

**PUTTING CHILD SUPPORT ON ICE:  
EVALUATING ARIZONA'S NOVEL  
APPROACH UNDER ARIZONA REVISED  
STATUTE SECTION 25-318.03**

MADELEINE MESSINGER\*

I. INTRODUCTION

In vitro fertilization (“IVF”) technology is a relatively recent scientific breakthrough, with the first successfully birthed child born in 1978.<sup>1</sup> Consequent to its successful use, fertility technologies associated with IVF began to expand their possible application. The ability to successfully freeze, thaw, implant, and bring an embryo to term through the combination of cryopreservation and IVF was first observed in 1984.<sup>2</sup> Now, a once-revolutionary process has become a common means of promoting and increasing fertility for some childless individuals, and of preserving at-risk fertility for others.<sup>3</sup> As these processes have become more widespread and mundane, new legal and ethical implications are emerging for consideration. While fertility sciences have rapidly and innovatively responded to newly developed technologies and changing cultural norms, the law has not.

Disputes over what to do with cryogenically preserved embryos are not uncommon or unforeseeable. Imagine that a heterosexual couple receives tragic medical news. The couple learns that the female partner has cancer and will have to undergo chemotherapy and radiation to combat the illness. Consequent to the life-saving drugs and therapies the woman will undergo, she will lose her ability to conceive a child through traditional means. So, her doctor recommends that before undergoing chemotherapy, the female partner have eggs removed from her body, fertilized with sperm from her male partner, and cryogenically frozen and preserved for later use. The couple gladly and happily follows the doctor’s advice. But, after a period of months or years, the couple decides to divorce before implanting the cryogenically preserved embryos. Now, one partner might want to use and implant the frozen embryos, while the other partner wants to dispose of them or prevent the other partner from using the embryos for conception and to bring the child to term. The law has yet to definitively determine which of the two holds the legal right to these embryos or what the courts should do if the former couple disagrees on what ought to be done with the embryos.

---

\* Co-Editor-in-Chief, *Southern California Interdisciplinary Law Journal*, Volume 30; J.D. 2021, University of Southern California Gould School of Law; B.A., Humanities & English, Villanova University.

<sup>1</sup> Louise Brown, *Louise Brown on 40 Years of IVF: ‘I Was the World’s First IVF Baby, This is My Story’*, INDEPENDENT (July 25, 2018), <https://www.independent.co.uk/life-style/health-and-families/ivf-baby-louise-brown-story-test-tube-world-first-40th-anniversary-a8455956.html>.

<sup>2</sup> Sarah Zhang, *A Woman Gave Birth from an Embryo Frozen for 24 Years*, ATLANTIC (Dec. 21, 2017), <https://www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876>.

<sup>3</sup> *Id.*

Embryo disputes are an important and difficult issue; yet, little legislative guidance dictates how these disputes should be decided. Because of this, embryo<sup>4</sup> disputes are unpredictable and rely heavily on the sparse case law that has been established. Beginning in 1992 with *Davis v. Davis* in Tennessee,<sup>5</sup> a handful of states have since encountered cases of first impression on this issue.<sup>6</sup> Each has noted that, unlike traditional forms of reproduction—namely sexual intercourse which results in a child—IVF necessitates at least one extra step in the reproductive process. This extra step complicates the legal analysis. Instead of sexual-intercourse-to-baby, we have a unique situation in which the embryo is created outside of the uterus and then must be placed back into a uterus with the intention that the embryo will continue to develop into a child.<sup>7</sup> This added step has created a multitude of legal issues, including the specific issue that this Note will address.

At the outset, it should be observed that this Note will not concern itself with situations in which two parties have consensual sexual intercourse resulting in a pregnancy for which one party does not wish to be responsible. These two situations have always been treated as distinct for a variety of social and ethical policy reasons. Additionally, situations in which individuals who choose to freeze gametes (eggs and sperm) as opposed to embryos should be distinguished. In the former situation, conflicts cannot, by their nature, result in the types of litigation discussed here, since gametes are the product and property of only one of the possible parents.<sup>8</sup> In the latter situation, both parties have a potentially valid legal claim to custody of the embryos.

Due to the importance of genetic relation to the embryos, this Note will focus heavily on the hypothetical situation in which the two parties involved are both genetic donors to the embryo.<sup>9</sup> This distinction means there is a

<sup>4</sup> For ease of reading and clarity, this Note will refer to pre-embryos as “embryos.” Both “pre-embryo” and “embryo” have been accepted as legitimate ways to refer to the result of sperm and ova coming together to form a fertilized egg.

<sup>5</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>6</sup> See generally I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP., July 15, 2016 at 13, 13–19, <https://onlinelibrary.wiley.com/doi/full/10.1002/hast.600>.

<sup>7</sup> *In re Marriage of Rooks*, 429 P.3d 579, 582 (Colo. 2018). The IVF procedure involves several steps: “(1) developing eggs in the contributor’s ovaries using hormones to stimulate ovulation, (2) removing the eggs from the contributor’s ovaries, (3) placing the eggs and sperm together in a laboratory to allow fertilization to occur, and (4) transferring fertilized [embryos] into the carrier’s uterus” (or into cryostasis for later implantation). *Id.*

<sup>8</sup> While it is possible to successfully freeze separate gametes, later success rates of thawing, fertilizing, and implanting frozen ova in particular are distressingly low. This is due in part to the fact that eggs are a single large cell, whereas “a five-day-old embryo is the same size, but contains more than 100 cells, each of which is less vulnerable to damage.” Pam Belluck, *What Fertility Patients Should Know About Egg Freezing*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/health/eggs-freezing-storage-safety.html> (quoting Dr. Janis Fox, assistant professor of reproductive endocrinology and infertility at Harvard and Brigham and Women’s Hospital: “egg freezing has been much harder to crack because of the size that they are, the water content, and that spindle.”); see also Ariana Eunjung Cha, *She Championed the Idea that Freezing Your Eggs Would Free Your Career. But Things Didn’t Quite Work Out.*, WASH. POST (Jan. 27, 2018), [https://www.washingtonpost.com/classic-apps/brigitte-adams-became-the-poster-child-for-freezing-your-eggs-but-things-didnt-quite-work-out-how-she-imagined/2018/01/27/ff55857a-e667-11e7-833f-155031558ff4\\_story.html](https://www.washingtonpost.com/classic-apps/brigitte-adams-became-the-poster-child-for-freezing-your-eggs-but-things-didnt-quite-work-out-how-she-imagined/2018/01/27/ff55857a-e667-11e7-833f-155031558ff4_story.html) (discussing the heart wrenching situations in which women have frozen their eggs in an effort to preserve their ability to have genetically-related children at a later point in time, but the current success rates of this technology resulted in failure and disappointment for many women).

<sup>9</sup> This Note will not consider the rare situation in which three parties have contributed genetic material to the creation of an embryo. See Jessica Hamzelou, *Exclusive: World’s First Baby Born with New “3 Parent” Technique*, NEWS SCIENCE (Sept. 27, 2016), <https://www.newscientist.com/article/>

donated ovum from one party and donated sperm from the other party, and both of these gametes were used in the formation of the embryo(s) that are the subject of litigation.<sup>10</sup> Situations in which one of the parties did not contribute genetic material to the embryo are legally distinct, since the unrelated party does not have the same level of legal claim as the genetically related parent. That individual is merely the intended parent of any child that should result from the frozen embryos during the relationship. Upon termination of that relationship, the unrelated individual is no longer an intended parent, nor does the individual possess any of the rights that may have come from being an intended parent. This is not to say that the non-genetically related parent is not the legal parent of any child already born as a result of the IVF procedure during the hypothetical marriage. There is an important legal distinction that courts have identified when both parties have a genetic claim to the embryos in dispute, as opposed to when just one or neither party has a genetic claim to the embryos.<sup>11</sup>

The legal and ethical issues involved in the adjudication of these disputes are uniquely complex. There may be a constitutional right to avoid procreation.<sup>12</sup> Yet, there are specific types of instances in which we will allow “forced procreation.” For example, neither statutory nor jurisprudential law allows men (or individuals who contribute male gametes) to force the individual carrying the child to abort the child in utero to so that they can avoid becoming a parent.<sup>13</sup> Instead, there appears to be a constitutional right to avoid the government forcing a person to procreate, as well as a constitutional right allowing a person to procreate. In plainer terms, the government cannot enact a general ban on abortion,<sup>14</sup> and the government cannot force a person to have an abortion. On similar merits, the government cannot forcibly sterilize individuals.<sup>15</sup> All of these points combine to

---

2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique (discussing a scientific breakthrough which allows parents with “rare genetic mutations to have healthy babies” via a “pronuclear transfer” which involves fertilizing the mother’s egg and a donor egg with the father’s sperm: “Each nucleus is removed” from the fertilized eggs prior to division, and then “the nucleus from the donor’s fertilized egg is discarded and replaced by that from the mother’s fertilized egg.”). If such a situation would ever be litigated, it is likely that all three individuals would have some sort of claim to the embryos in question. Due to the nature of this extremely specific procedure, however, and the fact that the word “donor” is used, I would argue that the individual who donated genetic material would have no claim to the embryos, something which will be discussed in more length later in this Note.

<sup>10</sup> Due to this, much of this Note speaks in hetero-normative terminology. I acknowledge that sexual gametes do not necessarily correlate to gender-identity. In situations in which the parties in question identify as transgender or gender-nonconforming, the legal analysis proposed in this paper still applies, so long as both parties in the dispute had contributed genetic material to the disputed embryos.

<sup>11</sup> As such, this Note will focus on the former scenario, while recognizing that frozen embryo disputes where one or neither party is genetically related to the embryos has occurred. While interesting and worthy of further examination, that nuance of this broad topic is not within the scope of this Note.

<sup>12</sup> I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV., 1115, 1118 (Sept. 2008).

<sup>13</sup> While it is technically possible for the reverse to happen, and the situation to involve a female donor of an ovum who may not wish a child to be carried to term, these situations are far less common and carry some of the same legal and ethical implications. Consequently, unless otherwise necessary, examples will generally involve masculine archetypes but have principles of derivative conclusions that could apply to either male or female litigants.

<sup>14</sup> It is important to note, however, that while there is a Constitutional right to abortion, states are within their rights to regulate abortions to a certain extent. For example, many states limit abortion availability after the twenty-week mark, whereas others have sought to limit abortion availability once the fetus becomes “viable.”

<sup>15</sup> But they can offer incentives for being sterilized to prisoners, making the United States’ government’s participation in the practice of state-sponsored sterilization somewhat nuanced and

illustrate how both federal and state governments have continually protected individuals' interest in reproductive autonomy, both in a positive and a negative sense.

Yet, there are instances in embryo dispute litigation in which courts have decided that they will allow a form of forced reproduction to further an individual's right to reproduce. In nearly all of these cases, the situation is the same and involves an exceptional circumstance: an ex-wife is granted full custody and permission to use previously-created embryos without the consent of the ex-husband, who is the genetic donor to these embryos. The question here, then, is should our legal system allow this form of forced reproduction, and, if it should, why? Are there public policy reasons that we should protect a woman's right to reproduce in these situations over her ex-husband's allegedly equally valid right to not have to reproduce? Or in the less common, but still equally possible situation, should we protect a man's right to reproduce in these situations over his ex-wife's equally valid right to not have to reproduce? In nearly all instances of litigation over embryo custody, courts have consistently dismissed the argument that a party's willing participation in IVF procedures translates into that party's consent to have children at a later point in time.<sup>16</sup> In this way, this particular corner of family law distinguishes itself from the general principles of contract law, in which consent is held and inferred from the moment of contract formation.<sup>17</sup>

Consequently, in marshalling the different disciplines of law inherent in these disputes, this discussion will strive to offer a possible solution for these tensions. First, this Note will review the current case law and approaches courts have taken in ruling on these challenging cases. Second, this Note will study *Terrell v. Torres*, and the Arizona Revised Statute Section 25-318.03 adopted in response to this case. Third, this Note will evaluate the Arizona Revised Statute Section 25-318.03's constitutionality. Fourth, this Note will evaluate child support, situations in which child support is not implemented, and the tensions between aiding in reproduction and allowing for child support, as the financial needs and concerns of legal parentage and financial legal responsibilities of being a parent are intricately connected with the child support scheme. Fifth, this Note will establish why other states should adopt statutes similar to Arizona Revised Statute Section 25-318.03. Finally, this Note will address the current state of *Terrell v. Torres* and the current state of frozen embryo litigation.

Case law has been dealing with the issue of frozen embryo disputes on-and-off because it is dealing with the forced tension between the right to procreate and the right to avoid procreation and any consequences of procreation. If more states were to adopt Arizona Revised Statute Section 25-318.03, which grants the frozen embryos to the party who wishes to bring the embryos to term and immunizes ex-spouses from legal parenthood who do not wish for the embryos to be used, these tensions would largely dissipate. This is a statutory means of granting the right to procreate while avoiding the financial obligations of forced procreation. Though there are

---

problematic. Kathryn Krase, *The History of Forced Sterilization in the United States*, OUR BODIES OURSELVES (Oct. 1, 2014), <https://www.ourbodiesourselves.org/book-excerpts/health-article/forced-sterilization>.

<sup>16</sup> See *A.Z. v. B.Z.*, 431 Mass. 150 (1999).

<sup>17</sup> See generally *Kass v. Kass*, 91 N.Y.2d 554 (1998).

non-financial reasons to not wish to procreate, the primary issues involved in these cases deal with legal parenthood and from one party's desire not to be financially and legally responsible for a child they do not wish to have.<sup>18</sup>

## II. CURRENT CASE LAW

### A. THE CONTRACT APPROACH

The contract approach, flowing logically from typical contract principles, was adopted by the New York Court of Appeals in the 1998 decision *Kass v. Kass*.<sup>19</sup> In *Kass*, Maureen and Steven Kass disputed over the disposition of five frozen, stored embryos created during their marriage.<sup>20</sup> Maureen wanted the embryos for implantation, claiming that the embryos were her "only chance for genetic motherhood."<sup>21</sup> Steven, on the other hand, objected to forced parenthood and claimed that the parties previously agreed that the embryos "would be donated to the IVF program for approved research purposes" in the event the parties divorced.<sup>22</sup> The court ultimately enforced the IVF consent documents which indicated the parties' dispositional intent in the event of divorce.<sup>23</sup>

Under the contract approach, contracts between disputing progenitors, or gamete donors, regarding disposition of their embryos will be generally presumed valid and binding, and thus enforceable, unless the contract is found to violate that state's public policy.<sup>24</sup> As such, the contract approach's greatest strength in adjudicating these disputes arises from its predictability in honoring a written contract that enables both parties to ensure that what they at one time agreed to will be, in fact, enforced. This strength, however, also results in one of the contract approach's greatest weaknesses, namely its inherent inflexibility in accounting for the changing needs and desires of the parties and in preventing courts from balancing the written language of a contract with the social policy concerns of that state or jurisdiction.

With respect to the first concern, sometimes neither party wants the contract to be enforced as written, but the contract approach would generally force them to abide by the plain language of the document.<sup>25</sup> Hypothetically, a couple could contract that upon divorce, any remaining frozen embryos will be donated to research. Upon divorce, however, one can easily imagine a situation in which the woman now wishes to use the embryos; whereas, the man now wants the embryos destroyed. In a contract jurisdiction, the court will likely order the embryos to be donated, despite neither party wishing for that outcome. With respect to the second concern, courts are sometimes wary of enforcing documents that they determine run counter to the jurisprudence

---

<sup>18</sup> Legal parenthood does involve a variety of different responsibilities beyond the financial, many of which shall be at least obliquely referenced or addressed in this Note. Still, one of the most important of these is financial, a fact evidenced by the centrality of financial concerns to litigation with one party not wanting to provide financial support to any resulting children.

<sup>19</sup> See *Kass*, 91 N.Y.2d at 554.

<sup>20</sup> *Id.* at 557.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 566.

<sup>24</sup> *Id.* at 565.

<sup>25</sup> See generally *id.*

of their courts or that prevent the enacting of justice suitable to the situation. But the court in *Kass* deliberately disregards these concerns, as it notes, “Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.”<sup>26</sup>

Crucially, the court concluded that the disposition of the embryos in this case “does not implicate a woman’s right of privacy or bodily integrity in the area of reproductive choice; nor are the [embryos] recognized as ‘persons’ for constitutional purposes.”<sup>27</sup> Further, the court in dicta stated:

The objecting party should have a veto over a former spouse’s proposed implantation, owing to the emotional and financial burdens of compelled parenthood. A fact-finding hearing would be authorized only when the party desiring parenthood could make a threshold showing of no other means of achieving genetic or adoptive parenthood, which was not shown on this stipulated record.<sup>28</sup>

In many ways, the prior statement indicates that the New York Court of Appeals, in developing the contractual approach, also considered principles not normally included in the normal adjudicatory approach of contractual disputes. The court was interested in balancing the competing interests of the parties and ensuring that justice and fair play were present, given the gravity of the financial and legal implications of parenthood. This fact foreshadows concerns that courts will weigh in the balancing approach.

#### B. THE BALANCING INTERESTS APPROACH

Of the states that have given first impressions to this issue, many have employed or adopted the balancing method, with states typically applying this approach in situations in which there is no written agreement between the parties, or the court finds the preexisting agreement to be invalid because the agreement is against the public policy of the state.<sup>29</sup> Thus, the balancing approach flows logically from the contractual approach, allowing courts to enforce contracts, both when the existence of a prior contract enables them to do so, and when the contractual stipulations are appropriate for that state’s reproductive policy goals. In situations in which there is no valid contract, however, the balancing approach allows courts to weigh each party’s interests in having a child against the other party’s unwillingness to become a parent.<sup>30</sup>

Courts in balancing states have generally refused to grant use of embryos to a party who wishes to attempt to use the embryos to have a child against the will of the other party, thus showing that they usually weigh more heavily

---

<sup>26</sup> *Id.* at 565–66.

<sup>27</sup> *Id.* at 564.

<sup>28</sup> *Id.* at 561.

<sup>29</sup> *A.Z. v. B.Z.*, 431 Mass. 150, 160 (2000). These public policy goals usually center around increasing reproductive autonomy and ensuring that women who might not otherwise be able to have genetically-related children can do so, a fact which will be explained more fully later in this Note.

<sup>30</sup> *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

the interests of the party who wishes to avoid procreation.<sup>31</sup> In the specific instances in which the woman lacks the ability to procreate children genetically related to her without use of the frozen embryos created with the now-unwilling partner, however, courts often disregard the pattern of jurisprudence just mentioned. This very fact indicates that the strength of the balancing approach arises from its recognition that the interest most in need of legal protection can change based upon the circumstances of the litigating parties.<sup>32</sup> Many balancing approach cases hinge on the fact that the couple decided to undergo the IVF procedure for the specific reason of preserving the woman's fertility, with a further wrinkle entailing that the woman's fertility was certain to cease in the wake of a cancer diagnosis and treatment.<sup>33</sup>

In 1992, the Tennessee Supreme Court became the first court to consider frozen embryo distribution issues in the wake of a divorce proceeding that included a disagreement over embryo ownership. In *Davis v. Davis*, Mary Sue Davis and Junior Davis contested the disposition of their cryogenically-preserved embryos.<sup>34</sup> Due to extenuating circumstances, including the removal of both fallopian tubes, Mary Sue Davis was left unable to conceive naturally.<sup>35</sup> Thus, she and her husband, Junior Davis, turned to IVF as their last resort to conceive a genetically-related child together.<sup>36</sup> During this time period, the cryogenic freezing of embryos became a viable technology,<sup>37</sup> and the Davises made use of this method of preservation during the last round of IVF the couple underwent.<sup>38</sup> After their divorce, Mary Sue Davis sought custody of the embryos so she could either attempt to bring them to term herself or donate them to another couple; whereas, Junior Davis wished for the embryos to be destroyed.<sup>39</sup>

In the absence of a valid, enforceable agreement, the court concluded that the correct approach was to “weigh the interests of each party to the dispute . . . in order to resolve that dispute in a fair and responsible manner.”<sup>40</sup> In this particular case, the court reasoned that the right to privacy of the party wishing not to procreate was to be weighed heavier than that of the other party. Citing to *Eisenstadt v. Baird*, which noted that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a

---

<sup>31</sup> See *A.Z.*, 431 Mass. at 160.

<sup>32</sup> See *Terrell v. Torres*, 438 P.3d 681 (Ariz. Ct. App. 2019); *Reber v. Reiss*, 42 A.3d 1131 (Pa. Super. Ct. 2012) (in which a wife's inability to achieve biological parenthood without the use of the embryos was an interest which outweighed the husband's desire to avoid procreation).

<sup>33</sup> In fact, it appears that such extenuating circumstances are necessary for such an outcome. See Justin Wm. Moyer, *Calif. Judge Rejects Woman's Plea to Save Frozen Embryos from Destruction*, WASH. POST (Nov. 19, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/19/calif-court-rules-against-divorced-cancer-survivor-in-dispute-over-frozen-embryos-even-though-she-may-be-infertile> (describing a situation in which a woman being too old to harvest new embryos was not enough for the court to grant her custody of said embryos).

<sup>34</sup> *Davis v. Davis*, 842 S.W.2d 588, 592 (Tenn. 1992).

<sup>35</sup> *Id.* at 591.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 592.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 590.

<sup>40</sup> *Id.* at 591.

child,” the court determined that the right not to procreate should not be infringed upon by the courts in this instance.<sup>41</sup> Here, Junior Davis, the party who did not wish to procreate, was granted custody of the disputed embryos.<sup>42</sup> The court speculated, however, that, in the case of a woman who now lacks the ability to conceive genetically-linked progeny outside of the already-existent embryos, the right of the party wishing to procreate could be weighed more heavily than that of the party wishing not to procreate. This proposition indicates that, had Mary Sue Davis been unable to procreate without the disputed embryos, the court could have weighed her interest in procreating more heavily than Junior Davis’s interest in not procreating.<sup>43</sup> The *Davis* court further acknowledged that an agreement “regarding [the] disposition of any untransferred [embryos] in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors,” establishing a viable means by which parties could avoid the necessity of the balancing approach as a means of litigation with more effective contract drafting.<sup>44</sup> Given the issues seen with contract drafting in the contractual approach above, however, such an idea may be overly optimistic.

### C. THE CONTEMPORANEOUS MUTUAL CONSENT APPROACH

The contemporaneous mutual consent approach has only been explicitly adopted by one state: Iowa.<sup>45</sup> This approach weighs equally the decisionmaking power of both parties, requiring the two to agree on a conclusion before the court will make any determination. This approach derives from *In re Marriage of Witten*,<sup>46</sup> decided in 2003. Prior to the dissolution of Arthur and Tamera Witten’s marriage, Tamera, unable to conceive children naturally, underwent the IVF process with Arthur in an attempt to become pregnant.<sup>47</sup> These attempts, however, were unsuccessful, and at the time of litigation, there were seventeen remaining cryogenically-frozen embryos which Tamera wished to either implant into herself or into a surrogate mother in “an effort to bear a genetically linked child.”<sup>48</sup> Conversely, while Arthur did not wish for the embryos to be destroyed, he did not want Tamera to use them.<sup>49</sup> Determining that Arthur had changed his

---

<sup>41</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). *See also* *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (deciding whether or not to beget or bear a child is fundamental to individual autonomy).

<sup>42</sup> *Davis*, 842 S.W.2d at 604–05.

<sup>43</sup> Other courts have cited to *Davis v. Davis* in order to use this reasoning. I would argue that this reasoning is the crux to why Ruby Torres in *Terrell v. Torres* should be allowed to use the embryos, regardless of the Arizona statute I will discuss further later in this Note. There has yet to be a case in which a now-sterile male gamete donor has sought to obtain frozen embryos in order to procreate, but if such an event were to occur, logic would dictate that he would also be able to argue for custody of the frozen embryos to seek to procreate via a surrogate.

<sup>44</sup> *Id.* at 597.

<sup>45</sup> *But see* *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. App. 2016) (applying a method similar to the contemporaneous consent approach. The court, however, did not explicitly identify the approach used as the contemporaneous consent approach, Missouri does not exclusively rely on said method, nor did the court explicitly cite to the method, indicating through case precedent that the state will follow the balancing test approach and the contract approach.).

<sup>46</sup> *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

<sup>47</sup> *Id.* at 772.

<sup>48</sup> *Id.* at 772–73.

<sup>49</sup> *Id.* at 773.



mind since he and Tamera signed the initial IVF agreement (which specified the disposition of the embryos in the event the couple divorced), the court adopted the contemporaneous mutual consent approach, requiring signed authorization from both donors before any “transfer, release, disposition, or use of the embryos” could occur.<sup>50</sup>

In this case, the court established that “decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed.”<sup>51</sup> Further, “no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo.”<sup>52</sup> This approach allows for advanced directives but further allows one of the party members to change his or her mind.<sup>53</sup> Recognizing the gravity of parenthood and of the decision either to implant or to destroy the embryos, the court determined that if the couple could not come to a contemporaneous mutual decision as to the disposition of their shared embryos, the best place for the embryos was to remain frozen, because “frozen is not final and irrevocable.”<sup>54</sup> This common-sense approach, in theory, allows for couples to reach an agreement at a later date without either party performing irrevocable actions regarding the embryo at a time when the parties cannot reach an agreement.<sup>55</sup> Case law demonstrates, however, the ease with which this logical approach can be twisted to allow one party in a divorce to extort another.

There are additional, likely valid, concerns of coercion in the face of the contemporaneous mutual consent approach. Mark P. Strasser argues that courts using this model “give each progenitor a powerful bargaining chip at a time when individuals might very well be tempted to punish their soon-to-be ex-spouses. As a matter of public policy, this makes no sense and may invite individuals to hold hostage their ex-partner's ability to parent a biologically related child in order to punish or to gain other advantages.”<sup>56</sup> Certainly, Strasser correctly identifies an issue within the contemporaneous mutual consent approach, and he recognizes the approach's failure to adequately protect the party who wishes to use the embryos without forcing an additional financial and emotional penalty upon that party. Yet, within this approach lies the recognition that the wishes of both parties should and must be protected, even if this attempt only poorly protects parties' interests in some cases or is capable of being manipulated in others. If the interests of both parties are to be protected, and the court denies the possibility of a former contract governing the dispute, then a more comprehensive approach than those described above must be constructed. Still, the contemporaneous mutual consent approach's problems are illuminating, as the issues arising from this approach indicate the inherent difficulty of adjudicating disputes between divorcing peoples because of frequent and predictable acrimony.

---

<sup>50</sup> *Id.* at 783.

<sup>51</sup> *Id.* at 777 (citation omitted).

<sup>52</sup> *Id.* at 778.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Mark Stasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFFALO L. REV. 1159, 1225 (2009).

The contemporaneous mutual consent approach strives to protect the parties' present interests, instead of the interests of the parties at the moment of contract. Unlike the contractual approach, the contemporaneous mutual consent approach will not allow the enforcement of a contract if one party later changes his or her mind. The court is correct to apply social policy analyses and recognize the gravity of bringing a child into the world, especially when one party is vehemently against the procreation. Yet, this refusal to enforce a contract implies that these disputes are different than most other contractual agreements, as courts consistently allow individuals to contract for all manner of extremely serious matters extending well into the future, with some of these matters being equally life-changing, and courts usually do not make allowances for one party in these agreements to change his or her mind.<sup>57</sup>

Yet, in the unique legal forum of family law, there are multiple situations in which contracts are vulnerable to one party changing his or her mind. Most states have statutes that bar adoption contracts from being valid until after the birth of the child.<sup>58</sup> Further, consent in this instance can be revocable. Birth mothers can revoke their consent after the birth of the child and before a certain amount of time passes.<sup>59</sup> Adoption laws center on the understanding of the gravity of parenthood, with the explicit understanding that some mothers will later change their minds. Further, consent of both the birth mother and father are generally required. If the birth father is unknown, consent is implied; however, should the birth father come forward within a state-specific time period, he can fight for custody of the child.<sup>60</sup>

Even the distinction between family law and other areas of jurisprudence has exceptions. For instance, adoption laws are in tension with surrogacy laws. California has some of the most surrogacy-friendly laws in the country, honoring surrogacy contracts at a much earlier date than most states.<sup>61</sup> Additionally, surrogacy contracts in California are almost always held to be valid and do not provide for any party to change his or her mind.<sup>62</sup>

The discussion above illuminates the many legal, social, and ethical concerns in disputes about the disposition of embryos between a formerly married couple. Chief among them are the constitutionally protected rights for and against procreation, which cannot always be held in tension and respected equally. Frequently, jurisprudence has weighed the desires of the party not to procreate more heavily than that of the party wishing to use

---

<sup>57</sup> Prenuptial agreements are an obvious example of this phenomenon of contracting for extended periods of time with respect to a very serious matter. For non-family law examples, mortgages, particularly the modern thirty-year mortgage, theoretically provide a longer financial and legal obligation than child-rearing. Enlistment in the military provides an example of a contract that will almost always be honored, though it involves the endangerment of a party's life interest.

<sup>58</sup> *Adoption Laws*, ADOPTION CTR., <http://www.adopt.org/adoption-laws> (last visited Dec. 15, 2019).

<sup>59</sup> This amount of time varies from state to state. For a comprehensive list, see *Adoption Laws By State*, ADOPTIVEFAMILIES, <https://www.adoptivefamilies.com/adoption-laws-by-state/> (last visited Dec. 15, 2019).

<sup>60</sup> CAL. FAM. CODE § 7662 (West 2014).

<sup>61</sup> *CA Surrogacy Laws*, FERTILITY SOURCE COS., <https://www.fertilitysourcecompanies.com/ca-surrogacy-laws> (last visited Dec. 15, 2020).

<sup>62</sup> See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (in which a heterosexual couple used donor gametes for both elements as well as a gestational surrogate. Parties got divorced and ex-husband tried to claim he was not the legal father of the resulting child because he was not the genetic father. Courts disagreed and found he was the legal father due to his initial intent to have the child with his ex-wife via donor gametes and surrogate, making him the intended father.).

embryos to procreate, except in extreme cases where the embryos in dispute are the only viable means of the latter party becoming a genetic parent.

### III. THE INCITING CASE AND THE RESPONDING STATUTE

Some courts are wary of withholding embryos from a woman who underwent the invasive procedure of IVF with the sole goal to preserve her fertility and her ability to have genetic children of her own. For many, the concept of weighing the right not to procreate, which is usually exercised by a male party, against a woman's right to procreate can result in an unjust outcome, particularly if the context in which the dispute comes to the court is the hypothetical just mentioned. In the wake of *Terrell v. Torres*, explained in greater detail below, Arizona courts encountered exactly this situation: a woman losing the right to use the embryos she had created in the wake of a devastating cancer diagnosis. In response, the Arizona legislature adopted Arizona Revised Statute Section 25-318.03 into law on April 3, 2018<sup>63</sup> in an attempt to more adequately protect a woman's right to procreate in these situations.

#### A. *TERRELL V. TORRES*

The fact pattern in *Terrell v. Torres* is unfortunately, by this point, a familiar one. In the wake of an aggressive cancer diagnosis,<sup>64</sup> Ruby Torres and John Joseph Terrell created and cryogenically preserved seven embryos using Torres's eggs and Terrell's sperm, as the treatment for the cancer would likely leave Torres sterile.<sup>65</sup> Torres relied on her oncologist's suggestion that she undergo IVF in order to produce embryos with her own eggs and donor sperm, so that Torres could preserve her ability to have a genetic child after she finished chemotherapy.<sup>66</sup> Torres initially intended to use an anonymous sperm donor to produce the embryos after her then-boyfriend, Terrell, refused to donate his sperm.<sup>67</sup> Hearing that this was her intention, Terrell ultimately changed his mind and agreed to be the donor.<sup>68</sup> Both parties executed the IVF Agreement provided by the Fertility Clinic—this agreement “specified that any embryo resulting from Torres' egg and Terrell's sperm would be their joint property.”<sup>69</sup> Torres and Terrell married four days after signing the IVF agreement, and Terrell filed a Petition for dissolution of marriage two years later.<sup>70</sup> Ultimately, Torres wanted to thaw and implant the embryos in an attempt to have children; Terrell, however, did not want Torres to have or use the embryos, as he was “concerned about his ‘financial liability in the future . . . as far as . . . [his] inheritance or, [an obligation to pay] child support for a child that [he] would [] never see[.]’”<sup>71</sup>

---

<sup>63</sup> *Bill History for SB1393*, ARIZ. STAT. LEG., <https://apps.azleg.gov/BillStatus/BillOverview/70559?SessionId=119> [<https://perma.cc/28AG-S6PE>] (last visited Nov. 9, 2019).

<sup>64</sup> *Terrell v. Torres*, 438 P.3d 681, 684 (Ariz. Ct. App. 2019).

<sup>65</sup> *Id.* at 684–85.

<sup>66</sup> *Id.* at 684.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 685.

<sup>71</sup> *Id.*

As a case of first impression in Arizona,<sup>72</sup> the Arizona Court of Appeals explicitly chose the aforementioned contractual approach as the general means of determining this type of conflict.<sup>73</sup> In this instance, the IVF Agreement granted the court the authority to decide disputes between the parties, and the court decided to balance the interests of the two parties.<sup>74</sup> In a case in which the parties “have no prior agreement, or if the agreement leaves the decision to the court, the balancing approach provides the proper framework for the determination.”<sup>75</sup> Applying the balancing test to the above fact pattern, the court ruled for Torres and awarded her custody of all seven embryos.<sup>76</sup> However, in response to the legal uncertainty revealed by this case, and the possibility of a judgment inconsistent with this result, the legislature adopted the Revised Statute Section 25-318.03.<sup>77</sup>

#### B. ARIZONA REVISED STATUTE SECTION 25-318.03

The statute applies to situations in which divorcing parties disagree about the disposition of in vitro human embryos. It attempts to address this situation and other possible iterations of this type of dispute. This statute does not prevent the parties from otherwise coming to an agreement about the disposition of the embryos, which may indicate influence by the contemporaneous mutual consent approach, but the statute provides legislative guidance for how courts should determine the disposition in the case that parties cannot agree.<sup>78</sup>

The statute, in pertinent part, reads:

A.1. [The court will] award the in vitro human embryos to the spouse who intends to allow the in vitro human embryos to develop to birth.

A.2. If both spouses intend to allow the in vitro human embryos to develop to birth and both spouses provided their gametes for the in vitro human embryos, [the court will] resolve any dispute on disposition of the in vitro human embryos in a manner that provides the best chance for the in vitro human embryos to develop to birth.

A.3. If both spouses intend to allow the in vitro human embryos to develop to birth but only one spouse provided gametes for the in vitro human embryos, [the court will] award the in vitro human embryos to the spouse that provided gametes for the in vitro human embryos.

....

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 689–90.

<sup>74</sup> *Id.* at 691.

<sup>75</sup> *Id.* at 689.

<sup>76</sup> *Id.*

<sup>77</sup> ARIZ. REV. STAT. ANN. § 25-318.03 (2018). It is important to note that this statute was not considered by the Arizona Court of Appeals in its decision. Further, as will be discussed in the last portion of this Note, the Arizona Supreme Court did not apply this new statute due to the fact that the statute did not contain a retroactivity clause. Thus, despite the fact that the legislature adopted this statute due to Ruby Torres’ plight, she was ultimately not able to benefit from the statute’s implementation.

<sup>78</sup> *Id.* § 25-318.03(A).

C. The spouse that is not awarded the in vitro human embryos has no parental responsibilities and no right, obligation or interest with respect to any child resulting from the disputed in vitro human embryos, unless the spouse provided gametes for the in vitro human embryos and consents in writing to be a parent to any resulting child as part of the proceedings concerning the disposition of the in vitro human embryos.

D. If the spouse who is not awarded the in vitro human embryos does not consent to being a parent as provided in subsection C of this section, any resulting child from the disputed in vitro human embryos is not a child of the spouse and has no right, obligation or interest with respect to the spouse.<sup>79</sup>

Section E specifies that in the case in which a “spouse who provided gametes” does not consent to being a parent as specified in subsection C, that spouse shall provide a “written nonidentifying” document that indicates “health and genetic history of the spouse and the spouse’s family.”<sup>80</sup> Section F provides pertinent definitions for “gamete,” “human embryo,” and “in vitro.”<sup>81</sup>

The statute represents an important step to more adequately balance the constitutionally-protected interests of both parties in the types of embryo disputes discussed in this paper. Recognizing the importance of protecting a party’s right to procreate, which may be limited to the embryos in dispute, the statute grants the embryos to that party but absolves the party desiring not to procreate of all legal and financial obligations. In so doing, the law allows for both interests to have some protection, even if the party wishing to avoid procreation might have other non-financial or non-legal concerns.<sup>82</sup>

---

<sup>79</sup> *Id.* §§ 25-318.03(A), (C)–(D).

<sup>80</sup> *Terrell*, 438 P.3d at 689–90.

<sup>81</sup> *Id.*

<sup>82</sup> It is important to note that this statute only applies in situations of divorce. It is unclear how Arizona would approach a situation in which an unmarried couple disputed over embryos. *But see* Szafranski v. Dunston, 34 N.E.3d 1132 (Ill. App. Ct. 2015) (in which an unmarried Illinois couple who underwent IVF disputed over embryo custody—the court decided that the proper approach would be to evaluate any pertinent contracts between the parties, and if no valid contracts existed, then to apply the balancing approach).

IV. CONSTITUTIONALITY OF ARIZONA REVISED STATUTE  
25-318.03A. WHY ARIZONA REVISED STATUTE SECTION 25-318.03 IS LIKELY  
CONSTITUTIONAL

Arizona Revised Statute Section 25-318.03 was enacted in order to protect “a parent’s right to his or her in vitro embryos in a divorce proceeding.” The intent was to prevent the possibility that a person should lose the ability to be a parent because that person’s former spouse “no longer wants to be a parent . . . . This bill balances the interests of the spouses by removing any right, obligation, or interest between the spouse that no longer wants to be a parent and any resulting child.”<sup>83</sup> The statute clearly seeks to protect the interests of both parties, interests defined by the Constitution. Crucially, this statute is gender-neutral, so male gamete donors may secure the embryos and bring them to term using a gestational surrogate. The interest-focused language of the statute seems to articulate a protected right and interest in the use of artificial reproductive technologies, including IVF, primarily as an extension of the constitutionally-protected right to procreate.<sup>84</sup>

The right to procreation’s development began in an otherwise innocuous evaluation of a criminal penalty being levied in the 1940s in Oklahoma. As part of its overturning of the criminal penalty in *Skinner v. Oklahoma*, the Court stated that procreation is “one of the basic civil rights,” and included language that “marriage and procreation are fundamental to human existence and survival.”<sup>85</sup> *Griswold v. Connecticut* later articulated a right to privacy for heterosexual couples in their sexual relationships, protecting a right to the use of contraception as a result.<sup>86</sup> These two threads are united in *Eisenstadt v. Baird*, which holds that the right to procreation is a necessary correlate to the rights to contraception and privacy. Individuals, under this approach, are protected from “unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>87</sup> As a natural extension of the right to procreate and the right to be free from unwanted governmental intrusion, consequently, § 25-318.03 now explicitly protects this right to procreation through the scientifically generated means of IVF.

Arguments about the unconstitutionality of this statute that rely on references to a woman’s protected constitutional right to bodily autonomy, therefore, miss the relevant constitutional standard. Bodily autonomy is a framework derived from *Roe v. Wade*, which finds a right to abortion but doesn’t address possible issues with the right to procreate. Given that frozen embryos are created via IVF, a woman’s bodily integrity has not been

<sup>83</sup>Alexa Lardieri, *Arizona Law Awards Custody of Embryos to Partner Who Wants Child After Divorce*, U.S. NEWS & WORLD REP. (July 19, 2018), <https://www.usnews.com/news/politics/articles/2018-07-19/arizona-law-awards-custody-of-embryos-to-partner-who-wants-child-after-divorce>.

<sup>84</sup>For an interesting take on why the right to IVF may be pertinent, see Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women’s Asymmetrical Property Interest in Pre-Embryo Dispositional Disputes*, 30 HASTINGS WOMEN’S L.J. 119 (2019).

<sup>85</sup>*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>86</sup>*Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

<sup>87</sup>*Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

intruded upon by the embryo, as the embryo is located outside of her body. Melissa B. Herrera notes that, should a situation arise in which the man is awarded the embryos, the woman's "bodily integrity . . . will not be infringed on because she will not gestate the embryo."<sup>88</sup> As such, because the statute does "not force implantation or gestation on to the woman,"<sup>89</sup> and because the relevant constitutional standard is governed by the right to procreation which *Eisenstadt* finds to be individual and not jointly-held, this statute is constitutional.

B. CRITICS OF ARIZONA REVISED STATUTE SECTION 25-318.03  
INCORRECTLY QUESTION ITS CONSTITUTIONALITY

Some have argued that the Arizona Revised Statute must be held unconstitutional under *Roe v. Wade* because "it indirectly imputes personhood and a right to life to a pre-embryo."<sup>90</sup> This position constitutes a clear misreading of the statute's narrowly-tailored language. The statute is only relevant in situations in which one party desires parenthood and the other spouse does not, and it only arises in the context of a divorce proceeding. In so establishing, the statute's legislators clearly sought to protect the interests and rights of the two parties in a specific type of dispute, not to provide a de facto protection for embryos as having any legally-recognizable life interest. Moreover, in situations in which neither party desires to use the embryos, the statute does not empower the court to force either party to attempt to bring the embryos to term. The statute instead determines that in situations in which individuals have taken direct steps in order to facilitate having a child, neither party should be allowed to unilaterally prevent this outcome.

Further, the pragmatic lawmaker would see how the Arizona statute serves the important function of protecting women's bodily autonomy, unlike any of the judicially-constructed approaches this Note has discussed. While statistics about this type of dispute are not available, the case law demonstrates that the party seeking to prevent implantation of the embryos is almost always male. The contractual approach has almost universally favored men and disfavored women in these disputes; whereas, the balancing approach has only favored women in extreme situations in which a woman can no longer have genetically-related children in any other way except the disputed embryos. Further, as discussed above, the contemporaneous mutual consent approach typically results in the male party exerting control over the female party by preventing her from using the embryos without bargaining away parts of the marital property that she might otherwise have retained.<sup>91</sup>

---

<sup>88</sup> Herrera, *supra* note 84, at 136. Herrera went on to argue that she feels the woman's bodily integrity has already been compromised due to the nature of the IVF procedure. While interesting, I do not believe that such a concern is covered under *Roe* or any subsequent cases concerning a woman's bodily autonomy, especially in the case in which a woman voluntarily undergoes IVF. Abortion, for example, can involve a woman's bodily integrity to be compromised due to the nature of such procedures. While it is important to preserve a woman's bodily autonomy, it is equally important to recognize that women as individuals can voluntarily consent to such a violation—to claim otherwise is to infantilize women, and, as such, I cannot support Herrera's argument.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 135.

<sup>91</sup> See generally Stasser, *supra* note 56.

While it is true that both parties have the ability to bargain, the case law we have demonstrates that it is typically the woman who desires use of the embryos and it is typically the man who wishes for the embryos to be donated or destroyed.<sup>92</sup>

Others argue that the statute is unconstitutional because it results in “forced procreation” for the unwilling party. While the claim that the statute forces parenthood onto an unwilling party correct insofar as implantation without dual consent ensures that a child is born with genetic material from a non-consenting party, but it is unclear whether this fact creates a constitutional violation. Professor I. Glenn Cohen has argued that the Constitution is bereft of a right not to procreate. Cohen speculates that the perceived right to avoid procreation involves the conflation and collapse of three distinct principles: “the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent.”<sup>93</sup> In essence, Cohen argues that contraceptive jurisprudence cannot make sense unless it recognizes the distinction between “rights” one and two, on the one hand, and right three, as the first two “rights” are not actually constitutionally protected, while the latter is protected through privacy rights.<sup>94</sup>

I assert that Cohen is correct, insofar as he identifies the right not to procreate as the right to avoid gestational parenthood, and that there is no constitutional right to avoid *genetic* procreation. The Arizona statute actually harmonizes with Cohen’s position, as the statute allows for “forced” genetic procreation, but it removes all legal or financial burdens on the objecting party. Because of this, while it is true that the Arizona statute “forces parenthood” on the objecting party, the statute ensures that the objecting individual is not a legal parent, and thus not tied to the child in any meaningful legal way. While it is understandable that some individuals will feel connected to a child with whom they share genetic material, these feelings of connectedness should not allow the party unwilling to meet the obligations of this potential emotional connection to avoid parenthood at the expense of the party wanting to bring the embryos to term.

## V. CHILD SUPPORT

As seen above, the threat of child support and other financial obligations to a genetic child are a major reason for the conflict this Note studies. Thus, to more fully situate the context in which Arizona’s revised statute was passed, this Note will also examine the policy reasons for the existence of child support payments. Additionally, it will articulate why the government traditionally prevents parents from bargaining away future child support for their children as part of a divorce agreement. Lastly, this Part will note that the government’s powerful interest in guaranteeing child support can be overwhelmed in extreme cases like the one which is the topic of this paper.

---

<sup>92</sup> See *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

<sup>93</sup> I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1138 (2008) (describing the conflation as a “bundling”).

<sup>94</sup> *Id.*



### A. WHY DO WE HAVE CHILD SUPPORT?

The traditional and most widespread understanding and justification for child support obligations is the “societal consensus that both parents have a moral obligation to support their children, even if the child lives primarily with one parent.”<sup>95</sup> As a general rule of social construction, individuals should be held responsible for the consequences of their actions. In this manner, child support can be seen both as a punishment for fathers engaging in “irresponsible male sexual behavior” and as an extension of the government’s desire to provide for vulnerable members of society.<sup>96</sup>

Yet, there are also some scholars that conceive of child support as the direct result of an assumption of risk. By choosing to engage in sexual activity, there is an underlying current of belief that one should be held responsible for any resulting children. Additionally, that there is the belief that “child [has] a moral claim to their father’s resources” may also explain the rationale for holding unwilling men financially responsible as fathers.<sup>97</sup> There are, however, legitimate concerns for the mental and emotional harm a child might sustain as a result of an unwilling father. In such a situation, Katharine Baker considers whether “the child would be better off with resources emanating directly from the state rather than from a reluctant father who is not likely to pay very much or very consistently and is unlikely to assume a meaningful role as father.”<sup>98</sup> I will explain in further detail below as to why this concern of forcing unwilling fathers into legal parenthood is thus solved by the Arizona Statue in question.

### B. PARENTS CANNOT BARGAIN AWAY CHILD SUPPORT FOR THEIR CHILDREN

Generally, legal parents are not allowed to waive a child’s right to child support.<sup>99</sup> For example, in the context of divorce, one parent is not allowed to promise their ex-spouse that he or she will not seek child support from the other party for current or future children. This legal tradition arose out of the government seeking to avoid financial obligations when it can procure resources in another manner and because the government values providing a child with the resources of a two-parent household.

<sup>95</sup> Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. LEGIS. 107, 137 (2008).

<sup>96</sup> Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 17 (2004). There have been, however, instances in which male statutory rape victims have been held liable for child support. Not only are these instances disturbing, they call into question the validity of child support as a punitive measure to discourage irresponsible behavior. See *Cnty. of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843 (Ct. App. 1996); *Mercer Cnty. Dep’t of Soc. Servs. v. Alf M.*, 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992).

<sup>97</sup> Baker, *supra* note 96, at 18.

<sup>98</sup> *Id.* at 21.

<sup>99</sup> At first, this principle may be striking. The law terminates or prevents the exercise of several other rights within the parent-child relationship, such as legal guardianship, decision-making powers, and visitation rights, all of which are necessary parts of this relationship and which contribute to the emotional and physical well-being of a child. State governments are generally hesitant, however, to terminate child-support obligations, even though financial security may be less important than other aspects of the parent-child relationship. Why? Likely, states recognize a difference between the rights that a parent may exercise in raising their child and those which are obligations arising from the rights of the children conceived by his or her genetic material.

The concern for a potential child's financial well-being and security is sometimes overruled by other policy concerns. A notable exception to waiving a child's right to financial support arises from the gamete-donor relationship. State statutes consistently immunize gamete donors and surrogates from child support.<sup>100</sup> It is understandable that an individual would not donate genetic material if he or she could later be held liable for child support for any resulting child. This fact indicates that states generally have privileged an individual's desire to procreate over the ability for a child to receive support from a genetic donor. In so privileging this policy concern, states have recognized that situations do arise in which stripping a child of the right to the financial resources of two parents and forcing the government to otherwise cover childcare costs are worthwhile sacrifices for the social goals of respecting individuals' reproductive autonomy. While it is true that most children resulting from gamete donations are frequently raised in two-parent households, that is not always the case. In recent years, more and more children are born to single parents using genetic donors and raised without the financial resources of a two-parent household.<sup>101</sup> In these cases, it is the state, and not an individual party, that allows for the waiver of a genetic parent's financial obligations to any genetic children.<sup>102</sup>

Undoubtedly, states have a strong interest in preserving a child's ability to obtain child support. As such, there must be a significant and persuasive reason for a state to allow an individual to divorce themselves from the legal parent-child relationship and the financial support inherent to that relationship. Traditionally, gamete donations were made to infertile *couples* seeking to achieve pregnancy.<sup>103</sup> As such, the child resulting from this form of genetic donation was ultimately not withheld financial support from two parents, since the situation presupposed the existence of a two-parent household. Yet, in recent years, social views on the nature of the family have shifted, allowing for individuals to purposefully create single-parent households.<sup>104</sup> To protect the individual's desire to reproduce as a single parent, children born to a single individual and a gamete donor usually cannot seek financial support from the donor.<sup>105</sup> As such, the gamete donor is immunized from providing financial support to the resulting child with no other adult to take his or her place. This demonstrates that, as a society, we have privileged the ability to reproduce over the ability of a child to be

---

<sup>100</sup> *Do Sperm Donors Have to Pay Child Support?*, SCHOENBERG FAM. L. GRP. (May 4, 2018), <https://www.sflg.com/blog/2018/05/do-sperm-donors-have-to-pay-child-support>. Courts and legislatures generally employ strict requirements and standards for a person to be considered a donor immune to child support obligations. Most states have adopted statutes or requirements that require donors to go through official banks or medical offices. *See, e.g.*, *Straub v. B.M.T. ex rel. Todd*, 645 N.E.2d 597 (Ind. 1994) (holding that a man was liable for child support for his naturally conceived child, even though the mother had induced him to impregnate her with a written statement releasing him from liability).

<sup>101</sup> *See Is Possible to Be a Single Mother?*, IVI (Mar. 24, 2020), <https://ivi-fertility.com/blog/single-mother>.

<sup>102</sup> Though such a distinction might initially seem to be splitting hairs, states often have to balance questions of reproductive autonomy with the state's own financial interests. Consequently, when a state has the general policy of increasing reproductive autonomy, it may be willing to acquiesce to the increased financial costs of single-parent households; whereas, an individual's attempt to immunize him or herself financially likely does not serve any overarching state interest.

<sup>103</sup> Maya Sabatello, *Disclosure of Gamete Donation in the United States*, 11 IND. HEALTH L. REV. 29, 33 (2014).

<sup>104</sup> *See* Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1532–33 (2018).

<sup>105</sup> The Uniform Parentage Act of 1973 generally immunizes donors from child support obligations if a physician is involved in the process (i.e., the pregnancy does not occur through intercourse).

supported by two parents in very specific cases. As such, we should apply the same thought process to the matter at hand, given that the doctrine would advance many of the same policy goals as protecting reproductive autonomy.

## VI. WHY STATES SHOULD ADOPT STATUTES SIMILAR TO AZ STATUTE SECTION 25-318.03

### A. WHY ARIZONA STATUTE SECTION 25-318.03 IS THE BEST SOLUTION

The Arizona statute combines elements of the contract approach, the balancing approach, and the mutual consent approach by providing a failsafe solution to the problem of embryo disposition in the case that parties should fail to reach an alternative agreement. The statute recognizes the gravity of embryo disposition whilst simultaneously understanding that parties may ultimately change their minds in the wake of a radical situational change, such as divorce. Yet, the statute also recognizes that the initial intent of the parties in contracting and fertilizing embryos was to procreate—one does not generally undergo IVF without at least a semblance of an understanding that the embryos being created could one day develop into children. As such, the party that relied on the initial understanding of IVF—the party who underwent invasive treatments in order to produce the embryos, the party who is usually female—is not punished at a later date because the other party no longer wishes to follow the initial understanding to its intended consequence.

Further, the statute does not negate all the benefits inherent in the contractual approach. Should the couple successfully agree on a contract governing the embryo disposition or come to a new agreement during litigation, the court will honor that agreement. Admittedly, in a situation in which both parties had previously contracted to agree to let the embryos be destroyed in the case of divorce, and then one party changes his or her mind, then that initial contract would not be honored under the statute.<sup>106</sup> Crucially, in situations in which both parties remain in agreement, the contract would be valid and enforceable—the Arizona statute does not nullify contracts in which there is no disagreement. In the event in which one party seeks donation and the other seeks destruction, the court would not force either party to become an unwilling parent.<sup>107</sup>

Just like the formation of embryos cannot be undone, the *destruction* of embryos cannot be undone, providing equally-weighty concerns on both ends of the IVF spectrum. Consequently, destruction will rarely be a just option in these disputes. In situations in which one party is no longer able to

---

<sup>106</sup> ARIZ. REV. STAT. ANN. § 25-318.03(A) (2018).

<sup>107</sup> It is likely in the above hypothetical that the court would order donation over destruction of the embryos. Due to the statute's specification that the embryos should go to the party that is most likely to help the embryos come to term, destruction would likely be the option of last resort under the statute. There does remain the difficulty of determining whether donation means the embryos are given to another party seeking to use the embryos to potentially become pregnant, or if donation means a scientific donation. The former definition appears to be more in line with the Arizona statute, but it is important to recognize that both definitions exist. The statute would likely treat both scientific donation and destruction similarly, but I would still argue that destruction of the embryos would be last in the order.

produce viable gametes (or gametes at all, for that matter), the embryos represent a last chance at genetic parenthood. The Arizona statute recognizes the gravity of both creating and destroying embryos and provides protections for the party more likely to fight for implantation. Unlike the contemporaneous mutual consent approach, which can idealize embryo disposition in a divorce proceeding, the Arizona statute sidesteps the unique situation in which some prospective parents are forced to bargain, which, in effect, might make them more vulnerable to the whims or mistreatment of the opposing party. Consequently, the Arizona statute strives to preserve the protected interests of both parties, establishing, as a rule, a final means to determine the outcome of these disputes, should the parties otherwise fail to agree.

#### B. POTENTIAL PITFALLS OF THE STATUTE

However, financial motives are not the only reason for which an individual would not wish to be a parent, legal or otherwise. There appears to be a general unease among the individuals in the aforementioned cases who did not wish for the embryos to be implanted and brought to term, as they were uncomfortable about the idea of having their child out in the world without them.<sup>108</sup> Many expressed that they would feel obligated to be a part of any resulting child's life, regardless of whether the other parent expected the reluctant parent's involvement. Junior Davis, for example, was "vehemently opposed to fathering a child that would not live with both parents,"<sup>109</sup> in part due to his own childhood trauma as a result of his parent's separation when he was a boy.

Further, individuals typically undergo IVF procedures with the understanding that they, as a couple, are creating a child that they will one day raise together. In the wake of a divorce, this situation has generally ceased being a reasonable possibility, and the reason someone once wished to procreate may have become the reason they may no longer wish to do so. Consequently, it may no longer be fair to claim that implied assent to become a parent still exists now that the relationship between the parties has fractured.

It also may be unfair to reduce the unwilling individuals within the aforementioned cases to mere gamete donors, as the Arizona Statute does. An anonymous gamete donor makes donations with the understanding that his or her genetic material may one day result in a child, but he or she generally does so without the intent to learn of or participate in the lives of these hypothetical children.<sup>110</sup> Whereas gamete donors have this added layer of intentional anonymity, the decision to have a child with another person is a deeply personal affair for most people. It is understandably difficult to reconcile the idea that the child you tried so hard to have with another person will now possibly be raised by that now ex-lover without your influence.

---

<sup>108</sup> See generally *Terrell v. Torres*, 438 P.3d 681 (Ariz. Ct. App. 2019).

<sup>109</sup> *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

<sup>110</sup> But see Susan Dominus, *Sperm Donors Can't Stay Secret Anymore. Here's What That Means.*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/magazine/sperm-donor-questions.html> (discussing how donor anonymity is becoming a thing of the past due to the rise of DNA kit popularity).

Further, it is understandable why someone, in the wake of a particularly nasty divorce, would no longer wish to have a physical reminder in the form of a child serve as a marker of that past relationship. Even if the individual who did not wish to become a parent had no contact with the resulting child, the very fact that the child existed *somewhere* could be understandably distressing.

Lastly, it is difficult to understand why forced genetic parenthood would necessarily be more distressing than losing the opportunity to become a genetic parent. For many of the individuals in these cases, the disputed embryos represent a last chance for the realization of the dream to become a genetic parent. It is unclear why the loss of that dream should be seen as less psychologically damaging than forcing an unwanted child upon a person. Ultimately, these disputes often require some sort of balancing in which we must determine which right we should privilege more: the right to procreate or the right not to procreate. Both outcomes are significant, as one involves the right to create genetically-related children and the other entails the right to prevent those genetically-related children from existing. In this situation and for the reasons discussed above, I believe the right to procreate must be protected over the right not to procreate. It is unclear whether there is a right not to procreate, but it is overtly clear that there is a constitutional right to procreation. It is unfortunate that this means that at times, one party will become an unwilling parent. Yet, unlike traditional forms of unwanted parenthood, Arizona's statute at least removes all legal parental obligations from the unwilling party. The American adversarial-legal system typically leaves one party unsatisfied. Here, the party wishing to avoid procreation will understandably be upset with this outcome. However, should statutes like Arizona Statue Section 25-318.03 be adopted universally, parties seeking to undergo IVF treatments and store frozen embryos will be aware of this potential outcome ideally long before any litigation takes place.

## VII. *TERRELL V. TORRES* ARIZONA SUPREME COURT DECISION

### A. ARIZONA SUPREME COURT DECISION

On January 23, 2020, the Supreme Court of Arizona vacated the Court of Appeals opinion and affirmed the Superior Court order that Terrell and Torres donate the disputed frozen embryos.<sup>111</sup> Despite the passage of Arizona Statute Section 25-318.03, whose implementation would have ensured that Torres be granted possession and usage of the embryos regardless of Terrell's objections, the Arizona Supreme Court declined to implement the statute in this case. In the pertinent part, the court stated:

---

<sup>111</sup> *Terrell*, 456 P.3d at 18.

Since the family court's ruling here, the legislature enacted A.R.S. § 25-318.03, which directs the disposition of embryos in marriage dissolution proceedings regardless of any contract. *See* 2018 Ariz. Sess. Laws ch.128, § 1. That statute does not state that it applies retroactively, and we do not consider it further. *See* A.R.S. § 1-244 (“No statute is retroactive unless expressly declared therein.”).<sup>112</sup>

Ultimately, this failure to apply the statute retroactively must be placed wholly in the legislature's intentional or unintentional refusal to add a retroactivity clause. It is odd that the legislature failed to include a retroactive clause when A.R.S. § 25-318.03 was explicitly passed due to the plight of Ruby Torres and her inability to secure access to her frozen embryos. As the court was not obligated to follow the new statute, and in fact explicitly ordered to not retroactively apply said statute, the court instead implemented the contractual approach.<sup>113</sup> Drawing on past Arizona divorce precedent, the court stated that it had “traditionally enforced contracts between divorcing couples regarding the disposition of property”<sup>114</sup> and thus would rely on contract interpretation in the determination of this case.

B. ANALYSIS OF THE CONTRACT IN *TERRELL V. TORRES* AND THE COURT'S REASONING

The dispute centered around paragraph 10(H) of the Agreement, and whether 10(H) left the dispositional choice to the courts' discretion, “as Torres [argued] and the lower courts concluded,” or whether the Agreement “requires the donation of the embryos,” as Terrell asserted.<sup>115</sup> When read in context of the entire contract, the court determined that paragraph 10(H) meant “upon divorce or dissolution of the relationship, the parties chose to donate the embryos absent a contemporaneous agreement” that one of the parties may instead use the embryos.<sup>116</sup> As Terrell remained set against Torres ever using the embryos to potentially bring said embryos to term, the parties were never in contemporaneous agreement about the disposition of the frozen embryos. As such, the court determined that the contract required that the embryos be donated, and thus refused to allow Torres possession of the embryos. In making their decision, the Arizona Supreme Court heavily relied on the dissent's argument from the Arizona Court of Appeals decision, which had argued that traditional Arizona divorce precedent should be honored in the adjudication of this dispute.

---

<sup>112</sup> *Id.* at 15 n.1.

<sup>113</sup> *Id.* at 15.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 16.

C. POST-*TERRELL V. TORRES*

As of 2021, no other cases have cited to *Terrell v. Torres* as decided by the Arizona Supreme Court.<sup>117</sup> Prior to the Arizona Supreme Court's final decision, in which it did not implement Arizona Statue Section 25-318.03, I had hoped the Arizona Supreme Court would rule in a manner consistent with the new statute, thus paving the way for other courts to do the same. As frozen embryo cases are currently rare, there have not been any other cases that have sought to use the aforementioned statute. As such, there is still no case precedent of successfully implementing the statute and awarding disputed frozen embryos to the party who wishes to attempt to bring those embryos to term over the objecting party. Still, the implied recognition by the statute and the Arizona legislature for the concerns of women in the medical situations discussed throughout this Note allows for continued optimism about the direction of future legal decisions for these kinds of disputes.

While the fact that the statute was unable to be applied in *Terrell v. Torres* is an unfortunate setback, the Arizona statute was not struck down and remains good, if unapplied, law. The Arizona Supreme Court did not consider the Arizona statute at all in its decision. In fact, as noted and cited above, the Arizona Supreme Court explicitly refused to consider the statute. Consequently, future litigants should hopefully be able to make use of the statute. It is likely that when the statute is inevitably invoked, the statute will also face some or all of the constitutional challenges discussed above. At that time, I hope my constitutionality arguments hold true and the court rightfully decides that the Arizona statute is constitutional, thus allowing the statute to be invoked to its fullest and in accordance with legislative intent.

As a final note on *Terrell v. Torres* specifically, while it is possible for the Arizona state legislature to amend the statute to allow for the Arizona statute to be retroactively applied, the state legislature should not do so. The fact that the statute does not currently contain a retroactivity clause is frustrating in the case of *Terrell v. Torres* but understandable when one considers the broad negative implications a retroactivity clause could bring. To allow for a retroactive application of the statute would likely result in some particularly unpleasant scenarios, not the least of which would be possibly relitigating already determined and decided cases. Situations in which the court initially ruled that the disputed embryos be destroyed could then potentially see damage suits brought by the harmed party. In such situations, it is unclear how the court would determine damages—what are rightful damages for the loss at the chance to become a genetic parent? Further, cases in which the embryos were initially donated and then used by another couple could get similarly messy. Monetary damages would seem insufficient to remedy the damages being claimed, but taking away a resulting child from another couple is equally abhorrent. There is no

---

<sup>117</sup> Crucially, no other states have enacted legislation similar to Arizona Statue Section 25-318.03 as of January 18, 2021. As of that date, it would appear that no other state is currently engaging in discussions surrounding frozen embryo disputes. It is likely that until another high profile case akin to *Terrell v. Torres* occurs, other states will not look to legislative solutions such as the one found in Arizona Statue Section 25-318.03.

adequate way to remedy the damages that these cases have already done—the disputed embryos are likely long gone, used by others, donated to science, or merely destroyed. As such, the legislature was right in its decision to not allow for a retroactive application of the statute. Despite Ruby Torres being the catalyst for Arizona Statue Section 25-318.03, she unfortunately was not able to ultimately benefit from its passage and likely never will.

### VIII. CONCLUSION

As of 2020, there are an estimated 1 million embryos in cryostasis in the United States, and the number continues to grow.<sup>118</sup> While litigation in this area of the law has been relatively rare so far, the ever growing popularity of IVF and other artificial reproductive technologies indicate that litigation over cryogenically-preserved embryos will likely increase, particularly as these technologies become even more widely available. This growing area of litigation necessitates clear state legislation on how these disputes should be settled.

The unfortunate and emotional nature of these frozen embryo disputes means that regardless of the result, one party is likely to be severely disappointed about the outcome. Parenthood may be forced upon a party or the possibility of parenthood may be stripped away. The unanswered ethical issues behind these disputes, namely which right should we privilege more—the right to procreate or the right not to procreate—has resulted in a high level of uncertainty and unpredictability with these cases. Arizona Statue Section 25-318.03 provides that needed predictability and certainty. The statute protects the constitutional right to procreate while also affording those who do not wish to procreate with a legal out. Further, the statute still allows for contract enforcement so long as neither party disagrees with the contract at hand. In the event that neither party wishes to attempt to bring the embryos to term, the statute does not require that the court mandate procreation.

The ever present concern that technology can, and frequently does, outpace the law is no excuse to not provide clarity to those individuals seeking to use this technology to plan for their futures. As the court in *Kass* so aptly states, “As science races ahead, it leaves in its trail mind-numbing ethical and legal questions.”<sup>119</sup> Arizona Statue Section 25-318.03 grants this much needed relief and guidance.

---

<sup>118</sup> *What We Do*, NAT'L EMBRYO DONATION CTR., <https://www.embryodonation.org> (last visited Dec. 15, 2020). This number includes the ever growing number of abandoned embryos—left in cryostasis due to a variety of reasons, including extended litigation time, failure to contract properly, inability to find labs who take in donated embryos, and an increasing number of cryo-laboratories which refuse to destroy these frozen embryos. Such labs often refuse to destroy these frozen embryos for fear of later litigation—for once the embryos are destroyed, there is nothing more that can be done on the part of the lab. Thus, in an effort to avoid later liability, many labs have thousands upon thousands of abandoned embryos in storage. While this Note was unable to delve into this issue, this ever growing number further reveals the necessity of relevant and modern legislation. See Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC NEWS (Aug. 12, 2019), <https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806> (discussing how medical developments no longer require the fertilization of dozens of embryos at a time and that the United States would be best suited adopting the Italian or German method of only creating a small number for embryos at a time and refusing to allow the cryogenic freezing of embryos).

<sup>119</sup> *Kass v. Kass*, 91 N.Y.2d 554, 562 (1998).