Responding to *Reber*: The Disposition of Pre-Embryos Following Divorce in Pennsylvania

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ABSTRACT

Since the first successful childbirth using *in vitro* fertilization (IVF) in the 1970s, more couples and individuals have turned to assisted reproductive technology (ART), including IVF, to have children. The various forms of ART open the door to parenthood for couples with infertility problems, as well as for same-sex couples and individuals without partners. However, the increasing prevalence of ART in society has also opened the door to new legal problems that states must now confront.

For example, imagine a married couple that undergoes IVF after being unable to conceive a child naturally. The couple freezes the pre-embryos created through IVF, intending to have them implanted when they are ready to have children. However, the couple divorces before using the pre-embryos. After the divorce, one spouse wants to use the pre-embryos to have children on her own, as she is frightened by the fact that she may not have another chance to have children in the future. Conversely, the other spouse does not want to parent a child with his ex-spouse. The parties turn to the courts for resolution of their disagreement.

Pennsylvania first confronted this problem in *Reber v. Reiss*. However, in *Reber*, the Superior Court of Pennsylvania made a fact-sensitive holding and declined to adopt an approach that would apply to pre-embryo disposition in the future. This Comment, after analyzing the Superior Court of Pennsylvania's rationale in *Reber* and the approaches adopted in other states, argues that if parties to IVF have made a valid agreement regarding the disposition of pre-embryos following divorce,

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Pennsylvania courts must enforce that agreement. If parties do not have an agreement, Pennsylvania courts should balance the interests of the parties to determine how to distribute the pre-embryos.

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I. INTRODUCTION

Since the first birth of a child using *in vitro* fertilization (IVF) in 1978,[1] more couples and individuals have turned to assisted reproductive technology (ART) to have children.[2] ART involves "all treatments or procedures which include the handling of human oocytes or embryos."[3] The various forms of ART make it possible for infertile couples to

1. Lyria Bennett Moses, Note, *Understanding Legal Responses to Technological Change: The Example of* In Vitro *Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 506 (2005).

2. *See* Jen Christensen, *Record Number of Women Using IVF to Get Pregnant*, CNN (Feb. 18, 2014, 2:36 PM), www.cnn.com/2014/02/17/health/record-ivf-use/.

3. 42 U.S.C. § 263a-7(1) (2012) (defining ART in the context of a statute regarding laboratory licensing and reporting requirements); *see also* Moses, *supra* note 1, at 512 (defining ART as "techniques [that] aim to facilitate [] fertilization of human gametes in order to enable pregnancy"); Anetta Pietrzak, Note, *The Price of Sperm: An Economic Analysis of the Current Regulations Surrounding the Gamete Donation Industry*, 14 J.L. & FAM. STUD. 121, 123 (2012) ("Assisted-reproductive technologies (ART) are scientific means of conception not achieved through sexual intercourse.").

become parents and also enable same-sex couples and individuals without partners to have children.[4]

The most popular form of ART is IVF.[5] IVF involves fertilizing an egg by combining it with sperm in a petri dish and then implanting the resulting pre-embryo into a woman.[6] Because IVF is a time-consuming and costly procedure, IVF clinics often fertilize multiple eggs during one round of IVF.[7] Then, if the first implantation does not result in pregnancy, the clinic can implant the remaining eggs, as opposed to going through additional egg collection procedures.[8] The extra pre-embryos are often cryopreserved, or frozen, for use in the future.[9]

Legal problems arise when couples with cryopreserved pre-embryos separate and disagree as to what should happen to their pre-embryos.[10] For example, one party may wish to have the pre-embryos implanted, whereas the other party may wish to destroy the pre-embryos or donate them for research.[11] Courts and legislatures around the country have used different approaches to solve these legal issues; Pennsylvania, however, has not yet adopted an approach, leaving couples and IVF clinics in a state of uncertainty.[12]

Part II of this Comment will discuss this state of uncertainty in Pennsylvania,[13] beginning with the Superior Court of Pennsylvania's decision in *Reber v. Reiss*.[14] *Reber* is the only Pennsylvania court decision regarding pre-embryo disposition following divorce. In *Reber*,

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4. Pietrzak, *supra* note 3, at 123.

5. *See Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/ (last updated Mar. 30, 2017).

6. Jillian Casey et al., *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 85 (2016). This Comment uses the term "pre-embryo" to refer to fertilized eggs prior to implantation. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 437 n.2 (1990). While numerous courts also use the term "pre-embryo" or "preembryo," *see, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1132 n.1 (Pa. Super. Ct. 2012); Litowitz v. Litowitz, 48 P.3d 261, 262 n.2 (Wash. 2002), other sources use "pre-embryo" and "embryo" interchangeably. *See, e.g.*, Molly Miller, Note, *Embryo Adoption: The Solution to an Ambiguous Intent Standard*, 94 MINN. L. REV. 869, 874 n.32 (2010). This Comment uses pre-embryo throughout for consistency purposes.

7. *See* Bradley J. Van Voorhis, In Vitro *Fertilization*, 356 NEW ENG. J. MED. 379, 380 fig.1, 382–83 (2007).

8. *See* Casey et al., *supra* note 6, at 89.

9. *Id.*

10. *Id.*

11. *See, e.g.*, *Reber*, 42 A.3d at 1134. In *Reber*, the wife wanted the pre-embryos to be implanted, while the husband wanted them destroyed. *Id.*

12. *See id.* at 1134–36; Marisa G. Zizzi, Comment, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391, 412 (2012); *infra* notes 38–40 and accompanying text.

13. *See infra* Section II.A.

14. Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012).

the Superior Court applied a balancing approach to determine which party to IVF would gain control of the parties' pre-embryos.[15] However, the court concluded that, based on the facts of the case, it need not determine which approach to adopt and apply in the future.[16]

After analyzing the Superior Court's rationale in *Reber*, Part II explains the three approaches that other states have applied to pre-embryo disposition disagreements.[17] Part III argues that rather than automatically applying a balancing approach and weighing the rights of the parties involved, Pennsylvania courts must first enforce any valid agreements made between parties to IVF regarding the disposition of pre-embryos following divorce.[18] If parties do not make an agreement, Pennsylvania courts should apply the *Reber* court's balancing approach to determine how to distribute the pre-embryos.[19]

II. BACKGROUND

In order to determine which approach Pennsylvania courts should apply to pre-embryo disposition following divorce, an understanding of the current law in Pennsylvania and in other jurisdictions is imperative. Therefore, this Part will discuss the only Pennsylvania case regarding the disposition of pre-embryos following divorce, and will then analyze the approaches applied by other jurisdictions.

A. The Current Pennsylvania Law Regarding Pre-Embryo Disposition

The sole decision dealing with the issue of pre-embryo disposition following divorce in Pennsylvania is *Reber v. Reiss*. In *Reber*, Andrea Lynn Reiss ("the wife") was diagnosed with breast cancer.[20] Based on her doctor's recommendation, she and her husband ("the husband") underwent IVF in order to protect her ability to have children at a later date.[21] The wife forwent her cancer treatment for a few months in order to undergo IVF, and the resulting pre-embryos were cryopreserved.[22] After a difficult treatment process and medical testing, the wife was "[led] to believe" that she could no longer conceive naturally.[23]

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15. *Id.* at 1136.
16. *See id.*
17. *See infra* Section II.B.
18. *See infra* Section III.A.
19. *See infra* Section III.B.
20. *Reber*, 42 A.3d at 1132.
21. *Id.*
22. *Id.* at 1133.
23. *Id.* The wife withstood 2 surgeries, 8 rounds of chemotherapy, and 37 rounds of radiation to treat her cancer. *Id.* While she did not produce medical evidence or rely on

Almost three years following the initial IVF procedure, the husband filed for divorce.[24] In the ensuing divorce action, the wife sought control of the cryopreserved pre-embryos so that she could have them implanted, enabling her to have biological children,[25] while the husband sought to have the pre-embryos destroyed.[26] A special master[27] initially awarded the pre-embryos to the husband to be destroyed.[28] However, after the wife filed an exception[29] to the master's decision, the trial court awarded the pre-embryos to the wife.[30]

In making its decision, the trial court balanced the competing interests of the husband and wife.[31] The trial court noted that the husband had a strong interest in avoiding unwanted parenthood, which normally would outweigh a spouse's desire to have children.[32] Nevertheless, the trial court reasoned that the wife's inability to naturally have biological children outweighed the husband's interest in avoiding unwanted parenthood.[33] As a result, the trial court awarded the pre-embryos to the wife,[34] and the husband appealed the decision to the Superior Court of Pennsylvania for a determination of how to resolve this dispute regarding cryopreserved pre-embryos, an issue of first impression in Pennsylvania.[35]

The Superior Court began its analysis by identifying the three main approaches applied to pre-embryo disposition in other jurisdictions: (1) the contract approach, which enforces disposition agreements between parties; (2) the contemporaneous mutual consent approach, which dictates that parties cannot use, dispose of, or donate pre-embryos unless

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medical experts at trial to support her claim that she could no longer conceive naturally, she testified at a master's hearing that "she does not 'think it is possible' for her to have a biological child." *Id.* at 1137. The master noted that the wife did not support her testimony with medical evidence, but based on the wife's age and medical history, concluded that "conceiving naturally may be extremely difficult." *Id.* at 1137–38. The trial court and the Superior Court agreed that based on the wife's medical history and tests, "it would be highly unlikely, if not impossible, for her to become pregnant after undergoing chemotherapy treatments." *Id.* at 1138.

24. *Id.* at 1133.

25. *Id.* at 1134.

26. *Id.*

27. A special master is "[a] master appointed to assist the court with a particular matter or case." *Master*, BLACK'S LAW DICTIONARY (10th ed. 2014).

28. *Reber*, 42 A.3d at 1133.

29. In Pennsylvania, after the issuance of a master's report, the parties may file exceptions to the report. PA. R. CIV. P. 1920.55-2(b). The trial court then rules on the exceptions. *Id.* at 1920.55-2(c).

30. *Reber*, 42 A.3d at 1134.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.*

both parties agree; and (3) the balancing approach, whereby the court balances the interests of the parties in order to determine who should be awarded the pre-embryos.[36] However, the Superior Court concluded that based on the facts of the case, it need not determine which approach to adopt for the future:

> Both the master and the trial court applied the balancing approach because neither party had signed the portion of the consent form related to the disposition of the pre-embryos in the event of divorce or death of one party.[37] Also, it was quite obvious that [the] [h]usband and [w]ife could not come to a contemporaneous mutual agreement regarding the pre-embryos. Accordingly, we agree that the balancing approach is the most suitable test.[38]

Therefore, because the husband and wife did not sign an agreement regarding the disposition of the pre-embryos, and because they would not be able to agree on the disposition, the court applied the balancing approach.[39] However, the court stated that this decision was based on the facts of the case alone and declined to choose which approach it would apply to pre-embryo disposition in the future.[40]

When applying the balancing approach, the Superior Court balanced two competing interests: (1) the wife's inability to become a parent without the use of the pre-embryos, and (2) the husband's interest in avoiding unwanted parenthood.[41] First, in weighing the interests of the wife, the Superior Court considered her inability to become a parent without the use of the pre-embryos.[42] The Superior Court agreed with the trial court's conclusion that it would be difficult, if not impossible, for the wife to have children naturally because of her age and medical history.[43]

In addition, in response to the husband's argument that the wife could adopt, the court noted that adoption was not a viable option for the

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36. *Id.* at 1134–36. For further discussion of these approaches, see *infra* Section II.B.

37. Before undergoing IVF, the husband and wife signed a consent form specifying that the pre-embryos could be stored for up to three years. *Reber*, 42 A.3d at 1136. The Superior Court concluded that this agreement could not "be read as an agreement between [the] [h]usband and [w]ife to destroy the pre-embryos at the end of three years; rather, it [was] an agreement between the two of them and [the Reproductive Science Institute of Suburban Philadelphia, P.C.] about the storage of the pre-embryos." *Id.*

38. *Id.*

39. *See id.*

40. *See id.* at 1136 ("In this case, we need not decide whether to adopt one approach or another.").

41. *Id.* at 1137–42.

42. *Id.* at 1137–39.

43. *Id.* at 1138, 1140.

wife because adoption is particularly difficult for aging, single women with negative medical histories.[44] Furthermore, the court found that even if adoption was an option, adoption "occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child."[45] Because the pre-embryos were "likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all," the court found that the wife had a "compelling interest[] in using the pre-embryos."[46]

Next, the court addressed the husband's interest in avoiding unwanted parenthood.[47] The husband argued that based on his experiences as an adopted child, he would want his children to know their biological father, and hence, his wife should not be able to use the pre-embryos to have children outside of their marital relationship.[48] Nonetheless, because the wife agreed to let the husband be involved in any future children's lives, the court determined that this argument did not deserve substantial weight.[49] Similarly, because the wife promised not to seek child support from the husband, the court rejected the husband's argument that any children would be a financial burden on him.[50] Although the court recognized that "[i]n Pennsylvania, a parent cannot bind a child or bargain away that child's right to support," the court found that the trial court did not err in considering the wife's promise, even though it could not be binding.[51]

The husband also argued that he never actually intended to have a child with his wife, but the court declared that "the only reason one undergoes IVF is to have a child."[52] Furthermore, the husband argued that "it is against Pennsylvania public policy to force him to procreate with [his] [w]life when he does not want to do so."[53] Significantly, the court rejected this argument and "agree[d] with the trial court that Pennsylvania public policy is silent on the issue of forced procreation under these circumstances."[54] Because of that silence,[55] the court

44. *See id.* at 1139.
45. *Id.* at 1138.
46. *Id.* at 1140.
47. *See Reber*, 42 A.3d at 1140–42.
48. *See id.* at 1140.
49. *See id.*
50. *See id.* at 1141.
51. *Id.* at 1141–42 (alteration in original).
52. *Id.* at 1140.
53. *Id.* at 1142.
54. *Id.* This statement indicates that forced parenthood is not against Pennsylvania public policy, and Pennsylvania courts must therefore enforce pre-embryo disposition agreements that provide for the implantation of pre-embryos upon divorce. *See infra* notes 170–72 and accompanying text.

concluded that until the Pennsylvania General Assembly addresses this issue, the court will "consider the individual circumstances of each case."[56] In this case, the balance weighed in favor of the wife's interest in having biological children.[57]

In sum, the Superior Court did not determine which disposition approach Pennsylvania courts would permanently adopt, but rather, the court employed the balancing approach because no other approach was applicable to the facts of the case.[58] Inevitably, Pennsylvania courts will be forced to choose the most suitable approach to apply in cases of pre-embryo disposition following divorce. When deciding, the courts should consider the approaches adopted in other jurisdictions.

B. The Law Outside of Pennsylvania Regarding Pre-Embryo Disposition: Three Predominant Approaches

As the *Reber* court indicated, other jurisdictions have developed three approaches to dealing with disputes involving the disposition of pre-embryos at the time of divorce: (1) the contract approach, (2) the contemporaneous mutual consent approach, and (3) the balancing approach.[59] These approaches are not necessarily mutually exclusive; some states apply different approaches in different situations,[60] while other states consistently apply only one approach, regardless of the unique facts of each case.[61]

1. The Contract Approach

The majority of states that have addressed the issue of pre-embryo disposition apply the contract approach.[62] Under the contract approach, if

55. See *infra* Section III.A.1 for a discussion of public policy determinations in Pennsylvania.

56. *Reber*, 42 A.3d at 1142.

57. *See id.*

58. *See id.* at 1136.

59. *Id.* at 1134. Moreover, some states provide for the disposition of pre-embryos by statute. *See* Zizzi, *supra* note 12, at 409–12 (identifying and explaining the pre-embryo disposition statutes in various states). For example, in Florida, couples undergoing IVF must enter into written contracts specifying how pre-embryos will be handled if they divorce. *See* FLA. STAT. § 742.17 (2017).

60. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 597–98, 603–04 (Tenn. 1992) (adopting the contract approach but applying the balancing approach because the parties did not enter into a contract).

61. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 781–83 (Iowa 2003) (rejecting the contract approach on public policy grounds and adopting the contemporaneous mutual consent approach).

62. *See* Szafranski v. Dunston, 993 N.E.2d 502, 514–15 (Ill. App. Ct. 2013); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); *In re* Marriage of Dahl & Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008); *Davis*, 842 S.W.2d at 604; Roman v. Roman, 193 S.W.3d 40,

spouses execute a valid agreement that specifies the way in which pre-embryos will be distributed upon divorce, the agreement will be enforced.[63]

The Court of Appeals of New York was the first court to apply the contract approach.[64] In *Kass v. Kass*,[65] spouses turned to IVF after they were unable to conceive naturally.[66] Before their successful IVF procedure, the couple signed four consent forms that stated that if they could not make a decision regarding the disposition of their pre-embryos, the pre-embryos would be donated to the IVF program for research.[67] The parties later divorced, and of their own volition, wrote and signed an agreement indicating that "the frozen [five pre-embryos] . . . should be disposed of [in] the manner outlined in our consent form."[68] Nearly two months later, the wife filed an action requesting the pre-embryos for implantation, and her husband counterclaimed for specific performance of their agreement.[69]

The Court of Appeals of New York concluded that "the parties clearly expressed their intent that in the circumstances presented the pre-[embryos] would be donated to the IVF program for research purposes."[70] Accordingly, the court affirmed the Appellate Division's decision awarding the pre-embryos to the husband to be donated for research.[71] The court explained that because the case did not implicate a woman's right to bodily integrity and because the pre-embryos were not "persons," a valid agreement between the two spouses should govern.[72] The court also reasoned that enforcing these agreements (1) encourages parties to think carefully prior to IVF about the disposition of frozen pre-embryos, (2) prevents expensive litigation, and (3) enables couples instead of courts to "make what is in the first instance a quintessentially

49–50 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261, 267–68 (Wash.), *amended by* 53 P.3d 516 (Wash. 2002).

63. *See Szafranski*, 993 N.E.2d at 506, 514–15; *Kass*, 696 N.E.2d at 180; *Dahl*, 194 P.3d at 840; *Roman*, 193 S.W.3d at 49–50; *Litowitz*, 48 P.3d at 267–68. Other courts have adopted the contract approach, but applied the balancing approach when the parties did not have a contract. *See, e.g.*, *Davis*, 842 S.W.2d at 604.

64. *See Kass*, 696 N.E.2d at 178–79. The Supreme Court of Tennessee adopted the contract approach in 1992 but did not apply it because the parties in that case had no contract. *See Davis*, 842 S.W.2d at 597–98, 604.

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

66. *Id.* at 175.

67. *Id.* at 176–77.

68. *Id.* at 177.

69. *Id.*

70. *Id.* at 178.

71. *See id.*

72. *Id.* at 179 (citing Roe v. Wade, 410 U.S. 113, 162 (1973); Byrn v. N.Y.C. Health & Hosps. Corp., 286 N.E.2d 887, 890 (N.Y. 1972)).

personal, private decision."[73] The court then applied contract principles to determine that the consent forms were enforceable and that the pre-embryos would be donated for research.[74]

Following *Kass*, numerous other courts adopted the contract approach. In *Litowitz v. Litowitz*,[75] the Supreme Court of Washington applied this approach to a situation in which the wife was not "biological[ly] connect[ed]" to the frozen pre-embryos.[76] Because the wife was not the biological mother of the pre-embryos, the court reasoned that any rights she had to the pre-embryos after her divorce from the husband had to be grounded in contract.[77] The court enforced the parties' cryopreservation contract, which indicated that the pre-embryos should be "thawed but not allowed to undergo further development" after five years.[78]

Four years later, the Court of Appeals of Texas reviewed Texas statutes allowing surrogacy contracts and concluded that those statutes indicated that Texas public policy allowed for the enforcement of pre-embryo disposition agreements.[79] Because the agreement at issue unambiguously indicated that the pre-embryos should be destroyed if the parties divorced, the court remanded the case to the trial court to enter an order providing for the destruction of the pre-embryos.[80]

Similarly, in *In re Marriage of Dahl and Angle*,[81] the Oregon Court of Appeals followed the *Kass* decision and enforced a pre-embryo storage agreement between divorcing spouses and a hospital.[82] In *Dahl*, the husband argued that his desire to save the life of the pre-embryos should overcome his wife's desire not to have children.[83] However, the court rejected this argument because it found no public policy that

73. *Id.* at 180.
74. *See id.* at 181.
75. Litowitz v. Litowitz, 48 P.3d 261 (Wash.), *amended by* 53 P.3d 516 (Wash. 2002).
76. *See id.* at 262, 267. The husband's sperm and donor eggs were used to create the pre-embryos, as opposed to the wife's eggs. *Id.* at 262. Accordingly, the wife was not biologically related to the pre-embryos. *See id.* Some of the pre-embryos were implanted in a surrogate, while some pre-embryos were cryopreserved. *Id.* at 262–63.
77. *See id.* at 267.
78. *See id.* at 263, 268–71.
79. *See* Roman v. Roman, 193 S.W.3d 40, 49–50 (Tex. App. 2006) ("We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances.").
80. *See id.* at 54–55.
81. *In re* Marriage of Dahl & Angle, 194 P.3d 834 (Or. Ct. App. 2008).
82. *See id.* at 840–41.
83. *See id.* at 841.

"would impose a genetic parental relationship on someone as a default principle."[84]

Most recently, in 2013, the Appellate Court of Illinois reasoned that it would apply the contract approach to a pre-embryo dispute because this approach (1) allows parties to make their own personal procreative decisions and (2) "promote[s] serious discussions between the parties prior to participating in [IVF] regarding their desires, intentions, and concerns."[85] Moreover, the court determined that if parties did not make an agreement in advance, it would apply the balancing approach, under which "the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood."[86]

Courts have identified numerous benefits of the contract approach. Primarily, courts maintain that parties should take IVF and cryopreservation seriously and should consider what will happen to their frozen pre-embryos in the event of divorce.[87] The best way to ensure that parties will seriously consider the consequences of IVF before signing cryopreservation or disposition agreements is to enforce these agreements.[88] Furthermore, courts conclude that the contract approach promotes the anti-paternalistic idea that parties, not courts, should make decisions regarding their private family lives and reproductive choices.[89] Accordingly, courts reason that enforcing agreements is preferable to exposing these personal choices to a court's subjective balancing approach.[90]

Courts have also concluded that binding agreements prevent costly litigation and provide more predictability and consistency to those involved in the IVF and cryopreservation processes.[91] Additionally,

84. *Id.*

85. Szafranski v. Dunston, 993 N.E.2d 502, 515 (Ill. App. Ct. 2013).

86. *Id.* (quoting Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992)). The court remanded the case to the trial court to apply this two-part test. *Id.* at 518. The trial court concluded that (1) the two parties had an oral agreement that gave the ex-girlfriend control over the pre-embryos and (2) the balancing approach would favor the ex-girlfriend because she would not be able to have a biological child without the use of the pre-embryos. *See* Szafranski v. Dunston, 34 N.E.3d 1132, 1146–47 (Ill. App. Ct. 2015). The Appellate Court of Illinois affirmed. *See id.* at 1137.

87. *See Szafranski*, 993 N.E.2d at 515; Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

88. *See Szafranski*, 993 N.E.2d at 515; *see also Kass*, 696 N.E.2d at 180.

89. *See Szafranski*, 993 N.E.2d at 515; *Kass*, 696 N.E.2d at 180; *Dahl*, 194 P.3d at 840; *Davis*, 842 S.W.2d at 597; Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006).

90. *See Szafranski*, 993 N.E.2d at 514–515; *Kass*, 696 N.E.2d at 180.

91. *See Kass*, 696 N.E.2d at 180; *see also Szafranski*, 993 N.E.2d at 506, 515; Marina Merjan, Comment, *Rethinking the "Force" Behind "Forced Procreation": The Case for Giving Women Exclusive Decisional Authority Over Their Cryopreserved Pre-Embryos*, 64 DEPAUL L. REV. 737, 753 (2015).

although some scholars argue that the difficulties inherent in making pre-embryo disposition decisions indicate that such agreements are unlikely to express the true intent of the parties,[92] courts can apply contract principles to determine whether these agreements reflect the parties' intentions.[93]

On the other hand, courts recognize various problems with the contract approach. Primarily, courts worry that this approach does not sufficiently protect individual interests because individuals cannot change their minds when confronted with emotional and potentially unforeseen circumstances relating to reproduction.[94] Furthermore, at least one court has suggested that individuals are not capable of making intelligent decisions concerning the disposition of pre-embryos prior to actually confronting the issue.[95] Finally, some courts reason that the judicial system should not force procreation on unwilling parties.[96] These concerns led both the Supreme Judicial Court of Massachusetts and the Supreme Court of Iowa to declare that pre-embryo disposition agreements are unenforceable because they violate public policy.[97]

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92. *See* Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 67–75 (2011) ("In addition to illuminating the great challenge embryo disposition poses to patients, the literature makes clear that patients' views regarding preferred disposition often change significantly over time.").

93. *See Kass*, 696 N.E.2d at 180–81; Zizzi, *supra* note 12, at 414 ("A second benefit of advanced dispositional agreements is that the agreements set forth a sound legal framework under which disputes between donors can be analyzed—a contractual framework.").

94. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003) (concluding that disposition agreements between spouses are unenforceable based on a public policy that includes an "understanding that decisions involving marital and family relationships are emotional and subject to change").

95. *See id.* at 777.

96. *See id.* at 782; A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000).

97. *See Witten*, 672 N.W.2d at 781; *A.Z.*, 725 N.E.2d at 1057–59. In *A.Z. v. B.Z.*, the Supreme Judicial Court of Massachusetts explained that "even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of frozen pre[-]embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will." *A.Z.*, 725 N.E.2d at 1057. To make this decision, the court looked to the Massachusetts Legislature, which had already "determined by statute that individuals should not be bound by certain agreements binding them to enter or not enter into familial relationships," such as contracts to marry and certain adoption and surrogacy agreements. *Id.* at 1058–59. The court determined that a pre-embryo disposition agreement that forces one party to become a parent against his or her will is similar to these other unenforceable agreements. *Id.* In *J.B. v. M.B.*, the Supreme Court of New Jersey did not find pre-embryo disposition contracts to be unenforceable, but it did determine that these contracts would be enforced subject to the right of either party to change his or her mind. *See* J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001). If one party changes his or her mind, the balancing approach is applied. *See id.* Therefore, because parties can change their minds,

In sum, despite the arguments against enforcing contracts that might compel unwilling parties to procreate, numerous courts around the country have adopted the contract approach and enforced valid, unambiguous agreements between spouses regarding the disposition of pre-embryos upon divorce.[98] These courts have justified the contract approach because it allows parties to make personal, procreative decisions for themselves and promotes predictability for parties involved in IVF.[99]

2. The Contemporaneous Mutual Consent Approach

The contemporaneous mutual consent approach is the least popular of the three approaches to pre-embryo disposition at divorce. To date, only Iowa has adopted this approach, which finds that "no transfer, release, disposition or use of the embryos can occur without the signed authorization of both donors."[100] Under this approach, if the parties cannot agree, "the status quo [will] be maintained," and cryopreserved pre-embryos will remain frozen.[101]

In *In re Marriage of Witten*,[102] the Supreme Court of Iowa held that neither the husband nor the wife could use or dispose of the frozen pre-embryos at issue until they came to an agreement.[103] The court refused to enforce a pre-embryo disposition agreement between the spouses, reasoning that such agreements are unenforceable because it is "against the public policy of [Iowa] 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."[104] Furthermore, the court rejected the balancing approach because the parties, not the court, should be the decision-makers "in this highly emotional and personal area."[105] Therefore, the court affirmed the trial court's ruling enjoining the parties

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pre-embryo disposition contracts are not binding in New Jersey if parties decide not to follow their agreement.

98. *See* Szafranski v. Dunston, 993 N.E.2d 502, 514–15 (Ill. App. Ct. 2013); *Kass*, 696 N.E.2d at 180; *In re* Marriage of Dahl & Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992); Roman v. Roman, 193 S.W.3d 40, 49–50 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261, 267–68 (Wash.), *amended by* 53 P.3d 516 (Wash. 2002).

99. *See supra* notes 89–91 and accompanying text.

100. *Witten*, 672 N.W.2d at 782.

101. *Id.*

102. *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).

103. *Id.* at 783.

104. *Id.* at 781.

105. *Id.* at 779.

from using or transferring the pre-embryos without the other party's written consent.[106]

One benefit of the contemporaneous mutual consent approach is that it allows parties to change their minds regarding important and difficult reproductive decisions.[107] In addition, it recognizes the equal genetic contributions of the parties, and accordingly gives the parties an equal say in the use of their genetic material.[108] By preserving genetic material in its frozen state, the contemporaneous mutual consent approach ensures that the parties can reach an agreement at a later date.[109] Finally, this approach prevents courts from getting overly involved in family decisions by forcing parties to work out disagreements on their own.[110]

Other jurisdictions have been quick to criticize the contemporaneous mutual consent approach for being unrealistic and creating additional antagonism between divorcing parties.[111] For example, this approach could allow one party to hold pre-embryos hostage by demanding more money or property from the other party before he or she will release the pre-embryos to the other party's control.[112] Furthermore, at least one court has pointed out that cryopreserved pre-embryos may not remain viable forever; consequently, the "problem with maintaining the status quo" is that it may eventually render the pre-embryos unusable.[113] Because of these criticisms, the contemporaneous mutual consent approach has received little judicial support.

3. The Balancing Approach

The final approach to the disposition of pre-embryos following divorce is the balancing approach, which involves weighing the interests

106. *See id.* at 783.

107. *See* Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013) (explaining that the contemporaneous mutual consent approach resolves some of the issues with the contract approach because it permits parties to change their minds); *see also Witten*, 672 N.W.2d at 781–82.

108. *See Szafranski*, 993 N.E.2d at 511; *Witten*, 672 N.W.2d at 780–81.

109. *See Witten*, 672 N.W.2d at 778, 783 ("If a stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs.").

110. *See id.* at 781.

111. *See Szafranski*, 993 N.E.2d at 511; *see also* Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) ("[I]t was quite obvious that [the] [h]usband and [w]ife could not come to a contemporaneous mutual agreement regarding the pre-embryos.").

112. *See Szafranski*, 993 N.E.2d at 512.

113. *See* Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

of both parties.[114] When applying this approach, courts have given significant weight to a party's right to avoid procreation, although courts have recognized that if the party desiring to use the pre-embryos cannot procreate by other means, "forced procreation" may be appropriate.[115]

Davis v. Davis[116] was the first case in the United States to deal with the disposition of pre-embryos following divorce.[117] In *Davis*, the wife wanted the pre-embryos donated to another couple, while the husband wanted the pre-embryos destroyed.[118] Although the couple in *Davis* did not have a prior agreement, the court found that a pre-embryo disposition agreement "should be presumed valid and should be enforced as between the progenitors" so that the couple "retain[s] decision-making authority" over the disposition of the pre-embryos.[119] Because the couple in this case did not have such an agreement, the court balanced the interests of

114. *See, e.g.*, *Reber*, 42 A.3d at 1135–36. In some states, this approach is only applied if there is no contract between parties. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *4, *6–9 (Colo. App. Oct. 20, 2016) (adopting the contract approach but applying the balancing approach because the parties did not have an agreement); *Davis*, 842 S.W.2d at 597–98, 603–04 (same). In other states, pre-embryo disposition contracts are unenforceable if one party changes her mind, in which case courts apply the balancing approach. *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).

115. *See Davis*, 842 S.W.2d at 604 ("The case would be closer if Mary Sue Davis were seeking to use the pre[-]embryos herself, but only if she could not achieve parenthood by any other reasonable means."); *see also Reber*, 42 A.3d at 1140–42.

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

117. *Davis* is particularly significant in that it addresses issues related to pre-embryo disposition that courts no longer discuss, including: (1) whether a pre-embryo is a person or property; (2) the state and federal constitutional right to privacy; and (3) the state's interest in potential human life. *See id.* at 594–602. In terms of whether a pre-embryo is a person or property, the court dealt first with terminology, concluding that "pre-embryo" is the correct scientific and medical term for "the four- to eight- cell entities at issue." *Id.* at 593–94. This label was important because the trial court found that an "embryo" and a "pre-embryo" were the same thing, and therefore concluded that pre-embryos, like embryos, were "children in vitro" and that the best interests of the child standard would be applied to determine what would happen to the pre-embryos. *Id.* The Supreme Court of Tennessee rejected this conclusion, finding that pre-embryos are not "people" under Tennessee law, but are instead in a category distinct from people and property. *Id.* at 597. In this "interim category," pre-embryos deserve "special respect because of their potential for human life." *Id.* Addressing the constitutional right to privacy, the court concluded that the right to privacy is protected by the Tennessee and United States Constitutions; that this right includes the right of procreation; and that the right of procreation includes both the right to procreate and the right to avoid procreation. *Id.* at 600–01. Finally, the court concluded that the state's interest in potential human life is not significant enough to infringe on the couple's "procreational autonomy." *Id.* at 602.

118. *Id.* at 590.

119. *Id.* at 597; *see also Rooks*, 2016 WL 6123561, at *4, *6–9 (adopting the contract approach but applying the balancing approach because the parties did not have an agreement as to pre-embryo disposition).

the parties, including the husband's right to avoid procreation and the wife's right to procreate.[120]

Regarding the husband's interests, the *Davis* court found that the husband would be burdened financially and psychologically if forced to procreate.[121] The husband's psychological burden was particularly significant because of his negative childhood experiences with divorce.[122]

Against the husband's interests, the *Davis* court balanced the wife's interest in procreation.[123] The court found that the wife did not have a strong interest because she did not wish to become a parent using the pre-embryos; instead, she wanted to donate the pre-embryos to another couple for implantation.[124] While she had an interest in knowing that the fruits of the grueling IVF procedure would be used, her interest in donation was not as significant as her husband's interest in avoiding procreation.[125] Thus, the *Davis* court found that the balance weighed in favor of the husband's interests.[126]

The benefit of the balancing approach is that it allows courts to take into account the specific facts of each case,[127] rather than compelling

120. *See Davis*, 842 S.W.2d at 603–04.

121. *See id.*; *see also Rooks*, 2016 WL 6123561, at *7 (considering the husband's "emotional and psychological well-being" and the financial implications of allowing the wife to use the pre-embryos to have more children against the husband's wishes).

122. *See Davis*, 842 S.W.2d at 603–04. The husband testified that after his parents divorced when he was a child, his mother had a breakdown, and he was sent to live at a home for boys, separated from some of his siblings. *Id.* at 603. Thereafter, he saw his mother monthly and his father only three times. *Id.* The court noted that the husband "clearly feels that he has suffered because of his lack of opportunity to establish a relationship with his parents and particularly because of the absence of his father." *Id.* at 604. The court considered these experiences when weighing the husband's interest in avoiding procreation outside of marriage. *See id.* at 603–04.

123. *See id.* at 604.

124. *See id.*

125. *See id.* The court explained:

> If she were allowed to donate these pre[-]embryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. . . . Donation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.

Id. Similarly, the New Jersey Supreme Court applied the balancing approach in *J.B. v. M.B.* and concluded that the ex-wife wishing to avoid procreation prevailed because the ex-husband already had children and could father additional children naturally. *See* J.B. v. M.B., 783 A.2d 707, 719–20 (N.J. 2001).

126. *See Davis*, 842 S.W.2d at 604. The *Davis* court, on rehearing, clarified that if the parties agreed, the fertility clinic could donate the pre-embryos for research. Davis v. Davis, No. 34, 1992 Tenn. LEXIS 622, at *4 (Tenn. Nov. 23, 1992). If the parties could not agree, the clinic was to destroy the pre-embryos. *Id.*

127. For example, the balancing approach allowed the court in *Davis* to consider the husband's childhood experiences with divorce and therefore give more weight to his right

courts to enforce contracts that are no longer equitable.[128] On the other hand, the balancing approach is subjective and takes decision-making authority away from the parties.[129] Moreover, unlike the contract and contemporaneous mutual consent approaches, this approach is unpredictable and requires "burdensome ad hoc litigation" for every disagreement.[130]

In conclusion, courts around the country have developed three approaches to apply to disputes involving the disposition of pre-embryos at divorce: (1) the contract approach, (2) the contemporaneous mutual consent approach, and (3) the balancing approach.[131] The majority of states that have addressed the issue of pre-embryo disposition have adopted the contract approach, choosing to enforce valid pre-embryo disposition agreements between spouses.[132] In contrast, only one jurisdiction has adopted the contemporaneous mutual consent approach, which requires parties to come to a mutual agreement regarding the disposition of their pre-embryos.[133] Finally, the balancing approach, which involves the court weighing the interests of both parties, has been applied in at least four jurisdictions.[134] As Part III argues, Pennsylvania

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not to procreate. *See Davis*, 842 S.W.2d at 603–04. This approach also allows courts to consider whether parties are able to procreate by other means. *See id.* at 604.

128. This benefit only accrues to parties in states in which pre-embryo disposition agreements are unenforceable and in which the balancing approach is applied regardless of the existence of a contract between the parties. *See, e.g.*, *J.B.*, 783 A.2d at 719 (explaining that "if there is disagreement as to disposition because one party has reconsidered his or her earlier decision, the interests of both parties must be evaluated"). In states that enforce disposition agreements, like Tennessee in *Davis*, the balancing approach is not applied as an alternative to compelling courts to enforce inequitable contracts; instead, it is applied simply because the parties did not enter into a contract. *See Davis*, 842 S.W.2d at 597–98, 603. Either way, however, the balancing approach presents courts with the opportunity to consider the particular facts of each case, which may result in a more equitable outcome for the parties. *See id.* at 603–04.

129. *See In re* Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003) ("Public policy concerns . . . demand even more strongly that we not substitute the courts as decision makers in this highly emotional and personal area. Nonetheless, that is exactly what happens under the decisional framework based on the balancing test . . . .").

130. *See* Merjan, *supra* note 91, at 755–56 (explaining that "[e]very new dispute would need to be litigated based on the specific facts of each case, and then the facts of each case weighed using a subjective analysis").

131. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1134–36 (Pa. Super. Ct. 2012) (describing the three approaches applied by states to pre-embryo disposition).

132. *See* Szafranski v. Dunston, 993 N.E.2d 502, 514–15 (Ill. App. Ct. 2013); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); *In re* Marriage of Dahl & Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008); Roman v. Roman, 193 S.W.3d 40, 49–50 (Tex. App. 2006); Litowitz v. Litowitz, 48 P.3d 261, 267–68 (Wash.), *amended by* 53 P.3d 516 (Wash. 2002).

133. *See Witten*, 672 N.W.2d at 782.

134. *See In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *4 (Colo. App. Oct. 20, 2016); J.B. v. M.B., 783 A.2d 707, 716–17, 719 (N.J. 2001); *Reber*, 42 A.3d at 1136; Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992). However, some of

courts must follow the majority of states and apply the contract approach if the parties have a valid pre-embryo disposition agreement.[135] In the absence of such an agreement, Pennsylvania courts should apply *Reber*'s balancing approach.[136]

III. ANALYSIS: HOW PENNSYLVANIA COURTS SHOULD RESPOND TO PRE-EMBRYO DISPOSITION AFTER *REBER*

After *Reber*, it is unclear which approach to pre-embryo disposition would be applied in Pennsylvania if a couple had a pre-embryo disposition agreement or if the party wishing to use the pre-embryos was able to have children by other means. This uncertainty in the law[137] leaves couples wishing to undergo IVF, as well as clinics and hospitals assisting in IVF procedures, unsure of the fate of many frozen pre-embryos. Such precariousness may cause some couples to turn to different procedures or to undergo IVF in different states in order to guarantee certainty with regard to their frozen pre-embryos.[138]

In order to provide couples, clinics, and trial courts with more certainty, the Supreme Court of Pennsylvania needs to adopt a definitive method of disposing of pre-embryos until the Pennsylvania General Assembly acts.[139] This Part argues that Pennsylvania courts must apply the contract approach if the parties have a valid pre-embryo disposition agreement.[140] In the absence of such an agreement, this Part argues that Pennsylvania courts should apply the balancing approach.[141]

A. Pennsylvania Courts Must Apply the Contract Approach

If parties undergoing IVF have a valid pre-embryo disposition agreement, Pennsylvania courts must apply the contract approach and

these jurisdictions have applied the balancing approach only because no valid contract existed between the parties. *See Rooks*, 2016 WL 6123561, at *4; *Davis*, 842 S.W.2d at 597–98, 603–04.

135. *See infra* Section III.A.

136. *See infra* Section III.B.

137. *See* Zizzi, *supra* note 12, at 412.

138. Scholars have documented a similar problem with regard to surrogacy laws, as couples and individuals interested in surrogacy "forum shop" for states that are more likely to enforce surrogacy agreements. *See* Jaclyn N. Kahn, *The Legal Minefield of Two Mommies and a Baby: Determining Legal Motherhood Through Genetics*, 16 FLA. COASTAL L. REV. 245, 254–55 (2015).

139. Advancing a statutory solution to the problem of pre-embryo disposition in Pennsylvania is beyond the scope of this Comment. However, Marisa G. Zizzi has proposed legislation to govern pre-embryo disposition in Pennsylvania. *See* Zizzi, *supra* note 12, at 415–18.

140. *See infra* Section III.A.

141. *See infra* Section III.B.

enforce the agreement because it does not violate public policy.[142] Specifically, Pennsylvania public policy is silent on pre-embryo destruction, research, and forced parenthood,[143] indicating that Pennsylvania courts must enforce pre-embryo disposition agreements that provide for such results until the legislature establishes an unambiguous public policy.[144] Moreover, Pennsylvania courts have enforced other ART-related agreements, such as surrogacy and sperm donor agreements,[145] which suggests that pre-embryo disposition agreements similarly do not violate public policy and must be enforced.[146]

1. Determining Public Policy in Pennsylvania

In Pennsylvania, an unambiguous, otherwise-valid contract must be enforced unless it violates public policy.[147] Public policy determinations are generally left to the legislature, particularly when the policies at issue are controversial or require in-depth study.[148] Pennsylvania courts cannot declare public policy unless a "given policy is so obviously for or against the public health, safety, morals or welfare that there is virtual unanimity of opinion in regard to it."[149] Therefore, without a "positive, well-defined, universal public sentiment"[150] for or against pre-embryo disposition contracts, Pennsylvania courts must enforce them.

142. *See infra* Sections III.A.1–.3.

143. *See infra* Section III.A.2.

144. In Pennsylvania, a valid contract must be enforced unless it violates an unambiguous public policy. *See* Ferguson v. McKiernan, 940 A.2d 1236, 1244–45 (Pa. 2007); Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *In re* Baby S., 128 A.3d 296, 303 (Pa. Super. Ct. 2015). See *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941), for a discussion of when public policy is unambiguous. *Mamlin*, 17 A.2d at 409.

145. *See infra* Section III.A.3.

146. *See infra* Section III.A.3.

147. *See Ferguson*, 940 A.2d at 1244–45; *Eichelman*, 711 A.2d at 1008; *Baby S.*, 128 A.3d at 303.

148. *See Mamlin*, 17 A.2d at 409.

149. *Id.* General public sentiments are not enough for a Pennsylvania court to declare public policy. *See* Hall v. Amica Mut. Ins. Co., 648 A.2d 755, 760 (Pa. 1994) ("Public policy is more concrete than a general desideratum which presumably supports the legislation in question and thus forms part of the legislature's intention. Public policy is more than a vague goal which may be used to circumvent the plain meaning of the statute."). Specifically, "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." *Id.* (quoting Muschany v. United States, 324 U.S. 49, 66–67 (1945)).

150. *See Mamlin*, 17 A.2d at 409.

2. No Pennsylvania Public Policy Against Pre-Embryo Destruction, Research, or Forced Parenthood

No clear public policy in Pennsylvania renders pre-embryo disposition agreements unenforceable. Consequently, courts must apply the contract approach and enforce valid pre-embryo disposition agreements. These disposition agreements generally provide for one of three outcomes: (1) the destruction of cryopreserved pre-embryos;[151] (2) the donation of pre-embryos for research;[152] or (3) the utilization of the pre-embryos, enabling one party to have a child.[153] Parties to pre-embryo disposition agreements may argue that these agreements are not enforceable in Pennsylvania because Pennsylvania public policy is against pre-embryo destruction, pre-embryo research, or forced parenthood.[154] However, pre-embryo destruction, pre-embryo research, and forced parenthood do not violate Pennsylvania public policy.[155] Accordingly, Pennsylvania courts must enforce pre-embryo disposition agreements because they do not violate a clear, universal public policy.[156]

In Pennsylvania, the General Assembly has not clearly established a public policy regarding pre-embryo destruction. However, the General Assembly implicitly accepted the legality of pre-embryo destruction by requiring those who perform IVF to file reports with the Pennsylvania Department of Health indicating the number of fertilized eggs destroyed or discarded every quarter.[157] The recognition that pre-embryos in

151. *See, e.g.*, Roman v. Roman, 193 S.W.3d 40, 54 (Tex. App. 2006) (finding that the pre-embryos at issue would be destroyed based on the parties' prior agreement).

152. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 178 (N.Y. 1998) (concluding that the parties had an agreement that upon divorce, their pre-embryos would be donated to the IVF program for research).

153. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1137 (Ill. App. Ct. 2015) (affirming the trial court's conclusion that the parties had an oral agreement that gave the girlfriend control over the pre-embryos).

154. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012). The husband in *Reber* attempted a variation of this argument when he claimed that forced procreation is against Pennsylvania public policy. *Id.* However, he was arguing about the application of the balancing approach as opposed to the contract approach. *See id.*

155. *See infra* notes 157–72 and accompanying text.

156. *See* Ferguson v. McKiernan, 940 A.2d 1236, 1244–45 (Pa. 2007); Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *In re* Baby S., 128 A.3d 296, 303 (Pa. Super. Ct. 2015); *see also* Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941) (discussing when public policy is universal).

157. *See* 18 PA. CONS. STAT. § 3213(e)(5) (2017). *Contra* Fotini Antonia Skouvakis, Comment, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 109 PENN ST. L. REV. 885, 902 (2005). Skouvakis countered:

> Although this statute may seem to indicate that Pennsylvania approves of discarding pre[-]embryos, its meaning is not quite that clear or simple. The statute's purpose seems to be to regulate IVF through quarterly reports. Because the legislature has not yet addressed the discarding of pre[-]embryos,

Pennsylvania are destroyed, coupled with the lack of a legislative mandate preventing this destruction, indicates that no "universal public sentiment" exists regarding the destruction of pre-embryos in Pennsylvania.[158] Because Pennsylvania courts can declare actions to be for or against public policy only if "there is virtual unanimity of opinion" on the issue,[159] Pennsylvania courts should not find the destruction of pre-embryos to violate public policy. Thus, Pennsylvania courts must enforce pre-embryo disposition agreements that require the destruction of pre-embryos upon divorce, as valid contracts must be enforced unless they clearly violate public policy.[160]

Similarly, pre-embryo disposition agreements that provide for cryopreserved pre-embryos to be donated for research if the couple separates do not violate a clear Pennsylvania public policy. The language of Section 3216 of the Pennsylvania Abortion Control Act[161] ("the Act") seems to imply that experimenting on pre-embryos is a felony because

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> this statute is simply a mechanism used to ensure that IVF clinics are keeping good records until such a law is passed.

Skouvakis, *supra*, at 902. While Skouvakis may be correct that this statute does not indicate the Pennsylvania General Assembly's approval of discarding pre-embryos, because the statute is the only legislative discussion of pre-embryo destruction, it at least shows that no strong public policy exists *against* pre-embryo destruction, meaning that courts must enforce agreements providing for the destruction of pre-embryos until the legislature dictates otherwise. *See Mamlin*, 17 A.2d at 409 (finding that in Pennsylvania, courts cannot resolve questions of public policy unless there is "a positive, well-defined, universal public sentiment" surrounding a particular issue); *Baby S.*, 128 A.3d at 303–05, 307 (explaining that a valid contract will be enforced in Pennsylvania unless it violates a clear, established public policy).

158. *Mamlin*, 17 A.2d at 409. At least one commentator has argued that due to Pennsylvania's history as a pro-life state, Pennsylvania would not order the destruction of pre-embryos. *See* Skouvakis, *supra* note 157, at 897, 902 (arguing that Pennsylvania would apply a "best interests of the pre[-]embryo" standard to pre-embryo disposition and would therefore not order the destruction of cryopreserved pre-embryos). Indeed, the Pennsylvania Abortion Control Act states that the Commonwealth has a public policy of "encouraging childbirth over abortion." 18 PA. CONS. STAT. § 3202(c). However, this Act defines "abortion" as "[t]he use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child." *Id.* § 3203. Pregnancy refers to the "female reproductive condition of having a developing fetus in the body." *Id.* Therefore, in spite of some ambiguities in this statute, it is likely that the General Assembly did not intend the public policy encouraging childbirth over abortion to include favoring the implantation of pre-embryos over the destruction of pre-embryos, because the destruction of pre-embryos does not involve terminating a pregnancy. *See* Skouvakis, *supra* note 157, at 901–02.

159. *See Mamlin*, 17 A.2d at 409.

160. *See Ferguson*, 940 A.2d at 1244–45; *Eichelman*, 711 A.2d at 1008; *Baby S.*, 128 A.3d at 303.

161. 18 PA. CONS. STAT. §§ 3201–3220 (2017).

fertilized pre-embryos are unborn children.[162] However, the Act also states that individuals who "experiment[] in" IVF must report information about the experimentation process.[163] This statutory provision recognizes that pre-embryo experimentation occurs in Pennsylvania, in spite of the Act's implication that this experimentation is a crime.[164]

Consequently, whether Pennsylvania public policy is for or against research on pre-embryos is unclear, as one statutory provision implies that experimentation is allowed while another provision implies that experimentation is a crime.[165] In Pennsylvania, otherwise-valid contracts must be enforced unless they violate clear public policy.[166] Because there is no unambiguous public policy on pre-embryo research,[167] Pennsylvania courts must leave the resolution of this issue to the legislature and must enforce pre-embryo disposition agreements that provide for the donation of pre-embryos to research.

Finally, there is no universal Pennsylvania public policy against forced parenthood in a situation in which one spouse seeks implantation of the pre-embryos against the other spouse's wishes.[168] The *Reber* court permitted forced parenthood by awarding the pre-embryos to the wife for implantation instead of to the husband for destruction.[169] In addition, the *Reber* court stated that "Pennsylvania public policy is silent on the issue of forced procreation under these circumstances."[170] This statement

162. Section 3216 of the Act provides that "[a]ny person who knowingly performs any type of nontherapeutic experimentation . . . upon any unborn child . . . commits a felony of the third degree." *Id.* § 3216(a). An "unborn child" includes "an individual organism of the species homo sapiens from fertilization until live birth." *Id.* § 3203. Fertilization is then defined as "the fusion of a human spermatozoon with a human ovum," which would seem to include fertilization through IVF. *Id.*; *see* Casey et al., *supra* note 6, at 85 (defining IVF as "the combination of the egg and sperm to achieve fertilization outside of the woman's body"). Therefore, this Act seems to indicate that experimenting on pre-embryos is a felony, 18 PA. CONS. STAT. § 3216(a), because pre-embryos, which are fertilized eggs, are unborn children, *id.* § 3203.

163. 18 PA. CONS. STAT. § 3213(e).

164. *See supra* note 162 and accompanying text.

165. *See supra* notes 162–64 and accompanying text.

166. *See* Ferguson v. McKiernan, 940 A.2d 1236, 1244 (Pa. 2007); Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *In re* Baby S., 128 A.3d 296, 303 (Pa. Super. Ct. 2015).

167. *See supra* notes 161–65 and accompanying text.

168. This Comment only addresses situations in which a woman wants the pre-embryos implanted in her in order to have a child, or a man or woman wants to have the pre-embryos implanted in a surrogate so that he or she can become a parent. This Comment will not address a situation in which a man wants the court to force a woman to have the pre-embryos implanted in her. Not only would forced impregnation likely violate public policy, but also, the author is unaware of any cases in which a party argued for forced impregnation through IVF.

169. *See* Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct. 2012).

170. *Id.*

indicates that forced parenthood, at least when a spouse cannot procreate through other means, is not against public policy.[171] Because a valid contract must be enforced in Pennsylvania unless it violates public policy, agreements awarding pre-embryos to one party for implantation over the objections of the other party must be enforced.[172]

In conclusion, no clear Pennsylvania public policy renders pre-embryo disposition agreements unenforceable simply because those agreements provide for the destruction of pre-embryos, the donation of pre-embryos for research, or forced parenthood. In Pennsylvania, otherwise-valid contracts can be held unenforceable only if they violate public policy.[173] Hence, because Pennsylvania has no public policy against pre-embryo disposition agreements, Pennsylvania courts must apply the contract approach and enforce valid pre-embryo disposition contracts.

3. No Pennsylvania Public Policy Against ART-Related Agreements

Although Pennsylvania courts have never considered the enforceability of pre-embryo disposition agreements,[174] courts have determined that other ART-related contracts,[175] including surrogacy and

171. Furthermore, in other contexts, Pennsylvania explicitly requires forced parenthood. For example, the Act provides that no one can perform an abortion on a woman after 24 weeks into her pregnancy except in cases in which the life and health of the woman are at risk. *See* 18 PA. CONS. STAT. § 3211 (2017). Therefore, Pennsylvania will force women to carry their fetuses to term after a certain point in their pregnancy unless certain exceptions are met. *See id.* While this requirement is not directly comparable to forced parenthood through IVF, it does support the conclusion that Pennsylvania will impose parenthood on individuals in certain situations, which suggests that forced parenthood does not clearly violate public policy. *Cf. Baby S.*, 128 A.3d at 298, 306–07 (declaring a woman to be the parent of a child to whom she was not genetically related based on a surrogacy agreement in which she agreed to be the parent of the child carried by the surrogate).

172. *See* Ferguson v. McKiernan, 940 A.2d 1236, 1244–45 (Pa. 2007); Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *Baby S.*, 128 A.3d at 303.

173. *See Ferguson*, 940 A.2d at 1244; *Eichelman*, 711 A.2d at 1008; *Baby S.*, 128 A.3d at 303.

174. *See* Zizzi, *supra* note 12, at 412; *see also Reber*, 42 A.3d at 1136 (finding that no contract existed between the husband and wife regarding pre-embryo disposition in the case of divorce).

175. ART-related agreements are relevant to the present discussion because Pennsylvania courts have associated surrogacy and sperm donation with ART, even though surrogacy and sperm donation do not always involve ART. *See Ferguson*, 940 A.2d at 1245 (relying on the "evolving role played by alternative reproductive technologies" in order to determine whether a sperm donation agreement was enforceable); *Baby S.*, 128 A.3d at 306 (discussing surrogacy policy in the context of the "growing acceptance of alternative reproductive arrangements in the Commonwealth"). In addition, courts and scholars around the country similarly associate surrogacy with

sperm donation agreements, are not clearly against Pennsylvania public policy and are thus enforceable.[176] While there are differences between surrogacy and sperm donation agreements and pre-embryo disposition agreements, these agreements are comparable in that they all attempt to preemptively resolve problems that may arise when couples achieve pregnancy or have children using alternative technologies and arrangements.[177] In addition, courts that discuss the public policies surrounding pre-embryo disposition agreements often rely on state surrogacy policies.[178] Consequently, Pennsylvania's treatment of surrogacy and sperm donor agreements is instructive when considering the public policy implications of pre-embryo disposition agreements.[179]

In particular, Pennsylvania's treatment of surrogacy and sperm donation agreements implies that if the Pennsylvania General Assembly fails to enact legislation regarding ART-related agreements, these agreements do not violate public policy.[180] Because the legislature has not legislated regarding pre-embryo disposition agreements, the following cases intimate that pre-embryo disposition agreements similarly do not violate public policy and must be enforced.[181]

ART and pre-embryo disposition agreements. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (considering the Massachusetts public policy against surrogacy agreements and concluding that pre-embryo disposition agreements should similarly be unenforceable); Roman v. Roman, 193 S.W.3d 40, 49 (Tex. App. 2006) (examining Texas legislation regarding surrogacy agreements in order to determine whether pre-embryo disposition agreements violate Texas public policy); Casey et al., *supra* note 6, at 85 ("Artificial insemination (AI) and surrogacy, while not technically ARTs, implicate similar legal issues by assisting individuals and couples in achieving pregnancy, and thus will be considered in this discussion.").

176. *See Ferguson*, 940 A.2d at 1248 (sperm donation agreements); *Baby S.*, 128 A.3d at 306–07 (surrogacy agreements).

177. *See* Casey et al., *supra* note 6, at 85.

178. *See supra* note 175; *infra* note 179.

179. Other states have similarly used state surrogacy law to determine whether pre-embryo disposition agreements violate public policy. For example, in *Roman*, the Texas Court of Appeals explained:

> We also look to new legislation concerning gestational [surrogacy] agreements. . . .
>
> We glean from these statutes that the public policy of this State would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for an embryo's disposition in the event of a contingency . . . .

Roman, 193 S.W.3d at 49; *see also A.Z.*, 725 N.E.2d at 1059 (discussing case law on surrogacy agreements in order to determine whether pre-embryo disposition agreements violate Massachusetts public policy).

180. *See infra* notes 185, 190, and 193 and accompanying text.

181. In Pennsylvania, a valid contract must be enforced unless it violates public policy. *See Ferguson*, 940 A.2d at 1244; Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *Baby S.*, 128 A.3d at 303.

In *In re Baby S.*,[182] a husband and wife made an agreement with a gestational surrogate[183] in which the spouses agreed to be the legal parents of any children born in accordance with the agreement.[184] The Superior Court of Pennsylvania determined that the surrogacy agreement was enforceable and did not violate any clear public policy because "the absence of a legislative mandate one way or the other 'undermines any suggestion that the agreement at issue violates a dominant public policy or obvious ethical or moral standards.'"[185] In addition, the court recognized that Pennsylvania case law evinces "a growing acceptance of alternative reproductive arrangements in the Commonwealth."[186] Therefore, the court found no established public policy that could render the surrogacy agreement unenforceable.[187]

Similarly, in *Ferguson v. McKiernan*,[188] a woman and sperm donor agreed that the donor would surrender his parental rights to children conceived with his sperm in exchange for his release from child support obligations.[189] The Supreme Court of Pennsylvania held that the oral agreement was enforceable based on the "evolving role played by alternative reproductive technologies in contemporary American society," the frequency with which contracts are used to govern ART, and the lack of legislative guidance on the status of sperm donors.[190]

Baby S. and *Ferguson* illustrate how Pennsylvania courts treat the contracts entered into in the context of ART and IVF.[191] This case law indicates that Pennsylvania courts generally accept contracts as a means of addressing the complexities of ART.[192] Moreover, these cases demonstrate that a lack of legislative action on a particular issue tends to show that no clear public policy exists for or against that issue.[193] In the

182. *In re* Baby S., 128 A.3d 296 (Pa. Super. Ct. 2015).

183. A gestational surrogate is a woman who gestates an implanted embryo but is not genetically related to the embryo. *See* Casey et al., *supra* note 6, at 86.

184. *See Baby S.*, 128 A.3d at 300.

185. *Id.* at 306 (quoting *Ferguson*, 940 A.2d at 1248).

186. *Id.*

187. *See id.* at 306–07 ("The legislature has taken no action against surrogacy agreements despite the increase in common use . . . . Absent an established public policy to void the gestational carrier contract at issue, the contract remains binding and enforceable . . . .").

188. Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).

189. *Id.* at 1238.

190. *See id.* at 1245, 1248. The court explained that the lack of legislative guidance on the status of sperm donors indicated that there was no "manifest, widespread public policy" against enforcing the sperm donation agreement. *Id.* at 1248.

191. Although surrogacy and artificial insemination are not themselves ARTs, *see supra* note 175, both *Ferguson* and *Baby S.* involved the use of IVF to achieve pregnancy. *See Ferguson*, 940 A.2d at 1240; *Baby S.*, 128 A.3d at 300.

192. *See Ferguson*, 940 A.2d at 1248; *Baby S.*, 128 A.3d at 306–07.

193. *See Ferguson*, 940 A.2d at 1248; *Baby S.*, 128 A.3d at 306.

case of pre-embryo disposition agreements, the Pennsylvania General Assembly has not enacted any relevant legislation.[194] Hence, the fact that the legislature has failed to legislate regarding pre-embryo disposition agreements suggests that these agreements do not violate any incontrovertible public policy.[195] Because pre-embryo disposition agreements do not clearly violate Pennsylvania public policy, courts must apply the contract approach and enforce valid agreements.[196]

In sum, no dominant Pennsylvania public policy renders pre-embryo disposition agreements unenforceable simply because these agreements provide for the destruction of pre-embryos, the donation of pre-embryos for research, or forced parenthood.[197] Moreover, Pennsylvania's enforcement of ART-related agreements, namely, surrogacy and sperm donation agreements, bolsters the conclusion that pre-embryo disposition contracts do not violate any incontrovertible public policy.[198] Consequently, because no clear Pennsylvania public policy dictates that pre-embryo disposition agreements are unenforceable, Pennsylvania courts must apply the contract approach and enforce valid pre-embryo disposition agreements.[199]

B. If No Contract Exists, Pennsylvania Courts Should Apply the Balancing Approach

In spite of the benefits of entering into a pre-embryo disposition agreement, parties may undergo IVF without deciding how their pre-embryos should be handled in the event of separation, in which case courts will not be able to apply the contract approach.[200] When no agreement exists between parties, Pennsylvania courts should follow *Reber* and apply the balancing approach, as opposed to applying the contemporaneous mutual consent approach.

Courts should apply the balancing approach when parties do not have a pre-embryo disposition agreement because this approach

194. *See* Zizzi, *supra* note 12, at 393 ("Currently, there is no . . . statute in Pennsylvania that governs the disposition of frozen embryos . . . .").

195. *See Ferguson*, 940 A.2d at 1248; *Baby S.*, 128 A.3d at 304, 306–07.

196. *See Ferguson*, 940 A.2d at 1244; Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998); *Baby S.*, 128 A.3d at 303.

197. *See supra* Section III.A.2.

198. *See supra* Section III.A.3.

199. In Pennsylvania, courts must enforce valid contracts unless they violate a clear public policy. *See Ferguson*, 940 A.2d at 1244; *Eichelman*, 711 A.2d at 1008; *Baby S.*, 128 A.3d at 303. Because there is no public policy against pre-embryo disposition agreements, *see supra* Sections III.A.2–.3, courts must enforce these agreements.

200. *See, e.g.*, Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) (applying the balancing approach because the parties did not enter into a pre-embryo disposition agreement).

comports with the Superior Court of Pennsylvania's analysis in *Reber*.[201] Not only did the *Reber* court apply the balancing approach when the parties did not have a contract,[202] but the court also rejected the contemporaneous mutual consent approach as an impractical avenue for resolving pre-embryo disposition disagreements.[203] Specifically, the *Reber* court found that "it was quite obvious that [the] [h]usband and [w]ife could not come to a contemporaneous mutual agreement regarding the pre-embryos."[204] In addition, the court elaborated on its criticism of the contemporaneous mutual consent approach: "This approach strikes us as being totally unrealistic. If the parties could reach an agreement, they would not be in court."[205] Consequently, Pennsylvania courts should follow the Superior Court's analysis in *Reber* and apply the balancing approach to pre-embryo disposition disagreements when there is no contract between the parties.

In addition, Pennsylvania courts should adopt the balancing approach if parties do not make a contract because the balancing approach rectifies the disadvantages of the contemporaneous mutual consent approach.[206] In particular, the contemporaneous mutual consent approach could allow one party to hold pre-embryos hostage by demanding money or property from the other party before he or she will release the pre-embryos to the other party's control.[207] The balancing approach avoids this manipulation by vesting decision-making authority in the court as opposed to the parties, allowing the court to choose the most equitable result.[208] Furthermore, when utilizing the balancing approach, courts are able to consider the unique facts of each case,[209] as opposed to applying a strict rule that parties must work out disagreements among themselves regardless of the circumstances.[210]

201. *See id.* (applying the balancing approach because the parties did not make a contract and could not agree on the disposition of their pre-embryos).

202. *See id.*

203. *See id.*

204. *Id.*

205. *Id.* at 1135 n.5.

206. For a more detailed description of the criticisms of the contemporaneous mutual consent approach, see *supra* Section II.B.2.

207. *See* Szafranski v. Dunston, 993 N.E.2d 502, 512 (Ill. App. Ct. 2013).

208. However, the balancing approach has been criticized for granting decision-making power to the court as opposed to the parties. *See In re* Marriage of Witten, 672 N.W.2d 768, 779 (Iowa 2003).

209. For example, the balancing approach allowed the court in *Davis* to consider the husband's childhood experiences with divorce and therefore give more weight to his right not to procreate. *See* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992). This approach also allows courts to consider whether parties are able to procreate by other means. *See id.* at 604.

210. The contemporaneous mutual consent approach finds that regardless of the facts of the case, "no transfer, release, disposition or use of the embryos can occur without the

Hence, if parties do not make a pre-embryo disposition agreement, Pennsylvania courts should apply the balancing approach, as this approach conforms with *Reber* and may produce more equitable results than the contemporaneous mutual consent approach.

IV. CONCLUSION

After the Superior Court of Pennsylvania's decision in *Reber v. Reiss*, Pennsylvania courts have been left with little guidance as to how to distribute cryopreserved pre-embryos after couples divorce.[211] This Comment argues that if parties make an agreement regarding the disposition of their pre-embryos, Pennsylvania courts must apply the contract approach and enforce the agreement because it does not violate any incontrovertible public policy.[212] Alternatively, if parties do not make an agreement regarding the disposition of their pre-embryos, courts should apply the balancing approach as opposed to the contemporaneous mutual consent approach because the balancing approach is more equitable and practical.[213] By explicitly adopting this approach to pre-embryo disposition, the Supreme Court of Pennsylvania will provide much-needed guidance for couples, clinics, and trial courts as these parties attempt to navigate the murky waters of pre-embryo disposition.

signed authorization of both donors." *Witten*, 672 N.W.2d at 782. Forcing parties to work together to come to an agreement regarding the disposition of pre-embryos, as opposed to allowing courts to intervene in certain circumstances, could be dangerous to parties. *See* Linda C. Neilson, *At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases*, 52 FAM. CT. REV. 529, 531–32, 541 (2014) (expressing concern for judicial dispute resolution and mediation in divorce cases involving domestic violence, as an abusive party may intimidate the other party during discussions regarding child custody and property distribution).

211. *See supra* Section II.A.

212. *See supra* Section III.A.

213. *See supra* Section III.B.