SAY YES TO HER REDRESS: A TWO-STEP APPROACH TO POST-DIVORCE EMBRYO DISPUTES

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INTRODUCTION

> I can't believe Taylor Swift is about to turn 30 - she still looks so young! It's strange to think that 90% of her eggs are already gone - 97% by the time she turns 40 - so I hope she thinks about having kids before it's too late! She'd be a fun mom. :)[1]

Readers may remember the uproar alt-right propogandist Stefan Molyneux created when he delivered this bizarre commentary on singer Taylor Swift's ovaries via Twitter in 2019. The internet was quick to defend Swift, rightly calling the tweet creepy and misogynistic.[2]

It is also, however, scientifically accurate.[3] Though it should go without saying that speculating about women's reproductive capabilities on Twitter is inappropriate, to say the least, it is true that women have twelve percent of their egg supply left at age thirty, and three percent by the time they turn forty.[4] Age is an aspiring mother's worst enemy;[5] women are born with all the eggs they will ever have and once they reach menopause, they are out for good.[6]

In vitro fertilization ("IVF"), a fertility treatment, is becoming more popular as women wait longer than ever to start a family.[7] IVF involves extracting eggs from a woman's uterus, fertilizing them in a laboratory, and inserting the resulting embryos directly back into the uterus. However, women also have the option of freezing their fertilized embryos until they are ready for implantation. Freezing is often chosen by those who are not yet ready for children but want to preserve the option, women who want a safety net before undergoing chemotherapy or something else that will wreak havoc on their reproductive system, and those who have leftover embryos from an

1. Chris Stokel-Walker, *Is the Worst Tweet Ever Really the One About Taylor Swift's Eggs?*, INPUT (Oct. 8, 2021, 10:15 AM) (quoting @StefanMolyneux, TWITTER (Dec. 9, 2019, 7:20 PM)), https://www.inputmag.com/culture/twitter-worst-tweet-ever-bracket-taylor-swift-ruthkanda-forever-stefan-molyneux [https://perma.cc/EL55-UHN8]. Molyneux has since been banned from Twitter.

2. Isabel Jones, *The Internet Is Coming to Taylor Swift's Defense After an Alt-Right Troll Tweeted About Her Egg Count*, INSTYLE (Dec. 10, 2019, 11:15 AM), https://www.instyle.com/news/taylor-swift-tweet-eggs-reaction [https://perma.cc/S7HB-6DD8].

3. Actually, it may be one of the only scientifically accurate statements Molyneux has ever made. *See Stefan Molyneux*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/individual/stefan-molyneux [https://perma.cc/HM4N-2VYW].

4. *See* W. Hamish B. Wallace & Thomas W. Kelsey, *Human Ovarian Reserve from Conception to the Menopause*, 5 PLOS ONE 1, 4 (Jan. 27, 2010).

5. *Risk Factors*, U.C.S.F., https://crh.ucsf.edu/risk_factors [https://perma.cc/5CT3-NQ3N].

6. *Normal Ovarian Function*, ROGEL CANCER CTR., https://www.rogelcancercenter.org/fertility-preservation/for-female-patients/normal-ovarian-function [https://perma.cc/BU24-37Y9].

7. *See* DANIELLE M. ELY & BRADY E. HAMILTON, TRENDS IN FERTILITY AND MOTHER'S AGE AT FIRST BIRTH AMONG RURAL AND METROPOLITAN COUNTIES: UNITED STATES 2007–2017, at 1, 5, NAT'L CTR. FOR HEALTH STATS (2018).

IVF cycle that they want to save for potential later use.[8] Though it is becoming increasingly common, IVF is an expensive, invasive, and painful procedure for women, and, as with any surgery, comes with risks.

Unfortunately, while most frozen embryos withstand the test of time,[9] many marriages do not.[10] Upon divorce, a couple has to decide what to do with their frozen embryos, and that question becomes thorny if they cannot agree. Currently, courts use one of three methods to determine what happens to embryos upon divorce when the ex-spouses do not see eye to eye. The Contractual Method strictly follows the fertility clinic's consent forms the spouses signed before undergoing IVF, ignoring the uniquely emotional and one-sided nature of those forms. The Contemporaneous Mutual Consent Method refuses to award the embryos to either spouse for any purpose unless and until the ex-couple can agree on an outcome, leaving the parties in limbo. The Balancing Method looks at the facts of each individual case and decides which spouse's rights should prevail. The potential application of three different methods means that outcomes are often unpredictable and arbitrary. Because these cases are relatively novel, most states have no established precedent, and courts have little guidance as to which method they should choose. Family law is a state issue, so there is no federal law or precedent on the subject either.

Nonetheless, trends have emerged in the way courts resolve embryo dispute cases. Most courts undermine or completely ignore the disproportionate burden women face both during and after the IVF process as compared to men. Courts also overwhelmingly rule against the spouse who seeks implantation, which in most cases is the woman. They ignore the fact that, for many of these women, the frozen embryos are their only chance at becoming parents, and instead allow them to be destroyed, donated, or held in storage indefinitely. These trends are not only unfair but also go against both the language and purpose of existing law. This Note proposes a two-step approach to embryo disputes between heterosexual, divorced couples, in cases in which the wife was the egg donor. Embryos should be considered marital property, making their division fall under existing marital

8. The number of embryos inserted is carefully controlled in an attempt to avoid multiple births and the associated risks. *See In Vitro Fertilization (IVF)*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/9Z98-YXCQ].

9. *See* Pam Belluck, *What Fertility Patients Should Know About Egg Freezing*, N.Y. TIMES (Mar. 13, 2018), https://www.nytimes.com/2018/03/13/health/eggs-freezing-storage-safety.html [https://perma.cc/6LA9-TZ45].

10. *See* Erin McDowell, *13 Surprising Facts About Divorce in the US*, INSIDER (July 30, 2020, 8:52 AM), https://www.businessinsider.com/alarming-facts-about-divorce-in-the-us [https://perma.cc/32B2-BVUP].

property dissolution statutes. Fundamentally, these statutes prescribe a fair split of marital assets, and a fair split of embryos means awarding them to the wife—every single time.

This Note intends to establish three points. First, the existing law in this area is not adequate and often causes more irreversible harm than good. Second, this corner of the law is yet another area where women and their suffering are undermined and overlooked. Finally, although this proposed two-step approach may initially seem somewhat radical, existing law is generally amenable to it already. With nearly 1.5 million frozen embryos currently in storage,[11] legal experts predict that these cases "will continue to pile up in courts"[12]—if nothing else, a realistic, fair, and sustainable solution is needed for efficiency purposes.

Part I explains the process of IVF and how embryo dispute cases are currently decided. It begins by underlining how women face a substantially disproportionate burden throughout the IVF process, but courts have had a tendency to dismiss that disparity when deciding embryo disputes. Part II analyzes embryo disputes in the context of a property framework. It argues that embryos should be considered property—marital property, to be specific—and discusses how states currently define embryos, as well as how statutes govern the division of marital property upon divorce. While states have their own marital dissolution statutes, the crux of each one is that, above all else, the division should be fair. Part III details the thrust of the argument—that due to the disproportionate burdens women face both during and after the IVF process, a fair split, as required by these statutes, will always entail giving the woman possession of the embryos upon divorce, regardless of the facts of each case.

I. THE SCIENTIFIC AND LEGAL BACKGROUND OF EMBRYO DISPUTES

A. IN VITRO FERTILIZATION: THE PROCESS AND ASSOCIATED RISKS

In vitro fertilization is a type of assisted reproductive technology ("ART") that involves surgically removing eggs from a woman's ovaries and fertilizing them in a laboratory before transferring the resulting embryos

11. *See* Marilynn Marchione, *In Limbo: Leftover Embryos Challenge Clinics, Couples*, MED. XPRESS (Jan. 17, 2019), https://medicalxpress.com/news/2019-01-limbo-leftover-embryos-clinics-couples.html [https://perma.cc/Z5HC-6VGW].

12. Mark F. Walsh, *Arizona Law Determines Fate of Frozen Embryos in Divorce Cases*, A.B.A. J. (Dec. 1, 2018, 2:20 AM), https://www.abajournal.com/magazine/article/arizona_law_frozen_embryos_divorce [https://perma.cc/YM4Q-UAAJ].

back into a uterus.[13] It is the most effective form of ART but is usually performed only after other methods of treating infertility have failed, as it is invasive and expensive.[14] Forty years after the first baby was born via IVF, more than eight million babies have been born as a result of the procedure.[15]

Before beginning the IVF process, the couple contributing genetic material ("gamete donors") undergo testing, such as ovarian reserve testing, uterine exams, a mock embryo transfer, and semen analysis.[16] The first step of IVF is ovarian stimulation, which requires the woman to take synthetic hormones so that she produces multiple eggs instead of the natural one per month.[17] It usually takes a week or two on these hormones, plus a blood test and vaginal ultrasound, to determine that the eggs are ready for retrieval.[18] During egg retrieval, the woman is put under anesthesia while her eggs are surgically removed with a needle inserted into her vagina.[19] Meanwhile, sperm is retrieved through self-stimulation.[20] Once the eggs and sperm have been extracted, fertilization takes place in a laboratory before the embryos are inserted back into the woman's uterus via a catheter inserted into her vagina and through the cervix.[21] Sedation is sometimes required for the embryo transfer step.[22] One cycle of IVF takes about three weeks, and many women require more than one cycle.[23] The average cost per cycle is about $12,000, not including the medication.[24]

If the couple is not yet ready for implantation, they also have the option to freeze fertilized embryos or unfertilized eggs.[25] However, eggs are more fragile than embryos and are less likely to survive the freezing and thawing process.[26] Furthermore, freezing eggs poses a unique risk in the sense that it

13. *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 17, 2021), https://www.cdc.gov/art/artdata/index.html [https://perma.cc/D2AC-XXWM].

14. *See In Vitro Fertilization (IVF)*, *supra* note 8.

15. Eur. Soc'y Hum. Reprod. & Embryology, *More than 8 Million Babies Born from IVF Since the World's First in 1978*, SCIENCEDAILY (July 3, 2018), https://www.sciencedaily.com/releases/2018/07/180703084127.htm [https://perma.cc/G2PL-HRMN].

16. *In Vitro Fertilization (IVF)*, *supra* note 8.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Rachel Gurevich, *How Much Does IVF Really Cost?*, VERYWELL FAM. (Nov. 27, 2021), https://www.verywellfamily.com/how-much-does-ivf-cost-1960212 [https://perma.cc/3FD9-CHDN].

25. *See* Korin Miller, *Is It Better to Freeze Eggs or Embryos?*, COLO. CTR. FOR REPROD. MED. (Oct. 17, 2017), https://www.ccrmivf.com/news-events/freeze-eggs-embryos [https://perma.cc/2AA3-KLXT].

26. *Id.*

is impossible to know how many of those eggs will be able to create viable embryos until they are thawed and fertilized.[27] Many couples do not see the point of taking these risks, as they are sure in the moment that they want to have children with their partner and cannot envision a breakup. Unfortunately, this is not the case for four in every ten married couples,[28] and when a couple divorces with embryos in storage and cannot agree on what to do with them, a legal mess ensues.

B. HOW COURTS CURRENTLY DECIDE EMBRYO DISPUTES

Family law is predominantly a state issue.[29] As such, there is no federal law governing the disposition of cryopreserved embryos in disputes.[30] Instead, three approaches to resolving embryo disputes have emerged since the first such case was decided in 1992.[31] Due to the relative lack of existing precedent, courts have largely been free to choose a method in any given case, leading to confusing and unpredictable results despite often similar fact patterns. This Section describes those three methods and their respective strengths and weaknesses. The ideal method is quick and easy—and therefore cheap—to apply and achieves consistent results without ignoring the nuances of these types of cases. It acknowledges and respects the unique, emotional nature of embryo disputes. It fully understands the consequences of ruling for one party or the other. It leads to a fair outcome, or as fair an outcome in this kind of case can be. As this Section will illustrate, none of the three existing methods meet all, or even most, of these goals.

1. The Contractual Method

The first method presumes that contractual agreements between gamete donors and their fertility clinic are valid and binding, and follows the agreements' instructions for disposition.[32] Virtually all fertility clinics in 2022 have the couple sign a consent form before the IVF process begins, and those forms include what should happen to the embryos in the event of contingencies such as death or divorce. The idea of the Contractual Method is that couples should be encouraged to think through these contingencies and thoughtfully outline their wishes before undergoing the IVF process so

27. *See id.*
28. McDowell, *supra* note 10.
29. Walsh, *supra* note 12.
30. Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women's Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN'S L.J. 119, 125 (2019).
31. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
32. *See* Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998).

that they can be enforced in the event that they occur.[33] The strengths of this method are that it strives to honor the parties' wishes, and it saves time and money by avoiding expensive litigation.[34] However, legal scholars have noted that this particular subject matter is highly emotional, making the decision to enforce these agreements more complicated than the average contract. Carl H. Coleman, a professor of law and bioethics who writes about assisted reproductive technology, argues,

> Because of the difficulty of "predict[ing] and project[ing] a response to profound [human] experiences that have not yet unfolded," it may simply be impossible to make a knowing and intelligent decision to relinquish a right in advance of the time the right is to be exercised. This is particularly true in decisions about intensely emotional matters, where people act more on the basis of feeling and instinct than rational deliberation.[35]

Couples undergo IVF when they are happy and want to bring a child into the world. At this moment it is difficult for them to realistically envision and plan for a scenario in which the two seek divorce.[36] Enforcing the original agreement aims to "respect[] the decision-making authority of the persons the partners were at the time the agreement was made," but that happy couple is not the same one battling it out in court.[37]

Others believe enforcing an agreement in such a "highly personal area of reproductive choice when one of the parties has changed his or her mind" is against public policy.[38] Furthermore, standardized consent forms are widely seen as a "bureaucratic hurdle to be jumped," and patients often do not take the time to fully read and understand the long and complex language.[39] Bioethics professor Ellen A. Waldman argues that in these situations "the consent form serves merely to protect the doctor from exposure to a medical malpractice suit; it does not facilitate informed, deliberate, and voluntary patient choice."[40]

These issues are reminiscent of the debate over standard-form, accept-or-return offers, stirred up by two appellate court decisions in the 1990s

33. *See id.*
34. *See id.*
35. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 98 (1999) (alteration in original) (citation omitted); *see also* Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 922–24 (2000).
36. *See* Herrera, *supra* note 30, at 141–42.
37. Coleman, *supra* note 35, at 91.
38. *In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003).
39. Waldman, *supra* note 35, at 921–22.
40. *Id.* at 922.

regarding the enforceability of shrinkwrap licensing in software sales.[41] A traditional idea in contract law is that contracts must stem from negotiations between two parties with relatively equal bargaining power, meaning each party needs to have the ability to negotiate the terms of the contract until both fully assent to each term.[42] Obviously this may not be the case for the majority of consumer sales today, but courts and scholars disagree on just how much unilateral contracting is considered unconscionable and, therefore, unenforceable. The problem with accept-or-return offers is that the party on the other end of the contract is unable to negotiate as to the specific terms of the contract—the party can take the offer as is or abandon it completely.[43] This is typically true of standard-form contracts, including shrinkwrap licensing, where the buyer might not even fully read the lengthy and technical terms of the contract.[44] Another problem with standard-form contracts is that the terms often serve to limit the seller's liability instead of governing use of the product or service.[45] Therefore, some scholars argue that "standard-form contracts cannot, under almost any circumstances, reflect the terms of a fair bargain because they are not, by definition, negotiated, and because they invariably reflect the dictates of just one party to the bargain."[46]

While the subject matter of fertility contracts is quite different than software licensing contracts, these problems with standard-form contracts apply in both cases. Couples are not able to meaningfully negotiate with fertility clinics over the terms of the contracts they are signing. Many do not retain legal counsel to review these contracts and therefore may not fully read or understand what they are signing. Furthermore, these contracts are designed to insulate the clinic from liability rather than to help the spouses figure out what should be done in the event of divorce. Therefore, there are many reasons to believe that this method is too flawed to be widely used, and numerous courts[47] and scholars[48] agree.

41. *See generally* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991).

42. Jeff C. Dodd, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 HOUS. L. REV. 195, 210 (1999).

43. Kristin Johnson Hazelwood, *Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers*, 55 WASH. & LEE L. REV. 1287, 1323 (1998).

44. *Id.*

45. Dodd, *supra* note 42, at 210–11.

46. *Id.* at 236.

47. *See e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003); J.B. v. M.B., 751 A.2d 613, 619–20 (N.J. Super. Ct. App. Div. 2000), *aff'd in part, modified in part*, 783 A.2d 707; A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000).

48. *See e.g.*, Coleman, *supra* note 35, at 88–89; Waldman, *supra* note 35, at 900–01; I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP., July–Aug. 2016, at 13, 16.

2. The Contemporaneous Mutual Consent Method

The second method dictates that the frozen embryos will remain in storage unless and until the couple can agree on what to do with them.[49] This method treats the right to consent or withhold consent as the most important consideration in such disputes.[50] In addition to making these cases simpler to resolve, the advantage to this method is that no one is forced to become a parent against his or her will, something courts tend to feel very strongly about.[51] However, it also ignores potentially valid interests of the parties—for example, if the wife has since become infertile or too old to produce any more viable eggs, the embryos are therefore her only chance at having biological children. This method means that whichever spouse is seeking implantation ultimately loses, and for some, that loss can have devastating implications. As one court has noted, leaving "the parties in limbo would not be doing justice to anyone."[52]

3. The Balancing Method

Under the Balancing Method, the court weighs the interests of each party and essentially decides whose rights trump the other's.[53] This analysis is primarily fact based,[54] so the outcome varies depending on the facts of the particular case at bar. Factors the court typically looks to are the "positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."[55] In particular, the court evaluates whether the party seeking implantation has a reasonable possibility of achieving parenthood, biological or otherwise, without the embryos.[56] This method ensures that the specific circumstances of each case and party are taken into consideration, as opposed to a general rule that ignores the nuances of each case. Therefore, the Balancing Method theoretically ensures what is best in each case, as considerable attention and thought is given to this emotional and life-altering decision.

However, this method also creates the possibility of arbitrary, inconsistent, expensive, and time-consuming decisions.[57] With this method there tends to be a presumption in favor of the party who wants to avoid

49. Coleman, *supra* note 35, at 89.
50. *See id.*
51. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1025–27 (2004).
52. Patel v. Patel, 99 Va. Cir. 11, 17 (2017).
53. *See* Davis v. Davis, 842 S.W.2d 588, 603 (Tenn. 1992).
54. *See Patel*, 99 Va. Cir. at 16.
55. *Davis*, 842 S.W.2d at 603.
56. *See id.* at 604.
57. *See* discussion *infra* Section I.C.1.

procreation,[58] which is typically the husband. Even when the embryos represent the wife's only hope at having children and she agrees to take on all financial and other responsibilities, courts tend to consider forced procreation a worse harm than making procreation difficult or even impossible.[59] Some courts also believe that adoption is a viable and appropriate substitute.

TABLE 1. The Three Methods and States That Have Endorsed Them

Method	*Method Description*	*States*
Contractual Method	Contractual agreements between fertility clinics and gamete donors are presumed valid and binding, and the court follows their instructions for disposition (often, destruction).	New York[60] Oregon[61] Texas[62] Arizona[63]
Contemporaneous Mutual Consent Method	Embryos remain in storage unless and until the couple can agree on what to do with them.	Iowa[64] Massachusetts[65] Missouri[66]
Balancing Method	The court weighs the rights of each party and decides whose interests trump the other's.	New Jersey[67] Pennsylvania[68] Tennessee[69] Virginia[70]

Notes: This chart was produced independently, relying on the sources cited therein.

C. INFLUENTIAL EMBRYO DISPUTE CASES

A handful of embryo dispute cases tend to be the most cited and have largely been the most influential in shaping the current legal landscape. In each case the court ultimately ruled against implantation, which was a ruling

58. *See Davis*, 842 S.W.2d at 604.
59. *See* Kass v. Kass, 663 N.Y.S.2d 581, 599–600 (App. Div. 1997).
60. *See id.* at 587.
61. *See* Dahl v. Angle, 194 P.3d 834, 840 (Or. Ct. App. 2008).
62. *See* Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006).
63. *See* Terrell v. Torres, 456 P.3d 13, 15–18 (Ariz. 2020).
64. *See In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003).
65. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000).
66. *See* McQueen v. Gadberry, 507 S.W.3d 127, 157–58 (Mo. Ct. App. 2016).
67. *See* J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001).
68. *See* Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).
69. *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
70. Patel v. Patel, 99 Va. Cir. 11, 17–18 (2017).

against the woman in all but one case. In this Section it will become clear that courts widely consider the rights of men to trump the rights of women in these embryo disputes, particularly when those women are seeking implantation, and that this stance is both unwarranted and unjust.

1. *Davis v. Davis*

In the first major post-divorce embryo dispute case in 1992, Mrs. Davis sought to donate the embryos she created with her ex-husband, while Mr. Davis wanted to discard them.[71] The Tennessee Supreme Court noted the fact that Mrs. Davis had had five "extremely painful tubal pregnanc[ies]," resulting in the removal of both fallopian tubes.[72] The Davises had at one point tried to adopt, but the birth mother changed her mind at the last minute, and other attempts at adoption proved to be financially impossible for them.[73] The couple then spent tens of thousands of dollars on six failed rounds of IVF "despite [Mrs. Davis's] fear of needles."[74] Before each attempt she underwent a month of subcutaneous injections to shut down her pituitary gland and eight days of intermuscular injections to stimulate her ovaries.[75] She went under anesthesia five times.[76] Finally, nine viable embryos were created and frozen.[77]

In the absence of a contractual agreement, the court turned to the Balancing Method and concluded that, despite all Mrs. Davis had gone through to obtain those embryos, Mr. Davis's interest in avoiding procreation trumped Mrs. Davis's interest in giving the embryos a chance at life.[78] This court established a presumption in favor of the spouse opposing parenthood, as long as the other spouse had a "reasonable possibility" of becoming a parent through some other means.[79] In its decision, the court opined,

> We are not unmindful of the fact that the trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process is more severe than is the impact of the procedure on men. In this sense, it is fair to say that women contribute more to the IVF process than men. Their experience, however, must be viewed in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted

71. *Davis*, 842 S.W.2d at 590.
72. *Id.* at 591.
73. *Id.*
74. *Id.*
75. *Id.* at 591.
76. *Id.*
77. *Id.* at 592.
78. *See id.* at 604.
79. *See id*.

> parenthood. As they stand on the brink of potential parenthood, [Mrs. and Mr.] Davis must be seen as entirely equivalent gamete providers.[80]

In this way, the *Davis* court set the stage for decades of decisions undermining the disproportionate burden women face both during and after the IVF process, leading to unjust and debilitating outcomes for those women.

Davis is also an example of just how time-consuming and arbitrary the Balancing Method can be. To analyze the burden each spouse would face from a contrary ruling, the court dug into the childhood of Mr. Davis, who strongly opposed implantation of the embryos. Mr. Davis testified that his parents divorced when he was five years old, leading to his separation from both parents and causing "severe problems" for him as a young boy.[81] Because of his traumatic childhood, Mr. Davis "vehemently opposed . . . fathering a child that would not live with both parents."[82] He objected to donation, Mrs. Davis's request, "because the recipient couple might divorce, leaving the child (which he definitely would consider his own) in a single-parent setting."[83] While Mr. Davis's fears may be understandable, millions of children of divorce go on to lead happy, healthy lives, not to mention those raised in single-parent households. Mr. Davis's apparent belief that existing as a child of divorce is worse than existing at all lost the embryos the chance at life for which Mrs. Davis had sacrificed so much. Ruling for one party for a reason as speculative as a potential divorce between two hypothetical people underscores just how arbitrary outcomes can be under the Balancing Method; after all, it is virtually impossible to determine which type of suffering is worse than another in any given case, especially before that suffering is even realized. It is also worth pointing out how time-consuming and expensive it would be for each court to dive into the childhood traumas of every party before them.

2. *Kass v. Kass*

Five years after the *Davis* ruling, Mrs. Kass sought possession of her and her ex-husband's embryos to implant herself, which Mr. Kass opposed.[84] Over the span of three years, Mrs. Kass, who was unable to conceive naturally, had undergone ten unsuccessful, very expensive rounds of IVF.[85]

80. *Id.* at 601.
81. *Id.* at 603–04.
82. *Id.* at 604.
83. *Id.*
84. Kass v. Kass, 663 N.Y.S.2d 581, 585 (App. Div. 1997).
85. *Id.* at 583.

Upon the Kasses' divorce, five frozen embryos remained.[86] Unlike the Davises, however, the Kasses had signed an informed consent document,[87] so the New York Court of Appeals followed the Contractual Method by ruling that Mrs. Kass was unable to unilaterally change her mind regarding the document.[88] The agreement directed the embryos to be donated for research purposes in the event of divorce,[89] and, despite Mrs. Kass's infertility and fierce desire to become a mother, the court upheld the agreement and denied her the embryos for implantation.

3. *A.Z. v. B.Z.*

In this case, the wife wanted to implant the embryos she created with her ex-husband, which he strongly opposed.[90] Like the other cases, the wife had traumatic fertility experiences. She had suffered two ectopic pregnancies, leading to the removal of both fallopian tubes.[91] The couple underwent fertility treatments for over ten years before finally giving birth to twins through IVF.[92] After their divorce, the husband sought to permanently enjoin the wife from using the remaining embryos for implantation.[93]

The couple had signed an agreement that directed the embryos to be released to the wife for implantation.[94] However, in a deviation from the Contractual Method, the Massachusetts Supreme Court declined to enforce the agreement because it interpreted the agreement as defining the couple's relationship with the clinic rather than with each other.[95] Additionally, the court opined that the agreement did not show clear intent of the parties.[96] Therefore, the court upheld the probate court's decision permanently enjoining the wife from using the embryos, despite her decade of infertility issues.[97] The probate court had used the Balancing Method to decide that the husband's rights outweighed the wife's.[98]

86. *Id.* at 584.
87. *Id.* at 586.
88. *Id.* at 590–91.
89. *Id.* at 588.
90. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1052 (Mass. 2000).
91. *Id.*
92. *See id.*
93. *See id.*
94. *Id.* at 1054.
95. *See id.* at 1056–57.
96. *See id.* at 1057.
97. *Id.* at 1052–53.
98. *Id.* at 1054–55.

4. *J.B. v. M.B.*

In an unusual role reversal, the husband in this case wanted the embryos for implantation, which the wife opposed.[99] After a miscarriage, the wife found out she had a condition that made her infertile, so the couple underwent IVF.[100] After the birth of their child through IVF, the couple divorced, and the wife requested that the remaining embryos be destroyed.[101] The husband, on the other hand, sought the embryos for implantation or donation.[102]

The New Jersey Supreme Court ruled in the wife's favor for essentially the same reasons other courts had ruled for husbands—her right not to be a biological parent outweighed her ex-husband's right to be one.[103] The ex-husband was capable of having children by other means, so a ruling against implantation would not prevent him from having more children, whereas the wife would be forced to have another child, an irreversible outcome.[104] Because the fertility clinic agreement did not manifest clear intent on the part of both spouses, the court used the Balancing Method.[105] It is notable, however, that the outcome was driven by a presumption against implantation, rather than any rights the wife had specifically as a woman.

5. *Terrell v. Torres*

Terrell v. Torres was decided in early 2020; however, an earlier decision by a lower court has already inspired a new law in Arizona regarding disposition in embryo disputes[106] and this case will likely have a hand in shaping the legal landscape over the next several years. In *Terrell*, the Arizona Supreme Court upheld an agreement directing donation of a couple's embryos, despite the fact that the wife had undergone IVF for the sole purpose of preserving her ability to have biological children after she finished battling an aggressive form of breast cancer.[107] The Court of Appeals had used the Balancing Method to award the embryos to the wife, deciding that her chances of becoming a parent, whether it be through natural conception, adoption, or a donated embryo, were so remote that the scales tipped in her favor.[108] The court also acknowledged that the wife had

99. J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001).
100. *Id.* at 709.
101. *Id.* at 710.
102. *Id.*
103. *See id.* at 716–17.
104. *See id.*at 717.
105. *See id.* at 716–20.
106. *See* Herrera, *supra* note 30, at 121–22.
107. *See* Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020).
108. *See* Terrell v. Torres, 438 P.3d 681, 691–94 (Ariz. Ct. App. 2019), *vacated*, 456 P.3d 13 (Ariz.

undergone IVF for the sole purpose of preserving her ability to have biological children, which also warranted ruling in her favor.[109] However, because the Arizona Supreme Court chose a strict interpretation of the Contractual Method, the wife's chance at having biological children was lost forever.

II. ANALYSIS: FITTING EMBRYOS INTO A PROPERTY FRAMEWORK

First, this Section will explain why embryos should be defined as property. Next, it will assess how states currently treat embryos and how amenable each of those treatments is to the two-step approach. Finally, it will discuss how states treat marital property upon divorce and what guidelines each state uses for dividing that property between the spouses. This will establish the foundation for arguing that a woman-centric approach to these embryo disputes is the fairest way to achieve consistent outcomes for courts everywhere.

A. EMBRYOS SHOULD BE DEFINED AS PROPERTY

To fit embryos into the existing framework of marital property, it must first be established that they ought to be treated as property. To some this categorization will seem obvious, while to others it may be blasphemous. Due to moral and intuitive reasons, some people are vehemently opposed to classifying embryos as property, as opposed to persons. However, legal scholars, case law, and statutory law are all generally in agreement that embryos are property, though some compromise somewhat by labeling embryos as property of a special character.[110] Embryos meet the requirements of property and defining them as anything else becomes exceedingly complicated.

1. Embryos Have the Characteristics of Property

Black's Law Dictionary defines property as "[c]ollectively, the rights in a valued resource" or "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised."[111] As embryos in these disputes are in vitro, meaning external to the uterus (internal would be in utero), they are external,[112] and a valued resource indeed. A trickier question is, what rights, if any, does one have in the embryos?

2020).

109. *Id.* at 692.

110. *See* discussion *infra* Section II.B.

111. *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

112. *See* McQueen v. Gadberry, 507 S.W.3d 127, 148 (Mo. Ct. App. 2016).

Property is often described as a "bundle of rights," including the right to use one's property, the right to transfer one's property, and the right to exclude others from one's property.[113] Our discussion of embryos as property is simply a discussion of whether and how those rights exist in embryos.[114] While the gamete providers' rights in the embryos can be limited, they still exist, much more so than any other person or institution.[115] It is generally undisputed that gamete donors have ownership rights in their embryos.[116] They have a right to use and enjoy those embryos within the confines of the law,[117] including implanting the embryos whenever they choose, excluding others from using their embryos, and requesting physical possession of the embryos at any point in time.[118] Though at least one state does not allow gamete providers to intentionally destroy their embryos,[119] this does not unravel the "bundle of rights" completely. Rights within the bundle can be added, removed, or regulated, and this does not change the characterization of the bundle as property. For example, homeowners associations are able to limit the freedom of property owners in areas such as landscaping, pets, and paint color, but that does not mean that property does not still belong to each homeowner. Similarly, there can be regulations regarding destroying embryos, or buying and selling them, without undermining their characterization as the property of the gamete donors.[120] Gamete providers' ownership rights in the embryos are not unlimited, but they do exist.

2. Defining Embryos as Persons Would Be Implausible and Messy

If embryos were not considered some form of property, the other option would be to classify them as persons. This defies both logic and science and has implications that are unnecessarily complicated. First, embryos do not meet any of the usual standards for personhood—they do not have consciousness, awareness of their surroundings, and they cannot feel pain.[121]

113. *Property*, *supra* note 111.

114. *See* Kansas R. Gooden, *King Solomon's Solution to the Disposition of Embryos: Recognizing a Property Interest and Using Equitable Division*, 30 U. LA VERNE L. REV. 66, 84 (2008).

115. *See* John A. Robertson, *Resolving Disputes over Frozen Embryos*, 19 HASTINGS CTR. REP., Nov.–Dec. 1989, at 7, 9.

116. *E.g.*, *id. But see* LA. STAT. ANN. § 9:126 (2018) ("An in vitro fertilized human ovum is a biological human being which is not the property of . . . the donors of the sperm and ovum.").

117. At least one state statute prohibits intentional destruction of the embryos. *See, e.g.*, LA. STAT. ANN. § 9:129.

118. Gooden, *supra* note 114, at 84.

119. *See* LA. STAT. ANN. § 9:129.

120. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 455 (1990) ("Although the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.").

121. I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1129 (2008).

In vitro embryos will not develop into persons on their own, absent interference, unlike those in utero.[122] If embryos were considered persons due to their potential for life, then one could just as easily call a sperm or an egg a person—a bizarre idea.[123] Furthermore, affording personhood status to embryos could lead to *both* gamete providers being forced to become parents against their will,[124] an unnecessary and troubling outcome. Embryo dispute cases would then center on who would be the best parent for the future children, much like child custody cases, which seems absurd for a cluster of cells smaller than the period at the end of this sentence.[125] Moreover, classifying embryos as persons would have serious and potentially disastrous implications for the abortion debate.[126]

On the other hand, if embryos were considered property for the sake of divorce proceedings, court resources would be saved by treating this as the routine separation of any other marital asset.[127] There are already statutes directing courts on how to divide marital property.[128] Though this would not take the emotion out of embryo dispute cases, it would at least create clear, consistent, and predictable outcomes, once the equitable division laws are overlayed with a woman-centric approach. The subject of procreative choice and bodily integrity would not need to be disturbed.

It is important to remember that this Note suggests defining embryos as property only for the sake of divorce proceedings.[129] As John A. Robertson, a bioethics legal scholar, has explained, "Applying terms such as 'ownership' or 'property' to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur . . . ."[130] Those who would be morally repulsed by the very idea of embryos as property should be assuaged by the fact that the definition is applicable only to the legal disposition of such embryos. Furthermore, as the next Section will outline, some courts have already taken steps to define embryos as

122. *Id.* at 1130.

123. *Id.* at 1129–30.

124. Tara Carlin, *Why the Legal Classification of Cryogenically Preserved Pre-Embryos Matter*, 17 RUTGERS J.L. & PUB. POL'Y 312, 351 (2020).

125. *See* Ronald M. Green, *The Ethical Considerations*, SCI. AM. (Nov. 24, 2001), https://www.scientificamerican.com/article/the-ethical-consideration [https://perma.cc/6VEE-KKNT].

126. Discussions on such legal or moral implications on the abortion debate is beyond the scope of this Note.

127. Gooden, *supra* note 114, at 85–86.

128. *See id.* at 90.

129. *See* Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 170–71 (2005).

130. Robertson, *supra* note 120, 454–55.

property for these purposes.

B. HOW STATES CURRENTLY TREAT EMBRYOS

One advantage of the two-step approach to embryo disputes is that the current law is already generally amenable to it. With the exception of three states, those that have broached the subject have recognized embryos as varying types of property, either directly or indirectly. Once embryos are legally defined as property, they fit neatly into existing marital property dissolution statutes, offering a clean, predictable solution to embryo disputes. The following Sections will categorize the states that have already tackled this subject. The categories are: (1) states that treat embryos as property and are thus clearly amenable to the two-step approach, (2) states that treat embryos as property "entitled to special respect" and are likely amenable to the two-step approach, and (3) states that treat embryos as people, making them not currently amenable to the two-step approach.

1. As Property: Clearly Amenable

A handful of states have decided, either directly or indirectly, that embryos should be legally treated as property. Oregon has taken the clearest stand in this direction. In *Dahl v. Angle*, the Oregon Court of Appeals decided that frozen embryos are "personal property . . . subject to a 'just and proper division' " under Oregon's statute for the dissolution of marital property.[131] Though the court ultimately decided to enforce the divorcing couple's embryo storage agreement,[132] that does not undermine the state's characterization of the embryos as personal property subject to the same statutory division as any other marital asset. If anything, the court's decision reinforces it, because contracts can govern property but not children.[133] It is worth noting that after deciding the embryos were property subject to equitable division, the court stated, "[g]iven that conclusion, the question of what constitutes a just and proper distribution of that right presents a significantly more difficult question."[134] Of course, under the two-step approach, this question would not be a difficult one at all.

Two courts in Virginia have also treated embryos as property. In *York v. Jones*, the district court concluded that a bailment had been created between a couple and the fertility clinic storing their embryos, recognizing

131. Dahl v. Angle, 194 P.3d 834, 839 (Or. Ct. App. 2008).

132. *See id.* at 841–42.

133. *See* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 70 (2014) ("Custody contracts are not typically enforceable.").

134. *Dahl*, 194 P.3d at 839.

the couple's property rights in the embryos.[135] In making the determination, the court looked to a cryopreservation agreement between the couple and the fertility clinic, and decided that the clinic had "fully recognize[d] plaintiffs' property rights in the pre-zygote [at issue]."[136] Instead of divorcing, the couple in this case was merely trying to move their embryos to another clinic out of state, but the case can serve as an analogy. Furthermore, in *Patel v. Patel*, a Virginia trial court awarded the embryos of a divorcing couple to the ex-wife after considering the factors set forth in Virginia's marital property dissolution statute, including "the ages, physical and mental conditions of the parties; how and when specific items of such marital property were acquired; and other factors deemed necessary and appropriate to consider in order to arrive at a fair and equitable award."[137] This case serves as yet another example of a court's treatment of embryos as marital property.

The Iowa Supreme Court indirectly designated embryos as property in *In re Marriage of Witten* when it declined to legally consider embryos "children" under Iowa's statute governing child custody determinations.[138] Therefore, by default, embryos must be considered some form of property. The court explained that the issue in embryo dispute cases is not the custody of children but rather "who will have decision-making authority with respect to the fertilized eggs."[139] The court gave this decision-making authority to the couple, showing further treatment of the embryos as property.[140] In one case, the New York Court of Appeals determined that embryos are not "persons"[141] and that the cryopreservation agreement's term that legal ownership of a divorcing couple's embryos be determined in a property settlement "must be given meaning."[142] Both determinations lead to the implication that the embryos are, in the courts' views, property.

In *Reber v. Reiss*, the Pennsylvania Superior Court upheld the trial court's determination that the embryos were marital property subject to equitable distribution.[143] Florida has enacted a statute giving joint decision-making authority to the couple absent an agreement.[144] In 2008, Michigan amended its constitution to allow researchers to create new embryonic stem

135. *See* York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989).
136. *Id.* at 427.
137. Patel v. Patel, 99 Va. Cir. 11, 18–19 (2017). Incidentally, this is exactly the analysis proposed by this Note. *See* discussion *infra* Section III.D.1.
138. *In re* Marriage of Witten, 672 N.W.2d 768, 776 (Iowa 2003).
139. *Id.* at 775–76 (citation omitted).
140. *Id.* at 780–81.
141. Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).
142. *Id.* at 181.
143. *See* Reber v. Reiss, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012).
144. *See* FLA. STAT. § 742.17(2) (2022).

cell lines from embryos created for fertility treatment, giving creators of those embryos full decision-making authority over them.[145] These states have all treated embryos as property and, thus, are clearly amenable to the two-step approach to embryo disputes.

Moreover, many states refuse to call weeks-old, nonviable fetuses persons for the sake of wrongful death suits,[146] because "whether the child would be born healthy and talented would be incapable of prediction with reasonable certainty."[147] If an eight-week-old fetus falls into this category, certainly an eight-cell embryo would as well. While not entirely analogous, the comparison with the separate field of tort law is nonetheless useful, as it lends credence to the idea that week-old fetuses should not be recognized as persons.

2. As Property Entitled to Special Respect: Likely Amenable

Some states recognize embryos as a distinct type of property—property entitled to "special respect" due to their potential for human life.[148] Essentially, the gamete donors maintain a property interest in the embryos, but not an absolute one.[149] In *Davis v. Davis*, the Tennessee Supreme Court made this determination and concluded, "[A]ny interest [the parties] have in the preembryos . . . is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos . . . ."[150] The court explained that embryos are unique in their potential to *become* people, but they should not be treated *as* people because they have yet to develop any characteristics of personhood and are not even guaranteed to ultimately reach their "biologic potential."[151] Though the court makes clear it does not believe embryos are property in every sense of the word, it does consider the gamete providers to have enough ownership of the embryos to determine what happens to them. For the purpose of argument, that is enough. Again, it is important to note that calling embryos property for the sake of these embryo disputes "merely designate[s] who has authority to decide whether

145. *See* Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 143 (2009).

146. *See, e.g.*, Coveleski v. Bubnis, 571 A.2d 433, 435 (Pa. Super. Ct. 1990), *aff'd*, 634 A.2d 608 (Pa. 1993); Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67, 71 (R.I. 1991).

147. *Coveleski*, 571 A.2d at 435.

148. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

149. Baiman, *supra* note 145.

150. *Davis*, 842 S.W.2d at 597.

151. *Id.* at 596.

legally available options with early embryos will occur."[152]

Missouri has also recognized this interim status for embryos. In *McQueen v. Gadberry*, the state appellate court refused to classify the embryos as children and instead called them "marital property of a special character."[153] Though the court gave them "special respect,"[154] it classified them as property nonetheless. The American Society for Reproductive Medicine endorses this view as well.[155]

A classification of property entitled to special respect means that the gamete donors have a property interest in their embryos that is not absolute.[156] This limited property interest is defined by an inability to buy or sell; the donors have control over what happens to the embryos, but they cannot buy or sell them because they are not property in the traditional sense.[157] This does not undermine the two-step approach because it does not require embryos to be considered property in every sense of the word. The two-step approach merely proposes that gamete donors have a property interest in the embryos that gives them control over what happens to them. The courts that give embryos special respect still give the donors this control.

3. As Persons: Not Amenable

Three states have passed statutes essentially elevating embryos to the status of human beings. Louisiana law provides that an in vitro embryo is a "juridical person" who can "sue or be sued."[158] The statute explicitly calls the embryo a "biological human being" who is not the property of anyone, including the gamete donors.[159] It also forbids the intentional destruction of these embryos.[160] New Mexico law does not grant embryos this juridical status, but it does direct each embryo to be implanted, giving embryos specific protection beyond what gamete providers may elect to do with them.[161] Similarly, Arizona has a statute specifically for embryo disputes,

152. Robertson, *supra* note 120, at 454–55.
153. McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016) (emphasis omitted).
154. *Id.* at 149.
155. *See Ethics in Embryo Research: A Position Statement by the ASRM Ethics in Embryo Research Task Force and the ASRM Ethics Committee*, 113 FERTILITY & STERILITY 270, 274 (2020), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/ethics_in_embryo_research.pdf [https://perma.cc/ZS4Z-8NRP].
156. Baiman, *supra* note 145.
157. *See* Caroline A. Harman, *Defining the Third Way—The Special-Respect Legal Status of Frozen Embryos*, 26 GEO. MASON L. REV. 515, 536 (2018).
158. LA. STAT. ANN. §§ 9:123–9:124 (2018).
159. *See id.* § 9:126.
160. *See id.* § 9:129.
161. *See* N.M. STAT. ANN. § 24-9A-1(D) (2011).

enacted in response to *Terrell v. Torres*,[162] that awards the embryos to whichever spouse wants to allow them to develop to birth.[163] Evidently, the current law in these three outlier states is not amenable to the two-step approach; if embryos are given human being–like status, they are not subject to marital property dissolution statutes in those states.

TABLE 2. States That Have Adopted Each Approach to Embryo Characterization

Approach	*State*
As Property	Florida[164] Iowa[165] Michigan[166] New York[167] Oregon[168] Virginia[169]
As Property Entitled to Special Respect	Missouri[170] Pennsylvania[171] Tennessee[172]
As Persons	Arizona[173] Louisiana[174] New Mexico[175]

Notes: This chart was produced independently, relying on the sources cited therein.

C. HOW STATES DIVIDE MARITAL PROPERTY AFTER DIVORCE

Having established that states should, and largely do, treat embryos as property, embryo disputes can fit into the wider context of marital property

162. *See* Bob Christie, *Top Arizona Court: Divorced Woman Can't Use Frozen Embryos*, ABC NEWS (Jan. 23, 2020, 11:19 AM), https://abcnews.go.com/Health/wireStory/top-arizona-court-divorced-woman-frozen-embryos-68485614 [https://perma.cc/BS8K-8ZKJ].

163. ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2021).

164. *See* FLA. STAT. ANN. § 742.17(2) (West 2016).

165. *See In re* Marriage of Witten, 672 N.W.2d 768, 776 (Iowa 2003).

166. *See* Baiman, *supra* note 145, at 143.

167. *See* Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).

168. *See* Dahl v. Angle, 194 P.3d 834, 839 (Or. Ct. App. 2008).

169. *See* Patel v. Patel, 99 Va. Cir. 11, 18–19 (2017); York v. Jones, 717 F. Supp. 421, 425 (E.D. Va. 1989).

170. *See* McQueen v. Gadberry, 507 S.W.3d 127, 149 (Mo. Ct. App. 2016).

171. *See id.*; Reber v. Reiss, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012).

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

173. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2021).

174. *See* LA. STAT. ANN. §§ 9:123–9:124, 9:126, 9:129 (2018).

175. *See* N.M. STAT. ANN. § 24-9A-1(D) (West 2011).

dissolution. If embryos are property, it is clear that they are marital property, not separate property. The exact definition of marital property[176] varies by state, but it essentially boils down to property acquired by either spouse during the marriage.[177] Because the embryos are usually created during the marriage, using genetic material from both spouses, the logical conclusion is that they are marital property.[178]

Because family law is largely governed by individual states, it should be no surprise that states have different laws on how to divide marital property upon divorce. Luckily for simplicity's sake, these laws fall into two categories—equitable distribution and equal division.[179] Forty-seven states use equitable distribution, which calls for "a fair, but not necessarily equal, allocation of the property between the spouses."[180] Each of these states has its own statutory guidelines for equitable distribution.[181] The remaining three states use equal division.[182]

1. Equitable Distribution

The vast majority of states use equitable distribution to divide marital property upon divorce.[183] These states have statutes directing the courts to consider all relevant factors and name specific factors as guidelines.[184] Many of these factors are nearly or exactly the same across states. For example, several states include the contribution of each spouse to the acquisition of the property and the value of the property to each spouse.[185] Other factors states suggest considering to achieve an equitable split include the age and physical condition of the spouses,[186] the nature of the property,[187] the rights[188] and needs[189] of the spouses, and how and when specific items were

176. Marital property is the term used in common law states, while community property is used in community property states, but this Note uses them interchangeably. *See Property*, *supra* note 111.

177. *See Community Property*, BLACK'S LAW DICTIONARY (11th ed. 2019). Community property excludes gifts, inheritances, and devises. *Id.*

178. Separate property is generally defined as property acquired before the marriage. *See Separate Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

179. *See Equitable Distribution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

180. *Id.*

181. *See id.*

182. *Id.*

183. *See id.*

184. *See, e.g.*, KY. REV. STAT. ANN. § 403.190 (West 2017); ME. REV. STAT. ANN. tit. 19-A, § 953 (2020).

185. *See, e.g.*, KY. REV. STAT. ANN. § 403.190(1)(a)–(b); ME. REV. STAT. ANN. tit. 19-A, § 953(1)(A)–(B); MO. REV. STAT. § 452.330 (2021).

186. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 5/503(d)(8) (West 2019); VA. CODE ANN. § 20-107.3(E)(4) (2022).

187. *See, e.g.*, WASH. REV. CODE § 26.09.080(1)–(2) (2022).

188. *See, e.g.*, TEX. FAM. CODE ANN. § 7.001 (West 2021).

189. *See, e.g.*, 750 ILL. COMP. STAT. ANN.§ 5/503(d)(8).

acquired.[190] Wyoming law mentions "the respective merits of the parties and the condition in which they will be left by the divorce,"[191] and Oregon law implores courts to consider "costs reasonably anticipated by the parties."[192] While the specifics of each statute vary, it is evident that states intended to give courts leeway in arriving at whichever outcome happens to be just and fair in each specific case.

2. Equal Division

California, Louisiana, and New Mexico are equal division states.[193] But while these states require marital property to be divided equally between the spouses, each state has its own nuances. For example, while one California statutory provision dictates equal division of community property,[194] another provision allows the court to, "[w]here economic circumstances warrant, . . . award an asset of the community estate to one party on such conditions as the court deems proper" in order to achieve equality.[195] Expounding upon this point, the California Supreme Court has stated,

> Even in cases in which the court must divide the community property equally, it has never been supposed that each asset must be cleaved in twain, without regard to the wishes of the parties or the justice of the matter. We conclude that the possibility that upon divorce an asset may be awarded entirely to one spouse is one of the incidents of community property and, in a sense, a qualification of the equal interests of each spouse in each community asset.[196]

The statute enumerating this principle "was intended to, and does, vest in the [trial] court considerable discretion in the division of community property in order to assure that an equitable settlement is reached."[197] For example, in *In re Marriage of Fink*, the California Supreme Court upheld an order dividing a divorcing couple's community property using the asset distribution method.[198] The asset distribution method has the court "first determine[] the value of each community asset and liability and then, *taking*

190. *See, e.g.*, VA. CODE ANN. § 20-107.3(E)(6).
191. WYO. STAT. ANN. § 20-2-114(a) (2022).
192. OR. REV. STAT. ANN. § 107.105(1)(f)(G) (West 2016).
193. The term "equal division state" should not be confused with "community property state." Nine states are community property states, and the term speaks to how they define community (marital) property, as opposed to separate property. However, only three of those nine states—California, Louisiana, and New Mexico—actually mandate equal division of that community property, as opposed to equitable division. *See Equitable Distribution*, *supra* note 179.
194. CAL. FAM. CODE § 2550 (West 2020).
195. *Id.* § 2601.
196. Phillipson v. Bd. of Admin., 473 P.2d 765, 775 (Cal. 1970).
197. *In re* Marriage of Connolly, 591 P.2d 911, 918 (Cal. 1979).
198. *See In re* Marriage of Fink, 603 P.2d 881, 883 (Cal. 1979).

into consideration the needs and desires of the parties, assign[] them to the parties so that the net value of community property distributed to each [is] equal."[199] In *In re Marriage of Lotz*, the California Court of Appeal awarded a family business entirely to the husband, absent evidence that the ex-spouses could effectively operate it together as business partners, and awarded equally valued assets to the wife.[200]

Louisiana law prescribes a division of community property such that each spouse's resulting property is equal in net value.[201] The statue says that in achieving this equal net value, the court can divide any particular asset equally or unequally, or allocate it entirely to one spouse.[202] The court is told to consider the "nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances [it] deems relevant."[203] In *Romero v. Romero*, the Louisiana Court of Appeal determined that one of the divorcing couple's properties did not need to be partitioned by licitation, but rather it could be awarded entirely to one spouse, and if such award resulted in unequal net distribution, the trial court could order an equalizing payment to still result in net equal value.[204]

Despite being an equal division state, the New Mexico Court of Appeals has opined that, when it comes to the division of community property, there is "no set rule."[205] The New Mexico Court of Appeals has also called attention to "the longstanding recognition that mathematical exactness in community division is neither expected nor required and that a proper apportionment of community property and debts depends on what is fair considering all of the evidence with reference to the facts and circumstances of each case."[206] In *Cunningham v. Cunningham*, the New Mexico Supreme Court awarded an ex-couple's entire ranch to the wife, with a provision that she pay the husband a sum over a seven-year period to equalize the award.[207] Therefore, while these three equal division states are more rigid in how community property can be divided, each has a certain amount of wiggle room to ensure a fair split, where the two-step approach can comfortably fit. At the very least, all of them allow courts to award an entire asset to one spouse as long as the overall division is equal, which dovetails neatly with the two-step approach.

199. *Id.* (emphasis added).
200. *See In re* Marriage of Lotz, 174 Cal. Rptr. 618, 621–22 (Ct. App. 1981).
201. *See* LA. STAT. ANN. § 9:2801(A)(4)(b) (2018).
202. *See id.* § 9:2801(A)(4)(c).
203. *Id.*
204. *See* Romero v. Romero, 457 So. 2d 317, 321 (La. Ct. App. 1984).
205. English v. English, 879 P.2d 802, 809 (N.M. Ct. App. 1994).
206. Bustos v. Gilroy, 751 P.2d 188, 193 (N.M. Ct. App. 1988) (citations omitted).
207. *See* Cunningham v. Cunningham, 632 P.2d 1167, 1168, 1170 (N.M. 1981).

III. ARGUMENT: HOW COURTS SHOULD MAKE A FAIR SPLIT

While marital property laws vary, to an extent, across states, they all essentially call for the courts to make a fair split, based on the unique facts of each case. Due to the rapid increase in the use of reproductive technologies, it is clear that embryo disputes are not going anywhere,[208] so an efficient, consistent, and equitable solution is needed. Some legal scholars have argued that in heterosexual couples, where the woman is the egg donor, she should presumptively win embryo disputes.[209] This Section will expound upon that argument. Ruling in favor of the woman in a heterosexual relationship is the fairest way to settle these embryo disputes and will give these cases the consistency they lack.

A. THE WOMAN-CENTRIC APPROACH

The argument for a woman-centric approach stands on the idea that women's physical investment in the IVF process is much greater than men's investment. Furthermore, eggs are more valuable to women than sperm is to men. As legal scholar Ruth Colker once summarized, "[s]perm [i]s [c]heap, [e]ggs [a]re [n]ot."[210]

For women, IVF is invasive, painful, and associated with a variety of risks. First, the woman must take fertility medication to stimulate egg production; side effects include headaches, mood swings, abdominal pain, abdominal bleeding, hot flashes, and, in rare but serious cases, ovarian hyperstimulation syndrome,[211] a painful and sometimes life-threatening condition.[212] Transvaginal ultrasounds and blood tests are done to check on the ovaries and hormone levels, respectively.[213] Then, a needle is inserted through the pelvic cavity to remove the eggs, exposing the woman to the possibility of bleeding, infection, and damage to her bowel or bladder.[214] Implanting the embryos takes yet another invasive procedure.[215] Side effects of the IVF process can include cramping, bloating, heavy vaginal bleeding,

208. *See* Walsh, *supra* note 12.

209. *See* Herrera, *supra* note 30, at 137; Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1079 (1996).

210. Colker, *supra* note 209, at 1063.

211. *IVF—In Vitro Fertilization*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization-70966 [https://perma.cc/D92C-M7WK].

212. *See Ovarian Hyperstimulation Syndrome*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/ovarian-hyperstimulation-syndrome-ohss/symptoms-causes/syc-20354697 [https://perma.cc/X5RJ-EBGL].

213. *IVF—In Vitro Fertilization*, *supra* note 211.

214. *Id.*

215. *See id.*

pelvic pain, blood in the urine, and a high fever.[216] Risks include nausea, shortness of breath, severe stomach pain and bloating, and weight gain.[217] On top of the physical burdens, "[p]sychological stress and emotional problems are common."[218]

Men, on the other hand, engage in the usual act of self-stimulation, and their job is done.[219] The only difficulty for men is, perhaps, the clinical setting of the doctor's office. The process for men is not invasive nor painful—in fact, quite the opposite. That is not to say the process is not also emotionally taxing for the man, or that his contribution has no value—it is, and it does.[220] That said, the fact of the matter is that the man's burden in this process is not equal to the woman's—not by a long shot.[221] Because of the disproportionate burden the IVF process places on women, they should have more "sweat equity" in the resulting embryos.[222]

Critics have argued that women also have a greater burden than men when it comes to childbirth, yet child custody disputes are not decided on that basis.[223] That is true, but it is not a persuasive comparison. Children are human beings, and custody decisions are based on what is best for that child. Embryos are not children, and embryo disputes have an entirely different goal. As this Note has argued, embryos should, and to an extent already are, considered marital property, and the main factor in such disputes is fairness. Child custody decisions are driven by what is best for the child, while embryo disputes should be driven by what is most fair for the ex-spouses, and the burden caused by IVF should weigh heavily in the determination of what is fair.

Perhaps more important than the burden placed on the woman *during* the process is the burden she faces *after* the process is complete. Women are born with all the eggs they will ever have—their bodies are not capable of producing more.[224] By the time a woman reaches puberty, she has only twenty-five percent of those eggs remaining, and that supply dwindles each

216. *Id.*
217. *Id.*
218. *Id.*
219. *See In Vitro Fertilization (IVF)*, *supra* note 8.
220. *See* Herrera, *supra* note 30, at 141.
221. *See id.* at 125. This idea is further supported by the difference in price between eggs and sperm. Sperm sells for around $700 while eggs can cost upwards of $30,000. Jeanne Sager, *How Much Do Fertility Treatments Cost, Anyway?*, COFERTILITY (Aug. 9, 2019), https://cofertility.com/iui-vs-ivf-cost [https://perma.cc/WH9D-AT8K].
222. Herrera, *supra* note 30, at 122.
223. *See* Robertson, *supra* note 115, at 7.
224. *See Normal Ovarian Function*, *supra* note 6.

month until it is depleted.[225] Women see a significant decline in their ability to conceive after the age of thirty-five, and by the time they experience menopause, they have virtually no eggs left.[226] Most women are unable to carry a successful pregnancy past their mid-forties.[227] Furthermore, in addition to quantity, the quality of eggs declines with age as well.[228] In contrast, men produce millions of sperm a day—about 1,500 per second, in fact.[229] Though the quality of sperm does decline with age too, this decline takes place over a man's entire lifetime, and many men are able to father children well into their sixties and seventies.[230]

In embryo disputes, the woman often wants the embryos so she can implant them and hopefully have a child.[231] In some cases, she went through the IVF process because she knew she was about to become infertile, for example due to chemotherapy, and wanted to preserve her ability to have children.[232] In these types of cases, if the woman cannot implant these embryos, she loses her only chance at biological parenthood.

Unfortunately, due to biology, this is still often the case even if she did not undergo IVF due to an impending external event causing infertility. Imagine a woman, Emily,[233] who gets married at age twenty-eight.[234] Emily and her new husband know they want to have children someday, but Emily just got a big promotion at work and wants to focus on her career right now. Luckily, Emily and her husband are able to afford IVF, and the procedure results in fourteen viable embryos. Emily can now relax—her healthy embryos are safely stored and waiting for her, whenever she decides she is ready. In her mind, there is no longer any need to rush into motherhood. Several years pass, and as Emily continues to succeed at her job, she feels the time is never quite right for children. She does not worry because she has

225. *Id.*

226. *Id.*

227. AM. SOC'Y FOR REPROD. MED., AGE AND FERTILITY 4 (2012), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Age_and_Fertility.pdf [https://perma.cc/3UTU-4K89].

228. *Female Infertility*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/female-infertility/symptoms-causes/syc-20354308 [https://perma.cc/JXR3-E99R].

229. *How Long Does It Take for Sperm to Regenerate? What to Expect*, HEALTHLINE, https://www.healthline.com/health/mens-health/how-long-does-it-take-for-sperm-to-regenerate#_noHeaderPrefixedContent [https://perma.cc/63EH-JLZ2].

230. *See A Man Can Become a Father at 75, but Should He?*, HEALTHLINE, https://www.healthline.com/health-news/man-can-become-a-father-at-75 [https://perma.cc/3APR-M5XT].

231. *See, e.g.*, Terrell v. Torres, 456 P.3d 13, 14 (Ariz. 2020).

232. *See, e.g.*, *id.*

233. Emily is a fictitious character for illustrative purposes.

234. This is the median age a woman gets married in the United States. *See Historical Marital Status Tables*, U.S. CENSUS BUREAU (Nov. 22, 2021), https://www.census.gov/data/tables/time-series/demo/families/marital.html [https://perma.cc/P85K-WVV7].

the fourteen cryopreserved embryos as a safety net.[235] Unfortunately, however, Emily's marriage begins to fall apart, and at age thirty-five she gets divorced. Emily and her ex-husband agree on the division of all of their assets, except for the embryos. Emily wants to implant them, but her husband wants them destroyed. The two go to court, and Emily loses. By the time all of this is adjudicated, Emily is thirty-eight years old.

Emily now has limited options. She can try and conceive naturally, though the odds are not in her favor. Even if she started trying immediately, her fertility began substantially declining at age thirty-five.[236] Emily likely would need at least a couple of years to find someone else with whom she wants to conceive, making her chances of getting pregnant at that age five percent each month she tries.[237] She could undergo IVF again, but putting aside the pain and financial costs,[238] her odds of having a successful pregnancy from IVF at her age is only around twenty-five percent.[239] If she waits another two years, those odds go down to about fifteen percent.[240] It turns out Emily's best chance at having a biological child was with the original fourteen embryos, which were retrieved during her prime reproductive years.[241] It looks like she may now be out of luck.

But not to worry, according to the courts—she can just adopt! Putting aside for the moment the fact that adoption is simply not equivalent to having a biological child,[242] the reality is that adoption is not even a feasible option for many women. Older, single women are less desirable to both adoption agencies and birth mothers looking to place children.[243] Furthermore, the process is often more expensive than IVF, and birth mothers are sometimes given up to several weeks after birth to change their minds,[244] leading to crushing disappointment for the would-be adoptive parents. Adoption is just not realistic for many of these women, and the fact that courts rarely acknowledge this "reveals both insensitivity to the frozen embryo litigants'

235. *See* Waldman, *supra* note 51, at 1055–56.
236. *See* AM. SOC'Y FOR REPROD. MED., *supra* note 227.
237. *Id.*
238. A single IVF cycle costs at least $12,000–$17,000. *IVF—In Vitro Fertilization*, *supra* note 211.
239. *Id.*
240. *Id.*
241. *See* AM. SOC'Y FOR REPROD. MED., *supra* note 227.
242. Very few courts acknowledge this point. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). *But see* Reber v. Reiss, 42 A.3d 1131, 1138 (Pa. Super. Ct. 2012) ("Adoption is a laudable, wonderful, and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child."). Further comparison of adoption and biological parenthood is beyond the scope of this Note.
243. *See* Waldman, *supra* note 51, at 1059.
244. *See id.* at 1056–57.

parental aspirations and a profound inattention to the real-world barriers that threaten their fulfillment."[245]

B. THE "MYTH OF FORCED PARENTHOOD"

In embryo disputes, women should be accorded a greater property interest in the embryos, one that is proportional to women's more substantial investment in their creation.[246] Because women only have a finite supply of eggs, and they lose that supply steadily over time, these embryos are simply more valuable to women, despite factual variations between cases.[247] Regardless of whether the woman seeks implantation or whether she is likely to be able to produce additional healthy embryos, she should have a greater say in what happens to those embryos.[248]

Inevitably, this would oftentimes lead to the man being forced to become a parent against his will, something courts have vehemently opposed.[249] Most courts that have encountered this issue so far have concluded that one's right not to become a parent trumps the other's right to become one.[250] It is clear that, at least within the context of embryo disputes, these courts believe that biological ties of parenthood are stronger than psychological ones.[251] However, evidence has suggested that the idea of fatherhood is largely a social construct rather than a biological destiny, otherwise known as the myth of "forced parenthood."[252] Data shows that paternal attachment depends on a number of variables, including how far the father lives from the child,[253] how long it has been since the father's separation from the mother,[254] and the status of his relationship with the mother.[255] Studies in this nature have not been done in the context of embryo

245. *See id.* at 1059.
246. *See id.* at 1060.
247. *See* Colker, *supra* note 235, at 1063. This is why, although the myth of forced parenthood seemingly would exist for women as well, they should be able to avoid this outcome if they so desire.
248. *See* Herrera, *supra* note 30, at 139.
249. *See* discussion *infra* Section I.C.
250. *See* discussion *infra* Section I.C.
251. *See* Waldman, *supra* note 51, at 1027.
252. *See id.* at 1028–29.
253. One study showed that, post-divorce, nearly fifty percent of children ages eleven to sixteen who did not live with their biological father had not seen him in the last year. See *id.* at 1041–42 for more data.
254. According to one study, thirty-one percent of children did not see their biological father in a typical month when their parents had been separated less than two years, fifty-five percent did not see him in a typical month after five years, and after ten years, that number grew to nearly seventy-five percent. See *id.* at 1042–43 for more data.
255. In one study, fathers who were not romantically involved with the child's mother were sixty-seven percent less likely to be involved with their children than fathers who were romantically involved with their coparent. See *id.* at 1044 for more data.

disputes specifically, and while the comparison is certainly not exact, it is clear at least that biological attachment does not inherently guarantee psychological attachment.

Another useful set of data is attitudes of sperm donors towards their potential offspring. In one study, eighty percent of sperm donors did not want to be informed of any children conceived from their donation, and eighty-eight percent of sperm donors said they would not want to meet any of those children.[256] None wanted to leave a message for their potential offspring, and sixty percent would stop donating if their children would be able to find them later in life.[257] Again, this comparison is not perfect; sperm donors go into the process knowing they will have no obligation to any potential offspring, whereas the fathers in embryo dispute cases created those embryos intending to ultimately become a parent in every sense of the word.[258] Knowing that one *might* have children somewhere who were ultimately born to strangers is admittedly not comparable to knowing that one *does* have children with an ex-spouse, but these studies suggest that parenthood is more than mere biology.

It is also worth noting that men become fathers against their will all the time. If a woman gets pregnant and decides she wants to keep the baby, the father is out of luck and on the hook for financial support until that child turns eighteen. Though this, of course, involves an element of bodily autonomy that embryo disputes do not, the fact of the matter is, men are forced to become fathers against their will all the time, no matter how terrible some might think that is. Every time a man chooses to have sex with a partner capable of conceiving a child, he assumes this risk. Though the degree of risk may vary depending on what protection is used, some risk is always present. Men who assume that risk understand that, in the event of a pregnancy, they cannot demand an abortion, which ultimately leads to procreation against their will. Why is it any less acceptable to say that, when men choose to create an embryo, they similarly assume the risk of procreating against their will at some point in the future?

Legal scholar John A. Robertson believed that the spouse wishing to avoid procreation should generally prevail.[259] He has argued that the objecting spouse would be "irreversibly harmed" if the embryo was implanted and brought to term against his will, "for the burdens of unwanted

256. *Id.* at 1049–50.

257. *Id.* Fortunately for those children, this study was conducted in 1994, before websites like Ancestry.com and 23andme.com were launched.

258. *See id*. at 1051.

259. Robertson, *supra* note 115, at 8.

parenthood cannot then be avoided."[260] In explaining such burdens of unwanted parenthood, Robertson discusses at length the potential financial liability, then adds one vague paragraph about the "[p]sychosocial [i]mpact."[261] Robertson insists that the psychosocial burdens of forced parenthood are "significant and should be given appropriate weight," but the only examples of these burdens he comes up with are "strong feelings of attachment, responsibility, guilt, [and so forth]," as well as the "powerful attendant reverberations which that can ignite."[262]

That said, Robertson's worry about the financial burdens of unwanted parenthood is both valid and able to be assuaged. There is little disagreement that, where a spouse is awarded embryos for implantation against the other spouse's wishes, the opposing spouse should not have to provide any financial support for the resulting children. In *Kass v. Kass*, the New York appellate court contemplated the wife's promise to bear all responsibilities of parenthood should the court rule in her favor and award her the embryos for implantation, but ultimately concluded that there was no way to enforce this without legislation.[263] "[U]ltimately it is for the Legislature to enact such progressive laws. A strong case can be made for legislation relieving the objectant of unwanted parenthood by treating him as a sperm donor in cases such as this."[264] This case was decided in 1997, and twenty years later, the legislature passed a law doing just that. In 2018, Arizona enacted a statute awarding disputed embryos to the spouse seeking implantation, and it also declares that the opposing spouse "has no parental responsibilities and no right, obligation or interest" in any resulting children, unless the opposing spouse was a gamete provider and consents in writing.[265] So, while Robertson's concern about the financial burdens of forced parenthood is valid, legislative bodies can ensure that objecting fathers in embryo disputes are legally freed of financial and other obligation—and one such law already exists.

C. OTHER OPPOSITION

According to Robertson, "frustrating the ability of the willing partner to reproduce with these embryos will—in most instances—not prevent that partner from reproducing at a later time with other embryos."[266] For the

260. *Id.*
261. *Id.*
262. *Id.*
263. *See* Kass v. Kass, 663 N.Y.S.2d 581, 599–600 (App. Div. 1997).
264. *Id.* at 600.
265. ARIZ. REV. STAT. ANN. § 25-318.03(C) (Supp. 2021).
266. Robertson, *supra* note 115, at 8.

reasons already discussed, this is simply not true for women. The fact that women have a finite number of eggs, which they lose every single month, very often would prevent the woman from reproducing later with other embryos. This assertion also ignores the fact that many women who undergo IVF know they will soon be infertile and subject themselves to the painful, invasive, and expensive procedure for that specific reason.

Furthermore, Robertson undermines his own point when he concedes that "[o]ne might then reasonably argue [in the case of infertility] that the equities favor the party who has no alternative opportunity to reproduce, because the pleasures of parenthood will be deeper and more intense than the discomfort of unwanted genetic offspring."[267] That is the very idea underlying the myth of forced parenthood—the joys of parenthood outweigh the comparatively mild discomfort of unwanted genetic offspring. As women would frequently have no alternative opportunity to reproduce if they lost rights to their embryos, this Note's argument is actually more aligned with Robertson's than it may first appear. He, and many others, just do not seem to understand how often women truly have no alternative opportunity to reproduce.

Other legal scholars argue strongly for the Mutual Consent approach, in which embryos would not be released to either spouse for any purpose until the two agree on what to do with them. Proponents of this approach insist that doing anything with the embryos against one spouse's wishes is a greater burden on the unwilling spouse than keeping the embryos frozen would be on either of the spouses.[268] As previously discussed, these embryos are many women's only chance to have biological, or any, children. For these women, keeping the embryos frozen indefinitely is the same as destroying or donating them.

Carl H. Coleman has argued that, even if the spouse who wants the embryos for implantation cannot have children any other way, those rights are still trumped by the spouse who does not wish to become a parent, and therefore the Mutual Consent approach is still best.[269] He asserts that, because the unwilling spouse is not the cause of the other's inability to have children, he should not have to take on the burden of forced parenthood to "remedy a situation he did nothing to create."[270] This is not entirely true—while the ex-husband who no longer wishes to use the embryos did not directly cause his ex-wife's inability to have any other children, he certainly

267. *Id.* at 9.
268. *See* Coleman, *supra* note 35, at 81.
269. *See id.* at 83.
270. *See id.* at 83–84.

contributed. Think back to Emily, the imaginary thirty-eight-year-old divorcée. Because Emily knew her healthy, twenty-eight-year-old embryos were frozen for when she was ready to use them, she did not take measures to preserve her ability to have children in any other way. Now, her chance to have children otherwise may be gone, solely due to her age. Her ex-husband did not cause this age-related infertility, but by creating embryos with her when she still had viable eggs for the purpose of preserving her ability to have children, he gave Emily a safety net that she relied on but no longer has.[271] The decisions her ex-husband made with her led to the situation where she may have lost her ability to have biological offspring forever. If she had known this, she might have created a contingency plan. In theory, the Mutual Consent approach may seem fair, but, in practice, it disproportionately harms women.

Legal scholars who argue for a presumption in favor of the woman believe that women should win embryo disputes only when they are seeking to implant the embryos[272] or only in cases where the man is not infertile.[273] It is important to emphasize that, though much of this discussion has focused on women who want the embryos for implantation, as this situation tends to be the most common, this Note argues that the woman should win even when she wants the embryos donated, destroyed, or kept frozen. Her greater investment in their creation should give her greater property rights in those embryos; she only has so many eggs, and she should get to decide what happens to them.[274] Accordingly, the woman should win even if the man is infertile. Consider what the ex-wife went through to create these embryos, compared to what the ex-husband went through. The sweat equity the woman has in the embryos means she should still be awarded the embryos. While the two-step approach may not be the most intuitive solution in these rarer cases, the woman did still contribute more to the embryos' creation, and utilizing this approach would provide clarity and consistency. Similarly, in the case of a woman who is still young and able to produce healthy, viable eggs while the man is completely infertile, awarding the embryos to the woman in all cases is still the fairest way to arrive at predictable and quick decisions, at the very least, in exchange for the suffering she went through to create them.

Furthermore, in cases where the man becomes infertile due to an external event like chemotherapy, he has the option to freeze his sperm. Eggs are unstable when frozen and then thawed, which is why most women avoid

271. *See* Waldman, *supra* note 51, at 1055–56.
272. *See* Colker, *supra* note 209, at 1075.
273. *See* Herrera, *supra* note 30, at 139–40.
274. *See id.* at 139.

the risk by instead freezing embryos.[275] However, sperm can much more easily be frozen on its own,[276] making male infertility cases less compelling than female infertility cases in this context.

D. INTERPRETING MARITAL PROPERTY STATUTES WITH THE WOMAN-CENTRIC APPROACH

With an understanding of the burdens women face both during and after the IVF process, marital property dissolution statutes can now be interpreted with those burdens in mind. As already discussed, whether in an equitable division state or an equal division state, the mandate is essentially to make a fair split, whatever that entails in any given case. While these vague guidelines can lead to arbitrary, unpredictable, and expensive decisions, the two-step approach would make those decisions quick and consistent. Awarding the embryos to the woman is the fairest outcome of these disputes.

1. Equitable Division

The statutes in the forty-seven states that prescribe equitable division propose several factors to guide that fair split,[277] and they all tip in the woman's favor.

i. The Contribution of Each Spouse to the Acquisition of the Property

As discussed in previous Sections, the woman contributes significantly more to the creation of the embryos than the man. Women undergo a painful and invasive procedure with risks ranging from mild to fatal,[278] while men need only to engage in self-stimulation. This factor reinforces the merit of a sweat equity theory, and the woman clearly prevails on that front.

275. *See* Miller, *supra* note 25.

276. *See Sperm Freezing: Frequently Asked Questions, Answered*, LEGACY (Oct. 28, 2021), https://www.givelegacy.com/resources/sperm-freezing-frequently-asked-questions-answered [https://perma.cc/XUC3-QEKF].

277. *See* discussion *infra* Section II.C.1.

278. *See* discussion *infra* Section III.A.

ii. The Value of the Property to Each Spouse

One round of IVF retrieves ten to fifteen eggs if the woman is lucky,[279] while the average ejaculate contains 100 million sperm.[280] Women are born with a set number of eggs while men produce millions of sperm a day.[281] By sheer number alone, eggs are more valuable to the average woman than sperm is to the average man. Since a woman's fertility declines as she gets older and ultimately drops off by age fifty,[282] what happens to her embryos is critical to whether or not she will ultimately become a parent. This is not necessarily the case for men, many of whom are able to conceive well into their sixties and seventies.[283] While in most situations, value of the embryos adds additional support for ruling in favor of the woman, it is true that there will be rare instances in which the man is infertile and the woman wants to destroy the embryos. In these cases, contribution should trump value; the woman still went through much more than the man to create those embryos, and a universal rule provides clarity and consistency, even where the value argument cuts the other way.

iii. Age and Physical Condition of the Spouses

The facts will, of course, vary from case to case, but in many instances where the ex-spouses are battling for their embryos, the woman is older, past the age of thirty-five when fertility begins to rapidly decline,[284] and often she is infertile due to age or illness. Her age and physical condition usually make her chances of conceiving in any other way slim to none. Men, on the other hand, are often able to conceive into their seventies,[285] so age is not as determinative for them as it is for women.

iv. The Nature of the Property

As many courts have noted, even if embryos are marital property, they are marital property of a special character.[286] The very nature of what

279. *See How Is IVF Done—Step by Step?*, ARC FERTILITY (Mar. 19, 2019), https://www.arcfertility.com/how-is-ivf-done-step-by-step [https://perma.cc/33P2-ZD8L].

280. Mary Anne Dunkin, *Sperm FAQ*, WEBMD (Oct. 24, 2020), https://www.webmd.com/infertility-and-reproduction/guide/sperm-and-semen-faq#1 [https://perma.cc/EWA5-68NG].

281. *See* Zawn Villines, *What to Know About Sperm Production*, MED. NEWS TODAY (July 31, 2019), https://www.medicalnewstoday.com/articles/325906#daily-sperm-count [https://perma.cc/5L9B-5Q9B].

282. *See* AM. SOC'Y FOR REPROD. MED., *supra* note 227.

283. *See A Man Can Become a Father at 75, but Should He?*, *supra* note 230. Admittedly, in any cases where the man is infertile and the woman wants to destroy the embryos, the embryos are more valuable to him. However, as argued *supra* Section III.A., the woman's disproportionate investment in their creation should trump here.

284. *See* AM. SOC'Y FOR REPROD. MED., *supra* note 227.

285. *See A Man Can Become a Father at 75, but Should He?*, *supra* note 230.

286. *See* discussion *infra* Section II.B.2.

embryos are supports the idea of a special rule for their disposition post-divorce. Embryos are not the same as a couple's house or car; they are a unique form of property and deserve to be treated as such. What they are, and what they often represent to women, should tip the scales in the woman's favor.

v. The Rights and Needs of the Spouses

As previously discussed, the right to not become a parent rests on the so-called myth of forced parenthood. Some legal scholars have argued that there is no legal right to avoid parenthood,[287] and others have said that courts place an unwarranted emphasis on the burdens faced by an unwilling parent.[288] Furthermore, women need the viable embryos that they froze when they were fertile, as many of them are no longer in the position to create more. The embryos are much more critical to their ability to become parents than to men's, who, again, can often procreate decades past when a woman can. It is clear that women's needs outweigh men's needs in these disputes, and a man does not have the right to not become a parent at the expense of a woman's only chance at parenthood.

vi. How and When Specific Items Were Acquired

The woman had a greater hand and heavier burden in the creation of the embryos, and they were made at a time when she was more fertile than she is at the time of adjudication. This factor leans in women's favor as well.

vii. Respective Merits of the Parties and the Condition in Which They Will Be Left by the Divorce

Earlier Sections have already enumerated the merits of the woman in these disputes, and they do not need repeating here. As for the condition the parties will be left in by divorce, this Note has explained how women will be left largely infertile and potentially unable to adopt, especially as an older, single parent. In contrast, men will often be able to naturally procreate for several decades after the divorce. The condition each party will be left in by the divorce dictates that it is fairest for the women to be given the embryos, as in most cases they may represent her only chance at parenthood.

viii. Costs Reasonably Anticipated by the Parties

While in many cases the ex-husband can have his own biological children well after the divorce, very few ex-wives in these disputes have that option. If she does, she will probably have to turn to more IVF, or else adoption. Each cycle of IVF can cost more than $20,000, and most women

287. *See* Herrera, *supra* note 30, at 137; Berg, *supra* note 129, at 169.
288. See Waldman, *supra* note 51, at 1030.

have to go through at least two cycles.[289] Adoption can cost upwards of $50,000.[290] For men, conceiving another child would often essentially be free, whereas for women, it would likely cost tens of thousands of dollars. Therefore, it is reasonably anticipated that a woman will face significantly more costs if she loses an embryo dispute than the man will.[291]

2. Equal Split

California, Louisiana, and New Mexico law all prescribe an even split when it comes to marital property.[292] However, each state has, through statute or case precedent, made it clear that this is not to be taken literally to mean an equal division of each specific asset. Instead, courts have deemed allocating individual assets to each spouse acceptable, as long as the overall effect is net equality.[293] Even if doing so requires equalizing payments by one party, this is still considered an appropriate way to divide marital property in these states.[294] This shows that the two-step approach can still be implemented in these three remaining states—even if it means the court has to allocate other assets to the husband or order the wife to pay equalizing payments to him. In cases where the embryos represent the woman's last chance at parenthood, this compromise on her part seems more than fair.[295]

While admittedly asset distribution is less common than equal division in these three states, the embryos are an unusual marital asset, to say the least. If courts make these sorts of distributions for typical property like houses or cars, even rarely, it certainly seems more likely that they would do so for frozen embryos. Though asset distribution may not be the standard solution for these states, the nature of the embryos makes them an asset that is anything but standard.

289. *See How Much Does IVF Cost?*, SINGLECARE (Aug. 20, 2020), https://www.singlecare.com/blog/ivf-cost [https://perma.cc/SPY3-A2YJ].

290. CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 4 (2016), https://www.childwelfare.gov/pubPDFs/s_costs.pdf [https://perma.cc/F24N-292P].

291. Remember, statutes can be created to exempt fathers from any financial responsibility in these cases. *See* ARIZ. REV. STAT. ANN. § 25-318.03 (Supp. 2021).

292. *See Equitable Distribution*, *supra* note 179.

293. *See, e.g.*, *In re* Marriage of Fink, 603 P.2d 881, 883 (Cal. 1979); Romero v. Romero, 457 So. 2d 317, 321 (La. Ct. App. 1984); Cunningham v. Cunningham, 632 P.2d 1167, 1168, 1170 (N.M. 1981).

294. *See, e.g.*, *Romero*, 457 So. 2d at 321; *Cunningham*, 632 P.2d at 1168, 1170.

295. It must be said, however, that this compromise has the potential to open a new can of worms, so to speak. First of all, it begs the question of how to value the embryos, as well as what to do in the event that the couple does not have other assets to distribute. In these cases, giving the woman the embryos but no other assets might impoverish her, especially because she would not receive any child support from her ex-husband. This is something that each woman should carefully consider before deciding to fight for the embryos in these states.

i. California

California law allows courts to, "[w]here economic circumstances warrant, . . . award an asset of the community estate to one party on such conditions as the court deems proper" to achieve equality in community property division.[296] The California Supreme Court has elaborated that those proper conditions include when justice warrants such an outcome.[297] One example of justice warranting asset distribution is a case where ex-spouses owned a business together, and the court saw no evidence that they were capable of running that business together as partners after their divorce.[298] Instead of letting this create more problems for the two spouses, the California Court of Appeal awarded the business entirely to the husband, against his wishes, and gave the wife assets of equal value.[299] This is just one example where the court awarded an asset entirely to one spouse, against the request of one of the parties. Surely embryos are an even more sensitive matter than a family business and warrant the court's discretionary consideration in achieving justice, even if the court needs to defy one of the party's wishes to do so. These laws allow for the possibility that the embryos would be awarded entirely to the woman, even where the husband objects, if this is the best way to achieve justice.[300]

ii. Louisiana

Similar to California law, Louisiana's marital property dissolution statute allows a court to award any given asset entirely to one spouse, based on the "nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances [it] deems relevant."[301] This gives courts plenty of room to award the embryos to the woman, and as earlier Sections have already argued, each of these factors weighs in her favor. Louisiana law also prescribes equalizing payments by one party if such an allocation results in an unequal net value.[302] In embryo dispute cases, a court would have the ability to award the embryos entirely to the ex-wife and allocate other assets to the ex-husband or order equalizing payments to

296. *See* CAL. FAM. CODE § 2601 (West 2020).
297. *See* Phillipson v. Bd. of Admin., 473 P.2d 765, 775 (Cal. 1970).
298. *See In re* Marriage of Lotz, 174 Cal. Rptr. 618, 621–22 (Ct. App. 1981).
299. *See id.*
300. One might argue that another, better way to achieve justice would be to give half of the disputed embryos to each party to do with them what they will. However, in practice, this would achieve justice for neither party. In such a case, the party who does not want the embryos implanted would lose if the other party is given the chance to do so; while the party who "wins" by being given the opportunity to implant the embryos actually has a much smaller chance of success if that number is halved, given that the average woman needs two rounds of IVF and multiple embryos are often implanted in each round. *See* Robertson, *supra* note 115, at 7–8.
301. *See* LA. STAT. ANN. § 9:2801(A)(4)(c) (2018).
302. *Id.* § 9:2801(A)(4)(d).

him.[303] The two-step approach can therefore fit within the confines of Louisiana law.

iii. New Mexico

The New Mexico Court of Appeals has written that "mathematical exactness in community division is neither expected nor required and . . . a proper apportionment of community property and debts depends on what is fair considering all of the evidence with reference to the facts and circumstances of each case."[304] This would clearly allow the courts to award all of the embryos to the woman, given that it is the fairest outcome. In one case, the New Mexico Supreme Court declared "there is no requirement that each party receive exactly the same dollar value [in property division in a divorce] as long as the community property is equally apportioned by a method of division best suited under the circumstances."[305] Because, essentially, there is no set rule in New Mexico when it comes to dividing marital property,[306] it is evident that courts have plenty of freedom to award any given asset entirely to one spouse. These precedents make clear that a division of marital property is dependent on the specific facts in each case, and that what is ultimately "equal" will vary on a case-by-case basis. New Mexico courts have the discretion to award embryos entirely to the woman in embryo disputes, and as this outcome would be the fairest, this ruling would fit with existing precedent.

CONCLUSION

Currently, courts choose to rely on one of three methods—the Contractual Method, the Contemporaneous Mutual Consent Method, or the Balancing Method—when deciding embryo dispute cases. While only a handful of states have had to decide these types of cases, each state has endorsed a different method, showing a lack of consistency in how these cases are decided. An easier, more reliable method is needed.

Up until now, the law has mostly treated embryos as property, not people, and this is the correct classification. Embryos fit the legal definition of property: they are external things over which the "owners," or gamete providers, exercise control. Embryos do not have any of the characteristics typically used to define personhood, and they are not capable of reaching birth on their own without intervention. With the exception of a few states,

303. Admittedly, determining the value of the embryos would be tricky, but solving that particular issue is not within the scope of this Note.

304. *See* Bustos v. Gilroy, 751 P.2d 188, 193 (N.M. Ct. App. 1988) (citations omitted).

305. *See* Ridgway v. Ridgway, 610 P.2d 749, 750 (N.M. 1980) (citations omitted).

306. *See* English v. English, 879 P.2d 802, 809 (N.M. Ct. App. 1994).

courts already treat embryos as some form of property, and this definition has much simpler implications than the alternative.

Once it is established that embryos are property, it is clear that they are the marital property of the divorcing couple, and therefore fall under the marital dissolution statutes of whichever state they are in. While these statutes vary by state, each strives for the same outcome—a fair split of assets between the spouses. This may mean awarding individual assets entirely to one spouse, and awarding equally valued assets, or else equalizing payments, to the other spouse, for an overall effect of net equality. Courts have statutes and case law to guide their determination of what a fair split of marital property entails, including the contribution of each spouse to the property, the value of the property to each spouse, the nature of the property, and the rights and needs of each spouse.

When it comes down to it, a fair split means the embryos should go to the woman, no matter what she is planning to do with them. She went through an invasive, painful, and risky process to create those embryos, giving up a piece of her body to do so.[307] She only has a finite number of eggs, and she should have the right to decide what happens to them. Furthermore, the fact of the matter is that in most of these embryo disputes, the woman is seeking possession of the embryos for implantation because her chances of having a child, biological or not, are slim to none without them. By the time of adjudication, she is much worse off than her male counterpart, and the law needs to recognize this.

The two-step approach is by no means a perfect solution.[308] However, it is the fairest way to accomplish a clean, quick, and reliable outcome across the country, despite the fact that family law varies by state. Many legal scholars in this field have called for a uniform set of rules, but that is not realistic, at least for the near future, because family law has never before been considered a federal issue. The two-step approach is a compromise that honors existing state law but provides an interpretation that will at least lead to predictable outcomes across states. It does not require any drastic new laws or radical ways of thinking. Instead, it merges established legal principles with normative concepts to fill an existing gap in the law. The two-step approach is better than any existing method because it will lead to cheaper, more consistent, and, most importantly, fairer outcomes. Even misogynists[309] on the Internet have acknowledged that the burdens men and

307. *See* Herrera, *supra* note 30, at 141.

308. One glaring disadvantage is the fact that the approach does not apply to disputing couples who were never married.

309. "So strange. Do you know that female lipstick stimulates sexual arousal? Can you imagine a man showing up for a business meeting with a giant artificial boner straining at his pants? Yet lipstick is

women face when it comes to procreation are not the same—it is time the law does so as well.

perfectly acceptable in the business world." Courtney Pochin, *Man Compares Lipstick to Something Very Sexual—and Leaves Everyone Very Confused*, MIRROR (Aug. 10, 2019, 2:31 PM) (quoting @StefanMolyneux, TWITTER (Aug. 9, 2019, 10:28 PM)), https://www.mirror.co.uk/news/weird-news/man-compares-lipstick-artificial-boner-18885350 [https://perma.cc/LD6T-QFEH].