The Trouble With Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Embryos

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INTRODUCTION

The problem is that “your scientists were so pre-occupied with whether or not they could, that they didn’t stop and think if they should.”¹ A very telling quote highlighting the all too common problem involved with the tug of war between science and morality. We are at the point today where that question is no longer relevant in the world of in vitro fertilization (IVF), surrogacy, cryopreservation and the like. We can, we do and we will. The relevant question today is once again, how the law plays catch up to science.

Dating back to the late 1970s, the industry and practice of IVF with human embryos has developed and expanded with the first successful live birth of a “test tube baby” in 1978.² One of the byproducts of the IVF industry is that often more embryos are created than needed and they are created in advance of the IVF procedure(s). The technology of cryopreservation of embryos became viable in 1983 when the first pregnancy from a frozen human embryo was reported.³ Since that time, the practice of cryopreserving embryos has grown by leaps and bounds. The latest data shows that as of April 11, 2002, a total of 396,526 embryos have been

¹Jurassic Park (Universal Studios 1993).
placed in storage in the United States. A more recent estimate is found to be somewhere around 500,000 as of October 2008.

Of the 396,526 embryos stored as of April 11, 2002, the vast majority—88.2%—were stored for family building. As for the other 11.8%, 2.8% were designated for research, 2.3% were awaiting donation to another patient, 2.2% were to be discarded, and 4.5% were held in storage for other reasons including lost contact with a patient, patient death, abandonment and divorce. Keep in mind, however, that the entire 88.2% designated for family building will not be used in that manner. At some point in time once families are created or a divorce or death occurs or feelings change, some of those embryos will also move into the other categories of research, donation, awaiting destruction, or “other reasons.” This is where the questions arise. What happens with the embryos that are left?

Currently in the United States and many other countries the courts are struggling with this question of what happens to these embryos. The question becomes increasingly difficult to answer when the parties who originally came together to create the embryos no longer agree as to the fate of these embryos. What are human embryos? Are they property? Are they people? Are they something else? The framework of the legal system has causes of action, legal principles, duties, remedies, and penalties dealing with issues relating to people and issues relating to property. How is the framework applied when we do not know what we are dealing with? Not very well and not very consistently.

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6Id.
7Id.
Only a handful of state legislatures have even attempted to address the issue with the most comprehensive of these being Louisiana. Therefore, the courts in other states across the country have been wading into this quagmire without any legislative guidance. The problem then becomes that the courts are addressing issues that they would rather not and the issues are complex and entangled with ethical and moral implications. We must answer the question of what are human embryos and how should they be treated under the law. We cannot continue to bury our heads in the sand and hope that things will change. We must engage in an open and honest dialogue about what is going on and how the situation can realistically be handled. In order to do so, part of what must be embraced is a nonideal theory. Basically speaking, we cannot continue to look at the process and the problem as how we believe it should be but for what it really is.

This article will begin with the first section addressing the medical issues with which we are dealing. The second section analyzes the history of legal disputes that get us to where we are today and how they have been resolved in the courts. The third section classifies the embryo as

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property with special dignity and provides an analysis of why this is the best way to both promote life and allow the individuals a large degree of autonomy. The fourth section of the article will discuss the need for legislative guidance and present a proposed legislative framework for state and possibly the federal government to provide structure in this problematic area. Finally, the article will conclude with a discussion of how the previously decided cases would have had a much different outcome after applying the proposed model.

I. THE SCIENCE OF ASSISTED REPRODUCTION

The legal definition of infertility varies greatly from state to state but the medical definition of infertility is that it is a disease of the reproductive system that impairs the body’s ability to perform the basic function of reproduction. Infertility affects about 7.3 million women and their partners in the US—about 12% of the reproductive-age population. While it is reported that in vitro fertilization (IVF) accounts for less than 3% of infertility services, during the time period of 1985 to 2006, almost 500,000 babies have been born in the United States as a result of reported Assisted Reproductive Technology Procedures (ART) with IVF accounting for 99% of the ART procedures. As of 2002, one in every 100 babies born in the US was conceived using some ART procedure and the trend continues.

Focusing on the IVF process, since that accounts for 99% of all ART procedures, the process begins with parents seeking to conceive their own biological child through ART

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11 Id.

12 Id.

13 Id.
undertaking treatment to provide their own gametes—sperm and ova or oocytes.\textsuperscript{14} Acquiring oocytes used for ART is more onerous, painful and risky than acquiring sperm.\textsuperscript{15} The oocyte source, usually the gestational mother, undergoes a drug-induced process intended to stimulate her ovaries to produce many more oocytes in a single cycle, a process referred to as “superovulation.”\textsuperscript{16} The process requires the daily injection of hormones accompanied by frequent monitoring using blood tests and ultrasound examinations.\textsuperscript{17}

When the monitoring suggests the oocytes are sufficiently mature, the clinician attempts to harvest them. A procedure using a needle guided by ultrasound is inserted through the vaginal wall and into the mature ovarian follicles.\textsuperscript{18} An ovum is withdrawn, along with some fluid, from each follicle.\textsuperscript{19} This is performed as an outpatient procedure and the risks and complications are low, but they do exist.\textsuperscript{20}

Once the sperm and oocytes are collected, they are transferred into a culture medium containing the intended mother’s blood serum. Once properly prepared, the clinician attempts to

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\textsuperscript{15} Id.

\textsuperscript{16} Id. The superovulation method is used in an attempt to obtain as many oocytes as possible to allow for a higher number to be fertilized at once compensating for poor embryonic viability. See Tucker, Morton, Liebermann, \textit{Human Oocyte Cryopreservation: A Valid Alternative to Embryo Cryopreservation?}, European Journal of Obstetrics & Gynecology and Reproductive Biology 113S (2004) S24-S27.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Id.
}
induce fertilization—the union of sperm and ovum culminating in the fusion of their separate pronuclei and the initiation of a new, integrated, self-directing organism.\textsuperscript{21} It is common practice to attempt to fertilize all available oocytes because cryopreservation of the oocyte without fertilization remains an experimental procedure that should not be offered or marketed as a means to defer reproductive aging according to a committee opinion of the Practice Committee of the American Society for Reproductive Medicine.\textsuperscript{22} There is currently a low success rate for the process due to the damage that may occur to the oocyte during the freezing and thawing processes.\textsuperscript{23}

Once fertilized, due to concerns with respect to how many embryos may be implanted at one time, there are surplus embryos not used in the IVF procedure at that time.\textsuperscript{24} Due to the expense, emotional hardships, and the potential for medical or surgical complications involved in

\footnotesize{\textsuperscript{21} Id. (emphasis added).}

\footnotesize{\textsuperscript{22} American Society for Reproductive Medicine, Committee Report by the Practice Committee of the ASRM (October 2007).}

\footnotesize{\textsuperscript{23} European Journal of Obstetrics & Gynecology and Reproductive Biology, “Oocyte cryopreservation: a biological perspective,” G. Coticchio et al, 115S(2004) S–2—S–7. (Studies have failed to reproduce consistently high survival and pregnancy rates, with the consequence that oocyte freezing is currently perceived as an experimental approach) at S3. As of 2008, in an article by S.P. Leibo, the difficulties of cryopreservation of the oocyte were still being explored. See “Cryo preservation of oocytes & embryos: Optimization by theoretical versus empirical analysis, Theriogenology 69 (2008) 3 7-47. Dr. Marc Fritz, Chairman of ASRM practice committee stated “Egg-freezing is still an experimental procedure.” Only 4 babies have been born as a result of the procedure. Nic Fleming, “Women warned not to freeze their eggs,” www.telegraph.co/uk October 10, 2007.}

\footnotesize{\textsuperscript{24} See Tucker, Morton & Liebermann, Note 16 supra.}
the superovulation process and oocyte retrieval, spare fertilized embryos are cryopreserved for future use.\textsuperscript{25}

This is the point in the time line where the legal trouble begins. This cryopreservation is the current solution to the problem of what to do with the embryos not used in the current IVF or other ART procedure, but that very the solution is what raises the ethical and legal issues at hand. Basically, there are five possible outcomes for the “surplus” embryo: (1) remain in cryostorage until a transfer into the mother’s uterus in the future; (2) donation to another person or couple seeking to have a baby; (3) donation for research; (4) remain in cryostorage indefinitely; or (5) destruction.\textsuperscript{26} One of the most problematic issues is that the embryos “are co-owned by two people who may separate, and as such the embryos then face an uncertain fate, commonly decided in courts of law.”\textsuperscript{27}

As evidenced by the handful of court opinions that have addressed the issue of the classification and treatment of the cryopreserved human embryo, there is inconsistent use of terminology. Part of the problem with even giving this reproductive material a name is the ethical, scientific, philosophical and religious question of when life begins. Referring to a cryopreserved three-day old fertilized human egg as an embryo can imply that the egg is a “person.” The word that is used to describe the fertilized human egg may significantly impact


\textsuperscript{26}Reproduction & Responsibility: \textit{The Regulation of the New Biotechnologies} (Ch. 2) President’s Commission on Bioethics.

\textsuperscript{27}See Tucker, Morton & Liebermann, \textit{supra} Note 15.
the perception of when life begins. Many scientists and ethicists posit that a fertilized human egg is not an embryo until at least uterine implantation and two weeks of development. A number of ethicists and scientists have developed different names for human eggs fertilized outside the womb and not yet implanted in the womb, including “proto-embryo,” “pre-implantation embryo,” and “pre-embryo.” From this point forward, this article will use the term “pre-embryo” when discussing the embryo in the cryopreserved state prior to implantation. In addressing issues involving the legal status of the pre-embryo, we are focusing on the cryopreserved fertilized ovum up to 14 days old before implantation in the uterus.

II. Disputes Over Disposition Arising Under the Present State of the Law

Throughout the past two decades, several cases have been presented to the courts in this country, as well as in others, which focus our attention on the very emotional and real nature of the problem at hand. These cases arise when the couples who had come together originally to create these pre-embryos in an effort to have biological children of their own are divorcing or ending their relationships. Now the common goal they once shared has changed. The courts have been asking for assistance from the state legislatures for years to no avail. As we see from the limited body of case law on the subject, the courts began the struggle with these issues in 1992 and they are still struggling even as recently as 2007.

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30 *Id.*

31 American Heritage Dictionary and American Heritage Medical Dictionary; *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992).
The courts have created frameworks for these disputes that have basically fallen into the following categories: (1) contractual approach; (2) contemporaneous mutual consent model and (3) the balancing test. Three states (New York, Tennessee, Washington) utilize a contractual approach being that contracts entered into at the time of in vitro fertilization are enforceable so long as they do not violate public policy. However, the contractual approach has been criticized “because it ‘insufficiently protects’ the individual and societal interests at stake.” The first concern being that the issues involved implicate very personal, individual beliefs of personal importance and they should be allowed to make such decisions with their contemporaneous wishes, values and beliefs. The second concern is that requiring couples to make binding decisions about the future use of the pre-embryos ignores the difficulty in predicting a person’s future response to life-altering events. Third, conditioning treatment on binding agreements calls into question the authenticity of the initial agreements as well. Fourth and finally, the binding contract approach “undermines important values about families,

32 *In Re Witten*, 672 N.W.2d 768, 774 (Iowa 2003).

33 *Id.* at 776. *See also Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (N.Y. 1998); *Litowitz v. Litowitz*, 146 Wash.2d 514, 48 P.3d 261 (2002). It appears that Texas may also utilize this contractual approach after the Roman v. Roman decision in 2007. However, that decision is from the 14th Court of Appeals in Houston and the petition for review to the Texas Supreme Court was denied. It is possible that there is another chapter to be written on this issue in Texas. *Roman v. Roman*, 193 S.W.3d 40 (Tex. App.–Houston [1st Dist.] 2006, pet denied), *cert denied* 2008 WL 140521 (Jan. 9, 2008).

34 *Witten*, 627 N.W.2d at 777.

35 *Id.*

36 *Id.*

37 *Id.*
reproduction, and the strength of genetic ties.” Because of such concerns, the concept of contemporaneous mutual consent came to be suggested.

In the contemporaneous mutual consent model decisions regarding the disposition of the pre-embryos belong to the individuals who created them and they have equal say as to how the pre-embryos are to be disposed. While losing some certainty and predictability of the binding contract approach, the positive result is that the couples are not compelled to guess in advance as to how they will feel about the issues surrounding the pre-embryos years into the future. While compelled parenthood imposes burdens on an individual, mandatory destruction of a pre-embryo “can have equally profound consequences, particularly for those who believe that embryos are persons.” Therefore, the mutual consent model allows for no disposition of the pre-embryo without the contemporaneous mutual consent of the couple who created the pre-embryo.

With the balancing approach as the third option, this model appears to incorporate the idea of contemporaneous decision-making but not the mutual consent concept. In this model the courts have focused on the principle that the better rule is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos. The obvious problem with this approach is inconsistency. The courts would be required to weigh in

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38 Id.
39 Id.
40 Id. at 778.
41 Id.
42 In re Witten at 779 (emphasis in original).
each individual case the specific relative interests of the parties in deciding the disposition when the parties cannot agree.\textsuperscript{43}

Additionally, while the individuals who created the pre-embryos have the “primary, and equal, decision-making authority with respect to the use or disposition of their embryos”\textsuperscript{44} “[w]e think, however, that it would be against public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos.”\textsuperscript{45} In addition to the personal autonomy of the individuals, consideration must also be given to the fact that the clinics and facilities need some guidance with respect to the desire of the parties and some framework within which to operate. Therefore, even courts allowing the parties to change course from the original agreement had not held that the agreements between the parties and the fertility clinics had no validity.\textsuperscript{46} The agreements entered into with the clinic at the time the in vitro fertilization process begins are enforceable and binding but the parties can change their minds with respect to the disposition of the pre-embryos. The clinics are free to and should rely on the agreements entered into with the parties unless and until they pare provided in writing with a notice that there has been a change of intention by the parties involved.\textsuperscript{47}

One of the most unique outcomes in utilizing the contemporaneous mutual consent model allowed for no transfer, use or disposition of the pre-embryos without the signed authorization of

\begin{itemize}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.} at 780-781.
\item \textsuperscript{45} \textit{Id.} at 781.
\item \textsuperscript{46} \textit{Id.} at 782.
\item \textsuperscript{47} \textit{Id.} at 782-783.
\end{itemize}
both donors. In the event of a stalemate, the status quo would be maintained with the pre-embryos stored indefinitely unless both parties agreed to destroy them with the expense for such storage being borne by the party opposing destruction. Therefore, in resolving that dispute, the pre-embryos would remain in storage until some agreement can be reached by them with the storage fee being paid by one or both of them. Practically speaking, the part desiring to have a child will be prevented from doing so unless the other party changes his mind, but the non-consenting party will be prevented from donating or destroying them unless the other party changed her mind, and the pre-embryos will remain in cryopreservation for some indefinite time.

The most recent case law shedding light on this emotional battleground is that of Roman v. Roman. Randy and Augusta Roman were married in 1997 and began trying to have children. When their attempts proved unsuccessful, the Romans turned to artificial insemination as a means of conceiving a child. Those efforts were also unsuccessful. Therefore, in 2001 the parties sought the services of Dr. Schnell and eventually discussed in vitro fertilization as the Romans’ best option for a biological child. Since the process of fertilizing Augusta’s eggs for in vitro fertilization typically results in more pre-embryos than needed, the Romans entered into an agreement with the clinic for cryopreservation of the pre-embryos.

On March 27, 2002, the parties signed an “Informed Consent for Cryopreservation of Embryos.” The document gave the clinic authority to maintain the cryopreserved pre-embryos until the time of transfer with consent of both the husband and wife. The parties also had to

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48 Id. at 783.
49 Id.
select an option regarding disposition of the pre-embryos in the event of divorce. The parties were allowed by the agreement to withdraw consent to the disposition of the pre-embryos and to discontinue participation in the program.\textsuperscript{51}

On April 17, 2002, the procedures resulted in six pre-embryos but only three were viable for cryopreservation. The night before implantation, Randy Roman withdrew his consent to the procedure that was to take place the following day and Dr. Schnell was informed of that development. A month later the party signed an agreement to thaw the pre-embryos and implant them but was contingent on counseling. Randy and Augusta never completed the counseling.

On December 10, 2002, Randy filed for divorce. The parties reached an agreement regarding all issues except for the frozen pre-embryos.\textsuperscript{52} Randy asked the trial court to have the pre-embryos discarded pursuant to the couples’ agreement with the clinic and Augusta wanted the opportunity to have the pre-embryos implanted so that she could have a biological child.\textsuperscript{53} Augusta stated that Randy would not have parental rights or responsibilities for any child born from the pre-embryos. The trial court awarded possession of the pre-embryos to Augusta with the finding that “the three frozen embryos are community property.”\textsuperscript{54} The court also entered a second set of findings which included a finding that “the court considered all evidence and testimony in balancing the constitutional rights of both parties in making the award of the three

\textsuperscript{51}Id. at 42.

\textsuperscript{52}Id. at 43.

\textsuperscript{53}Id. The court noted in footnote 3 that Dr. Schnell testified that Augusta had a 10% chance of becoming pregnant if the embryos were transferred to her. This statistic meshes with the ASRM stats for live birth after embryo transfer for someone Augusta’s age.

\textsuperscript{54}Id.
(3) frozen embryos to AUGUSTA N. ROMAN.’’

And also an additional conclusion of law stating that the award of the pre-embryos to Augusta was part of the “just and right division of the community estate.”

Randy Roman appealed to the Houston Court of Appeals where this was an issue of first impression in Texas. The court of appeals considered the issue to be whether the award to Augusta as a just and right division of the community property was proper in light of the agreement with the clinic regarding disposition. Randy argued that the agreement clearly provided for disposal of the pre-embryos in the event of divorce and the trial court erred by not enforcing that agreement. Augusta did not deny signing the agreement but argued that other jurisdictions have held similar agreements to be unenforceable.

The agreement itself referred to the frozen pre-embryos as “joint property” of Randy and Augusta based on current legally accepted principles regarding legal ownership of human sperm and oocytes. The agreement also indicated that Texas laws regarding such legal ownership could change at any time as it continues to develop. In all actuality, Texas had no statute or case law prior to the Roman case addressing the disposition of pre-embryos. Therefore, the court of appeals reviewed the cases from other jurisdictions to date. The court started with Davis and went all the way through Witten before embarking into this new territory in Texas.

55 Id.

56 Id. at 44.

57 Id.

58 Id. at 44-45.

59 Id. at 44, footnote 7.

60 Id.
The court began by looking at these agreements at issue in the context of the public policy of the State of Texas. As noted, Texas had already adopted the Uniform Parentage Act which contains provisions regarding assisted reproduction and gestational agreements and parentage issues related to such procedures.\textsuperscript{61} Texas has adopted a statute requiring both husband and wife consent to assisted reproduction but within that statute also contains a provision acknowledging a child may be born without the husband’s consent.\textsuperscript{62} An additional section addresses paternity in the event of divorce by indicating that if the use of the egg, sperm of embryos happens after divorce, the former spouse is not a parent unless there was a record of such an agreement to the contrary.\textsuperscript{63} However, there is no legislative guidance as to the disposition of pre-embryos in the event of divorce. The state has also adopted statutes governing gestational agreements as well, allowing for private agreements to be enforced. In looking at these statutes as a whole, the Houston Court of Appeals concluded that public policy of the state would allow a husband and wife to enter into an agreement that would govern the disposition of pre-embryos in the event of “divorce, death or changed circumstances.”\textsuperscript{64}

Ultimately the court declared that an embryo agreement in Texas that “allows the parties to voluntarily decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of this State and

\textsuperscript{61}Id. at 48-49.

\textsuperscript{62}Id. at 49. See also Tex. Fam. Code Ann. § 160.704 (Vernon 2002).

\textsuperscript{63}Id. at 49 citing Tex. Fam. Code Ann. § 160.706(a).

\textsuperscript{64}Id. at 49.
the interests of the parties.”65 The next step was to review the precise agreement that the Romans entered into to determine its validity under this rule.

The court began by delving into a discussion of rules of contract interpretation and the required elements of a valid and binding contract. While there were nine different forms the couple were required to sign, the focus of the dispute comes from the “Informed Consent for Cryopreservation of Embryo.” There was a provision that in the event that both parties die the embryos would be discarded.66 Additionally, there was a specific provision for the event of divorce which is a distinguishing factor from the other cases decided in the various jurisdictions. That provision indicated that in the event of divorce the couple authorized and directed jointly that the frozen embryos shall be discarded.67 The following paragraph indicated if “other circumstances arise” where embryos remain where the embryos are not used for initiating a pregnancy in the husband or wife or if they are “not able to agree on the disposition of the remaining embryos for any reason” the unused frozen embryo(s) will be discarded.68 Then an additional provision indicated that the parties were free to withdraw consent as to the disposition of the embryos and to discontinue participation in the program by asking the embryos be transferred to another facility.69

The totality of the court’s analysis and discussion of the disposition of the Romans’ pre-embryos focused exclusively on contract principles and the specific wording of the consent form.

65Id. at 50.
66Id. at 51 (citing to page 3 of the cryopreservation agreement).
67Id. at 51 (citing to page 4 of the cryopreservation agreement).
68Id.
69Id. (citing to a provision on page 5 of the cryopreservation agreement).
There was no contemplation by the court that despite the words of the agreement either of the parties could possibly have a change of heart or desire a different result. Instead the court stated that “the embryo agreement’s language could not be any clearer.”\textsuperscript{70} The provision indicated in the event of divorce the embryos would be destroyed and despite the fact that Augusta Roman no longer agreed to such a disposition, the Houston Court of Appeals ordered the agreement complied with, which will result in the destruction of the pre-embryos.\textsuperscript{71}

The final blows came in the months following the Houston Court of Appeals’ ruling as the Texas Supreme Court denied Augusta Roman’s petition for review and finally the U.S. Supreme Court denied the petition for writ of certiorari.\textsuperscript{72}

With case after case of highly emotionally charged arguments, what is the current state of the law and where should it go to more adequately address these disputes? This is where a discussion of the status of the pre-embryo and its legal classification must be had.

III. CLASSIFICATION OF THE PRE-EMBRYO: PRESERVING THE DIGNITY OF HUMAN LIFE WITH A PROPERTY RIGHTS MODEL

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<td>(Creation of the Pre-embryo)</td>
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Dating back to \textit{Moore v. UCLA},\textsuperscript{73} there has been apprehension when dealing with the legal status of tissues, organs, cells that are removed from the human body. There is some

\textsuperscript{70}Id. at 52.

\textsuperscript{71}Id. at 55.


\textsuperscript{73}51 Cal.3d 120, 793 P.2d 479 (Cal. 1990).
natural ethical and moral discomfort in thinking of parts of the human body as property. When we take the step from dealing with the legal status of cells from someone’s spleen, to someone’s sperm or eggs to a human embryo that is cryopreserved for potential future development, the discomfort becomes even more severe. While lawyers, judges, legal scholars, scientists, philosophers and clergy have called for guidance on the issue, the legislative branch has failed to take adequate steps to deal with the issue of the legal status of the pre-embryo.

As illustrated by the timeline above, when addressing issues in the context of in vitro fertilization coupled with cryopreservation, there is a period of time where the laws addressing traditional procreative activity don’t squarely fit. There are statutes and cases addressing sperm and egg donors and the legal characterization of the sperm and egg. There also exists a mountain of case law addressing abortion, fetal homicide and tort causes of action involving the unborn during the period of gestation. However, as for the period of time between fertilization and implantation of the cryopreserved pre-embryo, there is little legislation and no agreement among the courts on an approach to take. Additionally, some courts have gone out of their way to avoid any type of classification or detailed discussion of the status of the pre-embryo.

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75 Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 LEd.2d 147 (1973)(abortion); Hughes v. State, 868 P.2d 118 (Okla. 1994)(viable fetus at time of injury may be subject of homicide); Pino v. US, 193 P.3d 1001 (Okla. 2008)(a wrongful death action may be maintained for a nonviable stillborn fetus). But see State v. Larsen, 578 P.2d 1280 (Utah 1978)(“person” does not include an unborn fetus for purposes of crime of homicide); Baum v. Burrington, 70 P.3d 456 (Wash. Ct. App. 2003), review denied, 95 P.3d 758 (2004)(mother could not maintain a wrongful death action as “unborn child” or fetus was not a person).

76 Kass v. Kass, 696 N.E.2d 174, 179 (NY 1998) (refusing to determine whether the pre-embryos in dispute were people, property, or property deserving special respect).
Because of the avoidance of the issue, how should the pre-embryo be treated under the law, there is no clear guidance to anyone—gamete providers, clinics, physicians and courts.

Once we move forward on the timeline from separate gametes to the moment of fertilization, there is great difficulty in accepting a pure property model for the pre-embryo, however easy and certain it might be from a legal standpoint. It is a little like “Goldilocks and the Three Bears” with one approach being too loose, one being too restrictive and the need to find an approach that is just right. By creating a new classification for the human embryo but by using a property rights model that is tailored to the uniqueness and dignity of the pre-embryo, the law can achieve an approach that is indeed just right.

A. Pre-Embryos Cannot be Classified as People Under the Law

In looking at the legal dichotomy that is property versus person, it is significant to consider what the implications are with the classification as person under the law. Although the constitutional rights that a “person” receives may vary there is a core set of rights that seem to follow the legal classification as “person”—the right to due process, to own property, to bodily integrity, right to live, and right not to be owned. As proposed by a commentator, “every entity whose rights fall short of this hard nucleus would not be a person, or subject, but rather an object.”

The status of the law as it currently exists provides a valuable context for a discussion of the status of the pre-embryo as not person but more than property. The pre-embryo is more “human” than the separate sperm and eggs that combined to create it because there is actually

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78 See Ducour at 199.
something new that has emerged through the initial stages of cell division during the first hours of development. However, if we take a step back and look at the pre-embryo outside of the womb in a petri dish and a pre-embryo in the same stage inside a woman’s body we realize that treating a pre-embryo as “person” would elevate it to a status higher than that of the same pre-embryo at the same stage of development inside of the woman.

The pre-embryo before cryopreservation has been allowed to develop for not more than 14 days and usually much less than that, typically 48 hours allowing the pre-embryo to reach the four to six cell stage. This is well before the time period of any form of viability and before any human organs and structures have developed. At this stage of development if inside a woman’s body, in most instances a woman is “late” for her menstrual cycle and what has actually happened is that she was in the very early stages of pregnancy and had a miscarriage without even realizing that was the case. Additionally, in looking at this early stage of pregnancy, the medical data shows that the rate of pregnancy loss or miscarriage following IVF

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81 At the stage of development 5 days after retrieval & fertilization the development is that of the Blastocyst which is the stage where there is a fluid-filled cavity and cells begin to form the early placenta and embryo. At the 8-cell stage, the developmental singleness of one person has not been established. Amer. Fertility Society, report on Ethical considerations of the New Reproductive Technologies (June 1990).

82 Miscarriages occur in about 15-20% of pregnancies. Most occur in the first 13 weeks of pregnancy. Some miscarriages take place before a woman misses a menstrual period or is even aware that she is pregnant. http://www.acog.org/publications/patient_education/bp090.cfm
is similar that in the general population, with the risk increasing with the mother’s age.\textsuperscript{83} Miscarriage may occur even after ultrasound identifies a pregnancy in nearly 15\% of women under the age of 35, in 25\% at age 40 and in 35\% at age 42.\textsuperscript{84} Therefore, even if the fertilization is successful and a pre-embryo is formed, once transferred there is still the same risk present in any other naturally occurring pregnancy that cell division will stop and a miscarriage will occur.

When cryopreservation is added to the mix, there is also the possibility that upon thawing there will not even be a viable pre-embryo to transfer to the woman.\textsuperscript{85} That is why a fertility clinic’s live birth rates are really more significant than the other statistics that are assembled. The live birth rate indicates the probability of delivering a live baby per IVF cycle started. The live birth rate in the United States for each IVF cycle started is approximately 30\% to 35\% for women under age 35; 25\% for women ages 35 to 37; 15\% to 20\% for women ages 38 to 40; and 6\% to 10\% for women over 40.\textsuperscript{86} In looking at these various procedures and statistics, even if the pre-embryos are successfully created and transferred to a woman’s body the best we can say is they now have the same chance of success and survival as any other pregnancy. If from that point forward the playing field is equal, why should the law create a more elevated status to begin with. Would this mean that if a child is created by means of ART then they cannot be aborted or there would be automatic wrongful death claims available, but if a child is created

\textsuperscript{83}American Society for Reproductive Medicine, Assisted Reproductive Technologies: A Guide for Patients, p. 13 (2007)

\textsuperscript{84}Id.

\textsuperscript{85}Id. at 10.

\textsuperscript{86}Id. at 11.
“naturally” then no such “rights” exist? Such a result seems like an incomprehensible status for the legal system to maintain.

Looking to the current state of the law with respect to unborn children and wrongful death or fetal homicide cases we see even more reason why under the law the pre-embryo does not have status as a legal “person.” In first turning to the wrongful death context, the purpose of a wrongful death claim is to compensate a decedent’s survivors for the loss of the decedent’s life.\(^87\) While the Restatement (Second) of Torts states that if the tortious conduct and the legal causation of the harm can be satisfactorily established, there may be recovery for any injury at any time after conception,\(^88\) the vast majority of states in addressing this issue have specifically required a viable fetus in order to support some claim of wrongful death.\(^89\) As most state legislatures have seen fit to require some standard of viability to include an unborn child within the parameters of the statute, it seems logical to conclude that a cryopreserved pre-embryo, which is a stage of development much sooner than viability, would not have any attendant wrongful death claims as well and not fall within a legal definition of “person.”


\(^88\) Restatement (Second) of Torts § 869 comment d (1979).

\(^89\) Statutes in Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Idaho, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin allow recovery under the wrongful death statute only for a viable fetus. California, Florida, Iowa, New Jersey, New York, and Virginia statutes do not allow recovery for an unborn child under a wrongful death action. Georgia is somewhere in between using “quickening” or the child’s ability to move in its mother’s womb as the standard required for recovery under the wrongful death statute. Finally, Illinois, Louisiana, Maine, Missouri, Oklahoma, South Dakota, Texas and West Virginia allow a wrongful death claim for a child in utero regardless of any determination of viability.
Turning to fetal homicide statutes and cases, the focus here turns away from compensation for a loss to punishment for a person’s wrongdoing. While at common law a conviction was only possible if the child was born alive and then died, statutes have changed this rule. While in the fetal homicide context we find more state statutes that include the unborn child as “human,” there is still disagreement and inconsistency among them as to when the criminal liability may attach. However, due to the differing purposes of wrongful death and fetal homicide statutes one can reconcile the desire to eliminate a non-viable fetus from recovery under the former but provide for criminal liability for the death of same in the latter. If we extrapolate this into the context of the cryopreserved pre-embryo, if given status as a human being in that context, would the physician who thaws the cryopreserved pre-embryo that does not survive be guilty of murder or manslaughter? It does not seem that such a result should be intended or anticipated.

90 For example, during the 2003 Regular Session of the Texas Legislature, SB 319 was debated and eventually codified in the Civil Practice & Remedies Code and Texas Penal Code, addressing both wrongful death actions and homicides involving the unborn. In the Texas Bill Analysis for SB 319 the Digest states that SB 319 would allow civil and criminal penalties to be imposed for the death or injury of an unborn child, defining “individuals” to include an unborn child from every stage of gestation from fertilization until birth. Supporters were on record as stating, “SB 319 would close a gap in current law by allowing criminal and civil penalties for a third party who wrongfully injured or killed an unborn child against the wishes of the mother through actions such as murder, assault or drunk driving... Texas Prosecutors have been unable to bring criminal charges because of the definition in the Penal Code. See Senate Comm. on State Affairs, Bill Analysis, Tex. S.B. 319, 78th Leg., R.S. (2003).


92 See Tex. Penal Code § 1.07(a)(26) which defines an individual as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth,” But see Cal. Penal Code § 187(a) which defines murder as the unlawful killing of a human being or a fetus with malice aforethought. This wording clearly indicates that while a fetus is included within the parameters of the crime of murder, the fetus is viewed separately from a human being. See also Wasserstrom for additional discussion of varying fetal homicide statutes.
Also, the issue has been addressed in some jurisdictions the issue of an unborn child being placed in protective custody. This question has arisen when (1) the mother is involved in behavior threatening the life of the child such as drug or alcohol use or (2) for religious or other reasons the mother refuses medical procedures necessary for the survival of the fetus against the advice of her physician. Not all states have faced this issue, but in the majority of those addressing the issue they have declined to give custody of the unborn child to the Department of Human Services. These states have done so for two reasons. One reason is that of statutory construction. Based on the interpretation of “child” in the context of children’s, Juvenile or Penal Codes, the courts have concluded that a “fetus” is not within the definition of “child” leaving the courts without jurisdiction. Three states have allowed protective custody on the grounds that the state’s interest in the fetus out weights the mother’s rights, but in those instances the fetus was either viable or had reached the midpoint of the pregnancy.

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93 *Arkansas Dept. Of Human Svcs v Collier*, 351 Ark. 506 (2003)(pregnant woman had not received prenatal care and tested positive for methamphetamine and the court said “juvenile” in the Arkansas Juvenile Code applied to an individual from birth to the age of eighteen); *State ex rel Angela MW v. Kruzicki*, 209 W.S.2d 112 (1997)(pregnant woman tested positive for drugs but unborn fetus not put in protective custody because the word “child” in the Children’s Code does not encompass unborn fetuses); *In re Unborn Child of Starks*, 18 P.3d 342 (Okla. 2001) (Oklahoma Legislature did not intend to include fetuses, viable or otherwise, within the definition of child under the Children’s Code); *People in Interest of H*, 74 P.3d 494 (Colo. App. 2003)(fetus is not specifically included in the statutory definition of “child”); *Stallman v. Younquist*, 531 N.E.2d 355 (1988)(a pregnant woman owes no legally cognizable duty to her developing fetus and thus it cannot have rights superior to those of its mother); *In re A.C.*, 573 A.2d 1235, 1238 (D.C. 1990)(a mother’s privacy rights against bodily intrusion outweighs the interests of the unborn child and state).

94 *Jefferson v. Griffin Spalding County Hospital Authority*, 274 S.E.2d 457 (GA. 1981)(unborn child was a viable human being and court ordered protective custody when the mother refused a caesarian section on religious grounds); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421 (1964)(protective custody of a fetus was necessary to initial medical treatment to save its life in mother’s thirty-second week of pregnancy); *In re Jamaica Hospital*, 491 N.Y.S.2d 898 (1985)(the fetus had not reached viability but the pregnancy was mid-term and
Finally, in looking to *Roe v. Wade*\(^{95}\) where all paths on this subject usually lead, again the legal framework that has been established in the discussion of abortions further supports the position that the pre-embryo is not a person from a legal standpoint. In the landmark case of *Roe v. Wade*, the United States Supreme Court held that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother were unconstitutional.\(^{96}\) Prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician but subsequent to that time the state may regulate in ways reasonably related to maternal health, and at the point of viability the state may even prohibit abortions except where necessary to preserve the life of the mother.\(^{97}\) While the Court in *Roe* was balancing a woman’s right to privacy against the state’s interest in protecting life,\(^{98}\) in the context of the pre-embryo, we are still looking at a balancing of the right to procreate,\(^{99}\) including therein the right to utilize assisted reproductive technology, against the other party’s desire to avoid procreation. The state’s potential interest in protecting life is actually not implicated in the context of the pre-embryo because the courts have recognized that the state’s interest in protecting life is not court ordered a blood transfusion over mother’s objection on religious grounds due to compelling state interest).

\(^{95}\)410 U.S. 113, 93 S.Ct. 705, 35 L. Ed. 2d 147 (1973).

\(^{96}\)Id. at 705.

\(^{97}\)Id.

\(^{98}\)Id. at 732 (recognizing the state’s compelling interest in protecting potential life is at the point of viability).

implicated until the stage of viability. If the pre-embryo were treated as a person, this would completely frustrate the Roe decision as well as again elevate the status of the pre-embryo above that of the non-viable fetus at a much later stage of development inside the woman’s body.

The Court’s rationale in Roe while focusing on a different tug-of-war of interests, really provides the key in unlocking this whole distorted question that is presented with the pre-embryo today. In looking at the history of the law criminalizing abortions, the Court had to sort through the various positions taken over time. The Court explained that the common law provided that an abortion that occurred before quickening, recognizable movement of the fetus in utero, appearing usually in the 16th to 18th week of pregnancy, was not an indictable offense. This viewpoint appears to have developed from philosophical, theological, civil and cannon law concepts of when life begins. The Court stated that a “loose consensus” evolved that the embryo or fetus became recognizably human at some point between conception and live birth. However, Christian theology ultimately fixed the point of “animation” at 40 days for a male and 80 days for a female. Prior to that point the fetus was to be regarded as part of the mother and its destruction was not homicide. Even if we apply this Christian theological approach of

\[100\] *Id.*

\[101\] *Id.* at 716-717.

\[102\] *Id.* at 717.

\[103\] *Id.*

\[104\] *Id.*

\[105\] *Id.*
“animation” to the pre-embryo we do not have a human person as defined by that characterization.\textsuperscript{106}

Due to the lack of empirical basis, the animation approach was not used and the idea of quickening was what was adopted by common law in the United States.\textsuperscript{107} As the Court wrapped up its analysis of the question of when life begins from a legal standpoint, Justice Blackmun wrote “it is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19\textsuperscript{th} Century, abortion was viewed with less disfavor than under most American statutes” that were currently in effect at the time of the \textit{Roe} decision.\textsuperscript{108}

As Justice Blackmun stated in \textit{Roe}, “we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”\textsuperscript{109} This is still true today. The debate as to the question of when life begins is ongoing and just as emotionally charged as ever. It is doubtful that we will ever reach a consensus. However, that does not change the fact that we need laws to govern society and those laws must act in a way that preserves fundamental liberties that have been time and time again found within the words of the Constitution. It is in this light we should embrace the fact that the pre-embryo should not be classified as a human

\textsuperscript{106}This is so because the pre-embryo is at less than 14 days of development, much less than the 40 to 80 day mark.

\textsuperscript{107}Id.

\textsuperscript{108}Id. at 720. As he restated, “a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”

\textsuperscript{109}Id. at 730.
person under the law. The pre-embryo is in a much earlier state of development than the non-viable fetus and even the fetus at the time of quickening. But by turning away from recognition as a full legal person does not mean that as a society we have to accept an idea of potential children being sold on the market or flushed down a drain.

By moving to the middle ground we prevent a man or woman from having his or her fertility held hostage. This is more so for the woman than the man simply due to science. While the male sperm can be, and has been for years, cryogenically stored and thawed for later use, the female egg does not enjoy the same possibility.\textsuperscript{110} While science is working towards such a possibility, it is not a true viable option at this time. What this means is that for a woman who is faced with the emotional and physical strain of infertility her solution is creating the pre-embryo and storing some or all for future use.\textsuperscript{111} This means that she has no choice but to mix her “property” with that of a male sperm provider, whether her husband or some donor, in order to have hopes for a child in the future. She must give up her autonomy in making these decisions to have the hope of a child in the future. We may soon reach a day when that is not the reality but for now it is. By moving the pre-embryo into the position as a legal person as some states propose to do would essentially deprive her of the right to procreate and have the hope of a biological child of her own.\textsuperscript{112} By allowing her spouse the ability to essentially veto her future


\textsuperscript{112} Recently there has been proposed constitutional amendments and legislation in a variety of states that would essentially elevate the pre-embryo to full legal person status. The Georgia legislature has proposed a bill titled “The Human Embryo Protection Act” which would give “personhood” status to embryos, declare that they are not property, that they must be made available for
use of the pre-embryo in the event of a later disagreement, again she is being deprived of the possibility and hope of a biological child of her own and in turn we are reducing the chance of potential life.

This is where the law of property, amazingly enough, can step in and actually provide a win-win situation.

**B. Problems with Treating Pre-Embryos as Purely Property as Illustrated by the Sperm and Egg Market**

The Thirteenth Amendment to the United States Constitution abolished slavery in the United States due to significant moral, philosophical and religious problems with the concept of owning another human being. If a person could not own another person, then how could a person own a part of another person or of their own body? Such an issue did not really come up for debate until more modern times. In *United States v. Garber*, the Fifth Circuit Court of Appeals in the setting of a dispute with the IRS over an income tax return, one issue the court was addressing was whether or not the payments to Ms. Garber for plasma donation was adoption if they are no longer going to be used by the creating couple, and would prohibit the destruction of them. See American Society of Reproductive Medicine, Washington Wire, ASRM News, Spring 2008 Vol 42 No. 1. Additionally ASRM summarizes a variety of legislation proposed in West Virginia which prohibits destruction of embryos to enable them to “live out its full life;” an Indiana bill that would prohibit destruction of an abandoned embryo and would permit its adoption; the New Jersey bill that would require the motivating intent for creation of the pre-embryo to be implantation in a married woman’s body; and a far reaching proposed constitutional amendment in Colorado that would elevate the pre-embryo to full legal person status. See also New York Times editorial “Abortion Rights on the Ballot, Again”, Oct. 13, 2008. These proposed legislative enactments would almost certainly bring the ART industry to a screeching halt at least for a time and cryopreservation of pre-embryos would most certainly be very limited when considering them as human persons who must be implanted into someone. As a result of the elections on November 4, 2008 Colorado voters did not support the proposed Constitutional Amendment by a 3-to-1 margin. See Electra Draper, “Personhood Push Rejected,” *The Denver Post* (Nov. 5, 2008).

113 U.S. Const. amend. XIII, § 1. See also Sprankling, Understanding Property Law, Ch. 7, §7.05[A] p. 82 (2d Ed. 2007).
payment for a service or for property. The Fifth Circuit concluded that plasma “like any other part of the human body” is tangible property.\textsuperscript{114}

With the development of organ transplants, the issue was once again renewed with a discussion of control over human organs resulting in the Uniform Anatomical Gift Act being adopted by all fifty states.\textsuperscript{115} We can also look to \textit{Moore v. UCLA} where the California Supreme Court addressed the question of whether cells that had been removed from Mr. Moore’s body were his property.\textsuperscript{116} While the majority opinion in \textit{Moore} refused to recognize the cells as Mr. Moore’s property, the dissenting opinion by Justice Mosk provides a well-reasoned and rational approach to the question providing some guidance to assist in the area of reproductive materials from the human body.

Justice Mosk stated in his dissent that concepts of property and ownership in our law are extremely broad.\textsuperscript{117} The term property is comprehensive enough to include every species of estate, real and personal, and everything which one person can own and transfer to another.\textsuperscript{118} He affirms the fact that property is an abstract concept that is said to be composed of a bundle of rights that may be exercised by the owner of that property, the most common of those being the

\begin{footnotes}
\item[114]United States v. Garber, 607 F.2d 92, 97 (5th Cir. 1979).
\item[115]Revised Uniform Anatomical Gift Act (2006) originally enacted in 1968, it was the first organ donation act and allowed the donation of organs and tissues. In 1987, it was modified to prohibit the sale of human organs, make donation easier and give rights to coroners and medical examiners. In 2006, the UAGA was revised again to hopefully create more uniformity. At least 38 states have enacted the revised UAGA.
\item[116]51 Cal. 3d 120, 793 P.2d 479 (Cal. 1990).
\item[117]\textit{Id.} at 161.
\item[118]\textit{Id.} at 165.
\end{footnotes}
right to possess, to use, to exclude others and to dispose or transfer by sale or gift. The important point to note is that the same bundle does not attach to all property. Based on policy, the law may limit or forbid the exercise of certain rights over certain forms of property. Such a limitation or prohibition may diminish the bundle of rights but there could still be deemed in the law a property interest worthy of protection. Pruning away of some or a great many of these elements does not entirely destroy the title. Mosk was clearly in favor of recognizing a property interest in the human body but providing some limitations and protections against the sale and market type transfers with which society would be concerned. Basically, he was looking at all parts of the human body along the lines of organs. For example, a person can donate a kidney to another but cannot donate both kidneys while still alive. A person can receive compensation for costs of removal, processing, preservation, quality control, storage, transportation, implantation or disposal of a part. However, it is a felony to knowingly purchase or sell a part for transplant or therapy.

However, the concurring opinion by Justice Arabian gets to the heart of the moral issue that surrounds the idea of allowing parts of the human body to be treated as property. Arabian stated that the plaintiff wanted to treat “the human vessel–the single most venerated and

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119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
124 Revised UAGA Sec. 16 (b) (2006).
125 Revised UAGA Sec. 16 (a) (2006).
protected subject in any civilized society—as equal with the basest commercial commodity."\textsuperscript{126} Arabian went on to state that this would “commingle the sacred with the profane” and he greatly feared the effect on human dignity if there existed a marketplace in human body parts.\textsuperscript{127}

Well guess what? There already is a marketplace in the human body parts that are the components of reproduction—sperm, egg, and hormones. Whether we label egg and sperm as property or not, the simple truth is that they are freely bought and sold in market conditions and are treated as property of the individuals. As discussed by Professor Debora L. Spar of Harvard Business School, in 1986 the revenue produced from infertility treatments totaled $41 million and by 2002 the revenues approached $3 billion.\textsuperscript{128} The basic components of the fertility industry are the human eggs, sperm and hormones each fetching their own market rates.

Sperm banks operate throughout the world but those in the United States seem to operate a little differently from those overseas.\textsuperscript{129} The American sperm banks offer up a whole host of information about the “anonymous” sperm donor and in some instances sperm banks go a step further and provide information so that the children born from the sperm may one day contact their “biological fathers.”\textsuperscript{130} These banks are raking in huge profits at the same time. According to Professor Spar, most sperm banks charge a standard fee of $200 to $300 per specimen vial

\textsuperscript{126}Moore, 51 Cal 3d at 149.

\textsuperscript{127}Id.


\textsuperscript{129}Id. at 38-39.

\textsuperscript{130}Id. at 39.
while paying the donors approximately $75 per specimen. Each of those donated specimens provide three to six vials of sperm.

While the collection of donated sperm is relatively low-tech, the area of collection of eggs is a much more involved process. The market for eggs emerged in the 1990s so it is a much newer frontier than the sperm market. It also brings with it much more controversy. The market developed for eggs in conjunction with the IVF process. “[F]or women who had no other way of conceiving, the combination of IVF and donor eggs was a godsend. As one recipient reported, ‘I have just given birth to a miracle child.’” The egg market relies on supply of healthy eggs and medical procedures to collect those eggs. As described above in section one of this article above, the woman who is donating eggs will undergo a drug-induced process to overstimulate her ovaries and produce a larger quantity of eggs and those eggs are then removed through a procedure using a needle guided by ultrasound into the ovarian follicles. In the case of the biological mother undergoing IVF this rigor of hormones and medical procedures will hopefully produce in the end a baby for that mother. However, in the context of the egg donor, the same rigor is required without the potential future joy. So as compared to the supply of donor sperm in the market, the supply of donor eggs is much more limited. That is where the money comes in.

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131 Id. at 37, 39.
132 Id. at 39.
133 Id. at 41-42.
134 Id. at 42.
135 Id. at 42.
136 See supra notes 15-17.
Agencies have cropped up across the United States that offer fees to egg donors for their “time and inconvenience.”\footnote{Spar, Ch. 2, p. 44. In 1990, clinics offered $2,500 to healthy women for their time and inconvenience. “Tokens of appreciation” have also been given at the time of egg retrieval in the form of chocolates, a massage, sometimes a diamond necklace. \textit{Id.} at 45. By 2004 substantially higher prices were being offered.} The most shocking evidence of the market driven area is found in some advertisements for egg donors. An ad was posted in 1999 at an Ivy League school offering $50,000 for a donor who was at least 5'10” with an SAT score of 1400 and no family medical problems.\footnote{\textit{Id.} at 46.} Another ad offered $100,000 to a Caucasian woman with college level athletic ability.\footnote{Id. Citing Joan O’C. Hamilton, “What Are the Costs?” and James Herbert, “Donation Dilemmas: Selling of Eggs Gives Birth to Controversy,” \textit{San Diego Union-Tribune}, September 3, 2000, E1.} The egg donation centers range from those being purely anonymous to those that offer an online database with everything from name, SAT scores and photos of the donor and her family.\footnote{Id. at 45. Genetics & IVF Institute offers information on the donors such as ethnic background, education, occupation and interests. Center for Egg Donation is the facility that offers the online site with complete information. \textit{Id.}}

The American Society for Reproductive Medicine published an Ethics Committee Report in August 2007 discussing the very issues raised by ads and transactions of this nature.\footnote{ASRM Ethics Committee Report, Fertility and Sterility Vol. 88, No. 2, August 2007, pp. 305-309.} ASRM states that the “use of financial compensation raises two ethical questions: [1] do
recruitment practices incorporating remuneration sufficiently protect the interests of oocyte donors, and [2] does financial compensation devalue human life by treating oocytes as property or commodities?"142 The ethics committee basically answers these questions by proposing a system allowing for compensation but in a limited and calculated way in order to recognize the time and inconvenience involved in the process as well as some potential medical and psychological risks associated with the process. As stated in the report, originally it was believed that donated oocytes would come from three different types of donors: (1) women undergoing IVF who had excess oocytes; (2) women undergoing an unrelated medical procedure that also resulted in ovarian stimulation allowing for oocytes to be retrieved during the unrelated surgery; and (3) women who specifically underwent the process to provide oocytes to others.143 Reality quickly revealed that the women in the second category were not a viable source due to their own medical issues as well as a lack of desire to participate in the process. This left the potential donors in the first two categories. With the development of embryo cryopreservation, most women in the first category were no longer a viable source for donation because they would use all collected oocytes for fertilization and creation of pre-embryos. This leaves the donor pool most likely coming from the third category of women who are going through the process solely to be a donor.144

The ethics guidelines set forth by the ASRM Ethics Committee represent a well-reasoned and middle of the road approach to take recognizing society’s desire to avoid commodification of the human body while also embracing scientific technologies for reproductive medicine.

142 Id. at 305.
143 Id.
144 Id.
basic structure outlined for payment to oocyte donors would allow for the following: (1) financial compensation up to the amount of $5,000; (2) any payments from $5,000 to $10,000 would require justification; (3) sums above $10,000 would not be considered appropriate; (4) adoption of effective disclosure and counseling procedures to discourage inappropriate reasons for donation; (5) provide for the same physician patient relationship for oocyte donors as any other patient; (6) adoption of disclosure policies regarding coverage of a donor’s medical costs should complications arise from the procedure; (7) allow for a donor’s withdrawal from the program at any point in time for medical or other reasons and allow payment of a portion of the fee appropriate to the time and effort contributed; (8) under no circumstances a conditioning of payment on successful retrieval or the number of oocytes retrieved; and (9) compensation should not vary according to the planned use (research or use), the number and quality of the oocytes retrieved, the outcome of prior donation cycles or the donor’s ethnic or personal characteristics.145

These types of market driven practices are what make people dislike a property label being placed on eggs, sperm and especially embryos. The proper way to legally classify pre-embryos has been a taboo topic for various courts across the United States. Yet as discussed above, in case after case the courts have been perfectly willing to allow destruction of the pre-embryos in order to support either a contractual agreement or a desire of one party to avoid procreation. Additionally, any agreement to destroy pre-embryos would violate public policy if they were recognized as human beings.146 Therefore, with very limited exception, it appears that

145 Id. at 308 (emphasis added).
146 Shackelford & Collett, Brief Amicus Curie of the Texas Physicians Council, Roman v. Roman, No. 06-0554, p. 7 (citing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S.
there is some degree of implicit agreement that the law pre-embryos are not given legal status as human beings.\textsuperscript{147} So where does that leave us?

While the products of conception exist independently as egg and sperm they have been treated along the lines of property of the individual provider even if reluctant to actually label it as such. Two cases originating out of California courts have squarely addressed the issue of classification of sperm and have labeled cryopreserved sperm as “property” that could pass through the decedent’s will.\textsuperscript{148} Although the courts in both \textit{Hecht v. Superior Court} and \textit{Estate of Kievernagel v. Kievernagel} treated the sperm as property for purposes of passing through the decedent’s will, both courts were sure to point out that the sperm as reproductive material constituted a special type of “property” that would not allow application of laws relating to gifts of personal property.\textsuperscript{149} These courts did not, however, have to address the truly difficult legal and moral questions that arise in the context of disputes over the pre-embryo because whether property or not, there are interests of only one individual involved, the sperm provider–no balancing tests are necessary and no tug-of-war over the right to procreate vs. the right not to procreate is present.\textsuperscript{150}

\textsuperscript{911} (1993); \textit{Miller v. Am. Infertility Group}, No. 02-L-7394, slip op. at 1 (Cir. Ct. Cook County, Ill. Feb. 4, 2005).


\textsuperscript{149} \textit{Hecht}, 16 Ca. App. 4\textsuperscript{th} at 850; \textit{Estate of Kievernagel}, 2008 WL 4183504 at 5.

\textsuperscript{150} \textit{Estate of Kievernagel}, 2008 WL 4183504 at 7.
Really what people are uncomfortable with is really only one stick in the bundle of property rights that are defined—transferability of the property. With egg and sperm there has been a limitation in some cases regarding the sale of eggs and sperm, however, the eggs and sperm donors are allowed to be paid for their service, a technical distinction from paying for the actual reproductive material itself. Whenever money is changing hands, regardless of whether it is payment for the material or the service, the gametes seem like a commodity in the marketplace just like any other. When the eggs and sperm and separate, while they may have an ability to create life, that has not occurred and it cannot occur without a successful joining of the two. However, the very value of the sperm lies in its potential to create a child after fertilization, growth and birth.\textsuperscript{151} That means in turn, the very value of the pre-embryo is the even more certain potential of creating a child after implantation, growth and birth as the fertilization has already occurred and initial development has begun.

\textit{B. Classification of the Pre-Embryo as “Property With Special Dignity”}

Property rights serve human values. They are recognized to that end, and they are limited by it.\textsuperscript{152}

Property law is private law, concerned with facilitating interactions of individuals.\textsuperscript{153} Property law enables individuals to peacefully acquire, keep, transfer or dispose of virtually every kind of thing that has value.\textsuperscript{154} However, part of the distaste and taboo nature of using

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\textsuperscript{151}\textit{Hecht v. Superior Court}, 16 Cal. App. 4\textsuperscript{th} 836, 850 (Cal. App. 2\textsuperscript{nd} Dist. 1993).


\textsuperscript{153}Patricia Smith, \textit{The Nature and Process of Law: An Introduction to Legal Philosophy}, Ch. 4 The Nature of Property and the Value of Justice, p. 365.

\textsuperscript{154}\textit{Id.}
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property rights to define the status of the human embryo is the misunderstanding of what property truly is. One of the most commonly found definitions of property is that property is legally enforceable rights among people that relate to things. But that notion of the rights relating to “things” is really inaccurate. Property is not just things, tangible items like land, cars, houses, paintings or jewelry. Property is also discoveries, business goodwill, and ideas. The lyrics to a song, the idea for a play, an invention are all property. So can property law be used to define the relationship of people to pre-embryos? The answer is a qualified yes.

If we accept some basic ideas (1) the unborn have never been recognized in the law as persons in the whole sense, (2) the buying and selling of human body parts and potential human life is unethical, (3) no state’s highest court has chosen to treat the pre-embryo as a legal person, (4) there has been some treatment, even if not labeled as such, of sperm, egg and pre-embryos as property, and (5) the fact that an individual’s procreative freedoms are


156 Roe, 93 S.Ct. at 731.

157 Davis v. Davis, 842 S.W.2d at 588. Jeter v. Mayo Clinic, 211 Ariz. 386, 121 P.3d 1256 (Ariz. Div. 1 2005). ASRM Ethics Committee Report, Fertility and Sterility Vol. 88, No. 2, Aug. 2007. (setting forth a system where payments to donors would only be allowed to a certain maximum amount and payments could not be made to certain characteristics.

158 Davis v. Davis, 842 S.W.2d 588 (Tenn.1992) (pre-embryos not persons or property but occupy an interim category); Kass v. Kass, 91 N.Y.2d 554 (NY 1998) (pre-embryo’s were not “persons” for constitutional purposes but the court did not need to address any special status); A.Z. v. B.Z., 431 Mass. 150 (Mass. 2000); J.B. v. M.B., 170 N.J. 9 (N.J. 2001); Litowitz v. Litowitz, 146 Wash.2d 514 (Wash. 2002); In re Witten, 672 N.W.2d 768 (Iowa 2003) (not a legal person); Roman v. Roman, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. Denied), Cert denied 2008 WL 140521 (Jan. 9, 2008) (at the trial court the pre-embryos were treated as community property; on appeal the court left that determination to be made by the legislature.

159 Revised UAGA, Sec. 16 (2006); York v. Jones, 717 F. Supp 421 (E.D. Va. 1989)(pre-zygote was “property” of the parents); Roman v. Roman, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. Denied), Cert denied 2008 WL 140521 (Jan. 9, 2008) (at the trial court the pre-embryos were treated as community property; on appeal the court left that determination to be made by the legislature.

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implicated, then we can move forward in establishing a legal framework to deal with disputes about the disposition of cryopreserved pre-embryos.

If pre-embryos are treated similarly to organs, they could still be “property” for purposes of establishing ownership and control issues but as Justice Mosk stated in his dissent in Moore, the full bundle of rights does not have to be present. The right to transfer stick in the bundle could be limited in a way, as it currently is in some places, that such property cannot be transferred for consideration, thereby allowing gifts or gratuitous transfers but prohibiting sales, much like the UAGA does with organs.160

The problem is that in having legally enforceable rights in the pre-embryos the law cannot treat them in the exact same manner as inanimate objects of personal property such as paintings or cars or even ideas. There is a human life component to the pre-embryos—the potential for human life to develop—that does make them inherently unique. They deserve their own classification. However, this classification can be somewhat defined by using a property rights model for guidance. So, in order to further discuss the potential use of a property rights analysis for the pre-embryo, let us first explore the traditional Bundle of Rights Model.

1. Property Rights as the Traditional Bundle of Rights Model.

The bundle of rights model most commonly includes the right to include, right to exclude, right to transfer and right to possess while other rights may also be added to the bundle

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160Revised UAGA, Sec. 16 (2006). Remember, the provisions in the UAGA do allow for some limited compensation which would be in agreement with the ASRM Ethics Committee report.
as well. The bundle of rights view of property is what commonly corresponds with the
definition of property being a set of legal relationships among people that relate to things.
However, as the “things” defined as property have expanded over time, these “things” are no
longer a list of tangible objects but also include very intangible “things” such as business
goodwill, business identity, franchises, licenses, employment, government benefits and services,
inventions, technological and scientific developments, expressions of ideas and investments. The creation of these new forms of property create new ideas about property.

However, as pointed out by Craig Arnold, judges and lawyers still care very much about
the “thingness” of property, despite this evolution in what is included in the category of property
and how the law treats it. If we move away from the “thingness” idea, then a property rights
model can be effectively utilized to treat the pre-embryos in dispute as property with special
dignity, recognizing both the property and human components of what is involved. It has been
argued that property is entirely a legal concept, without law there would be no property. However, others suggest that property is “a moral notion that follows from certain conceptions of
rights and justice.” This makes property have more to do with human rights, relationships and
interactions than with things in and of themselves. This is the heart of the debate over the
disposition of pre-embryos and why the property rights model can work effectively. Although we

\[161\] Footnote 20 from Arnold, 26 Harv. Env'tl. L. Rev. 281 “The Reconstitution of Property:
Property as a Web of Interests”

\[162\] 26 Harv. Env'tl L Rev at 288.

\[163\] 26 Harv Envtl L Rev at 289.

\[164\] Smith, The Nature of Property and the Value of Justice at 366.

\[165\] Id.

\[166\] Id.
as a society may be reluctant to label them as such, at the core of all of the legal battles outlined in the prior section of this article is a dispute over what control each party has over the pre-embryos—it comes down to perceptions of ownership.

In analyzing the classic Bundle of Rights model and the rights commonly included therein, it is easy to see how the model can work without having a purely tangible “thing” involved. The bundle consists of the right to include, right to exclude, right to transfer and right to possess. It incorporates the traditional concept of ownership of a tangible thing along with ownership of intangibles as well.

The right to include allows the holder of this right to determine how the property will be used. What exactly will the owner of this property allow to happen to it? For something like land, it is easy to see how the owner has the ability to determine how that land will be used, of course subject to restrictions placed by the public and by private individuals. For intangible property, the owner also has the ability to determine how the property will be used, although in a different sense. Instead of dictating whether or not a home may be built on Blackacre, the owner of some intangible property may determine who may have permission to use an idea or invention that has been patented or a work that has been copyrighted.

With the right to exclude, the owner of the property has the ability to prevent others from making use of that property. Again, as an owner of real property with the right to exclude, the owner may prevent someone from trespassing on his land. As the owner of a work that has been patented or copyrighted...

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167 Spar, The Baby Business, Ch. 7 Songs of Solomon, 198-199.

168 While an owner’s right to use his land may be fairly unlimited, public regulations such as zoning ordinances may limit the owner’s use and private restrictions such as covenants may also limit the owner’s use to an extent. With tangible personal property we can also see that the right to use property may also be limited, for example as limited by criminal law a person cannot legally use a car to run over someone or cannot use a handgun to shoot someone.
copyrighted, the owner may exclude others from using that copyrighted material unless given the express permission of the copyright holder.

The right to possess is different from both the right to include and exclude but is tied to those rights as well. The definition of possession differs depending on the circumstances and what “thing” is involved. The idea of possession of real property differs from personal property and it also differs within personal property depending on whether the item is tangible or intangible and what form the tangible item takes. However, possession has some common core in that possession is often defined as both some intent to exclude others from using the property and having some degree of dominion and control over the property or the thing in which the rights are held.\footnote{\textit{Popov v. Hayashi}, 2002 WL 31833731, Cal. Superior (Dec. 18, 2002).}

The right to transfer gives the holder of that right the ability to transfer the holder’s property rights to others.\footnote{Understanding Property Law (Sprankling, 2d Ed. Year?) Chapter 1, What is Property, p. 5.} There are of course limitations placed on this right as well by the law. With respect to land, the owner cannot transfer his rights in order to avoid creditors’ claims or may not impose invalid conditions upon the transfer of the land. Some types of property cannot be transferred at all and some can only be transferred during life or at death.\footnote{For example, property held in a life estate cannot be transferred at the death of the life tenant because by nature of what that person holds, there is nothing left to transfer upon death. There are certain future interests in property that at common law could not be transferred during the holder’s life and could only be inherited by intestate succession upon the holder’s death. If we look at the human body as property, the body cannot be sold. Also, a person’s organs cannot be sold, but can be donated. The right to vote is viewed as a property right and cannot be transferred at all.}

These four core rights that form the Bundle of Rights model are arranged differently to define the ownership interest the person has acquired and to an extent take into account the

\begin{footnotesize}
\footnote{Understanding Property Law (Sprankling, 2d Ed. Year?) Chapter 1, What is Property, p. 5.}
\footnote{For example, property held in a life estate cannot be transferred at the death of the life tenant because by nature of what that person holds, there is nothing left to transfer upon death. There are certain future interests in property that at common law could not be transferred during the holder’s life and could only be inherited by intestate succession upon the holder’s death. If we look at the human body as property, the body cannot be sold. Also, a person’s organs cannot be sold, but can be donated. The right to vote is viewed as a property right and cannot be transferred at all.}
\end{footnotesize}
“thing” that is being owned. Therefore, in different situations the bundle looks different and it is
different. None of these rights is absolute in their individual formations and in combination. So,
can the bundle be adjusted to fit the idea of a pre-embryo as property and if so should the
legislature step in and make it so?

A legal positivism model asserts that rights, including property rights, arise only through
the government.\textsuperscript{172} The natural law theory argues that rights arise in nature as a matter of
fundamental justice, independent of the government.\textsuperscript{173} The role of the government is simply to
enforce natural law and not invent new law.\textsuperscript{174} However, when science creates something new
that is subject to new classification and significance, new law has to be invented or evolved.
And, as we have seen time and time again from the cases that currently exist, the courts are
struggling with this idea. No one from the government has decided to jump in and dictate what
should happen within the process of ART, with limited exception.\textsuperscript{175} Individuals are taking their
disputes, their pleas for help to the courts and demanding decisions be made, and really, they
must be made.

\textsuperscript{172} Understanding Property Law (Sprankling, 2d Edition 2007), Chapter 1 What is Property, P. 2
\textsuperscript{173} \textit{Id.} at p. 3.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} According to Kindregan & McBride, “as a practical matter, the in vitro fertilization business
has become so commercialized that a legal or policy argument raising objections to IVF based on
the exchange of money for such services is unlikely to find support today.” Assisted
Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science, Ch. 3 In vitro
Fertilization, § 3.2 Legal Regulation of IVF, p. 80 (ABA Publ. 2006). Laws that do exist have
been enacted on an ad hoc basis and do not impose any substantial legal restrictions. \textit{Id.} At 81.
The U.S. Federal Organ Transplant Act of 1986 (42 USC § 274 (e) (2005)) prohibits the sale of
human organs, but it has never been applied to gametes and banning the sale is unlikely \textit{Id.} @
80.
The law that currently exists is based on the dichotomy of person and thing and now that society is moving into new territory where we are dealing with ideas that are really neither person nor thing, so from which perspective should we work at this problem? Under the legal positivism model, the government could create the rights for this new category or under natural law theory it could be argued that the government is merely enforcing what already exists. John Locke theorized that “every man has a property in his own person” from which it immediately follows that “the labour of his body and the work of his hands. . .are properly his.” \(^{176}\) If one owns one’s body, then on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one’s personhood. \(^{177}\) Therefore, if our own body is our personal property, when something is removed from the human body, under a natural law theory it would remain as that individual’s personal property and the laws that the government enacts to deal with those situations would simply be enforcing the natural law and embrace that as an individual’s personal property and would place this squarely into the property category. From a legal positivism perspective, however, the government may need to invent new law to address whether or not any rights of the person even exist in that situation because under this model there are no rights unless the government defines them.

If the Bundle of Rights Model is applied in the situation of the natural law theory, where it is basically assumed that property rights exist in the independent cells that make-up these pre-embryos, then the only laws that would exist would be those laws that give recognition to and enforce this property. However, once the separate property of each individual is combined and the pre-embryo is created, under a natural law theory perspective, how does the law enforce the

\(^{176}\)J. Locke, 2\(^{nd}\) Treatise of Gov’t, Ch. V, § 27

\(^{177}\)Perspectives on Property Law, p. 11.
natural rights of each individual? And even more complicated, what if the sperm comes from a donor and the egg comes from an “intended parent?” Even if the gametes (sperm and egg) are individual personal property of each man and woman, how does the natural law deal with this combination of the two? Does this mean the law should at that point recognize a 50/50 ownership in this newly created property if we label it as such? And what does natural law recognize for a donor who is providing sperm or egg but does not intend to keep any ownership interest in that property once donated? In that instance under natural law, is the newly created property owned 100% by the person who is biologically connected to it? Using a natural law perspective seems to lead to strange and unintended results. The theory of law enforcing what naturally exists does not really work in application when what exists did not come about naturally.

From a legal positivism perspective, if rights only arise through the government, the bundle of rights could be constructed in a manner that is tailored to the very unnatural consequences that arise from this scientific marvel of ART, but what would that bundle look like? It would still involve the right to include and exclude, however, overlapping with those rights would also be the fact that there is a concurrent ownership component layered onto those rights. The right to possess again is involved but fine-tuned. The right to transfer stick would need to be at least limited if not eliminated. While the owners would have in theory a possessory interest in the property being the pre-embryo, for some time possession would be transferred, though ownership not transferred, to someone else.

\footnote{Embryo donors or gestational surrogates should not be considered the parents of a child resulting from such transfer or implantation because that would contradict the intent of the parties, which should govern. Kindregan & McBride at 119.}
a. The Rights to Include and Exclude

The Supreme Court of the United States has stated that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”\(^\text{179}\) The right to exclude allows the owner of this right the ability to prevent others from using or accessing the property without permission to do so.\(^\text{180}\) As stated by the court in *State v. Shack*, “it was a maxim of the common law that one should so use his property as not to injure the rights of others.”\(^\text{181}\) Additionally, the right to include is the right that gives the owner the ability to allow others to make use of the property.\(^\text{182}\) Again, a difference in the treatment of these rights when dealing with pre-embryos rather than the independent gametes.

If the gametes are treated somewhat as personal property of each individual from whose body they originated, in the situations where a man and woman have the available gametes but need ART to assist with the process of conception, the individual rights to include and exclude that existed when the gametes were personal property would now carry over to the newly formed pre-embryo once the fertilization process is completed. Now the man and woman who originally owned the separate gametes and had the ability to determine how the gametes would be used, if they would be used, and whether or not others would be allowed to use them now have those same rights to make those determinations about the pre-embryos. However, now these rights are


\(^{180}\)Dukeminier, Property (6th Ed. 2006) at 86.

\(^{181}\) *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971). Although this case was dealing with an issue relating to real property, the idea is still applicable in the context of a non-tangible “property.”

\(^{182}\)Dukeminier, at 86.
further complicated by the fact that not one individual has a property interest here, but rather two individuals share these interests in this pre-embryo that has been created. The man and woman who now own the pre-embryo would have the ability to determine how the pre-embryo would be used, if it would be used and whether or not other would be allowed to use it. This begins the whole complicated mess that needs to be sorted out and it only gets more challenging.

If we look to the models that have been used in the cases, a combination of approaches by the court can work to establish a moderate and balanced approach to the idea of who, if anyone, controls the outcome. As a practical matter, there should be a requirement that all couples entering going down the IVF path fill out consent forms that give the clinics some guidance as to what the parties desires are for the future disposition of the pre-embryos to be stored in the event of divorce, death of one or both parties, or withdrawal from or completion of the IVF process. However, pulling away from the court’s binding contract approach with a requirement of mutual consent to change the disposition as dictated found in *Kass* and following an approach as set forth by the court in *Witten* would be more likely to give effect to the true intent of the parties. In *Witten* the court would allow for contracts to be enforceable and provide guidance to the medical providers. However, the *Witten* court also recognized that in dealing with issues of such a personal and emotional nature, the individuals should be allowed to change his or her mind with respect to disposition of the pre-embryos up until the time of any such disposition. In order for the change to be valid, it must be communicated to both the medical provider and the other party (spouse or former spouse) through some form of written communication whether by letter or a court document. At that moment the clinic would be required to maintain the status quo if there is no agreement by the other party and allow for the dispute to be resolved. However, the options for resolution are where the outcome may change from the current situation.
b. The Right to Possess

The right to possess is the right to have exclusive physical control of a thing, or to have such control as the nature of the thing admits.\textsuperscript{183} Possession may be divided into two parts—the right to be put in exclusive control and the claim that others should not interfere with that control without permission.\textsuperscript{184} When the sperm and egg were in each individual’s body, each had a right to possess their own genetic material within their own body, i.e. the right to be in exclusive control and to prevent others from access to such material. Once the egg and sperm are removed from the body, the individuals do not necessarily lose the right to possess their reproductive material but rather have a practical need to transfer the possession of this material to qualified physicians and clinics in order for the material to be viable for use in the future. While the clinics may temporarily be transferred the right to possess, the individual are not transferring any ownership or control over the material. They are simply recognizing the practical reality that they lack the ability to maintain the material in their possession if it is to be successfully used in the future.

The same thing happens when the egg and sperm are further turned into pre-embryos through the process of in vitro fertilization. The individuals who provided these gametes for the fertilization process are also aware of the fact that they cannot maintain the pre-embryo in their possession but rather need to have that possession transferred to the physician and his or her clinic for the time being until the pre-embryos are used in the future. However, nothing more is

\textsuperscript{183}A.M. Honore, Ownership, p. 371 (Patricia Smith, The Nature and Process of Law, Ch. 4 The Nature of Property and the Value of Justice).

\textsuperscript{184}Id.
transferred to the physician and/or clinic other than some limited right to possession. The physician and clinic acquire no other rights incident to ownership.

However, what rights to possession do the individuals maintain? When sperm and egg are separate, the man has the right to demand “possession” of his sperm, unless that has been relinquished to a sperm bank or specific recipient of the sperm, the same would be true of a woman’s eggs. However, the pre-embryo is made of the sperm and egg together and when there is disagreement, who can demand possession? This is one of the sticks in the bundle that must be tailored to reflect the human component of what we are dealing with. If we were dealing with something like land or a painting, the parties could demand a partition which would result in a physical splitting up of the property if possible or the sale of the property and the monetary proceeds divided according to fractional shares of ownership. This right to partition is an absolute right of co-owners of property. However, the pre-embryo cannot be physically divided and the parties in dispute are not looking for money to split, someone is seeking the use of the pre-embryo or some disposition of it. This is where we have to move away from a pure property principle. A single pre-embryo cannot be “divided” and in the disputes that arise it has not been because both individuals want them for their own use, it has been the scene of destruction vs. personal use or donation vs. personal use and the interests involved aren’t subject to the type of partition where the law could say, okay party #1 you take half and do what you want and party #2 you take the other half and do what you want. The result that would come from that would completely frustrate the purpose of the parties.

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Sprankling, Understanding Property Law, Ch. 10 Concurrent Ownership, § 10.04 [B] p. 143-144 (2d Ed. 2007).
In the specially created right to possession stick, in the instance of a dispute over “possession” of the pre-embryos, there are several outcomes to consider. All disputes would begin with the idea of a valid and enforceable contract, which should be required by every fertility clinic and service provider in this context for their own guidance and reliance. However, as indicated by the court in *Witten*, the parties could change their mind from what was originally agreed upon in the contract.\(^\text{186}\) There is a need to reject the binding contract view in *Kass* because while contracts can be easily enforced in other areas where arms-length transactions are involved, the implications of these types of contracts are much different. For one thing, the contracts represent agreements with the clinic with respect to actions the clinic should or should not take regarding their pre-embryos stored there. The contracts are not agreements between the parties themselves.\(^\text{187}\) Additionally, the subject matter of these agreements involve very personal and intimate decisions that do implicate personal religious and moral beliefs that may indeed change over time. As stated by one woman facing the issue of whether or not to continue storing remaining pre-embryos at the fertility clinic she stated, “Before I became pregnant, I thought the decision would be easier for me. . . . But when it actually happened, I realized these are three potential lives.”\(^\text{188}\)

The enforceability of the contracts, however, would allow the clinics to rely on the provisions with respect to their obligations and responsibilities unless notified in writing that

\(^\text{186}\)672 N.W.2d 768, 780 (Iowa 2003).

\(^\text{187}\)A.2. v. B.2., 725 N.E.2d at 1056. See also Augusta Roman’s Brief on the merits to the Supreme Court of Texas (p. 23-24).

there is some disagreement as to what is to be done with the disposition of the pre-embryos.\textsuperscript{189} This would lessen the amount of potential disputes and liability for the clinics themselves while allowing the parties an opportunity to change their minds about this very personal decision.

However, when a disagreement occurs and the clinic is notified, there are some possible options for the resolution of the dispute.

\textbf{Scenario \#1:} if the dispute is one of destruction vs. personal use, the party desiring personal use would receive the possession stick and have the ability to have the pre-embryos implanted for that party’s desire to have a child. There would be no requirement that this be the absolute only means of having a child because adding that requirement would cause an addition burden on the party desiring to make use of the pre-embryo which could further complicate and lengthen the dispute to a point where even with the pre-embryos available for use no pregnancy could occur without the use of a surrogate which brings its own added layer of complications.\textsuperscript{190} As stated by Lee Rubin Collins, co-chairwoman of Resolve’s national advocacy committee, “Reproductive medicine is about creating life, not ending it.”\textsuperscript{191} By allowing the party who desires to make use of the pre-embryo the ability to do so even over the objection of the other party, the goal of creating life is recognized and protected. However, as contemplated by the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{189} \textit{Witten} at 782-783.
\item \textsuperscript{190} \textit{See} the case of Augusta Roman in \textit{Roman v. Roman}. Augusta Roman sought possession of the pre-embryos for her own personal use to have a biological child. Her ex-husband, Randy Roman, even contested the fact that this was her only way to have a biological child. Appellant’s Reply Brief, p. 9. Additionally, by the time the litigation and appeals concluded, Augusta Roman was then 45 making her chances of having a biological child even slimmer. See Augusta Roman’s Petition for Review to the Texas Supreme Court, p. 2.
\end{enumerate}
\end{footnotesize}
Uniform Parentage Act, the party withdrawing consent would not be obligated to be a legal parent of any children resulting from implantation.192

Scenario #2: if the dispute is one of destruction vs. no destruction but instead donation for adoption, if the party opposing destruction opposed that option under any circumstances, the parties could maintain the status quo with continued storage until the death of the party opposing destruction. Additionally, if the party desiring donation for adoption does not oppose destruction if the donation for adoption is not allowed, then the destruction could occur. This scenario is slightly different from the first option presented because in this case neither party desires use for their own purposes of having a biological child.

If we go back to some of the contract theory brought in through the courts in the various cases, at the outset of creating the pre-embryos there was intent on the part of both parties to create the pre-embryos to have a biological child for themselves. Admittedly at the time it was within the confines of their marital relationship, but there was intent to undertake efforts to conceive a child. The donation for adoption is beyond the realm of personal use. Now this would put the parties’ biological offspring into the hands of total strangers—an idea not originally contemplated, unless specifically indicated by contract. Research suggests that most families prefer not to donate their unused pre-embryos for adoption. In a recent study by Duke University in 2007, 22% of the families questioned were somewhat or very unlikely to donate to another couple. Slightly more than the 22% said they would thaw and discard them.193 By

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193Shari Roan, “On the Cusp of Life, and of Law,” Los Angeles Times, Health Section, October 16, 2008 citing to study by Anne Drapkin Lyerly, associate professor of obstetrics and gynecology at Duke University. Additionally noted in the study, almost half of the couples questioned said they would donate the unused pre-embryos to science, including use for stem cell research.
allowing for prolonged storage, the party opposing destruction is allowed to continue on in his or her lifetime knowing that the pre-embryos still exist and the party desiring to donate or destroy them is allowed to continue in his or her life knowing that while nothing is being done currently, there is the potential for donation in the future or even ultimately the destruction of the pre-embryos and no use of them.

c. The Right to Transfer

The right to transfer is simply that—the property owner’s right to transfer his property rights to others. In the market driven world in which we live, there is great emphasis on the property owner’s right to transfer his property freely but the law does impose restrictions on this right. The right to transfer is the stick in the bundle that most people are concerned with when the notion of treating pre-embryos or any other reproductive material as property arises. This brings in the concept of commodification and the possibility that we will have a market in babies. As illustrated by Professor Spar, there already is such a market and it is operating almost without any regulations or constraints. As she so eloquently put it, we “can’t put the genie back in the bottle” and it’s not clear that we should. It is possible that we simply need the law to fix the market instead of getting rid of it. While commodification of children should not and

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195 Id. The examples are given that O cannot transfer title to Redacre for the purpose of avoiding creditors’ claims; not is O free to impose any condition he wishes incident to the transfer and O cannot refuse to sell his rights in Redacre because of the Buyer’s race, color, national origin or gender.

196 Spar, The Baby Business, Ch. 7 Songs of Solomon, p. 196.

197 Id. at 196-197.
would not be accepted by society\textsuperscript{198} property rights being defined in sperm, eggs, hormones and even pre-embryos would not necessarily turn children into chattel.\textsuperscript{199} She goes on to state that “clarifying a system of property rights would not resolve the deep moral issues that surround the human embryo” but it could provide a framework to identify who has the right to create, dispose of, implant and exchange embryos.\textsuperscript{200}

After realizing a working market already exists in this area, the right to transfer gets even more complicated. This is especially the case when dealing with pre-embryos that have been created and are not going to be used by the couple who originally owned the gametes separately and now jointly own the pre-embryo. The ability to transfer property can occur inter vivos or at death. It can be a transfer with or without consideration. This gets back to the heart of the issue dealt with in \textit{Moore v. UCLA} and also in the Uniform Anatomical Gift Act. Even if individuals have property interests in their bodies and the cells, organs and tissue of their bodies, aside from questions that come up when we now are dealing with a pre-embryo, what type of transfers, if any, should be allowed? And would a transfer of this pre-embryo to someone else be better than just allowing for the destruction of it?

This is an area where in crafting new law to address this aspect of the bundle of rights framework it would have to address the idea of transfers in exchange for money. Something can indeed be property yet not freely alienable as indicated above. There are situations where under the law society is not willing to accept the idea of the property involved being alienable at all or if so only in a donative transfer. Organs cannot be sold for transplantation purposes because

\textsuperscript{198}\textit{Id.} at 199-200.
\textsuperscript{199}\textit{Id.} at 200.
\textsuperscript{200}\textit{Id.} at 202.
there are ramifications on society from such a scenario that we are not willing to accept, at least in the United States.\textsuperscript{201} If as Justice Mosk pointed out the right to transfer were limited or eliminated, that would take a step away from a pure property characterization that most people associate with the term and make the pre-embryos more akin to the organ donation context, allowing for a donative transfer, i.e. for research or adoption, but not any type of transaction for monetary gain where we would end up with a true market of buying and selling potential children.

Will there continue to be ART if eggs, sperm, hormones and embryos are transferred or exchanged without \textit{any} money changing hands? Probably not. The likelihood of purely gratuitous transfers occurring, especially in the context of eggs and embryos where significant medical procedures have taken place, is slim to none. However, in looking back at the proposed ethical guidelines from ASRM, it is possible to provide some compensation for the service provided and the process that the donor has gone through without ending up with a system where hundreds of thousands of dollars are offered for reproductive material from athletes, ivy league scholars, or people possessing other “valued” characteristics.\textsuperscript{202}

2. \textit{Why this Property Rights Model is a Reasonable and Workable Solution that both Promotes Life and Protects Individual Autonomy in Reproductive Matters}

As outlined in the modified bundle of rights above, this model takes into account traditional rights of the property owner as well as making adjustments for the unique situation created with the pre-embryo. In looking at Hohfeld’s analysis of legal relations and the

\textsuperscript{201} Revised UAGA, Sec. 16 (2006).

\textsuperscript{202} ASRM Ethics Committee Report, Financial Compensation of oocyte donors, Fertility and Sterility Vol. 88, No. 2, Aug. 2007 (compensation should not be based on donor’s ethnic or other personal characteristics)(p.808)
discussion of “rights” and “duties” the concept emerges that when rights are involved there are relationships between individuals in that if one person holds a right there is someone else with a corresponding duty not to violate that right. However, as discussed by Arnold in his article, “property now has several prominent features that reflect the influence of the particular intellectual and social forces behind property’s reconceptualization.”

Legal analysis really focuses on the relationships of the people, not on the specific things or objects of those interests. We see again that if we focus our efforts on discussing these legal issues in the context of the relationships of the people involved in these disputes over disposition of pre-embryos and turn away from any notion that the discussion turns the pre-embryos into things or objects, we can have a more meaningful and productive discussion with a real solution to the problem with which these individuals are faced.

The question then is raised as to why these adjustments should be made and why there should be a bundle of rights tailored for this situation that maybe defines their roles and interests in a different way than their original contracts with the fertility clinics. The answer comes down to the reliance interest that can be found in property. As articulated by Joseph William Singer two decades ago, there is a reliance interest in property rights and adjustments must be made in instances where there are competing claims over the right of access to property.

universe” has never been more than partially correct. There are myriad ways that property can

\[203\] Id. at 288.

\[204\] Id. at 289.


\[206\] Id. at 637.
be shared in ownership concurrently or over time and it is “old-fashioned, misleading and unproductive to identify a single ‘owner’ of valued resources when control of those resources has been divided by law or contract among several interested parties.”\textsuperscript{207} Whether a single owner or multiple owners, even the most absolute ownership is subject to limitations.\textsuperscript{208} The use of property is limited in ways that protect legitimate interests of the community, that prevent substantial interference with neighbors’ use and enjoyment of their property, and that prevents an owner from disposing of property in such a way that would unreasonably restrain it’s future alienability.\textsuperscript{209} In the setting of the pre-embryo, while the individuals may have enjoyed almost unlimited freedom to use or not use their sperm and egg, once joined and something new is created, the laws can and must step in to create some limitations in the manner in which the future relationships between the individuals and the pre-embryos will continue. However, this can be achieved by taking more of a property approach and not taking giant leap of classifying the pre-embryo as a legal person.

Even though both the man and woman are the “owners” of the rights and interests in the pre-embryos, simply due to the nature of what is involved their interests may no longer be equally protected depending on the circumstances. The core problem is readjusting the relationship.

This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of the individuals who are parties with him in consensual transactions relating to the use of the property.

\textsuperscript{207} Id.

\textsuperscript{208} Id. at 641.

\textsuperscript{209} Id. at 642.
We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between [them].\footnote{State v. Shack, 58 N.J. 297, 277 A.2d 369, 373-374 (N.J. 1971). This same quote in its edited form was also used by Singer in his article. In both Singer’s article and State v. Shack the focus is on interests in real property, this language and approach to classifying interests is even more applicable when dealing with new forms of property as well. We cannot simply shove the pre-embryo into some pre-determined property mold nor can we shove it into the role of legal human being.}

In addressing the idea of personal property, Singer uses a social relations approach which works very well in the current setting. His social relations approach takes into account power inequalities within the relationships and the focus should be on the ways in which vulnerable people rely on relationships of mutual dependence.\footnote{Singer at 662.} The rights at issue here are created due to a relationship of mutual dependence. The pre-embryo cannot be created without both parts sperm and egg, male and female. Therefore, the parties are mutually dependent on one another in this process. However, due to scientific facts, the female is more dependent on the male and from a legal standpoint more vulnerable and acting in reliance on the sperm provider or intended father.\footnote{Again this is because of the lack of sufficient medical technologically to successfully cryopreserve and thaw unfertilized eggs for future use. See Note 23 supra.} The legal system sometimes protects the more vulnerable party to the relationship by protecting her reliance interest in property and limiting protection of the stronger party’s interests.\footnote{Singer at 664.} As illustrated by Hohfeld’s rights/duties analysis of legal interests, there is an
interplay of rights and privileges of one person with duties and obligations of another.\textsuperscript{214} When entering legal relationships such as a business partnership or a marriage, there are mutual obligations placed on the parties in the relationship and when those relationships dissolve, the legal system requires a further sharing or shifting of property interests to protect the more vulnerable party.\textsuperscript{215} This adjustment happens “not because the parties have relied on specific promises to their detriment, but because the parties have relied on each other generally and on the continuation of their particular kind of relationship.”\textsuperscript{216} Singer argues that this type of reliance and adjustment of interests has been expanding and is well-established in both the common law and statutes.\textsuperscript{217}

In the context of acquiring an interest in land adversely, there is a relationship of sorts between the adverse possessor and the “true owner” of the land. The interest of the adverse possessory grows stronger over time as he moves closer and closer to the point in time when legal title will be transferred to him by virtue of his possession. Conversely, the interest of the true owner weakens over time as we move closer to that same point in time. The adverse possessor is developing a legitimate expectation that she will continue having access to the property. “It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party.”\textsuperscript{218} Ultimately as the adverse possessor’s

\textsuperscript{214} W.N. Hohfeld, \textit{Fundamental Legal Conceptions} (New Haven: Yale University Press, 1919).

\textsuperscript{215} Singer at 664.

\textsuperscript{216} \textit{Id}.

\textsuperscript{217} Singer at 664-665.

\textsuperscript{218} Singer at 667.
reliance grows, so do her legal rights, with ultimately her acquisition of legal title to the property without any obligation to compensation the true owner for it.\textsuperscript{219} The prescriptive easement is similar although title to the land is not being acquired but rather a specific use of the property. However, there is reliance in the same sense as in acquiring title to the land by adverse possession. In both instances, the ultimate outcome is a transfer or shift of property interests from one party to another due to the reliance on both access to the property and the true owner’s long-standing acquiescence in the adverse use.\textsuperscript{220} And in both examples the party who acted in reliance is not obligated to compensate the former owner. The legal interests of the more vulnerable party were protected by the shift.\textsuperscript{221}

Other illustrative examples include those of easements by estoppel and easements by necessity. In the context of easement by estoppel, permission is treated as a waiver of property rights rather than an exercise of them.\textsuperscript{222} The article points to the principle and counter principle involved. The general rule is that licenses are revocable at will. However, in the easement by estoppel the license becomes irrevocable because it would be unfair to the non-owner. When the owner knows or should have known that the non-owner was going to expend labor and money in activity in reliance on the permission, the owner cannot come back and interfere with the non-owner’s right of access.\textsuperscript{223} The easement by necessity, in contrast, does not arise out of any permission from the landowner at all but rather as a legal means of preventing someone from

\textsuperscript{219}Singer at 669, see also note 183.

\textsuperscript{220}Singer at 669.

\textsuperscript{221}Id. at 670.

\textsuperscript{222}Id.

\textsuperscript{223}Id. at 671.
having any access to his property. Access is awarded by law even if not intended by the parties. This protects the more vulnerable party’s ability to access his own land.\textsuperscript{224}

Examples of the reliance factor are also present in market relationships such as landlord/tenant and employer/employee. In the last few decades, state and federal legislatures have seen fit to impose some readjustment of interests in an effort to protect the tenant and the employee as the more vulnerable parties in those relationships. The Implied Warranty of Habitability is one of the most significant adjustments in the landlord tenant relationship moving from a common law approach of let the lessee beware to a system where the landlord must disclose defects and warrant that the premises will be habitable for the tenants. Due to the importance of the issue and the unequal bargaining power of the parties, the law has seen fit to make such a provision non-waivable for the most part. This redistributes property rights in a way that protects the interests of the more vulnerable party—the tenant—in relying either on the continuation of the relationship generally or on access to the property specifically.\textsuperscript{225}

The examples provided in the Singer article with respect to the role of the reliance interest in the law focuses on ideas surrounding real property and actual physical access to that property. However, the examples still provide a helpful discussion of how this idea of reliance works to fine tune the bundle of rights for the pre-embryo. Singer proposed a restatement provision to be included in the Restatement (Third) of Property. His suggested language includes a provision that “when people create relations of mutual dependence involving joint efforts, and the relationship ends, property rights (access to or control of valued resources) must be redistributed (shared or shifted) among the parties to protect the legitimate interests of the

\textsuperscript{224}Id. at 672.

\textsuperscript{225}Id. at 679, 682.
more vulnerable persons.”

“The legal system recognizes affirmative obligations that grow out of relationships over time, and it does not confine such obligations to those formally agreed to by the parties.”

In several of the cases presented to the court and in commentary by legal scholars, an equitable estoppel theory has been argued to come into play to allow the woman, in all instances but one, to be able to make use of the pre-embryo and prevent its destruction. However, the reliance theory being advanced there which has been rejected by courts so far, is a reliance theory based on specific representations, basically “he agreed to have a child with me so it should happen.” This theory illustrated by Singer is more subtle and goes to the heart of the medical and emotional relationship taking place between the man and woman. She needs his sperm, she needs to utilize cryopreservation in order to limit future medical procedures or maybe because her eggs are about to be destroyed by chemotherapy or no longer available due to age, and in reliance on the man’s willingness to provide his sperm for this situation, she is vulnerable and dependent on this continued relationship. If the man withdraws consent, she is effectively blocked from having biological children or at least making that prospect significantly more difficult whether due to additional medical risks, uncertainties or even expense. This is a result


227 Singer at 701.

228 Augusta Roman’s Brief on the merits to the Sup. Ct. Of Tx (p. 35-38)(Augusta argued that Randy roman should be estopped from asserting rights because Augusta relied on his conduct in good faith and this caused her to change her position for the worse. See id. at 36. As set forth in Augusta Roman’s Reply to Randy Roman’s Responsive Brief on the Merits, the record revealed that Randy consented twice to implantation and then withdrew his consent twice. (p. 15) Additionally, there were 6 fertilized embryos and had Randy not withdrawn consent 10 hours before the procedure there would have been no remaining embryos cryopreserved because Dr. Schnell would have implanted all 6. See p. 16. This is a situation where Augusta relied on Randy to her detriment and equity should have caused her to prevail.
on her reliance on their particular kind of relationship. Just as property is equitably divided during divorce, the pre-embryo can be as well. And concepts of equity would take into consideration and allow for this readjustment of the interests.

The readjustment that would allow one of the parties to use the pre-embryo over the objection of another is one that has already been contemplated in the Uniform Parentage Act (UPA) in its provisions dealing with paternity issues of the pre-embryo.\textsuperscript{229} The UPA has been codified by a number of states in its entirety and has been adopted by all states at least in part.\textsuperscript{230} The purpose of the 2002 Act is to revise the 1973 version of the UPA to modernize the law for determining the parents of children.\textsuperscript{231} The comments preceding Article 7, “Child of Assisted Reproduction” include some insight into what the UPA attempts to achieve. “If the couple later divorces, or one of them dies, absent legislation there are no clear rules for determining the parentage of a child resulting from a pre-zygote implanted after divorce or after the death of the would-be father. Disposition of such pre-zygotes, or even issues of their “ownership,” create not only broad publicity, but also are problems in which the courts need guidance.”\textsuperscript{232} A comment following section 702 “Parental Status of a Donor” also states that issues of ownership and disposition are left to other statutes or to common law. Only the issue of parentage falls within the act.\textsuperscript{233}

\textsuperscript{229}Uniform Parentage Act of 2002 (Dec. 2002).


\textsuperscript{232}Uniform Parentage Act of 2002, Article 7, comments (Dec. 2002).

\textsuperscript{233}Art. 7, § 702 Comment.
There are two sections within Article 7 that are particularly applicable to this discussion. In section 704, the UPA addresses consent to assisted reproduction by the man and woman and specifically provides that consent by a woman and man who intend to be parents of a child born via ART must be in a record signed by both of them.\textsuperscript{234} However, the next subsection goes on to state that failure of the man to sign the consent before or after birth does not prevent a finding of paternity if he raised the child with the woman for the first two years.\textsuperscript{235} Then in a subsequent provision, section 706, the UPA addresses the effect of dissolution of marriage or withdrawal of consent.\textsuperscript{236} Section 706 provides “[i]f a marriage is dissolved before placement of eggs, sperm or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.”\textsuperscript{237} The following subsection provides “[t]he consent of a woman or man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.”\textsuperscript{238}

The comments to this section seem to have considered the very position of this article.\textsuperscript{239}

\textsuperscript{234}UPA Art. 7, § 704(a) (Dec. 2002).

\textsuperscript{235}Id. at § 704(b).

\textsuperscript{236}Id. at § 706.

\textsuperscript{237}Id. at § 706 (a).

\textsuperscript{238}Id. at § 706(b).

\textsuperscript{239}Id. at § 706, comments: If a former wife proceeds with assisted reproduction after a divorce, the former husband is not the legal parent of the resulting child unless he had previously consented in a record to post-divorce assisted reproduction and had not withdrawn any such consent prior to the post-divorce assisted reproduction.
before placement recognizes that an enforceable agreement could be made with the clinic but still allows the individuals the opportunity to change his or her mind as to disposition. Then by further incorporating the language that if consent is withdrawn that person does not have to be the parent of the resulting child allows one party to use the embryos without the consent of the other but relieves the non-consenting party from legal responsibility of the child. However, it does not deprive the non-consenting party the right to be a legal parent, it just prevents that status from being forced on that person without their consent.

There are some commentators who have taken issue with the provisions in the UPA regarding parentage in the context of assisted reproduction and do not agree with a person’s ability to avoid legal parenthood by withdrawing consent to ART. However, as noted in one article the provisions of section 706 work as a compromise regarding the problematic issue of disposition of the pre-embryos at the time of divorce. If a system is in place as the one proposed in this article, by allowing one party to be able to use the pre-embryos over the objection of the other, the compromise position would be to allow the objecting party the chance to avoid legal parenthood of any resulting child or children. This is a means of reducing the validity of the argument that the objecting party’s right to avoid procreation should prevail as it has been in our past case law. Although in Singer’s examples of situations involving an adjustment of interests using the reliance principle there was no compensation or consideration exchanged for such adjustment, this compromise could be seen as giving some acknowledgment to the objecting party’s desire to avoid becoming a parent.

\[240\] See e.g. Susan B. Apel, Cryopreserved Embryos: A Response to “Forced Parenthood” and the Role of Intent, 39 Fam. L. Q. 663 (2005).

The question still becomes, why should parenthood be avoided in the context of ART where the parties had an intent at one point to try to create a child yet when done the old fashioned way where there may be no intent at all to create a child, legal responsibility cannot be avoided?\textsuperscript{242} Yes, it is part compromise due to the situation presented, but there is a rational reason behind the compromise. In the circumstance where a pregnancy occurs in the context of sexual intercourse, if the embryo does indeed implant itself in the uterine wall and development begins, we are in the period of gestation and continued development of that embryo is going to occur unless there is a natural miscarriage of the pregnancy or there is an abortion that terminates the pregnancy. The case law is clear that due to the woman's right to privacy, the man cannot force her to have an abortion and cannot prevent her from having an abortion.\textsuperscript{243} The woman does have control to and extent because of the fact that her bodily integrity is involved.\textsuperscript{244} The man ends up being the legal father of the child regardless of his ideas about whether he wanted to have a child, contemplated having a child, never wanted to have a child, etc.\textsuperscript{245} However, at that

\textsuperscript{242} Apel at 667.


\textsuperscript{245} UPA Art.2, § 201(b) (2002). The prefatory comments to the 2002 UPA also state that equal treatment of marital and nonmarital children was a hallmark of the 1973 Act. With the goal of marital and nonmarital children being treated equally as the goal, that is also accomplished in Art. 7 addressing Children of Assisted Reproduction. There is just a distinction made between those children and those conceived via sexual intercourse. Section 701, Scope of the Article, very specifically states “[t]his article does not apply to the birth of a child conceived by means of
point in time the child is going to be born barring some unexpected circumstances whether the father or mother wants to be a parent. While the woman may have some degree of control due to the fact that she can legally have an abortion, which does not mean that abortion may really and truly be a choice for her. In the context of a child created by ART, there is a lot of choice involved even after the pre-embryo has been successfully created.

The UPA does admittedly provide an “out” for the man in the context of children born of ART. It could be because really there is some contractual, meeting of the minds component involved and also in part because the pre-embryo that has been created and cryopreserved is closer to the property end of the spectrum than the human child end of the spectrum. This is another area where we see some mixing and matching of rights in the bundle. If we look at this conscious choice component, there was choice and intent on the part of both parties initially to take steps towards having a child. They both chose to take that step of creating pre-embryos and cryopreserving at least some of them. Then, when faced with a situation down the line where there are still pre-embryos in storage, there is another choice to be made—what should happen to them. If they were legal human beings, every single pre-embryo would have to be implanted and pregnancy attempted. Those pre-embryos would have a right for that to happen.

If the pre-embryos are treated as property with special dignity because of the potential for human life, then there is still a choice to be made and because this property with special dignity involves interests and desires of both parties that may have changed through time, then both parties get to make a choice. There is a choice to be made regarding disposition. Again, if everyone still feels the same as they did when signing the original agreement with the clinic, the sexual intercourse. I believe this is an acknowledgment of the different circumstances involved in those situations.
clinic proceeds with their instructions. If there is a change, the party now desiring a different outcome must notify the clinic and other party in writing. If there are clear statutory guidelines as to what happens next, the clinic would know how to proceed from here. This allows for one party to make the choice that he or she should get to try to have a child using the cryopreserved pre-embryos and the party who does not share this desire gets a choice of whether or not they want to be responsible for and involved in any potential child’s life. There is no gestation yet. There is no clear path to a child being born yet. All of that which naturally takes place inside the woman after sexual intercourse has been frozen and suspended in time. That time that has passed is what makes the situation different. It’s not a few hours or a few days—it’s years. A lot can happen and does happen during those years that pass—that’s why we see these conflicts arising in the setting of a divorce or termination of a relationship. Essentially once the man has withdrawn consent he has become a sperm donor to an extent. While the law relieves the traditional sperm donor of any claims of paternity, what is recognized in the UPA is that the man who withdraws his consent to ART is not required to be the legal father of the child 247, however, he still has that option and can choose to recognize the child as his own and participate in the child’s life. 248 If he chooses against this option, like the anonymous sperm donor he fades into the background and there is still a chance for the woman who still desires to have a child the opportunity to attempt to do so.

247 UP A, Art. 7, § 702 (2002). “A donor is not a parent of a child conceived by means of assisted reproduction.” The comments indicate that this applies to donors of sperm or egg. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.

248 Id. § 704(b), 706.
IV. THE ROLE OF THE LEGISLATURE—A BALANCED APPROACH NOW

There are many areas of the law where reason and legal rules do not necessarily match perfectly with philosophical, moral and religious ideologies (i.e. abortion, capital punishment, birth control). However, at some point there must be a legal analysis conducted separate from the religious, moral and philosophical concerns to come up with some sort of legal structure. Then at that point this structure can be fine-tuned to develop into something that in acceptable to society as a whole which does indeed have a moral, religious and philosophical component to it. We just cannot continue to ask the courts to do this. The state or federal legislatures must take on this task now and answer the hard questions.

“Currently we are making choices in a purely ad hoc way, depending on the state, the local court system, and the finances of the individuals involved. Surely this is not the best way to deal with such dramatic decisions.” 249 There has been much recognition of this fact. The comments in Article 7 to the UPA also state that issues such as ownership and disposition of embryos, regulation of medical procedures, insurance coverage, etc., are left to other statutes or to the common law. 250 According to The President’s Council on Bioethics in 2004, “the current regulatory landscape is a patchwork, with authority divided among numerous sources of oversight.” 251 However, the report went on to state that the “objectives of current direct federal oversight of ART are consumer protection and quality assurance for embryo laboratories. While these are important goals, they do not aim directly at most of the ethical concerns described

249 Spar, The Baby Business, Ch. 7 Songs of Solomon, 225.

250 UPA, Art. 7, § 702, comment (2002).

above. . . .” Moreover, the report pointed out that while some states had made attempts at addressing ethical concerns of ART, there is lack of uniformity among states with many providing little regulation or none at all. In an earlier report in 2003 by The President’s Council on Bioethics, the committee proposed regulations that would require reporting of creation, use and disposition of embryos. The committee stated that by requiring reporting of data on the creation, use and disposition of the embryos this would signal a measure of respect for “nascent human life and would allow prospective patients, policy makers and the public to better understand the actual practice of assisted reproduction.” While this is all fine and good, the reporting requirement really only impacts the clinic and does nothing for the parties fighting over the disposition of their pre-embryos. While this whole realm is inherently personal and should be left to the control of the individuals, some legislation is needed to provide assistance to the courts that are left to struggle with these issues.

So, what can be done? The following is a proposal for legislation that could be used to establish a system under the model proposed above, allowing for a large degree of personal autonomy by the parties within the realms of sound ethical judgment yet without going too far.

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252 President’s Committee on Bioethics, Assisted Reproduction, p. 45.

253 Id.


255 1 N.C. Family Law Practice § 9:4, Rights of children and the unborn. Kelso cites to a California Court of Appeals opinion where the court stated “we join the chorus of judicial voices pleading for Legislative attention to the increasing number of complex issues spawned by recent advances in the field of artificial reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.”
This statute governs the storage and usage of in vitro fertilized ovum.

**Definitions:**

**In-vitro fertilized ovum:** fertilization of the egg by a sperm in vitro. This is the equivalent of a cryopreserved pre-embryo.

**In vitro:** in the laboratory

**Pre-embryo:** a fertilized human egg, up to 14 days old that can develop into a human

**Objecting Party:** Party seeking modification of original agreement

**Non-Objecting Party:** Party that did not seek modification of original agreement

**Legal Status:**

For the purposes of this chapter an in vitro fertilized ovum shall not be considered property nor shall it constitute a person; it shall be property with special dignity.

**Rights to Transfer:**

Reproductive components still in existence as individual sperm or ovum may be donated or transferred to a third party for monetary compensation in accordance with the ethical guidelines of the American Society of Reproductive Medicine. Compensation for ovum is considered to be within the ethical guidelines as compensation for the time, medical procedures, and discomfort during said medical procedures so long as the compensation does not exceed $5,000. A payment may be made up to $10,000 as long as there is supporting evidence for the need for this increased level of compensation. At no time may compensation be based on racial, ethnic, or other genetic traits.

A fertilized ovum may also be donated to transfer to a third party for monetary compensation in accordance with similar guidelines and accepted practices within the area of adoption. Compensation may only be for expenses, time and medical procedures and not for any type of racial, ethnic or other genetic traits of the fertilized ovum. Compensation shall be limited based on actual expenses and time and procedures involved.

The donation or transfer to a third party of individual sperm or ovum only requires the consent of the provider. The donation or transfer to a third party of a fertilized ovum must comply with the section below entitled “Donation of In Vitro Fertilized Ovum.”
Agreement:

The original agreement of the parties with the fertility clinic completed prior to creation of the in-vitro fertilized ovum shall govern subject to the following sections.

Request for Modification:

In order for the original agreement to be modified, the party wishing to modify such agreement must provide written communication to all parties named in the original agreement. Such communication shall include:

i. all changes sought; and
ii. reasons for such changes

If the clinic or storage facility has already acted in accordance of the terms of the original agreement with respect to disposition of the in-vitro fertilized ovum prior to receipt of the Request for Modification, the clinic shall not be subject to any liability or penalty.

Original Agreement no Longer Effective:

Upon receipt of communication meetings standards described in the modification section, the original agreement shall no longer be effective and the clinic shall be required to act according to the parameters of this statute governing disposition. If presented with a court order, the clinic shall be obligated to continue cryopreservation of the in-vitro fertilized ovum until final resolution of the dispute.

Effectiveness of Modification:

A proper written request for modification of the original agreement shall preserve the status quo with respect to the in vitro fertilized ovum and may direct the clinic to act as follows:

1. If one party requests possession of the in-vitro fertilized ovum for implantation for that party’s opportunity to bear a child then the in-vitro fertilized ovum shall be transferred to that party even if the other party does not consent to said transfer.

2. If one party requests donation of the in-vitro fertilized ovum for donation to another couple via embryo adoption so that another couple may attempt to bear a child, such donation shall only occur with the express written consent of the other party to the original agreement. In the event that there is disagreement with respect to donation for embryo adoption,

   a. If both parties desire destruction in the alternative, express written direction by both parties must be provided to the clinic so that destruction may occur.

   b. If both parties do not agree to destruction in the alternative, the in-vitro fertilized ovum shall continue to be stored in its cryopreserved state with the party objecting to destruction paying for the cost of storage. At some time in the future, either party may request possession of the in-vitro fertilized ovum for his or her own personal implantation or both parties may jointly
consent to embryo adoption or destruction. If the in-vitro fertilized ovum continues in its
cryopreserved state until the death of both parties to the original agreement, the in-vitro fertilized
ovum will be donated to scientific research unless the parties expressly denied such in which the
in-vitro fertilized ovum would be destroyed.

Storage of Embryos upon Request for Modification:
Upon receipt of written communication seeking modification of agreement, the storage facility
shall maintain the in-vitro fertilized ovum(s) in storage until:
1. Written modification is provided under the provisions of the above section.
2. In-vitro fertilized ovum is no longer viable
3. Storage facilities are no longer available

Determination that in-vitro fertilized ovum are no longer viable:
In the event the storage facility determines the in-vitro fertilized ovum are no longer viable, the
in-vitro fertilized ovum shall only be removed from storage upon third party verification that the
in-vitro fertilized ovum are no longer viable

Failure to Reach Agreement:
Should parties fail to reach agreement shall remain in frozen storage until:
   I. New agreement is reached, or
   ii. CPE is no longer viable, or
   iii. Storage facilities are not longer available

Payment of Storage:
Storage facility shall be reimbursed costs of storage based on the following:
Party objecting to original agreement/party seeking modification of agreement, shall pay for
storage until event described in above should occur except:
   i. if original agreement did not provide for destruction of CPE both parties shall continue
to split the storage costs

         ii. Should both parties object to original agreement storage costs shall be split evenly
between the parties

Donation of In Vitro Fertilized Ovum:

Donation of In Vitro Fertilized Ovum to another party via embryo adoption shall be allowed only
if both parties have expressly agreed to donation in writing. Donation of the In Vitro Fertilized
Ovum for medical research shall be allowed only if both parties have expressly agreed to
donation in writing and such agreement has not been revoked or modified in writing.
Divorce
In event of divorce of the parties the above rule remains applicable

Death

At the time of death of the parties, the intent of the parties for disposition shall be sought from the terms of the original cryopreservation agreement and any additional modifications to said original agreement. At the time of death of both parties, if there is written consent from both parties for (1) donation to a third party for implantation (embryo adoption) or (2) donation to a third party for approved scientific research then that disposition shall control. However, if there is no mutual agreement in writing or a specific objection by one party in writing as to donation for embryo adoption or scientific research then the in vitro fertilized ovum shall be destroyed.

After the death of one party, if there is written consent for donation for embryo adoption or scientific research up on their death and the surviving party is in agreement and expresses such agreement in writing, such disposition may be made at that time. If at the time the first parties dies that individual has not given express written consent for embryo adoption or donation for scientific research the only remaining disposition options shall be use by the surviving party to have the in vitro fertilized ovum implanted to have a biological child of his or her own or destruction of the in vitro fertilized ovum.

Failure of Statute to resolve issue:

Should such agreement not be able to be modified by the above statute, the court shall make determinations giving regard to the in vitro fertilized ovum with view to the parents having defined property rights in the in vitro fertilized ovum and shall not treat the in vitro fertilized ovum as a legal person.

V. ANALYZING THE RESOLUTION OF THE PRIOR DISPUTES UNDER THE PROPOSED MODEL

Looking back at the cases decided by the various courts on this topic, in applying the proposed model, some outcomes would remain the same but most would be very different. Starting back with Davis v. Davis where the ultimate decision of the court was to choose between one party’s desire to donate the pre-embryos to another couple and the other party’s desire to have the pre-embryos discarded. Discarding won out in a balancing test looking at the right to procreate vs. the right not to procreate. In applying the proposed model to the circumstances of the Davis case, the pre-embryos would still not be donated to a third party over
the objection of one party but would not be discarded either. If Mary Sue Davis had wished to pay for storage until the time of her death, the pre-embryos could have been stored until that time, allowing her to avoid the emotional turmoil of destruction of the pre-embryos.

Moving to *Kass v. Kass*, the court there followed the “binding contract” requiring donation of the pre-embryos to the clinic for research. Despite the fact that Maureen Kass objected to having the pre-embryos donated for research and still desired to use the pre-embryos to have a biological child of her own, the court upheld the agreement with the clinic. In applying the proposed model, this would be a case where one party changes her mind prior to the ultimate disposition of the pre-embryos and still desires to use the pre-embryos for her own attempts at having a biological child. Maureen Kass would have been awarded the pre-embryos for her attempts to have a child and her ex-husband would have been given the option of consenting to the implantation and being the parent of any born children or could have withheld consent and been relieved of any responsibilities of parenthood.

Next in *A.Z. v. B.Z.*, the court was again faced with a woman who although having had a child of her own already, desired to use the stored pre-embryos to have an additional biological child. Her ex-husband objected to the use of the stored pre-embryos and favored destruction in order to avoid procreation. The court found the agreement unenforceable that would have given the pre-embryos to the wife and held for the husband preventing the ex-wife from implanting the remaining pre-embryos and in effect vetoing her efforts to have more children. In the proposed model, this is yet again another case where one party desires to use the pre-embryos for her own personal use to have a child. The one distinguishing factor here is that the circumstances for A.Z. were not as dire as those for Ms. Kass or Ms. Roman in that A.Z. had the opportunity during marriage to have two biological children. However, the pre-embryos were stored for
additional attempts at pregnancy and that is what was desired by A.Z. In this circumstance A.Z. would be allowed to use the pre-embryos for her own implantation giving B.Z. the same options as set forth above.

In *J.B. v. M.B.* which again is the reverse situation of *Davis*—here the man wants the pre-embryos donated to another couple while the woman wants them destroyed—the court in looking at the balancing of the interests allowed for the destruction of the pre-embryos. In the proposed model, again this would be an outcome where prolonged storage could be achieve with J.B. paying for those costs during his lifetime in order to avoid destruction. However, M.B. could successfully object to any donation to a third party.

Now looking to *Litowitz v. Litowitz* instead of completely ignoring the desire of both parties by sticking strictly to a prior agreement with the clinic, the parties are allowed to modify the original choices made. Ultimately in that case while the agreement with the clinic allowed for destruction, neither party desired that result. David Litowitz desired donation to another couple and Becky Litowitz desired to use the pre-embryos for her own personal use. In sticking strictly to a binding agreement approach it is possible the court would allow for such a result. Again, applying the proposed model, Becky Litowitz would have been allowed to personally use the pre-embryos and again David would have had the available options of choosing to become the parent of any resulting child or declining any such legal obligation and involvement.

*In re Witten* presented another dispute of the husband desiring donation to another couple but no use by his wife and the wife desiring to use them herself giving her husband the option of being a parent or not. Both parties adamantly opposed destruction but Tamara also opposed donation to another couple. The Iowa court allowed for the option of prolonged storage with the parties allocating the fees to the one who desire not to destroy. Using the proposed model,
Tamara would be allowed to do as she desired, have implantation of the pre-embryos, and then giving Trip the opportunity to be a parent to any born children or avoid such responsibility and relationship.

Finally, in the heartbreaking case of Roman v. Roman, the proposed model most definitely avoids destruction of the pre-embryos and provides Augusta Roman with the opportunity to try for a biological child. In the dispute where Augusta desired personal use of the pre-embryos and Randy desired destruction, Augusta’s personal use would win out, again affording Randy the decision-making opportunity of being a father to any children born of such efforts or avoiding the relationship. Augusta Roman would at least have had the opportunity to do what the couple originally set out to do—at least make an attempt to have a biological child.

In looking back at the different results, the decisions by the various courts allowed for destruction in five of the cases, donation for clinical research in one case, and storage without use in one case. After applying the proposed model we would end up with personal use of the pre-embryos in five of the cases, and storage without use in two cases. In no case would the pre-embryos have been destroyed immediately as a result of the disagreement upon divorce. A drastically different set of results much more in favor of life and dignity with the guidance of a property rights model.

VI. CONCLUSION

“Any discussion of public policy pertaining to biotechnologies touching the beginnings of human life will necessarily open the question of the moral status of the developing embryo, and it would be futile and probably wrong to pretend otherwise.”256 Science continues to

advance at warp speed and the rest of us are all trying to catch up. Our ideas about morality, ethics, the law’s role in these decisions are all still evolving and changing with time. That is no different for the man and woman whose hopes for a biological child of their own rest in the hands of the miracle workers at fertility clinics across the country. They enter into agreements, make decisions about things that might happen many, many years down the road all in an attempt to do something now. Yes, it is important to have enforceable agreements to provide guidance and evidence of intent, but that is more important to the clinics and their concerns about their own operations than for the individuals involved. The people stuck right in the middle of this emotional roller coaster need the opportunity for a change of heart, a different belief structure, a different desired outcome. Things change and the law needs to recognize that is definitely the case when it comes to making decisions about an individual’s reproductive future. By taking steps to rise to the challenge of addressing these issues, maybe the heartbreak of those five individuals we saw at the beginning of this article could be avoided, and there might be five more happy, healthy and loved children in the world today. Does this mean that the cryopreserved pre-embryo needs status as a legal person to achieve that—no. There is the middle ground that property rights can help us to achieve. Let’s create the bundle, put it into statutory form and provide guidance for the people stuck in the middle of the vortex a lifeline.