

IVF BATTLES: LEGAL CATEGORIES AND COMPARATIVE TALES

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ABSTRACT

Coupled with modern reproductive technologies, the ancient desire for parenthood has led to novel legal challenges. This essay discusses landmark cases addressing those challenges. At the outset, it distinguishes between two litigation paradigms in this area—termed “horizontal” and “vertical.” Horizontal controversies involve private parties who have different aspirations regarding a joint parenthood project (e.g., between two partners who began an IVF procedure and later disagree whether to complete the process). In contrast, vertical controversies concern clashes between an individual (or individuals) and the state, such as when the state or one of its authorities does not allow the individual to move forward with technologies that may lead to parenthood (e.g., new surrogacy procedures), though all affected individuals consent. The essay then focuses on horizontal litigation, and examines the ways in which various legal systems draw on, and sometimes adjust to the particular circumstances of the case, traditional concepts such as contract, reliance, property, and more to resolve such disputes.

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INTRODUCTION

The aspiration for parenthood (and sometimes even beyond—for grandparenthood) is often assumed to be—at least by the majority of views—an inherent trait of humankind. It is prevalent in human societies in ways that transcend conditions and cultures. At the same time, some aspects of this aspiration are culturally dependent. This essay is dedicated to evaluating one particularly sensitive variant: the intersection of sophisticated technological possibilities with the aspirations of prospective parents, when their aspirations conflict with one another.

This essay examines the ways in which various legal systems draw on, and sometimes adjust, traditional concepts of contract, reliance, property, and more to resolve such disputes. For example, is an understanding between prospective parents a contract? Does it relate to property or to an interest that has some property characteristics? Is it governed by private or public law? What is the role of the pre-formulated consent forms that IVF clinics may require? This essay explores how the preliminary choice of analogy shapes courts' analyses in IVF-related disputes.

I. THE BACKGROUND CONDITIONS FOR COMPARISON: LAW AND CULTURE

The overarching question regarding reproductive technologies is whether what is feasible from a scientific and technological perspective should also be permissible from a legal perspective.¹ Indeed, the law is not expected to mirror the scope of scientific possibilities. At the same time, it

1. I expressed this notion in my opinion in the case of HCJ 4077/12 Doe v. Ministry of Health (5.2.2013) (hereinafter: *Sperm Bank* case), to be discussed later. I stated the following: “The case at bar is yet another example of the new challenges presented by scientific and technological progress. From a medical aspect, a woman who seeks conception may select the preferred sperm donor after having reviewed his specifications as well as the availability of a sperm unit ‘inventory’ provided by him. The availability of such possibilities to her join many other situations in which technology creates new opportunities—freezing ova or storing sperm (for future use thereof), early detection of embryo genetic diseases, and more. These situations repeatedly raise the question of whether the availability of a certain mode of action, as a matter of science and technology, necessarily entails the existence of a right to use it, and that the exercise of such right is not to be limited.” *Id.* at para. 32 of my opinion.

would be naïve to think that new scientific and technological possibilities do not influence and reshape the scope of legality.

When examining legal questions relating to reproductive technologies, comparative law seems to be especially useful. The rise of these technologies occurred in different places around the same time and several legal systems simultaneously looked for solutions to similar disputes. Because the moral and human dilemmas are similar across jurisdictions, the comparison comes naturally. This is, in fact, reflected in some of the judicial decisions discussed below, which explicitly take insights from comparative law.

In addition, some of these cases include a transnational dimension, as couples from jurisdictions with restrictive rules on IVF often opt to begin the procedure in countries with more permissive regulatory frameworks. Thus, very practically, the “fertility tourism” phenomenon directly results from a comparative analysis of different legal systems. At the same time, legal decision-making in this area—and the moral intuitions that guide it—is deeply influenced by background cultural conditions. Therefore, a comparative law analysis relating to reproductive technologies must be conducted with care.²

For example, the legal regime applying to the use of reproductive technologies in Israel might reflect the fact that the local culture is very family-oriented, as a result of both Jewish tradition generally and the national trauma of the Holocaust. Israel is, in fact, a leader in fertility medicine. Not only does Israel have highly advanced medical treatments, but, more importantly, the state supports assisted fertilization in a benevolent manner, giving it priority above many other medical services. Fertilization treatments are included in Israel’s national health insurance law;³ every woman is entitled to fertilization treatments. Universal access to fertility medicine highlights a sociological reality; in Israel, having children is not merely a “right,” “privilege,” or “choice,” but rather is regarded almost as a social duty.⁴ In a different way, Germany’s approach to reproductive technology

2. For the use of comparative law to inspire legislation in areas that involve technological innovations and moral dilemmas, see Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 COLUM. J. EUROPEAN L. 477, 482–83 (2009).

3. National Health Insurance Law – 1994, [1994] *Sefer Hahukim* (No. 1469) 156.

4. See also SUSAN MARTHA KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION 3–4 (2000); Carmel Shalev and Sigal Gooldin, *The Uses and Misuses of In-Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM: A JOURNAL OF JEWISH WOMEN’S STUDIES & GENDER ISSUES, 151, 152 (2006); Daphne Barak-Erez, *Reproductive Rights in a Jewish and Democratic State*, CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 228, 230 (Susanna Mancini and Michel Rosenfeld eds., 2014).

has been shaped by, and in opposition to, the country's Nazi history.⁵ In China, the use of IVF was sometimes regarded as a way to apply the "one child policy."⁶ Other commentators have argued that in the U.S., the development of reproductive technology law has been influenced by the background culture, which values freedom of contract—and thus the use of reproductive technologies has been subject, mainly, to contract law.⁷

II. TWO TYPES OF LEGAL CLASHES: HORIZONTAL AND VERTICAL

It is important first to distinguish between two reproduction-related litigation paradigms: horizontal and vertical. Horizontal controversies are litigated between (at least) two private parties who have different aspirations regarding a joint parenthood project—for example, two partners who started an IVF procedure but later disagree whether to complete it. In contrast, vertical controversies involve conflicts between individuals and the state, usually when the state or one of its agencies tries to prevent individuals from using technological possibilities that may allow them to reach aspired parenthood—e.g., surrogacy procedures (which, while previously not at all possible, are now regulated and therefore subject to certain conditions).⁸

5. The applicable statute is the Embryo Protection Act 1990 of December 13, 1990 (BGBl. I p. 2746), last amended by Article 1 of the Law of November 21, 2011 (BGBl. I p. 2228). This law is mainly directed at medical professionals and prohibits actions conducted without consent. Section 4(1) of this law states that a person shall be punished with up to three years imprisonment or a fine if he or she "undertakes artificially to fertilize an egg cell without the woman whose egg cell is to be fertilized, and the man whose sperm cell will be used for fertilization, having given consent". See SHEILA JASANOFF, *DESIGNS ON NATURE: SCIENCE AND DEMOCRACY IN EUROPE AND THE UNITED STATES* 159 (2005); YAEL HASHILONI-DOLEV, *A LIFE (UN)WORTHY OF LIVING: REPRODUCTIVE GENETICS IN ISRAEL AND GERMANY* 29–30 (2007).

6. In certain Chinese provinces, some doctors justified the use of IVF as a fair application of the one child policy, i.e., it would allow everyone to have one child. See Ayo Wahlberg, *The Birth and Routinization of IVF in China*, 2 *REPRODUCTIVE BIOMEDICINE & SOC.* 97, 104 (2016) ("So I told the Family Planning bureau in Hunan that our population policy should be based on this idea that every family should have one healthy baby, not only fertile, but also infertile couples, so this is fair to every family.").

7. See John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 *COLUM. J. TRANSN'L L.* 189, 193–94 (2004). For the many uses of contracts in the context of U.S. family law, see generally Adrienne Jules and Fernanda Nicola, *The Contractualization of Family Law in the United States*, 62 *AM. J. COMP. L.* 151 (2014).

8. In Israel, for example, surrogacy is legal only for heterosexual couples, according to a statute enacted in 1996. The first petition to the Supreme Court protesting this limitation was brought by a single woman. At the time, the petition was dismissed based on a reasoning that acknowledged the legitimacy of limiting the scope of new experimental legislative models. See H CJ 2458/01 *New Family v. Committee for Approval of Surrogacy Contracts*, Ministry of Health, 57(1) PD 419 (2002) (Isr.). Almost twenty years later, another petition was brought against the law, this time by same-sex couples. So far, the Supreme Court has refrained from deciding the case, since a new bill concerning proposed reforms to the current statute is being considered in the Knesset. The Court expressed grave concerns regarding the constitutionality of the statute's limitations that prevent its application to same-sex couples and singles,

Sometimes, the two types of litigation become interrelated, such as when the state does not permit surrogacy and only one of the partners would like to pursue it abroad.

Notably, this distinction is also present in the area of abortion law, where two prospective parents might have different views regarding the continuation of a pregnancy, and in addition their choices might be legally limited. However, in the area of abortion law, most legal debates have focused on the vertical clash, since once the pregnancy starts, the mother has, in the horizontal arena, an inherent advantage: the fate of the pregnancy has physical implications only for her.⁹

This essay focuses on horizontal, rather than vertical, conflicts in the area of IVF. There are several reasons for this. First, horizontal litigation between private parties in this area predates vertical litigation vis-à-vis state regulation, and therefore it is already possible to reflect on its developments. Second, horizontal clashes provide a better opportunity to assess the legal regulation of parenthood—without the need to consider its impact on third parties or the public at large (necessarily part and parcel of vertical analyses, which in turn include issues like the availability of surrogacy).

However, even horizontal case analysis requires considering the background regulation of the vertical sphere. For example, parties who want to use IVF procedures that will be completed through surrogacy depend on the surrogacy procedure's legality. A sweeping prohibition on surrogacy in the parties' country of residence may sometimes even influence the legality of their consent to go through it elsewhere. It is worthwhile noting that, while the scope of legal surrogacy and its availability is hotly debated, the use of IVF procedures as such is now widely permitted.¹⁰

but refrained from deciding the issue in order to allow the Knesset to complete the legislative process. *See* HCJ 781/15 Arad-Pinkas v. The Committee for Approval of Surrogacy Contracts authorized by the Surrogacy Contracts (Approval of Contract and the Status of the Newborn), 1996 (3.8.2017) (Isr.).

9. In other words, in contrast to abortion law, horizontal IVF-related conflicts are not dominated by the winning argument regarding the impact of the decision on the woman's body.

10. Generally speaking, the legality of IVF procedures is largely accepted. An exception to this was presented in Costa Rica, where the Supreme Court decided in 2000 that IVF procedures jeopardize the life and dignity of human beings. *See* Sala Constitucional de la Corte Suprema de Justicia de Costa Rica, Sentencia No. 2306-00 de las 15:21 horas del 15 de marzo del 2002 (website of Sistema Costarricense de Información Jurídica). In *Artavia Murillo v. Costa Rica* (2012), the Inter-American Court of Human Rights criticized this view, deciding a case in favor of infertile couples who, due to the ban, had not been able to undergo IVF treatment. In the judgment, the Inter-American Court stated that the approach of the Costa Rican Supreme Court arbitrarily interfered with the rights to privacy and family life. It was established that the ban constituted a form of discrimination against infertile people in Costa Rica, as it impeded their access to a treatment that would have remedied their disadvantage in relation to fertile couples—namely the possibility of having biological children. *Artavia Murillo v. Costa Rica*, Preliminary objections, merits, reparations, and costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 381 (Nov. 28, 2012). *See also* S. H. v. Austria, concerning the Austrian law on IVF. This law limited recourse to IVF

III. COURTS SEARCHING FOR A MODEL: BORROWING FROM VARIOUS LEGAL INSTITUTIONS

The most common form of horizontal litigation stems from former partners who commenced an IVF procedure together but later come to differ over the future of the procedure—more concretely, over the future of frozen embryos.¹¹ The typical question before the courts is, therefore, whether the partner who wishes to proceed with the IVF procedure may do so without the other party's consent.¹²

Examining the accumulated judicial experience of several systems reveals that despite background differences, courts have based their decisions in these matters on well-established legal frames of reference, such as contract and property. Since there are several possible ways to analogize new reproductive questions to existing legal institutions, the preliminary choice of model tends to dictate the result. Despite its importance, quite often, this preliminary choice is made by courts without legislative guidance. This analysis will thus start by presenting the models used by courts from

procedures to the use of the sperm and ova of a couple who wanted a child, with limited exceptions. Originally, the Austrian court ruled, in 1999, that the law passed relevant tests. However, the European Court of Human Rights held that the government's argument, that a complete prohibition on donations was the only way to prevent the risks associated with donor gametes, was not convincing. The original decision was handed down in 2010 (Application 57813/00) (1 April 2010), and the decision of the Grand Chamber was in 2011 (3 November 2011). *X S.H. v. Austria*, Eur. C. H.R. (2011).

11. Where the IVF procedure has not developed to the stage of fertilizing embryos, the connection between the two partners is easily replaceable, and therefore these issues do not arise in any significant manner.

12. The less customary format of litigation, which lies beyond the scope of this analysis, concerns cases in which one of the partners manages to complete the process without the consent of the other, by way of misrepresentation or even deceit. *See, e.g., ARB v. IVF Hammersmith Ltd.* (2017) EWHC 2438 (QB) (dismissing a wrongful birth case against an IVF clinic. In this case, a heterosexual couple had engaged in IVF proceedings at the renowned IVF clinic of Hammersmith in 2008, which after just one cycle led to the birth of a son. A number of embryos remained frozen and the couple maintained contact with the clinic for advice. Two years later, the woman forged her partner's signature on a consent form and, on the basis of this, had an embryo implanted into her womb. Ultimately, she gave birth to a daughter. In the meantime, the relationship had broken. While the girl lived with the mother for most of the time, the father also fulfilled parental duties. His action for compensation from the IVF clinic, including the cost of private education and refurbishing a bedroom, was dismissed, on the basis that no compensation could be due for the birth of a healthy baby.); *Högsta Domstolens, Judgement of October 29, 2015, T 4994-14, Nytt Juridiskt Arkiv 2015, at 675 (Swe)* (dismissing a request to deny paternity. In this case, a married couple, KB and ÅB, undertook an IVF procedure with donated sperm that, following the transfer of two embryos, allowed ÅB to give birth to twins. The couple divorced soon thereafter. KB petitioned the court to annul his legal status of paternity, formed pursuant to his marriage with ÅB, on the finding that his consent to IVF had been limited to the transfer of a single embryo. The court held that, although ÅB had concealed the limited scope of her husband's consent during the treatment, his interest not to be the father of twins could under no circumstances outweigh the interest of the children to have a legal father.).

different jurisdictions. Later, it will point to some relevant legislative initiatives.

A. Contract?

Most courts have analyzed IVF-related controversies using a contract law framework. Their decisions can be described as presenting a contract-based model (what will be termed in this essay the “contractual model”)—that is, they resolve the conflict based on the parties’ expressed or implied agreement. Since the advent of these disputes, the contractual model has been perceived as the “natural” choice in the absence of any applicable statutory provision, given that the parties had to agree with one another to start IVF treatment in the first instance. In addition, fertility clinics usually require prospective parents to sign agreements and consent forms at the initiation of the IVF process—at least vis-à-vis the clinic. These documents sometimes include provisions that influence the rights and duties of the partners vis-à-vis one another.

The contractual model assumes that what governs the fate of frozen embryos is the partners’ consent, subject to the limitations imposed by contract law on the enforcement of certain contracts, especially contracts with intense personal aspects. In practice, as explained below, the implementation of the contractual model usually benefits the party who wishes to stop the IVF process.¹³

B. Reliance?

In some relatively exceptional cases, courts have been willing to go beyond the formal contours of private law to embrace a balancing model, which takes into account the real consequences of the decision for the parties. Termed here the “reliance model,” this approach has enabled courts to consider the grave reliance of parties for whom stopping a pending IVF procedure has irreversible consequences, as it is their sole chance to achieve biological parenthood—for example, when one of the partners becomes sterile.

C. Property?

Presumably, property law could provide an alternative legal framework for deciding these cases (here, the “property model”). However, property law, standing alone, has often been considered a less appropriate alternative because the background issue remains linked to the parties’ agreement

13. See *infra* Part IV.

regarding this “property,” and whether that agreement is enforceable.¹⁴ In addition, reference to property law implies the commodification of human materials such as sperm and eggs, which is itself controversial. As a consequence, courts frequently refer to frozen embryos as having property traits, rather than directly calling them property—or, as the Tennessee Supreme Court stated in *Davis v. Davis*, “property deserving special respect.”¹⁵

D. Personhood?

In general, and in contrast to abortion-related cases, efforts to decide controversies between ex-partners by using a trump card—the argument that frozen embryos are a form of life and therefore the party interested in using them for fertilization should prevail (the “personhood model”)—seem to remain in the periphery. In fact, even those who promote the view that life begins with conception tend to be reluctant about making that argument with regard to frozen embryos.¹⁶

The argument for the personhood model was presented most strongly in the Irish case *Roche v. Roche*.¹⁷ In *Roche*, a woman sued her estranged husband for the right to use three frozen embryos. She based her argument on the Irish Constitution, which expressly states that “[t]he State acknowledges the right to life of the unborn.”¹⁸ The Supreme Court of Ireland held that when this provision was debated, there had been no consensus regarding the question when human life begins and therefore it

14. The Canadian case, *C.C. v. A.W.*, 2005 ABQB 290, presents an exceptional example of a court’s reference to property law with no qualifications. This case concerned the matter of Ms. CC and Mr. AW, who were former lovers, and who later remained friends. In 1998, AW donated sperm so that CC could become pregnant through IVF. On the third attempt, CC became pregnant with twins, who were born in 2001. Four fertilized embryos remained in the clinic. CC wanted to use the remaining embryos but AW refused to consent to their release, citing his difficulty co-parenting the twins with CC as his reason. The court found that AW gave his sperm to CC as a friend and as an unqualified gift in order to conceive children. AW knew that CC could use the embryos when and as she chose. Thus, the court held that the remaining embryos were CC’s property, to be used as she saw fit, and that AW had no legal interest in them.

15. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). This was in contrast to the Court of Appeals’ holding, which effectively treated the frozen embryos as mere “property.” *Id.* at 595–97. See generally Bridget M. Fuselier, *The Trouble with Putting All of your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos*, 14 TEX. J. CIV. LIB. & CIV. RTS. 143 (2009).

16. This was actually the view of the trial court in *Davis v. Davis*. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *30 (Tenn. Cir. Ct. 1989) (hereinafter *Davis Trial Court*) (“The Court finds and concludes that by whatever name one chooses to call the seven frozen entities—be it preembryo or embryo—those entities are human beings; they are not property.”).

17. *Roche v. Roche*, (2010) 2 I.R. 321.

18. Constitution of Ireland 1937, art. 40.3.3.

should not be interpreted as covering frozen embryos outside the mother's womb. Accordingly, the Court limited itself to adding that the embryos should be "treated with respect."¹⁹

In the U.S., the Missouri Court of Appeals, in *McQueen v. Gadberry*,²⁰ dismissed a similar pro-life argument. The majority opinion held that the frozen embryos in question should not be protected as "human beings."²¹ Interestingly, in that case, the majority did accept the view that the embryos were property.²² However, its main analysis was based on contract law.²³ In contrast, in Louisiana, state legislation specifically defines frozen embryos as "persons."²⁴

E. Legislation?

Because the answers to these questions are so complicated, a legislative scheme would be very helpful. However, in many countries the legislature is silent. At any rate, when legislation does exist, its evaluation often raises many of the same questions, this time on the constitutional level, due to its potential to bear on such rights.²⁵

IV. THE CONTRACTUAL MODEL AND PRIORITIZING THE NEGATIVE RIGHT

Irrespective of the actual contents of the contract in question, the application of the contractual model to IVF disputes has typically led courts to prioritize the party resisting completion of the procedure. On the one hand, with regard to contracts that include a commitment to continue the process, courts have largely ruled the commitment unenforceable, thereby aligning

19. *Roche*, (2010) 2 I.R. 321 at par. 219 (Geoghegan, J.).

20. *McQueen v. Gadberry*, 507 S.W.3d 127, 127 (Mo. Ct. App. 2016), *reh'g and transfer denied* (Dec. 15, 2016), *transfer denied* 2017 Mo. LEXIST 32 (Mo. Jan. 31, 2017). The case was decided by a majority of two judges, with one judge dissenting.

21. *Id.* at 147–48 ("We also hold that an application of section 1.205, including declarations that life begins at conception/fertilization, to the frozen pre-embryos and to Missouri's dissolution statutes under the circumstances of this case, (1) would be contrary to U.S. Supreme Court decisions interpreting the U.S. Constitution; and (2) would violate Gadberry's constitutional right to privacy, right to be free from governmental interference, and right not to procreate. Accordingly, the trial court did not err in failing to classify the frozen pre-embryos as children under Chapter 452."). In fact, the judges in the majority accepted the view that the "frozen embryos [were] marital property of a special character." *Id.* at 149. However, the main analysis in the case was contractual.

22. *Id.* at 148–49.

23. *Id.* at 155–58.

24. La. Stat. Ann. § 9:123 (2017) ("An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.").

25. *See infra* Part VI.

with the traditional tendency in contract law to avoid enforcing contracts for personal services. On the other hand, with regard to contracts that condition the procedure on continued mutual consent, the party resisting the process can easily base his or her arguments on the contract's contents. In such cases, courts have generally relied on a "freedom of contract" precept to rule on that party's behalf. In other words, the argument that the contractual model should lead to the *enforcement* of a clear commitment to continue the process has not had much success.²⁶

The contractual model is best exemplified by American case law.²⁷ This is the legacy of the first, and perhaps most famous, case litigated in the U.S., *Davis v. Davis*²⁸—although the case itself did not involve a contract, as explained below. In that case, the plaintiff, who suffered from a medical condition that rendered her unable to conceive, and her husband started IVF treatments, which produced seven frozen pre-embryos.²⁹ Subsequently, the plaintiff's husband filed for divorce.³⁰ Despite the split, the plaintiff wanted to use the seven frozen embryos for future attempts to become pregnant.³¹ Her ex-husband, the defendant, was opposed.³² Notably, by the time suit was filed, the preferences of the two parties had shifted: both parties had remarried, and rather than use the frozen embryos herself, the plaintiff sought

26. For a contractual approach that supports a different result when the contract includes a clear pre-commitment to the process' continuation, *see generally* John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L. J. 407 (1990); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L. J. 989 (2001); John A. Robertson, *Precommitment Issues in Bioethics*, 81 TEXAS L. REV. 1849 (2003). For a contractual approach that insists on continued mutual consent, *see also* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 55 (1999).

27. Interestingly, a German court decision also insisted on mutual consent until the moment of transfer to the womb. In Germany, surrogacy is illegal. *See* Robertson, *supra* note 7. Therefore, this question may arise only when fertilized eggs are intended for implementation into the womb of the biological mother. Another reason for the scarcity of cases from Germany is the limitation on how many eggs may be fertilized in each round of the procedure (to three, according to section 1(3) of the law). *See* Landgericht Bonn, Judgement of October 19, 2016 - 1 O 42/16, ECLI:DE:LGBN:2016:1019.1O42.16.0A (upholding the notion of required continued consent. In this case, the prospective parents had signed a notarized agreement granting both parties the right to withdraw from the IVF procedure "until its completion."). After the eggs had been fertilized, but before their implantation, one party signaled his withdrawal. *Id.* The court held that both parties enjoyed the right to become—or not become—a parent, irrespective of the choice of a certain reproductive technology. If IVF allows parties to postpone the decision to procreate to the later stage (the actual transfer of the fertilized embryo), then there has to be continued consent until this very moment. *Id.* The court added that the Embryo Protection Act did not intend to modify this principle). *Id.*

28. *Davis v. Davis*, 842 S.W.2d 588, 598 (1992).

29. *Id.* at 591.

30. *Id.* at 592.

31. *Id.* at 589.

32. *Id.*

to donate them to a childless couple.³³ The trial court sided with the plaintiff and awarded her custody of the embryos based on the personhood model (referring to the frozen embryos as human beings).³⁴ The Court of Appeals reversed, employing the property model to hold that both parties would need to agree to continue the process.³⁵

On appeal, the Supreme Court of Tennessee reversed and, after duly considering the possibility of regulating the relationship of the parties under contract law, held that, “as a starting point . . . an agreement regarding disposition of any untransferred preembryos 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”³⁶ and can be enforced between prospective parents. At the same time, the Court recognized the possibility that “the initial agreements may later be modified by agreement will,”³⁷ and that this protected the parties “against some of the risks they face in this regard.”³⁸ The Court did not have the opportunity to fully evaluate the contractual model as a basis for resolving the dispute because it found that the parties did not make an actual or implied contract, aside from agreeing that the wife could use the frozen embryos to become pregnant.³⁹ Absent a contract, the Court decided to balance the interests of the parties and held for the husband, ruling that his negative interest in avoiding parenthood was greater than his ex-wife’s interest in avoiding the emotional burden of knowing that the embryos would go unused.⁴⁰

33. *Id.* at 590.

34. *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at *36 (Tenn. Cir. Ct.1989) (“In the case at bar, the undisputed, uncontroverted testimony is that to allow the parties seven cryogenically preserved human embryos to remain so preserved for a period exceeding two years is tantamount to the destruction of these human beings. It was the clear intent of Mr. and Mrs. Davis to create a child or children to be known as their family. No one disputes the fact that unless the human embryos, in vitro, are implanted, their lives will be lost; they will die a passive death.”). *See supra* Part III (D) (explaining the “personhood model”).

35. *Davis v. Davis*, 1990 Tenn. App. LEXIS 642, at *9 (Tenn. Ct. App. Sept. 1990). The Court of Appeals referred to an earlier decision that concerned a dispute between a couple and an IVF clinic. *See York v. Jones*, 717 F.Supp. 421, 423-24 (E.D.Va. 1989). *See also supra* Part III(C) (explaining the “property model”).

36. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

37. *Id.*

38. *Id.*

39. *Id.* at 598.

40. *Id.* at 604 (“Refusal to permit donation of the preembryos would impose on her the burden of knowing that the lengthy IVF procedures [the plaintiff] underwent were futile, and that the preembryos to which she contributed genetic material would never become children. While this is not an insubstantial emotional burden, we can only conclude that Mary Sue Davis’s interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood.”).

Davis proved to be hugely influential. Other American courts have largely followed, analyzing similar cases through the contractual model. Consequently, most often, they rule to protect the negative right to avoid parenthood.

The second important case to follow *Davis* was *Kass v. Kass*.⁴¹ Mr. and Ms. Kass were married in 1988 and soon thereafter began IVF treatment.⁴² During the enrollment process, the couple signed an agreement that stated, among other things, that if they were unable to decide what to do with any of the frozen embryos, they would be given to the IVF program for research.⁴³ In 1993, with divorce imminent, the couple signed an uncontested divorce agreement that included a passage stating that the frozen embryos would be disposed of in the manner outlined in the consent form.⁴⁴ A month later, Ms. Kass requested sole custody of the frozen embryos with the intention of undergoing another implantation procedure.⁴⁵ Mr. Kass opposed the request and any further attempts by Ms. Kass to achieve pregnancy with the couple's embryos.⁴⁶ The trial court granted Ms. Kass custody of the frozen embryos, but the appellate court reversed.⁴⁷ While divided on whether the contract was too ambiguous to enforce, the court unanimously held that when parties to an IVF procedure contract regarding the means to dispose of any unused fertilized eggs, their agreement should control.⁴⁸ Accordingly, the court held that the signed agreement clearly expressed the parties' intent and, thus, the frozen embryos should be donated to the IVF program for research purposes.⁴⁹

In *AZ. v. BZ*,⁵⁰ the Massachusetts Supreme Court held unenforceable an IVF-related contract stipulating that an IVF process could continue in the event of marital separation, thus reinforcing the negative right to avoid unwanted parenthood articulated in *Davis v. Davis*.⁵¹ In *AZ. v. BZ*, the partners participated in a prolonged IVF treatment, which produced several frozen embryos.⁵² The clinic had presented the parties with a contract form that asked, among other things, what it should do with any frozen embryos

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

42. *Id.* at 175.

43. *Id.* at 176–77.

44. *Id.* at 177.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 180.

49. *Id.* at 182.

50. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000).

51. *See Kass*, 696 N.E. at 182.

52. *A.Z.*, 725 N.E.2d at 1053.

in the event of marital separation. The husband signed a blank form and the wife wrote in that the embryos should be “returned to the wife for implantation.”⁵³ The couple succeeded in having twin daughters.⁵⁴ They later divorced, but before their separation the wife stated her intent to become pregnant again using the remaining frozen pre-embryos, and her ex-husband objected.⁵⁵ The Massachusetts Supreme Court ruled that the prior written agreement between the husband and wife regarding the status of the frozen embryos in the event of a divorce was unenforceable.⁵⁶ The court further held that IVF contracts may not give one party the right to continue with the process without the other party’s consent.⁵⁷ Under the guise of contract law, the court thus embraced a strong value preference for the protection of a negative freedom: to be free from unwanted parenthood. Although it did not constitute part of the court’s reasoning in this case, it is also important to note that the couple already had children.⁵⁸ This has proven to be relevant in similar cases, as discussed below.⁵⁹

The same reasoning was applied in *J.B. v. M.B.*⁶⁰ There, a married couple started IVF procedures and managed to have a child.⁶¹ Soon after, they filed for divorce.⁶² The wife wanted to destroy the frozen embryos, but the husband wanted to donate them to other infertile couples.⁶³ The only written agreement between the couple was a consent form from the IVF clinic, which stated that in the event of a divorce, the couple would relinquish control of the frozen embryos to the clinic or as otherwise determined by a court in the divorce proceedings.⁶⁴

Once again, the court upheld a negative right and ruled in favor of the party seeking to destroy the embryos.⁶⁵ The Supreme Court of New Jersey first held that the husband and wife had never entered into a separate binding

53. *Id.* at 1053–54.

54. *Id.* at 1053.

55. *Id.*

56. *Id.* at 1057.

57. *Id.* (“With this said, we conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will.”).

58. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1052 (Mass. 2000).

59. *See infra* Part V.

60. 783 A.2d 707, 719 (N.J. 2001).

61. *Id.* at 710.

62. *Id.* at 708.

63. *Id.* at 710. Interestingly, this time it was the wife who wanted to dispose of the embryos, in contrast to most other examples.

64. *Id.* at 709–710.

65. *Id.* at 720.

contract providing for the status of their embryos in unambiguous and unconditional terms.⁶⁶ More importantly, it held that an agreement regarding the implantation of frozen embryos resulting from an IVF procedure is generally unenforceable if one of the parties changes his or her mind before implantation.⁶⁷ Here, too, however, it is important to note that the parties already had a child. Though not relevant to a contract-model analysis, that fact may have provided important background to the case, a factor that will be—as already indicated—assessed later.⁶⁸

Iowa applied very similar reasoning in the case *In re Marriage of Witten*.⁶⁹ There, too, a divorced couple disagreed regarding the fate of embryos they had produced through IVF while still married.⁷⁰ As part of the IVF process, they had signed a consent form prepared by the medical center that detailed the transfer, release, or disposition of the embryonic eggs upon certain contingencies, but was silent regarding what should happen in the case of the couple's divorce.⁷¹ After the divorce, the wife, the appellant, sought to use the frozen embryos to have children against her ex-husband's wishes. He, in turn, did not want the frozen embryos destroyed or for his ex-wife to use them, but was not opposed to donating them to another couple.⁷² The case eventually came before the Supreme Court of Iowa.⁷³ The Court found that the contract did extend to the circumstances, but held that “judicial enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against the public policy of this state.”⁷⁴ Eventually, since the couple could not agree regarding the outcome, the eggs remained frozen.⁷⁵ In essence, this solution de-facto prioritized, once again, the party resisting the process' completion.

66. J.B. v. M.B., 783 A.2d 707, 714 (N.J. 2001).

67. *Id.* at 719–20 (“We believe that the better rule, and the one we adopt, is to enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos Finally, 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 Because ordinarily the party choosing not to become a biological parent will prevail, we do not anticipate increased litigation as a result of our decision.”).

68. *See infra* Part V.

69. 672 N.W.2d 768, 780-81 (Iowa 2003).

70. *Id.* at 772–773.

71. *Id.* at 772.

72. *Id.* at 773 (“Trip testified at the trial that while he did not want the embryos destroyed, he did not want Tamera to use them. He would not oppose donating the embryos for use by another couple.”).

73. *Id.* at 772.

74. *Id.* at 782.

75. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003).

More recently, the Missouri Court of Appeals decided *McQueen v. Gadberry*.⁷⁶ McQueen and Gadberry married in 2005, separated in 2010, and filed for divorce in 2013.⁷⁷ During their marriage, they used IVF to create four pre-embryos, two of which were used to produce twins.⁷⁸ Notably, the couple's decision to use IVF was not related to any issues with fertility, but rather was because the couple was geographically separated by Gadberry's military service.⁷⁹ After the couple divorced, the parties litigated the fate of the remaining two pre-embryos. McQueen wanted to use the remaining pre-embryos to mother more children, while Gadberry did not want to have more children with McQueen, due to the difficulties they had co-parenting their twins.⁸⁰ The court held that no transfer, release, or use of the frozen embryos could occur without the signed authorization of both parties; in other words, it insisted on mutual continued consent to use the embryos for any future parenthood endeavors.⁸¹

In sum, when courts have relied on a contractual model to resolve disputes over embryos, they have been reluctant to give priority to parties who want to proceed with the IVF process—no matter the content of the contract signed. When contracts have stated that the procedure would be stopped if one of the parties so desired, courts have enforced them. When contracts have stated otherwise, courts have generally considered them unenforceable.⁸²

V. THE RELIANCE MODEL AND BALANCING THE CIRCUMSTANCES OF THE CASE

Although the traditional contractual model is the most common approach to IVF cases in the U.S., some jurisdictions have embraced an alternative variation to emphasize the importance of reliance. These cases usually result in dramatically different outcomes than those applying the traditional contractual model. Here, courts more often find it possible to enforce IVF-related contracts, leading to a prioritization of a *positive* right to parenthood in some circumstances. In doing so, courts have tended to focus

76. *McQueen v. Gadberry*, 507 S.W.3d 127, 132–33 (Mo. Ct. App. 2016), *reh'g and transfer denied* (Dec. 15, 2016), *transfer denied* 2017 Mo. LEXIST 32 (Mo. Jan. 31, 2017).

77. *Id.* at 133.

78. *Id.* at 133–34.

79. *Id.* at 133.

80. *Id.* at 135–36.

81. *Id.* at 158.

82. For criticism of a sweeping resistance for the enforcement of such contracts, see generally Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 *YALE J. L. & FEMINISM* 159 (2013).

on each case's unique context, considering the parties'—and their agreements'—specific characteristics.

The first example of this approach comes from Israel and lies at the heart of the so-called *Nahmani* affair.⁸³ Considering Israel's cultural and political embrace of parenthood and fertility medicine,⁸⁴ it may come as no surprise that an alternative, *positive* rights-based view emerged for the first time there. The essential facts in *Nahmani* are similar to many of the previous cases discussed above. They involved a married couple, Ruti and Danny Nahmani, who commenced IVF with plans to complete the process using surrogacy because Ruti had undergone a hysterectomy.⁸⁵ Accordingly, Danny's sperm was used to fertilize Ruti's remaining eggs.⁸⁶ During the process, the couple separated.⁸⁷ Ruti wanted to move forward with surrogacy, which was her only chance to achieve biological parenthood, but Danny, who by the time the case commenced had a new partner and children, did not.⁸⁸ In other words, as is usual in these cases, only one of the parties wanted to proceed with the IVF process. In contrast to many of the cases discussed so far, however, here, no clear contractual provision applied.⁸⁹ Further, in contrast to most, if not all the previous cases, the litigation concerned a “to be or not to be” situation. For Ruti, the disputed embryos provided her only hope for biological children.

In a relatively extraordinary manner, this case was litigated not once, but twice before the Israeli Supreme Court, first by a five justices panel,⁹⁰ and then by an enlarged panel of eleven justices.⁹¹ In the first round of litigation, the Court adopted a line of reasoning very similar to that in the U.S. cases previously discussed. The majority of the panel (four justices) ruled that the right to be a parent and the right to avoid parenthood are “two sides of the same coin,”⁹² and that the right to avoid parenthood should be prioritized over the right to parenthood, which inherently carries burdens for

83. See CA 5587/93 *Nahmani v. Nahmani* 49(1) PD 485 (1995) (Isr.) (hereinafter First *Nahmani* decision); FHA 2401/95 *Nahmani v. Nahmani* 50(4) PD 661 (1996) (Isr.) (hereinafter Second *Nahmani* decision). Interestingly, the decisions of the Israeli Supreme Court in this renowned case were referenced in some of the decisions of other jurisdictions mentioned earlier. See Daphne Barak-Erez, *Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries*, 47 TULSA L. REV. 405, 418–20 (2011).

84. See *supra* Part I (discussing the historical and cultural reasons for Israel's support of IVF).

85. First *Nahmani* decision, *supra* note 83, at 495.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Second *Nahmani* decision, *supra* note 83, at 2.

92. First *Nahmani* decision, *supra* note 83, at 500.

the other side.⁹³ In addition, the majority stated that the contract between the parties, to the extent that it obligated Danny, was unenforceable.⁹⁴ This decision, like its foreign predecessors, exclusively applied the contractual model⁹⁵ and did not meaningfully give weight to Ruti's irreversible reliance.

In contrast, in the second hearing of the case⁹⁶ (initiated via the Court's special capacity to rehear a case due to its precedential value),⁹⁷ the majority (seven justices) prioritized Ruti's right to parenthood, while four justices dissented. The rationale of the various justices in the majority differed, but in general, they all pointed to the fact that the case was one of first impression, and therefore the Court's decision could be inspired by reference to equity and justice.⁹⁸ In this context, the case's special circumstances—the fact that it represented one of the parties' only chance for biological parenthood—played a major role. The Court was confronted by two legitimate, but conflicting, considerations.⁹⁹ On the one hand, Danny's consent to the procedure was given under the assumption that the circumstances (the couple's marriage) would continue, and his change of view regarding the embryos was thus understandable. But on the other hand, it was impossible to disregard the fact that his consent triggered an irreversible decision on Ruti's side—to use his sperm for the fertilization of her last eggs. Ultimately, the Court held that she should not have to bear the grave consequences of his reversal.

For many years, the Israeli *Nahmani* decision was a lone precedent. Several commentators expressed their support of its more nuanced approach, but it did not leave a mark on actual court decisions.¹⁰⁰ It took some time before U.S. judgments signaled a similar approach when addressing circumstances where, because of a party's reliance on his or her partner's consent, that party would not have another opportunity to achieve biological

93. *Id.* at 500–01.

94. *Id.* at 513–14.

95. *See supra* Part III(A) (explaining the contractual model).

96. First *Nahmani* decision, *supra* note 83, at 485.

97. Basic Law: Judicature § 18 (Isr.).

98. *See* First *Nahmani* decision, *supra* note 83, at 742–43 (Bach, J.). In contrast, some of the dissenting Justices insisted that their result was also supported by justice considerations. *See id.* at 785–88 (Zamir, J.).

99. *See* Daphne Barak-Erez and Ron Shapira, *The Delusion of Symmetric Rights*, 19 OXFORD J. LEGAL STUDS. 297, 301–05 (1999).

100. *See, e.g.,* Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 102–03 (2002) (arguing that courts, in making decisions regarding reproduction, should take into account factors such as whether the parties have children or are able to have additional children, as well as public policy considerations); Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 U.S.C. L. REV. 1115, 1115–16 (arguing that the right not to be a genetic, gestational, or legal parent are separable rights) (2008).

parenthood. In retrospect, this approach may be traced to the earlier American court decisions discussed above,¹⁰¹ but they never expressly articulated it because those cases concerned contexts where the party who wished to continue with the process had not faced a “last chance” scenario. For example, while the Supreme Court of Tennessee in *Davis v. Davis*¹⁰² applied a balancing approach (after it found that the parties did not have an agreement that covered the wife’s wish to donate the frozen embryos),¹⁰³ there, the wife did not want to use the embryos herself—whereas the husband made a powerful argument regarding the agony he would experience at being separated from the children who would result.¹⁰⁴

Courts in the United States eventually had the opportunity to reach the same conclusion as the Israeli Court did in the *Nahmani* affair—giving priority to the party who wanted to continue the IVF process when it was his or her last chance to achieve biological parenthood—and did so in *Reber v. Reiss*¹⁰⁵ and *Szafranski v. Dunston*.¹⁰⁶ Both involved women diagnosed with cancer who underwent IVF specifically to preserve their fertility. In each case, embryos were formed and cryopreserved. When the women’s respective partners wished to halt the process, the court denied their requests and awarded both women sole rights over the embryos.¹⁰⁷

Reber v. Reiss was decided first, by the Superior Court of Pennsylvania. The court held that unless the legislature legislated otherwise, it was the court’s duty to consider the individual circumstances of each case.¹⁰⁸ The court explained that in the case before it, because the husband and wife had never made an agreement concerning a scenario of divorce prior to undergoing IVF, and since the pre-embryos were likely the wife’s only opportunity to achieve biological parenthood (and her best chance to achieve parenthood at all), the balancing of interests tipped in favor of the wife.¹⁰⁹ The court stated that adoption, while a “laudable, wonderful, and fulfilling

101. See *supra* Part IV (detailing the *Davis v. Davis* line of cases).

102. 842 S.W.2d 588, 603 (Tenn. 1992).

103. *Id.*

104. *Id.* at 603–04. Even though in this instance, the party choosing not to continue IVF prevailed, it is implicit to the balancing test that this outcome may not always result). A hint in this direction can also be found in *JB v. MB*, where the court noted that priority “ordinarily” goes to the negative right—i.e., there are certain cases where the balance would favor the party who wanted to continue IVF treatment. See *supra* note 60.

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

106. *Szafranski v. Dunston*, 34 N.E.3d 1132, 1164 (Ill App. Ct. 2015).

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

108. *Id.*

109. *Id.*

experience . . . occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child.”¹¹⁰

The Appellate Court of Illinois held similarly in *Szafranski v. Dunston*. In that case, the appellee, Karla Dunston, was diagnosed with lymphoma.¹¹¹ Since her course of treatment presented the risk of infertility, she and her partner, Jacob Szafranski, used IVF to freeze embryos.¹¹² Several months later, their relationship ended.¹¹³ The cancer treatment rendered Dunston infertile; the three embryos she had frozen with Szafranski thus represented her only chance to have biological children.¹¹⁴ Prior to any attempts by Dunston to implant the embryos, Szafranski sued to prevent her from using them.¹¹⁵ At trial, the court held that a prior verbal agreement between the parties supported Dunston’s position.¹¹⁶ The trial court expressly rejected Szafranski’s argument that the informed consent document supplied by the fertility clinic (which stated that the embryos could not be used unless both parties agreed) modified or superseded their oral contract.¹¹⁷ The Illinois Court of Appeals affirmed,¹¹⁸ and the Supreme Court denied certiorari.¹¹⁹ Though formally speaking, the case was decided by using the contractual model, in practice, it applied the reliance model.

Obviously, these two cases are uniquely different from previous U.S. cases, which involved a party who wanted to implant embryos without the other’s consent when that party already had children. This difference is reflected in their results, which were largely influenced by the grave reliance involved.

Notably, in the Irish case *Roche v. Roche*,¹²⁰ where one party (the wife) wanted to implant IVF-produced embryos while her estranged husband did not, the Court considered relevant the fact that the couple already had two children, one naturally and one through IVF.¹²¹ Indeed, the Court held that

110. *Id.* at 1139. It is worthwhile adding that the husband’s financial concerns were dismissed on the ground of the wife’s commitment not to seek financial support from him if a child was born. I would add that the validity of such a commitment should be considered at best questionable. At any rate the financial concerns are usually not at the center of the conflicts in this area, partly because they become prevalent only at a later stage.

111. *Szafranski* 34 N.E.3d at 1136.

112. *Id.*

113. *Id.* at 1140.

114. *Id.* at 1163.

115. *Id.* at 1136.

116. *Id.* at 1149.

117. *Szafranski v. Dunston*, 34 N.E.3d 1132, 1153 (Ill App. Ct. 2015).

118. *Id.* at 1164.

119. *Szafranski v. Dunston*, 136 S. Ct. 1230, 1230 (2016).

120. *Roche v. Roche*, (2009) 2 I.R. 321, 321 (S.C.) (Ir.).

121. *Id.* at para. 37 (Denham, J.).

the parties had not agreed to move forward with the procedure in the case of separation.¹²² However, the Court then went on to consider the parties' circumstances. Specifically, it noted that the wife had already secured her right to biological parenthood.¹²³ As Judge Denham said, "All the circumstances would have to be considered carefully. If a party had no children, and had no other opportunity of having a child, that would be a relevant factor for consideration."¹²⁴ Based on the facts of the case, the five justices who sat on the wife's appeal unanimously dismissed it.¹²⁵

The U.S. case *In re Marriage of Rooks* reflected a similar sentiment.¹²⁶ Mary and Drake Rooks married in 2002, and Drake filed for divorce in 2014.¹²⁷ During their marriage, the Rooks had three children, all conceived using IVF.¹²⁸ In addition, the couple had six embryos in cryostorage.¹²⁹ It was undisputed that Mary used her last eggs to create the embryos.¹³⁰ The couple had signed an agreement with the fertility clinic stating, among other things, that in the event of divorce and if the couple could not agree, the trial court would decide who would have custody over the embryos.¹³¹ Nevertheless, the Colorado Appellate Court expressly rejected the contractual approach as unrealistic.¹³² It stated that since the contract was ambiguous, it was necessary to employ a balancing approach to the dispute instead.¹³³ More specifically, the court found that since the husband's interest in not having children outweighed the wife's desire to have a fourth child, the balance tilted toward the husband.¹³⁴ In the circumstances, the wife's reliance on the IVF process for the purpose of having another child was outweighed by her husband's right not to be a parent to another child.¹³⁵

VI. THE POTENTIAL CONTRIBUTION OF LEGISLATION

Due to the complicated, value-laden aspect of this area of law, a clear legislative scheme could be of great assistance. Of course, legislation is not

122. *Id.* at para. 34 (Denham, J.).

123. *Id.*

124. *Id.*

125. *See Roche v. Roche*, (2009) 2 I.R. 321, 353, 366, 373, 383, 395 (S.C.) (Ir.).

126. *In re Marriage of Rooks*, No. 15CA0990, 2016 WL 6123561 (Colo. Ct. App. Oct. 20, 2016).

127. *Id.* ¶ 7.

128. *Id.* ¶ 8.

129. *Id.*

130. *Id.* ¶ 2.

131. *Id.* ¶ 3.

132. *Id.* ¶ 36.

133. *Id.* ¶¶ 37–38.

134. *Id.* ¶¶ 42–46.

135. *Id.*

a panacea, and the question regarding the preferred content of that legislation remains. Nevertheless, it is a pity that instructive legislation in this area is often lacking. The U.S. cases were decided in the absence of legislation, as were the cases in Israel and in Ireland. An example of a system that has had such legislation in place from a relatively early stage is the UK, where the Human Fertilisation and Embryology Act 1990¹³⁶ sets out clear rules regarding the fate of frozen embryos. Schedule 3 of the law states that either partner may withdraw his or her consent, in writing, at any time before the implantation of the fertilized eggs in question and thus prevent the other party from going forward with the procedure.¹³⁷ Similar legislation was subsequently enacted in Canada.¹³⁸ Against this background, it is helpful to analyze the leading IVF case emanating from the UK, *Evans v. United Kingdom*,¹³⁹ which was eventually heard by the Grand Chamber of the European Court of Human Rights.

The basic facts in *Evans* are similar to those that characterized the *Nahmani* affair:¹⁴⁰ the case represented one of the parties' only opportunity to achieve biological parenthood. Natalie Evans started IVF treatments with her then-partner, Howard Johnston.¹⁴¹ After the couple split, Johnston wrote to the clinic storing the embryos to request that they be destroyed.¹⁴² Evans opposed Johnston's request and immediately began legal proceedings.¹⁴³ As in *Nahmani*, the couple had started the treatment after Evans was diagnosed with ovarian cancer, and therefore the embryos in question were likely her only chance to achieve biological parenthood.¹⁴⁴ In contrast to the situation in *Nahmani*, however, the case was purportedly ruled by a clear statutory provision rather than a contractual understanding—and the statute supported Johnston.¹⁴⁵

Evans was unsuccessful at all stages of litigation, though various courts expressed sympathy toward her.¹⁴⁶ In the first instance, her case was

136. Human Fertilisation and Embryology Act 1990, c.37 (Eng.).

137. *Id.* at sched. 3.

138. *See* Assisted Human Reproduction Act, S.C. 2004, c. 2, Sec. 8 (2004); *see also* Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137 (2007).

139. *Evans v. United Kingdom*, App. No. 6339/05 Eur. Ct. H.R. (Apr. 10, 2007).

140. *See, supra*, Part IV.

141. *Evans*, App. No. 6339/05 Eur. Ct. H.R. at para. 13 (Apr. 10, 2007).

142. *Id.* at para. 18.

143. *Id.* at para. 19.

144. *Id.* at para. 14.

145. *Id.* at para. 57.

146. *See, e.g., id.* at para. 90 (“As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else.”); *Evans v. Amicus Healthcare Ltd. & Ors*, EWCA Civ 727 at para. 69 (2004) (“The

dismissed by the High Court.¹⁴⁷ Her appeal was then dismissed by the Court of Appeals, which affirmed the decision.¹⁴⁸ Evans' application for leave to appeal to the House of Lords was dismissed, and she eventually took her case to the European Court of Human Rights.¹⁴⁹ In 2006, the European Court of Human Rights, in a panel of seven judges, delivered a 5-2 majority ruling against Evans.¹⁵⁰ The European Court also expressed sympathy for Evans, but ultimately concluded that her right to family life could not override her partner's withdrawal of consent.¹⁵¹ Evans then applied to the Grand Chamber of the European Court. In 2007, the Grand Chamber of the ECtHR Ruled against Evans' appeal (13 judges against 4).¹⁵²

The fate of the proceedings in *Evans* demonstrates that legislation, *qua* legislation, does not necessarily provide satisfactory solutions to all parties. In practice, specific legislation may elicit the same questions that are debated in cases decided without its guidance. Indeed, some countries that have legislated on the matter have chosen the threshold juncture—after which consent cannot be withdrawn—as the fertilization of eggs, not their implantation.¹⁵³ This is Italy's approach, under its comprehensive 2004 law on this matter.¹⁵⁴ Originally, the Italian law was intended to preclude related conflicts by outlawing freezing embryos and limiting the permitted number of fertilized eggs in each round of treatment to three.¹⁵⁵ However, this provision of the law was declared unconstitutional by the Italian Constitutional Court.¹⁵⁶ In contrast, the American Bar Association's

sympathy and concern which anyone must feel for Ms. Evans is not enough to render the legislative scheme of Sch. 3 disproportionate.”).

147. *Evans v. Amicus Healthcare Ltd. & Ors*, EWHC 2161 (Fam) 1, 70 (2003).

148. *Evans v. Amicus Healthcare Ltd. & Ors*, EWCA Civ 727 at para. 121 (2004).

149. *See Evans v. United Kingdom*, App. No. 6339/05 Eur. Ct. H.R. at para. 13 (Apr. 10, 2007).

150. *Id.* at para. 6.

151. *See id.* at para. 67 (“The Court, like the national courts, has great sympathy for the plight of the applicant who, if implantation does not take place, will be deprived of the ability to give birth to her own child. However, like the national courts, the Court does not find that the absence of a power to override a genetic parent's withdrawal of consent, even in the exceptional circumstances of the present case, is such as to upset the fair balance required by Article 8.”).

152. *See id.* at para. 93–96 (Apr. 10, 2007).

153. *See Rosy Thornton, European Court of Human Rights: Consent to IVF treatment*, 6 INT. J. CONST. L. 317, 330 (2008) (pointing to legislation in Austria and Estonia that chose differently). For criticism of the Canadian legislation, which insists on the continuing consent, just as in the UK, *see Stefanie Carsley, Rethinking Canadian Legal Responses to Frozen Embryo Disputes*, 29 CAN. J. FAM. L. 55, 61 (2014).

154. Legge 19 febbraio 2004, n.40, G.U. Feb. 24, 2004, n.45, art. 6(3) (It.).

155. *Id.* art. 14(2).

156. Corte Cost., 8 maggio 2009, n. 151, Foro it. 2009, I, ¶ 2. At any rate, the Italian law did not affect already existing frozen embryos. In *Parrillo v. Italy*, No. 46470/11, Eur. Ct. H.R. 1, 47 (2015), the European Court of Human Rights dismissed an attack on the law coming from a woman who wanted to donate the frozen embryos she had produced with her late husband for research.

proposed Model Act would not permit parties to implant embryos for reproduction after one of the intended parents asserted his or her desire not to procreate.¹⁵⁷

Although legislation does not necessarily solve the dilemmas discussed here, having legislation in place has merits. Legislation may shape the expectations of the parties starting the IVF process. In addition, legislation can dictate what an enforceable contract concerning a joint IVF endeavor may and should include,¹⁵⁸ including the maximum time limit for keeping fertilized eggs, as well as provide procedures for bringing suit in related disputes.¹⁵⁹

VII. BEYOND RELIANCE?

This essay would not be complete without an analysis of more recent cases in which the question of promoting an IVF procedure was raised when reliance (in terms of the impact on one party's sole opportunity to achieve biological parenthood) was not involved. By way of contrast, these cases shed light on the importance of reliance—and courts' strong reservations regarding moving forward with fertilization processes without it.

The first example worth discussing is the *Sperm Bank* case,¹⁶⁰ decided by the Supreme Court of Israel. The case dealt with the petition of a woman who sought to proceed with an IVF procedure using the sperm of an anonymous donor, whose sperm she had already used to give birth to a daughter.¹⁶¹ In the time that had passed since her first pregnancy, the donor

157. See P. Kindregan Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L. Q. 203, 212–13 (2008). This approach reflects the view of some state laws. See, e.g., TEX. FAM. CODE ANN. § 160.706 (2009).

158. See Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 436 (2013) (supporting a pre-commitment contractual approach subject to legislation that will clarify the rules regarding the contract).

159. See, e.g., The Human Reproductive Technology Act 1991 (Austl.), which served the basis for the litigation in *G. v. G.* (2007) FCWA 80. Section 24(1) of this law states that “no human egg undergoing fertilization or human embryo shall be stored for a period in excess of 10 years except with the approval of the Council under subsection (1a).” Section 26(2) states that “where rights in relation to a human egg undergoing fertilization or a human embryo are vested in a couple and the couple disagree about its use or continued storage, the CEO shall, on application by a member of that couple, direct the licensee storing the egg or embryo to ensure that the storage is maintained subject to . . . (c) any order made by a court of competent jurisdiction which otherwise requires.” In this case, the Family Court of Western Australia examined the status of a couple's fertilized eggs following the breakdown of their relationship. After separating, one party wanted to discard the fertilized eggs, but the other sought to have them transferred into his custody, most likely for donation to an infertile couple. In the circumstances of the case, the court held that the parties' intent at the time of the procedure did not include donation (in addition to its unfavorable impression from the party seeking to donate the eggs).

160. See *Sperm Bank* case, *supra* note 1.

161. *Id.* at para. 1.

had approached the sperm bank and asked that it no longer use his sperm, as he had had a change of heart regarding having biological children in the world with whom he had no connection.¹⁶² From a formal perspective, the parties to the litigation were the woman and the sperm bank, but in fact, the sperm bank was protecting the wishes of the donor. In essence, then, this was another example of a horizontal clash.

The Court prioritized the donor's rights not to be a parent over the woman's request to become a parent using his sperm. In so doing, the court balanced the parties' clashing rights in a way that gave more weight to the party seeking the negative right to avoid parenthood than it did in the *Nahmani* affair—but for good reasons. First, there was no issue of reliance, in the full sense of the word. The petitioner had not secured the sperm prior to her first pregnancy, and thus could not rationally expect a right to it later.¹⁶³ Second, and more importantly, the donor's refusal did not lead to a wholesale denial of the petitioner's chance to achieve biological parenthood. The issue was rather whether the petitioner had the right to become a mother to a child with specific genetic traits.¹⁶⁴ The Court deemed her desire insufficiently important to overcome the right of the other party to avoid parenthood.¹⁶⁵

A second useful example is the *Potential Grandparents* case,¹⁶⁶ another relatively recent judgment by the Supreme Court of Israel. It concerned the bereaved parents of a young man who wished to use their deceased son's

162. *Id.* at para. 20 (Rubinstein, J.).

163. *Id.* at para. 9 (Rubinstein, J.).

164. A new bill aimed at regulating the operation of sperm banks in Israel at large seems to adopt the view of the Court, by stating that sperm donors will be allowed to abolish their consent to donate if they decide to do so before the sperm has been used for fertilization. *See* Sperm Banks Bill, § 24 (2017) (Isr.).

165. In this case, the Court also dismissed a simple property model, which was endorsed in Canada. *See* J.C.M. v. A.N.A., 2012 BCSC 584, ¶ 55 (Can.) (holding that sperm straws should be considered property). JCM and ANA, two women, were married in 1998. *Id.* ¶ 3. ANA gave birth to a child in 2000 and JCM gave birth to a child in 2002, both through therapeutic insemination with sperm from a single donor. *Id.* After the procedures, thirteen sperm straws were left over. *Id.* ¶ 6. In 2007, the couple entered a separation agreement. *Id.* ¶ 4. In 2011, JCM, wanting more children with a new partner, asked ANA if she could use the remaining sperm straws, but ANA preferred the sperm straws be destroyed. *Id.* ¶ 13. The court, after analyzing multiple cases and secondary sources from Canada, America, and Britain, concluded that the sperm straws in this case should be treated as property. *Id.* ¶ 55. To so conclude, the court relied mainly on the Canadian case of C.C. v. A.W., *supra* note 14, and the UK case *Jonathan Yearworth & Ors v. North Bristol NHS Trust*, (2009) EWCA Civ 37 (involving six men who gave samples of their sperm before undergoing chemotherapy, whose sperm was then negligently destroyed). *Id.* ¶ 55. While the Court stated that sperm straws should be considered property, it did note that that frozen embryos, with their greater “potential for human life,” were more likely to be in an “interim category” between person and property. *Id.* ¶ 66. Ultimately, it held that the thirteen sperm straws would be divided and half would be given to each party. *Id.* ¶ 55.

166. RFA 7141/15 Anonymous v. Anonymous (2016) (Isr.) (*Potential Grandparents* case).

sperm to have a grandchild,¹⁶⁷ in a manner that would allow for the realization of his unfulfilled parenthood. This type of case is considered particularly heartbreaking in the Israeli context, when such requests are sometimes (though not necessarily) submitted by parents who have lost their children during military service. Such requests are sometimes debated only in the vertical sphere, between private parties and the state, but occasionally they also surface in the horizontal one—particularly when the bereaved parents' aspirations do not conform to those of the decedent's partner. In theory, it is also possible to imagine the same case from the opposite perspective—a surviving partner who wishes to continue with the fertilization process against the wishes of the decedent's bereaved parents (although in terms of actual life experience, this would not be a typical case).¹⁶⁸

In fact, the vertical controversy is not easy either, as it presents new questions regarding the wish of the decedent himself, as well as the implications for a child who is born with the knowledge that he or she was “planned” after the death of a genetic parent. Several years ago, Israel's Attorney General promulgated instructions guiding hospitals to permit harvesting sperm from deceased men at the request of their partners, under the assumption that they would be best situated to express the will of the deceased.

In the *Potential Grandparents* case, however, the surviving partner did not want to become pregnant and also resisted the use of her deceased spouse's sperm by his parents. The Supreme Court decided (in a majority of four, against the dissenting view of Justice Melcer), that the bereaved parents should not be permitted to move forward, as doing so would go beyond the knowable will of their son.¹⁶⁹ The characteristics of this case are somewhat different from the cases above, but it reflects the proposition, once again, that judicial decisions supporting the right to parenthood are often limited to circumstances in which there is irreversible reliance on an IVF process that has already commenced.

167. *Id.* at para. 1 (Hayut, J.).

168. *In re Estate of Kievernagel*, 166 Cal. App. 4th 1024, 1026–27 (Cal Ct. App. 2008) presents an opposite case of this type. In this case a husband had given his sperm but had signed an agreement stating that he wanted it destroyed in the event of his death. After he passed away, his parents sought to have his apparent intent respected by destroying his frozen sperm, but his widow, who was also the administrator of his estate, wanted to use the sperm to have children. The court held that the intent of the deceased should be honored. In this case, the decision was easier in at least two ways—firstly, the sperm had already been given prior to the death of the husband; secondly, and more importantly, the late husband had clearly expressed his will on this matter.

169. *Potential Grandparents* case, *supra* note 166, at para. 34 (Hayut, J.).

CONCLUSION

Cases involving reproductive technologies will most certainly continue to appear in courts. Judges deciding these cases will need to continue addressing legal questions that are entangled with moral- and value-laden considerations. Over time, courts' accumulated experiences from cases such as those discussed above have, at least partially, opened the door for more nuanced analyses, beyond a simplistic contractual approach. This essay has presented the models that courts have used, with varying degrees of success, to resolve controversies between former partners regarding IVF procedures. At the same time, it has revealed that employing purely formal legal categories does not by itself resolve the value-laden dilemmas in this area of law, and that, in fact, courts are generally influenced by more substantive considerations, such as a party's reliance and its impact on reaching a just solution. Further, because developments in the law have often resulted from disputes that legislation did not anticipate, legislatures have been in fact far less influential in the development of law in this area. Accordingly, courts decide cases of this sort also by reference to their particular circumstances, as well as, sometimes, their broader cultural context.