*, 13 FAM. L.R. 789 (1989); 1990 FLC 92-126 at FEM. L.R. 799.

171. *See id.* There is no indication of the eventual outcome of the disagreement over the disposition of the frozen embryos as the court dealt with the issue of whether the husband's attorney could continue to represent him in light of a conflict of interest with the wife.

X. CONCLUSION

The Unites States, unlike England and Australia, lacks a uniform approach to assessing the emerging legal issues associated with assisted reproductive technologies. However, this lack of regulation has recently begun to be addressed by several groups, including the New York State Task Force on Life and the Law,[172] the Assisted Reproductive Technologies and Genetics Committee of the American Bar Association,[173] and the Institute for Science, Law and Technology's Working Group on Reproductive Technologies.[174]

The case law developing around these issues, with an occasional ad hoc state statute, is insufficient to provide individuals and families with adequate guidance to comfortably plan for their future or to assert their rights upon divorce or the sudden death of a spouse. Therefore, comprehensive and flexible legislation is needed in every state to provide courts and individuals with notice of the rights and responsibilities arising from assisted reproductive technology. Like the Warnock Committee in Britain, the United States could form a committee composed of legal scholars, scientists, ethicists, theologians, etc, to formulate legislative recommendations specifically tailored to U.S. citizens.[175]

Although the Department of Health and Human Services (DHHS) issued a model certification program for ART clinics in July 1999, these guidelines are voluntary and states may choose to implement separate programs.[176] While these guidelines require ART clinics to adopt

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172. *See* Lori B. Andrews & Nariette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 44 (2000); *see also* THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (1998).

173. *See* Andrews & Elster, *supra* note 172. The Assisted Reproductive Technologies and Genetics Committee is currently drafting a model state law to regulate ART; however, the American Bar Association declined to endorse the model in their last annual meeting in June 2000. *See* Debra Baker, Model ALT on Hold: Family Law Section Stalls Its Proposed Measure Addressing Reproductive Technology, at http://www.abanet.org/journal/jun00/ajam.html (last visited Apr. 22, 2001).

174. *See* Andrews & Elster, *supra* note 172; *see also* Institute for Science, Law and Technology Working Group, *ART into a Science: Regulation of Fertility Techniques*, 281 SCIENCE 651 (1998).

175. As noted in the Warnock Report, "[d]ifferent countries are at different stages in the development both of services and of a policy response. They have different cultural, moral, and legal traditions, influencing the way in which a problem is tackled and the ways in which it might be resolved." WARNOCK, *supra* note 124, at 6. Recognizing these differences, the Warnock report urges that countries adopt individual remedies appropriate for their own cultures. *Id.*

176. Implementation of the Fertility Clinic Success Rate and Certification Act of 1992, 64 Fed. Reg. 39373 (July 21, 1999).

policies governing disposition of excess embryos, they do not provide substantive guidance as to the contents of such policies.[177]

The lack of uniform policy in the ART field is responsible for the inconsistent decisions by U.S. courts concerning the enforcement of embryo disposition agreements. Without contracts that courts can rely on as indicators of the parties' intent and consent as to the disposition of their frozen embryos, courts are left to decide cases on an ad hoc basis. As these situations go to the heart of very personal moral, ethical, and religious issues, courts should abide by the agreements made by the couple prior to undergoing fertility treatment.[178] Disputes over frozen embryos are best resolved by requiring all clinics and facilities participating in IVF and cryopreservation to provide a clear, nationally uniform consent agreement. Moreover, if both the infertile couple and the IVF facility know in advance that dispositional agreements will control, this predictability will promote stability in the assisted reproductive market. By upholding the contracts as agreed to by the parties, the courts will create a strong incentive for couples to carefully consider the agreement, and to sign knowing they will be held to the contract. In this way, these very personal decisions will be left with the individuals who are intimately involved, and not with the courts.

177. *See* David M. Vukadinovich, *Assisted Reproductive Technology Law: Obtaining Informed Consent for the Commercial Cryopreservation of Embryos*, 21 J. LEGAL MED. 67, 67-68 (2000).

178. A recent *New York Times* article concerning a deeply religious couple's choice to put their frozen embryos up for adoption highlights the very personal issues involved in deciding the disposition of frozen embryos. *See* Stolberg, *supra* note 145, at A1.