SPLITTING THE BABY: THE IMPLICATIONS OF CLASSIFYING PRE-EMBRYOS AS COMMUNITY PROPERTY IN DIVORCE PROCEEDINGS AND ITS IMPACTS ON GESTATIONAL SURROGACY AGREEMENTS

Comment

by Derek Mergele-Rust[*]

* B.S., Geography, Texas State University, Dec. 2011; B.P.A., Texas State University, Dec. 2011; J.D. Candidate, Texas Tech University School of Law, May 2017.

I. INTRODUCTION

Forty-three years ago, in 1978, the first baby was born using in vitro fertilization (IVF).[1] Since that time, scientists and doctors have gained access to significantly more sophisticated techniques to assist adults in having biological children.[2] IVF has resulted in the birth of 45,000 American babies.[3] However, when adults turn to doctors and hospitals for reproductive assistance, constitutional, property, and contractual issues arise.[4] When potential parents contemplate IVF procedures, a complex IVF agreement is usually signed that informs the hospital and the progenitors, or intended parents, of what will happen to the pre-embryos in certain circumstances.[5] But, what happens when the progenitors separate or divorce and one or both parties change their mind about having the hospital discard any remaining pre-embryos as per the previously-signed IVF agreement?[6] What happens if the court finds that the agreement is not legally binding?[7] What happens when a party is awarded the pre-embryos and is biologically unable to use the pre-embryos to produce a biological child?[8]

First, this comment will explore two cases in California where one party is seeking control over the pre-embryos in order to use the pre-embryos to procreate.[9] One of the cases highlights a woman desiring to use the pre-embryos, and the other case discusses a man that wants custody over the pre-embryos.[10] Second, this comment will examine the seminal case, *Davis v. Davis*, and its progeny of cases, and summarize the jurisprudence of IVF agreements to glean possible connections and insight into potential outcomes for the two California cases.[11] Third, assuming that one of the progenitors from one of the California cases is awarded the pre-embryos, this comment will examine what kind of interest a person might have in a pre-embryo and

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1. *See* Thomas D. Arado, *Frozen Embryos and Divorce: Technological Marvel Meets the Human Condition*, 21 N. ILL. U. L. REV. 241, 241 (2001).

2. *See generally id.* (highlighting scientific advancements since the beginning of IVF treatments).

3. *See id.*

4. *See id.*

5. *See generally* Respondent's Trial Brief at 5–9, *In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 4522887 (Cal. Super. Ct. filed June 29, 2015) (a woman is seeking control over embryos created during IVF despite a signed agreement that the hospital would destroy the embryos if the couple divorced).

6. *See generally id.*

7. *See generally* J.B. v. M.B., 751 A.2d 613, 616 (N.J. Super. Ct. App. Div. 2000) (holding that it was against public policy to uphold an agreement that forced a person into a familial relationship).

8. *See generally* Anthony McCartney, *Loeb vs Vergara Embryo Suit Gets Court Ruling*, USA TODAY (May 22, 2015, 6:18 PM), http://www.usatoday.com/story/life/tv/2015/05/22/loeb-vs-vergara-embryo-suit-gets-court-ruling/27800753/ [https://perma.cc/7VF6-EBAU] (asking the court for custody of the embryos).

9. *See infra* Part II.

10. *See infra* Part II.

11. *See infra* Part III.

how a court might value that interest.[12] Fourth, this comment will address what happens when a party gains possession of the pre-embryos, is biologically unable to have a child, and seeks to use the pre-embryo through a gestational surrogate, utilizing a gestational agreement in a community property state.[13] Finally, this comment will discuss the transitory nature of the United States population, and propose three statutes that create the necessary continuity and consistency linking the disposition of pre-embryos from IVF agreements and gestational surrogacy agreements.[14] The statutes will also provide clear guidelines for the minimum requirements that IVF agreements and gestational surrogacy agreements need to be valid, binding contracts.[15]

A. IVF Defined

IVF is a medical procedure that is primarily used when the woman has damaged or diseased fallopian tubes, but can still produce healthy eggs.[16] The IVF procedure is also used when men have a low sperm count.[17] Generally, IVF is utilized by individuals and couples who are infertile.[18] Infertility is medically defined as being unable to conceive or bear offspring.[19] IVF begins when eggs are removed from the follicles of the ovaries.[20] The woman takes subcutaneous injections to shut down her pituitary gland.[21] Intermuscular injections are used for eight days to stimulate her ovaries.[22] Next, the eggs are harvested via laparoscopy or ultrasound-directed needle aspiration and then placed in a petri dish and mixed with the sperm.[23] Upon fertilization, the pre-zygote begins to divide.[24] When the pre-zygote becomes a four to six cell organism, it is implanted into the woman's uterus.[25] Any excess pre-embryos undergo cryopreservation.[26]

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12. *See infra* Part IV.
13. *See infra* Part V.
14. *See infra* Part VI; Appendices A–F.
15. *See infra* Part VI; Appendices A–F.
16. *See* Arado, *supra* note 1, at 242–43.
17. *See id*.
18. *See* Lloyd T. Kelso, *In Vitro Fertilization and the Legal Status of Stored Embryos*, 1 N.C. FAMILY L. PRACTICE § 9:4, at 1 (2015).
19. *See id*.
20. *See* Arado, *supra* note 1, at 243.
21. *See id*.
22. *See id*.
23. *Id.*
24. *Id.* at 243–44.
25. *Id.* at 244.
26. *Id.* A pre-embryo is the organism existing before fourteen days of development, prior to the attachment to the uterine wall and the development of the primitive streak. *See* Deborah Kay Walther, *"Ownership" of the Fertilized Ovum in Vitro*, 26 FAM. L.Q. 235, 244 (1992); Madeleine Schwartz, *Who*

However, prior to beginning the IVF procedure, couples sign an agreement, intended to identify each individual's wishes concerning the disposition of the pre-embryos in various situations, including death of one or both of the progenitors, separation or divorce, or a desire not to use any remaining pre-embryos.[27]

B. The Context of the IVF Agreement

The IVF process lends itself to many potential medical and legal complications.[28] Prior to beginning the IVF process, couples are commonly presented with a myriad of forms and waivers, collectively known as an IVF agreement.[29] The IVF process produces more pre-embryos than couples can usually use at one time, so the hospital becomes a repository for the frozen pre-embryos.[30] The IVF agreement seeks to provide guidance to the hospital on how to handle the pre-embryos in the event of numerous situations, including separation or divorce.[31] However, courts struggle to provide a consistent answer as to whether IVF agreements are enforceable contracts.[32] Judicial decisions range from enforcing the agreements to refusing to enforce the agreements without contemporaneous consent.[33] However, courts in most community property states have not specifically ruled on whether IVF agreements are enforceable.[34]

II. CURRENT CASES

A. In re Marriage of Findley v. Lee

In 2010, Stephen Findley and Mimi Lee sought fertility assistance after Lee was diagnosed with breast cancer.[35] Findley and Lee had conversations about having a child prior to her cancer diagnosis.[36] Lee sought IVF treatments from the University of California, San Francisco Medical Center

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Owns Pre-Embryos?, THE NEW YORKER (Apr. 28, 2015), http://www.newyorker.com/tech/elements/who-owns-pre-embryos [https://perma.cc/7K6A-AMPR].

27. *See infra* Part I.B; Appendices B, E.

28. *See* Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 57–58 (2011).

29. *See id*. at 58–59.

30. *See id*. at 58.

31. *See id*. at 59.

32. *See id*.

33. *See id*.

34. *See infra* Part III.

35. Brief for Claimant at 1, *In re* Marriage of Findley v. Lee, 2015 WL 4396104 (2016) No. FDI13780539, (Cal. Super. Ct. June 29, 2015).

36. *In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *3–4 (Cal. Super. Ct. S.F. Nov. 18, 2015).

(UCSF) prior to beginning her cancer treatment plan.[37] One option was for Lee to freeze her eggs instead of creating pre-embryos.[38] Lee chose not to freeze her eggs because the procedure would have required her to take significant time off from her medical practice, and the procedure was cost prohibitive.[39] Additionally, at the time, the technology used to freeze unfertilized eggs was still an emerging technology, and the hospital encouraged the couple to fertilize all of the eggs, creating pre-embryos, instead of freezing the eggs unfertilized, because that would provide the couple with their best chance at having children, considering Lee's age and cancer diagnosis.[40] The couple decided to fertilize all of the eggs and cryogenically freeze the remaining pre-embryos.[41] Findley and Lee decided to utilize IVF procedures to attempt to have children following the completion of Lee's cancer treatment.[42] Furthermore, Findley and Lee considered using a surrogate given Lee's age, but decided that Lee would first try to carry the child herself.[43]

Prior to beginning IVF, Findley and Lee received a ten-page agreement titled "Consent & Agreement for Cryopreservation Disposition of Frozen Embryos" (Agreement).[44] UCSF provided the Agreement in compliance with California law.[45] Findley and Lee signed the Agreement on September 22, 2010.[46] The Agreement instructed the hospital to thaw and discard any pre-embryos held by the hospital in the event of divorce, legal separation, or dissolution of their relationship.[47]

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37. Brief for Respondent at 6, *In re* Marriage of Findley v. Lee, 2015 WL 4522887 (2016) (No. FDI13780539), (Cal. Super. Ct. June 29, 2015).

38. *Lee*, 2015 WL 7295217, at *4.

39. *Id.*

40. *See* Brief for Respondent at 6, 2015 WL 4522887; *Lee*, 2015 WL 7295217, at *4–5. The hospital began freezing eggs in 2009, the year before Lee began IVF treatments. *Id.*

41. *See* Brief for Respondent at 5, 2015 WL 4522887.

42. *See* Brief for Claimant at 1, *In re* Marriage of Findley v. Lee, 2015 WL 4396104 No. FDI13780539, (Cal. Super. Ct. June 29, 2015).

43. *Lee*, 2015 WL 7295217 at *10.

44. Brief for Claimant at 1, 2015 WL 4396104.

45. CAL. HEALTH & SAFETY CODE § 125315 (West 2015). The consent agreement is required to provide six options in the eventuality of divorce or separation by progenitors: (1) Made available to the female partner, (2) made available to the male partner, (3) donation for research purposes, (4) thawed with no further action taken, (5) donation to another couple or individual, (6) other disposition that is clearly stated. *Id.* § 125315(b)(3)(A)–(F). It is medical malpractice per se not to secure advance written directives by the physician before the IVF procedures begin. *Id.* § 125315(a)–(b). California law makes it a felony to use pre-embryos for any other purpose than what is identified on the written consent form. CAL. PENAL CODE § 367g (West 2015). *But cf.* N.M. STAT. ANN. § 24-9A-1(D) (West 2015) (requiring all fertilized ovum, zygotes, and embryos to be implanted into a female recipient without the option for disposition).

46. *See* Brief for Claimant at 1, 2015 WL 4396104.

47. *See id.*

On December 6, 2013, Findley filed for divorce after three years of marriage.[48] On April 15, 2015, the court granted the divorce and reserved the matter of the disposition of the pre-embryos for trial.[49] Prior to the ruling of the court, Findley filed a complaint seeking to join UCSF to the proceeding to force UCSF to act in accordance with the Agreement to discard the pre-embryos.[50]

At trial, Lee asked the court to hold that the Agreement was only between Findley and Lee and not between Findley, Lee, and UCSF.[51] Furthermore, Lee asked the court to liken the Agreement to a medical directive that she could unilaterally change at any time.[52] Lee also requested the court to find the Agreement unenforceable that UCSF did not properly obtain her consent when she signed the Agreement, and adopt a balancing test weighing her right to procreate against Findley's interest not to procreate.[53] Alternatively, Findley asked the court to find the Agreement legally binding and enforceable, which, as previously stated, clearly indicated the assent of both parties to thaw and discard the pre-embryos in the case of divorce or separation.[54] Additionally, UCSF asked that the court find that the pre-embryos are property and uphold the Agreement as valid because UCSF obtained informed consent from both progenitors when they signed the Agreement.[55]

Prior to this case, no California court directly addressed a dispute concerning the disposition of frozen pre-embryos.[56] The trial court determined that the California Health and Safety Code required the court to hold that the Agreement is a binding contract.[57] Further, the court noted that relying on the Agreement is in line with California public policy.[58] The court decided to give judicial deference to the intent of progenitors if the Agreement is defective.[59] As a result, the court held the Agreement was a valid, binding contract, and for UCSF to thaw and discard the embryos.[60]

The court found no violation of Lee's constitutional right to procreate, but rather, only her ability to procreate with Findley.[61] In light of the disposition of frozen pre-embryos being a case of first impression in

48. *See Lee*, 2015 WL 7295217, at *2.
49. *See id.* at *10.
50. *See id.*
51. *See id.* at *3.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.* at *12.
57. *See id.* at *17.
58. *See id.*
59. *See id.*
60. *See id.* at *20.
61. *See id.*

California, an appeal is possible.[62] While the Superior Court of San Francisco held that the Agreement must be binding, the California Superior Court of Los Angeles must determine how to weigh the progenitor's interests if the Agreement is defective, and what analysis the court should use to determine whether the court should award the pre-embryos to the male progenitor.[63]

B. Loeb v. Vergara

Currently before the California Superior Court of Los Angeles, Nick Loeb is suing for custody over the pre-embryos he created with ex-girlfriend Sophia Vergara.[64] Similar to *Lee*, Loeb and Vergara sought reproductive assistance through IVF procedures and signed a "Form Directive."[65] The Form Directive, similar to the Agreement signed by Findley and Lee, instructed the hospital not to allow any action regarding the pre-embryos without the consent of both parties.[66]

The procedure was successful and resulted in two fertilized pre-embryos that the couple decided to cryogenically freeze.[67] When Loeb and Vergara separated in May 2014, Loeb filed suit to obtain and use the two pre-embryos.[68] On May 22, 2015, the court granted a request from Loeb for leave to amend his complaint.[69] Loeb's reasons for amending his complaint are unclear, but presumably, he felt he had a better chance of winning the suit if the action concerned the sanctity of life instead of obtaining possession of property.[70]

Loeb's new complaint alleged that the Form Directive is insufficient under California law and cannot be a valid, binding contract because the Form Directive did not include an option to donate the pre-embryos when contemplating disposition, and did not specifically instruct the hospital how to handle the pre-embryos if the couple separated or divorced, as required by California law.[71] Loeb also asked the court to consider evidence that

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62. *See id*.

63. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1056 (Mass. 2000); *supra* Part III.B. The court found the IVF agreement defective, but based the reasoning of the holding on different grounds.

64. *See* McCartney, *supra* note 8.

65. *See* Rich Cromwell, *What Nick Loeb's New Action Against Sophia Vergara Means*, THE FEDERALIST (May 26, 2015), http://thefederalist.com/2015/05/26/what-nick-loebs-new-action-against-sophia-vergara-means/ [https://perma.cc/JF83-5HZB].

66. *See* McCartney, *supra* note 8.

67. *See id*.

68. *See id*.

69. *See id.*; Cromwell, *supra* note 65 (explaining the ongoing legal battle between Vergara and Loeb).

70. *See* McCartney, *supra* note 8.

71. *See* Cromwell, *supra* note 65; CAL. HEALTH & SAFETY CODE § 125315(b)(3)(A)–(F) (West 2015) (explaining the requirements of a form directive).

Vergara, verbally and in writing, intended to take the pre-embryos to term, and that she considers the pre-embryos lives.[72] Additionally, Loeb asked the court to use a balancing test to determine whether to give him custody of the pre-embryos.[73] Finally, Loeb asked the court to consider the state's interest in procreation.[74] Loeb argued that including the state's interest in potential life should create a presumption in favor of the progenitor who wants to bring the pre-embryo to term.[75] If awarded the pre-embryos, Loeb intended to use the embryos via a gestational surrogate.[76]

Similar to *Lee*, the question before the court is whether one progenitor should be able to procreate using biological material previously created against the other progenitor's wishes.[77] Both *Lee* and *Vergara* involve signed agreements, under California law, which direct the hospital on the progenitor's wishes on how to handle the pre-embryos.[78] However, the court could be willing to hold that the agreement used by Loeb and Vergara is insufficient because the language of the agreement does not track the statute.[79] Loeb is asking the court to take additional steps not taken by any other court that has directly decided the disposition of pre-embryos.[80] Additionally, Loeb is asking the court to declare that a pre-embryo is life not property; as a result, despite Loeb's current ability to reproduce naturally, the state should award the pre-embryos to him because the state's interest in life creates a presumption in his favor.[81] In order to decide which progenitor's interest should control, courts rely on the seminal case history of IVF agreements, beginning with *Davis v. Davis*.[82]

72. *See* Cromwell, *supra* note 65.

73. *See id*. The balancing test is the same balancing test used in *Lee*, but in addition, Loeb is asking the court to balance the state's interest in potential life with the progenitor's constitutional right to procreate. *See id.*

74. *See id.*

75. *See id.*

76. *See* McCartney, *supra* note 8. *See generally infra* Part V.B (identifying which states allow gestational surrogacy and the requirements for a gestational surrogacy agreement to be binding).

77. *See In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *3 (Cal. Super. Ct. S.F. Nov. 18, 2015); Cromwell, *supra* note 65.

78. *See Lee*, 2015 WL 7295217, at *3; Cromwell, *supra* note 65.

79. *See* Cromwell, *supra* note 65.

80. *See id*.

81. *See id.*; *infra* Part IV.A.

82. *See infra* Part III.

III. SEMINAL CASE HISTORY

A. Davis v. Davis

In April 1980, in Tennessee, Mary Sue Davis and Junior Davis were married.[83] Mary Sue eventually became pregnant, but suffered an extremely painful tubal pregnancy.[84] Subsequently, she had surgery to remove her right fallopian tube.[85] The couple continued attempting to have children, but Mary Sue suffered five more tubal pregnancies.[86] After an additional surgery on her remaining fallopian tube, Mary Sue's doctor encouraged the couple to seek IVF treatment.[87] Mary Sue's doctor explained that IVF was the last remaining option for them to become biological parents.[88] In preparation for the IVF procedure, the Davises' did not sign an agreement that would direct the hospital how to dispose of pre-embryos in the event of death, separation, or divorce.[89] The Davises' attempted IVF six times between 1985 and 1988.[90] On the couple's seventh attempt, the clinic recovered nine ova for fertilization.[91] The ova were fertilized and placed in cryogenic storage.[92]

In February 1989, Junior filed for divorce.[93] The issue presented to the trial court was who should have custody over the seven pre-embryos.[94] Mary Sue sought custody to implant the pre-embryos into her uterus to become pregnant.[95] The trial court granted Mary Sue's petition.[96] The court of appeals reversed the trial court's holding that Junior's constitutional right not to have children supersedes Mary Sue's desire to use the pre-embryos.[97] The court of appeals further held that both parties had a joint interest in the pre-embryos and remanded the case to the trial court vesting joint control of the pre-embryos to Junior and Mary Sue.[98] Mary Sue appealed to the Tennessee

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83. *See* Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992).

84. *See id.* A tubal pregnancy, more generally known as an "ectopic pregnancy," occurs when the fertilized egg implants itself in the fallopian tube instead of in the lining of the uterus. *Diseases and Conditions, Ectopic Pregnancy*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/ ectopic-pregnancy/multimedia/normal-and-ectopic-pregnancy/img-20006402 [https://perma.cc/BL7B-8FTC] (last visited Nov. 2, 2015).

85. *See Davis*, 842 S.W.2d at 591.

86. *See id*.

87. *See id*.

88. *See id*.

89. *See id*. at 597.

90. *See id*. at 592.

91. *See id*.

92. *See id*.

93. *See id*.

94. *See id*. at 589.

95. *See id*.

96. *See id*.

97. *See id*.

98. *See id*.

Supreme Court contesting the court of appeals' ruling, which was rooted in Junior's constitutional rights.[99]

First, the court needed to determine what kind of interest the Davises' might have in the pre-embryos: should pre-embryos be considered "persons" or "property"?[100] The court determined that the pre-embryo is not strictly a person nor is it property, but rather it belongs in a category in between a person and property that entitles the pre-embryos "to special respect because of their potential for human life."[101]

Second, although the parties did not raise this issue directly on appeal because no previous agreement existed between the parties, the court considered whether or not an agreement signed prior to beginning IVF is enforceable.[102] The court recognized that a couple engaged in IVF does so at a time when there is substantial transition in their lives and their emotions are high.[103] However, the court said that IVF agreements regarding disposition should be presumed valid because the parties' initial informed consent to the procedures will not usually rise to actual, informed consent due to the impossibility of anticipating all of the twists and turns that the IVF process can take.[104] The court further reasoned that the law protects parties from the risk of unpredictable future harm as long as the IVF consent agreement allows for future modification.[105] However, absent such a modification, the agreements should be considered binding.[106]

Third, the court considered each parent's constitutional right to procreational autonomy.[107] Each citizen has the substantive right to privacy protected under the Fourteenth Amendment.[108] Additionally, the Tennessee Constitution protects a citizen's right to privacy.[109] The Tennessee Constitution does not explicitly protect citizens from their choices in IVF agreements; however, the court reasoned "[t]hat a right to procreational autonomy is inherent in our most basic concepts of liberty[, which] is also indicated by the reproductive freedom cases."[110] The court held that the right

99. *See id*. at 590.

100. *See id*. at 596. The court outlines three possible ways to classify pre-embryos: (1) that the pre-embryo is human, (2) that the pre-embryo is no different than any other human tissue, and (3) that the pre-embryo deserves special respect because of its potential for human life. In an effort not to confuse the issues, this comment will not discuss the ethical or religious implications of classifying a pre-embryo as property or discarding pre-embryos. *Id.*

101. *Id.* at 597.

102. *See id*.

103. *See id*.

104. *See id*.

105. *See id*.

106. *See id*.

107. *See id*. at 601.

108. *See id*. at 599.

109. *See id*.

110. *Id.* at 601 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S.113 (1973)).

to procreational autonomy is made up of two rights of equal significance: (1) the right to procreate, and (2) the right to avoid procreation.[111] No other entity, including the state, has an interest that can trump the gene-providers' decision to continue or terminate the IVF process, because no one else has to bear the consequences of those decisions.[112]

Ultimately, the court held that to decide what happens to pre-embryos, the court must follow the parties' wishes, which are indicated either through their actions or by previous agreement.[113] If no prior agreement exists, then the court must weigh the interests of the parties using, or not using, the pre-embryos.[114] Usually, the party wishing to avoid procreation should prevail as long as the other party has a reasonable means of achieving parenthood without using the pre-embryos.[115] If no reasonable means exists for the party wanting to procreate, then the court should consider the argument of the party seeking the pre-embryos, unless that party only desires the pre-embryos for the purpose of donating them to another couple.[116]

B. A.Z v. B.Z.

In 1999, A.Z., the former wife of B.Z., appealed the Massachusetts Probate and Family Court's ruling, which provided a permanent injunction against A.Z. from utilizing pre-embryos in cryopreservation at the fertility clinic.[117] While married, the couple signed an IVF agreement that instructed the clinic as to what to do with the pre-embryos in the event of divorce or separation.[118] The clinic's IVF handbook stated that the consent forms were only valid for one year.[119] However, there was no evidence that the husband and wife actually knew the consent form was only good for one year.[120] The form instructed the fertility clinic that in the event of divorce, the pre-embryos would be returned to the wife for implant.[121]

The couple used IVF procedures a total of six times and signed a consent form each time IVF was performed.[122] However, each time the couple signed the form, B.Z. signed first without filling out the form; then,

111. *See id*.
112. *See id.* at 602.
113. *See id.* at 604.
114. *See id.*
115. *See id.*
116. *See id.*
117. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1051 (Mass. 2000).
118. *See id.* at 1054.
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*

A.Z. filled out the form and signed it.[123] Each consent form signed by the couple was worded substantially similarly.[124]

Throughout the four years after the couple signed their last consent form in 1991, they experienced a variety of different life events: the birth of their twins as a result of the IVF procedures, the filing for divorce, and the wife's receipt of a protective order against B.Z.[125] The probate and family court held that this change in circumstances made the consent agreement unenforceable.[126] The judge reasoned that the agreement should not be enforced when intervening events changed the circumstances in a way that was not anticipated by the parties when the consent agreement was signed before the IVF procedure commenced.[127] But in the absence of a current consent agreement "the 'best solution' was to balance the wife's interest in procreation against the husband's interest in avoiding procreation."[128]

The Massachusetts Supreme Court reasoned that the primary purpose of the consent form was to provide guidance of the donors' desires in disposition of the pre-embryos at the time the form was signed; however, the consent form did not indicate that it was to be a binding agreement should the donors later disagree about what to do with the pre-embryos.[129] Additionally, the consent form did not contain a controlling duration provision because the one-year duration period had previously expired, and the form addressed disposition if they "become separated," but not divorced.[130] Therefore, it was unclear whether or not the consent form or the donor's intent should control in these circumstances.[131] Finally, the consent form is not a separation agreement that is binding in a divorce proceeding.[132] The court held that even if the agreement was unambiguous, the court would not bind a party and force an individual to become a parent against contemporaneous objection.[133]

C. J.B. v. M.B.

In 2000, the New Jersey Superior Court had an opportunity to evaluate pre-embryo disposition.[134] J.B., the wife, suffered from endometriosis and

123. *See id.*
124. *See id.*
125. *See id.* at 1054–55.
126. *See id.*
127. *See id.*
128. *Id.* at 1055.
129. *See id.* at 1056.
130. *See id.* at 1057.
131. *See id.*
132. *See id.*
133. *See id.* at 1059.
134. *See* J.B. v. M.B., 751 A.2d 613, 613 (N.J. Super. Ct. App. Div. 2000).

sought IVF to assist her and her husband in having children.[135] M.B., the husband, had a normal sperm count.[136] The couple signed an IVF consent agreement and engaged in IVF.[137] The agreement stated that "J.B. (patient), and M.B. (partner), agree that all control, direction, and ownership of our tissues will be relinquished to the IVF program [in the event of] . . . [a] dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues."[138] As a result of IVF, the couple was able to have a healthy baby girl in March 1996.[139]

In November 1996 the couple divorced, but the wife wanted the remaining eight frozen pre-embryos discarded.[140] However, the husband wanted a judgment compelling J.B. to have the remaining pre-embryos implanted or donated to other infertile couples.[141] The husband maintained that he and his wife had conversations about the pre-embryos prior to undergoing the IVF treatment, and decided that the remaining pre-embryos would be donated to infertile couples.[142] The wife contested that those conversations never occurred; however, other family members corroborated that the conversations did in fact occur.[143] The trial court held that the parties engaged in IVF to create a child within the context of their marriage, and they achieved their goal.[144] However, they were no longer married, the reasons for creation and preservation of the pre-embryos no longer applied, and the father was still capable of fathering a child without the use of the existing pre-embryos.[145]

On appeal to the New Jersey Superior Court, the husband contended that the trial court failed to establish the parties' understanding of the parameters regarding the disposition of the pre-embryos, and that the trial court ruling violated his constitutional rights to procreate, to due process, and to equal protection under the law.[146]

The superior court began its analysis by assessing the husband's and wife's constitutional rights to procreate, and the court reasoned that the conflict was more apparent than real.[147] The husband still had the ability to have children because he still could produce sperm.[148] In the alternative, if

135. *See id*. at 616.
136. *See id*.
137. *See id*.
138. *See* Kelso, *supra* note 18, at 13.
139. *See J.B.*, 751 A.2d at 616.
140. *See id*.
141. *See id*. at 613–17.
142. *See id*. at 616.
143. *See id*.
144. *See id*.
145. *See id*.
146. *See id*.
147. *See id*. at 618.
148. *See id*. at 619.

the court were to enforce the husband's right to procreate by allowing him to use the pre-embryos, eliminating any financial or custodial responsibility on the part of the wife, the fact remains that a biological child of the wife would still exist, resulting in an infringement on the wife's constitutional right not to procreate.[149]

However, the court felt compelled not to base its reasoning on constitutional rights grounds; instead, the court agreed with the Massachusetts Supreme Court and reasoned that a contract to procreate is contrary to public policy and is unenforceable.[150] The court held that "agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions."[151] Similarly, the court reasoned that it cannot enforce contracts to marry or force parents to surrender a child for adoption, and thus it cannot enforce contracts to procreate.[152] The superior court affirmed, ruling in favor of the wife.[153] As a result, this ruling allowed for the pre-embryos to be destroyed because the wife did not want to have them implanted into her body.[154]

D. In re Marriage of Witten

In 2002, Arthur "Trip" Witten and Tamera Witten sought to have their marriage dissolved.[155] Earlier in the marriage, the Wittens attempted to conceive children using the IVF process.[156] Prior to beginning the process, the couple signed consent documents that provided for the disposition of pre-embryos only when both parties gave written consent.[157] The agreement allowed for an exception to the dual consent only in the event of either party's death.[158] At the time of divorce, seventeen pre-embryos were held in cryogenic storage.[159]

At trial, Tamera sought custody of the pre-embryos so that she could have the pre-embryos implanted into her, or a surrogate mother, in order to have a genetically linked child.[160] Tamera claimed that Trip would have the option to exercise or terminate his parental rights if Tamera was given

149. *See id.*
150. *See id.* at 619–20; A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).
151. *J.B.*, 751 A.2d at 620.
152. *See id.*
153. *Id.*
154. *Id.*
155. *In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

custody.[161] She was strongly against destroying the pre-embryos or donating them to someone else.[162] Trip was not in favor of donating the pre-embryos, and did not want Tamera to use them.[163] Trip sought a permanent injunction prohibiting Tamera from taking any action regarding the pre-embryos without the written consent of both parties.[164]

The district court held that the agreement, which required both parties to consent, should control.[165] Tamera appealed, contesting that the agreement was silent with regard to disposition of the pre-embryos in the case of divorce, because there was no specific provision in the agreement that dealt with that contingency.[166] Also, Tamera argued that she was entitled to the pre-embryos due to her fundamental right to bear children.[167]

The court interpreted the provision broadly and held that the provision regarding pre-embryos was sufficiently worded to encompass dissolution of the pre-embryos due to divorce.[168] The court reached this decision framing the issue as whether or not such agreements are enforceable when one party subsequently changes their mind.[169] The court held that it would be against public policy to enforce an agreement concerning reproductive choice when one of the parties has changed their mind.[170] The court reasoned that these decisions are highly emotional, subject to a later change in heart, and the decision to have a family rests with the couple, not a judicially enforceable agreement.[171] Furthermore, the court held that the requirement of contemporaneous mutual consent will control in Iowa, and in the event of a stalemate, the status quo will control.[172] This requires the parties to store the pre-embryos indefinitely unless both parties can agree to a resolution.[173]

E. Seminal Case History Summary

In summation, the courts' rulings find: (1) the agreements binding, (2) the agreements are unenforceable and against public policy, or (3) the agreements are insufficient in some way, and use a different analysis to govern whether or not a progenitor should be entitled to the pre-embryos.[174]

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161. *See id*.
162. *Id.* at 772–73.
163. *Id.* at 773.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 773–74.
169. *Id.*
170. *Id.* at 781.
171. *Id.* at 782.
172. *Id.* at 783.
173. *See id*.
174. *See supra* Parts III.A–D.

These three types of decisions also align with the three approaches, discussed below, that the courts use to determine what property interest exists in a pre-embryo.[175]

In the seminal case, *Davis*, the Tennessee Supreme Court laid out a comprehensive analysis in dicta to determine whether the interest of one party's wish to procreate should supersede the interest of the other party's desire not to procreate.[176] First, the progenitor's wishes concerning the disposition of pre-embryos should control.[177] Second, if the wishes of the progenitors are ambiguous, or there is a dispute between them, then prior agreements governing disposition should control.[178] Third, if no prior agreement exists, then the court must weigh the interests of the party wishing to avoid procreation.[179] Normally, the party wishing to avoid procreation should prevail unless the other party has no reasonable possibility of achieving parenthood without using the pre-embryos.[180] However, if the party seeking control of the pre-embryos merely wishes to donate the pre-embryos to another couple, the objecting party should prevail.[181]

Following the Tennessee Supreme Court's recommendations, courts have been willing to use previously agreed upon IVF agreements and contracts to ascertain and bind progenitors to their previously identified wishes.[182] However, despite existing IVF agreements, other courts have been unwilling to enforce the previous agreements as a matter of public policy.[183] These courts reason that they should not be able to enforce procreation contracts and agreements when the state is unable to enforce marriage contracts and contracts that force children to be given up for adoption.[184] Courts' unwillingness to enforce these agreements has led to the adoption of the Contemporaneous Mutual Consent Rule.[185] The rule

175. *See infra* Part IV.A.

176. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id*.

181. *See id*.

182. *See* Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); Szafranski v. Dunston, 993 N.E.2d 502, 517–18 (Ill. App. Ct. 1st Dist., 2d Div. 2013) (reasoning that honoring the parties' agreements allows the parties to make their own reproductive choices, rather than the court, and provide a measure of certainty for family planning). The Tennessee Supreme Court stated in *Davis* that it would have held an agreement binding if an agreement had existed. *See Davis*, 842 S.W.2d at 604.

183. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000); J.B. v. M.B., 751 A.2d 614, 620 (N.J. Super. Ct. App. Div. 2000).

184. *See J.B.*, 751 A.2d at 620.

185. *See A.Z.*, 725 N.E.2d at 1059; *J.B.*, 751 A.2d at 620; *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003). The Contemporaneous Mutual Consent Approach (Rule) was proposed by Carl Coleman in 1999. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 80–86 (1999).

requires both parties to agree on actions regarding the pre-embryos at the time of disposition, regardless of any previous consent agreements.[186] Courts relying on this rule claim that their ruling is in line with *Davis* because the court is attempting to know the intent of the progenitors.[187]

Other courts have not been willing to enforce previous agreements because the circumstances have in some way changed, or one of the progenitors is not biologically able to have any children in the future.[188] In these circumstances, these agreements are overly harsh, especially when an individual's inability to naturally procreate is no fault of their own.[189] After the court determines that one of the progenitors should receive the pre-embryos, the court must determine what kind of interest the progenitor has in the pre-embryo for purposes of equitably dividing the assets.[190]

IV. DETERMINATION OF A PROPERTY INTEREST AND VALUATION OF PRE-EMBRYO

A. Determining a Property Interest in a Pre-Embryo

Generally, courts across the country continue to have a difficult time determining what kind of interest a progenitor should have in a pre-embryo.[191] Courts have held that progenitors have some sort of property interest in a pre-embryo, but pro-life advocates are contesting in greater frequency that a pre-embryo should be viewed as a life instead of property.[192] In order for pro-life advocates to be more persuasive, advocates are now asserting that the state has an interest in preserving the life of the pre-embryo, in addition to the interests of the progenitors.[193] Courts tend to rely on three different analyses to determine what property interest each party should have in pre-embryos: (1) the contractual approach, (2) the contemporaneous mutual consent approach, and (3) the balancing approach.[194]

The first approach is the contractual approach.[195] This approach allows the court to focus solely on the previously agreed upon contracts governing

186. *See A.Z.*, 725 N.E.2d at 1059; *J.B.*, 751 A.2d at 620; *Witten*, 672 N.W.2d at 783.

187. *See Davis*, 842 S.W.2d at 604.

188. *See J.B.*, 751 A.2d at 616; Reber v. Reiss, 42 A.3d 1131, 1141–42 (Pa. Super. Ct. 2012) (holding that the wife's only opportunity to have biological children was with the existing pre-embryos; the court should allow her to use the pre-embryos).

189. *See Reber*, 42 A.3d at 1141–42.

190. *See supra* Part IV.

191. *See Davis*, 842 S.W.2d at 597.

192. *See id*. "We conclude that pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." *Id.*

193. *See* Cromwell, *supra* note 65.

194. *See* Szafranski v. Dunston, 993 N.E.2d 502, 506 (Ill. App. Ct.1st Dist. 2013).

195. *See id.*

the disposition of pre-embryos.[196] These contracts, or consent agreements, were presented to the parties, usually by the hospital or clinic, and signed by the parties prior to beginning IVF procedures.[197] As identified in *Davis* and *Witten*, these contracts will be enforced unless the court feels that they violate public policy.[198] However, criticisms of the contractual approach include an individual's inability to predict future responses to life-altering events, including subsequent parenthood.[199] Additionally, the contractual approach has been criticized as being overly harsh in certain circumstances, and does not allow the court deference to hold differently than what is stated in the agreement.[200]

The second approach is the contemporaneous mutual consent approach.[201] This approach proposes that neither party can use an existing pre-embryo without the contemporaneous mutual consent of both parties who created the pre-embryo.[202] This approach is also referred to by courts as the Contemporaneous Mutual Consent Rule.[203] Under this approach, previous agreements are not treated as binding contracts.[204] However, the Pennsylvania Supreme Court has found this approach totally unrealistic because it felt that if the parties could reach an agreement, then they would not be in court.[205]

The third approach is the balancing approach.[206] The balancing approach begins by enforcing any pre-existing contracts between the parties, but in the absence of a previously agreed upon IVF consent agreement or other contract, the court attempts to balance the parties' interests.[207] This approach gives the court deference to determine which party is entitled to the pre-embryos sans an agreement.[208] However, the Supreme Court of Iowa has criticized the balancing approach because it gleans toward court deference and fails to provide a clear guideline for lower courts to follow.[209]

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196. *See id*.

197. *See id*.

198. *See id*. at 506–07; Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (opining that an agreement regarding disposition of pre-embryos should be deemed valid and enforceable); *In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) (holding that contracts entered into regarding the disposition of pre-embryos should be enforced subject to the public policy of not forcing people to become parents, by enforcing contracts, when then do not want to be parents).

199. *See Szafranski*, 993 N.E.2d at 507

200. *See id*. at 512.

201. *See id*. at 510.

202. *See id.*; *Witten*, 672 N.W.2d at 778 (evaluating the contemporaneous mutual consent approach to determine applicability in Iowa).

203. *See Szafranski*, 993 N.E.2d at 510; *Witten*, 672 N.W.2d at 778.

204. *See Szafranski*, 993 N.E.2d 510–11.

205. *See id*. at 511.

206. *See id*. at 512.

207. *See id*.

208. *See id*.

209. *See id*.

B. Possible Methods for Determining a Property Interest in a Pre-Embryo in Community Property States

Usually the three approaches are evaluated independently of one another, and the court chooses the best approach for its jurisdiction.[210] However, hypothetically, courts in community property states could determine a parties' property interest in a pre-embryo by tracing the community property interest between the two parties, assigning a monetary value to the pre-embryo, or by setting the pre-embryo apart from the rest of the assets without assigning a monetary value and assign only possession to one of the parties.[211] A court in a community property state could also analyze the property interests of the progenitors in a pre-embryo from a purely statutory point of view.[212]

1. Community Property Interest Tracing Analysis of Pre-Embryos

In an equitable division of the assets, during divorce proceedings in community property states, there is separate property and community property.[213] Separate property is property owned or claimed by the spouse before marriage.[214] Community property is property acquired by either party during the marriage, other than separate property.[215] Sometimes property is both separate and community property, and the property interest must be traced back to identify what percentage of the property is community and separate property.[216] Tracing the property interest of a pre-embryo requires identifying the property interest in the female egg and the male sperm.[217] At the time of birth, women are born with all of the eggs that they will have for their entire life.[218] Therefore, a woman's egg could be considered separate property under the statutory definition because she owned all of her eggs prior to the marriage.[219] Since an embryo consists of one-part egg and one-part sperm, the egg a woman provides to the embryo constitutes 50% of the

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210. *See id.* at 514 (holding that the proper approach for Illinois was the balanced approach, where prior agreements would be enforced, but in the absence of valid agreements, the interests of both parties would be weighed against each other).

211. *See infra* Part IV.B.1–4.

212. *See infra* Part IV.B.1–2.

213. *See* TEX. FAM. CODE ANN. §§ 3.001–.002 (West 2015).

214. *See* CAL. FAM. CODE § 770 (West 2015); LA. CIV. CODE ANN. art. 2341 (2015); TEX. FAM. CODE ANN. §§ 3.001 (West 2015); WASH. REV. CODE ANN. § 26.16.010 (West 2015).

215. *See* statutes cited *supra* note 214.

216. *See* Pearson v. Fillingim, 332 S.W.3d 361, 363 (Tex. 2011).

217. *See* Arado, *supra* note 1.

218. *See The Female Reproductive System*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/healthy_living/hic_Coping_with_Families_and_Careers/hic_the_female_reproductive_system [https://perma.cc/5LL5-CYMQ] (last visited Nov. 3, 2015).

219. *See* statutes cited *supra* note 214.

pre-embryo.[220] Since the law could consider an egg separate property, the woman theoretically owns a 50% property interest in each pre-embryo.[221]

Unlike a woman's eggs, a man's sperm are continually produced throughout the man's life.[222] Thus, because sperm are created during the marriage, they could be considered community property under the statutory definition.[223] As a result, the 50% interest that the sperm has in the pre-embryo could be divided in half, with 25% awarded to the woman and 25% awarded to the man.[224] At the conclusion of tracing the property interest in the pre-embryo, the woman could have a 75% property interest and the man could have a 25% property interest in the pre-embryo.[225]

2. Community Property Interest Tracing Analysis of a Donated Egg

Not all women and men are able have children naturally.[226] Some couples acquire eggs or sperm from donors to have children.[227] If an egg is donated to a married couple, and the couple acquired the egg during the marriage, then it would be considered community property.[228] The egg would still have a 50% property interest in the pre-embryo, but like the sperm, the property interest of the egg could be divided equally giving the woman and the man a 25% interest in the egg.[229] The sperm-property interest analysis would remain the same.[230] The result of this hypothetical situation would be that the man and the woman would each have a 50% interest in the pre-embryo.[231]

3. Monetary Valuation of Pre-Embryos

There is no fixed rule to determine how much a court should award a party in an equitable division of the assets.[232] Courts are only required to

220. *See* statutes cited *supra* note 214.

221. *See* statutes cited *supra* note 214.

222. *See The Male Reproductive System*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/healthy_living/hic_Mens_Health_Your_Preventive_Health_Program/hic_The_Male_Reproductive_System [https://perma.cc/YZK8-U2PH] (last visited Nov. 3, 2015).

223. *See* statutes cited *supra* note 214.

224. *See* statutes cited *supra* note 214.

225. *See* TEX. FAM. CODE ANN. §§ 3.001–.002 (West 2015).

226. *See In re* C.K.G., 173 S.W.3d 714, 717 (Tenn. 2005) (woman was too old to have children so she used a gestational surrogate to have a baby).

227. *See* K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005) (woman donated an egg to her lesbian partner for a gestational surrogacy).

228. *See* statutes cited *supra* note 214.

229. *See* statutes cited *supra* note 214.

230. *See supra* Part IV.B.

231. *See* TEX. FAM. CODE ANN. §§ 3.001–.002 (West 2015).

232. *See* Collins v. Wassell, 323 P.3d 1216, 1224 (Haw. 2014).

award each party what is "just and equitable."[233] In some instances, courts award property or assets to one party, and award money to the other party as compensation for the property, rather than forcing the parties to sell the asset and split the proceeds from the sale.[234] A court might find it challenging or undesirable to attempt to assign a monetary value to pre-embryos.[235] However, a court could decide that each pre-embryo is worth one of the following: the cumulative cost of the IVF procedures, the cost of one particular procedure, or an average cost of the IVF procedures divided by the remaining pre-embryos to be distributed.[236] Alternatively, the court could divide the cost by the total number of pre-embryos, thus accounting for pre-embryos that the party previously used.[237]

4. Assigning the Pre-Embryos to One Party Without Monetary Valuation

Pre-embryos are a unique property interest, and courts are conscious of the reality that pre-embryos cannot be treated like other pieces of property.[238] At times, courts prefer to separate the pre-embryo from the normal equitable division of the assets.[239] If the court intends to assign ownership of the pre-embryos to one of the progenitors, it is possible that the court will not assign a value to the property interest, but rather it could assign ownership to only one of the progenitors.[240]

C. Evaluating Whether Pre-Embryos Could Be Awarded in the Current Cases

1. In re Marriage of Findley v. Lee

In *Lee*, the trial court upheld the pre-embryo agreement as binding and cited the conclusion that the California Legislature intended to support the enforceability of the agreement.[241] The California Court of Appeals could possibly conclude that the legislature desired to make sure that patients and

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233. *See id*.

234. *See id*.

235. *See infra* Part IV.B.4.

236. *See* Arado, *supra* note 1. *See generally* Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992) (Mary Sue Davis had multiple implantation procedures in an attempt to become pregnant).

237. *See generally Davis*, 842 S.W.2d at 597 (Davis's pre-embryos that resulted in unsuccessful pregnancy cost money to create and use; excluding the recovery of consumed pre-embryos could be a greater equitable division).

238. *See id*.

239. *See In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *2 (Cal. Super. Ct. S.F. Nov. 18, 2015).

240. *See id.* (setting aside the award of the pre-embryos for trial after the conclusion of the equitable division of the assets).

241. *See id.* at *20.

partners had all of the relevant information prior to engaging in IVF procedures.[242] The agreements are meant more as a protection for patients against doctors' failure to perform their duty to properly inform patients of the risks and choices regarding the procedure.[243] If the California Court of Appeals concludes that the California Legislature may not have intended the documents to be binding, then that decision would allow the court to hold that the IVF agreements are not contracts to procreate, are against public policy, and are unenforceable.[244] This result would be the same as in *A.Z. v. B.Z.* and *J.B.* v. *M.B.*[245] If the court of appeals finds the agreement not binding, then, like in *A.Z v. B.Z.* and *J.B. v. M.B.*, the court will likely rely on the Contemporaneous Mutual Consent Rule, requiring both progenitors to agree on the disposition or use of the pre-embryos.[246] That result would still not allow Lee to use the pre-embryos.[247]

2. Loeb v. Vergara

If the *Vergara* trial court holds similar to the trial court's ruling in *Lee*, that the California Legislature intended the agreement to be enforceable, then the court would still need to weigh the sufficiency of the agreement's language with whether the failure of the agreement to track with the statute is sufficient to find the agreement defective.[248] The court could eventually use the Contemporaneous Mutual Consent Rule to force the progenitors to decide the best use for the pre-embryos, rather than the court.[249] A ruling relying on the Contemporaneous Mutual Consent Rule would likely provide the court with an avenue to avoid addressing the state's interest in potential life through a balancing test and ruling on whether a pre-embryo is a property interest or something else.[250] In the alternative, if the court awarded the pre-embryos to Loeb, he would need a gestational surrogate to use the pre-embryos, assuming state law allowed for gestational surrogacy agreements.[251]

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242. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).
243. *See id.*
244. *See id.*
245. *See id.*
246. *See id.*
247. *See id.*
248. *See In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *20 (Cal. Super. Ct. S.F. Nov. 18, 2015); Cromwell, *supra* note 65.
249. *See A.Z.*, 725 N.E.2d at 1059; J.B. v. M.B., 751 A.2d 614, 620 (N.J. Super. Ct. App. Div. 2000).
250. *See A.Z.*, 725 N.E.2d at 1059; *J.B.*, 751 A.2d at 620; Cromwell, *supra* note 65.
251. *See infra* Part V.B.

V. UTILIZATION OF GESTATIONAL SURROGACY AGREEMENTS TO USE A PRE-EMBRYO

When a court awards the pre-embryos to one of the progenitors (if at all), the progenitor with the pre-embryos needs the ability to use the pre-embryos.[252] Without the ability to use the pre-embryos, the court's ruling is meaningless.[253] The court is likely to award pre-embryos in situations where the progenitor is unable to have a child through traditional biological means, thus likely requiring the use of a surrogate to procreate.[254] Such situations could include an award to a woman whose uterus may be unusable after cancer treatments, or an award of the pre-embryos to a man who is unable to biologically produce sperm.[255]

Similar to IVF, the law has had a difficult time keeping pace with surrogacy used as a procreative assistant.[256] Additionally, the statutes written to address surrogacy contracts are gender specific, and the statutes struggle to address situations involving same-sex couples.[257] Development of surrogacy law should not be left to judicial opinion, which varies from jurisdiction to jurisdiction, but rather the legislature should adopt a law that can be uniformly applied based on intent and not gender.[258]

A. Understanding Surrogacy and Gestation Agreements

There are two types of surrogacy.[259] The first type is called Straight, or Traditional, Surrogacy.[260] A specialist implants the surrogate mother with the donor father's semen, and the surrogate mother carries the resulting fetus to term.[261] The second type of surrogacy is Gestational, or Host, Surrogacy.[262] Gestational Surrogacy is commonly used in combination with

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252. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (reasoning that if a party has no reasonable possibility of achieving parenthood unless they use the pre-embryos, the party desiring to use the pre-embryos should be able to use the pre-embryos).

253. *See infra* Part V.B.

254. *See Davis*, 842 S.W.2d at 604.

255. *See supra* Part II.A.

256. Kira Horstmeyer, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 677 (2007).

257. *See id.*

258. *See id.*

259. *Types of Surrogacy*, SURROGACY UK, http://www.surrogacyuk.org/about_us/types-of-surrogacy [https://perma.cc/MEG2-DKSV] (last visited Jan. 16, 2016).

260. *See id.* Straight Surrogacy is also known as artificial insemination. *Id.*

261. *See* SURROGACY UK, *supra* note 259. Straight surrogacy is not overtly controversial because the genetic material used to create the baby and the people who will become the mother and father are the same people, and the established rules of maternity and paternity apply. *See* Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41, 47 (2001).

262. *See* SURROGACY UK, *supra* note 259.

IVF procedures.[263] A specialist harvests an egg from a donor mother and harvests sperm from a donor father.[264] The egg and the sperm are combined in a laboratory to create a pre-embryo.[265] The surrogate mother is then implanted with the pre-embryo.[266] The egg and the sperm contain all of the DNA that formed the pre-embryo, therefore, the surrogate mother has no genetic relation to the baby that she will carry to term.[267]

The validity of gestational surrogacy agreements vary widely by jurisdiction.[268] Many jurisdictions do not allow individuals to enter into gestational surrogacy agreements.[269] Other jurisdictions require a written agreement between the surrogate mother, her husband (if a husband exists), the intended parents, and the donors if they are different than the intended parents.[270] However, to be binding, the court must validate the gestational surrogacy agreement.[271] Additionally, some jurisdictions allow surrogacy agreements to compensate the surrogate mother, while others do not.[272]

B. The Current State of Community Property States' Gestational Agreement Statutes

Community property states approach gestational surrogacy agreements from four perspectives: (1) the state's statutes do not address gestational surrogacy agreements; (2) the state's statute resembles the language, or the intent of the language, of the Uniform Parentage Act of 1973 (UPA (1973)); (3) the state's statutory language resembles the gender-neutral intent of the donor language of the Uniform Parentage Act of 2002 (UPA (2002)); or (4) the state's statute resembles a hybrid statute that combines the language of the UPA (1973) and the UPA (2002), accounting for the common place use of Assisted Reproductive Technology (ART).[273]

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263. *Id.*
264. *See id.*
265. *See id.*
266. *See id.*
267. *See id.*
268. *See* Horstmeyer, *supra* note 256, at 684.
269. *See* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).
270. *See id.* § 801(a).
271. *See id.* § 801(c), 803.
272. *Id.* § 801(e). *But cf.* N.M. STAT. ANN. § 32A-5-34 (West 2015); WASH. REV. CODE ANN. § 26.26.230 (West 2015) (expressly disallows a valid gestational surrogacy contract that includes compensation). States have enacted "baby-selling" statutes which prohibit compensation in gestational agreements for surrogate mothers to discourage surrogate mothers from entering into surrogacy agreements to profit from giving birth to children. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 9(a) CMT (UNIF. LAW COMM'N 2001).
273. *See* CAL. FAM. CODE § 7613 (West 2015).

1. No Statute Regarding Gestational Surrogacy Agreements

Several states do not have any statutes that address gestational surrogacy agreements.[274] Arizona no longer has a statute that addresses gestational surrogacy agreements because the Arizona Supreme Court found that the statute was unconstitutional.[275] Arizona's statute denied parental rights to the donor parents in the case of a gestational surrogacy arrangement.[276] The court analyzed the statute using a strict scrutiny analysis, and held that Arizona's statute violated the due process clause of the Fourteenth Amendment and infringed on a person's constitutionally protected right to procreate.[277] Following the Arizona Supreme Court's ruling, the legislature has not rewritten the statute, and Arizona has instead remained without a gestational surrogacy agreement statute.[278]

2. Statutes that Track the Uniform Parentage Act (1973)

The UPA (1973) states that a man who donates semen to a woman, who is not his wife, is not the natural father of any children that result from the procedure.[279] In *Vergara*, if the court granted Loeb custody of the pre-embryos and a specialist implanted one of the pre-embryos into a surrogate, then according to the UPA (1973), Loeb would not be the natural father of the child that resulted from the pregnancy.[280] Consequently, Loeb would not have any parental rights to the child because he was not the natural father.[281] The language of the UPA (1973) is gender specific and does not address the parental rights of another woman, a female donor, who is biologically unable to carry the baby to term, or a woman who chooses to have another woman carry the baby to term.[282] Recall that the UPA (1973) was written prior to the first child born as a result of IVF procedures in 1978.[283] The UPA (1973) does not contemplate the significant advances in medical reproductive

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274. Horstmeyer, *supra* note 256, at 684. No statutes specifically regarding requirements of gestational surrogacy agreements were found in Alaska, Arizona, Hawaii, Idaho, and Wisconsin. *See* Ami S. Jaeger, *Charts: Chart 8–Surrogacy and Gestational Carriers*, 33 FAM. L. Q. 908, 908 (2000).

275. *See* ARIZ. REV. STAT. ANN. § 25-218 (2015); Soos v. Super. Ct. Maricopa, 897 P.2d 1356, 1358 (Ariz. Ct. App. 1994).

276. *See Soos*, 897 P.2d at 1360.

277. *See id*.

278. *See* ARIZ. REV. STAT. ANN. § 25-218; *Soos*, 897 P.2d at 1358.

279. *See* WIS. STAT. ANN. § 891.40 (West 2015); UNIF. PARENTAGE ACT § 5(a) (1973), *amended by* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

280. *See* UNIF. PARENTAGE ACT § 5(a) (1973); *supra* Part II.B.

281. *See* UNIF. PARENTAGE ACT § 5(a) (1973); *supra* Part II.B.

282. UNIF. PARENTAGE ACT § 5(a) (1973).

283. *See* Arado, *supra* note 1.

science, and it is unrealistic to use it to address gestational surrogacy scenarios.[284]

3. Statutes That Track the Uniform Parentage Act (2002)

When the UPA (2002) was written, the use of ART was a mainstream procedure.[285] The UPA (2002) removed some of the gender-specific language, but the distinguishing difference from the UPA (1973) was the inclusion and contemplation of ART and gestational surrogacy agreements.[286] The prospective gestational mother, her husband (if she is married), the donor or donors, and the intended parents must enter into a written agreement.[287] The written agreement requires that the surrogate mother agree to the pregnancy, the gestational mother and her husband (if any) relinquish all parental rights to the child, and that the intended parents become the parents of the child.[288] However, the agreement cannot limit in any way the gestational surrogate's ability to make medical decisions to safeguard her health or the health of the fetus.[289] Several states have modeled their gestational agreement statutes after the UPA (2002).[290]

4. Statutes That Exist as a Hybrid of the Uniform Parentage Act (1973) and the Uniform Parentage Act (2002)

California uses a hybrid of the UPA (1973) and UPA (2002).[291] The result is a comprehensive approach to assisted reproductive technologies.[292] The California statute does not separate artificial insemination from surrogacy, but instead, it intentionally creates a link between all ARTs.[293] The downside to the UPA (1973) is that it fails to consider most ART

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284. *See* UNIF. PARENTAGE ACT § 5 CMT (1973).

285. *See Timeline: The History of in Vitro Fertilization*, PBS: THE AMERICAN EXPERIENCE (2006), http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/2/[https://perma.cc/BF8V-WZYP].

286. *See* NEV. REV. STAT. § 126.710 (2015); UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

287. *See* UNIF. PARENTAGE ACT § 801(a) (2002).

288. *See* TEX. FAM. CODE ANN. § 160.754(a) (West 2015). Texas added a condition that the intended parents must be married to each other, which would have limited intended parents to married, heterosexual couples prior to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (granting same-sex couples the right to marry). *See* TEX. FAM. CODE ANN. § 160.754(b) (West 2015); UNIF. PARENTAGE ACT § 801(a) (UNIF. LAW COMM'N 2002).

289. *See* UNIF. PARENTAGE ACT § 801(f) (2002).

290. *See* NEV. REV. STAT. § 126.750 (2015).

291. *See* CAL. FAM. CODE § 7613 (West 2015).

292. *See id.*

293. *See id.*

advancements post-artificial insemination.[294] The downside of the UPA (2002) is that section 801 only addresses surrogacy agreements.[295] The hybrid statute attempts to address both together, similar to the menu of ART options a doctor's office would present to a patient.[296] However, California's hybrid statute does not remove the necessity for a statute that specifically outlines the minimum requirements for gestational surrogacy agreements.[297] Bringing all of the ART statutes into one provision helps to bridge the gap that currently exists between the disposition of pre-embryos and gestational surrogacy agreements.[298]

VI. NEXUS BETWEEN PRE-EMBRYO AND GESTATIONAL SURROGACY AGREEMENTS

A. Bridging the Gap Between the Division of Pre-Embryos and the Current State of Gestational Surrogacy Agreements

Our society is a transitory society where people have the ability to move great distances, moving between states at a greater frequency than any other generation in the history of the United States.[299] The greatest possibility for large moves can occur after finishing college, near the time when young couples are beginning to plan a family.[300] In 2003, approximately 4 out of 5 people living in the United States had flown on an airplane at least once in their life.[301] In *Lee*, Findley and Lee had a bi-coastal relationship, and in *Vergara*, Loeb and Vergara also lived on opposite sides of the United States.[302] In 2014, the average tenure of employment was 4.6 years.[303] The average employment tenure for someone between 25 and 34 years old was

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294. *See* UNIF. PARENTAGE ACT § 5 (1973), amended by UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

295. *See* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002).

296. *See* CAL. FAM. CODE § 7613 (West 2015).

297. *See infra* Appendices A, D.

298. *See infra* Part VI.A.

299. *See generally Employee Tenure Summary*, U. S. DEP'T OF LAB.: BUREAU OF LAB. STATS. (Sept. 18, 2014), http://www.bls.gov/news.release/tenure.nr0.htm [https://perma.cc/J6TC-BDJA] (reporting the current United States labor force statistics); *Airline Passenger Travel*, U.S. DEP'T OF TRANSP.: BUREAU OF TRANSP. STATS., (Sept. 2003), https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/omnistats/volume_03_issue_03/pdf/entire.pdf [https://perma.cc/5GAW-NPAA] (reporting statistics of airline travel in the United States).

300. *See* PAUL TAYLOR ET AL, AMERICAN MOBILITY: WHO MOVES? WHO STAYS PUT? WHERE'S HOME?, 4 (Pew Research Ctr. December 29, 2008). 77% of college graduates have changed communities at least once; 44% of people who moved chose their current community because of a business opportunity; 36% of people who moved did so because the new community was a good place to raise children. *Id.*

301. *See Airline Passenger Travel*, *supra* note 299.

302. *See In re* Marriage of Findley v. Lee, No. FDI3780539, 2015 WL 7295217, at *3 (Cal. Super. Ct. S.F. Nov. 18, 2015); *supra* Part II.A–B.

303. *See Employee Tenure Summary*, *supra* note 299.

three years.[304] On average, a person between 25 and 34 years old will likely have ten places of employment over a thirty-year career.[305] The United States population continues to shift to the south and the west as more people move to community property states.[306] These statistics point to the reality that consistency and uniformity in family planning statutes across community property states is crucial to the transitory population of the United States.[307] Legislatures need to enact consistent statutory schemes on how to handle IVF agreements and gestational surrogacy agreements resulting from IVF.[308]

B. Proposed Uniform Legislation

A court has no desire to dictate how progenitors intended to dispose of their pre-embryos upon the dissolution of their relationship.[309] Nor do courts want to interpret the tea leaves that make up the existing IVF and surrogacy agreement jurisprudence coupled with the occasional state statute.[310] Ultimately, courts want to grant possession of the pre-embryos to the person who the parties intended to have possession of the pre-embryos.[311] The contractual approach, which allows the previously signed contracts to bind the parties, clearly states the progenitor's intent.[312] As stated in *Davis*, as long as the progenitors have the opportunity to revise their choices regarding how to dispose of the pre-embryos upon death, divorce, or separation, the agreement provides the clearest indicia of the progenitors' intentions.[313] Legislatures in community property states should enact three statutes to remedy the dilemma demonstrated in *Findley v. Lee* and *Loeb v. Vergara*.[314]

1. Pre-Embryos Included in an Equitable Division of the Assets

The first statute seeks to accomplish three objectives: (1) remove any ambiguity regarding whether courts should enforce IVF agreements as contracts; (2) remove any ambiguity regarding what kind of interest a court

304. *See id.*

305. *See generally id.* (reporting the current United States labor force statistics).

306. *See By the Grid: Population Shift to the West and South*, U. S. CENSUS BUREAU (Oct. 18 2012), https://www.census.gov/dataviz/visualizations/024/ [https://perma.cc/6R3R-DPSV].

307. *See supra* Part II. *See generally Employee Tenure Summary*, *supra* note 299 (reporting the current United States labor force statistics); *Airline Passenger Travel*, *supra* note 299 (reporting statistics of airline travel in the United States).

308. *See infra* Appendices A–F (appendices A–C propose additions and revisions the Uniform Parentage Act, and appendices D–F propose additions and revisions to the Texas Family Code).

309. *See supra* Part III.E.

310. *See supra* Part III.E.

311. *See supra* Part III.E.

312. *See supra* Part IV.A.

313. *See supra* Part III.A.

314. *See infra* Appendices A–C.

should give a pre-embryo while providing flexibility to the court in how the court values a pre-embryo in an equitable division of the assets; and (3) create an intentional connection between awards from courts of pre-embryos and gestational surrogacy agreements.[315] This statute will provide clarity for progenitors when they sign the IVF agreements, and it will provide clarity to the courts when trying to equitably divide community property.[316]

2. In Vitro Fertilization Agreement Requirements and Standards

The second statute attempts to clearly identify the minimum requirements and standards of an IVF agreement.[317] The intent of this statute is to remove any ambiguity that progenitors and courts have experienced from IVF agreements in the past.[318] Similar to California's IVF agreement requirement statute, the proposed statute attempts to standardize the minimum choices available to progenitors when deciding how to dispose of pre-embryos in certain circumstances.[319] Recognizing that disposing of pre-embryos at the point in the process when couples are hoping to have pre-embryos could require couples to make a choice that is emotionally disconnected from their current status.[320] However, the goal is to reduce confusion and misunderstanding by standardizing the portion of the agreement concerning the disposition of pre-embryos.[321]

3. Gestational Surrogacy Agreement Requirements and Standards

Similar to the intent of the IVF Agreement statute above, the Gestational Surrogacy Agreement Standards statute seeks to standardize some of the requirements for gestational surrogacy agreements.[322] The language of the proposed statute is similar to the UPA (2002), but it also accounts for recent ART advances and the potential increase of same-sex couples taking advantage of ART procedures.[323]

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315. *See infra* Appendix A (recommends additional statute UNIF. PARENTAGE ACT § 708); *infra* Appendix D (recommends additional statute TEX. FAM. CODE § 3.105).

316. *See infra* Appendix A, D.

317. *See infra* Appendix B (recommends additional statute UNIF. PARENTAGE ACT § 810); *infra* Appendix E (recommends additional statute TEX. FAM. CODE § 160.704).

318. *See infra* Appendices B, E.

319. *See infra* Appendices B, E. *See generally* CAL. HEALTH & SAFETY CODE § 125315 (West 2015) (providing the foundational language for this statute).

320. *See In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003).

321. *See infra* Appendices B, E.

322. *See infra* Appendix C (recommending revised statute UNIF. PARENTAGE ACT § 801); *infra* Appendix F (recommending revised statute TEX. FAM. CODE § 160.754).

323. *See generally* UNIF. PARENTAGE ACT § 801–03 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute); CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute).

C. How the Proposed Statutes Would Impact the Current Cases

1. In re Marriage of Findley v. Lee

In *Lee*, the proposed statutes would have prevented Lee from obtaining the pre-embryos.[324] The IVF agreement would be held as binding under the statute, and the UCSF would thaw and discard the pre-embryos.[325] Alternatively, Lee would potentially need a surrogate if the California Court of Appeals or the California Supreme Court granted her the pre-embryos.[326] Her cancer treatments and her current age could possibly impact her ability to have a child.[327] However, if Lee needed a surrogate, under the proposed uniform statute, she could obtain a surrogate to use the pre-embryos that the court awarded her.[328]

2. Loeb v. Vergara

In *Vergara*, the proposed statutes would likely prohibit Loeb from gaining custody of the pre-embryos.[329] First, the proposed statutes would force the court to only consider Loeb's property interest in the pre-embryos.[330] Second, if the court found that the agreement was invalid because it failed to track the language of the statute, then the court would apply the Contemporaneous Mutual Consent Rule.[331] In this case, Loeb will never gain Vergara's consent.[332] The medical facility could thaw and discard the pre-embryos after meeting the statute's time limit.[333] In the alternative, if the court awarded Loeb the pre-embryos, he could acquire a surrogate.[334] Under the proposed statute, Loeb could obtain a surrogate and use the pre-embryos to attempt to have children.[335] Loeb and Lee should benefit from the lack of ambiguity of the proposed statutes, and the court should benefit from the lack of ambiguity when applying the proposed statutes.[336]

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324. *See supra* Part VI.C.1.
325. *See supra* Part VI.C.1.
326. *See In re* Marriage of Findley v. Lee, No. FDI13780539, 2015 WL 7295217, at *10 (Cal. Super. Ct. S.F. Nov. 18, 2015).
327. *See infra* Appendix C.
328. *See supra* Part IV.B.3. The proposed statute would have a greater impact if Lee did not live in California because the proposed statute is significantly based on the California statute concerning gestational surrogacy agreements. *See generally* CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute).
329. *See infra* Appendices A–B.
330. *See infra* Appendix A(F).
331. *See supra* Part IV.A.
332. *See supra* Part II.B.
333. *See infra* Appendix B(C)(3).
334. *See supra* Part V.
335. *See infra* Appendix A(G).
336. *See infra* Appendices A–C.

VII. CONCLUSION

As a result of the ingenuity of IVF, courts struggle to determine whether a progenitor should have an interest in the pre-embryo after dissolution of the relationship.[337] Courts also struggle to decide which progenitor's interest should control when deciding whether either party should receive pre-embryos that resulted from IVF treatments.[338] Some earlier courts have held that previously agreed upon IVF agreements should control.[339] Other courts hold that IVF agreements are unenforceable because they are against public policy, in the same manner that makes contracts that force a person to enter a marriage or give up a child for adoption unenforceable.[340] Typically, when faced with this dilemma, courts usually require the progenitors to contemporaneously agree on how to dispose of the pre-embryos.[341] If the parties fail to agree, typically the result is that the pre-embryos remain cryogenically frozen at the hospital indefinitely.[342] Once the court decides whether to award a progenitor any pre-embryos, the court must then determine what kind of interest a person has in the pre-embryos.[343] To date, this important decision has resulted in a wide variety of outcomes and even more variations of how to interpret the validity and enforceability of an IVF agreement.[344] In order to provide courts with uniform guidelines, state legislatures should adopt the three pieces of legislation proposed in this comment.[345] By doing so, state legislators will provide consistency and continuity for couples to plan a family without having to worry about whether or not an agreement they signed prior to undergoing IVF is valid if the couple were to later divorce or separate and divide their assets.[346]

The reality is that science will continue to outpace the law.[347] Scientists are currently working on utilizing stem cells to create eggs and sperm and using the newly created eggs and sperm to create a pre-embryo.[348] This

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337. *See supra* Part III.E.

338. *See supra* Part III.E.

339. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000); J.B. v. M.B., 751 A.2d 614, 620 (N.J. Super. Ct. App. Div. 2000).

340. *See J.B.*, 751 A.2d at 620.

341. *See A.Z.*, 725 N.E.2d at 1059; *J.B.*, 751 A.2d at 620; *In re* Marriage of Witten, 672 N.W.2d 768 at 783 (Iowa 2003); Coleman, *supra* note 183, at 80–86.

342. *See Witten*, 672 N.W.2d at 783.

343. *See supra* Part IV.B.

344. *See supra* Part III.E.

345. *See infra* Appendices A–C. Texas versions of the proposed statutes are included in this comment. *See infra* Appendices D–F.

346. *See supra* Part VI.

347. *See supra* Part I.

348. *See* Colin Jeffrey, *Stem Cell Breakthrough May Allow Same-Gender Couples to Create Babies*, GIZMAG (Feb. 23, 2015), http://www.gizmag.com/stem-cell-skin-cells-embryos/36221/ [https://perma.cc/62CF-69Y8]; Ian Murnaghan, *Stem Cells and Same-Sex Reproduction*, EXPLORE STEM CELLS (Dec.

advancement will allow another group of people who have previously been unable to have biological children to procreate, including barren women, sterile men, and gay couples.[349]

Each day, the percentage of the American population affected by the patchwork quilt of statutes and judicial opinions that govern IVF agreements and gestational surrogacy agreements grows.[350] Therefore, the mobility of the American population combined with the swift advancements of reproductive technology requires that state legislatures respond by passing the proposed uniform statutes.[351]

21, 2015), http://www.explorestemcells.co.uk/stem-cells-same-sex-reproduction.html [https://perma.cc/L22Y-P7RZ].

349. *See* Jeffrey, *supra* note 348; Murnaghan, *supra* note 348.

350. *See supra* Part IV.B.2.

351. *See infra* Appendices A–F.

APPENDIX A *Proposed Uniform Parentage Act § 708: Embryos Included in an Equitable Division of the Assets*

(A) Definitions:

(1) Assisted Reproductive Technology Procedures: any medical procedure that assists with human procreation.[352]

(2) Embryo: any product resulting from assisted reproduction services, including, but not limited to embryos, pre-embryos, or zygotes.[353]

(3) In Vitro Fertilization (IVF) Agreement: any agreement that meets, at a minimum, the statutory requirements of the Uniform Parentage Act § 810.[354]

(B) This statute shall apply to any biological product associated with Assisted Reproductive Technology procedures.[355]

(C) A previously signed IVF agreement shall bind parties regarding the disposition of assisted reproduction products, including, but not limited to, embryos, pre-embryos, and zygotes in the event of:

(1) death of one or both of the parties;

(2) separation or divorce of the parties; or

(3) any other eventuality listed in the agreement.[356]

(D) In order to be a valid, binding contractual agreement, all IVF agreements must meet the minimum statutory requirements in the Uniform Parentage Act § 810.[357]

(E) In an equitable division of the assets, an embryo shall only be considered by the court as a property interest.[358]

(F) A court may value an embryo in a reasonable manner when included in an equitable division of the assets.[359]

(G) A party awarded embryos by the court resulting from an equitable division of the assets, and unable to biologically have children relying solely on their own body, shall be permitted to avail themselves of a gestational surrogate subject to the standards and requirements of gestational surrogacy agreements in the Uniform Parentage Act § 801.[360]

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352. *See generally supra* Part I.A (providing the medical context for this definition).

353. *See generally supra* Part I.A (providing the medical context for this definition).

354. *See infra* Appendix B. *See generally supra* Part I.A (providing the medical context for this definition).

355. *See supra* Part III.

356. *See supra* Part III.

357. *See infra* Appendix B.

358. *See generally supra* Part II.B (arguing that the court should treat an embryo as having a life interest instead of a property interest).

359. *See supra* Part IV.

360. *See supra* Part V; *infra* Appendix C.

APPENDIX B *Proposed Uniform Parentage Act § 810: In Vitro Fertilization Agreement Requirements and Standards*

(A) Definitions:

(1) Embryo: any product resulting from assisted reproduction services, including, but not limited to, embryos, pre-embryos, or zygotes.[361]

(2) Healthcare Provider: a healthcare provider is any physician, surgeon, nurse practitioner, or other licensed medical professional that provides assisted reproductive services.[362]

(3) In Vitro Fertilization (IVF) Agreement: any agreement that meets, at a minimum, the statutory requirements of this section.[363]

(4) Medical Storage Facility: any licensed medical facility that stores cryogenically frozen embryos.[364]

(B) "A healthcare provider delivering fertility treatment shall provide his or her patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any [. . .] remaining embryos following the fertility treatment. The failure to provide this information to a patient constitutes unprofessional conduct."[365]

(C) A healthcare provider providing fertility treatment information, per subsection (B), shall provide a written IVF Agreement to each partner or the individual without a partner. This form sets forth advanced written directives regarding the disposition of embryos, and this form is required to:

(1) Specify the name, address, phone number, and other relevant contact information of the patient and spouse, if any;

(2) Specify the name, address, phone number, and other relevant contact information for the medical facility providing assisted reproduction services;

(3) Specify a time limit on the storage of embryos, not to exceed the greater length of time of 20 years or the first party to reach 45 years of age;

(4) Include the following language in a conspicuous position at the top of the form under the name and contact information:[366]

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361. *See generally supra* Part I.A (providing the medical context for this definition).

362. *See generally supra* Part I.A (providing the medical context for this definition).

363. *See generally supra* Part I.A (providing the medical context for this definition).

364. *See generally supra* Part I.A (providing the medical context for this definition).

365. *See generally* CAL. HEALTH & SAFETY CODE § 125315 (West 2015) (providing the foundational language for this statute).

366. *See generally id.* (providing the foundational language for this statute).

I, _____ (patient) and _____ (spouse, if any) consent to assisted reproduction.[367] I understand, and it has been clearly explained to me by my healthcare provider, that this form is a legally binding contract, enforceable in a court of law.[368]

I understand that I am able to alter any answers to the following questions at any time prior to any of the contemplated events in the questions below by providing notice to my healthcare provider.[369]

I understand that I will receive confirmation of my revised in vitro fertilization agreement, acknowledging the changes from my healthcare provider within 10 business days of my change.[370]

I understand that any changes I make to the in vitro fertilization agreement become effective upon receipt by my healthcare provider. In the event that my partner and I do not agree on the method of disposition of the embryos, and subsequent to one of the contemplated events in one of the questions below, the medical facility holding my embryos will thaw and discard any remaining embryos following 180 days of one of the contemplated events barring a court order to the contrary.[371]

(5) Include, at a minimum, the following questions regarding the disposition of embryos:

(a) In the event of the death of either partner, the embryos shall be disposed of by one of the following actions:[372]

(i) Made available to the living partner;

(ii) Donation for research purposes;

(iii) Thawed with no further action taken;

(iv) Donation to another couple or individual; or,

(v) Other disposition that is clearly stated: _____.

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367. *See generally id.* (providing the foundational language for this statute).

368. *See generally supra* Part III (identifying problems courts had with IVF agreements).

369. *See generally supra* Part III (identifying problems courts had with IVF agreements).

370. *See generally supra* Part III (identifying problems courts had with IVF agreements).

371. *See generally* CAL. HEALTH & SAFETY CODE § 125315 (West 2015) (providing the foundational language for this statute).

372. *See generally id.* (providing the foundational language for this statute).

(b) In the event of the death of both partners or the death of a patient without a partner, the embryos shall be disposed of by one of the following actions:[373]

(i) Donation for research purposes;

(ii) Thawed with no further action taken;

(iii) Donation to another couple or individual; or,

(iv) Other disposition that is clearly stated: _____.

(c) In the event of separation or divorce of the partners, the embryos shall be disposed of by one of the following actions:[374]

(i) Made available to the patient;

(ii) Made available to the spouse of the patient;

(iii) Donation for research purposes;

(iv) Thawed with no further action taken;

(v) Donation to another couple or individual; or,

(vi) Other disposition that is clearly stated: _____.

(d) In the event of the partners' decision or a patient's decision who is without a partner, to abandon the embryos by request or a failure to pay storage fees, the embryos shall be disposed of by one of the following actions:[375]

(i) Donation for research purposes;

(ii) Thawed with no further action taken;

(iii) Donation to another couple or individual; or,

(iv) Other disposition that is clearly stated.

(D) In the event that one of the scenarios listed in subsection (C) occurs, if the beneficiary party fails to provide written acceptance of the embryos to the medical facility within 365 days of the event, the medical storage facility will thaw the embryos with no further action, unless otherwise instructed by the court.[376]

(E) A healthcare provider delivering fertility treatment shall obtain written, informed consent from each partner, or the individual without a partner, who elects to donate remaining embryos after fertility treatments for research, and shall convey all of the following to the individual:[377]

(1) A statement that the early human embryos will be used to derive human pluripotent stem cells for research and that the cells may be used, at some future time, for human transplantation research;[378]

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373. *See generally id.* (providing the foundational language for this statute).
374. *See generally id.* (providing the foundational language for this statute).
375. *See generally id.* (providing the foundational language for this statute).
376. *See generally id.* (providing the foundational language for this statute).
377. *See generally id.* (providing the foundational language for this statute).
378. *See generally id.* (providing the foundational language for this statute).

(2) A statement that all identifiers associated with the embryos will be removed prior to the derivation of human pluripotent stem cells;[379]
(3) A statement that donors will not receive any information about subsequent testing on the embryo or the derived human pluripotent cells;[380]
(4) A statement that derived cells or cell lines, with all identifiers removed, may be kept for many years;[381]
(5) Disclosure of the possibility that the donated material may have commercial potential, and a statement that the donor will not receive financial or any other benefits from any future commercial development;[382]
(6) A statement that the human pluripotent stem cell research is not intended to provide direct medical benefit to the donor; and,[383]
(7) A statement that early human embryos donated will not be transferred to a woman's uterus, will not survive the human pluripotent stem cell derivation process, and will be handled respectfully, as is appropriate for all human tissue used in research.[384]

379. *See generally id.* (providing the foundational language for this statute).
380. *See generally id.* (providing the foundational language for this statute).
381. *See generally id.* (providing the foundational language for this statute).
382. *See generally id.* (providing the foundational language for this statute).
383. *See generally id.* (providing the foundational language for this statute).
384. *See generally id.* (providing the foundational language for this statute).

APPENDIX C *Proposed Revised Uniform Parentage Act § 801: Gestational Surrogacy Agreement Requirements and Standards*

(A) A prospective gestational mother, her ~~husband~~ spouse if she is married, or other quasi-marriage status including domestic partnership or civil union, a donor or the donors, and each ~~the~~ intended parent~~s~~ may enter into a written agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her ~~husband~~ spouse if she is married, and each ~~the~~ donor~~s~~ other than the intended parents, if applicable, relinquish all parental rights and duties with respect to ~~as the parents of~~ a child conceived through assisted reproduction; ~~and~~

(3) the intended parents become the parents of the child~~.~~; and

(4) the gestational mother and each intended parent agree to exchange through the period covered by the agreement all relevant information regarding the health of the gestational mother and each intended parent.[385]

(B) The ~~man and the woman who are the~~ intended parent~~s~~ must ~~both~~ be a party ~~parties~~ to the gestational agreement.[386]

(C) A gestational agreement is enforceable only if validated as provided in Section 803.[387]

(D) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.[388]

(E) A gestational agreement may provide for payment of consideration.[389]

(F) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryos or fetus.[390]

(G) A donor of semen or ova provided to a licensed physician and surgeon, to a licensed sperm bank, or licensed egg donation facility for use in assisted reproduction:

(1) is treated in law as if he or she were not the natural parent of a child conceived unless otherwise agreed to in writing signed by the donor and the intended parent prior to conception of the child, or[391]

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385. *See* UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute).

386. *See id*. (providing the foundational language for this statute).

387. *See id*. (providing the foundational language for this statute).

388. *See id*. (providing the foundational language for this statute).

389. *See id*. (providing the foundational language for this statute).

390. *See id*. (providing the foundational language for this statute).

391. *See generally* CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute).

(2) The donor and the woman agreed in a writing signed prior to conception that the donor would not be a parent, or [392]

(3) A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent.[393]

(H) if the donor of semen or ova provided to a licensed physician, sperm bank, or licensed egg donation facility and is provided to the intended parent(s) anonymously, then the donor(s) are not required to be parties to a gestational agreement and is treated in law as if he and she were not the natural parent(s) of the child conceived.[394]

392. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

393. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

394. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

APPENDIX D *Proposed TEX. FAM. CODE § 3.105: Disposition of Embryos in an Equitable Division of the Assets*

(A) Definitions:

(1) Assisted Reproductive Technology Procedures: any medical procedure that assists with human procreation.[395]

(2) Embryo: any product resulting from assisted reproduction services, including, but not limited to, embryos, pre-embryos, or zygotes.[396]

(3) In Vitro Fertilization (IVF) Agreement: any agreement that meets, at a minimum, the statutory requirements of TEX. FAM. CODE § 160.704.[397]

(4) Medical Storage Facility: any licensed medical facility that stores cryogenically frozen embryos.[398]

(B) This statute shall apply to any biological product associated with Assisted Reproductive Technology procedures.[399]

(C) A previously signed IVF agreement shall bind parties regarding the disposition of assisted reproduction products, including, but not limited to, embryos, pre-embryos, and zygotes in the event of:

(1) death of one or both of the parties;

(2) separation or divorce of the parties; or

(3) any other eventuality listed in the agreement.[400]

(D) In order to be a valid, binding contractual agreement, all IVF agreements must meet the minimum statutory requirements in TEX. FAM. CODE § 160.704.[401]

(E) In an equitable division of the assets, an embryo shall only be considered by the court as a property interest.[402]

(F) A court may value an embryo in a reasonable manner when included in an equitable division of the assets.[403]

(G) A party awarded embryos by the court resulting from an equitable division of the assets, and unable to biologically have children relying solely on their own body, shall be permitted to avail themselves of a gestational surrogate subject to the laws concerning gestational surrogacy agreements in TEX. FAM. CODE § 160.754.[404]

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395. *See generally supra* Part I.A (providing the medical contexts of this definition).

396. *See generally supra* Part I.A (providing the medical contexts of this definition).

397. *See generally supra* Part I.A (providing the medical contexts of this definition).

398. *See generally supra* Part I.A (providing the medical context for this definition).

399. *See supra* Part III.

400. *See supra* Part III.

401. *See infra* Appendix E.

402. *See generally supra* Part II.B (arguing that the court should treat an embryo as having a life interest instead of a property interest).

403. *See supra* Part IV.B.

404. *See supra* Part V.B; *infra* Appendix F.

APPENDIX E *Proposed Revised TEX. FAM. CODE § 160.704: In Vitro Fertilization Agreement Requirements and Standards*

~~(a) Consent by a married woman to assisted reproduction must be in a record signed by the woman and her husband and kept by a licensed physician. This requirement does not apply to the donation of eggs by a married woman for assisted reproduction by another woman.~~

(A) Definitions:

(1) Embryo: any product resulting from assisted reproduction services, including, but not limited to, embryos, pre-embryos, or zygotes.[405]

(2) Healthcare Provider: a healthcare provider is any physician, surgeon, nurse practitioner, or other licensed medical professional that provides assisted reproductive services.[406]

(3) In Vitro Fertilization (IVF) Agreement: any agreement that meets, at a minimum, the statutory requirements of this section.[407]

(4) Medical Storage Facility: any licensed medical facility that stores cryogenically frozen embryos.[408]

~~(b) Failure by the husband to sign a consent required by Subsection (a) before or after the birth of the child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.~~

(B) A healthcare provider delivering fertility treatment shall provide his or her patient with timely, relevant, and appropriate information to allow the individual to make an informed and voluntary choice regarding the disposition of any remaining embryos following the fertility treatment. The failure to provide this information to a patient constitutes unprofessional conduct.[409]

(C) A healthcare provider providing fertility treatment information, per subsection (B) shall provide a written IVF Agreement to each partner or the individual without a partner. This form sets forth advanced written directives regarding the disposition of embryos, and this form is required to:

(1) Specify the name, address, phone number, and other relevant contact information of the patient and spouse, if any;

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405. *See generally supra* Part I.A (providing the medical context for this definition).

406. *See generally supra* Part I.A (providing the medical context for this definition).

407. *See generally supra* Part I.A (providing the medical context for this definition).

408. *See generally supra* Part I.A (providing the medical context for this definition).

409. *See generally* CAL. HEALTH & SAFETY CODE § 125315 (West 2015) (providing the foundational language for this statute).

(2) Specify the name, address, phone number, and other relevant contact information for the medical facility providing assisted reproduction services;
(3) Specify a time limit on the storage of embryos, not to exceed the greater length of time of 20 years or the first party to reach 45 years of age;
(4) Include the following language in a conspicuous position at the top of the form under the name and contact information:[410]

> I, _____ (patient) and assisted reproduction. I understand, and it has been clearly explained to me by my healthcare provider, that this form is a legally binding contract, enforceable in a court of law.[411]
>
> I understand that I am able to alter any answers to the following questions at any time prior to any of the contemplated events in the questions below by providing notice to my healthcare provider.[412]
>
> I understand that I will receive confirmation of my revised in vitro fertilization agreement, acknowledging the changes from my healthcare provider within 10 business days of my change.[413]
>
> I understand that any changes I make to the in vitro fertilization agreement become effective upon receipt by my healthcare provider. In the event that my partner and I do not agree on the method of disposition of the embryos, and subsequent to one of the contemplated events in one of the questions below, the medical facility holding my embryos will thaw and discard any remaining embryos following 180 days of one of the contemplated events barring a court order to the contrary.[414]

(5) Include, at a minimum, the following questions regarding the disposition of embryos:

> (a) In the event of the death of either partner, the embryos shall be disposed of by one of the following actions:[415]

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410. *See generally id.* (providing the foundational language for this statute).
411. *See generally supra* Parts II–III (identifying problems courts had with IVF agreements).
412. *See generally supra* Parts II–III (identifying problems courts had with IVF agreements).
413. *See generally supra* Parts II–III (identifying problems courts had with IVF agreements).
414. *See generally supra* Parts II–III (identifying problems courts had with IVF agreements).
415. *See generally* CAL. HEALTH & SAFETY CODE § 125315 (West 2015) (providing the foundational language for this statute).

(i) Made available to the living partner;
(ii) Donation for research purposes;
(iii) Thawed with no further action taken;
(iv) Donation to another couple or individual; or
(v) Other disposition that is clearly stated: _____.

(b) In the event of the death of both partners or the death of a patient without a partner, the embryos shall be disposed of by one of the following actions:[416]

(i) Donation for research purpose;
(ii) Thawed with no further action taken;
(iii) Donation to another couple or individual; or
(iv) Other disposition that is clearly stated: _____.

(c) In the event of separation or divorce of the partners, the embryos shall be disposed of by one of the following actions:[417]

(i) Made available to the patient;
(ii) Made available to the spouse of the patient;
(iii) Donation for research purposes;
(iv) Thawed with no further action taken;
(v) Donation to another couple or individual; or
(vi) Other disposition that is clearly stated: _____.

(d) In the event of the partners' decision or a patient's decision who is without a partner, to abandon the embryos by request or a failure to pay storage fees, the embryos shall be disposed of by one of the following actions:[418]

(i) Donation for research purposes;
(ii) Thawed with no further action taken; or
(iii) Donation to another couple or individual.
(iv) Other disposition that is clearly stated.

(D) In the event that one of the scenarios listed in subsection (C) occurs, if the beneficiary party fails to provide written acceptance of the embryos to the medical facility within 365 days of the event, the medical storage facility will thaw the embryos with no further action, unless otherwise instructed by the court.[419]

(E) A healthcare provider delivering fertility treatment shall obtain written, informed consent from each partner, or the individual without a partner, who elects to donate remaining embryos after fertility treatments for research, and shall convey all of the following to the individual:[420]

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416. *See generally id.* (providing the foundational language for this statute).
417. *See generally id.* (providing the foundational language for this statute).
418. *See id.* (providing the foundational language for this statute).
419. *See generally id.* (providing the foundational language for this statute).
420. *See generally id.* (providing the foundational language for this statute).

(1) A statement that the early human embryos will be used to derive human pluripotent stem cells for research and that the cells may be used, at some future time, for human transplantation research;[421]
(2) A statement that all identifiers associated with the embryos will be removed prior to the derivation of human pluripotent stem cells;[422]
(3) A statement that donors will not receive any information about subsequent testing on the embryo or the derived human pluripotent cells;[423]
(4) A statement that derived cells or cell lines, with all identifiers removed, may be kept for many years;[424]
(5) Disclosure of the possibility that the donated material may have commercial potential, and a statement that the donor will not receive financial or any other benefits from any future commercial development;[425]
(6) A statement that the human pluripotent stem cell research is not intended to provide direct medical benefit to the donor; and[426]
(7) A statement that early human embryos donated will not be transferred to a woman's uterus, will not survive the human pluripotent stem cell derivation process, and will be handled respectfully, as is appropriate for all human tissue used in research.[427]

421. *See id*. (providing the foundational language for this statute).
422. *See id*. (providing the foundational language for this statute).
423. *See id*. (providing the foundational language for this statute).
424. *See id*. (providing the foundational language for this statute).
425. *See id*. (providing the foundational language for this statute).
426. *See id*. (providing the foundational language for this statute).
427. *See id*. (providing the foundational language for this statute).

APPENDIX F *Proposed Revised TEX. FAM. CODE § 160.754: Gestational Surrogacy Agreement Requirements and Standards*

(a) A prospective gestational mother, her ~~husband~~ spouse if she is married, or other quasi-marriage status, including domestic partnership or civil union, ~~each~~ a donor or the donors, and each intended parent may enter into a written agreement providing that:

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her ~~husband~~ spouse if she is married, and each donor other than the intended parents, if applicable, relinquish all parental rights and duties with respect to a child conceived through assisted reproduction;

(3) the intended parents will be the parents of the child; and

(4) the gestational mother and each intended parent agree to exchange throughout the period covered by the agreement all relevant information regarding the health of the gestational mother and each intended parent.[428]

(b) ~~The intended parents must be married to each other.~~ Each intended parent must be a party to the gestational agreement.[429]

(c) ~~The gestational agreement must require that the eggs used in the assisted reproduction procedure be retrieved from an intended parent or a donor. The gestational mother's eggs may not be used in the assisted reproduction procedure.~~ A gestational agreement is enforceable only if validated as by a court if:[430]

(1) The following residence requirements have been satisfied and the parties have submitted to the jurisdiction of the court:[431]

(A) the intended parent(s) have been residents of the State of Texas for at least 90 days;[432]

(B) the prospective gestational mother's spouse, if she is married per (a), is joined in the proceeding; and[433]

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428. *See* TEX. FAM. CODE § 160.754 (West 2015) (providing the foundational language for this statute).

429. *See id.* (providing the foundational language for this statute).

430. *See generally* CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute).

431. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

432. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

433. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

(C) a copy of the gestational agreement is attached to the petition.[434]

(2) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents, and the intended parents meet the standards of suitability applicable to adoptive parents;[435]

(3) all parties have voluntarily entered into the agreement and understand its terms;[436]

(4) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and[437]

(5) the consideration or compensation paid to the prospective gestational mother is reasonable.[438]

(d) The gestational agreement must state that the physician who will perform the assisted reproduction procedure as provided by the agreement has informed the parties to the agreement of:

(1) the rate of successful conceptions and births attributable to the procedure, including the most recent published outcome statistics of the procedure at the facility at which it will be performed;

(2) the potential for and risks associated with the implantation of multiple embryos and consequent multiple births resulting from the procedure;

(3) the nature of and expenses related to the procedure;

(4) the health risks associated with, as applicable, fertility drugs used in the procedure, egg retrieval procedures, and egg or embryo transfer procedures; and

(5) reasonably foreseeable psychological effects resulting from the procedure.[439]

(e) The parties to a gestational agreement must enter into the agreement before the 14th day preceding the date the transfer of eggs, sperm, or

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434. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

435. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

436. *See* CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute).

437. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

438. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

439. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

embryos to the gestational mother occurs for the purpose of conception or implantation.[440]

(f) A gestational agreement does not apply to the birth of a child conceived by means of sexual intercourse.[441]

(g) A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.[442]

(h) A donor of semen or ova provided to a licensed physician and surgeon, to a licensed sperm bank, or licensed egg donation facility for use in assisted reproduction:

(1) is treated in law as if he or she were not the natural parent of a child conceived unless otherwise agreed to in writing signed by the donor and the intended parent prior to conception of the child; [443]

(2) The donor and the woman agreed in a writing signed prior to conception that the donor would not be a parent; or [444]

(3) A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent.[445]

(i) if the donor of semen or ova provided to a licensed physician, sperm bank, or licensed egg donation facility and is provided to the intended parent(s) anonymously, then the donor(s) are not required to be parties to a gestational agreement and is treated in law as if he and she were not the natural parent(s) of the child conceived.[446]

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440. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

441. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

442. *See* CAL. FAM. CODE § 7613 (West 2015) (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (UNIF. LAW COMM'N 2002) (providing the foundational language for this statute).

443. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

444. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

445. *See* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).

446. *See generally* CAL. FAM. CODE § 7613 (providing the foundational language for this statute); UNIF. PARENTAGE ACT § 801–03 (providing the foundational language for this statute).