What To Expect Before You’re Expecting: Clarifying Florida’s Statute Governing Pre-Embryo Disposition Agreements And Divorce

Alison P. Barbiero*
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Abstract

In 2013, Sofia Vergara, actress and star of the hit television show Modern Family, and her then fiance’ Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization (IVF) - a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term.

KEYWORDS: expecting, divorce, pre-embryo
WHAT TO EXPECT BEFORE YOU’RE EXPECTING: CLARIFYING FLORIDA’S STATUTE GOVERNING PRE-EMBRYO DISPOSITION AGREEMENTS AND DIVORCE

ALISON P. BARBIERO*

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In 2013, Sofia Vergara, actress and star of the hit television show Modern Family, and her then fiancé Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization ("IVF")—a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term. Prior to undergoing this treatment, the couple signed a form directive stating that "no unilateral action [could] be taken with regard to the embryos unless both parties consent." The couple created four female pre-embryos in total, two of which were unsuccessfully brought to term.

In May of 2014, prior to implanting the remaining two frozen pre-embryos, Ms. Vergara and Mr. Loeb separated. Three months later, Mr. Loeb filed an action to declare the form directive signed prior to undergoing treatment void and unenforceable, stating that it did not comply with California law by specifying what would happen to the pre-embryos in the event of a separation. In a New York Times op-ed, Mr. Loeb expressed his desire to have the frozen pre-embryos implanted in a surrogate and carried to term against Ms. Vergara’s wishes. Mr. Loeb wrote, “[d]oes one person’s

2. See In Vitro Fertilization, STEEDMAN’S MEDICAL DICTIONARY (27th ed. 2000); Meagan R. Marold, Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce, 25 HASTINGS WOMEN’S L.J. 179, 180 (2014). In 2005, the Court of Appeals of Arizona suggested that using the word embryo to describe cryopreserved fertilized egg outside of the uterus might incorrectly imply that the egg is a person. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1258 (Ariz. Ct. App. 2005). The court opted to use the word pre-embryo when referring to these un-transferred, fertilized eggs to avoid the highly charged debate about when life begins. Id. The Florida Statutes also use the word pre-embryo defining it as “the product of fertilization of an egg by a sperm until the appearance of the embryonic axis.” Fla. STAT. § 742.13(12) (2015). For the purposes of this Commentary, the terms embryo and pre-embryo are interchangeable, they both refer to the early stages of development of a fertilized egg. See id.

4. See Loeb, supra note 1.
5. Finn, supra note 3.
6. See Loeb, supra note 1.
7. Id.
8. Id.
9. Finn, supra note 3.
10. See id. The status of this litigation is presumed to be ongoing with the last known activity in April of 2015 when the California Superior Court allowed Nick Loeb to file an amended complaint under the pseudonym, John Doe. See id.
12. Ayala et al., supra note 11; see also Loeb, supra note 1.
13. See Ayala et al., supra note 11; Loeb, supra note 1.
14. Ayala et al., supra note 11; see also Loeb, supra note 1.
15. See infra Part VI.
16. Ayala et al., supra note 11; see also infra Part III–IV.
17. See Fla. STAT. § 742.17 (2015); infra Section V.A.
18. See id.
19. See id.
In 2013, Sofia Vergara, actress and star of the hit television show *Modern Family*, and her then fiancé Nick Loeb, a Florida businessman, sought to conceive a child through in vitro fertilization ("IVF")—a process by which an egg and sperm are fertilized outside of the body, and the resulting pre-embryo is implanted in the uterus with the objective of development to full-term. Prior to undergoing this treatment, the couple signed a form directive stating that "no unilateral action [could] be taken with regard to the embryos unless both parties consent." The couple created four female pre-embryos in total, two of which were unsuccessfully brought to term.

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Meanwhile, Ms. Vergara’s attorney released a statement on her behalf, indicating that she “is content to leave the embryos frozen indefinitely, as she has no desire to have children with her ex.” Mr. Loeb has amended his complaint against Ms. Vergara and continues to pursue custody and control over the pre-embryos.

In another case, Dr. Mimi Lee, a Julliard-trained pianist and doctor, and her husband of five years, Stephen Findley, a financial analyst, are battling over their own frozen pre-embryos in San Francisco Superior Court. Like Ms. Vergara and Mr. Loeb, the couple, both graduates of Harvard University, signed a consent form prior to undergoing IVF; however, in this case, the consent form directed that their embryos be destroyed in the event of divorce. Now that they are no longer together, Ms. Lee, like Mr. Loeb, seeks control of the pre-embryos so she can have them implanted and brought to term. However, another major difference in this case is that unlike Mr. Loeb, Ms. Lee claims she is infertile, due to both her age and a previous battle with cancer, meaning that these embryos are her very last chance to become a biological parent.

The predicament that these two couples face highlights some important legal issues with IVF: Are pre-embryo disposition contracts binding and enforceable, and, if so, should they be mandatory for all couples prior to undergoing IVF treatment? Further, if binding, enforceable contracts are formed, should a circumstance such as Ms. Lee’s infertility matter? While current Florida law does address the issue of pre-embryo disposition agreements, the governing statute is vague and leaves many questions unanswered, and there is no Florida case law dealing with this issue to provide guidance for interpreting the statute.

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Part II begins by providing a brief history and background of IVF. Part III discusses several prominent cases addressing the issue of pre-embryo disposition contracts and enforceability. Part IV continues with a discussion of how the previous case law would be applied to the two cases mentioned in this introduction. Part V compares Florida’s current pre-embryo disposition agreement statute with Florida’s gestational surrogate statute as well as pre-embryo disposition agreement statutes in other jurisdictions. Part VI proposes several recommended changes that would help clarify Florida’s current statute, and Part VII discusses the future solution of freezing genetic material separately.

II. HISTORY AND LEGAL BACKGROUND OF IVF

Assisted Reproductive Technologies (“ART”) are a range of techniques used to overcome infertility. One of the most common forms of ART is IVF. In 1978, the world’s first ART birth occurred by IVF. Since then, the number of couples in the United States undergoing IVF has increased rapidly, with 174,962 cycles reported by 380 clinics in 2015, resulting in the birth of 63,286 babies. This was an increase from the previous year, which reported 165,172 cycles of IVF, resulting in the birth of 61,740 babies.

The IVF procedure typically begins with hormonal injections, which stimulate a woman’s ovaries to produce multiple eggs. The eggs are removed from the woman’s body by either laparoscopy or ultrasound-directed needle aspiration and combined with sperm in a Petri dish. Once fertilized, the pre-embryo “divides until it reaches the four-cell stage, after which several [pre-embryos] are transferred to the woman’s uterus by a cervical catheter.” If successful, an embryo will implant in the uterus and develop into a fetus. Alternatively, the pre-embryos may be preserved for later use in liquid nitrogen through a process called cryopreservation. The exact numbers are not known, but sources estimate that there are approximately half a million cryopreserved pre-embryos (“frozen pre-embryos”) currently in storage in the United States.

Additionally, single embryo transfer, in which only one embryo is transferred into the uterus at a time, is becoming an increasingly popular choice by couples undergoing IVF. It follows that increased use of single embryo transfer will likely result in more pre-embryos from a single course of IVF being frozen as back-ups rather than immediately transferred. While the creation of these excess frozen pre-embryos “reduces both medical and physical costs” of IVF and increases the chances of a successful implementation, it also creates a future disposition problem for couples undergoing this procedure.

The Ethics Committee for the American Society for Reproductive Medicine strongly recommends that all assisted reproduction programs require each individual or couple contemplating embryo storage to give written instructions concerning disposition of embryos in the case of death, divorce, separation, failure to pay storage charges, inability to agree on disposition in the future, or prolonged lack of contact with the program. In the absence of program-specific policies, it is ethically acceptable for a program or facility to consider embryos to have been abandoned if at least [five] years

18. See infra Part II.
19. See infra Part III.
20. See infra Part IV.
21. See infra Part V.
22. See infra Part VI.
23. See infra Part VII.
25. Marold, supra note 2, at 180.
28. See id.
30. Id.
31. Id. More and more women are opting to have only one pre-embryo transferred at a time. See Press Release, Am. Soc'y for Reprod. Med., supra note 27.
32. Kass, 696 N.E.2d at 175.
33. Id. Cryopreservation is the “[m]aintenance at very low temperatures of the viability of tissues or organs that have been excised from the body.” Cryopreservation, STEDMAN’S MEDICAL DICTIONARY (27th ed. 2000). In 1984, the first baby produced from a frozen pre-embryo was born. First Baby Born of Frozen Embryo, N.Y. TIMES, Apr. 11, 1984, at A16.
35. Press Release, Am. Soc'y for Reprod. Med., supra note 27. “Most strikingly, we observed more women, no matter their age, chose to have a single embryo transferred. The increasing popularity of this choice was greatest in the youngest age group, women under thirty-five, with 22.5% of those patients having elective single embryo transfer in 2013, up from 14.8% in 2012.” Id.
37. Kass, 696 N.E.2d at 175.
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25. Marold, supra note 2, at 180.
28. See id.
30. Id.
have passed since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instruction from the couple exists concerning disposition. 38

Despite this guidance, the standards and practices of providing pre-embryo disposition forms differ from clinic to clinic.39 Without statutes governing pre-embryo disposition, and sometimes even with statutory guidance, conflicts have surfaced regarding how these forms should be interpreted—specifically when the commissioning couples divorce or separate.40

III. CASES: CONFLICTING APPROACHES

There is limited case law involving conflict over frozen pre-embryo disposition when a commissioning couple separates or divorces.41 Fewer than a dozen states have heard cases involving pre-embryo disposition after divorce. Most courts have considered whether prior agreements are enforceable in deciding the issue of pre-embryo disposition when a couple divorces or separates,42 with many enforcing their terms against the subsequent wishes of one of the parties.43 In the event that a commissioning couple did not enter into a prior agreement, or the prior agreement is found to be unenforceable, the courts have then looked to balancing the interests of the parties by considering factors, such as the parties’ constitutional rights both to procreate and not procreate, as well as whether other methods of having a biological child are available.45 A few states have adopted a contemporaneous mutual consent approach, which would not treat advance agreements as binding if either party’s current intention conflicts with their prior consent.46

A. New York: Upholding a Clinic Consent Form as a Binding Agreement

The Court of Appeals of New York examined a prior embryo disposition agreement in 1998 when faced with an issue of embryo disposition upon divorce.47 In Kass v. Kass,48 the appellant, Maureen Kass, sought sole custody of “five frozen, stored pre-embryos . . . created five years’ prior wishing to implant them against the objections of her ex-husband, Steven Kass.49 The couple signed four consent forms prior to undergoing their final procedure, which was the first to involve cryopreservation of remaining embryos.50 The forms provided that “in the event of divorce . . . legal ownership of any stored [pre-embryos] must be determined in a property settlement.”51 However, the forms also included a provision which offered the couple several choices from which they could indicate a preference “[in the event that . . . they were] unable to make a decision regarding the disposition of [their] stored, frozen [pre-embryos].”52 The couple indicated that their choice was to donate the pre-embryos to the IVF program for research.53 The Court of Appeals of New York held that the parties’ prior agreement was binding and enforceable, reasoning that since the couple was unable to settle the matter in their divorce agreement, the second provision would apply wherein they elected to donate the embryos for research.54 The court explained that:

https://nsuworks.nova.edu/nlr/vol40/iss2/2
have passed since contact with an individual or couple, diligent efforts have been made to contact the individual or couple, and no written instruction from the couple exists concerning disposition.\(^{38}\)

Despite this guidance, the standards and practices of providing pre-embryo disposition forms differ from clinic to clinic.\(^{39}\) Without statutes governing pre-embryo disposition, and sometimes even with statutory guidance, conflicts have surfaced regarding how these forms should be interpreted—specifically when the commissioning couple divorces or separates.\(^{40}\)

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\(^{40}\) See supra note 34, at 382.


\(^{42}\) See Szafrański, 34 N.E.3d at 1156, 1158; In re Marriage of Witten, 672 N.W.2d 768, 773–74 (Iowa 2003); A.Z., 725 N.E.2d at 1052–53; J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass, 696 N.E.2d at 180; Roman, 193 S.W.3d at 50; In re Marriage of Litowitz, 48 P.3d at 266, 268; In re Marriage of Nash, 2009 WL 1514842, at *5.

\(^{43}\) See Szafrański, 34 N.E.3d at 1156; Kass, 696 N.E.2d at 175; In re Marriage of Dahl, 194 P.3d at 841; Roman, 193 S.W.3d at 54; In re Marriage of Nash, 2009 WL 1514842, at *4.

\(^{44}\) See supra note 34, at 385–86; see also infra Section III.C.

\(^{45}\) See Szafrański, 34 N.E.3d at 1161–62; J.B., 783 A.2d at 716–17; Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

\(^{46}\) Forman, supra note 34, at 385–86; see also infra Part III.C.

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\(^{48}\) Id. at 175.

\(^{49}\) Id. at 176.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id. at 176, 181.

\(^{53}\) Kass, 696 N.E.2d at 177.

\(^{54}\) Id. at 175, 182.
Knowing that advanced agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event that the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.55

The court also looked to the consent forms themselves, which were freely and knowingly made by the parties and jointly specified their choice in disposition.56 “Words of shared understanding—‘we,’ ‘us,’ and ‘our’—permeate[d] the pages,” indicating that the husband and wife jointly contemplated the dispositional contingencies.57 As it found the agreement to be enforceable, the court did not perform any balancing analysis in this case.58 Kass has been used as persuasive authority for many other state courts where the enforceability of clinic disposition agreements was questioned.59 The contractual approach used in Kass is the most effective approach for addressing pre-embryo disposition disputes, as it resolves uncertainty and encourages parties to carefully consider the consequences of making pre-embryos prior to undergoing IVF.60

55. Id. at 180.
56. Id. at 180-81.
57. Id. at 181. “Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.” Kass, 696 N.E.2d at 180; see also Roman v. Roman, 193 S.W.3d 40, 45, 50 (Tex. App. 2006). “[A]llowing the parties voluntarily to decide the disposition of frozen embryos in advance of cryopreservation, subject to mutual change of mind, jointly expressed, best serves the existing public policy of [Texas] and the interests of the parties.” Roman, 193 S.W.3d at 50.
58. See Kass, 696 N.E.2d at 179–182.
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58. See Kass, 696 N.E.2d at 179-82.

B. Illinois: Upholding a Prior Oral Agreement Overriding a Clinic Consent Form

In Szafrański v. Dunston,61 the Appellate Court of Illinois had an opportunity to rule on a case about pre-embryo disposition.62 In Szafrański, an Illinois appellate court held that a couple's signed clinic consent form, stating that "[i]n no use [would] be made of [their frozen] embryos without the consent of both partners—if applicable"63 did not control in light of the couple's prior oral agreement.64 The respondent, Karla Dunston, sought exclusive custody over three frozen pre-embryos that she created with her ex-boyfriend, Jacob Szafrański, prior to undergoing the cancer treatment that would leave her infertile.65

The court reasoned that the couple had an oral contract under which Jacob agreed to give Karla the right to use the frozen pre-embryos without his consent.66 Evidence of this oral contract included Jacob's acceptance of Karla's offer to donate his sperm to create pre-embryos with her, including the fact that when the couple agreed to create the pre-embryos, Jacob did not mention any conditions or limitations on their future use.67 The court also noted Jacob's agreement to use his sperm to inseminate all of Karla's eggs, rather than half as the couple initially planned, after they learned that fewer eggs were harvested from Karla than expected.68 The appellate court affirmed the trial court's rejection of Jacob's argument that the oral contract should not be construed as giving Karla an unqualified right to use the pre-embryos because "the issue never entered his mind at the time he agreed to donate his sperm."69

In Szafrański, the court distinguished this case from other jurisdictions where the consent forms were found to be binding.70 The consent form in Szafrański was ambiguous as to disposition when an unmarried couple separates.71 The form provided for what would happen to the pre-embryos in three identified events: "(1) divorce or dissolution of the marriage or partnership; (2) death or legal incapacitation of one partner; and

62. Id. at 1136.
63. Id. at 1138.
64. Id. at 1157.
65. See id. at 1136.
66. Szafrański, 34 N.E.3d at 1151.
67. Id. at 1148-51.
68. See id. at 1150.
69. Id. at 1150-51.
70. See id. at 1157-61.
71. Szafrański, 34 N.E.3d at 1161.
(3) death or legal incapacitation of both partners.\textsuperscript{72} However, the form did not state what would happen to the couple's pre-embryos in the event of their separation.\textsuperscript{73}

The court also differentiated the consent form language from consent forms that were found by other courts to be legally binding.\textsuperscript{74} In the forms analyzed in those cases, words of shared understanding were used throughout, and more importantly, the couple was provided with disposition choices from which they could choose.\textsuperscript{75} Unlike these cases, the disputed provision of the contract contained no elective language or dispositional options from which the couple could choose.\textsuperscript{76} The Illinois court reasoned that "[i]f the provision was intended to be an expression of the parties' dispositional intent, it would contain language more reflective of a choice...\textsuperscript{77} Significantly, however, the court noted that under different circumstances, medical informed consent form could 'represent an 'advance agreement' that reflects a couple's intended disposition of the pre-embryos.'\textsuperscript{78}

The Illinois court's finding in Szafanski of an oral agreement based on Jacob's decision to make embryos with Karla has caused some concern that without sufficient evidence to the contrary, all pre-embryos are intended for use by the very fact that the parties agreed to make them in the first place.\textsuperscript{79} This makes it even more important to have clear, unambiguous pre-embryo disposition agreements prior to undergoing IVF.\textsuperscript{80}

C. Massachusetts and New Jersey: Prior Agreements and Public Policy Concerns

In A.Z. v. B.Z.,\textsuperscript{81} the Supreme Judicial Court of Massachusetts also looked to a clinic consent form when deciding an issue of pre-embryo disposition.\textsuperscript{82} Similar to the previous cases discussed, the couple in A.Z. underwent IVF treatment, resulting in excess pre-embryos, which were frozen and stored.\textsuperscript{83} After one successful implantation, the parties divorced, and the husband sought an injunction to prohibit the wife from using their remaining frozen pre-embryos.\textsuperscript{84} The consent form signed by the parties listed disposition options from which the couple could choose and a blank line on which they could indicate their preference.\textsuperscript{85} For each round of IVF, the couple indicated that the disposition preference was to have the pre-embryos returned to the wife to be transferred to her uterus and carried to term.\textsuperscript{86} However, the court held that the disposition agreement here was unenforceable because the husband had signed the forms while they were still blank, with the wife filling in the disposition information at a later time.\textsuperscript{87} Thus, the court could not conclude that the form was representative of the parties' joint intentions.\textsuperscript{88}

Interestingly, however, the court went on to state that as a matter of public policy, "even had the husband and the wife entered into an unambiguous agreement...[it] would not enforce an agreement that would compel one donor to become a parent against his or her will."\textsuperscript{89} Thus, the court in Massachusetts indicated its preference for a contemporaneous mutual consent approach in situations where a couple's disposition choice would force one party to become a parent against his or her will.\textsuperscript{90} The Supreme Court of New Jersey came to a similar conclusion in J.B. v. M.B.\textsuperscript{91}

In J.B., a woman sought to have her frozen pre-embryos discarded after filing for divorce from her ex-husband.\textsuperscript{92} Her ex-husband objected to the destruction of the frozen pre-embryos for religious reasons and wished to have them either used by J.B. or donated to another couple.\textsuperscript{93} "The consent form...did not manifest a clear intent...regarding disposition of the pre-embryos in the event of a [divorce]," instead directing that the matter be decided by a court.\textsuperscript{94} Thus, since no prior agreement controlled disposition of the pre-embryos, the court declined to "force J.B. to become a biological parent against her will."\textsuperscript{95} However, in dicta, the court also addressed the public policy issue of whether it would ever uphold such an agreement.
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allowing one party to use the pre-embryos against the objections of the other, stating that "the laws of New Jersey . . . evince a policy against enforcing private contracts to enter into or terminate familial relationships." The court, after citing A.Z., adopted a rule in which it would "enforce agreements entered into at the time [IVF] has 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," provided that they affirmatively notify the clinic of their change of intention in writing. Critics of the approach taken in A.Z. and J.B. argue that requiring contemporaneous mutual consent undermines the notion of a binding contract, creating instead an illusory promise. Thus, decisions such as these render any formal memorialization of the parties' intent pointless and ineffective.

D. No Prior Agreement: The Balance of Interests Approach

The first case regarding embryo disposition, when a couple divorces or separates, occurred in a 1992 case before the Supreme Court of Tennessee. In Davis v. Davis, Mary Sue Davis and her husband, Junior Lewis Davis, were unable to conceive naturally, due to prior surgeries in which Mary Sue's fallopian tubes were rendered non-functional. The parties elected to undergo IVF after a failed attempt at adoption, and they elected to have their remaining pre-embryos frozen to prevent Mary Sue from having to undergo additional rounds of hormonal stimulation. The parties had not formed any agreement concerning the disposition of their frozen pre-embryos in the event of a divorce prior to undergoing IVF, and both parties testified that there was no discussion or even contemplation concerning the implications of freezing and storing embryos. When Junior filed for divorce, the only issue that the parties could not agree upon was what to do with the pre-embryos they had created. Mary Sue initially wanted control of the frozen pre-embryos so that she could have them transferred into her uterus and carried to term. However, at the time the case was decided, she no longer wanted them for herself but wanted to donate them to another couple. Junior objected and wanted to have the pre-embryos thawed and discarded.

The court in Davis first clarified that pre-embryos are not persons and do not have any legal rights, as established by the Supreme Court of the United States in Roe v. Wade. However, it noted that their value as property lies only in their potential to become children, "[i]n thus, the essential dispute . . . is not where or how long to store the pre-embryos, but whether the parties will become parents." The court balanced the interests of both parties, considering first the burden that unwanted gestation of the pre-embryos would have on Junior psychologically and financially. Junior's interests were balanced against Mary Sue's desire to permit the pre-embryos to be carried to term. Ultimately, the court decided that Junior's interest in avoiding parenthood was more significant. The court also noted that even if Mary Sue wished to use the pre-embryos herself, rather than donate them to another couple, Junior's interest in not becoming a parent would still outweigh her interest in becoming a parent. The court considered that Mary Sue had other reasonable means of becoming a parent, such as future rounds of IVF or even adoption.

96. J.B., 783 A.2d at 717.
97. Id. at 719; see also A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000). The Supreme Court of Iowa adopted J.B.'s contemporaneous mutual consent rule in In re Marriage of Witten, stating: We think judicial decisions and statutes in Iowa respect the right of individuals to make family and reproductive decisions based on their current views and values. . . . For this reason, we think judicial enforcement of an agreement between a couple regarding their future family and reproductive choices would be against the public policy of this state. 672 N.W.2d 768, 782 (Iowa 2003). Note that the approach in A.Z. is more of a pseudo contemporaneous mutual consent approach, in which only prior agreements to implant and bring the pre-embryos to term in the event of a future contingency would not be enforced; unlike the New Jersey and Iowa courts, the Massachusetts court has not indicated that a prior agreement to dispose of a pre-embryo in the event of a divorce would violate public policy.
98. Fazila Isa, Note, To Dispose or Not to Dispose: Questioning the Fate of Preembryos After a Divorce in J.B. v. M.B., 39 Hous. L. Rev. 1549, 1567 (2003); see also A.Z., 725 N.E.2d at 1057–58; J.B., 783 A.2d at 719.
100. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).
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102. Id. at 591.
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102. Id. at 591.
alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered.\textsuperscript{113} 

Significantly, however, the Supreme Court of Tennessee noted that the balancing test should only be used when a prior agreement concerning disposition of pre-embryos has not been formed.\textsuperscript{114}

[A]s a starting point,... an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies—such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program—should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.\textsuperscript{115}

In J.B., the Supreme Court of New Jersey balanced the interest of the parties after finding that a clinic consent form did not clearly manifest their intentions with regard to pre-embryo disposition.\textsuperscript{116} It agreed with the Supreme Court of Tennessee’s holding in Davis and found that the wife’s right not to procreate outweighed the husband’s desire to become a parent because the husband was already a father and retained the ability to father additional children.\textsuperscript{117} The court in Szafranski, after deciding the case based on the existence of a prior agreement,\textsuperscript{118} alternatively looked at the balance of interests approach as well, noting that Karla’s inability to produce eggs for IVF due to ovarian failure meant that her interest in using the frozen pre-embryos would outweigh Jacob’s interest in not becoming a parent.\textsuperscript{119} Interestingly, the court did not consider adoption or use of a donated embryo as reasonable means of becoming a parent sufficient to tip the balance of interest in Jacob’s favor.\textsuperscript{120} At the time that the case was decided, Karla had, in fact, already become a parent through the use of a donated embryo.\textsuperscript{121}

IV. APPLYING THE CASE LAW GOING FORWARD

Inconsistencies between the approaches used by courts in different states as well as an overall lack of case law makes predicting the outcome of scenarios, such as the ones mentioned in the introduction to this article challenging.\textsuperscript{122} In the case of Nick Loeb and Sofia Vergara, Loeb argues that the consent form signed by the couple, which stated that “any embryos created through the process could be brought to term only with both parties’ consent” is not enforceable and should be void because it does not address the issue of pre-embryo disposition in the event of the couple’s separation, as California law requires.\textsuperscript{123} This is somewhat similar to the issue with the consent form in Szafranski, which also did not address a disposition option for when an unmarried couple separates.\textsuperscript{124} However, the problem for Loeb is that even if a court were to agree that their prior agreement is not enforceable, this decision would most likely result in the court applying a balancing of interests test.\textsuperscript{125} Under the balancing of interests test, as it has been applied by courts in other jurisdictions, Vergara’s interest in not becoming a parent would most likely prevail over Loeb’s desire to procreate, especially as Loeb has other avenues available if he wishes to have a biological child.\textsuperscript{126}

However, in the case of Mimi Lee and Stephen Findley, there is a stronger case for a balancing of interests that might result in Lee being awarded custody of the pre-embryos, due mostly to her claim of infertility.\textsuperscript{127} But unlike Vergara and Loeb’s situation, Lee and Findley’s prior agreement did clearly specify what would happen to the pre-embryos in the event of the

\textsuperscript{113} See id. at 1163.

\textsuperscript{114} Tamar Lewin, Chicago Court Gives Woman Frozen Embryos Despite Ex-Boyfriend’s Objections, N.Y. TIMES, June 13, 2015, at A9. The Szafranski court, in finding an oral agreement in the making of the pre-embryos, implicitly indicated that the balancing of interests test may now be moot. Szafranski, 34 N.E.3d at 1164; see also Strom, supra note 79.

\textsuperscript{115} See supra Part III.

\textsuperscript{116} See supra note 1.

\textsuperscript{117} Loeb, supra note 1.

\textsuperscript{118} Szafranski, 34 N.E.3d at 1155–56.

\textsuperscript{119} See supra Section III.D.

\textsuperscript{120} Szafranski, 34 N.E.3d at 1137; J.B. v. M.B., 783 A.2d 707, 716–17 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). In his op-ed, Loeb writes, “[m]any have asked me: Why not just move on and have a family of your own? I have every intention of doing so.” Loeb, supra note 1.

\textsuperscript{121} See supra Section III.D.
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couple's divorce—they would be thawed and discarded. The disposition agreement in Lee and Findley's case is more similar to the disposition agreement in Kass, indicating specific disposition options from which the couple could choose in the event of certain contingencies, divorce included. Thus, if the court finds the prior agreement to be enforceable and chooses to use a purely contractual approach, Findley and Lee's pre-embryos would be destroyed regardless of Lee's infertility. However, without proper guidance from legislatures, the courts are left with many conflicting and confusing options for how to decide these cases.

V. FLORIDA'S PRE-EMBRYO DISPOSITION STATUTE AND THE CURRENT REGULATORY SCHEME

There is very little regulation from the federal government regarding ART. Further, only a few states have enacted statutes attempting to tackle the difficult question of pre-embryo dispostion. Florida's current statute seems to support the contractual approach by requiring some form of prior written agreement regarding pre-embryo disposition. Having such legislation encourages parties to seriously contemplate their current and future intentions and execute agreements prior to undergoing IVF, which will best serve their own interests, the interest of clinics, and public policy.

A. Florida's Pre-Embryo Disposition Statute

Florida was one of the first states to enact legislation concerning pre-embryo disposition agreements. Section 742.17 of the Florida Statutes provides that a couple commissioning IVF treatment and their treating physician "shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance." The language of this statute suggests the use of disposition agreements but does not specify whether such agreements are binding and enforceable against a party who changes his or her mind about disposition preferences.

The statute does not list recommended options from which the couple could choose, nor does it address consequences to either the commissioning couple or the physician who proceeds with IVF without entering into such an agreement. Furthermore, the statute provides a default rule in which "[a]bsent a written agreement, decision-making authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple." The language of this statute provides little assistance to divorcing couples who disagree on the disposition of their frozen pre-embryos. Thus, while the statute itself suggests that a Florida court might enforce a prior disposition agreement, it gives no guidance as to

131. Ayala et al., supra note 11. Lee's position is that she did not believe that she was bound to these indications. Id.


133. See Kass, 696 N.E.2d at 180; Ayala et al., supra note 11; Dolan, supra note 11. The San Francisco County Superior Court filed a tentative decision and proposed statement of decision on November 18, 2015, four months after this Comment was submitted for publication. See In re Marriage of Stephen E. Findley v. Lee, No. FDI-13-780539, 2015 WL 7295217 (S.F. Cty. Super. Ct. Nov. 18, 2015). The court used the contract approach, and found that the Consent & Agreement signed by the parties was a binding contract and a valid written agreement expressing the couple's intent to thaw and discard the pre-embryos in the event of a divorce. Id. at *20. In the eighty-three-page decision, the court reasoned that the prior agreement was "replete with indicators of a mutual agreement to the disposition of the [e]mbryos. In addition to [twenty-seven] uses of some variation of 'agreement,' words of shared understanding, such as 'we,' 'us,' and 'our' appear at least 160 times." Id. at *23. The court also explained its decision to use the contract approach: "[b]inding agreements bring a certain solemnity to the IVF process, and require parties undergoing IVF to be responsible for the life altering decision of starting a family." Id. at *22.

Interestingly, after deciding that there was a valid, enforceable agreement to thaw and discard the embryos, the court considered the outcome of a balancing test, which would have been applied had the agreement been found to be unenforceable. Id. at *33. Putting the burden on Lee to prove by clear and convincing evidence all essential facts of the claim, the court noted Lee's failure to preserve her own fertility by harvesting additional eggs "after it was clear her marriage was either in serious trouble or had ended." In re Marriage of Stephen E. Findley, 2015 WL 7295217, at *34. The court also found that Lee had not proven that she was infertile per se, as medical testimony concluded that she had a "low but non-zero probability of conceiving a child," although at best the chance of live birth was between zero and five percent. Id. at *34. Ultimately, these facts coupled with "Findley's right not to be compelled to be a parent with Lee outweigh[ed] Lee's right to have a biologically related child." Id. at *39.

134. See supra Part III.

135. Marold, supra note 2, at 182; Paller, supra note 38, at 1585.
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131. Ayala et. al, supra note 11. Lee’s position is that she did not believe that she was bound to these indications. Id. at 33. See Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Ayala et al, supra note 11; Dolan, supra note 11. See Kass, 696 N.E.2d at 180; Ayala et al., supra note 11; Dolan, supra note 11. The San Francisco County Superior Court filed a tentative decision and proposed statement of decision on November 18, 2015, four months after this Comment was submitted for publication. See In re Marriage of Stephen E. Findley v. Lee, No. FDI-13-780539, 2015 WL 7295217 (S.F. Ct. Super. Ct. Nov. 18, 2015). The court used the contract approach, at found that the Consent & Agreement signed by the parties was a binding contract and a valid written agreement expressing the couple’s intent to thaw and discard the pre-embryos in the event of a divorce. Id at *20. In the eighty-three-page decision, the court reasoned that the prior agreement was “replete with indicators of a mutual agreement to the disposition of the [e]embryos. In addition to [twenty-seven] uses of some variation of ‘agreement,’ words of shared understanding, such as ‘we,’ ‘us,’ and ‘our’ appear at least 160 times.” Id at *23. The court also explained its decision to use the contract approach: “[b]inding agreements bring certain solemnity to the IVF process, and require parties undergoing IVF to be responsible for the life altering decision of starting a family.” Id at *22.

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135. Marold, supra note 2, at 182; Paller, supra note 38, at 1585.

136. Marold, supra note 2, at 182.

137. See FLA. STAT. § 742.17 (2015).

138. Pflanz, supra note 42, at 164; see also Kass, 696 N.E.2d at 180.

139. See Kass, 696 N.E.2d at 178.

140. FLA. STAT. § 742.17.

141. See id. The Florida Legislature has required binding and enforceable contracts in other domestic relations statutes, such as their surrogacy agreement statute. Id. § 742.15(1).

142. Marold, supra note 2, at 183.

143. FLA. STAT. § 742.17(2).

144. Marold, supra note 2, at 183.
necessary provisions in the document or the process by which it should be executed.  

B. California’s Pre-Embryo Disposition Statute

Section 125315 of the California Health and Safety Code mandates that “[a] physician . . . or other health care provider delivering fertility treatment shall provide his or her patient with . . . information to allow the individual to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the fertility treatment.” The statute states that “[w]hen providing fertility treatment, a . . . health care provider shall provide a form . . . that sets forth advanced written directives regarding the disposition of embryos. This form shall indicate the time limit on storage of the embryos at the clinic or storage facility and shall provide, at a minimum,” choices for disposition in the event of death of one partner, death of both partners, divorce or separation, and abandonment of the pre-embryos. The statute requires that the form offer several delineated options for each contingency, from which the couple can choose. Specifically in the case of divorce or separation, it states that the form must include the following disposition choices: “(A) [m]ade available to the female partner; (B) [m]ade available to the male partner; (C) [d]onation for research purposes; (D) [t]hawed with no further action taken; (E) [d]onation to another couple or individual; (F) [o]ther disposition that is clearly stated.”

Additionally, the statute addresses the issue of a physician’s failure to provide these forms to a couple, stating that this behavior constitutes unprofessional conduct. California’s is the only statute that has any consequence to the physician for not providing these forms; thus, it “seems to provide the most incentive for IVF . . . doctors” to ensure that a couple is informed about their disposition options. However, ultimately, the couple’s decision to fill out and sign these forms is voluntary.

146. CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
147. Id. § 125313(b)(1)-(4).
148. Id.
149. Id. § 125315(b)(3) (emphasis added).
150. Id. § 125315(a).
151. Marold, supra note 2, at 195.
152. Id.

C. Other Statutory Schemes

Massachusetts also has a statute that briefly addresses disposition of pre-embryos. The statute mandates that a provider of IVF therapy shall provide “information sufficient to allow [the couple] to make an informed and voluntary choice regarding the disposition of any pre-implantation embryos . . . remaining following treatment.” It also states that “[t]he physician shall present the patient with the options of storing, donating to another person, donating for research purposes or otherwise disposing of or destroying any unused pre-implantation embryos, as appropriate,” but it does not address any specific contingencies, such as separation or divorce. The Massachusetts statute includes donating to another person as a disposition option, which is interesting given the state’s unwillingness to enforce agreements to compel parenthood in previous case law. It does not require that the disposition information be recorded in any written document or signed by the parties. New Jersey and Connecticut have similar statutes requiring only that physicians inform IVF patients about storage and donation options.

D. The Model Act Governing Assisted Reproductive Technology

In 2008, the American Bar Association’s House of Delegates approved the Model Act Governing Assisted Reproductive Technology (“Model Act”). The Model Act was intended to provide guidance to legislators as they draft statutes governing ART. Section 501 of the Model Act states that intended parents must enter into “binding agreements executed prior to embryo creation” that would indicate:

154. Id.
155. Id.
156. Id.
158. See MASS. GEN. LAWS ch. 111L, § 4(a)(1)-(3). The statute does require an informational pamphlet and an informed consent form, indicating that the patient has reviewed and understands the pamphlet, be provided to the patient. Id. But the statute only requires the pamphlet to include information about the procedure and associated medical risks, not about disposition in the event of certain specified contingencies. Id.
159. Forman, supra note 145, at 91.
161. Id. at 206.
162. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1) (AM. BAR ASS’N 2008).
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Additionally, the statute addresses the issue of a physician's failure to provide these forms to a couple, stating that this behavior constitutes unprofessional conduct. California's is the only statute that has any consequence to the physician for not providing these forms; thus, it "seems to provide the most incentive for IVF . . . doctors" to ensure that a couple is informed about their disposition options. However, ultimately, the couple's decision to fill out and sign these forms is voluntary.

154. Id.
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159. Forman, supra note 145, at 91.
161. Id. at 206.
162. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1) (AM. BAR ASS’N 2008).
(a) [the] [i]ntended use and disposition of embryos; (b) [t]he use and disposition of preserved embryos in the event of divorce, incapacity, ... death of one or both intended parents, or other change of circumstances such as separation or estrangement; and (c) [t]he time at which ... preserved embryos will be deemed abandoned and the policy ... as to the disposition thereof.  

Section 203 of the Model Act also indicates the following disposition options that must be disclosed to the intended parents: storage, transfer, donation—either for transfer or for research—and destruction.  

The Model Act also states that the required agreement as to disposition of pre-embryos is subject to withdrawal of consent by either intended parent and will not be enforced if the previously agreed disposition option was to create a child. Thus, the Model Act seems to adopt a stance similar to Massachusetts, in which prior agreements to procreate run contrary to public policy and will not be enforced.

The Model Act also provides a default rule of five years for determining when stored pre-embryos can be deemed abandoned, if no agreement is otherwise made. A pre-embryo may be deemed abandoned when the storage facility has made a diligent effort to notify the interested participants and when the interested parties have formally acknowledged that they are aware of the provisions of the default rule. If it complies with the rules, a storage facility will not be liable for disposition of the pre-embryos, “absent criminal intent, gross negligence, or intentional misconduct.”

VI. CLARIFYING FLORIDA’S STATUTE

Florida is one of the few states that have already established a foundation of legislation governing pre-embryo disposition. However, Florida’s existing statute still contains ambiguity and gaps that should be clarified to prevent future disposition problems. The following sections discuss different ways that the Florida Legislature could improve section 742.17 to be more clear and thorough by looking to California’s pre-embryo disposition statute, the Model Act, as well as Florida’s surrogacy statute—section 742.15.  

A. Binding and Enforceable Agreement

In order to preserve the enforceability of prior written agreements, the Florida Legislature must have clear statutory guidelines in the context of pre-embryo disposition. First, the Florida Legislature must decide whether agreements to procreate are against public policy. If so, section 742.17 of the Florida Statute should include a provision allowing withdrawal of consent similar to the Model Act. However, if the Florida Legislature decides that agreements to procreate are valid and enforceable, such a provision need not be included. Rather, in this case, section 742.17 of the Florida Statute should clearly indicate that these agreements will be binding and enforceable.

As it stands, section 742.17 states only that a commissioning couple “shall enter into a written agreement” with their physician regarding pre-embryo disposition. However, the statute goes on to provide for three default provisions for instances where written agreement exists. This indicates that such an agreement is not required prior to creating embryos.

The language of the disposition statute would provide more clarity and certainty if it mirrored the language of section 742.15 of the Florida Statute, regarding gestational surrogacy. Section 742.15 states that “prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made.” Using the words binding and enforceable agreements: “It makes no sense to ask the parties to dictate whether an intended parent can use the embryos, but then to declare any such use impermissible without contemporaneous consent. Which provision controls?”

163. Id. § 501(3)(e).  
164. Id. § 501(16a)–(g).  
165. Id. § 203(16a)–(g).  
166. Id. § 501(3)(c)–(d). The Model Act goes on to state that should such a transfer occur, the individual seeking to avoid gestation would not be the parent of a resulting child. Id. § 501(3)(e).  
167. See supra Section III.C.  
168. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)(h).  
169. Id. § 504(1)(h)–(g).  
170. Id. § 504(3).  
171. See supra note 145, at 89, 94.  
172. See CAL. HEALTH & SAFETY CODE § 125315 (West 2015); FLA. STAT. §§ 742.15, 742.17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 203, 301, 302, 501, 504, 702; infra Sections V.A.-V.D.  
173. See infra supra note 98, at 1582.  
174. See supra Section III.C.  
175. See supra Section V.D.  
176. See supra note 145, at 96. Forman is critical of including such a provision, as it creates confusion and undercuts the notion that the forms are binding and enforceable agreements: “It makes no sense to ask the parties to dictate whether an intended parent can use the embryos, but then to declare any such use impermissible without contemporaneous consent. Which provision controls?” Id.  
177. See FLA. STAT. §§ 742.15(1), 742.17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501(1).  
178. FLA. STAT. § 742.17.  
179. Id. § 742.17(1)–(3).  
180. See id.  
181. See id. §§ 742.15(1), 742.17.  
182. Id. § 742.15(1).
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163. See CAL. HEALTH & SAFETY CODE § 125315 (West 2015); FLA. STAT. §§ 742.15, 17; MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 203, 301, 302, 501, 504, 702; infra Sections VI.A–D.

164. See supra Section III.C.

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166. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)(a).

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168. See FLA. STAT. § 742.17(5)(1), (17); MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 301(1).
enforceable contract clearly spells out that the agreement will be enforced in a court of law, and the statute further requires that the contract be made prior to taking any action, which encourages couples to take this decision seriously.\footnote{183}

B. **Clearly Drafted Consent Forms: Mandatory Provisions**

The varied nature of clinic consent forms is an issue that permeates most of the pre-embryo disposition cases.\footnote{184} Clinic consent forms are frequently drafted with confusing and conflicting language, and often fail to clearly and accurately reflect the parties’ true intentions about their disposition preferences.\footnote{185} Mandatory form contracts would provide structure and uniformity among clinics.\footnote{186} Furthermore, clearly drafted consent forms would allow a couple undergoing IVF to be better prepared and avoid having their “private affairs . . . forced into court and construed by strangers who can only guess at the circumstances surrounding their intent.”\footnote{187} It is the responsibility of the Florida Legislature to re-draft its statute to require IVF providers to design clear and thorough consent forms.\footnote{188}

Thus, the Florida statute should require minimum mandatory provisions and language that must be included in consent forms.\footnote{189} First, it is important that the consent forms contain the word agreement or contract, especially when referring to disposition information, which would signal to the parties that they are signing a binding document.\footnote{190} Second, the mandatory provisions should include words of shared understanding to indicate joint contemplation by the parties.\footnote{191} Thus, these provisions must include language such as we, us, and our.\footnote{192} Third, these mandatory minimum provisions should include specific disposition options, which would provide guidance to the couple, similar to those outlined in section 125315 of the California Health and Safety Code and section 203 of the Model Act.\footnote{193} Specifically, in the case of divorce or separation, there should be a list of options from which the commissioning couple must indicate their preference: 1) made available to a designated commissioning partner for use; 2) donated for research purposes; 3) thawed and discarded; 4) donated to another couple or individual; 5) other disposition that is clearly stated.\footnote{194}

Additionally, the Florida statute should include a default provision to address the issue of abandoned pre-embryos.\footnote{195} Here, it would be helpful if the Florida Legislature looked to section 504 of the Model Act, which deems a stored pre-embryo as abandoned after five years, in the absence of a length of time designated by the couple and when the couple has been formally notified and made aware of the default standard.\footnote{196} Adopting the Model Act’s pre-embryo abandonment provision would help to alleviate the growing problem of abandoned pre-embryos in storage facilities and unpaid maintenance costs, both of which pose a significant burden to storage providers and clinics.\footnote{197}

C. **Incentivizing Physicians and Patients**

Physicians, who are mainly concerned with obtaining informed consent and avoiding liability, generally lack incentive to ensure that embryo disposition agreements clearly reflect the parties’ intentions.\footnote{198} Further, Florida’s current legislation puts no real burden on the provider to ensure that the rules are being followed.\footnote{199} California’s statute provides an example of a statutory provision that would incentivize IVF providers to proceed as instructed.\footnote{200} Section 125315(a) states that a physician who fails to provide a patient with the minimum required disposition information may be charged

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\item \footnote{183} FLA. STAT. § 742.15(1); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).
\item \footnote{184} "Knowing that advanced agreements will be enforced underscores the seriousness and integrity of the consent process." Kass, 696 N.E.2d at 180; see also Forman, supra note 145, at 84.
\item \footnote{186} See supra note 184.
\item \footnote{188} Forman, supra note 145, at 80–81.
\item \footnote{189} See id.; Paller, supra note 38, at 1595.
\item \footnote{190} See Forman, supra note 145, at 83.
\item \footnote{191} See Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998); supra Section III.A.
\item \footnote{192} See Kass, 696 N.E.2d at 181.
\item \footnote{193} See CAL. HEALTH & SAFETY CODE § 125315(b)(1)-(4) (West 2015); MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 203(1)(a)-(d) (AM. BAR ASS'N 2008).
\item \footnote{194} See CAL. HEALTH & SAFETY CODE § 125315(b)(3).
\item \footnote{195} See, e.g., Kindregan, Jr. & Snyder, supra note 160, at 218.
\item \footnote{196} MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 504(1)-(3); see also supra Section V.D.
\item \footnote{197} E.g., Kindregan, Jr. & Snyder, supra note 160, at 218.
\item \footnote{198} Forman, supra note 145, at 85.
\item \footnote{199} See FLA. STAT. § 742.17 (2015); Issa, supra note 98, at 1584.
\item \footnote{200} See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015); Marold, supra note 2, at 195.
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188. See id.; Paller, supra note 38, at 1595.
189. Katherine Poste Gunning, Note, Poaching the Eggs: Courts and the
190. See id.
191. See id.; Paller, supra note 38, at 1595.
192. See Kass, 696 N.E.2d at 181.
193. See CAL. HEALTH & SAFETY CODE § 125315(b)(1)–(4) (West 2015).
194. See CAL. HEALTH & SAFETY CODE § 125315(b)(3).
195. See, e.g., Kindregan, Jr. & Snyder, supra note 160, at 218.
196. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 203(1)(c)–(d) (AM. BAR ASS’N 2008).
197. E.g., Kindregan, Jr. & Snyder, supra note 160, at 218.
198. Forman, supra note 145, at 85.
199. See F.L.A. STAT. § 742.17 (2015); Issa, supra note 98, at 1584.
200. See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015); Marold, supra note 2, at 195.
health consultation prior to a procedure that involves the creation of any pre-embryos, which would hopefully encourage the parties to discuss the complex emotional issues that accompany the creation and disposition of pre-embryos before undergoing the procedure and better prepare them for the IVF process.

Further, the Florida Legislature should consider a provision that requires independent legal counseling to assist the commissioning couple in their disposition decision. The law governing pre-embryo disposition agreements is unsettled. Thus, the guidance of legal counsel helps to guarantee that the parties are making an informed decision and are aware of the importance of the documents they are signing. Further, independent counsel is often better situated than the IVF provider to assist the parties in understanding the complex information needed to make disposition choices. In adopting such a provision, the Florida Legislature should look to sections 702 and 703 of the Model Act, which require legal representation by all parties when making a gestational surrogacy agreement, and apply it to parties seeking to undergo IVF treatment.

VII. FREEZING EGGS AND SPERM SEPARATELY: A FUTURE SOLUTION

A future solution to the pre-embryo disposition problem is separate cryopreservation of eggs and sperm. This alternative technique to cryopreservation of pre-embryos would allow divorcing couples to merely take control of their own genetic tissues, which they could then do with as they please. While technology has enabled physicians to freeze sperm since the 1940s, there has been less success with egg freezing. Historically, there has been lower overall success with fertilization and

201. See Issa, supra note 98, at 1583. “This evaluation is not intended to be an evaluation of the intended parent’s suitability to parent.” MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 302(1)(d). “The results of this consultation shall not be used to arbitrarily deny any intended parent the right to procreate.” Id. § 301(1).

211. See FRA, supra note 98, at 1587.

212. See Issa, supra note 98, at 1587.


214. See Issa, supra note 98, at 1587.

215. See id.

216. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 702(1)(c), 703(2)(c).


218. See FLA. STAT. § 742.17(1) (2015). “[A]ny remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm.” Id.

with unprofessional conduct. Adopting a similar provision would help to ensure that physicians have greater motivation to administer IVF treatment to patients in compliance with the statute.

Commissioning couples also need greater incentive to complete disposition agreements and take them seriously. Statutory default provisions, which would govern in the event that a couple fails to come to a disposition agreement prior to undergoing IVF treatment, would better encourage couples to take care to manifest their preferences with regard to pre-embryo disposition. Florida's statute currently includes a default provision that the commissioning couple will retain joint decision-making authority absent a written agreement, but this provision neither incentivizes nor assists couples in such a scenario. The default rule needs to clearly indicate a disposition option that will control absent a written agreement; such as a default rule in which pre-embryos would be destroyed unless the couple indicates otherwise. This default rule would incentivize the couple to make any alternate preference clear and explicit, and it also would provide the courts with statutory guidance for confusing situations where the parties' intent is not clearly manifested.

D. Other Considerations: Mental Health Evaluation and Presence of an Attorney

Some other procedural guidelines that should be considered by the Florida Legislature are the requirements of a mental health evaluation and presence of an attorney. Section 301 of the Model Act requires all ART participants to undergo mental health counseling. Section 302 provides additional counseling requirements for participants of procedures involving donor embryos or gestational carriers, stating that “[i]f no ART procedure that involves the transfer of donor gametes or embryos . . . shall be initiated or performed until . . . [t]he intended parents have undergone a mental health evaluation to determine their suitability to participate in collaborative reproduction. This provision could easily be amended to require a mental health consultation prior to a procedure that involves the creation of any pre-embryos, which would hopefully encourage the parties to discuss the complex emotional issues that accompany the creation and disposition of pre-embryos before undergoing the procedure and better prepare them for the IVF process.

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201. CAL. HEALTH & SAFETY CODE § 125315(a).
202. See id. § 125315(a); Marold, supra note 2, at 195.
203. See Forman, supra note 145, at 84; Issa, supra note 98, at 1586.
204. See Issa, supra note 98, at 1586.
206. Issa, supra note 98, at 1586.
207. Id.
208. See id. at 1589.
209. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 301(1) (AM. BOL.
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210. Id. § 302(1)(d).
211. See Issa, supra note 98, at 1583. "This evaluation is not intended to be an evaluation of the intended parent's suitability to parent." MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 302(1)(d). "The results of this consultation shall not be used to arbitrarily deny any intended parent the right to procreate." Id. § 301(1).
212. See Issa, supra note 98, at 1587.
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215. See id.
216. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 702(1)(e).
218. See Fla. Stat. § 742.17(1) (2015). "[A]ny remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm." Id.
219. MATURE OOCYTE CRYOPRESERVATION: A GUIDELINE, supra note 217, at 37.

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pregnancy from frozen eggs, which are made up largely of water.\textsuperscript{220} It is only recently that researchers have begun to see success with egg freezing, and in 2012, the American Society for Reproductive Medicine ("ASRM") issued a report stating that due to the dramatic improvements over the past decade, this "technique should no longer be considered experimental."\textsuperscript{221} The report also stated that egg freezing is a "reasonable strategy for patients who are unable to cryopreserve embryos."\textsuperscript{222}

Despite the positive developments in egg freezing, the ASRM has also stated that it is too soon to use this technology in lieu of pre-embryo cryopreservation.\textsuperscript{223} Currently, the success rate of IVF using frozen eggs is about half of the success rate using frozen pre-embryos.\textsuperscript{224} Several studies have shown decreased success with egg freezing in older women, and researchers are unable to confirm that the risks of developmental abnormalities in children born from frozen eggs are similar to those born from frozen pre-embryos.\textsuperscript{225} However, down the line, improvements in reproductive technology may make freezing eggs a better alternative to freezing pre-embryos, at least from a legal standpoint.\textsuperscript{226}

VIII. CONCLUSION

IVF is a wonderful option for couples experiencing fertility issues.\textsuperscript{227} However, the question of what to do with frozen pre-embryos can cause problems for even the happiest couples.\textsuperscript{228} This is why it is imperative that couples seriously consider how they would like to proceed in the event of all possible contingencies, prior to creating pre-embryos.\textsuperscript{229} Further, some of this responsibility should be borne by both the IVF physician and clinic,

\begin{itemize}
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} Id. at 38, 41.
  \item \textsuperscript{222} Id. at 41.
  \item \textsuperscript{223} Id. at 42.
  \item \textsuperscript{224} Freezing Eggs or Embryos, BREASTCANCER.ORG, http://www.breastcancer.org/tips/fert_preg_adoption/options/fertility/freeze_embryos (last modified Jun. 26, 2014).
  \item \textsuperscript{225} See Mature Oocyte Cryopreservation: A Guideline, supra note 217, at 41–42.
  \item \textsuperscript{226} See id. at 41.
  \item \textsuperscript{227} See supra Part II. “[O]ver ten percent of American women suffer[] from some sort of fertility problem.” Marold, supra note 2, at 179 (footnote omitted). “An estimated thirty-three percent of couples are infertile by age forty.” Paller, supra note 38, at 157 (footnote omitted).
  \item \textsuperscript{228} See Forman, supra note 34, at 388. "Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time." Id. (footnote omitted).
  \item \textsuperscript{229} See supra Parts III, V, and VI.
  \item \textsuperscript{230} See CAL. HEALTH & SAFETY CODE § 125315(a) (West 2015).
  \item \textsuperscript{231} See Fla. STAT. § 742.17 (2015).
  \item \textsuperscript{232} See id.; supra Section V.A.
  \item \textsuperscript{233} See Fla. STAT. § 742.17; Gunnison, supra note 187, at 290; supra Part VI.
  \item [T]hese regulations should stop short of regulating the science of cryopreserved embryos. As the stem cell debate has illustrated, the involvement of government regulations has severely curtailed the use of stem cells in research. Extending these regulations to the use of embryos by couples could impact how many embryos are created and how many are implanted into a woman at any one given time. These broad reaching regulations would only hamper thousands of couples' efforts to create a child... Gunnison, supra note 187 at 290–91 (footnotes omitted).
  \item \textsuperscript{234} See Gunnison, supra note 187, at 290.
\end{itemize}
pregnancy from frozen eggs, which are made up largely of water. It is only recently that researchers have begun to see success with egg freezing and in 2012, the American Society for Reproductive Medicine ("ASRM") issued a report stating that due to the dramatic improvements over the past decade, this "technique should no longer be considered experimental." The report also stated that egg freezing is a "reasonable strategy for patients who are unable to cryopreserve embryos."

Despite the positive developments in egg freezing, the ASRM has also stated that it is too soon to use this technology in lieu of pre-embryos cryopreservation. Currently, the success rate of IVF using frozen eggs is about half of the success rate using frozen pre-embryos. Several studies have shown decreased success with egg freezing in older women, and researchers are unable to confirm that the risks of developmental abnormalities in children born from frozen eggs are similar to those born from frozen pre-embryos. However, down the line, improvements in reproductive technology may make freezing eggs a better alternative to freezing pre-embryos, at least from a legal standpoint.

VIII. CONCLUSION

IVF is a wonderful option for couples experiencing fertility issues. However, the question of what to do with frozen pre-embryos can cause problems for even the happiest couples. This is why it is imperative that couples seriously consider how they would like to proceed in the event of all possible contingencies, prior to creating pre-embryos. Further, some of this responsibility should be borne by both the IVF physician and clinic.

220. Id.
221. Id. at 38, 41.
222. Id. at 41.
223. Id. at 42.
226. See id. at 41.
227. See supra Part II. "[O]ver ten percent of American women suffer[]" from some sort of fertility problem." Marold, supra note 2, at 179 (footnote omitted). The estimated thirty-three percent of couples are infertile by age forty. Paller, supra note 38, at 157 (footnote omitted).
228. See Forman, supra note 34, at 388. "Social science research has revealed that even for couples in intact relationships, the decision about disposition is emotionally challenging and frequently unstable over time." Id. (footnote omitted).
229. See supra Parts III, V, and VI.