Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution Under Florida Law

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Abstract

Medical technology has now added a new dimension to human reproduction through in vitro fertilization aided by cryopreservation.

KEYWORDS: life, property, rights
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The unknown status of the cryopreserved embryo in a divorce dispute is an example of the "law, marching with medicine but in the rear and limping a little." "

I. INTRODUCTION

Medical technology has now added a new dimension to human


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reproduction through in vitro fertilization aided by cryopreservation.\(^2\) This technology, however, is the source of uncharted legal issues and requires the law to keep pace. Tennessee’s Davis v. Davis\(^3\) has emerged as the first case concerning the disposition of cryopreserved (frozen) embryos in a divorce dispute and it predicts the path that state courts will be forced to travel in the future. With some 20,000 frozen embryos currently in storage,\(^4\) it is inevitable that Florida courts will be called upon to settle disputes between divorcing spouses who, after completing the in vitro fertilization and cryopreservation processes, but prior to implantation, disagree on the fate of their stored embryos.

As the facts of Davis indicate, frozen embryos are destined to challenge Florida courts to resolve three new divorce disputes: 1) The "mother" fighting for implantation of the embryo in her own body and the "father" wanting implantation in his new spouse;\(^5\) 2) only one progenitor ("parent") wanting implantation;\(^6\) and 3) neither progenitor desiring implantation, but disagreeing on adoption by donees or termination.\(^7\)

Unfortunately, Florida courts will have to embrace these new divorce controversies without precedent. Thus, the Davis decisions,\(^8\) although not binding, will be utilized by Florida courts because they offer the only in depth legal analysis on the disposition of frozen embryos in a divorce dispute. Davis is limited in its guidance, however, because of its contradictory holdings: The trial court authorizing implantation after finding frozen embryos to be persons,\(^9\) the court of appeals permitting continued storage upon inferring that the embryos are property,\(^10\) and the Tennessee Supreme Court granting termination despite classifying the embryos as "potentials for human life."\(^11\)

With the lack of well defined direction in this new area, Florida courts will be forced to "march with medicine" before the gap between medical technology and the law becomes too vast. The law cannot remain static. To resolve the conflicts presented by the frozen embryo Florida courts must transcend established law. Just as science has given birth to new reproductive hope, a new legal realm will have to be born within Florida courts. Only then can courts secure the fate of frozen embryos suspended in divorce actions and consistently resolve progenitor disputes.\(^12\)

2. In vitro fertilization is a process whereby mature eggs are retrieved from a woman’s ovaries, fertilized in a petri dish in the laboratory with her partner’s sperm, and then transferred into the uterus. GEORGE SHUF, M.D. ET AL., FROM INFERTILITY TO IN VITRO FERTILIZATION 208-209 (1988). Cryopreservation is a process of freezing eggs, sperm, and embryos in liquid nitrogen and storing them for later use. Id. at 205; see also discussion infra part II.


5. Junior Davis, the "father" of the frozen embryos, remarried and his new wife is Tennessee Supreme Court decisions, Junior and his new wife indicated an interest in hiring a surrogate mother for the purpose of having at least one of the embryos implanted. Mark Curriden, Joint Custody of the Frozen Seven, A.B.A. J., Dec. 1990, at 36.

6. For the purposes of this note, "progenitors" will be used in place of "parents." The use of "parents," "mother," and "father" signify "genetrical parentage" and would indicate as contrary to this author’s proposition that the embryo is not a human being, but a "potential genote-providers" "genetic parent" to the frozen embryo. See, e.g., Davis, No. 34, 1992 WL 115574, at *14-15 (Tenn. June 1, 1992).


8. Davis, No. 34, 1992 WL 115574, at *1 (Tenn. June 1, 1992) (with Mary Sue fighting for the authority to donate the embryos to other infertile women and Junior preferring to have them discarded).

9. See Davis, No. 34, 1992 WL 115574 (Tenn. June 1, 1992); York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); (the only reported decisions concerning frozen embryos). York is not applicable because it did not involve the disposition of frozen embryos in a divorce case. In York, the United States District Court for the Eastern District of Virginia dealt with the York couple seeking to transfer their cryopreserved embryo to an in vitro fertilization clinic in California. Their physician, on behalf of the Virginia in vitro clinic, refused to allow the transfer. 717 F. Supp. at 422.


13. Davis, No. 34, 1992 WL 115574, at *17 (Tenn. June 1, 1992) (labelling the frozen embryos as "potentials for human life" but treating them as mere property by authorizing the "father" to have them destroyed against the "mother’s" wishes).

14. For a different attempt at achieving consistent resolution of progenitor disputes using established contract law see Mario J. Trepalacion, Note, Frozen Embryos: Towards an
reproduction through in vitro fertilization aided by cryopreservation. This technology, however, is the source of uncharted legal issues and requires the law to keep pace. Tennessee’s Davis v. Davis has emerged as the first case concerning the disposition of cryopreserved (frozen) embryos in a divorce dispute and it predicts the path that state courts will be forced to travel in the future. With some 20,000 frozen embryos currently in storage, it is inevitable that Florida courts will be called upon to settle disputes between divorcing spouses who, after completing the in vitro fertilization and cryopreservation processes, but prior to implantation, disagree on the fate of their stored embryos.

As the facts of Davis indicate, frozen embryos are destined to challenge Florida courts to resolve three new divorce disputes: 1) The "mother" wanting implantation in her own body and the "father" wanting implantation in his new spouse; 2) only one progenitor ("parent") wanting implantation; and 3) neither progenitor desiring implantation, but

2. In vitro fertilization is a process whereby mature eggs are retrieved from a woman’s ovaries, fertilized in a petri dish in the laboratory with her partner’s sperm, and then transferred into the uterus. GEOFFREY SHER, M.D. ET AL., FROM INFERTILITY TO IN VITRO FERTILIZATION 208–209 (1988). Cryopreservation is a process of freezing eggs, sperm, and embryos in liquid nitrogen and storing them for later use. Id. at 203; see also discussion infra part II.


5. Junior Davis, the "father" of the frozen embryos, remarried and his new wife is incapable of having children. In the interim of the Tennessee Supreme Court decisions, Junior and his new wife indicated an interest in having a child through Junior’s mother for the purpose of having at least one of the embryos implanted. Mark Curriden, Joint Custody of the Frozen Seven, A.B.A. J., Dec. 1990, at 36.

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This article will attempt to achieve consistent resolution, under Florida law, of three potential divorce disputes presented by the frozen embryo. In Part II, the in vitro fertilization and cryopreservation processes will be briefly described. Part III will begin by discussing the facts of Davis and then will explain how, at each level of the Tennessee judicial system, the analysis of the issue was flawed. Part IV will analyze the legal status of the cryopreserved embryo, concluding that the frozen embryo should not be categorized as a human being or as property under Florida law, but should instead be granted the status of a "potential for life." The rights underlying this new "potential for life" in a divorce dispute will be defined in Part V. In Part VI three potential divorce disputes will be resolved by applying the "potential for life" status accorded the frozen embryo and Florida law.

II. IN VITRO FERTILIZATION AND CRYOPRESERVATION

In vitro fertilization (IVF) provides an avenue for couples who, because of complications with the woman’s reproductive organs or a low sperm count in the man, can not conceive naturally.15 The IVF process duplicates the natural fertilization and development of an embryo within the woman’s fallopian tube.16 Fertility drugs initiate the IVF process by stimulating the production of multiple eggs from the ovaries.17 The eggs are then retrieved through laparoscopy, a surgical procedure using a needle tip for collection, or ultrasound, a nonsurgical process that withdraws the egg from the ovary.18 Once the eggs are retrieved, they are placed in petri dishes and allowed to mature.20 Upon maturation, previously collected sperm are introduced into the culture, fertilizing the eggs and forming zygotes.21 The zygotes develop by cell division until reaching a two to eight cell embryonic stage.22 The resulting embryos can then be placed in the woman’s uterus,23 with pregnancy resulting upon attachment to the uterine wall.24 If the retrieval and fertilization processes produce additional embryos, the surplus can be cryopreserved for subsequent implantation.25 Cryopreservation utilizes liquid nitrogen to freeze the embryos in the two to eight cell stage.26 When ready for implantation, the embryos are thawed and then transferred to the woman’s uterine cavity, where they will hopefully implant and result in pregnancy.27

III. FACTS AND DECISIONS OF DAVIS

Junior and Mary Sue Davis shared a nine-year marriage, during which they tried repeatedly to have children through natural conception. After suffering five tubal pregnancies and rupturing one of her fallopian tubes, Mary Sue was required to undergo surgery that rendered her infertile. Still wanting children, the couple decided to pursue alternative means to achieve a family.28

19. Id. at 84-5. Under the non-surgical ultrasound procedure, a long probe is placed into the woman’s vagina which transmits the ovary’s image onto the ultrasound monitor. A needle is then inserted through the vagina into the ovary, and the eggs and surrounding fluid are extracted through the needle’s canal. Id. at 86.
20. Id. at 91.
21. SHER ET AL supra note 2, at 92-3.
22. Id. at 93.
23. Id. at 102. To implant the embryos, a catheter is inserted into the vagina, through the cervix and into the uterine cavity. The embryos are injected into the uterus through the catheter’s canal. Id. Because multiple gestation presents risks to both the mother and the developing fetus, a maximum of three to four embryos are transferred to the woman’s uterus per attempt. Id. at 60-1. Such risks include high blood pressure and uterine bleeding for the mother and brain damage or dangerously low birth weight for the baby. SHER ET AL supra note 2, at 60-1.
24. Id. at 60. Placement of four embryos in the woman’s uterus has a twenty-five to thirty percent probability of resulting in a successful pregnancy. Id.
25. Id. at 186.
26. Id. at 203.
27. SHER ET AL supra note 2, at 188. The transfer of one to two thawed embryos into a woman’s uterus has a fifteen to twenty-five percent successful pregnancy rate. Id.
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In 1985 the couple participated in the East Tennessee Fertility Center's in vitro fertilization program. Mary Sue underwent six separate IVF procedures, but each implantation attempt failed to produce a pregnancy. Junior and Mary Sue then sought, unsuccessfully, to adopt a child.38

The Davises re-entered the Fertility Center's program in 1988, after learning of the new cryopreservation process that would offer Mary Sue several attempts at pregnancy through a single IVF procedure. On December 8, 1988, the procedure produced nine acceptable embryos for the couple to implant. Two of the embryos were implanted in Mary Sue on December 10, 1988, but pregnancy was not achieved. The remaining seven embryos were cryopreserved and committed to storage for future implantation.39

Prior to placing the embryos in cryogenic storage, Junior and Mary Sue were warned that practical storage life for these embryos could not exceed two years.40 The couple mentioned the possibility of donating the preserved embryo to another infertile couple if Mary Sue's first implant proved successful, but the Davises failed to make a final decision on this matter.41 Additionally, the couple neglected to determine, or even discuss, the fate of the preserved embryos in the event of any unforeseen circumstances.42

Upon learning that the first implant had failed, the couple tentatively planned to implant at least one of the frozen embryos into Mary Sue in March or April of 1989. This attempt was not made, however, because Junior Davis filed for divorce in early 1989.35 The seven frozen embryos became the subject of controversy between the Davises on February 23, 1989.43

36 Id. at *2, *21. The Fertility Center of East Tennessee at Knoxville was opened by Dr. Irving Ray King, a medical doctor licensed by the state of Tennessee. Dr. King was involved in the subspecialty of Gynecology, Infertility/Reproductive Endocrinology for approximately twelve years. Id. at *21.
37 Id. at *2.
38 Id. at *3.
39 Davises, No. E-14496, 1989 WL 140495, at *3 (Tenn. Cir. Ct. Sept. 21, 1989). Dr. King testified that "cryopreserved human embryos can be kept in good condition for at least two years," but he had "no further data on the length of cryopreservation." Id. at *22.
40 Id. at *3.
41 Davises, No. 34, 1992 WL 115574, at *2 (Tenn. June 1, 1992) (noting, "[w]hen the agreement specifying what disposition should be made from the cryopreservation process").
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A. The Trial Court Decision

With the fate of the Davises' seven cryogenically frozen embryos in the hands of the Tennessee Circuit Court, Judge W. Dale Young initiated the court's analysis by focusing on the intent of the Davises in participating in the IVF program.37 Upon concluding that their intent was to "produce a human being to be known as their child," the court sought to determine whether the Davises had accomplished this intent.38 The court reasoned that such a determination depended upon when human life begins, which first required the court to decide if the embryos were human beings.39

Judge Young ignored the substantial testimony of three expert witnesses40 who collectively insisted that the embryos were not human beings, due to their lack of organs and nervous systems, but were "at a stage in development where they simply possess the potential for life."41 Judge Young instead adopted the single position of Dr. Jerome Lejeune,42 who testified that "[e]ach human has a unique beginning which occurs at the moment of conception."43 Dr. Lejeune explained "that upon fertilization, the entire constitution of the man is clearly, unequivocally spelled-out, and"

36. Id. On February 23, 1989 Junior filed suit in the Circuit Court of Tennessee, Blount County, seeking an order preventing Mary Sue from transferring the remaining cryopreserved embryos. Id.
37. Id. at *25, *19.
38. Id. at *3.
40. Id.
41. Id. at *6-7. The three expert witnesses were Dr. Irving Ray King, Dr. Charles A. Shaver, and Professor John A. Robertson. Dr. King is a "Medical Doctor and is a well qualified specialist in the field of Infertility/Reproductive Endocrinology." Id. at *4. Dr. Shaver is a "well qualified Embryologist and is experienced in the laboratory work necessary for in vitro fertilization and cryogenic storage of human embryos." Id. Professor Robertson is an eminently [sic] qualified Professor of Law whose scholarly treatment, dealing primarily with non-coital reproduction, have served as the basis for consideration of many medical-legislative subjects." Davis, No. E-14496 1989 WL 140495, at *4 (Tenn. Cir. Ct. Sept. 21, 1989).
42. Id. at *8.
43. Id. at *4 (emphasis added).
44. Id. Dr. Jerome Lejeune is an "eminently [sic] qualified Medical Doctor, Doctor in Science, Professor of Fundamental Genetics and recognized throughout the world in his specialty, Human Genetics." Id.
including arms, legs, nervous systems, and the like" evidenced by DNA examination.46

Admitting that the court would have to blindly accept Dr. Lejeune's opinions without being able to observe what he claimed,47 Judge Young concluded that the embryos were human beings based on life beginning at conception. Based on this conclusion, Judge Young held that the Davises did in fact accomplish their intent "to produce a human being to be known as their child."48 Judge Young then invoked the common law doctrine of "paresns patriae"49 and held that it was "to the manifest best interest of the children, in vitro,"50 that Mary Sue "be permitted the opportunity to bring these children to term through implantation."51

The trial court significantly misinterpreted federal law when it held that frozen embryos are human beings and "children in vitro." The court neglected to consider how the law, rather than medicine, treats embryonic life. The trial court's holding is squarely contradicted by the prevailing legal view, expressed by the United States Supreme Court in Roe v. Wade,52 held that the word "person" as used in the United States Constitution has no prenatal application.53 Thus, the court's conclusion indicates a

46. Id. at *8.
47. Id. at *7. (noting, "[t]he testimony given by Dr. Lejeune relative to conclusive proof induced through DNA examination is highly technical, incapable of observation by the Court and requires the Court to either accept or reject the scientist's conclusion that it can be done.").
48. Id. at *9.
49. Id. at *10. "Paresns patriae", literally 'parent of the country', refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . . ." BLACK'S LAW DICTIONARY 712 (6th ed. 1990).
53. Id. at 157. "Section 1 of the Fourteenth Amendment contains three references to the word "person". . . . But in nearly all of these instances, the use of the word "person" is such that it is merely a word of art or a word of the law. None contains, with any assurance, that it has any possible prenatal application." Id. The Supreme Court has noted, "[t]he word "person" is such that possible prenatal application."
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B. The Appellate Court Decision

Once the Davis case reached the Tennessee Court of Appeals, Mary Sue changed her position; no longer desiring implantation of the embryos in her own body, Mary Sue wished to donate them to other infertile women.54 Faced with this new scenario, presiding Judge Franks determined that the fundamental issue was "who is entitled to control seven of Mary Sue's ova fertilized by Junior's sperm through the in vitro fertilization process."55

Judge Franks initiated his analysis by rejecting the trial court's reasoning, as well as the result.56 Judge Franks never speculated as to when human life begins, but steadfastly chastised the lower court's action by stating, "[t]he trial court . . . ignored the public policy implicit in the Tennessee statutes, the case holdings of the Tennessee Supreme Court and the teachings of the United States Supreme Court."57 Judge Franks proceeded to reject the trial court's conclusion that the frozen embryos are human beings, referring to the Tennessee Criminal Abortion Statute's indication that even after viability, embryos are not given legal status equivalent to that of a person already born.58

Judge Franks then began his exploration of who should have the right to control the frozen embryos.59 Judge Franks quickly determined that the control would not be vested solely in Mary Sue by stating, "it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant...

46. Id. at *8.
47. Id. at **7 (noting: "[t]he testimony given by Dr. Lejeune relative to conclusive proof induced through DNA examination is highly technical, incapable of observance by the Court and requires the Court to either accept or reject the scientist's conclusion that it can be done.").
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51. Davis, No. E-14496, 1989 WL 140495, at *11 (Tenn. Cir. Ct. Sept. 21, 1989) (reserving "all matters concerning support, visitation, final custody and related issues to the Court for further consideration and disposition at such time as one or more of the seven 52. 410 U.S. at 113 (1973)).
53. Id. at 157. "Section 1 of the Fourteenth Amendment contains three references to the word 'person'. 'But in nearly all these instances, the use of the word 'person' is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatatal application.' Id. The Supreme Court also noted, "[s]ubstantial problems for this view [recognizing the existence of life from conception] are posed, however, by . . . new medical techniques such as . . . implantation of embryos . . . ." Id. at 160.
54. 410 U.S. at 113 (holding the "[w]ord 'person' as used in the Fourteenth Amendment does not include the unborn").
55. Davis, No. 180, 1990 WL 130807, at *3 n.1 (Tenn. Cir. Ct. App. Sept. 13, 1990). "Mary Sue has . . . informed this Court that her intention should be the . . . Court uphold the lower court's judgment is not to implant the embryos . . . she wants authority to donate the embryos so that another childless couple may use them." Id.
56. Id. at *1.
57. Id. at *2-3.
58. Id. at *3.
to order Junior to bear the psychological, if not the legal, consequences of paternity against his will. 64 Judge Franks supported his conclusion by citing first to Skinner v. Oklahoma's ruling that a person has a constitutionally protected right to procreate, and then to Carey v. Population Services International, which stated that a person has an equally protected right to prevent procreation. 65

Judge Franks decided both "parents" should control the destiny of the embryos by relying upon the Uniform Anatomical Gift Act, which requires parental consent prior to experimentation and research on an aborted fetus. 66 Judge Franks concluded that the Davises should "share a joint interest in the seven fertilized ova" and demanded the case to the trial court to enter judgment "vesting Mary Sue and Junior with joint control . . . and . . . equal voice" in the embryos' disposition. 67

Although the decision of the Tennessee Court of Appeals did not actually state that it viewed the Davis' embryos as property, awarding joint interest to Junior and Mary Sue explicitly implies that the appellate court did in fact believe that the preserved embryos were property to be equally shared in the divorce suit. 68 The property implication is further confirmed by the court's correlation of the frozen embryos to aborted fetuses under the Uniform Anatomical Gift Act. 69 This property inference demonstrates the appellate court's disregard for the embryos' potential for developing into human life and denigrates them to the same status as dead tissue.

The essence of the court's misapplication of the law is found in the conclusion that Junior Davis' constitutionally protected right not to procreate

61. Id. at *3.
62. Id. at *2. (The United States Supreme Court . . . recognized the right to procreate is one of a citizen's "basic civil rights." (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).


65. Id.

66. See e.g., Davis, No. 34, 1992 WL 115574, at *7-8 (Tenn. June 1, 1992). "The intermediate court, without explicitly holding that the . . . embryos in this case were 'property', nevertheless awarded 'joint custody' . . . for the proposition that 'the parties share an interest in the seven fertilized ova.' The intermediate court did not otherwise define this interest." Id. at *7. "[T]he Court of Appeals has left the implication that it is in the nature of a property interest." Id. at *8.


68. As Dr. Ray King testified at the trial level, practical storage life for cryopreserved embryos does not exceed two years. Davis, No. E-14496, 1989 WL 140485, at *22 (Tenn. Cir. Ct. Sept. 21, 1989). It is interesting to note that each trial level commented that the frozen embryo's cryopreservation could not exceed two years, yet no mention was given to the fact that the Davis' embryos had been preserved from 1988 through 1992.

69. The court chose to overlook the fact that Junior had already exercised his constitutional right to procreate when he willingly chose to fertilize Mary Sue's ova. Choosing to conceive or not to conceive are mutually exclusive decisions; upon deciding to conceive, the right not to do so is automatically eliminated. Therefore, upon donating his sperm, Junior chose to procreate and eliminated his right not to procreate.

The court rendered the substance of its judgment inconsequential by granting Mary Sue and Junior Davis joint interest in the embryos. This judgment places the parties in the same predicament as before they turned to the courts for guidance, that is, unable to jointly agree on the fate of their seven embryos. The appellate court's holding, however, does not effectuate an "equal voice" for both progenitors as it claims. The decision, in effect, gives the progenitor opposing implantation determinative control. Rather than mutual decision-making power, the court gave Junior Davis power of veto over Mary Sue's so-called joint interest and the authority to sentence the embryos to a passive death. 69

C. The Tennessee Supreme Court Decision

By the time Mary Sue sought review of the intermediate court's decision both she and Junior had altered their positions. 70 Mary Sue, still desiring authority to donate the embryos to other infertile women, had remarried and moved to the state of Florida. 71 Junior, also remarried, no longer wanted the embryos to remain in storage, but instead preferred to have them discarded. 72

Finding that "the decision of the [c]ourt of [a]ppeals does not give adequate guidance to the trial court in the event the parties cannot agree" Justice Martha Craig Daughtrey granted review. 73 Justice Daughtrey initiated her analysis by accepting the appellate court's determination that the embryos could not be considered "persons" under Tennessee law. 74 Justice Daughtrey briefly echoed the intermediate court's reliance on the

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to order Junior to bear the psychological, if not the legal, consequences of paternity against his will. Judge Franks supported his conclusion by citing first to Skinner v. Oklahoma's ruling that a person has a constitutionally protected right to procreate, and then to Carey v. Population Services International, which stated that a person has an equally protected right to prevent procreation.

Judge Franks decided both "parents" should control the destiny of the embryos by relying upon the Uniform Anatomical Gift Act, which requires parental consent prior to experimentation and research on an aborted fetus. Judge Franks concluded that the Davises should "share a joint interest in the seven fertilized ova" and remanded the case to the trial court to enter judgment "vesting Mary Sue and Junior with joint control... and equal voice" in the embryos' disposition.

Although the decision of the Tennessee Court of Appeals did not actually state that it viewed the Davis' embryos as property, awarding joint interest to Junior and Mary Sue explicitly implies that the appellate court did in fact believe that the preserved embryos were property to be equally shared in the divorce suit. The property implication is further confirmed by the court's correlation of the frozen embryos to aborted fetuses under the Uniform Anatomical Gift Act. This property inference demonstrates the appellate court's disregard for the embryos' potential for developing into human life and denigrates them to the same status as dead tissue.

The essence of the court's misapplication of the law is found in the conclusion that Junior Davis' constitutionally protected right not to procreate precludes implantation. The court chose to overlook the fact that Junior had already exercised his constitutional right to procreate when he willingly chose to fertilize Mary Sue's ova. Choosing to conceive or not to conceive are mutually exclusive decisions; upon deciding to conceive, the right not to do so is automatically eliminated. Therefore, upon donating his sperm, Junior chose to procreate and eliminated his right not to procreate.

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61. Id. at *3.
62. Id. at *2. ("The United States Supreme Court... recognized the right to procreate is one of a citizen's "basic civil rights." (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)). "Conversely, the [c]ourt has clearly held that an individual has a right to prevent procreation." (citing Carey v. Population Serv. Inst., 431 U.S. 678 (1977)).
65. Id.
66. See, e.g., Davis, No. 34, 1992 WL 115574, at *7-8 (Tenn. June 1, 1992). "The intermediate court, without explicitly holding that the... embryos... in this case were 'property', nevertheless awarded 'joint custody'... for the proposition that 'the parties share an interest in the seven fertilized ova'. The intermediate court did not otherwise define this interest." Id. at *7. "[T]he Court of Appeals has left the implication that it is in the nature of a property interest." Id. at *8.
68. Id. at *2 (citing Carey, 431 U.S. at 678).
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71. Id.
72. Id.
73. Id.
74. Id. at *6.
Tennessee Criminal Abortion Statute, that even "viable fetuses in the womb are not entitled to the same protection as 'persons'."

Justice Daughtrey then labelled the intermediate court's property inference "troublesome," but avoided any additional commentary on the property issue by flatly concluding, "any interest that Mary Sue Davis and Junior Davis have in the . . . [embryos] in this case is not a true property interest." Justice Daughtrey, relying on the ethical standards set by The American Fertility Society, instead adopted the conclusion that the embryos "are not, strictly speaking, either 'persons' or 'property', but . . . potential[s] for human life."

After defining the new legal status to be accorded frozen embryos, Justice Daughtrey reverted to the appellate court's analysis of Junior's constitutionally protected right not to procreate. Justice Daughtrey emphasized the importance of weighing the relative interests of both parties in using or not using the embryos, but gave primary focus to Junior's right not to beget a child. Justice Daughtrey determined that Mary Sue's interest in donation was not as significant as Junior's interest in avoiding the financial and psychological consequences of unwanted parenthood.

Justice Daughtrey concluded that "if the party seeking control of the . . . [embryos] intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail." Justice Daughtrey further concluded that had Mary Sue desired implantation, Junior, wishing to avoid procreation, would still prevail, because Mary Sue had other means to achieve parenthood.

The inadequacy of these conclusions lies in the court's decision that Junior's right not to beget a child precludes implantation. The court failed to acknowledge that Junior had exercised his constitutional right of procreation when he participated in the IVF program. As Mary Sue's attorney articulated after the decision was rendered, once Junior "consented to giving the sperm and paying for the medical costs, . . . we have some

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76. Id. at *7.
77. Id. at *9.
78. Id. at *8.
79. Id. at *9 (emphasis added).
81. Id. at *15-16.
82. Id., at *16.
83. Id. at *17.
84. Id.
88. State v. McColl, 458 So. 2d 875, 877 (Fla. 2d Dist. Ct. App. 1984). "[T]he words 'human being' . . . mean] one who has been born alive." Id. (citing FLA. STAT. §§ 768.18-27 (1983)).
89. Id. (holding that a "viable fetus, subsequently stillborn, is not a 'person' under the new Wrongful Death Act."). In McColl, the court dismissed the counts of vehicular homicide and DWI manslaughter charged against a driver who was involved in an automobile accident which resulted in the death of full-term viable fetus. Id.
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The inadequacy of these conclusions lies in the court's decision that Junior's right not to beget a child precludes implantation. The court failed to acknowledge that Junior had exercised his constitutional right of procreation when he participated in the IVF program. As Mary Sue's attorney articulated after the decision was rendered, once Junior "consented to giving the sperm and paying for the medical costs . . . we have some kind of consensual basis . . . . It's a little late in the day for him to withdraw support . . . ." 85 Additionally, the court's decision gave the frozen embryos a hollow entitlement to legal respect. The court claimed to accord the frozen embryos the legal status of "potentials for human life" requiring "special respect." 86 This legal status, however, was merely an illusory label, evidenced by the court supporting the progenitor opposing implantation. The court, in essence, used the terminology "potential for life" but actually treated the embryos as disposable property by giving Junior Davis the right to have them destroyed.

IV. THE "PERSON" VS. "PROPERTY" DICHOTOMY
The contradictory holdings of the Tennessee Circuit, Appelleate, and Supreme Courts evidence that before Florida courts can consistently resolve divorcing progenitor disputes, the legal status of the frozen embryo must first be defined. The Florida courts must, therefore, escape the errors presented by the Davis decisions. By applying Florida's statutes and case law, Florida courts can surpass the "person" versus "property" argument of the Tennessee Circuit and Appellate courts and avoid the mere semantics of the Tennessee Supreme Court's "potential for life" status.

A. Frozen Embryos are not "Persons"
Although the Florida courts have not spoken on this issue, the policy of the State not to accord a frozen embryo the legal status of a person may be gleaned from Florida's treatment of fetuses in the womb. The Florida Wrongful Death Act, 87 for example, does not allow a wrongful death for a viable fetus unless it is first born alive. 88 Without live birth, Florida's Fourth District Court of Appeal has said, fetuses are not "persons" within the meaning of the statute. 89 In Simon v. United States, the United States

76. Id. at *7.
77. Id. at *9.
78. Id. at *8.
79. Id. at *9 (emphasis added).
81. Id. at *15-16.
82. Id., at *16.
83. Id. at *17.
84. Id.
87. FLA. STAT. §§ 768.16-17 (1997).
88. State v. McCall, 458 So. 2d 875, 877 (Fla. 2 Dist. Clt. App. 1984). "[T]he words 'human being' . . . mean[] one who has been born alive." Id. (citing FLA. STAT. §§ 768.16-17 (1983)).
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District Court for the Southern District of Florida further confirmed that the Florida Wrongful Death Act does not violate equal protection insofar as it fails to include a fetus within its definition of a person.96

Furthermore, judicial interpretation of Florida's battery statutes explicitly demonstrates that it would be contrary to Florida law to give frozen embryos, which are less developed than human fetuses, the legal status of persons. In Love v. State, Florida's Fourth District Court of Appeal held that the legislature's omission of "fetus" within the state's battery statutes "indicates an intention not to include the unborn within the protection of the battery statutes."97

Florida courts must also be mindful of the United States Supreme Court's exhaustive treatment regarding the rights of the unborn in the landmark decision of Roe v. Wade.98 In that case, the Court specifically rejected the argument that the "fetus is a person within the meaning of the Fourteenth Amendment."99 As the Supreme Court indicated, the unborn are not entitled to equal protection or due process guarantees.100

Thus, the established statutes and case law of the State of Florida, combined with the United States Supreme Court rulings, do not leave the Florida courts with the discretion to recognize frozen embryos as legal "persons." To accord the embryos the same status as human beings would require the Florida courts to depart from binding precedent, and in essence, turn their backs on the very foundation of the legal system. Thus, the Florida courts simply cannot stretch, in any cognizable way, the state's legal concept of an individual human being to include the frozen embryo.

B. Frozen Embryos are not "Property"

State statutes analyzed in conjunction with scientific technology and logical thought evince that the Florida courts would be assaulting the value of a potential human being by according the frozen embryo the status of "property." Under Florida's Sale of Anatomical Matter statute, for example, a person who sells any human tissue for consideration may be charged with a felony.101 Through this restriction on tissue sales, human tissue is protected from being accorded the degrading property right of economic value. By prohibiting such sales, the Florida legislature expressly fords the recognition of property rights in a frozen embryo that possesses developing human tissue.

The state's abortion statutes further enjoin the Florida courts from perceiving the frozen embryo as simple property. The Florida abortion statutes incorporate the Roe v. Wade trimester approach.102 This approach permits an abortion free from state interference during the first trimester, but makes termination of pregnancy during the third trimester illegal due to viability of the fetus.103 Under this statutory scheme, as embryos develop the state accords them more respect than mere human cells because of their increasing potential for life. Thus, the state accords potentials for life greater respect than that accorded to inanimate property. The Florida courts must, therefore, follow the state's statutory schemes and recognize the frozen embryo, possessing developing human tissue and a potential for human life, as more than property.

Beyond the legal analysis, it is the very nature of in vitro fertilization that forbids the Florida courts to label frozen embryos as property. One reason couples turn to IVF and cryopreservation is for the purpose of perpetuating their bloodline through producing a child of their own. Simple logic dictates that it is impossible to produce a child from mere property. Upon fertilization, the embryo acquires the capacity to become a newborn infant and in no way resembles property.

Furthermore, DNA molecule manipulation provides scientific evidence that the frozen embryo should be accorded a status higher than that of "property."104 The complicated process of manipulating and reading the DNA...
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²² 450 So. 2d 1191, 1193 (Fla. 4th Dist. Ct. App. 1984) (interpreting Fla. Stat. §§ 784.03, .045 (1981) (reversing the conviction and sentence of the defendant for the aggravated battery upon a fetus on the basis of shooting a woman who was seven and one-half months pregnant in which the bullet struck the unborn fetus).
²³ 410 U.S. 113 (1973).
²⁴ Id. at 157.
²⁵ Id. at 158. “The word ‘person’ . . . appears both in the Due Process Clause and in the Equal Protection Clause. But in . . . these instances, the use of the word is such that it has application only postnatally. None indicates . . . that it has any possible prenatal application.” Id. at 157.
²⁸ Fla. Stat. § 390.001 (1991) (incorporating the trimester approach outlined in Roe, 410 U.S. at 113). A woman and her doctor may decide on abortion within the first three months of pregnancy but after the third month, and before viability, abortion may occur at a properly regulated facility. After viability, abortion may be chosen to save the life of the mother. Thus, as the fetus develops from one trimester to the next, the state can increasingly regulate the termination due to the state’s interest in the developing human life. Id.
molecule indicates that upon the joining of the egg and sperm, cell differentiation occurs that affords the resulting embryo "a unique personal constitution of the individual being created." Thus, a frozen embryo is a potential for a specific human life. Although this scientific evidence is very technical in nature, Florida courts recognized the reliability of the DNA procedures in Andrews v. State. In this case, Florida's Fifth District Court of Appeal accepted as scientific fact that "the configuration of the DNA is different in every individual" and as such was admissible evidence in accurately identifying the perpetrator of a crime. Thus, the conclusion reached in Andrews requires the Florida courts to accept the DNA configuration as proof that the embryo has exceeded the status of "property" and has achieved the identity of an individual potential for human life.

The teachings of scientific technology, coupled with Florida's statutory strategies, mandate that Florida courts not consider frozen embryos property. The courts must acknowledge the frozen embryo's capacity to become a human being and avoid exposing the embryo to the de-humanizing categorization under property law. As then Congressman Albert Gore articulated, "there's a sharp distinction between something that is property and something that is not property... It is the responsibility of Florida courts to recognize that the frozen human embryo is something 'that is not property.'"

101. The DNA (deoxyribonucleic acid) molecule carries the body's genetic information and is a "long thread about one meter in length, cut into twenty-three pieces, each piece being coiled on itself very tightly to make a spiral..." Id. To read and manipulate the DNA molecule, the procedure of "restriction fragment length polymorphism" is used. Andrews v. State, 533 So. 2d 841, 847 (Fla. 5th Dist. Ct. App. 1988). Through this procedure, scientists are able to "cut the strands at predetermined locations and compare the DNA structures of individuals." The DNA molecule is treated with "an enzyme or reagent which recognizes differences in the sequences found in the DNA molecule." Id.

103. Id. at 847.
104. Id. at 850-51 (affirming the conviction of the defendant for aggravated battery, sexual battery, and armed burglary of a dwelling).
106. Henderson

C. Frozen Embryos are "Potentials for Life"

Elimination of the "person" versus "property" dichotomy will grant the Florida courts the freedom to legally recognize the frozen embryo for precisely what it is: A potential for human life, entitled to profound respect. Because embryos are living entities and have the capacity to become human beings, the Florida courts must provide the frozen embryo with the individualized recognition and protection that the "potential for life" status requires. Additionally, this "potential for life" status will provide the Florida courts with an avenue to "march in stride with medicine" and fill the legal void created by reproductive technology.

The Ethics Committee of The American Fertility Society already accords the frozen embryo the status as a "potential for life." The Ethics Committee reached this recognition by concluding, the embryo should not be treated as a person, because it has not yet developed the features of personhood... Yet, the... [embryo] is due greater respect than any other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Legal support of the "potential for life" position can be gleaned from the Supreme Court of Tennessee and United States Supreme Court. Rejecting the "person" versus "property" arguments, the Tennessee court concluded in Davis that frozen embryos "occupy an interim category that entitles them to special respect because of their potential for human life." Moreover, in Webster v. Reproductive Health Services, the United States Supreme Court held that the state has a "compelling interest in protecting potential human life" prior to fetus viability.

Florida courts, therefore, must look beyond the familiar concepts of "person" and "property" and account for the phenomenon of human development possessed by the frozen embryo. Florida courts must acknowledge that after fertilization the embryo is a living entity, a unique biological life, that compels legal respect. Thus, Florida courts must accord the frozen embryo the recognition of a "potential for life."
molecule indicates that upon the joining of the egg and sperm, cell differentiation occurs that affords the resulting embryo "a unique personal constitution of the individual being created." Thus, a frozen embryo is a potential for a specific human life. Although this scientific evidence is very technical in nature, Florida courts recognized the reliability of the DNA procedures in Andrews v. State. In this case, Florida's Fifth District Court of Appeal accepted as scientific fact "that the configuration of the DNA is different in every individual" and as such was admissible evidence in accurately identifying the perpetrator of a crime. Thus, the conclusion reached in Andrews requires the Florida courts to accept the DNA configuration as proof that the embryo has exceeded the status of "property" and has achieved the identity of an individual potential for human life.

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103. 533 So. 2d at 850.
104. Id. at 847.
105. Id. at 850-51 (affirming the conviction of the defendant for aggravated battery, sexual battery, and armed burglary of a dwelling).

108. Id. at *8.
109. Id. The Ethics Committee further concluded, "special respect is necessary to protect the welfare of potential offspring . . . and creates obligations not to hurt or injure the offspring who might be born after transfer." Id.
embryo the legal status of a "potential for life." This "potential for life" approach will serve a dynamic function in Florida's legal analysis of the frozen embryo in a divorce controversy, for it will create a specialized realm within the state's legal system within which consistent rights for the frozen embryo, the progenitors, and the state of Florida can be achieved.

V. DEFINING THE RIGHTS UNDERLYING THE "POTENTIAL FOR LIFE" STATUS

Upon recognizing the frozen embryo as a "potential for life," Florida courts will need to seek legal definition of this new entity by clarifying the state's role relevant to the frozen embryo in divorce proceedings. The courts can achieve this clarification by turning to precedent of the United States Supreme Court. In Roe v. Wade, the Court declared that the state does have an "important and legitimate interest in protecting the potentiality of human life." The Supreme Court further confirmed the state's rights to protect the "potential for life" in Planned Parenthood v. Casey. In that case, the Court held that the state does have "legitimate interests from the outset...in protecting...the life...that may become a child." Thus, the Supreme Court leaves Florida courts with the discretion to accord the state of Florida the legal right to protect the frozen embryo as a "potential for life."

113. 112 S. Ct. 2791 (1992). The Court reviewed five provisions of the Pennsylvania Abortion Control Act of 1982: A woman seeking an abortion must give her informed consent prior to the procedure; the woman must be given certain information twenty-four hours before the abortion is to be performed; informed consent of one parent must be given for a minor to get an abortion (with a judicial bypass procedure); abortion facilities must satisfy several reporting requirements, and a married woman must notify her spouse. All but the spousal notification were found to be constitutional. Id.
114. Id. at 2797 (emphasis added).
115. Although the "potential for life" status will serve a dynamic function in Florida's legal analysis of the frozen embryo, it will inevitably fuel the present fire of the abortion controversy by recognizing legal rights in this pre-fetus entity. However, this "potential for life" abortion implication is beyond the scope of this article's present discussion. Suffice it to say that the state's compelling interest, at which point abortion may be proscribed, does not arise within the pre-implantation frozen embryo context as it does under the post-implantationetus context. Under Roe, "viability" is the point at which the state's interest becomes compelling. 410 U.S. at 160. By defining "viability" as being approximately between twenty-four and twenty-eight gestational weeks, a pre-implantation frozen embryo which has not even reached the first day of gestation will not be affected by the abortion issue. Id. Furthermore, in Henderson v. Robertson, a Reproductive Health Servs., the Supreme Court

VI. CONSISTENT RESOLUTION OF THE DISPOSITION OF FROZEN EMBRYOS IN A DIVORCE DISPUTE

Recognizing the frozen embryo as a "potential for life" and assuring the determined that the state's compelling interest "extend[s] throughout pregnancy." 492 U.S. 400, 404 (1989). Therefore, the state's compelling interest cannot extend to a frozen embryo that has not yet produced a pregnancy. Additionally, the abortion analysis does not apply to the frozen embryo because the embryo, although labelled as a "potential for life," can be terminated by the progenitors. See infra text accompanying notes 122-27.
117. Florida's Uniform Child Custody Jurisdiction Act, for instance, requires the state, under the doctrine of parens patriae, to achieve justice for children involved in custody disputes. Kennedy v. Kennedy, 559 So. 2d 713 (Fla. 5th Dist. Ct. App. 1990). In Kennedy, the court granted the lower court jurisdiction over the case, even though it lacked proper subject matter jurisdiction, by concluding the Florida court has jurisdiction under doctrine of parens patriae to issue temporary protective order regarding child, if emergency is determined to exist, which will preserve status quo for limited time necessary for parties to bring proper child custody action in Georgia..." Id. at 716 (interpreting Fla. Stat. § 61.1308 (1989)) ("A court of this state...has jurisdiction to make child custody determination...").

118. See, also e.g., Ramey v. Thomas, 501 So. 2d 78 (Fla. 5th Dist. Ct. App. 1988). In Ramey when the maternal grandparents of a child sought to vacate a final judgment of the child's adoption, the court adopted the state's role under parens patriae in holding that "in adoption proceedings, as well as any other kind of proceeding regarding custody of a child, primary issue is the best interest and welfare of the child." Id. at 80 (citations omitted).

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Upon recognizing the frozen embryo as a "potential for life," Florida courts will need to seek legal definition of this new entity by clarifying the state's role relevant to the frozen embryo in divorce proceedings. The courts can achieve this clarification by turning to precedent of the United States Supreme Court. In Roe v. Wade, the Court declared that the state does have an "important and legitimate interest in protecting the potentiality of human life."112 The Supreme Court further confirmed the state's rights to protect the "potentials for life" in Planned Parenthood v. Casey.113 In that case, the Court held that the state does have "legitimate interests from the outset ... in protecting ... the life ... that may become a child."114 Thus, the Florida courts are in the position of defining the status of the Florida legal right to protect the frozen embryo as a "potential for life."115

113. 112 S. Ct. 2791 (1992). The Court reviewed five provisions of the Pennsylvania Abortion Control Act of 1982: A woman seeking an abortion must give her informed consent prior to the procedure; the woman must be given certain information twenty-four hours before the abortion is to be performed; informed consent of one parent must be given for a minor to get an abortion (with a judicial bypass procedure); abortion facilities must satisfy several reporting requirements, and a married woman must notify her spouse. All but the spousal notification were found to be constitutional. Id. 114. Id. at 2797 (emphasis added).
115. Although the "potential for life" status will serve a dynamic function in Florida's legal analysis of the frozen embryo, it will not inevitably fuel the present fire of the abortion controversy by recognizing legal rights in this pre-fetus entity. However, this "potential for life" abortion implication is beyond the scope of this article's present discussion. Suffice it to say that the state's compelling interest, at which point abortion may be proscribed, does not arise within the pre-implantation frozen embryo context as it does under the post-implantation fetus context. Under Roe, "viability" is the point at which the state's interest between twenty-four and twenty-eight gestational weeks, a pre-implanted frozen embryo which has not even reach the first day of gestation will not be affected by the abortion issue. Id. Furthermore, in Webster v. Reproductive Health Servs., the Supreme Court determined that the state's compelling interest "extend[s] throughout pregnancy." 492 U.S. 460, 484 (1989). Therefore, the state's compelling interest cannot extend to a frozen embryo that has not yet produced a pregnancy. Additionally, the abortion analysis does not apply to the frozen embryo because the embryo, although labelled as a "potential for life," can be terminated by the progenitors. See infra text accompanying notes 122-27.

VI. CONSISTENT RESOLUTION OF THE DISPOSITION OF FROZEN EMBRYOS IN A DIVORCE DISPUTE

Upon granting the state the right to protect frozen embryos, the Florida courts' next step will be to define this right. Such definition can be garnered from the established protective right of parens patriae. The common law doctrine of parens patriae is the power of the state to watch over the interests of those who are incapable of protecting themselves.116 Under the doctrine, the state uses the "best interest of the child" standard to achieve justice for children involved in custody disputes.117 Since this standard's application presently extends only to children, it could not be employed to protect a "potential for life" suspended in a custody action.118 Nonetheless, the Florida courts can expand the existing standard to provide for the protection of the frozen embryo. Thus, using the standard's guidelines, the Florida courts can define the state's right within the new divorce disputes at which is in the best interest of the frozen embryo as a "potential for life."
state the right to protect the interests of the frozen embryo will enable Florida courts to fairly and uniformly resolve the three progenitor divorce disputes: 1) The "mother" wanting implantation in her own body and the "father" wanting implantation in his new partner spouse; 2) only one progenitor wanting implantation, and 3) neither progenitor desiring implantation. The third scenario, with neither progenitor wanting implantation, will force the courts to explore the options of adoption by donees and termination.

A. Both Progenitors Fighting for Implantation

When the Florida courts are called upon to resolve the conflict of both progenitors fighting for the right to implant, the "mother" will be desiring implantation of the frozen embryo in her own womb and the "father" will be wanting to have the embryo implanted in his new spouse. In essence, both progenitors will be claiming the right to gestation of the embryo. Florida courts, therefore, will have to determine what would be in the best interest of the frozen embryo as a "potential for life" within this dispute.

Presumably, if the state is primarily concerned with protecting the interests of the frozen embryo, achieving life for the embryo will be the state's ultimate objective. Thus, Florida courts must first decide which woman, the progenitor mother or the father's new spouse, would be most able to achieve the state's goal. The implantation right must then be vested in the woman found to offer the greater chance of bringing this "potential for life" to full term.

B. One Progenitor Fighting for Implantation

Establishing that the state's ultimate objective is to achieve life for the frozen embryo will simplify the Florida courts' resolution of one progenitor fighting for the right to implant. This dispute involves one progenitor desiring to bring the embryo to term through implantation and the other progenitor wanting to terminate or store the frozen embryo. With the frozen embryo under the state's protection, it would be unjust for the courts not to grant implantation. Granting termination or further storage by the courts would deny the frozen embryo the opportunity to achieve its full potential for human life that the progenitor fighting for implantation offers. Thus, the Florida courts must give the progenitor wishing to implant the right to do so.

Florida courts can find further support for this conclusion through the doctrine of estoppel which prevents the estopped party from acting contrary to the expectations of the other party.20 The requirements of estoppel are satisfied when one progenitor opposes the other progenitor's desire to implant the frozen embryo. The progenitor opposing the implantation knowingly acted by participating in the in vitro fertilization process for the purpose of producing a child. The prejudice to the other progenitor consists of the financial, physical, emotional and psychological commitments expended to pursue the in vitro fertilization procedure. The resulting injury to the progenitor desiring implantation would be the time and money spent, and the lost opportunity to have the child.

The estoppel doctrine, therefore, requires the Florida courts to protect the progenitor who was "misled to his [or her] prejudice."21 Thus, the Florida courts must give the progenitor seeking implantation the opportunity to produce the child so desperately desired. Such a resolution recognizes the state's right to protect the frozen embryo as a "potential for life" and guarantees the progenitor desiring implantation the right to bring the embryo to full term.

C. Neither Progenitor Desiring Implantation

Upon resolving the implantation disputes, Florida courts will have to explore the issue of neither progenitor desiring to implant the frozen embryo. Though the progenitors agree to not implant the embryo, its fate still remains to be determined. Such a scenario will require Florida courts to address the options of termination and adoption by donees.

1. Termination of the Frozen Embryo

If neither progenitor wishes to implant the frozen embryo, termination could be the desired result. Florida courts will have to analyze the validity of this option. Applying the state's protective right, termination would not

119. See discussion infra part VI, C. 1.

120. The doctrine of estoppel states: "[W]here a person has, with knowledge of the facts, acted or conducted himself in a particular manner... he cannot afterward assume a position inconsistent therewith to the prejudice of one who has acted in reliance on such conduct..." 31 C.J.S. Estoppel § 108 (1964). The party against whom the estoppel is claimed must first have "done some act or pursued some course of conduct with knowledge of the facts and his rights." Id. § 108(b). Furthermore, the party claiming the estoppel must "have been misled to his prejudice." Id. When these two requirements are met, the doctrine of estoppel prevents the estopped party from acting contrary to the expectations of the other party. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1981) (finding "[e]stoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.").

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be in the best interest of the frozen embryo as a "potential for life" because it would deny the embryo the chance to achieve live birth. However, Florida courts must realize that the state's interest in protecting the frozen embryo's "potential for life" could be thwarted by the woman implanting the embryo and then, if pregnancy resulted, aborting the fetus. Thus, it would be futile to legalize the termination option.

Furthermore, permissive contraceptive use evinces that Florida courts do not have the discretion to legalize termination of the pre-implanted frozen embryo. For instance, the intrauterine birth control device (IUD) is a legal form of contraception.122 This birth control method destroys the fertilized ovum by preventing successful implantation in the uterus.123 Termination of the frozen embryo and the IUD employ identical concepts: both have a fertilized ovum;124 both prevent the fertilized ovum from being implanted in the womb; and both terminate the ovum prior to implantation and impregnation. Thus, the permissive use of the IUD demonstrates that destruction of the embryo prior to implantation is legally acceptable. Therefore, Florida courts must recognize termination of the frozen embryo as a legal option.

Upon recognizing termination of the frozen embryo as legal, Florida courts next will need to explore how the decision to terminate will be made. As part of this inquiry, Florida courts must analyze the rights of the progenitors in this decision-making process. It must be determined if it is the right of one progenitor to make the decision or if the progenitors have equal rights in deciding whether to terminate their frozen embryo.

Within the context of the abortion decision, the relative weight of the progenitors' rights has been established: The female progenitor alone has the right to decide. In Planned Parenthood v. Danforth, for example, the United States Supreme Court was unwilling to recognize a husband's fundamental right to participate in the decision of whether to abort his child by striking down a Missouri statute requiring spousal consent for an abortion.125 The Court reached this holding by concluding, "it is the

122. See Webster v. Reproductive Health Serv., 492 U.S. 490, 541 (1989) (noting that the intrauterine device is a form of contraception).
124. When the in vitro fertilized embryo is cryopreserved, it is suspended at the fertilized ovum stage. See discussion supra part II.
125. 428 U.S. 52, 69 (1976). "Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." Id.
126. Id. at 71.
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woman who physically bears the child and who is the more directly and immediately affected by the pregnancy."126 As these words indicate, the choice to abort a fetus is ultimately the right of the mother because she is the one who must bear the physical, emotional, and psychological burdens of pregnancy.

The abortion decision is, however, distinguishable from the decision whether to terminate the frozen embryo. If the embryo were implanted in the female progenitor's uterus, she would be more directly and immediately affected by the embryo. In contrast, prior to implantation, the female progenitor's health, and for that matter, bodily integrity, are not at issue. While the embryo remains cryopreserved, the female progenitor simply shares a genetic link to the embryo, as does the male progenitor. Thus, when confronted with the termination decision, as opposed to the abortion decision, there is no compelling reason for the courts to favor one progenitor's choice over that of the other.

By recognizing that it is not the right of one progenitor to make the termination decision the male and female progenitors must be accorded equal rights within the decision-making process. Just as the progenitors share an equal genetic link to the embryo, so do they share an equal interest in its termination. Therefore, the progenitors must be required to mutually agree before authorizing termination of their embryo.

2. Adoption by Donees

If the progenitors cannot agree whether to terminate their frozen embryo, ultimate disposition of the embryo will still remain in question. Thus, Florida courts will have to analyze the option of adoption by donees. From the outset, the decision to have another couple adopt the embryo appears to be in the best interest of the frozen embryo because it will provide the embryo with the opportunity to be brought to full term. This conclusion, however, does not address how the adoption decision will be made or what the rights of each progenitor are in the decision-making process. Florida courts, therefore, will have to define the progenitors' roles in deciding whether to donate their frozen embryo for adoption purposes.

This analysis must begin by exploring the state's present guidelines concerning the adoption of children. Under Florida's adoption statutes, for example, "[u]nless consent is excused by the court, a petition to adopt a
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Since the existing adoption statutes apply only postbirth, they could not by applied to a frozen embryo. However, the statutory requirements do provide a workable framework for the courts to address the issue of frozen embryo donation. Just as the progenitors played an equal role in deciding to participate in the in vitro fertilization process, the progenitors must also play an equal role in deciding whether another couple should be allowed to bring their embryo to term and raise the resulting child. Each progenitor must be given an equal voice in the donation decision, and thus, courts must require mutual consent before allowing the frozen embryo to be donated.

If mutual consent cannot be achieved, however, Florida courts can invoke the state’s protective right to excuse the mutual consent requirement. Thus, if one progenitor desires to donate the frozen embryo and the other desires termination, it would be in the best interest of the frozen embryo as a “potential for life” to be given the opportunity to achieve the life that donors offer. Florida courts must, therefore, excuse the consent of the progenitor seeking termination and permit the embryo to be donated to another couple. Such a resolution acknowledges the mutual consent requirement before termination can be granted and guarantees the state’s right to protect the frozen embryo.

VII. CONCLUSION

The development of in vitro fertilization and cryopreservation has now advanced medical technology toward the edge of life. With the emergence of divorcing progenitor disputes over the future of their frozen embryos, the time has come for the law to enter into the journey. When Florida courts are called upon to resolve progenitor disputes, they must abandon the "person" versus "property" dichotomy and legally recognize the frozen embryo as a "potential for life" demanding profound respect. To effectuate this respect, when both progenitors are fighting for the right to implant, Florida courts must vest the implantation right with the woman found to offer the greater chance of bringing this "potential for life" to full term. When only one progenitor desires implantation, the frozen embryo must be granted the opportunity to achieve its full potential for human life. When neither progenitor desires implantation, Florida courts must accord each progenitor an equal voice concerning their frozen embryo as a "potential for life" and require mutual consent before authorizing adoption or termination.

It is only through recognizing the frozen embryo as a "potential for life" that Florida courts can achieve consistent resolution of divorcing progenitor disputes and fill the present legal void created by reproductive technology. It is this new legal status that will enable the courts to secure the fate of the frozen embryo suspended in a divorce action and give the frozen embryo the right to the profound respect that it requires. Thus, by recognizing the frozen embryo as a "potential for life," Florida courts and medicine can march in stride and reach the edge of life together.

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129. It has been suggested that consistent resolution of progenitor disputes can be achieved using established law to create a contract to achieve live birth of the embryo between the progenitors. See Trespalacios, Note, supra note 14. However, the application of contract principals achieves inconsistent results: When only one progenitor desires adoption by donors, it is not permitted and the embryo is allowed to die; if both progenitors want the embryo implanted in a surrogate, but they cannot agree who the surrogate is to be, the embryo is simply not implanted; when neither party wishes to implant, the embryo is destroyed or used for medical research. Id.
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\textsuperscript{128} F.L.A. STAT. § 63.062 (1985) (emphasis added).

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