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ABANDONED FROZEN EMBRYOS AND TEXAS LAW OF ABANDONED PERSONAL PROPERTY: SHOULD THERE BE A CONNECTION?

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I. INTRODUCTION

"Law, marching with science but in the rear and limping a little."[1]

In vitro fertilization ("IVF") has become almost commonplace in society.[2] IVF is recognized as the process whereby eggs are surgically retrieved from a woman's ovaries and fertilized in a laboratory with the sperm of her husband or a donor.[3] Doctors then implant most, but not necessarily all, of the resulting fertilized eggs ("embryos")[4] into the

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1. Justice M.D. Kirby, *Medical Technology and New Frontiers of Family Law*, 14 LAW, MED. & HEALTH CARE 113, 113 (1986) (quoting Justice Windeyer in Australian case, *Mount Isa Mines Limited v. Pusey*, 125 C.L.R. 383, 385 (1970)).

2. *See, e.g.*, ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 118 (1989) (intimating that IVF has become increasingly accepted as means of reproduction); GENA COREA ET AL., *Prologue to* MADE TO ORDER: THE MYTH OF REPRODUCTIVE AND GENETIC PROGRESS 1, 5 (Patricia Spallone & Deborah Lynn Steinberg eds., 1987) (posing question of whether natural reproduction will eventually be replaced by increased use of IVF and citing references answering affirmatively); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 943 (1986) (explaining that IVF is now "recognized as an acceptable treatment for achieving pregnancy for couples in which the wife has absent or irreparably damaged fallopian tubes"); Elizabeth Ann Pitrolo, Comment, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 153 (1996) (noting that "what once was theoretical science has now become a routine commercial transaction"); Pat Schultheis, *Money-Back Guarantees Rekindle In Vitro Controversy*, DALLAS BUS. J., Oct. 18, 1996 (relating that reproductive technologies have advanced and "public has come to accept the solutions offered by practitioners of reproductive medicine"), *available in* 1996 WL 12493495.

3. *See, e.g.*, ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 147–51 (1989) (explaining IVF "medical protocol"); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 256–65 (1994) (detailing each step of IVF procedure); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 98 (1994) (noting briefly basic IVF operation). *But see* Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 327–28 (1986) (explaining that IVF is not always simple combination of husband's sperm and wife's egg but may be combined with other assisted reproductive techniques). Various combinations of IVF and embryo transfer are possible, including: (1) IVF without embryo transfer; (2) IVF with subsequent embryo transfer; and (3) in vivo fertilization and subsequent embryo transfer (recovering the embryos from the uterus of the donor). *Id.* at 327.

4. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW PRODUCTIVE TECHNOLOGIES 100–02 (1994) (describing various terms associated with "embryo"). Scientifically, a fertilized egg from conception to the birth of the child has stages at which it is referred to differently. *Id.* at 100. For example, because conception is a multiple step process, the initial joining of the sperm and egg creates a one-celled entity known as a zygote. *Id.* at 101. The zygote then divides several times, and by the time the zygote reaches a multi-cell stage, normally three, six or eight cells, the technically correct term is a "pre-embryo." *Id.* The pre-embryo is the stage at which a couple's fertilized eggs would be cryopreserved for future use or implanted. *Id.* The fertilized egg from the moment of

woman's uterus to achieve pregnancy.[5] Implantation of too many embryos may create multiple births, so couples often consider cryopreservation, a procedure that freezes the unused embryos for possible future use.[6] The widespread utilization of IVF and cryopreservation raises new questions with respect to ownership and disposition of embryos and compounds an already legally confusing problem replete with issues concerning the meaning of life and property in new reproductive technologies.[7]

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conception through the implantation process will be referred to as an embryo in this Comment. *See also* Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 508-09 (1990) (discussing medical procedures involved in IVF and cryopreservation); Jennifer Marigliano Dehmel, Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1380-81 (1995) (outlining IVF procedures and cryopreservation process).

5. *See, e.g.*, ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 151 (1989) (detailing process of transferring embryos to uterus); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 264–65 (1994) (explaining that embryos are placed in uterus upon developing into blastocyst); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 98 (1994) (noting that multiple fertilized eggs may be placed in uterus).

6. *See, e.g.*, ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 30 (1989) (reciting risk of multiple pregnancies with transference of too many embryos and advantages of freezing); Jean Voutsinas, *In Vitro Fertilization*, 12 PROB. L.J. 47, 47 (1994) (reiterating dangers of multiple births and need to monitor number of embryos implanted); Debbie K. Lerner, Comment, *New Reproductive Technology and Wisconsin Law: Fertility Clinics Making Law*, 75 MARQ. L. REV. 206, 211 (1991) (explaining that implantation of more than four embryos increases risk of multiple births).

7. *See* Joan Beck, *More Questions Than Answers in New Technology*, CHI. TRIB., Mar. 20, 1997, § 1, at 27 (illustrating questions and problems generated by increased use of IVF and cryopreservation), *available in* 1997 WL 3530581; Lois M. Collins, *The Ethics of Creation*, DESERET NEWS, June 7, 1997, at E01 (interviewing individuals involved in reproductive medicine and illustrating issues of concern raised by increased use of and advances in alternative reproduction), *available in* 1997 WL 10546629; *see also* Andrea L. Bonnicksen, *Ethical Issues in the Clinical Application of Embryo Freezing* (reporting that cryopreservation is routine practice), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 217, 217 (Helen Bequaert Holmes ed., 1994); ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 45 (1989) (asserting that cryopreservation was "quietly integrated" into IVF); Glenda Cooper, *Are Embryos People?*, WORLD PRESS REV., Nov. 1, 1996, at 38 (noting that IVF has produced 150,000 children since 1978), *available in* 1996 WL 83999723; *cf.* Jim Erickson, *Freezing Time: Egg Banking is Latest Step in Assisted Pregnancies*, ARIZ. DAILY STAR, June 1, 1997, at 1B (hypothesizing that alternative reproduction will continue to raise ethical issues as "boundaries of good judgment and common sense are stretched"), *available in* 1997 WL 7930325; Christopher G. Jesudason, *Maximum Consultation in the Use of Frozen Embryo*, NEW STRAITS TIMES, May 26, 1997, at 15 (discussing need to carefully consider legal and moral implications of storing embryos), *available in* 1997 WL 2962717. In her commentary, Ms. Beck raises a number of questions and concerns regarding IVF and cryopreservation. Joan Beck, *More*

This legal confusion, which so often surrounds developing technologies, may be addressed by either crafting specific regulations for that particular technology as its implications become apparent, or by applying current law. Examples of both approaches are found within the context of IVF and cryopreservation. The State of Louisiana, for example, has taken a proactive approach and has enacted legislation that specifically addresses issues of IVF and cryopreservation;[8] whereas states such as Massachusetts, New York, Tennessee and Virginia apply current laws in other areas to these issues.[9] Generally, as technology rapidly advances, the law per-

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Questions Than Answers in New Technology, CHI. TRIB., Mar. 20, 1997, § 1, at 27, *available in* 1997 WL 3530581. Some of the more notable questions included: "[C]an't labs easily destroy neglected or unwanted frozen embryos?"; "[w]hy can't scientists experiment freely with living embryos or even fetuses?"; "[i]s it wrong to keep a living baby (or pre-born child) in suspended animation in liquid nitrogen?"; "[h]ow long can this nightmarish state be allowed to continue?"; "[i]s a woman who has a frozen embryo considered pregnant?"; "[i]f the biological parents no longer intend to redeem their offspring and a surrogate mom can't be found, is it morally wrong to flush the living embryos away?"; "[w]hat if the lab goes out of business or announces it intends to destroy the unclaimed embryos?"; "[s]hould government step in to protect those specks of human life?"; and "[h]ow could the government give them what they need to have a life?" *Id.* Similarly, Ms. Collins's article points out several concerns regarding frozen embryos, which include posthumous use of embryos, questions of ownership, and concerns over use or disposal of the embryos. Lois M. Collins, *The Ethics of Creation*, DESERET NEWS, June 7, 1997, at E01, *available in* 1997 WL 10546629. Mr. Jesudason opines that allowing embryos to be frozen leads to facing the difficult issue of destroying the embryos. Christopher G. Jesudason, *Maximum Consultation in the Use of Frozen Embryo*, NEW STRAITS TIMES, May 26, 1997, at 15, *available in* 1997 WL 2962717.

8. LA. REV. STAT. ANN. §§ 121–133 (West 1991); *see* Elisa Kristine Poole, Comment, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67, 78 (1990) (noting that only Louisiana has "comprehensive statute" which fully regulates IVF). The Louisiana statute acknowledges that embryos have "certain rights granted by law," and limits the uses of a human embryo. *Id.* Additionally, there are no federal statutes regulating IVF. *Id.* at 80.

9. *See, e.g.*, York v. Jones, 717 F. Supp. 421, 424–28 (E.D. Va. 1989) (applying existing concept of breach of contract to IVF and cryopreservation); Del Zio v. Presbyterian Hosp. of N.Y., 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (deciding cases under tort and property law principles then in effect), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE, HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 18 (Julie Shuptrine et al. eds., 1985); AZ v. BZ, Mass. Law Wkly. No. 15–008–096, slip op. at 28 (Mass. Prob & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (refusing to address property, child custody issues or uphold pre-freeze agreement in accordance with applicable Massachusetts contract law) (transcript on file with the *St. Mary's Law Journal*); Kass v. Kass, No. 19658/93, slip op. 7376, 1997 WL 563419, at *8 (N.Y. App. Div. Sept. 8, 1997) (enforcing pre-freeze agreements in spirit of contract law without ruling on whether agreement was actually binding contract); Davis v. Davis, 842 S.W.2d 588, 594-601 (Tenn. 1992) (considering established constitutional law principles, property law and family law concepts). The *Davis* court noted that the "United States Supreme Court has never addressed the issue of procreation in the context of in vitro fertilization." *Id.* at 601. The

taining to that technology must necessarily advance in order to regulate new discoveries. The law, however, generally develops at a much slower pace than technology,[10] and IVF and cryopreservation are no different in this respect.

IVF began in Great Britain when British scientists produced the first human child by IVF in 1978.[11] In the years that followed and as this reproductive science became more recognized, numerous couples traveled to England's clinics to undergo IVF treatment.[12] Many of those who agreed to this procedure decided to have their extra embryos frozen for later use.[13] The British Parliament, in an attempt to control the number of unclaimed human embryos held in cryopreservation, passed a law mandating destruction of abandoned frozen embryos five years after cryopreservation.[14] After failed attempts to locate the parents of the ex-

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cases listed in this footnote constitute all known cases in America dealing with frozen embryos as of the publication date of this Comment.

10. *See* Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1641 (1984) (noting "that medical advances have outpaced the ability of society to accommodate those advances"); Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 507 (1990) (commenting that law has developed slowly in response to new technologies); Steve Murphy, Note, *Inheritance Rights of Cryogenically-Preserved "Preembryos": An Analysis of* Davis v. Davis, 7 BYU J. PUB. L. 351, 351 (1993) (stating that new legal issues are created by scientific advancements but "the impact of changing technology on the law is not instantly apparent").

11. John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 285 (1988); Anthony John Cuva, Note, *The Legal Dimensions of In Vitro Fertilization: Cryopreserved Embryos Frozen in Legal Limbo*, 8 N.Y.L. SCH. J. HUM. RTS. 383, 383 (1991); Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 511 (1990). The research of Dr. Patrick Steptoe and Robert Edwards, which took place in London over a ten year period, culminated with the birth of Louisa May Brown, the first test tube baby. Gary Cleve Wilson, *We Wanted a Test Tube Baby*, TEX. MONTHLY, Nov. 1985, at 163, 164.

12. *See* David Fletcher, *Middle East Hunt for the Couples Who Left Behind Frozen Embryos: Concern Grows Over Fate of 3,000 "Orphans" Created in Test-Tubes As Fertilisation Authority Rules Out Adoption*, DAILY TELEGRAPH (London), Feb. 1, 1996, at 4 (explaining that many couples from Middle-East came to England to utilize its IVF technology), *available in* 1996 WL 3924913.

13. *See id.* (quoting director of test-tube baby clinic as stating that "[n]inety-eight per cent of couples chose to have . . . [spare embryos] frozen").

14. *See id.* (explaining that British Parliament passed "Human Fertilisation and Embryology Act" mandating five year maximum storage, effective August 1, 1991); *see also* Glenda Cooper, *Are Embryos People?*, WORLD PRESS REV., Nov. 1, 1996, at 38 (detailing decision by British authorities to mandate destruction of frozen embryos after five years), *available in* 1996 WL 8399723; Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. TIMES, July 27, 1996, at A1 (pointing out Great Britain's law requiring destruction of abandoned embryos after five years), *available in* 1996 WL 11252924; Terence Monmaney, *Plan to Destroy Frozen Embryos Stirs Ethics Debate*, SEATTLE TIMES,

isting frozen embryos and in accordance with this new law, over 3,000 frozen embryos were destroyed on July 31, 1996.[15] Destruction of the embryos potentially caused the loss of reproduction capability for those persons whose embryos were destroyed.[16] Additionally, the action of the British Parliament stands as an example of what may happen when the law evolves in an attempt to keep pace with technological changes.[17]

There are currently more than 250 IVF clinics in the United States,[18] and the majority of these clinics offer cryopreservation.[19] While the number of abandoned frozen embryos in the United States remains unknown, it is estimated that the number may be as high as 20,000.[20] In

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July 29, 1996, at A3 (stating that 6,000 frozen embryos already existed in England when statute passed), *available in* 1996 WL 3674705; Weekend Edition: *The Ethics of Freezing Embryos* (NPR broadcast, Aug. 3, 1996) (quoting Arthur Kaplan, Director of Bio-ethics at University of Pennsylvania, as explaining that British were concerned about storing embryos longer than five years due to decreasing viability of embryos with long-term storage), *available in* 1996 WL 7992861. One commentator asserts that physical space for storing frozen embryos was not the main concern for the British government; rather, the main concern was the fact that embryos frozen longer than five years reduce the likelihood of a successful pregnancy and raise questions regarding what the government can do with embryos when parents cannot be found or contacted. *Id.*

15. *See Clinics Destroy Human Embryos*, CHI. TRIB., Aug. 2, 1996, at 12 (interviewing director of London test-tube clinic in confirming destruction of frozen embryos), *available in* 1996 WL 2695631.

16. *See* Glenda Cooper, *3,300 Embryos Like This Will Have to Perish: Massacre or Common Sense?*, INDEPENDENT (London), July 23, 1996, at 1 (quoting director of England's National Fertility Association as asserting that "[t]hese embryos are not children; they are a couple's potential to have children. When they are destroyed it is the potential that has gone."), *available in* 1996 WL 10947021.

17. *Cf.* Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. TIMES, July 27, 1996, at A1 (discussing that United States has no law on handling abandoned frozen embryos but has many frozen embryos in storage), *available in* 1996 WL 11252924.

18. *Compare* John A. Robertson, *Legal Troublespots in Assisted Reproduction*, 65 FERTILITY & STERILITY 11, 11 (1996) (estimating number of clinics in America at about 250), *with* Pat Schultheis, *Money-Back Guarantees Rekindle In Vitro Controversy*, DALLAS BUS. J., Oct. 18, 1996 (showing existence of about 300 clinics in America), *available in* 1996 WL 12493495, *and* Anne Scott, *The Price of Pregnancy*, BUS. REC., Sept. 9, 1996, at 10 (placing number of infertility clinics in America at 300).

19. *See, e.g.*, ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 30 (1989) (stating that increasing numbers of clinics offer cryopreservation); John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 408 (1990) (pointing out that 63% of infertility clinics offered embryo freezing in 1987); Natalie K. Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 559 (1991) (noting that many IVF clinics now provide cryopreservation services).

20. *Compare* Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. TIMES, July 27, 1996, at A1 (estimating number of abandoned frozen embryos in America at 20,000), *available in* 1996 WL 11252924, *with* Weekend Edition: *The Ethics of*

Texas, no official statistics exist to indicate the number of abandoned embryos stored and maintained by clinics in the state.[21] Arguably, this lack of statistical documentation disguises the need for consideration of abandoned frozen embryos as they become a growing concern for clinics, parents, and society. Specifically, clinics face growing concerns over storage problems for the accumulating frozen embryos and issues of whether abandoned frozen embryos can (or should) be born long after their parents die.[22] The answers to these problems may lie in the law; however,

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Freezing Embryos (NPR broadcast, Aug. 3, 1996) (hypothesizing that number of frozen embryos in storage in United States is 30,000), *available in* 1996 WL 7992861. Although the exact number of frozen embryos is unknown, statistics show embryos grow at a rate of 10,000 per year. Joan Beck, *More Questions Than Answers in New Technology*, CHI. TRIB., Mar. 20, 1997, § 1, at 27, *available in* 1997 WL 3530581; *see also* Gina Kolata, *Medicine's Troubling Bonus: Surplus of Human Embryos*, N.Y. TIMES, Mar. 16, 1997, at A1 (quoting law professor Lori Andrews as asserting that "frozen embryos have accumulated at the rate of 10,000 a year for the past five years"), *available in* 1997 WL 7988429. Ms. Kolata's article has been reprinted in a number of newspapers. *E.g.*, Gina Kolata, *Embryos Frozen in Time Represent Perpetual Youth, Bring Legal Limbo*, HOUS. CHRON., Mar. 16, 1997, at 11, *available in* 1997 WL 6545495; Gina Kolata, *Frozen Embryos Give Birth to Legal, Emotional Debate*, ROCKY MTN. NEWS, Mar. 16, 1997, at 2A, *available in* 1997 WL 6825803; Gina Kolata, *Frozen Embryos Pose Legal, Ethical Dilemmas*, ST. J.-REG., Mar. 16, 1997, at 23, *available in* 1997 WL 6989040; Gina Kolata, *Unused Embryos Prompt Legal, Emotional Questions*, PLAIN DEALER, Mar. 16, 1997, at 20, *available in* 1997 WL 6584853. One reason why the number of abandoned embryos is unknown is that no institution or government agency maintains statistics on exactly how many embryos are frozen in the United States. Gina Maranto, *Embryo Overpopulation*, SCI. AM., Apr. 1996, at 16, 18.

21. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*). Dr. Brzyski guesses that there are several hundred abandoned frozen embryos in the Health Science Center's program and believes that abandoned frozen embryos are a problem in Texas. *Id.* Dr. Brzyski also acknowledges that no exact numbers are known. *Id.*

22. *See, e.g.*, Laura D. Heard, Comment, *A Time to be Born, a Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 938–51 (1986) (discussing problems of inheritance for children of assisted reproduction and other inheritance issues); *A Helping Hand for Childless Couples*, NEW STRAITS NEWS, May 25, 1997, at 14 (noting that "frozen embryo[s] can be kept forever but storage space and ethics may dictate otherwise"), *available in* 1997 WL 2962509; Lois M. Collins, *The Ethics of Creation*, DESERET NEWS, June 7, 1997, at E01 (pointing out that alternative reproduction raises issues of posthumous use of embryos, questions of ownership, and concerns over use or disposal of embryos), *available in* 1997 WL 10546629; Christopher G. Jesudason, *Maximum Consultation in the Use of Frozen Embryo*, NEW STRAITS TIMES, May 26, 1997, at 15 (opining that storage of embryos creates problem of eventually having to destroy some of stored embryos), *available in* 1997 WL 2962717; *Malaysia Gives Birth to New Infertility Treatment*, COMLINE DAILY NEWS BIOTECH. & MED., June 5, 1997 (reporting that some believe embryos may be frozen for 100 years but is unable to report whether these embryos would contain increased incidence of abnormalities), *available in* 1997 WL 7750061; Weekend Edition: *The Ethics of Freezing Embryos* (NPR broadcast, Aug. 3, 1996) (asserting that

since no particular laws addressing abandoned frozen embryos exist in most states, including Texas, these embryos are arguably subject to whatever existing laws can be applied.[23]

Whether current laws apply and prevent the destruction of frozen embryos or whether new laws must be promulgated by state legislatures to address frozen embryos will depend largely on the legal status accorded the embryos.[24] Three possible views have emerged as to the legal status of embryos under state law: (1) embryos as life, (2) embryos as property, and (3) embryos as neither life nor property but deserving of "special respect."[25] Currently, IVF litigation shows that some states favor one view over the others.[26] Unlike jurisprudence, state legislative action on

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physical space for storage of frozen embryos is not main issue but that long term storage creates questions of embryo viability and what to do with abandoned embryos), *available in* 1996 WL 7992861; Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (indicating that growing numbers of abandoned embryos present storage issues for clinics) (transcript on file with the *St. Mary's Law Journal*). In precedent setting events recently, a California couple succeeded in finding a surrogate willing to carry to term the frozen embryos conceived by their daughter before the daughter's death from leukemia. Lois M. Collins, *The Ethics of Creation*, DESERET NEWS, June 7, 1997, at E01, *available in* 1997 WL 10546629; *accord* Ann Pepper, *Man Wants Surrogate to Carry Grandchild: He's Determined to Hold Dead Daughter's Baby*, DALLAS MORNING NEWS, Dec. 20, 1996, at 37A (discussing search for surrogate to bear child of couple's deceased daughter).

23. *See* Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 133 (1993) (explaining that couples are at mercy of courts because of absence of both state and federal regulation); Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. TIMES, July 27, 1996, at A1 (quoting chairman of United States National Advisory Board on Ethics in Reproduction as stating that "[w]e don't have any clear law over what to do with a frozen embryo that isn't claimed"), *available in* 1996 WL 11252924.

24. *See* Mark Curriden, *Frozen Embryos: The New Frontier*, A.B.A. J., Aug. 1989, at 68 (quoting Charles Clifford, attorney for Mr. Davis in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992)). Mr. Clifford stated that defining what embryos are establishes "what should be done with them." *Id.* at 69.

25. *See* Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 261 (1990) (identifying three possible classifications for embryos); Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 553 (1991) (illustrating that scholars will pick one of three embryo classifications to support). *But see* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 538 (1994) (asserting that current position of United States Supreme Court is undetermined fourth classification category).

26. *See, e.g.*, *York*, 717 F. Supp. at 424–27 (asserting that embryos are type of property); Del Zio v. Presbyterian Hosp. of N.Y., 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (declaring embryos to be type of property and allowing emotional distress cause of action for their destruction), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE, HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 18 (Julie

IVF has generally been related to the use of embryos in research and makes no direct comment on their status as life or property.[27] However, Louisiana is currently the only state to craft extensive legislation dealing directly with IVF and cryopreservation.[28] Pursuant to that legislation, the Louisiana legislature granted embryos the status of a "judicial person" with the right to sue and be sued.[29]

Many other states, including Texas,[30] allow fertility clinics to operate largely under a rule of self-regulation.[31] However, Texas does differ from most states that allow self-regulation of fertility clinics in that no litigation has arisen in the state to establish precedent on this issue.[32] After more than a decade since the initial application of this technology in Texas, and with the number of abandoned frozen embryos constantly increasing in number, the time has come to determine whether any existing Texas laws govern the actions of clinics and parents in their handling of abandoned frozen embryos.[33]

Shuptrine et al. eds., 1985); *Davis*, 842 S.W.2d at 597 (establishing that embryos are neither persons nor property but in unique category).

27. *See* Marcia Joy Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1080–81 (1986) (commenting that most statutes passed since *Roe v. Wade* attempt to regulate experimentation on and sale of embryos).

28. *See* Elisa Kristine Poole, Comment, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 AM. J. FAM. L. 67, 78-80 (1990) (noting that Louisiana is unique in its detailed regulation of IVF).

29. LA. REV. STAT. ANN. §§ 121–133 (West 1991).

30. *See* Laura D. Heard, Comment, *A Time to be Born, a Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 929 (1986) (noting that IVF is conspicuously absent from Texas statutory and case law).

31. *See* ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 30 (1989) (discussing background of self-regulation of IVF industry); Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 330 (1986) (noting that most IVF clinics regulate themselves based on community values). *But see* Thomas C. Howser, *ABA House to Meet Next Month; State's Delegates Seeking Input*, OR. ST. B. BULLETIN, Jan. 1997, at 45 (reporting that American Bar Association met in February 1997 in part to propose legislation to address disposition of frozen embryos in divorce cases, especially when no written agreement exists).

32. *See* Laura D. Heard, Comment, *A Time to be Born, a Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 929 (1986) (reiterating that Texas case law fails to address IVF and cryopreservation).

33. *See* Gina Kolata, *Frozen Embryos Pose Legal, Ethical Dilemmas*, ST. J.-REG., Mar. 16, 1997, at 23 (indicating that number of frozen embryos is growing nationally and asserting that this fact alone illustrates gravity of crisis of caring indefinitely for frozen embryos), *available in* 1997 WL 6989040. The number of frozen embryos is steadily increasing and thus demands that some source of authority provide either perpetual care for the embryos or make other dispositional choices. Gina Kolata, *Embryos Frozen in Time Represent Perpetual Youth, Bring Legal Limbo*, HOUS. CHRON., Mar. 16, 1997, at 11, *available in* 1997 WL 6545495; *see also* Weekend Edition: *The Ethics of Freezing Embryos* (NPR broadcast, Aug. 3, 1996) (developing relationship between American trend to limit government in-

Many important questions arise regarding the relationship between cryopreservation and Texas law. Is a frozen embryo considered life, property or deserving "special respect?" If a frozen embryo is to be considered property, does the law of abandonment of personal property apply? If abandonment law applies, what are clinics able or required to do with abandoned frozen embryos? Can embryos be legally discarded? If they are discarded and the parents/owners make a subsequent claim for the embryos, do the parents have a cause of action against the clinic and/or the individual who physically destroyed the embryos? These questions regarding the legal rights and the status of such embryos must be addressed in order to provide guidance to couples and clinics that either already stored frozen embryos or plan to preserve embryos through cryopreservation techniques in the future.

This Comment argues that Texas law of abandoned property applies to abandoned frozen embryos. This Comment examines how Texas lawmakers might recognize frozen embryos as property and suggests how the law of abandonment, as defined by both the common law and the Texas Property Code, might apply. Part II provides the background necessary for analyzing the legal framework pertinent to the law governing frozen embryo technology by generally discussing IVF and cryopreservation technology. Part III focuses on the available arguments for a frozen embryo's classification as either life, property or deserving "special respect." Part IV applies current Texas law to the various arguments for an embryo's classification. Part V reviews current Texas law as it applies to abandoned personal property. Part VI applies Texas law to the most logical classification for frozen embryos—property. Finally, Part VII suggests an interpretation for future application of Texas law that is consistent with technological advancements and applicable legal principles.

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volvement in private life and economic interests driving trend away from regulation of reproductive technologies), *available in* 1996 WL 7992861. Arthur Kaplan, the director of the Center for Bio-Ethics at the University of Pennsylvania, thinks that now is the right time to examine whether the money-making forces currently driving alternative reproduction technologies provide enough guidance to the technology in America, absent formal regulation. *Id.* In Texas, clinic self-regulation dominates since authorities agree that the legislature is not likely to pass any laws regulating IVF and cryopreservation; therefore, what laws currently exist will have to be applied to this issue. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*); Telephone Interview with John A. Robertson, Professor, The University of Texas at Austin School of Law (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*); *cf.* Weekend Edition: *The Ethics of Freezing Embryos* (NPR broadcast, Aug. 3, 1996) (asserting that inaction in Congress on issue of frozen embryos results from fear of association with abortion politics), *available in* 1996 WL 7992861.

II. Background on In Vitro Fertilization ("IVF") and Cryopreservation

A. *IVF*

Originally, IVF was developed to artificially impregnate women whose fallopian tubes were defective.[34] Many women suffer from structural defects or disease of the fallopian tubes that either prohibit fertilization or prevent the embryo from embedding in the uterus.[35] IVF remedies this problem by allowing fertilization to take place outside the body, thereby avoiding the fallopian tube malady.[36]

In simplest terms, the IVF process begins with drug-induced hormonal stimulation of a woman's ovaries.[37] This stimulation attempts to ripen as many eggs as possible for collection.[38] Doctors collect eggs upon matura-

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34. *See* Richard P. Dickey, *The Medical Status of the Embryo*, 32 Loy. L. Rev. 317, 318 (1986) (noting that most common cause of female infertility is fallopian tube disease, which often begins after first fertile cycle during adolescence); Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. Times, July 27, 1996, at A1 (relating that IVF developed to help women with healthy eggs become pregnant), *available in* 1996 WL 11252924. A medical history of sexually transmitted diseases or pelvic inflammatory disease can create blockages in a woman's fallopian tubes and lead to infertility problems. Lauren Picker, *Worried About Your Fertility?*, Glamour, Sept. 1996, at 106. In fact, experts trace forty percent of female infertility to problems in the fallopian tubes, while another forty percent of female infertility arises from problems in ovulation. *Id.* at 106, 114. However, IVF is not only a solution to female infertility because men who suffer from infertility also find IVF helpful. *Id.* at 114. Men can suffer from blockages in the vessels that transport sperm if they have a history of sexually transmitted disease. *Id.* Male infertility can be temporary if brought on by illness, such as an infection or fever, or by engaging in behavior, such as illegal drug usage, that reduces sperm production. *Id.* Some male infertility results from a condition known as varicocele in which a varicose vein interferes with a testicle's ability to produce sperm. Lauren Picker, *Worried About Your Fertility?*, Glamour, Sept. 1996, at 106. Varicocele may be addressed surgically, but the actual improvement in terms of the man's subsequent ability to impregnate a woman is controversial. *Id.* Of male infertility, an average of thirty percent of the incidents of infertility cannot be explained. *Id.* IVF is a solution to male infertility just as it is for female infertility because sperm are introduced directly with the egg, so there are no issues of blockage or poor motility. *Id.*

35. Michelle F. Sublett, Note, *Frozen Embryos: What are They and How Should the Law Treat Them*, 38 Clev. St. L. Rev. 585, 587 (1990). The initial fertilization process of pregnancy occurs in one fallopian tube, and then the embryo proceeds from the fallopian tube to the uterus where it embeds itself for the term of the pregnancy. *Id.*

36. *See* Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 Case W. Res. L. Rev. 543, 546 (1991) (noting that IVF duplicates natural fertilization process but does so outside fallopian tubes).

37. *See* Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 High Tech. L.J. 257, 265 (1990) (explaining that hormones are used to induce and control ovulation).

38. *See id.* (noting that multiple egg recovery increases likelihood of success).

tion and fertilize the eggs in a laboratory by using the collected sperm of the husband or a donor.[39] Fertilized eggs are then allowed to divide and develop before being placed into the woman's uterus.[40] At least two weeks will pass before it is known whether a successful pregnancy occurred.[41]

One important consideration is how many fertilized eggs will be implanted in the woman's uterus. Usually, there is no decision as to how many eggs to fertilize because the number retrieved is generally fairly low, and all available eggs are needed to attempt fertilization.[42] However, after results indicate how many eggs were successfully fertilized, the physician must decide how many eggs to implant.[43] Implantation of three or four embryos is common practice.[44] Parents, as "owners," must decide whether to donate, destroy or freeze the remaining embryos.[45]

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39. *See id.* at 263–65 (detailing egg retrieval process, confirming placement of eggs in culture medium, and explaining that "primitive streak" develops fourteen days after fertilization and marks sign of formal organization of unique person). After about two weeks of hormone treatments, the ripened eggs ("oocytes") are retrieved by means of a surgical procedure termed laparoscopy or an ultrasound technique. *Id.* at 265. The collected eggs are carefully placed in a culture medium, and the husband's sperm is then introduced into the medium. *Id.* Upon successful fertilization, the egg and sperm are now a preembryo (or embryo) and are placed in another culture medium and nurtured under heating lamps to allow division and development of the "primitive streak." *See* Gary Cleve Wilson, *We Wanted a Test Tube Baby*, TEX. MONTHLY, Nov. 1985, at 163, 262 (enunciating that sperm are dispersed in culture medium and allowed to "swim up" to egg). *See generally* Howard W. Jones, Jr., *Policy Considerations for Cryopreservation in In Vitro Fertilization Programs* (reiterating that primitive streak is crucial to formation of individual), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 209, 210 (Helen Bequaert Holmes ed., 1994).

40. *See* Gary Cleve Wilson, *We Wanted a Test Tube Baby*, TEX. MONTHLY, Nov. 1985, at 163, 262 (stating that transfer to mother is scheduled once fertilized eggs have chance to develop).

41. *See id.* at 264 (noting two weeks must pass before initial pregnancy test).

42. *See* SOUTH TEXAS FERTILITY CTR., DEP'T. OF OBSTETRICS AND GYNECOLOGY, THE UNIV. OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO, ADVANCED REPROD. TECH. MANUAL 12 (indicating that oocyte retrieval step 7 averages only 8 to 15 eggs retrieved per patient).

43. *See id.* at 13 (stating that step 9A regarding embryo transfer indicates that pregnancy occurs most frequently upon transfer of 3 to 4 embryos).

44. *Id.*

45. *See* Helen Bequaert Holmes, *To Freeze or Not to Freeze: Is That an Option?* (outlining options for handling of excess embryos open to parents), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 193, 196 (Helen Bequaert Holmes ed., 1994).

B. *Cryopreservation*

Cryopreservation, as a science, developed later than IVF.[46] As with the general IVF procedures, Great Britain and Australia each pioneered work to perfect cryopreservation techniques,[47] and scientists around the world continue to develop new methods of preserving embryos.[48] England recorded the first birth from a frozen embryo in 1978.[49] In the United States, the first of such births was reported in 1985.[50] Despite these initial successes, cryopreservation's success rate falls below the success rate of pregnancies achieved from fresh, rather than cryopreserved, embryos.[51] Nonetheless, in 1993 alone, 791

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46. *See* Mina Alikani, *Preservation of Human Eggs and Embryos Through Freezing* (explaining how development of cryopreservation followed perfection of IVF), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 201, 201 (Helen Bequaert Holmes ed., 1994).

47. *See* Simon Fishel, *IVF—Historical Perspective* (explaining early development of cryopreservation techniques), *in* IN VITRO FERTILIZATION: PAST, PRESENT, FUTURE 1, 12 (S. Fishel & E.M. Symonds eds., 1986).

48. *See id.* at 14–15 (showing that researchers continue to develop IVF and cryopreservation).

49. *See* Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy,* 5 HIGH TECH. L.J. 257, 259 (1990) (noting date first infant conceived by IVF in England).

50. *See id.* (reporting first birth from cryopreserved embryo in United States occurred in 1985).

51. *See* David Fletcher, *Middle East Hunt for the Couples Who Left Behind Frozen Embryos: Concern Grows Over Fate of 3,000 "Orphans" Created in Test-Tubes as Fertilisation Authority Rules Out Adoption*, DAILY TELEGRAPH (London), Feb. 1, 1996, at 4 (commenting that only small proportion of frozen embryos become babies), *available in* 1996 WL 3924913. The director of one of London's infertility clinics, Lord Winston, indicated that "only three frozen embryos out of 100 resulted in babies when implanted." *Id.* Lord Winston is also quoted as saying that "[a] fresh egg has a better chance of eventually becoming a human being." *Id.*; *see also* SOUTH TEXAS FERTILITY CTR., DEP'T OF OBSTETRICS AND GYNECOLOGY, THE UNIV. OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO, ADVANCED REPROD. TECH. MANUAL 22 (explaining that embryos do not survive cryopreservation process for number of reasons); Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies*, 19 HOUS. J. INT'L L. 147, 154 (1996) (asserting that "successful pregnancies have not been reported for embryos frozen more than twenty-eight months"). The University of Texas Health Science Center at San Antonio's program had a success rate with frozen embryos of 22% in 1993, and this success was above the national average of 13%. SOUTH TEXAS FERTILITY CTR., DEP'T OF OBSTETRICS AND GYNECOLOGY, THE UNIV. OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO, ADVANCED REPROD. TECH. MANUAL 22; Interview with Dr. Robert G. Brzyski, Assistant Professor, The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*). Success rates with fresh embryos range from 18 to 28% of attempts depending on the age of the mother. RICHARD MARRS, ASSISTED REPRODUCTIVE TECHNOLOGIES 30-31 (Serono Patient Educ. Libr.).

children were born in the United States and Canada from frozen embryos.[52]

The freezing process entails adding an agent known as a cryoprotectant to the embryo and then slowly freezing the embryo.[53] Technicians then transfer the frozen embryo into a more permanent fixture before it is lowered into liquid nitrogen for long term storage.[54] Thawing the embryo requires the temperature to be increased gradually and the cryoprotectant to be removed.[55] Although this cryopreservation procedure is somewhat standard, various other methods have proven to be successful.[56]

Cryopreservation appeals to couples for several reasons. Since the hormonal stimulation and egg retrieval processes are both physically and emotionally demanding on a woman, couples prefer cryopreservation because it reduces the need to repeat the process when a subsequent pregnancy is desired.[57] In addition, routine clinical experience has revealed that hormonal inducement of egg production causes numerous deleterious side effects for successful embryo implantation; therefore, greater success has been achieved when the woman's body has time to return to a more natural balance after IVF.[58] Thus, cryopreserved embryos often provide an efficient and effective means of impregnating a woman.

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52. *Assisted Reproductive Technology in the United States and Canada: 1993 Results Generated from the American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry*, 64 FERTILITY & STERILITY 13, 14 (1995).

53. *See* Mina Alikani, *Preservation of Human Eggs and Embryos Through Freezing* (explaining addition of cryoprotectant in freezing process), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 201, 202 (Helen Bequaert Holmes ed., 1994).

54. *See id.* (outlining details of freezing blastocysts as per cryopreservation).

55. *See id.* (detailing process of thawing of frozen embryo).

56. *See id.* at 201 (commenting that no single method of cryopreservation can be "universally applied").

57. *See* Helen Bequaert Holmes, *To Freeze or Not to Freeze: Is That an Option?* (commenting that "medical reasons" to utilize cryopreservation are numerous), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 193, 196 (Helen Bequaert Holmes ed., 1994).

58. *See id.* (reiterating that medical reasons for cryopreservation include increased success rate when woman's body is allowed to recover before transfer of embryo); RICHARD MARRS, ASSISTED REPRODUCTIVE TECHNOLOGIES 14 (Serono Patient Educ. Libr.) (noting increased success rates with implantation during normal menstrual cycles); Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 333 (1986) (delineating existence of fever, bleeding problems and other factors that inhibit successful implantation of embryo immediately after retrieval); Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 530 (1994) (explaining that implantation during normal menstrual cycle where body is "free of drugs and surgical intrusion" is more successful); *A Helping Hand for Childless Couples*, NEW STRAITS TIMES, May 25, 1997, at 14 (describing "hyper-stimulation" caused by fertility drugs and suggesting that pregnancy is more successful in cycle not affected by drugs), *available in* 1997 WL 2962509.

Moreover, as technology advances, couples may utilize cryopreservation to optimize their family planning options.[59] For example, a young couple who elects to freeze embryos produced early in their marriage can theoretically delay having children for a number of years without the subsequent risk of infertility problems.[60] Typically, as individuals age, their fertility capabilities decrease dramatically.[61] This decrease in fertility is most frequently associated with women, but infertility as a phenomenon strikes men and women equally.[62] Furthermore, since an emerging po-

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59. *See* Helen Bequaert Holmes, *To Freeze or Not to Freeze: Is That an Option?* (suggesting that cryopreservation allows couples to "put time in a bottle to make a later decision"), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 193, 196 (Helen Bequaert Holmes ed., 1994); Gina Kolata, *Frozen Embryos Pose Legal, Ethical Dilemmas*, ST. J.-REG., Mar. 16, 1997, at 23 (calling frozen embryos "perpetual youth" and suggesting that they "offer a kind of immortality"), *available in* 1997 WL 6989040.

60. *See* John A. Robertson, *Ethical and Legal Issues in Cryopreservation of Human Embryos*, 47 FERTILITY & STERILITY 371, 371 (1987) (explaining that cryopreservation may be considered "insurance against future sterility"). *But see* Anne Scott, *The Price of Pregnancy*, BUS. REC., Sept. 9, 1996, at 10 (quoting director of Iowa fertility clinic opining that incidence of infertility is not in fact growing, but that society's awareness of infertility is increasing).

61. CATHERINE GARNER ET AL., INSIGHTS INTO INFERTILITY 2-5 (Serono Patient Educ. Libr.); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 256–265 (1994); Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 318 (1986); Jim Erickson, *Freezing Time: Egg Banking is Latest Step in Assisted Pregnancies*, ARIZ. DAILY STAR, June 1, 1997, at 1B, *available in* 1997 WL 7930325. Women, for example, are physically able to carry children past menopause but experience loss of fertility as they age because of the unique function of the ovaries and eggs. CATHERINE GARNER ET AL., INSIGHTS INTO INFERTILITY 2-5 (Serono Patient Educ. Libr.). A woman has her total egg volume determined before birth—usually somewhere between one and two million. *Id.* Of that number, only as many as half a million are left by the time a female reaches child bearing age. *Id.* After menstruation begins, the supply of eggs is further depleted at the rate of about 30 each month, leaving the remaining eggs to mature to produce the one egg that is actually released in ovulation. *Id.*; *see also* Pamela Warrick, *A Tale of Stolen Embryos: Inside a Nightmare Fertility Clinic*, GLAMOUR, Sept. 1996, at 296, 297 (explaining that success of IVF also varies by age, "with the national fertility clinic average of 18 to 28% per attempt for women under 40, and just 7 to 12% for older patients").

62. CATHERINE GARNER ET AL., INSIGHTS INTO INFERTILITY 3, 12 (Serono Patient Educ. Libr.); LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 212 (1994). *See* Lauren Picker, *Worried About Your Infertility?*, GLAMOUR, Sept. 1996, at 106, 114 (calling infertility "equal-opportunity affliction"). Infertility has traditionally been blamed on women, but Picker's article points out that "40 percent of infertility is related to problems with the male, 40 percent to the female (20 percent is unexplained)." *Id.* Experts generally consider a couple to have infertility problems if they engage in unprotected sexual intercourse for one year without conception. *Id.* at 106; *see also* Anne Scott, *The Price of Pregnancy*, BUS. REC., Sept. 9, 1996, at 10 (indicating that statistics reveal that 5.3 million Americans experience infertility).

tential use for cryopreservation falls in the arena of genetic engineering,[63] cryopreservation may allow couples to screen for genetic abnormalities or to simply select the sex of a child.[64]

One of the greatest appeals of cryopreservation is that it offers couples a choice in deciding what to do with the extra embryos produced in the IVF process. Cryopreservation allows couples additional time to decide whether to implant, donate or destroy the unused embryos.[65] Cryopreservation serves as a safety net against future infertility, and thus has special significance where the couple may already have a child produced through IVF.[66] Dr. Robert G. Brzyski, a physician with the University of Texas Health Science Center at San Antonio's IVF program, suggests that couples who already have at least one child through IVF may easily view the remaining embryos as the child's siblings.[67] This perspective

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63. *See* Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 533–34 (1990) (opining that greatest threat of cryopreservation is potential "genetic manipulation" and baby shopping).

64. *See* Mina Alikani, *Preservation of Human Eggs and Embryos Through Freezing* (detailing use of cryopreservation to assist couples with diagnosing genetic abnormalities), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 201, 205 (Helen Bequaert Holmes ed., 1994); John A. Robertson, *Ethical and Legal Issues in Cryopreservation of Human Beings*, 47 FERTILITY & STERILITY 371, 371 (1987) (illustrating that cryopreservation may allow diagnosis and treatment of genetic defects before implantation).

65. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*); *see also* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreative Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 529–30 (1994) (commenting that cryopreservation is most beneficial because it delays "ethical dilemmas" of disposition of embryos).

66. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*).

67. *Id.*; *see also* John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455 n.48 (1990) (explaining that terms like "property" and "ownership" are difficult for couples who view embryos as "expected children"); Gina Maranto, *Embryo Overpopulation*, SCI. AM., Apr. 1996, at 16, 18 (asserting that couples who view frozen embryos as their children or family are not uncommon, especially if couple has other children by IVF). Even if couples do not generally categorize the embryos as unborn children, when talk shifts to taking steps to dispose of the embryos couples suddenly come to view the embryos as unborn children. Gina Kolata, *Embryos Frozen in Time Represent Perpetual Youth, Bring Legal Limbo*, HOUS. CHRON., Mar. 16, 1997, at 11, *available in* 1997 WL 6545495. Sometimes the feelings for the embryos prompts action like that of a woman in California who requested that her embryos be buried instead of being disposed of another way. *Id.*

makes it all the more difficult for parents to make the decision to destroy the unused embryos.[68]

Despite its benefits, cryopreservation is not a perfect safety net, even when supported by written contracts.[69] Many programs either offer or

68. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*); *see also* Glenda Cooper, *Are Embryos People?*, WORLD PRESS REV., Nov. 1, 1996, at 38 (proposing that parents with cryopreserved embryos would prefer seeing their embryos destroyed rather than donated to another couple), *available in* 1996 WL 83999723.

69. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*). Written contracts are only as good as their writer's abilities. *Id.* Since there are no mandatory regulations for the terms and conditions to be included in these contracts, clinics are free to choose their own terms or follow the guidelines provided by the American Society for Reproductive Medicine ("ASRM") (1209 Montgomery Highway, Birmingham, Alabama 35216, tel. 205–978–5000). *Id.* Even if the clinics follow the ASRM guidelines, they do not have to do so entirely. *Id.* Nonetheless, even with a written contract, clinics may have to deal with situations that were not contemplated by the parties to the contract. Howard J. Jones, Jr., *Cryopreservation and its Problems*, 53 FERTILITY & STERILITY 780, 780 (1990). Mr. Jones lists the following instances as unexpected circumstances:

> (1) death or disability of the prospective parents; (2) death or disability of one of the prospective parents; (3) legal separation of the prospective parents; (4) divorce of the prospective parents; (5) the cryopreserved material remains in storage beyond the reproductive limit of the prospective mother or beyond some other agreed on time limit; (6) loss of contact with the prospective parents, including their failure to pay current or delinquent cryopreservation fees and charges, if any; (7) loss of interest by the prospective parents in attempting a pregnancy; (8) wish of one prospective parent to remove the cryopreserved pre-zygote/pre-embryo from the original program; (9) wish of both prospective parents to remove the cryopreserved pre-zygote/pre-embryo from the original program; [and] (10) voluntary or involuntary discontinuation of a cryopreservation program by an in vitro fertilization (IVF) program.

Id. A recent disclosure of unethical and unauthorized practices at the University of California-Irvine provides evidence that written contracts are only proof of the agreement between parents and clinics. Pamela Warrick, *A Tale of Stolen Embryos: Inside a Nightmare Fertility Clinic*, GLAMOUR, Sept. 1996, at 296, 296. Employees of the University of California at Irvine's fertility program reported that directors of the clinic were giving eggs of one patient, sometimes fertilized and sometimes not, to other couples, and these unauthorized transfers of eggs resulted in at least 40 children. *Id.* at 313, 315. The case raises important questions including to whom do these children belong and what rights, if any, may either side assert. *Id.* at 314, 315; *see also Authorities at Fertility Clinic Unsure Who Got Whose Eggs*, ST. LOUIS POST-DISPATCH, July 7, 1995, at 12A (detailing events of and parties involved in university's fertility clinic scandal), *available in* 1995 WL 3330950; *Egg Swapping at Birth Clinic Brings Change*, N.Y. TIMES, July 9, 1995, at 17 (reporting scandal and indicating that incident has spawned AMA to reconsider its current guidelines), *available in* 1995 WL 2194275.

require couples to sign pre-freeze agreements.[70] These agreements outline by what terms the clinic preserves the embryos cryogenically and for what period of time.[71] Many clinics specify a time period after which the embryos are presumed to be abandoned and what actions may be taken by the clinic upon abandonment.[72] Even if a clinic requires parental consent for destruction of the embryos, these same clinics generally reserve the right to destroy the embryos after a given period of time.[73]

Consequently, cryopreservation creates a situation that potentially results in a conflict between clinics and parents. Cognizant of the terms in the pre-freeze agreement, parents may presume their embryos will be destroyed by the clinic under the clinic's reservation of rights.[74] Even if parents do not make such a presumption, many may be emotionally unable to make the decision to destroy their embryos and thus effectively leave that decision to the clinics.[75] Ironically, few, if any, clinics take steps to destroy stored embryos and thereby increase the number of frozen embryos falling under the abandoned category on a clinic's books.[76]

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70. *See* SOUTH TEXAS FERTILITY CTR., DEP'T OF OBSTETRICS AND GYNECOLOGY, THE UNIV. OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO, ADVANCED REPROD TECH. MANUAL, 22 (explaining that patients must sign pre-freeze agreement); Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (reiterating requirement that patients enter into written agreement with clinics) (transcript on file with the *St. Mary's Law Journal*).

71. *See* SOUTH TEXAS FERTILITY CTR., DEP'T OF OBSTETRICS AND GYNECOLOGY, THE UNIV. OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO, ADVANCED REPROD. TECH. MANUAL 22 (delineating conditions contained in pre-freeze agreement); Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (examining contents of typical pre-freeze agreement between clinic and prospective parents) (transcript on file with the *St. Mary's Law Journal*).

72. *See* Interview with Aloysius Leopold, Professor, St. Mary's University School of Law in San Antonio, Tex. (Oct. 23, 1996) (noting that abandonment law does not necessarily require time period) (transcript on file with the *St. Mary's Law Journal*). However, most pre-freeze agreements specify a time period.

73. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*).

74. *Id.*

75. *See* Joan Beck, *More Questions Than Answers in New Technology*, CHI. TRIB., Mar. 20, 1997, § 1, at 27 (noting that "few of the biological parents are willing to have their tiny offspring flushed away"), *available in* 1997 WL 3530581; Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (hypothesizing that some parents elect to allow clinics to decide fate of frozen embryos in order to avoid emotional issues associated with decision) (transcript on file with the *St. Mary's Law Journal*).

76. *See* Joan Beck, *More Questions Than Answers in New Technology*, CHI. TRIB., Mar. 20, 1997, § 1, at 27 (declaring that thousands of embryos are currently cryopreserved

As a result, abandoned frozen embryos have become a significant problem.

III. Arguments for the Frozen Embryo As Property, Life, or Deserving "Special Respect"

Legal commentators have attempted to classify frozen embryos as either property, life or as an entity deserving of "special respect."[77] Courts have contributed to the debate because they have faced the issue of classifying embryos without federal or state regulation; thus, it is no surprise that judicial conflict has arisen on this issue.[78] Accordingly, different views of the IVF embryo have developed, and particular attention has been given to defining the status of cryopreserved embryos under existing laws.[79]

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in America but "almost no one dares to discard them" and that "most labs have not been willing to [destroy embryos], even if the embryos are abandoned and their biological parents don't respond to queries and pay bills for room in the nitrogen tanks"), *available in* 1997 WL 3530581; *see also* Gina Kolata, *Frozen Embryos Give Birth to Legal, Emotional Debate: Tens of Thousands of Fertilized Eggs Get Kid-Glove Treatment,* Rocky Mtn. News, Mar. 16, 1997, at 2A (reporting that clinics, which charge fee for storage of frozen embryos, seldom destroy embryos even if couples fail to pay required fee), *available in* 1997 WL 6825803; Gina Maranto, *Embryo Overpopulation*, Sci. Am., Apr. 1996, at 16, 18 (explaining that lab workers are reluctant to destroy embryos even when told to do so); Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (explaining that his clinic possesses many abandoned frozen embryos that can be destroyed by contract but have not as of yet been destroyed) (transcript on file with the *St. Mary's Law Journal*).

77. *See* Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of States, Rights, and Research Policy*, 5 High Tech. L.J. 257, 261 (1990) (identifying three possible classifications for embryos); Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 Case W. Res. L. Rev. 543, 553 (1991) (illustrating that scholars prefer supporting only one of three classifications of embryos). *But see* Jennifer L. Carow, Note, Davis v. Davis: *An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DePaul L. Rev. 523, 538 (1994) (asserting that fourth classification is United States Supreme Court's stance at this time).

78. Elisa Kristine Poole, Comment, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 Am. J. Fam. L. 67, 78, 80 (1990); Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. Times, July 27, 1996, at A1, *available in* 1996 WL 11252924.

79. Elisa Kristine Poole, Comment, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 Am. J. Fam. L. 67, 78, 80 (1990); Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. Times, July 27, 1996, at A1, *available in* 1996 WL 11252924. Without establishing into what category embryos should fall, a California couple's estate was probated without giving consideration to their frozen embryos. Jean Voutsinas, *In Vitro Fertilization*, 12 Prob. L.J. 47, 62–63 (1994). In this case, an Australian court faced the decision of whether to include the frozen embryos in Australia as takers of the Rios's estate. *Id.* at 63–64. Because the couple died intestate, the court decided to

A. *Embryos As Property*

One possible classification for frozen embryos is that they should be considered property.[80] John Robertson, a professor at the University of Texas School of Law and a prolific commentator on IVF and cryopreservation, argues that defining embryos as property is not an attempt to equate them with tangible property or physical possessions;[81] rather, he and others apply the property designation to embryos as a means of describing who has the right to make decisions about disposition.[82] This reasoning also suggests that embryos deserve special respect because they have the potential to become life;[83] however, affording embryos special

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distribute the assets under California law without regard to the frozen embryos. *Id.* at 63. To this day, no one knows what the Australian government decided to do with the embryos. *Id.* The Australian government was free to destroy them or donate them for either implantation or research. *Id.* The *Rios* case is significant for two reasons. First, the Probate Court implied that embryos were not life by refusing to characterize the embryos as children for purposes of distributing the assets of the estate. *Id.* at 63–64. Second, the court hinted that had the Rios couple left a pre-freeze agreement stipulating their desires in the event of death, divorce or other catastrophe, the court may well have honored the agreement. *Id.* at 63.

80. Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of States, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 261 (1990); Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles Over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 553 (1991).

81. John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455 n.48 (1990). Robertson states that

> '[p]roperty' and 'ownership' are for some persons loaded, charged, or even pejorative terms, which use of the term 'quasi-property' only partially eases. Having a property or ownership interest in early embryos, however, should not be thought of as identical to having a property interest in furniture or cars, though there are many similarities.

Id. at 455 n.48. Robertson further states that "[a]pplying terms such as 'ownership' or 'property' to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property." *Id.* at 454. Further, Robertson argues that "[a]lthough the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless." *Id.* at 455.

82. *Id.* at 454–55, 455 n.48. Robertson notes that the "question of decisional authority is really the question of who owns or has a property interest in early embryos." *Id.* at 454. Even with the misunderstanding over the use of the words "property" and "ownership," Robertson argues that a discussion of embryos as property or the subject of ownership comes down to "who has dispositional authority and what limits are there on what they may do." *Id.* at 455 n.48.

83. *See id.* at 447 (explaining that determining whether embryo is worthy of special respect does not depend on "metaphysical assumption or religious belief" but on being open to what that actually implies). Robertson agrees that the embryo is unique because of its human potential even though it is not a "moral subject or rights holder." *Id.* Robertson states that "[t]he flag, the Torah, certain works of art, religious relics, and human remains are examples of other objects that are revered and respected because of their

respect does not necessarily mean that parents have no dispositional authority over their own embryos.[84] Furthermore, the property argument includes the concept that embryos and their disposition can be governed by contracts.[85] Primarily, contracts relating to embryos are embodied in so called pre-freeze agreements.[86] Professor Robertson asserts that pre-

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symbolic import, even though they are not themselves moral subjects or rights-bearers." *Id.* Thus, Robertson concludes that

> the amount of respect given the embryo is not a matter of moral duty, but a personal value or policy choice of how a person, family, or community wishes to constitute itself. Policies that aim to make a symbolic statement are not required by duties to actual persons, but are options for demonstrating normative commitments. As long as these demonstrations do not infringe any person's rights, the willingness to trade off symbolic and other interests lies within the discretion of the state. It becomes a judgment of how much respect is lost and how much other interests gain in any particular case of conflict.

Id. at 450 n.37. Robertson's statements arguably support the idea that the property classification can include the concept of special respect. *Cf.* Kristine E. Luongo, Comment, *The Big Chill*: Davis v. Davis *and the Protection of "Potential Life?"*, 29 NEW ENG. L. REV. 1011, 1021 (1995) (arguing that classification of embryos as property ignores their potential for life). Those who argue against the property classification believe that the special respect category is more accurate. *See id.* at 1023 (noting that special respect category includes same decision making notions as property category). It is contended that commentators who argue that embryos cannot be treated with special respect if they are characterized as a property interest fail to develop their argument fully. *Id.* In fact, these two characterizations are not diametrically opposing concepts. Although some argue that the special respect category is unique because it may limit the decision making authority by statute, limitations on property interests may similarly be instituted by statute. *Id.* The property classification only bestows a decision making authority on the parents. *Id.* Those who reject the property classification seem particularly offended by what the classification implies or by the fact that embryos may not be property in the traditional sense without recognizing that embryos as a property interest may be the most effective way to show them special respect. *See* Jean Voutsinas, *In Vitro Fertilization*, 12 PROB. L.J. 47, 47 (1994) (listing assumed negative implications of property classification and asserting that there are too many "inherent problems" with classification).

84. *Cf.* Kristine E. Luongo, Comment, *The Big Chill*: Davis v. Davis *and the Protection of "Potential Life?"*, 29 NEW ENG. L. REV. 1011, 1023 (1995) (arguing that showing embryos special respect includes decision-making authority, however limited).

85. *See* Kass v. Kass, No. 19658/93, slip op. 7376, 1997 WL 563419, at *7, 10 (N.Y. App. Div. Sept. 8, 1997) (holding that decisions regarding disposition of embryos should be left to parents but enforcing pre-freeze agreement as clear expression of parties' intent regardless of one party's change of heart upon divorce); John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 473 (1990) (asserting that couples retain dispositional authority over embryos absent pre-freeze agreement but may relinquish their authority by contract).

86. *See* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 409–10 (1990) (noting that most clinics require couples to enter pre-freeze agreements).

freeze agreements should be enforced according to the doctrines applicable to all other contracts.[87]

1. The *Del Zio* Case

The earliest case in the United States to deal with IVF was *Del Zio v. Presbyterian Hospital.*[88] This case arose in 1978, years before scientists had achieved the first successful human birth from IVF.[89] Therefore, when John and Doris Del Zio's doctor suggested the procedure as a way to by-pass Mrs. Del Zio's damaged fallopian tubes, the procedure was purely experimental.[90] The Del Zios agreed to undergo the procedure in 1973.[91] When the physician in charge of obstetrics and gynecology at Presbyterian Hospital learned of the existence of the Del Zios' embryos, he ordered them destroyed without consulting the Del Zios or their physician.[92]

The Del Zios' physician testified that he did not believe that Mrs. Del Zio could go through another IVF process after the 1973 egg retrieval,

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87. *Id.* at 414, 424. In one of his most frequently cited arguments, Robertson concludes that "[p]rior directives present the best way to maximize the couple's reproductive freedom, to give advance certainty to couples and IVF programs, and to minimize disputes and their costs." *Id.* at 414. Robertson thinks these agreements should be enforced under concepts similar to other contracts but draws a distinction between pre-freeze agreements and contracts covering surrogacy issues and does not want the surrogacy concepts to control. *Id.* Instead, Robertson sees these pre-freeze agreements as analogous to other "precommitment devices" couples utilize in their lives. *Id. But see* AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 25 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (holding, due to unique circumstance, that ex-wife cannot use embryos created and frozen during her marriage to her ex-husband despite several pre-freeze agreements giving embryos to wife upon separation). The judge in this case elected not to enforce the agreements after considering the changed circumstances of the parties and the countervailing interests of the husband. *Id.* One expert reacting to *AZ v. BZ* compared pre-freeze agreements to settlement agreements and asserted that pre-freeze agreements "may not hold up over time." David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAW. WKLY., Oct. 7, 1996, at 1.

88. 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE, HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 7 (Julie Shuptrine et al. eds., 1985).

89. *See id.* at 8 (explaining that at time IVF successful in animals but not reportedly in humans).

90. *Id.* Mrs. Del Zio learned she had blocked fallopian tubes when attempts to have a baby failed, and, unfortunately, surgery on her fallopian tubes to correct this problem was unsuccessful. *Id.* at 7–8. The defendants supported its position by referring to the procedure as the "in vitro experiment" and stated that the "state of the art of in vitro fertilization in September, 1973 offered no assurance." *Id.* at 12.

91. *See id.* at 8 (delineating facts of *Del Zio* case).

92. *Id.* at 9. Dr. Vande Wiele did not consult the Del Zios or their physician but did receive approval from two other institutional authorities. *Id.*

which in essence meant a loss of reproductive capability.[93] As a result, Mr. and Mrs. Del Zio allegedly suffered severe emotional distress.[94] Because of the loss of reproductive potential and the ensuing emotional distress, the Del Zios sued for conversion and intentional infliction of emotional distress.[95] The jury, however, awarded damages to the Del Zios only on the count of emotional distress in the amount of $50,000.[96]

The jury's failure to award the Del Zios damages under the property doctrine of conversion does not mean that the jury found no liability for conversion.[97] The court's instructions to the jury on damages made clear that finding for either the emotional distress claim or the conversion claim alone was sufficient to award damages, and thus the court held that the jury could simply have believed that damages for conversion itself were too speculative.[98] Thus, the court stated that the jury may actually

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93. Del Zio v. Presbyterian Hosp. of N.Y., 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE, HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 10 (Julie Shuptrine et al. eds., 1985).

94. *See id.* (reporting that Del Zios suffered emotional distress and that Mrs. Del Zio was treated by psychiatrist).

95. *See id.* at 7 (outlining claims of damages related to "severe emotional distress").

96. *Id.* at 13–14. The jury divided the amount awarded between the three defendants as follows: $12,500 paid by Presbyterian Hospital, $12,500 paid by Columbia University and the remaining $25,000 paid by Dr. Raymond L. Vande Wiele. *Id.*

97. *Id.* at 16–17. The court explained that the jury "could reasonably have found liability on the conversion claim" while rendering a verdict in favor of the defendants on the basis that "the amount of damage for conversion was too speculative to be determinable." *Id.*

98. *See* Del Zio Presbyterian Hosp of N.Y., 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (explaining that jury could have found liability for conversion but not been able to ascertain amount for damages), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 16–17 (Julie Shuptrine et al. eds., 1985). The court charged the jury on damages as follows:

> There is one general rule, before I get to the specific question of damages. The law does not permit you to award speculative damages. Damages which are undertain [sic], contingent or speculative in nature cannot be made the basis of a recovery. Thus, if you find that certain damages are speculative or uncertain, you cannot guess; rather, you must not make those damages the basis of a recovery. (Tr. 4394.) The measure of damages under the two theories are different, so if you find the defendants liable under only one theory, you must make sure you apply the appropriate measure of damages for that claim. Although the measure of damages is different, certain of the damages are the same. The plaintiffs are only entitled to be compensated once for expenses included in both claims. So if you find the defendants liable under both claims, you cannot double the recovery on those damages which are included in both claims. (Tr. 4394–95.)

The court also charged the jury on conversion as follows:

> When, as in this case, the property has no readily ascertainable market value, to determine the amount of plaintiffs' loss you may consider the replacement costs, if any, of

have "concluded, and properly so, that any damages for conversion were already included in the damages awarded for the [emotional distress]."[99] Arguably, conversion could have been applicable in this case, which would thereby imply that embryos are more analogous to property than to life or as deserving special respect.[100] This case is not only significant for its implication that embryos may be classified as property, but also for recognizing damages for emotional distress for the wrongful destruction of an embryo prior to implantation.[101]

2. The *York* Case

Subsequent to *Del Zio*, two other relevant cases dealing with this issue emerged. First, in *York v. Jones*,[102] the United States District Court for the Eastern District of Virginia upheld a breach of contract action by Steven and Risa York against the Jones Institute of Norfolk, Virginia.[103]

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the specimen. You may not take into account the sentimental value of the property to the plaintiffs. In determining the value of the property, it is the value on September 13, 1973 and you may not speculate or conjecture on the possible future value of the property. (Tr. 4401.)

Id. Jurors further knew that they only needed to find liability on one claim because they were charged with the instruction that "[p]laintiffs are entitled under the law to rely on two different theories. They are not required to elect one or the other. Also, plaintiffs only need to prevail on one of these theories in order to recover damages." (Tr. 4381.) *Id.* Thus, the jury could award for just the emotional distress claim without necessarily finding liability on the claim for conversion. *Id.* at 16–17.

99. *Id.* at 18.

100. *Id.* at 17–18. Arguably, the fact that the *Del Zio* court instructed the jury only on issues of tort and conversion with no suggestion that arguments for life or any other category existed is evidence that the court thus viewed the destroyed embryos as the Del Zios' property. *Id.*

101. *See* Thomas C. Shevory, *Through a Looking Glass, Darkly: Law, Politics, and Frozen Human Embryos* (emphasizing significance of case with respect to property classification and awarding of damages to parents), *in* ISSUES IN REPRODUCTIVE TECHNOLOGY 231, 234 (Helen Bequaert Holmes ed., 1994); Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1670 (1984) (examining issue of wrongful termination of in vitro procedure presented in *Del Zio*); Michelle F. Sublett, Note, *Frozen Embryos: What are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585, 598–599 (1990) (construing *Del Zio* as implying that frozen embryos are property).

102. 717 F. Supp. 421 (E.D. Va. 1989).

103. *See York*, 717 F. Supp. at 423 (describing procedural matters culminating in breach of contract complaint). While living in New Jersey, the Yorks sought treatment for their infertility problems and contacted the Jones Institute. *Id.* After being accepted into the IVF program there, Mr. and Mrs. York attempted IVF several times without success. *Id.* at 423–24. During these attempts the Yorks moved to California. *Id.* at 423. In anticipation of another IVF attempt the Yorks signed a pre-freeze agreement with the Jones Institute. *See id.* (summarizing cryopreservation agreement terms). The consent form explained the cryopreservation process and "detailed the couple's rights in the frozen pre-

After moving to California, the Yorks wished to have their cryopreserved embryo transferred from the Jones Institute in Virginia to California in order to have implantation done there.[104] Despite repeated requests from the Yorks, the Jones Institute refused to transfer the embryo.[105] The Jones Institute claimed that the pre-freeze agreement did not allow transfer as an option for disposition.[106] The Virginia court disagreed and noted that the pre-freeze agreement only limited the Yorks to selected options for disposition of the frozen embryo should they no longer desire to use the embryo to achieve pregnancy.[107] The court further reasoned that because the pre-freeze agreement clearly recognized the Yorks' property interest in the frozen embryo,[108] the pre-freeze agreement created a bailment contract, and the Jones Institute's role as bailee was limited to the control and dominion it could exercise over the disposition of the embryo by the Yorks as bailors.[109] Consequently, the

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zygote." *Id.* This procedure resulted in the removal and subsequent fertilization of six of Mrs. York's eggs. *Id.* Of these six, only five were implanted—the sixth was cryopreserved and was the subject of this suit. *Id.*

104. *Id.*

105. *Id.* at 424.

106. *See id.* at 425 (recognizing Jones institute's refusal to transfer remaining frozen pre-zygote).

107. *Id.* at 427. The cryopreservation agreement provided as follows:

> We may withdraw our consent and discontinue participation at any time without prejudice and we understand our pre-zygotes will be stored only as long as we are active IVF patients at the Howard and Georgeanna Jones Institute for Reproductive Medicine or until the end of our normal reproductive years. We have the principal responsibility to decide the disposition of our pre-zygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both. In the event of divorce, we understand legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate pregnancy, we understand we may choose one of the three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: (1) donated to another infertile couple (who will remain unknown to us) (2) donated for approved research investigation (3) thawed but not allowed to undergo further development.

Id. at 424. The *York* court argued that the entire suit contemplated the Yorks' continued desire for pregnancy, and that the above language of the pre-freeze agreement did not in any way restrict them to the Jones Institute for their pregnancy attempts. *Id.* at 427. Therefore, the Yorks were not limited to the "three fates" listed in the language of the agreement. *Id.*

108. *York*, 717 F. Supp. at 426–27.

109. *Id.* at 425, 427. The court further explained that the parties did not have to intend to create the bailment relationship. *Id.* at 425. Moreover, a bailment contract by its very nature requires the bailee to return the property to the bailor, the Yorks. *Id.* The court even outlined the requirements of a bailment relationship. *Id.*

Jones Institute was bound to release the embryo to the control of the Yorks upon their demand.[110]

The final element of the Yorks' argument was that the Jones Institute's exercise of control over their frozen embryo violated their constitutional right to procreational freedom.[111] The Jones Institute responded by claiming immunity from prosecution as an arm of the state under the Eleventh Amendment.[112] The court again disagreed with the Jones Institute on the grounds that the Institute was not an arm of the Commonwealth of Virginia and thus could not claim governmental immunity from liability.[113]

The *York* case is significant because the court recognized the Yorks' property interest in their frozen embryo[114] by allowing the Yorks the right to decide how to dispose of their embryo.[115] It is also important to note that the court interpreted this contract as a legally enforceable document.[116] Since the parties outlined their intentions and interests in the pre-freeze agreement, the court based its decision on that contract. Their pre-freeze agreement specified that, should the Yorks divorce, the embryos must become part of the property settlement.[117]

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110. *See id.* at 425 (explaining that "[t]he obligation to return the property is implied from the fact of lawful possession of the personal property of another").

111. *Id.* at 427. The Yorks claimed constitutional rights under the First, Fourth, Ninth and Fourteenth Amendments. *Id.*

112. *See id.* (examining application of Eleventh Amendment protection to state and state as party in interest).

113. *York*, 717 F. Supp. at 429. The court explained that the most important factor to consider in upholding an immunity claim such as the one in this case is whether state funds would be used to satisfy a judgment should the court rule against the Jones Institute. *Id.* at 428.

114. *See id.* at 424–27 (holding that embryos are property in context of breach of contract and detinue actions); *see also* Deborah Kay Walther, *"Ownership" of the Fertilized Ovum In Vitro*, 26 FAM. L.Q. 235, 243 (1992) (explaining that *York* court held embryos to be type of property).

115. *See York*, 717 F. Supp. at 426 n.5 (noting that provision of pre-freeze agreement treating embryos as property and outlining disposition is consistent with view of American Fertility Society). The American Fertility Society at that time specifically stated that embryos are the property of the parents, which gives the parents dispositional authority. *Id.*

116. *See id.* at 425 (explaining that pre-freeze agreement is governed by contract law and principles despite its classification as bailment contract).

117. *Id.* at 424.

3. The *Moore* Case

In *Moore v. Regents of the University of California*,[118] the California Supreme Court did not directly address IVF or cryopreservation.[119] Nonetheless, this 1990 case has potential implications for classifying embryos as property in its discussion of conversion as related to human tissues.[120] In 1976, John Moore learned that he had hairy-cell leukemia and approached the Medical Center of the University of California at Los Angeles (the "Medical Center") for treatment.[121] Doctors at the Medical Center recommended treatment that included removal of Moore's spleen, which Moore agreed to by written consent.[122] Moore's doctors discovered that his bodily tissue yielded an opportunity to create special disease and cancer fighting pharmaceutical products;[123] however, these same physicians failed to advise Moore of the special character of his cells and their intention to exploit his cells for their personal gain.[124] When Moore learned what had been done with his cells, he sued his physicians and the UCLA Medical Center for conversion.[125]

The Supreme Court of California held that Moore did not have a viable cause of action for conversion.[126] In doing so, the court rejected Moore's argument that he "continued to own his cells following their removal from his body, at least for the purpose of directing their use."[127] The *Moore* court rationalized a need to preserve the integrity of medical research and to prevent the imposition of an unnecessary duty of care on those doctors and scientists who use human cells to investigate the cells' origins.[128]

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118. 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991).

119. *Moore*, 793 P.2d at 480. This case dealt with the unauthorized use of human cells for medical research. *Id.*

120. *Id.* at 487–97. The *Moore* court concluded that Moore had neither title nor expectation to retain his cells once his spleen was removed. *Id.* at 488–89. California law also strictly limited patients' rights to control cells removed from their bodies. *Id.* at 491.

121. *Id.* at 481.

122. *Id.*

123. *Id.*

124. *Moore*, 793 P.2d at 481.

125. *See id.* at 479 (reporting that Moore sued for conversion as well as breach of physician's disclosure obligations).

126. *Id.* at 493. The court listed the following reasons for declining to impose liability for conversion: (1) a need to balance the policy interests in extending the tort to this situation; (2) the legislature is the appropriate body to decide to allow conversion to cover this issue; and (3) patients do not need the tort of conversion to protect their interest. *Id.*

127. *Id.* at 487.

128. *See id.* at 487, 493–97 (discussing policy reasons behind analysis).

Furthermore, the *Moore* court held that to establish conversion one must have title to the property and expect to retain possession thereof.[129] The court pointed out that Moore did not expect to keep possession of his spleen after his surgeons removed it; thus, the court doubted that Moore maintained any ownership interest in his spleen and its cells.[130] The court also pointed to special statutes that had been enacted in California regarding human tissues, including one that specifically "limit[ed], drastically, a patient's control over excised cells."[131] The court was simply unwilling to extend common property principles to areas where it believed it would contravene public policy.[132] An important factor the court considered in making its determination was that the product produced and patented from Moore's cells was not unique in that it did not carry a genetic code or other mark found only in Moore's body.[133] Because the product could not be scientifically linked to only one individual[134] and because every human has an identical molecular cell structure,[135] the court found nothing unique to establish that these cells were Moore's property.[136]

Arguably, *Moore*'s impact falls short of meaning that excised human cells can never be classified as property.[137] In fact, with respect to cryopreservation, the *Moore* decision appears to support the argument that frozen embryos are the unique property of the biological parents.[138]

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129. *See Moore*, 793 P.2d at 488–89 (listing elements of conversion as title and possession).

130. *See id.* (explaining that Moore had neither possession of nor ownership interest in his spleen cells).

131. *Id.* at 492.

132. *See id.* at 493–97 (explaining policy reasons in support of holding).

133. *Id.* at 490–91 nn.29–30.

134. *Moore*, 793 P.2d at 490; *see also id.* at 482 n.2, 490-91 nn.29-30 (noting that lymphokines have same molecular structure in every human).

135. *Id.* at 490; *see also id.* at 482 n.2, 490 nn.29-30.

136. *Id.* at 492.

137. *Id.* at 493. One of the court's overriding concerns was whether policy would be served if the court extended or applied the tort of conversion to the facts at issue. *Id.*

138. *Cf. id.* at 488 n.18 (finding weakness in Moore's argument, court stated that "genetic code for lymphokines does not vary from individual to individual"). Thus, a strong argument could be made to categorize certain human cells as property should they be found genetically unique. *See id.* at 493 (reiterating that court's declination to extend tort of conversion does not mean that excised human cells can never be property). *See also* Michelle F. Sublett, Note, *Frozen Embryos: What are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585, 599–600 (1990) (arguing that reasoning of lower *Moore* court is applicable to frozen embryos). Ms. Sublett wrote her article prior to the reversal of the lower court's decision by the Supreme Court of California where it was held that Moore's cells were not connected. *Id.* Thus, her analysis of the human embryo as analogous to the converted cells removed from Mr. Moore's body is stronger under the lower court's reasoning. *Id.* Nonetheless, an argument for conversion can still be made since

First, embryos are incredibly unique human tissue.[139] Just as a living child is genetically connected to only one man and one woman, a human embryo shares the same genetic material as its parents.[140] Unlike the spleen cells in dispute in *Moore*, the genetic code in each human embryo carries its own unique genetic characteristics and cannot be duplicated.[141] Second, the parents of any embryo expect to retain possession of and interest in that embryo because creating a viable embryo is the whole point of IVF.[142] Finally, California possessed special statutes governing

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parents of an embryo may intend to retain possession of the embryo once created and, consequently, have title to the embryo. *Id.*

139. *See* J.E. Schmidt, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER G–49 (perm. ed. rev. vol. 1996) (announcing definition of genetics with respect to human tissues). Genetics is defined as the "science dealing with the process of heredity and with the variations in similar or related individuals." *Id.* The science of genetics "studies the causes of differences and resemblances between parents and their offspring and between all individuals related by descent." *Id.* Genetically, the union of sperm and eggs creates an entity distinct yet uniquely linked to the parents. *See id.* (delineating that genetic material is "matter transmitted from the parent organism to the organisms of succeeding generations that determines the characteristics of the species and the differences between individuals of the species"); *see also* Margann Bennett, Comment, *Admissibility Issues of Forensic DNA Evidence*, 44 U. KAN. L. REV. 141, 142 (1995) (noting that structure of each human being is unique); Lisa Carrabino, Note, *The Admissibility of DNA Typing and Statistical Probability Evidence*, 29 SUFFOLK U. L. REV. 473, 475–77 (1995) (discussing DNA and genetic inheritance generally). Even siblings, who share the same set of parents, have similar but not identical genetic patterns. *See* Lisa Bouwer Hansen, Comment, *Stemming the DNA Tide: A Case for Quality Control Guidelines*, 16 HAMLINE L. REV. 211, 215 (1992) (discussing siblings genetic connection to parents while still distinguishable from each other and fact that genetic pattern does not vary over human's lifetime). Only identical twins share exactly the same genetic pattern. GEOFFREY ZUBAY, GENETICS 607 (1987); Demosthenes A. Lorandos, *Secrecy and Genetics in Adoption Law and Practice*, 27 LOY. U. CHI. L.J. 277, 287 (1996); Margann Bennett, Comment, *Admissibility Issues of Forensic DNA Evidence*, 44 U. KAN. L. REV. 141, 142 (1995); Lisa Carrabino, Note, *The Admissibility of DNA Typing and Statistical Probability Evidence*, 29 SUFFOLK U. L. REV. 473, 476 (1995). Fraternal twins, on the other hand, are no more similar genetically than any other children born of the same parents. GEOFFREY ZUBAY, GENETICS 607 (1987).

140. *See* Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 BYU L. REV. 129, 136–37 (discussing DNA paternity testing generally). DNA is so unique that a blood test can determine with amazing accuracy whether a man is the father of a child or not. *Id.* at 137.

141. GEORGE P. SMITH, II, GENETICS, ETHICS AND THE LAW 1–2 (1981). Genetic engineers have been working for decades to find ways to manipulate and duplicate human cells. *Id.* Many of their efforts are directed at curing diseases and problems caused by a defect in an individual's genetic code; however, IVF also grew out of this desire to manipulate human genetics. *Id.*

142. *See* John A. Robertson, *Legal Troublespots in Assisted Reproduction*, 65 FERTILITY & STERILITY 11, 11 (1996) (noting that couples consider embryos "theirs"). If parents had no interest in retaining the use of their embryos, then there would be no point to IVF.

the use of excised human tissues to which the court could look, and therefore, California law provided guidance to the *Moore* court in its decision.[143] In fact, these California statutes allowed the court to find that Moore's cells were not his property.[144] Arguably then, absent special statutes specifically directing the court on how to treat frozen embryos, the law of personal property may apply.[145]

B. *Embryos As Life*

Much of the groundwork for this argument is derived from the pro-life movement in its fight against abortion.[146] The Roman Catholic Church is the backbone of this movement.[147] The Church maintains the position that life begins at conception.[148] Although such a position by the Church existed before IVF and cryopreservation developed, when IVF and cryo-

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Id. The intent is to freeze their embryos for later use, which in and of itself evidences an intent to retain possession and use. *See id.* at 12 (discussing parents' stress and controversy surrounding situations where embryos switched, lost or destroyed); *see also* Pamela Warrick, *A Tale of Stolen Embryos: Inside a Nightmare Fertility Clinic*, GLAMOUR, Sept. 1996, at 296, 314 (explaining that couples who seek IVF want children so badly that they usually elect not to donate their embryos).

143. *Moore*, 793 P.2d at 491–92.

144. *See id.* at 492 (interpreting statute as eliminating patient's property rights for purposes of conversion claim).

145. *See id.* at 489 (indicating that without special laws addressing human biological materials courts must rely on personal property laws). The court notes that special statutes have been passed regulating issues like human tissues, blood and fetuses. *Id.* Thus, the court was confident that property law did not apply because of these special statutes. *Id.* However, had these specialized statutes not existed in California for human materials like Moore's, the court may have had no choice but to look to the personal property law for guidance. *Id.*

146. *See* Marcia Joy Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1090 (1986) (relying on idea that fertilized egg is alive and of human origin and therefore deserving of protection); Natalie K. Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 559 (1991) (discussing whether embryo is considered person).

147. *See* Natalie K. Young, *Frozen Embryos: New Technology Meets Family Law*, 21 GOLDEN GATE U. L. REV. 559, 559 (1991) (stating that Catholic Church considers embryo as person); *see also* Christopher G. Jesudason, *Maximum Consultation in the Use of Frozen Embryo*, NEW STRAITS TIMES, May 26, 1997, at 15 (writing that "[i]n the West, the sensitive cultures invariably possess the ancient Christian and Catholic living tradition regarding the sanctity of life, gained initially from their experience in disciplined community living while existing in a hostile and pagan world which held many contradictory values"), *available in* 1997 WL 2962717. Jesudason goes on to reiterate the Church's position on the destruction of an embryo as the equivalent of abortion. *Id.*

148. *See* CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY 14 (1987) (explaining that "[t]he human being is to be respected and treated as a person from the moment of conception; and therefore from

preservation emerged, these procedures were denounced by the Church.[149] Nonetheless, recognizing that such practices exist in society,[150] the Church asserts that embryos created through IVF must be treated as life.[151] Thus, the Church argues that life demands respect, no matter the means of its creation.[152]

1. Relevant Case Law

The view that embryos are "life" has not been judicially accepted. Both *Roe v. Wade*[153] and *Planned Parenthood v. Casey*[154] prevent states from interfering in a woman's reproductive decision prior to the *viability*

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that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life").

149. *See id.* at 10 (noting that "what is technically possible is not for that very reason morally admissible"). The main objection the Church finds to IVF and procedures like it lies in the creation of life outside the conjugal act of husband and wife, and in 1961, Pope John XXIII spoke out on the special character of the creation of human life by saying that:

> The transmission of human life is entrusted by nature to a personal and conscious act and as such is subject to the all-holy laws of God: immutable and inviolable laws which must be recognized and observed. For this reason one cannot use means and follow methods which could be licit in the transmission of the life of plants and animals.

Id. While Pope John XXIII's statement predates the first successful birth from IVF, his statement is nonetheless applicable, as evidenced by the Church's position that "God alone is the Lord of life from its beginning until its end: no one can, in any circumstances, claim for himself the right to destroy directly an innocent human being." *Id.* at 11. The Church sees procedures like IVF as improper because the procedure by its nature exposes the embryo to either destruction or freezing if not implanted. *See id.* at 19 (noting that freezing constitutes a risk to embryo and deprives embryo of "maternal shelter and gestation"); *see also* Glenda Cooper, *Are Embryos People?*, WORLD PRESS REV., Nov. 1, 1996, at 38 (asserting that Pope John Paul II denounces IVF and places IVF in same category as abortion), *available in* 1996 WL 8399723.

150. *See* CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY 5 (clarifying that Church recognizes that "[v]arious procedures now make it possible to intervene not only in order to assist but also to dominate the processes of procreation"). The Church further asserts that "[t]hese techniques can enable man to 'take in hand his own destiny,' but they also expose him 'to the techniques to go beyond the limits of a reasonable dominion over nature.'" *Id.*

151. *See id.* at 3 (defining that various terms used for stages of development of IVF fertilized eggs have "identical ethical relevance").

152. *Id.* at 31. The Congregation for the Doctrine of the Faith stated that "[a]lthough the manner in which human conception is achieved with IVF and ET cannot be approved, every child who comes into the world must in any case be accepted as a living gift of the divine Goodness and must be brought up with love." *Id.*

153. 410 U.S. 113 (1973).

154. 505 U.S. 833 (1992).

of an unborn child.[155] The rationale for this view is that, once pregnant, a woman is "uniquely affected" by the pregnancy, and should not be overburdened by state interference.[156] The Court in *Casey* indicated that it might have ruled differently had a reversal not meant overturning its own precedent without a fundamental reason.[157] Thus, *Casey* preserved the continued availability of abortion in the United States.[158] By preserving abortion, the Court preserved the idea that a state's interest turns on viability, not conception.[159] Should the Supreme Court ever overturn *Roe*, the status of unborn children, and consequently the status of frozen embryos, would be more questionable.[160]

2. Louisiana Statute

The only attempt in the United States to define frozen embryos as life has come in the form of state government legislation. One of the more significant state statutes can be found in Louisiana, which makes the intentional destruction of frozen embryos illegal.[161] Louisiana requires parents who renounce their rights in their frozen embryos to either donate their embryos to a married couple for implantation or make the eggs available for adoption.[162] Consequently, because embryos cannot be intentionally destroyed, they are given a status equal to that of a living child. Critics of Louisiana's statute argue that this limitation on reproductive freedom as to frozen embryos may violate the United States Constitution; however, the statute has yet to face a constitutional

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155. *See Casey*, 505 U.S. at 869–70 (noting *Roe*'s establishment of viability as point of state's right to have countervailing interest and affirming this point as law). The Court defined viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." *Id.* at 870.

156. *See id.* at 852 (opining that women's liberties are "at stake in a sense unique to the human condition and so unique to the law"). The Court explained that this uniqueness derives from the fact that a pregnant woman is "subject to anxieties, to physical constraints, to pain that only she must bear." *Id.*

157. *See id.* at 871 (declaring that question before *Casey* court was not weight of state interest as in *Roe*). The Court declined to address the soundness of the *Roe* court's analysis and concluded that, had the *Casey* court been sitting in 1973, *Roe* may have been decided differently. *Id.*

158. *Id.*

159. *Id.* at 879.

160. *Cf.* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 104 (1994) (arguing that states are currently free to legislate to protect embryos despite Supreme Court's holding in *Roe*).

161. LA. REV. STAT. ANN. § 129 (West 1991).

162. *Id.* § 130. This section also specifies that parents may never own embryos they create. *Id.*

challenge.[163] Several other states effectively grant frozen embryos a status equal to that given by the Louisiana statute by criminalizing the destruction of such embryos.[164] These states punish those who destroy embryos under existing homicide laws.[165]

3. The *Cuellar* Case

Following *Cuellar v. State*,[166] Texas may have new judicial precedent in the area of unborn children that potentially impacts embryos. In *Cuellar*, the Thirteenth District Court of Appeals in Corpus Christi sustained the conviction of Gerardo Cuellar for intoxication manslaughter for the death of Jeanie Coronado's daughter.[167] Cuellar drove his truck into Coronado's vehicle.[168] At the time, Coronado was seven months pregnant but, as a result of the accident, delivered a daughter who lived only two days.[169] Jurors deciding Cuellar's fate only deliberated on whether he had caused the accident that resulted in the child's death.[170] The issue of whether the child was a "person or a fetus at the time of the accident"

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163. *See* Christi D. Ahnen, Comment, *Disputes over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?—An Analysis of* Davis v. Davis, York v. Jones, *and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1316 (1991) (commenting that Louisiana's statute, which gives IVF embryos legal status, has not been challenged constitutionally); *see also* Anthony John Cuva, Note, *The Legal Dimensions of In Vitro Fertilization: Cryopreserved Embryos Frozen in Legal Limbo*, 8 N.Y.L. SCH. J. HUM. RTS. 383, 398 (1991) (reiterating that Louisiana's statute has never been tested for constitutional validity).

164. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 510/2(6) (West 1993) (stating in part that unborn child means "an individual organism of the species homo sapiens from fertilization until live birth"); MINN. STAT. ANN. § 609.266 (West 1987) (establishing definitions for statutes relating to crimes against unborn children and stating in relevant part: "'unborn child' means the offspring of a human being conceived but not yet born"); N.D. CENT. CODE §§ 12.1–17.1–01(3) (Michie Supp. 1993) (enunciating definitions to be used in chapter for offenses against unborn children and stating in pertinent part: "'unborn child' means the conceived but not yet born offspring of a human being").

165. *See* John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 451–52 & nn.42–44 (1990) (discussing various state homicide laws that Robertson asserts to protect embryos from destruction); Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 522 n.106 (1990) (discussing Minnesota's criminal law protection of frozen embryos).

166. 943 S.W.2d 487 (Tex. App.—Corpus Christi 1996, n.w.h.).

167. *Cuellar*, 943 S.W.2d at 489, 495.

168. *Id.* at 489.

169. CBS Morning News: *Man Involved in Drunk-Driving Incident Sentenced to 16 Years in Prison for the Death of a Fetus* (CBS television broadcast, Oct. 22, 1996).

170. *Spotlight Story Texas: Man Found Guilty of Intoxication Manslaughter*, AMERICAN POLITICAL NETWORK—ABORTION REPORT, Oct. 18, 1996.

was not their focus.[171] *Cuellar* potentially establishes criminal repercussions for the wrongful deaths of children who die after birth due to injuries sustained prior to birth.[172]

C. *Embryos Deserving "Special Respect"*

1. American Fertility Society[173]

Some commentators argue that the most accurate classification for embryos resulting from modern assisted reproductive technology is a middle ground between property and life.[174] In its guidelines, the American Fertility Society ("AFS") takes the same position, arguing that embryos are neither persons nor property but deserve "special respect."[175] Nonetheless, the AFS also asserts that, absent specific legislation to the contrary, people who donate sperm and eggs to create an embryo have decision-making authority over that embryo.[176]

2. *Davis v. Davis*

The Supreme Court of Tennessee in *Davis v. Davis*[177] established for the first time that embryos deserved more than the title of property. In *Davis*, the court addressed the divorce dispute between the Davises over the disposition of their seven frozen embryos.[178] Prior to the divorce, the Davises made numerous attempts at IVF without the option of cryo-

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171. *See id.* (reiterating that jury was not required to consider whether child was person or fetus when accident occurred).

172. *See id.* (citing director of Texas Abortion Rights Action League as saying that verdict raises flag to watch precedent set by this ruling).

173. Within the last couple of years, the American Fertility Society changed its name to the American Society for Reproductive Medicine. Because the existing case law and most commentaries on reproductive technology subjects refer to the Society by its former name, this Comment will use American Fertility Society for ease of discussion.

174. *See* Jennifer P. Brown, Comment, *"Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy*, 28 U.S.F. L. REV. 183, 197 (1993) (reporting that majority view supports middle position); Jennifer Marigliano Dehmel, Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1384 (1995) (noting that majority of commentators support middle position).

175. *See Davis*, 842 S.W.2d at 596 (discussing American Fertility Society Ethics Committee Report conclusion that pre-embryos require special respect).

176. *See id.* at 597 (holding that American Fertility Society recommends pre-embryo decision-making authority reside with biological parents).

177. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

178. *See Davis*, 842 S.W.2d at 589 (noting that suit brought because parties were not able to decide disposition of frozen embryos upon divorce).

preservation.[179] During their final attempt at IVF, however, the clinic had implemented cryopreservation, and thus the Davises froze their remaining embryos.[180] At the time of cryopreservation, no agreement regarding the disposition of the embryos was signed, and no discussion took place as to what should be done in the event of divorce.[181] Once Junior Davis filed for divorce, Mary Sue Davis requested leave to use the embryos herself.[182] By the time the case progressed to trial, her desires had changed, and Mary Sue Davis indicated that she wished to donate the embryos to another couple.[183] Junior Davis wanted the embryos destroyed.[184]

The Supreme Court of Tennessee agreed to review the case "not because [it] disagree[d] with the basic legal analysis utilized by the intermediate court, but because of the obvious importance of the case in terms of the development of the law regarding the new reproductive technologies."[185] The *Davis* court recognized that whether embryos should be classified as persons or as property was fundamental to the inquiry.[186] The court reviewed Tennessee legislation and common law and concluded that state law did not allow embryos to be considered persons.[187] Furthermore, the court pointed to *Roe v. Wade*[188] and other Supreme Court precedent and determined that the law in the United States fails to grant embryos protection as persons.[189]

In its attempt to define the embryos' status, the *Davis* court also rejected the property classification despite various legal arguments support-

179. *See id.* at 591–92 (recording that Davises endured six attempts at IVF, without cryopreservation option, that proved unsuccessful).

180. *See id.* at 592 (explaining that final attempt at IVF produced nine embryos, two of which were transferred unsuccessfully and seven were frozen).

181. *Id.* at 590.

182. *Id.* at 589.

183. *See Davis*, 842 S.W.2d at 590 (noting that Mary Sue Davis no longer wanted to utilize frozen embryos herself, but wanted authority to donate them to childless couple).

184. *See id.* (reporting that Mr. Davis was adamantly opposed to such donation and would prefer to see frozen embryos discarded).

185. *Id.*

186. *See id.* at 594 (asserting that fundamental issue is whether embryos should be classified as person or as property).

187. *See id.* at 594–95 (finding that state legislative law precludes fetuses as being classified as persons until birth).

188. 410 U.S. 113 (1973).

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

ing that viewpoint.[190] The court stressed that it was more appropriate to rely on the view of the AFS.[191]

The *Davis* court also addressed whether the Davises could have made a written agreement that would bind them and control the decision over disposition.[192] The court opined that such an agreement should be valid and enforced as between the donors of the sperm and eggs.[193] The donors would not be prohibited from amending the contract, but should no amendments occur, the original agreement would be binding.[194]

In a third area of discussion, the court reviewed the constitutional impact of the case. After reviewing both state and federal constitutional law, the court concluded that a right to procreational autonomy exists but is composed of two competing rights—the "right to procreational autonomy and the right to avoid procreation."[195] This procreational autonomy supports the argument that decisions over embryos belong solely to the parents since they are uniquely affected by the consequences of these decisions.[196] Also, the *Davis* court asserted that absent specific regulations that adhere to Supreme Court holdings on what constitutes sufficient state interests, no interest exists to justify interference with the procreational autonomy.[197]

Weighing all of the foregoing considerations, the *Davis* court concluded that Mr. Davis's desire to avoid parenthood outweighed Mrs. Davis's desire to donate the embryos.[198] The court reasoned that resolution of disputes over the disposition of a frozen embryo begins by looking at the preferences of the parents of the embryo.[199] Absent express wishes of the parents, a court may consider any known prior agreements covering

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190. *See id.* at 597 (asserting that embryos consequently are neither persons nor property).

191. *See id.* at 596 (following American Fertility Society ethical standards regarding frozen embryos).

192. *Id.* at 597.

193. *See id.* (presuming that agreement on disposition of embryos is valid and enforceable as between "progenitos").

194. *See Davis*, 842 S.W.2d at 597 (concluding that prior agreement without modifications is binding).

195. *Id.* at 601.

196. *See id.* at 602 (opining that no interest is sufficient to interfere with interest of parents when decisions affect their "reproductive status"). The court cited the *Del Zio* case to bolster its argument that the couple suffers uniquely when others make decisions regarding their embryos. *Id.* at 602 n.25.

197. *Id.* at 602.

198. *See Davis*, 842 S.W.2d at 604 (summarizing that "[o]rdinarily, the party wishing to avoid procreation should prevail").

199. *See id.* (holding that disputes over disposition of pre-embryos created in IVF process resolved first by examining "preferences of the progenitors").

disposition.[200] If no agreements exist, the next consideration is "the relative interests of the parties in using or not using the embryos," and the *Davis* court decided that ordinarily the interests of the party wishing to avoid parenthood should prevail.[201] However, this reasoning assumes that the opposing party has a "reasonable opportunity of achieving parenthood by means other than use of the preembryos in question."[202] Nonetheless, the *Davis* case is important since it stands for the proposition that embryos are not technically persons or property,[203] but deserve "special respect" and exist in an interim category that is not clearly defined.[204] Although it is too early to tell what influence *Davis* will have on the law, some courts have looked to its rationale for guidance.[205]

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200. *Id.*

201. *Id.*

202. *Id.* at 604.

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

204. *See id.* (noting that special respect interim classification reflects pre-embryo potential for life).

205. *See* Kass v. Kass, No. 19658/93, slip op. 7376, 1997 WL 563419, at *6 (N.Y. App. Div. Sept. 8, 1997) (agreeing with *Davis* court's decision requiring enforcement of pre-freeze agreements exist and constitute joint expressing of intent by husband and wife). Decided just as this Comment was going to press, the *Kass* case is the most recent decision in the United States on the frozen embryos issue and one of the few cases to make it to an appeals court. The *Kass* case arose when Steven and Maureen Kass decided to divorce but could not agree upon disposition of their five frozen embryos. *Id.* at *2–3. The lower court in this case decided that the determination of the fate of the embryos rested on a comparison of in vivo and in vitro fertilization and the state's interest in each situation. *Id.* at *3. The court concluded that no difference existed between the two, which means that the wife's interest should prevail. *Id.* In fact, the court reasoned that if a husband was allowed to prevail, he would be given rights he would not have had were his wife already pregnant. *Id.* The appeals court found that the lower court "committed a fundamental error in equating a prospective mother's decision whether to undergo implantation of pre-zygotes, which are the product of her participation in an IVF procedure, with a pregnant woman's right to exercise exclusive control over the fate of her non-viable fetus." *Id.* at *4. Instead, this court saw no need to balance the interests of the husband and wife because they together executed a pre-freeze agreement specifying that their embryos should be left in the possession of the IVF clinic for possible use in research. *Id.* at *2, 5. Interestingly, the appeals court did state that the Kasses could have modified their pre-freeze agreement through a divorce property settlement. *Id.* at *8. Since the Kasses had not altered their joint wishes for disposition of the embryos, the New York appeals court held that the pre-freeze agreement controls without specifying that the agreement constitutes a binding contract. *Id.* Without binding themselves to any particular classification for embryos, in dictum, the *Kass* court dealt with embryos as a property interest. *Id.* at *10. The court noted that Mrs. Kass failed to demonstrate any reason why she should have "custody" of the frozen embryos even though she was aware of the reasoning used by the lower court and by the *Davis* court. *Id.* at *9. Finally, the court cautioned that having children is a personal event for any couple without interference by courts where possible. *Id.* at *10. The court went further to say that parents who clearly express their intent regarding disposition of their embryos should be able to rely on absolute enforcement of their expressed intention.

3. *AZ v. BZ*

A Massachusetts court recently looked to the *Davis* court's legal rationale on the issues of IVF and cryopreservation in deciding the case of *AZ v. BZ*.[206] This case arose as part of divorce proceedings and an attempt of a husband to obtain an injunction against his wife to prevent her from thawing and implanting embryos created during their marriage.[207] The couple had successfully conceived and borne twin daughters through IVF before acrimony destroyed their relationship.[208] During the course of their seventeen year marriage, the wife underwent multiple IVF treatments whereby various embryos were cryopreserved; the four frozen embryos at the center of this dispute resulted from an IVF procedure undertaken in August of 1991.[209] Both the husband and the wife signed consent forms for each IVF procedure performed from 1988 to 1991, detailing their wishes for disposition of the frozen embryos in the event of divorce.[210] However, only the first form signed by the spouses in 1988

Id. This case seems significant in light of its decision to effectively treat frozen embryos as the property of parents who have absolute authority to determine the fate of their embryos, especially at a time when dispute exists in the country over whether and when to enforce pre-freeze agreements.

206. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 28 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction).

207. *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAWS. WKLY., Oct. 7, 1996, at 1 (noting that Massachusetts husband successfully prevents future ex-wife from thawing and implanting their frozen embryos); *Massachusetts Custody Battle Continues over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (hosting legal counsel for parties and explaining case as custody dispute over divorcing couple's frozen embryos), *available in* 1996 WL 11488477.

208. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96 slip op. at 2-3, 15 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAWS. WKLY., Oct. 7, 1996, at 1 (reiterating that couple had twin daughters because of August 1991 treatment that also created embryos in question); *Massachusetts Custody Battle Continues over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (noting birth of couple's twins and freezing of other embryos for future use), *available in* 1996 Wl 11488477.

209. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 8-11 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAWS. WKLY., Oct. 7, 1996, at 1 (reporting that couple attempted IVF seven times with final attempt creating remaining embryos at issue).

210. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 3 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAWS. WKLY., Oct. 7, 1996, at 1 (detailing execution of consent forms by couple); *Massachusetts Custody Battle Continues Over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (noting multiple forms signed by couple specifying disposition of embryos), *available in* 1996 WL 11488477.

was signed by each in the presence of the other and with the disposition language completed.[211] Each of the other consent forms, including the form signed in 1991, governing the embryos at issue, was reportedly signed by the spouses out of the presence of each other with only the wife completing the disposition language.[212]

On March 25, 1996, the trial court entered a permanent injunction against the wife.[213] In doing so, the court stated that the "special status category best recognizes the dual characteristics of the preembryos and will therefore be applied to the preembryos at issue in accordance with the *Davis* definition."[214] The court also maintained that because of its utilization of the special respect category, no consideration needed to be given to laws governing custody of children or statutes outlining property distribution.[215] The court applied the reasoning and logic of *Davis* to the unique facts in *AZ*.

Specifically, the wife in *AZ* sought to use the embryos herself rather than to donate them to another for use as in the *Davis* case.[216] The trial court in *AZ* recognized the wife's exceptional trauma in enduring multiple IVF procedures, but insisted that a balance must be struck between her right to procreate and her husband's right not to procreate.[217] The

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211. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 8-9, 24 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *But see Massachusetts Custody Battle Continues Over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (asserting that husband "never saw a completed dispositional form"), *available in* 1996 WL 11488477.

212. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 8-11 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *See Massachusetts Custody Battle Continues Over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (indicating all forms admittedly filled in with wife's handwriting), *available in* 1996 WL 11488477.

213. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 28 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction). *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAWS. WKLY., Oct. 7, 1996, at 1 (confirming that judge permanently restrained wife from using embryos); *Massachusetts Custody Battle Continues Over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (indicating that wife will not be allowed to use embryos), *available in* 1996 WL 11488477.

214. AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 19 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction).

215. *Id.*

216. *Compare* AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 27 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (explaining that wife desires to use embryos herself), *with* Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992) (noting that Mrs. Davis eventually decided to donate rather than use embryos herself).

217. *See* AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 26 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (recognizing wife's "sweat equity" in IVF procedures but declaring that balancing procreational interests is best solu-

fact that the wife could still conceive through subsequent IVF procedures weighed heavily against her in the balancing process.[218] For the husband's part, the trial court recognized that he clearly did not want more children, and under Massachusetts law he could not escape the financial responsibilities of fatherhood through any type of release or other agreement with the wife.[219]

Another important difference is that, unlike the *Davis* case, the husband and wife in *AZ* had in fact signed an agreement for disposition of these embryos upon divorce.[220] The trial court in *AZ* reasoned that holding couples to pre-freeze agreements into which they knowingly enter is a good policy.[221] However, the lower court noted that conditions may change so unexpectedly that enforcement of the agreement could lead to an inequitable result.[222] Thus, the trial court considered several determining factors in deciding whether the circumstances were so altered as to mandate overturning the agreement. These factors included: (1) the passage of time, (2) the fact that the couple had no children at the time these embryos were originally frozen, and (3) the fact that the husband had signed a blank consent form authorizing the freezing of these embryos.[223]

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tion to pre-embryo disposition disputes); David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAW. WKLY., Oct. 7, 1996, at 1 (quoting Judge Nesi's decision that interests of husband and wife must be balanced).

218. *See* AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 26, 28 (Mass. P. Ct., Mar. 25, 1996) (order granting preliminary injunction) (insisting that wife is capable of undergoing IVF again or adopting and is not limited to using embryos at issue); *see also* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAW. WKLY., Oct. 7, 1996, at 1 (recognizing Judge Nesi's view that other means of becoming mother are available to wife); *Massachusetts Custody Battle Continues Over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996) (arguing that wife need not involve husband to achieve motherhood in frozen embryo case), *available in* 1996 WL 11488477.

219. *See* AZ v. BZ, Mass. Law. Wkly. No. 15-008-056, slip op. at 27 n.2 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (explaining that Massachusetts courts do not allow parents to release each other from obligation to support children).

220. *Compare* AZ v. BZ, Mass. Law. Wkly. No. 15-008-096, slip op. at 10-11 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (illustrating that consent form of August 1991 covered embryos at issue and stipulated that, on divorce, embryos would go to wife), *with* Davis v. Davis, 842 S.W.2d 588, 590, 592 (Tenn. 1992) (confirming that Davises had not signed any agreement for disposition of embryos).

221. *See* AZ v. BZ, Mass. Law. Wkly. No. 15-008-096, slip op. at 22-23 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction) (holding that pre-embryo agreements produce most satisfactory results).

222. *Id.* at 25.

223. *Id.* at 24-25.

AZ is significant for two reasons. First, the case upholds the "special respect" category in line with *Davis* without defining any criteria for exactly what "special respect" means.[224] Second, the case gives those following the frozen embryo issue cause for concern over the validity of prefreeze agreements and raises questions surrounding what constitutes a change in circumstances that would allow such an agreement to be superseded.[225] The case, however, has not yet seen its last day in court because the wife filed a notice of appeal following issuance of the injunction.[226]

IV. Application of Texas Law to the Various Classification Arguments

A. *Embryos As Life*

1. The *Delgado* Case

Under Texas law, life begins at birth; that is, recovery for injuries to an unborn child will only be given if the child is born alive.[227] In 1971, the Court of Civil Appeals in Fort Worth made the foregoing conclusion in *Delgado v. Yandell*.[228] Isabel Delgado was at an early stage in her pregnancy when the car in which she was a passenger was struck by another vehicle driven by Michael Yandell.[229] Six and one-half months later, Mrs. Delgado delivered a daughter that she claimed suffered permanent damage as a result of the accident.[230] At that time, Texas law, as announced in *Magnolia Coca Cola Bottling Co. v. Jordan*,[231] did not allow recovery

224. *See id.* at 19 (holding that special respect category best applies to pre-embryos at issue but failing to enumerate any components of category).

225. *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, Mass. Laws. Wkly., Oct. 7, 1996, at 1 (quoting Massachusetts lawyer as saying that "what will happen is everyone will be much more careful about agreements regarding preembryos"). This same attorney also noted that allowing the husband to get out of a contract based on changed circumstances contradicts Massachusetts' state contract law. *Id.* Another Massachusetts attorney also questioned how a contract entered into as a responsible act can be voided based on changed circumstances. *Id.* One other Massachusetts attorney predicted that the impact of the decision will be to weaken prefreeze agreements and make them more akin to settlement agreements. *Id.*

226. Telephone Interview with Gretchen Van Ness, Attorney for the Wife in *AZ v. BZ* (Apr. 1997), (transcript on file with the *St. Mary's Law Journal*); *Massachusetts Custody Battle Continues over Four Frozen Embryos* (CNBC television broadcast, Dec. 23, 1996), *available in* 1996 WL 11488477.

227. *See* Delgado v. Yandell, 468 S.W.2d 475, 478 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (establishing that cause of action exists for injuries to unborn child before birth if child born alive and survives).

228. 468 S.W.2d 475 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

229. *Delgado*, 468 S.W.2d at 475.

230. *Id.*

231. 78 S.W.2d 944 (Tex. 1935).

for prenatal injuries unless the unborn child had reached viability by the time of the injury producing incident.[232] In 1967, in *Leal v. C. C. Pitts Sand & Gravel, Inc.*,[233] the Supreme Court of Texas overturned *Jordan* to the extent that *Jordan* allowed no recovery for the loss of an unborn child due to prenatal injuries.[234] The *Leal* court, however, chose not to address whether a cause of action for injuries to unborn children should include limitations, such as viability or live birth.[235] This pronouncement occurred in the *Delgado* case, which allowed recovery for prenatal injuries sustained at any point prior to birth as long as the child was born alive and survived.[236]

2. The *Witty* Case

Following the rationale set out in *Delgado*, the Supreme Court of Texas in *Witty v. American General Capital Distributors, Inc.*[237] held that no cause of action existed under the Wrongful Death Act for the death of a fetus. In *Witty*, Kimberly Witty alleged that her unborn child suffered injuries as a result of an on-the-job accident.[238] Consequently, these injuries prevented her child from being born alive.[239] Ms. Witty sued under the Texas Wrongful Death Act[240] alleging emotional distress, loss of companionship and support, and property damage as a result of the loss of her unborn child.[241]

Witty makes two additional points pertinent to a discussion of Texas's view of the classification of embryos as life. First, this case appears to eliminate the language in *Delgado*, which requires that the child survives beyond birth.[242] Second, the court held that the Texas Wrongful Death

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232. *See Jordan*, 78 S.W.2d at 950 (establishing that in 1935, no cause of action existed for prenatal injuries even if child born alive).

233. 419 S.W.2d 820 (Tex. 1967).

234. *See Leal*, 419 S.W.2d at 822 (overruling *Jordan*). The court agreed with Justice Cadena's dissenting opinion in *Jordan* that presented "the case for recognition of a right of action for prenatal injuries under the facts here presented." *Id.*

235. *See id.* (reserving decision on whether unborn child must be viable when injured and/or born alive to recover). The court noted "that some authorities do not recognize a cause of action for prenatal injuries unless the fetus is viable at the time of injury, and that other authorities do not do so unless the child is born alive." *Id.*

236. *Delgado*, 468 S.W.2d at 476, 478.

237. 727 S.W.2d 503, 506 (Tex. 1987).

238. *See Witty*, 727 S.W.2d at 504 (alleging damages for death of plaintiff's fetus).

239. *Id.* The trial court held that Witty's claims were barred as a matter of law because the child was not born alive. *Id.*

240. TEX. CIV. PRAC. & REM. CODE ANN. § 71.002 (Vernon 1995).

241. *Witty*, 727 S.W.2d at 504.

242. *See id.* at 505 (discussing requirement of live birth for recovery of prenatal injuries). The court stated that the "fetus has no cause of action for the [prenatal] injury, until subsequent live birth." *Id.* The court interpreted the Wrongful Death Act as establishing

Act precludes recovery for the death of an unborn child because the court believed that the legislature did not intend to include unborn children when it promulgated the Act with the words "individual" or "person."[243]

In light of *Delgado* and *Witty*, a strong argument can be made that Texas law does not currently support the view that an unborn child is life.[244] Since Texas elects not to classify unborn children as life, the chances that an embryo not yet implanted into a woman's uterus would be considered life is negligible at best.[245] Instead, it appears that the possibility for classification of an embryo as life falls below that of an unborn child in Texas.[246] Moreover, judicial handling of IVF and cryopreservation in other states and the law pertaining to abortion do not support a

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that "since there is no cause of action for injuries to a living fetus, there can be no cause of action for death of a fetus." *Id.*

243. *Id.* at 504. The court found nothing in the legislative history that demonstrated an intent on the part of the Texas legislature to embrace an unborn fetus within the scope of the Wrongful Deal Act. *Id.* Therefore, the court held that "no cause of action may be maintained for the death of a fetus under the wrongful death statute until the right to bring such action is afforded by the [Texas] legislature." *Id.* at 506.

244. *See* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 295 (1988) (noting that majority of jurisdictions fail to accord embryos status of persons). *But see Witty*, 727 S.W.2d at 505 (refusing to apply decisions of other jurisdictions). The court in *Witty* was faced with deciding whether Texas's Wrongful Death Act created a cause of action for prenatal injuries where a child was not born alive and live birth was a prerequisite for recovery under the common law. *Id.* The court could not find legislative intent that unborn children be treated as persons. *Id.* at 505–06. Thus, the court was unwilling to extend such status without legislative approval. *Id.* Consequently, this makes *Delgado* the only persuasive authority Texas has on the issue of unborn children as life.

245. *Cf.* John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 450–51 (1990) (suggesting that laws requiring live birth of unborn children not especially helpful in discussions of status of embryos). Professor Robertson suggests that the promulgation of statutes and decisions at common law that took place before procedures like IVF became common are only of limited value. *Id.* at 450–51. Further, Robertson reminds the reader that the unborn child must be born alive before acquiring standing in a cause of action for injury or homicide; thus, Robertson argues the embryo is even further from viability than the unborn child. *Id.* While Robertson's logic suggests that cases like *Delgado* have limited application, his logic may also suggest that a Texas court could see *Delgado* as a strong rationale for not extending personhood prior to implantation, and this logic could also be extended to frozen embryos. *Id.*

246. *See* John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 450 n.39 (1990) (discussing law requiring live birth of unborn child). While Robertson does not specifically address Texas law, his reference to the live birth requirement could easily be a reference to *Delgado*. *Id.*

framework wherein Texas would adopt a view of embryos as life.[247] Furthermore, Louisiana's legislative scheme that an embryo is a "judicial person" does not logically seem to be sufficient to overcome the long-standing precedent in Texas.[248] Current law therefore suggests that the Texas legislature would not grant the status of judicial persons to frozen embryos.[249]

B. *Embryos As Property*

If frozen embryos are not considered life under Texas law, the next logical question is whether they are a type of property. The Texas Family Code defines property as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings."[250] Accordingly, the question to be addressed is whether frozen embryos may be classified as a type of personal property. Personal property is normally defined to include everything that is the subject of ownership, not including real property.[251] This definition can be broken down into two categories of personal property, corporeal and incorporeal.[252] Corporeal personal property identifies tangible items, such as animals, furniture, or merchandise.[253] Incorporeal personal property includes interests like patents, copyrights, or stocks that are intangible but are subject to ownership.[254]

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247. *See* Laura D. Heard, Comment, *A Time to be Born, a Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 941–63 (1986) (outlining problems with Texas Probate Code and planning for children of new reproductive technologies). Ms. Heard's commentary reviews how Texas law lacks the ability to provide for the problems created by technologies like IVF. *Id.*

248. *See Witty*, 727 S.W.2d at 505 (enforcing reading of Texas law alone instead of applying decisions from other jurisdictions). It is also relevant to note that, as discussed above with *Magnolia* and *Delgado*, it took the State of Texas from 1935 until 1971 to define the law regarding recovery for prenatal injuries. Given the obvious hesitancy of the judicial system in Texas to proceed hastily, especially without science blazing the trail first, it seems further unlikely that another state statute, standing alone in its view, would be sufficient inspiration for a Texas court or legislature to adopt the view of embryos as persons.

249. *See Delgado*, 468 S.W.2d at 478 (establishing Texas law as allowing for recovery of prenatal injuries if child born alive and survives). *Delgado* is the only guidance in the state on the issue, but it stands as strong precedent against a view of frozen embryos as persons.

250. TEX. FAM. CODE ANN. § 5.41 (Vernon 1995). The definition put forth by the Family Code is in the context of property agreements and specifically premarital agreements. *Id.*

251. BLACK'S LAW DICTIONARY 1095 (5th ed. 1979).

252. *Id.*

253. *Id.*

254. *Id.* at 1096.

Although Texas law lacks specificity on whether frozen embryos can be a type of personal property, some guidance may be gleaned from *Witty*. While *Witty* announced Texas law pertaining to unborn children, the case also made a new declaration that is important to the classification of frozen embryos. Part of Ms. Witty's case was a claim for property damage to her unborn child.[255] The Supreme Court of Texas responded to her claim negatively by holding, as a matter of law, that "a fetus is not relegated to the status of chattel."[256] The court cited no law or rationale on which it based its conclusion, but further stated that the claim had no merit whatsoever.[257]

Nonetheless, since unborn children, under Texas law, are not considered life, it is a logical corollary that embryos will not be considered life as well. Thus, one could argue that the *Witty* case does not preclude the argument that embryos could be classified as a type of property under Texas law. The *Witty* case speaks of an *in utero* embryo that will be born alive absent outside interference.[258] The increased potential for life, as life is defined by Texas law, makes any argument for a property interest unrealistic; however, if parents have no ownership interest in their cryopreserved embryos, then they would have no decision-making authority over them.[259]

To clarify its position on this troubling issue, Texas could review the assessments of other jurisdictions for guidance. For example, the *Moore* case lends support to the property interest argument.[260] The *Moore* court left open the possibility that an expectation of use and future possession

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255. *See Witty*, 727 S.W.2d at 506 (stating that Mrs. Witty claimed property damage for destruction of her child, referred to as chattel).

256. *Id.*

257. *Id.* The court elected not to elaborate in its decision on this point, and thus there is little guidance as to the court's reasoning and holding. *Id.*

258. *See id.* at 504 (noting that case results from loss of unborn child, not frozen embryo).

259. *See* John A. Robertson, *Ethical and Legal Issues in Cryopreservation of Human Beings*, 47 FERTILITY & STERILITY 371, 373 (1987) (asserting that "[w]hile persons do not have unlimited freedom (property or ownership) in their body parts, the gamete providers, rather than others to whom they have not transferred their authority, have whatever property or quasi-property rights of ownership in embryos is legally available"). Robertson further asserts that the parents possess some right to transfer their authority, and transference of this authority allows the party receiving the authority to decide disposition of the embryo. *Id.* While not explicitly stating so, Robertson seems to be implying a direct connection between an ownership interest and the presence of decision-making authority.

260. *See Moore*, 793 P.2d at 493 (stating that declination to extend tort of conversion does not mean that excised human cells can never be property). Although the *Moore* decision fails to state under what circumstances the court could have found a property interest, the possibility exists, nonetheless, for such a classification. *Id.*

creates a type of property interest.[261] Clearly, couples utilizing IVF in Texas are doing so with the intention of creating embryos for their future use.[262] They arguably view the embryos as belonging to them and as existing solely by their authority.[263] Even if parents fail to implant an embryo, the abandonment does not negate any ownership interest in the embryo.[264] The abandonment may simply

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261. *See id.* at 488–89 (explaining why Moore had no property interest in his excised cells). While the issue of title to frozen embryos is in no way clear in any area of law, the *Moore* case indicates that "[t]o establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Id.* at 488 (quoting *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 610–11 (1981)). Moore, the court stated, did not expect to retain possession of his cells, so the question is impliedly raised whether expectation of possession is sufficient to constitute possession. *Id.* at 488–89. The case of frozen embryos is also distinct from *Moore* because there is case law supporting the proposition that parents have an ownership interest in their frozen embryos, whereas there was no case law for the California court to consider in reviewing Moore's claim. *Id.* at 489; *see also* York v. Jones, 717 F. Supp. 421, 424–28 (E.D. Va. 1989) (applying traditional ideas of property and contract law); Del Zio v. Presbyterian Hosp. of N.Y., 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (charging jury based on existing tort and property law), *reprinted in* BIOETHICS REPORTER: ETHICAL AND LEGAL ISSUES IN MEDICINE, HEALTH CARE ADMINISTRATION AND HUMAN EXPERIMENTATION 17 (Julie Shuptrine et al. eds., 1985); Davis v. Davis, 842 S.W.2d 588, 594–604 (Tenn. 1992) (considering traditional ideas of constitutional law, property law and family law). Also, a court deciding a frozen embryo case in Texas would not have the specific statutory law as the California court did in *Moore*, whereby the court rejected Moore's claim based on the fact that his cells were not unique. *Moore*, 793 P.2d at 489.

262. *See* Clifford Grobstein et al., *External Human Fertilization: An Evaluation of Policy*, 222 SCIENCE 127, 127 (1983) (explaining that "[t]he intent of IVF is to provide a baby to an otherwise sterile couple"); *see also* Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (noting that IVF attempts to provide children to infertile couples and use of cryopreservation assists process) (transcript on file with the *St. Mary's Law Journal*).

263. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*); *see also* John A. Robertson, *Reproductive Technology and Reproductive Rights: In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455 n.48 (1990) (explaining that terms like "property" and "ownership" are difficult for couples who view embryos as "expected children"); Gina Maranto, *Embryo Overpopulation*, SCI. AM., Apr. 1996, at 16, 18 (asserting that couples who view frozen embryos as their children or family are not uncommon, especially if couple has other children by IVF).

264. *See* Terence Monmaney, *By Law, Britain to Destroy 3,000 Frozen Embryos*, L.A. TIMES, July 27, 1996, at A1 (explaining that couples abandon embryos for several reasons), *available in* 1996 WL 11252924. Research has shown that couples abandon their frozen embryos for several reasons, including successful pregnancies that negate the need or desire for more children, a sense of defeat that leads to a lack of continued desire for the IVF process, the break up of the relationship in which the IVF process was started and a simple

reflect the parents' intent to discontinue ownership with respect to possible future use.[265]

Most persuasive, however, are the ideas expressed in the *York* case. The *York* court considered the embryos a property interest and found the pre-freeze agreement to be an enforceable contract.[266] *York*'s rationale becomes stronger when it is coupled with language of pre-freeze agreements currently utilized by Texas IVF clinics.[267] For example, both Baylor College of Medicine's and the University of Texas Health Science Center at San Antonio's IVF programs treat embryos as joint property of the parents, and this treatment is reflected in their pre-freeze agreements.[268] Undoubtedly, the policies of these two programs are not unique.[269] The reality, therefore, is that even if the law fails to afford

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loss of contact with clinics. *Id.* These examples explain why embryos may be abandoned; however, such changes in circumstances do not negate any intent to use the embryos to create life. *Id.*

265. *Id.*

266. *York*, 717 F. Supp. at 425.

267. *See* BAYLOR COLLEGE OF MEDICINE, BAYLOR ASSISTED REPRODUCTIVE TECH. PROGRAM: DISCLOSURE AND CONSENT FOR CRYOPRESERVATION AND THAWING OF HUMAN EMBRYOS 2–3 (1995) (declaring frozen embryos as joint property of spouses and allowing parents to change disposition arrangements); UNIVERSITY OF TEX. HEALTH SCI. CTR. AT SAN ANTONIO ACTING THROUGH ITS SOUTH TEX. FERTILITY CTR., INFORMATION CONCERNING EMBRYO CRYOPRESERVATION: CONSENT TO FREEZE, OR DISPOSE OF EXTRA OOCYTES AND EMBRYOS 2 (1996) (respecting authority of parents in decision making and mandating embryo inclusion in divorce settlement if couples opt out of destruction upon divorce).

268. BAYLOR COLLEGE OF MEDICINE, BAYLOR ASSISTED REPRODUCTIVE TECH. PROGRAM: DISCLOSURE AND CONSENT FOR CRYOPRESERVATION AND THAWING OF HUMAN EMBRYOS 2–3 (1995); UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO ACTING THROUGH ITS SOUTH TEXAS FERTILITY CENTER, INFORMATION CONCERNING EMBRYO CRYOPRESERVATION: CONSENT TO FREEZE, OR DISPOSE OF EXTRA OOCYTES AND EMBRYOS 2 (1996).

269. *See* ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 118 (1989) (explaining that directors use other IVF programs as models for their own and thus laboratory conception has become routine); Revised Minimum Standards for In Vitro Fertilization, Gamete Intrafallopian Transfer, and Related Procedures, 53 FERTILITY & STERILITY 225, 225 (1990) (noting that more than 150 IVF centers exist in United States). With a reproduction of this article, the ASRM attached a list of the centers to which it refers in the article. That list notes fifteen centers in Texas, as follows:

St. David's Hospital IVF & GIFT Program
Austin, Texas
512–397–4107
Trinity In Vitro Program
Carrollton, Texas
214–394–3699
Baylor Center for Reproductive Health
Dallas, Texas

214–821–2274
National Fertility Center of Texas
Dallas, Texas
214–788–6686
Presbyterian Hospital of Dallas
Dallas, Texas
214–345–2624
The University of Texas
Southwestern Medical Center
Dallas, Texas
214–648–2742
Center for Assisted Reproduction
Bedford, Texas
817–540–1157
OB & GYN Associates
Houston, Texas
713–512–7000
Baylor ART Program
Houston, Texas
713–798–8230
Texas Tech University, HSC
Lubbock, Texas
806–743–1200
Southwest Fertility Center
Hurst, Texas
817–498–1123
The Centre for Reproductive Medicine
Lubbock, Texas
806–788–1212
Fertility Center of San Antonio
San Antonio, Texas
210–692–0147
UT Health Sciences Center
San Antonio, Texas
210–567–4930
Clear Lake Fertility Institute
Webster, Texas
713–332–0073

Id.; *see also Assisted Reproductive Technology in the United States and Canada: 1993 Results Generated from the American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry*, 64 FERTILITY & STERILITY 13, 21 (1995) (listing IVF clinics by name in Texas whose results are on file with ASRM registry). All clinics listed above are included in the results generated with the exception of the clinic in Webster. *Id.* Of the clinics in Texas, the program at the University of Texas Health Science Center at San Antonio ("UTHSC") is one of the oldest. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*).

embryos the legal status of a type of property, embryos are treated as a type of property interest in practice.[270]

No law exists in Texas to negate an argument that frozen embryos are a property interest.[271] Combined with the fact that frozen embryos receive treatment as property interests in other jurisdictions and by Texas IVF clinics, the possibility exists that Texas courts could recognize embryos as a property interest.[272] Such recognition would probably be stated judicially rather than legislatively because, as mentioned previously, the experts in the field argue that Texas legislators are not likely to pass legislation on the issue in the foreseeable future,[273] despite the considerable press and controversy surrounding IVF cases nationally.[274] There-

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270. *See* BAYLOR COLLEGE OF MEDICINE, BAYLOR ASSISTED REPRODUCTIVE TECH. PROGRAM: DISCLOSURE AND CONSENT FOR CRYOPRESERVATION AND THAWING OF HUMAN EMBRYOS 2–3 (1995) (declaring frozen embryos as joint property of spouses and allowing parents to change disposition arrangements); UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT SAN ANTONIO ACTING THROUGH ITS SOUTH TEXAS FERTILITY CENTER, INFORMATION CONCERNING EMBRYO CRYOPRESERVATION: CONSENT TO FREEZE, OR DISPOSE OF EXTRA OOCYTES AND EMBRYOS 2 (1996) (respecting authority of parents in decision making and mandating embryo inclusion in divorce settlement if couples opt out of destruction upon divorce).

271. *See* TEX. FAM. CODE ANN. §§ 151.101–.103 (Vernon 1995) (outlining guidelines for issues in artificial insemination, oocyte donation, and embryo donation). As previously established, the common law in Texas is silent on the issue of frozen embryos, and the only attempt to legislate on assisted reproduction in Texas is found in the Texas Family Code, which only addresses artificial insemination issues. *Id.* Interestingly, the statute addressing artificial insemination continually uses language like "with the consent of the husband and the wife," which implies a certain respect for parental decision making. *Id.* This respect could reflect a mindset toward a property interest or ownership interest for parents in their sperm, eggs and embryos. Further, recent proposed legislation attempts to begin a reporting process in the State of Texas. *See* Tex. S.B. 1423, 74th Leg., R.S. (1995) (attempting to establish new guidelines for IVF).

272. Given the lack of guidance from both the courts and the legislature, this Comment suggests that a viable argument for the determination of frozen embryos as a property interest can be made as the law currently exists.

273. *See* Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (asserting that legislation in Texas on IVF is not likely in near future) (transcript on file with the *St. Mary's Law Journal*); *see also* Weekend Edition: *The Ethics of Freezing Embryos* (NPR broadcast, Aug. 3, 1996) (postulating that legislators in Congress fear frozen embryo issue because of its association with abortion politics). Dr. Brzyski argues that the best way to protect the interest of patients and frozen embryos and address the difficult issues that arise is by allowing self-regulation. Interview with Dr. Robert G. Brzyski, Assistant Professor at The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*). Dr. Brzyski also explained that Texas has an active Board of Medicine where "unscrupulous behavior can be dealt with effectively and efficiently." *Id.*

274. *See* Gina Kolata, *Embryos Frozen in Time Represent Perpetual Youth, Bring Legal Limbo*, HOUS. CHRON., Mar. 16, 1997, at 11 (noting that in most states, including

fore, legal disputes over frozen embryos must arise in order to force Texas courts to define frozen embryos.[275] In the meantime, the most persuasive argument under Texas law is that embryos are a type of property interest subject to applicable property laws.[276]

C. *Embryos Deserving "Special Respect"*

As discussed above, in medical practice, frozen embryos are treated as a property interest, but some legal scholars have argued that frozen embryos are neither life nor property but deserve "special respect."[277] Despite arguments and discussions by these scholars, no terms or tests have been proposed to determine what this "special respect" means.[278] As a result, Texas courts have no standards by which to analyze this third category of classification.[279]

Texas law does not necessarily need to distinguish between embryos as a property interest and embryos as deserving more "special respect" than a mere property interest.[280] If the issue of IVF is one of ownership and

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Texas, legal status of embryos is uncertain), *available in* 1997 WL 6545495. It is important to note that "no federal agency has responsibility for overseeing decisions about these embryos." *Id.*

275. *See* John A. Robertson, *Legal Troublespots in Assisted Reproduction*, 65 FERTILITY & STERILITY 11, 11 (1996) (noting that controversies over frozen embryos are likely to result in court battles).

276. *Cf.* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 304 (1988) (noting that bottom line of IVF embryo arguments is one of ownership). Robertson states that "the question is the bundle of rights or range of choice that gamete providers have over embryos" *Id.* Robertson further suggests that issues like negligent destruction of embryos will have to be addressed by legislatures and courts through development of tort and property law. *Id.* at 301.

277. *See* Lori B. Andrews, *Legal and Ethical Aspects of New Reproductive Technologies*, 29 CLINICAL OB. & GYN. 190, 191 (1986) (asserting that even people who fail to recognize embryos as persons agree that respect increases with each stage of development); Kristine E. Luongo, Comment, *The Big Chill*: Davis v. Davis *and the Protection of "Potential Life?"*, 29 NEW ENG. L. REV. 1011, 1024 (1995) (noting that most commentators like this category because it "considers both the parents' and states' interests"). *But see* Michelle F. Sublett, Note, *Frozen Embryos: What are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585, 602 (1990) (opining that affording embryos respect fails to solve issues but only leads to other questions).

278. *See* Kristine E. Luongo, Comment, *The Big Chill*: Davis v. Davis *and the Protection of "Potential Life?"*, 29 NEW ENG. L. REV. 1011, 1023–24 (1995) (illustrating lack of definition for term "special respect").

279. *See id.* (implying Supreme Court offers little guidance to lower courts because it has not defined "special respect").

280. *See* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 304 (1988) (noting that bottom line of IVF embryo arguments is one of ownership). As noted, the most compelling classification for frozen embryos would be a property interest. Although Texas law already has strong property

decision making authority, the special respect and ownership problems need not be mutually exclusive.[281] For example, a Texas court could find that embryos deserve special respect, and that this special respect is best demonstrated by providing the parents a property interest in and autonomy over their embryos.[282] In addition, absent an agreement to the contrary, clinics would not have dispositional authority over frozen embryos.[283] Rather, existing law would simply protect the interests of the owners of the frozen embryos in a manner similar to any conventional personal property.[284] Nonetheless, any discussion of classifying the frozen embryos as a property interest requires addressing exactly what law would be applicable to serve such a function.

V. TEXAS LAW OF ABANDONED PERSONAL PROPERTY

Assuming, arguendo, that frozen embryos are construed as property interests, it is necessary to determine the applicability of the law of abandonment of personal property to this issue. Before one begins this inquiry, however, it is important to understand how Texas defines abandoned property. From a common law perspective, one Texas Appellate Court[285] turned to the dictionary to define abandonment to mean "[t]o give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert."[286] Significantly, the

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principles in place, the state could recognize only a limited IVF property interest. Nonetheless, any limitations the state may place on frozen embryos as a property interest would be an expression of respect for the frozen embryos.

281. *See id.* (indicating that ownership is foundation of IVF embryo arguments). This ownership includes decision making authority as its primary interest, and, arguably, there is no logic in why decisions of ownership cannot be made with a high degree of respect for the frozen embryo.

282. *Cf.* TEX. FAM. CODE ANN. §§ 151.101–.103 (Vernon 1995) (recognizing authority of parents in artificial insemination situations but protecting interest of child). The Family Code specifies that parties interested in this form of assisted reproduction must express their decision making rights through informed consent. *Id.* Throughout the artificial insemination process, the Family Code is clear that the woman who carries the child and her husband are the parents of the child. *Id.*

283. *See* Wendy Dullea Bowie, Comment, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 164–71 (1990) (discussing issues of embryos as property belonging to parents and noting that right of disposition is essential to property interest but may not give clinics right to sell embryos).

284. *Id.*

285. Railroad Comm'n v. Waste Management of Texas, Inc., 880 S.W.2d 835 (Tex. App.—Austin 1994, no writ).

286. *Id.* at 843 (citing BLACK'S LAW DICTIONARY 2 (6th ed. 1990)); *see also* Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 646 (Tex. 1971) (defining abandonment to mean relinquishment of rights based on clear intent to desert rights); Lopez v. State, 797

court went on to conclude that "[w]hen applied to personal property, we think the term also includes an intent by the owner to leave the property free to be appropriated by any other person."[287] Other Texas courts have applied a similar intent analysis when deciding the issue of abandonment.[288]

Generally, abandonment in Texas is a fact question,[289] and the intent to abandon must also be clearly established.[290] The test for proof of intent to abandon is not, however, an express declaration; rather, the one trying to prove intent may rely on both facts and the surrounding circumstances.[291] The burden to prove intent falls upon the individual wishing to establish that property was indeed abandoned.[292] Interestingly, Texas

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S.W.2d 272, 273-744 (Tex. App.—Corpus Christi 1990, writ denied) (quoting *Wright's* definition of abandonment).

287. *See Waste Management of Texas*, 880 S.W.2d at 843; *see also* Morgan v. Fox, 536 S.W.2d 644, 652 (Tex. Civ. App.—Corpus Christi 1976, writ ref. n.r.e.) (reiterating that "[t]itle to abandoned personal property vests in the first person to reduce it to possession"); Gregg v. Caldwell-Guadalupe Pick-up Stations, 286 S.W. 1083, 1084 (Tex. Comm'n App. 1926, holding approved) (asserting that whomever first comes to possess abandoned property becomes its owner).

288. *See* Raulston v. Everett, 561 S.W.2d 635, 638 (Tex. Civ. App.—Texarkana 1978, no writ) (noting that when member abandons his membership in organization, those members who remain are entitled to his interest); Fender v. Schaded, 420 S.W.2d 468, 474 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.) (defining abandonment as relinquishing title without intention of vesting it in another).

289. Lopez v. State, 797 S.W.2d 272, 273 (Tex. App.—Corpus Christi 1990, writ denied); City of Anson v. Arnett, 250 S.W.2d 450, 454 (Tex. Civ. App.—Eastland 1952, writ ref'd n.r.e.).

290. *See* Adams v. Rowles, 228 S.W.2d 849, 852 (Tex. 1950) (reiterating abandonment definition); Dallas County v. Miller, 166 S.W.2d 922, 924 (Tex. 1942) (stating that abandonment may be proven by circumstances which indicate intention to abandon); Morgan v. Fox, 536 S.W.2d 644, 652 (Tex. Civ. App.—Corpus Christi 1976, writ ref. n.r.e.) (noting essential element of abandonment is to abandon).

291. *See* Raulston v. Everett, 561 S.W.2d 635, 638 (Tex. Civ. App.—Texarkana 1978, no writ) (discussing, in dicta, that "[a]n abandonment or waiver must be voluntary and intentional, but it need not be proved by express declaration, but may be inferred from the surrounding circumstances"); Fender v. Schaded, 420 S.W.2d 468, 473 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.) (reiterating that facts and circumstances may be considered to prove intent); *see also* Keystone Pipe & Supply Co. v. Zweifel, 94 S.W.2d 412, 415 (Tex. 1936) (holding that "[a]bandonment in the nature of a waiver may be the result of conduct or acts and may be shown by acts and declarations manifesting that purpose").

292. *E.g.*, Huffington v. Upchurch, 532 S.W.2d 576, 579 (Tex. 1976); Lopez v. State, 797 S.W.2d 272, 274 (Tex. App.—Corpus Christi 1990, writ denied); Gulf Ins. Co. v. Ball, 324 S.W.2d 605, 608 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.); Evans v. Evans, 50 S.W.2d 842, 844 (Tex. Civ. App.—Fort Worth 1932, writ ref'd).

courts have asserted that the passage of time alone fails to raise a presumption that abandonment has occurred.[293]

This common law understanding of abandonment has not been codified by the Texas legislature. The Texas Property Code[294] neither defines abandoned personal property nor specifies what may or may not be included in such a definition.[295] The Texas Property Code, however, is clear as to under what circumstances personal property is abandoned and what must be done once it is deemed abandoned.[296] Specifically, Chapter 72 of the Texas Property Code governs abandonment of personal property.[297] The Code allows a presumption of abandonment if the holder of the property does not know the whereabouts or the existence of the owner, and there is no evidence of any attempt to claim the property after at least three years.[298] Once a holder establishes the presumption of

293. *See* Morgan v. Fox, 536 S.W.2d 644, 652 (Tex. Civ. App.—Corpus Christi 1976, writ ref. n.r.e.) (explaining that "non-use and the passage of time alone do not constitute an abandonment of vested rights"); Strauch v. Coastal States Crude Gathering Co., 424 S.W.2d 677, 683 (Tex. Civ. App.—Corpus Christi 1968, writ dism'd) (indicating that even lack of use of easement for over twenty years is not enough for fact question or to establish intention to abandon); *City of Anson*, 250 S.W.2d at 454 (holding that six years was not long enough for abandonment to be a fact question). Even though time alone cannot create a presumption of abandonment, at least one case goes on to say that "[t]he non-use of a right is not sufficient of itself to show abandonment; but if the failure to use is long continued and unexplained, it gives rise to an inference of intention to abandon." *Id.* at 454. It is interesting to note that at least one jurisdiction in Texas has precedent indicating that, when dealing with personal property subject to a lease, there is a question of what is a reasonable amount of time following the end of the lease term for property left unclaimed to be considered abandoned. *See* Meers v. Frick-Reid Supply Corp., 127 S.W.2d 493, 497 (Tex. Civ. App.—Amarillo 1939, writ dism'd judgmt cor.) (asserting that circumstances will dictate what is reasonable time for abandonment purposes; however such circumstances must be alleged and proven).

294. The pertinent sections of the Texas Property Code cited in this Comment were amended by the Texas Legislature in 1997 to reflect the abolition of the office of the Treasurer of the State of Texas and transfer of the Treasurer's duties to the Comptroller. However, because the amendments had not been codified yet at press time, all citations to the Texas Property Code are to the 1995 Vernon's publication. Act of June 20, 1997, 75th Leg., R.S., ch. 1423, §§ 16.06–16.21, 1997 Tex. Sess. Law Serv. (page number unavailable) (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 74.101–401).

295. *See* TEX. PROP. CODE ANN. § 72.001 (Vernon 1995) (establishing that property code does not define personal property); *see also* Railroad Comm'n v. Waste Management of Texas, Inc., 880 S.W.2d 835, 838-40, 843 (Tex. App.—Austin 1994, no writ) (citing dictionary definitions of "property" and "abandon" and case law from Texas and Illinois).

296. *See* TEX. PROP. CODE ANN. §§ 72.001, 72.101–103, 74.001–301 (Vernon 1995) (detailing how property is determined to have been abandoned and procedures for handling such property).

297. *Id.* §§ 72.001, 72.101–103 (Vernon 1995).

298. *Id.* § 72.101. Section 72.103 also requires the holder to preserve the property without diminishing it in value or reducing it to the assets of the holder. *Id.* § 72.103.

abandonment, other requirements must be met before Chapter 72 actually applies.[299] Once property meets the qualifications set out by Chapter 72, the property becomes subject to reporting, delivery, and claims processes promulgated under Chapter 74.[300]

These processes ultimately place the abandoned property in the hands of the Comptroller of the State of Texas (the "Comptroller") by escheatment.[301] Once in the hands of the Comptroller, the escheating holder of the property is relieved of all liability for the property, and, subsequently, the Comptroller is not liable for any damage to the property while in the Comptroller's possession.[302] In addition, the Texas Property Code requires the Comptroller to sell the abandoned property;[303] however, if the property has insubstantial commercial value and was delivered from a safe deposit box or "other repository," the Comptroller may "destroy or otherwise dispose of the property at any time."[304] No action can be maintained against the State of Texas, its officers or the former holder of the property for actions taken with the property.[305]

VI. ANALYSIS

It is unclear from the language of the Texas Property Code whether the Code allows pre-freeze agreements to govern disposition of abandoned

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299. *Id.* § 72.001. Section 72.001(a)(1) specifies that "tangible or intangible personal property is subject to this chapter if it is covered by Section 72.101" and "the last known address of the apparent owner" must be in the State of Texas. *Id.* § 72.001(a)(1).

300. *Id.* § 72.001(d) (Vernon 1995).

301. TEX. PROP. CODE ANN. § 74.101(a) (Vernon 1995). Under Chapter 74, holders of abandoned property who hold that property as of June 30 of each year must report the property to the Treasurer of the State of Texas. *Id.* Subsection (b) of § 74.101 specifies the contents of the report of abandoned property made to the Treasurer. *Id.* § 74.101(b). Further, the presumptively abandoned property must be delivered to the Treasurer by November 1 of the year in which the property was held by the holder as of June 30 of that year. *Id.* § 74.301(a). The pertinent sections of the Texas Property Code cited in this Comment were amended by the Texas Legislature in 1997 to reflect the abolition of the office of the Treasurer of the State of Texas and transfer of the Treasurer's duties to the Comptroller. Act of June 20, 1997, 75th Leg., R.S., ch. 1423, §§ 16.06–16.21, 1997 Tex. Sess. Law Serv. (page number unavailable) (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 74.101–401).

302. *Id.* § 74.304(a)-(d). The only liability the State of Texas can incur after taking receipt of the abandoned property is if the property was mishandled or handled negligently. *Id.* § 74.304(d). Even if the state is liable through mishandling or negligence, the state's liability is limited. *Id.*

303. *Id.* § 74.401(a)-(c).

304. *Id.* § 74.401(d).

305. TEX. PROP. CODE ANN. § 74.401(e) (Vernon 1995).

frozen embryos.[306] Section 74.309 prohibits private escheat agreements that "take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process."[307] Given the intent of the abandoned property statute to take the property out of the hands of the holder and put it into the hands of the Comptroller,[308] it appears that the legislature intended the statute to prohibit agreements like the pre-freeze agreements that specify other actions when the embryos are deemed abandoned by the holder.[309] Thus, should pre-freeze agreements be insufficient to govern abandoned frozen embryos, both embryos frozen with agreements and those frozen without agreements will arguably be subject to the abandonment statute.[310]

A literal application of the abandonment statute would require that all embryos abandoned for a period of three years be reported and escheated to the Comptroller.[311] Because selling human tissues is generally prohibited, the Comptroller would probably determine that the embryos

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306. *See* TEX. PROP. CODE ANN. § 74.309 (Vernon 1995) (prohibiting private escheat agreements); *see also* Eason v. Calvert, 902 S.W.2d 160, 161 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (noting that contract is "illegal and unenforceable" if it violates state statutes).

307. TEX. PROP. CODE ANN. § 74.309 (Vernon 1995).

308. *See* State v. Texas Elec. Serv. Co., 488 S.W.2d 878, 882 (Tex. Civ. App.—Fort Worth 1972, no writ) (opining that legislative bill from 1961 reflected intent to "remove abandoned property from the possession of the current holder and put it in the hands of the State"). *Texas Electric* was overruled by *State v. Liquidating Trustees of Rep. Petroleum Co.*, 510 S.W.2d 311, 315 (Tex. 1974). However, *Liquidating Trustees* only overruled the case as to one line of its holding, so the statement of the purpose of the abandonment statute is not lost in its meaning. *Id.*

309. *See* TEX. PROP. CODE ANN. § 74.309 (Vernon 1995) (specifying private agreements or any means of avoiding escheat process for abandoned property prohibited).

310. *See* Bill E. Davidoff, Comment, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 155 (1993) (expressing that issues of "modification, adhesion, validity, and reliance" plague pre-freeze agreements and parents may not be protected). If a Texas court were to find the agreements either void or voidable, the embryos frozen by parents believing in their dispositional authority would find their stated intentions ignored. *Id.* This could be problematic if parents cannot be located or die prior to any decision on the issue because they would not be available to pronounce disposition in whatever way the law allows. *Id.* Embryos frozen without a pre-freeze agreement are automatically subject to disposition, particularly in absence of any law establishing what clinics may or may not do. *See id.* at 155-56 (stating that judiciary can provide only ad hoc approach, at best, to defining and solving such issues).

311. *See* Telephone Interview with John A. Robertson, Professor, The University of Texas at Austin School of Law (Oct. 22, 1996) (opining that Texas law of abandoned property applies to abandoned frozen embryos) (transcript on file with the *St. Mary's Law Journal*).

have no commercial value.[312] However, if the Comptroller elected to destroy the embryos based on a lack of commercial value, any subsequent parent or parents asserting a claim to the embryos would be unable to sustain a cause of action against the State of Texas or the former holder, the clinic.[313] In the event the Comptroller did not elect to destroy the embryos, the Comptroller would thereby become a custodial authority for embryos.[314] Whatever the Comptroller's decision, if a clinic chose to avail itself of the protections presented by the current state of the law and relinquish abandoned embryos to the Comptroller, the clinic would free itself of any liability from future suits by returning parents.[315]

Given the fact that this statute was promulgated prior to the establishment of IVF clinics in Texas,[316] it is unlikely that the Texas legislature intended to become a custodian for abandoned frozen embryos.[317] In

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312. *See* Wendy Dullea Bowie, Comment, *Multiplication and Division—New Math for the Courts: New Reproductive Technologies Create Potential Legal Time Bombs*, 95 DICK. L. REV. 155, 168 (1990) (reporting that law permits sale of blood and semen but not organs and arguing that legal approval of sale of embryos almost as unlikely as sale of children); James Fletcher Thompson, *Assisted Reproductive Technologies: South Carolina Law in the Embryonic Stage*, S.C. LAW., Mar.-Apr. 1997, at 26, 30 (asserting that "[t]he careful lawyer will advise any participant in assisted reproductive technologies that payment for sperm, eggs, embryos or surrogacy may violate the baby selling prohibition").

313. *See* TEX. PROP. CODE ANN. § 74.401(e) (Vernon 1995) (mandating that action may not lie against state or holder for any action taken on escheated property).

314. *See* TEX. PROP. CODE ANN. § 74.304(a) (Vernon 1995) (describing Treasurer as custodian); *see also id.* § 74.401(d) (elucidating that Treasurer "may destroy or otherwise dispose of the property at any time"). Section 74.401(d) does not require the Treasurer to destroy property that is not commercially viable, but he may elect to do so. *Id.* The pertinent sections of the Texas Property Code cited in this Comment were amended by the Texas Legislature in 1997 to reflect the abolition of the office of the Treasurer of the State of Texas and transfer of the Treasurer's duties to the Comptroller. Act of June 20, 1997, 75th Leg., R.S., ch. 1423, §§ 16.06–16.21, 1997 Tex. Sess. Law Serv. (page number unavailable) (Vernon) (to be codified as an amendment to TEX. PROP. CODE ANN. §§ 74.101–401).

315. *See* TEX. PROP. CODE ANN. § 74.401(e) (Vernon 1995) (mandating that action may not lie against state or holder for any action taken on escheated property).

316. *See* State v. Tex. Elec. Serv. Co., 488 S.W.2d 878, 882 (Tex. Civ. App.—Fort Worth 1972, no writ) (noting that legislature passed statute as part of 57th legislative session in 1961). Passage of this statute was seventeen years prior to the birth of the first IVF baby, and it is thus evident that Texas certainly had no IVF clinics at the time. In fact, the University of Texas at San Antonio Health Science Center's clinic is one of the oldest in Texas, which was founded in 1983. *See* Interview with Dr. Robert G. Brzyski, Assistant Professor, The University of Texas Health Science Center at San Antonio, in San Antonio, Texas (Oct. 22, 1996) (providing history of Health Science Center clinic but unable to specify when first clinic established in Texas) (transcript on file with the *St. Mary's Law Journal*).

317. Interview with Dr. Robert G. Brzyski, Assistant Professor, The University of Texas Health Science Center at San Antonio, in San Antonio, Tex. (Oct. 22, 1996) (transcript on file with the *St. Mary's Law Journal*).

fact, it is very likely that the legislature never envisioned and does not currently recognize what the law of abandonment may mean in the realm of frozen embryo technology.[318]

VII. Suggestions for Texas Law

Although this Comment argues that the law of abandoned personal property as currently promulgated and interpreted in Texas applies to abandoned frozen embryos, this argument should not be construed as an advocation of the application of such a law to this new technology. Instead, the objective is to bring this nuance in the law to the attention of the lawmakers and the citizens of the State of Texas by urging both awareness and change. Some changes should be immediate while other changes may develop with time.

It is imperative that lawmakers consider legislating now on both IVF and cryopreservation to prevent future problems. The objective of such legislation should be to make parents and clinics responsible for their actions and aware of the impact of their decisions. While infertility clinics may function well in many ways under a scheme of self-regulation, there is no doubt that financial considerations drive their actions as they develop new technologies and manipulate existing ones. Thus, there are no enforceable standards, so the consumer, often a resident of Texas, has little assurance of quality control. As an advocate for Texas consumers, the state has a duty to require that minimum precautions be taken in terms of handling and storing embryos and in terms of delineating rights for parents and clinics. In addition to the foregoing guidelines, there should also be mandatory disclosure statements containing uniform language provided to parents so that they do not avail themselves of this technology without fully comprehending the implications of their actions. By establishing these guidelines, each party to an IVF and cryopreserva-

318. *Cf.* Tex. Fam. Code Ann. §§ 151.101–.103 (Vernon 1995) (providing for assisted reproductive technology). From promulgation of this statute, it can be argued that the legislature is capable of legislating on assisted reproduction issues and does so with specificity when doing so consciously. Had they intended to legislate for frozen embryos in the property code, they very likely would have been more explicit and specific in their language and would have drafted a separate statute. The likely conclusion is that the Texas legislature did not intend to legislate for frozen embryos in the property code and are unaware of the implications of the language in the current abandoned person property statute. *Cf.* James Fletcher Thompson, *Assisted Reproductive Technologies: South Carolina Law in the Embryonic Stage*, S.C. Law., Mar.-Apr. 1997, at 26 (asserting that "[w]hen advising the client regarding the intimate matters of procreative rights, a lawyer must base his or her advise on supposition, conjuncture, ad hoc solutions and a contradictory statutory framework that was never intended to govern reproductive technologies").

tion experience will know whether the contract they sign is enforceable and what remedies are available under the law if problems arise.

Arguably, the greatest assurance to both consumers and clinics would be for the legislature to provide a framework for classifying frozen embryos. For example, in the last session of the Texas legislature, Representative John Longoria proposed a bill that seeks to establish that life begins at conception.[319] The language of the bill says that "[a]n unborn human organism is alive and is entitled to the rights, protections, and privileges accorded to any other person in this state."[320] On the surface, this bill seems to be attempting to do two things. First, the language suggests an attempt to legislatively overrule the common law precedent in Texas that life begins at birth.[321] Second, this bill effectively moves toward the spirit of Louisiana's legislation against destruction of human embryos by declaring them to be life.[322] However, without clear language in the bill outlining its purposes and goals, such a bill does not go far enough. Nonetheless, this bill, or one similar to it, serves as a positive step toward defining how Texas should view human embryos.

At the very least, Texas law should not arguably imply that human embryos may be viewed as property escheatable to the state. Thus, even if Texas lawmakers are unwilling to introduce legislation to govern IVF and cryopresevation, these same lawmakers should modify the Texas Property Code (the "Code") to eliminate the constructive inclusion of abandoned frozen embryos in the category of abandoned personal property.[323]

Modifications of the Code to eliminate IVF and abandoned frozen embryos from inclusion in the statute may be effectuated in two ways. First, the Texas legislature could include a definitional paragraph excluding the embryos resulting from alternative reproduction techniques, such as IVF, from the personal property categorization.

Second, the Code's definitional approach as to who constitutes a holder of property could be refined to eliminate infertility clinics, hospitals, and other such agencies to the extent that they hold human embryos in cryo-

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319. *See* Tex. H.B. 370, 75th Leg., R.S. (1997) (proposing that life begins at conception).

320. *Id.*

321. *See* Delgado v. Yandell, 468 S.W.2d 475, 478 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (establishing in Texas that "right to enforce cause of action" begins at birth).

322. *Compare* LA. REV. STAT. ANN. §§ 121–133 (West 1991) (declaring human embryos to be life and protecting them from destruction), *with* Tex. H.B. 370, 75th Leg., R.S. (1997) (proclaiming that life starts at moment of conception).

323. *See* TEX. PROP. CODE ANN. §§ 72.001, 72.101–103, 74.001–301 (Vernon 1995) (declaring personal property subject to abandonment, which by implication includes embryos).

presevation. Refining the definition of a holder of property does not necessarily exclude the abandoned frozen embryos from treatment as a property interest in all instances; however, this approach removes the requirement for clinics or others to escheat the abandoned frozen embryos to the State of Texas.

VIII. Conclusion

History illustrates that the law is slow in responding to advances in medical technology. Time must pass before the problems and ramifications of a new technology become apparent. Assisted reproductive technology like IVF poses especially difficult problems as viewpoints conflict on an appropriate classification for frozen embryos.

The classification argument becomes even more critical when frozen embryos are abandoned by the parents who created them. Regardless of the reasons motivating the abandonment, clinics and society at large face questions as to what to do with potential life bearing frozen embryos. How frozen embryos are classified by law determines what clinics, the government, and parents may permissibly do with the embryos. While Louisiana currently attempts to define frozen embryos as life, this classification likely fails under current federal law. Texas law also disagrees with such a classification.

Abandoned frozen embryos currently pose problems for Texas IVF clinics. Problems include storage of increasing numbers of frozen embryos and the potential for indefinitely stored embryos to be born after their parents' deaths. As the problems continue, clinics may be forced to examine Texas law to determine how to resolve their situation. Clinics currently deal with and discuss embryos in the context of a property interest, so the natural inclination for clinics could be to turn to the Property Code. The Property Code, as written, requires clinics to pass the burden to the State of Texas. The freedom from liability available in the Texas Property Code is a potential gold mine from liability for clinics.

Undoubtedly, the Texas legislature created the current abandoned property statute without consideration of its potential application to abandoned frozen embryos. While clinics may be ignorant of the gold mine accessible to them, as time passes, their desire to deal with the growing number of abandoned frozen embryos may spur them to comply with the Property Code's requirements. The question lawmakers must answer is whether the role of custodian or destroyer of embryos is an appropriate one for the State of Texas.