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Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives

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I. INTRODUCTION

This Article focuses on a parenthood issue that raises concerns in both family law and trusts and estates law and which illustrates differences and similarities between the approaches of the two disciplines—the disposition of eggs, zygotes, and sperm upon divorce or death. This may, in some ways, seem a little obscure, however, there are almost 200,000 frozen embryos nationwide, and at least 20,000 are "involved in some type of custody dispute" either at divorce or among "surviving relatives of a donor who stored embryos prior to death."[1] Some of the family law casebooks cite *Davis v. Davis*[2] or related cases, involving the disposition of zygotes upon divorce.[3] It has been a bitterly fought dispute in divorce cases, where courts have struggled with whether

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1. Kate W. Lyon, Note, *Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce*, 21 WHITTIER L. REV. 695, 713 (2000); Frank Rich, *The Genius of George W. Bush*, N.Y. TIMES, Aug. 18, 2001, at A15 (100,000–200,000); Joseph Curl, *Adoption Touted for Embryos Called Better Option Than Using Them for Stem-Cell Research*, WASH. TIMES, July 17, 2001, at A3 (188,000). In 1998, there were more than 8,000 egg transfers nationwide. Kenneth Weiss, *The Egg Brokers*, L.A. TIMES, May 27, 2001, at A1.

This Article uses the term zygote to refer to the union of gametic material during the first fourteen days after fertilization. John Jain, *The Future of Assisted Reproductive Technologies*, 21 WHITTIER L. REV. 435, 436 (1999) (citing AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS COMMITTEE OPINION No. 136, Apr. 1994).

2. 842 S.W.2d 588 (Tenn. 1992).

3. *E.g.*, JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 1097 (4th ed. 1999) (*Davis* as principal case); CARL E. SCHNEIDER & MARGARET BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 893–96 (2d ed. 2000) (discussing *Davis* and *Hecht*).

gametes are subject to property-based or custody-based rules.[4] Many trusts and estates teachers do include the *Hecht v. Superior Court*[5] case, which involved a man's attempts to will his sperm to his girlfriend, Deborah Hecht.[6] Based on course content, this is a live issue in both types of courses.

This Article covers a variety of situations involving family law, trusts and estates, and new reproductive technologies: disposition of zygotes at divorce or death and disposition of sperm and eggs upon divorce or death. Although there are certainly grounds for distinguishing eggs and sperm from zygotes—zygotes are closer to potential human life and require the union of two gametes[7]—in the context of reproductive technology, both gametes and zygotes (Gs & Zs) provide the hope of producing a child. Consequently, they are not discussed separately, unless the differences become relevant.

There are two overlapping issues in each discipline. First, who makes decisions about the use of gametic material? Can the partner seeking procreation use gametic material over the objections of the other partner? The objecting gamete provider could be either a divorcing spouse or a dead individual who has indicated opposition in a testamentary document, or who may have left no instructions.

The second, and related, issue, concerns how the use of donated, willed, or marital gametic material affects the legal determination of parenthood.[8] If surviving relatives or divorcing

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4. *See* Helene Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT. L. 75, 76–77 (2002) (at least five reported cases) ["*Frozen Pre-Embryos*"]; John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989 (2001) (discussing cases).

5. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

6. *E.g.*, JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS, AND ESTATES 117 (6th ed. 2000). The most recent version of FAMILY PROPERTY LAW includes a section on "Children Conceived by Assisted Reproductive Technologies." LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (3d ed. Foundation Press, 2002).

7. *See* Jain, *supra* note 1, at 436. This Article uses the term zygotes and pre-embryos interchangeably.

8. *See* Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1098–

spouses wish to use the gametic material, then what are the rights of the other spouse or the decedent's estate? Are courts likely to allow single parenting in either context? And, if notwithstanding one partner's objections, the other partner produces a child, then is the objecting partner the legal parent with the various attendant obligations? This second question has implications in family law for child support,[9] custody, and visitation, and in trusts and estates law for inheritance issues, such as class gifts to children/issue, and the identification of "children" under intestacy statutes.[10]

The overlapping issues concern the disposition of this material once there has been a change in situation because the relationship has dissolved through separation of the parties[11] or death. In these contexts, there may be no explicit direction; one party wants the material, the other wants it destroyed—at death, one family member may want the material and other family members may oppose that desire. Both areas are also concerned with the parent-child relationship—the identity of the parents is the initial decision, and from this determination flows issues of child support and custody in family law[12] and inheritance rights in the estates law context. Finally, all issues center on the importance of genetic connection: what rights are retained by an individual who produces genetic material to be used in alternative reproduction, and does use of that genetic material invariably create legal obligations?

In the family law area, most of the cases have concerned disposition of zygotes, and courts generally rule in favor of the person seeking to avoid procreation, regardless of any evidence as

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1100 (1997).

9. For example, notwithstanding a preconception agreement by a woman in which she agreed not to hold a man liable for child support, a court held the man liable to the woman for child support. Straub v. B.M.T., 645 N.E.2d 597, 598 (Ind. 1994).

10. *See* Shapo, *supra* note 8, at 1100.

11. The parties may be married or unmarried; they may be same-sex or heterosexual. Disposition of reproductive material may arise in any of these relationships. Most of the reported cases have arisen in the context of heterosexual couples. *See infra*, notes 93–109 and accompanying text.

12. *See generally* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000).

to the intent of the parties.[13] In balancing the constitutional right to procreate and the right not to procreate, divorce courts have almost uniformly privileged the right not to procreate.[14] In the trusts and estates area, most of the cases concern disposition of sperm, and the courts typically attempt to ascertain the testator's intent.[15] In both contexts, as this Article will show, courts, as well as legislatures and scholarly commentary, emphasize biology and genetic connection.

This Article proposes a solution that respects both biology and intent, and addresses the competing rights of avoiding and allowing procreation. This requires "breaking the link" between biological and social parenthood.[16] Courts and legislatures in the estates context have successfully recognized distinctions between biological and social parenthood, while divorce courts typically do not separate the two aspects of parenthood.[17] Use of a decedent's

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13. *See* Ellen Waldman, *Family Law Conundrums in Assisted Reproduction*, 21 WHITTIER L. REV. 451, 454, 456, 459 (1998). As Professor Waldman notes, "[i]t is hard not to view the courts' handling of these cases as results-oriented." *Id.* at 459. She further notes that courts have eschewed the traditional family law framework, which centers on determining the child's best interests, in favor of analyses based on either privacy or contract. *Id.* at 454, 456. *See also* Shapo, *Frozen Pre-Embryos*, *supra* note 4.

14. *Id.* at 455.

15. *See infra* Part V.B. Many law review articles have examined family law cases or trusts and estates cases, but few have examined both areas together. Nonetheless, the definition and redefinition of parenthood is central to the intersection between family law and the law of donative transfers. Professor Susan Frelich Appleton describes the divorce cases as articulating a notion of "planned parenthood," while issues of posthumous reproduction rely on intent. Susan Frelich Appleton, *"Planned Parenthood": Adoption, Assisted Reproduction, and the New Ideal Family*, 1 WASH. U. J.L. & POL'Y 85, 89–90 (1999).

16. *See* Nancy Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57 (2001); *see also* R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 265, 266 (1994) (discussing the law's preference for biology over intent in family law). In *Michael H. v. Gerald D.*, the Supreme Court recognized that biological parenthood was not equivalent to marital parenthood, upholding California's presumption that a married man was the father of any child born during the marriage. Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989).

17. See infra notes 96–100 and accompanying text.

sperm may not result in the vesting of inheritance rights in any resulting child.[18] By contrast, in the divorce context, courts have pointed to the specter of a divorced spouse's genetic child existing without that spouse's consent; they have not severed the link between genetic and legal parenthood.[19]

II. CURRENT APPROACHES TO MANDATORY PARENTHOOD: CONTRACTUAL, LEGISLATIVE, AND JUDICIAL SOLUTIONS

Disputes over gametes can be resolved through either private agreements or public regulation by courts or legislatures.[20] The providers may draft a document setting out their intentions (e.g., a contract or a will) with respect to disposing of gametic material in case of divorce or death, but states may enact legislation establishing either override rules that mandate certain outcomes, such as a prohibition on destruction of the material, or default rules which control in the absence of an expression of contrary intent.[21] The courts may also, pursuant to common law or constitutional law, guide the law. This section briefly discusses private contracting, judicial decision making, and legislative actions concerning the disposition of gametic material.

A. Agreements

The easiest way to answer questions raised in these

18. See infra note 100 and accompanying text.

19. See infra notes 65–71 and accompanying text.

20. Of course, the division between private conduct and public regulation is not this neat; for example, contracts and wills are subject to public regulations and scrutiny. The existing cases so far, however, have focused on the existence or non-existence of private statements of intention, even when they have chosen to override those statements.

21. Indeed, legislatures have enacted a few statutes that provide both default and override rules. We could, on the one hand, conceive of a legal scheme that mandates contracts or wills whenever genetic material is provided, and that never overrides these statements of intent. On the other hand, we could conceive of a legal scheme that mandated certain outcomes regardless of contrary intent, as currently occurs in Louisiana. *See infra* notes 39–42 and accompanying text; *Recent Cases*, 115 HARV. L. REV. 701, 706–07 (2001) (discussing desirability of default rules, rather than override, rules with respect to zygote disposition).

situations would be if the parties explicitly agreed on what to do in advance of divorce or death or if the sperm/egg bank has explicit procedures. Such an agreement, required by many in vitro fertilizations (IVF) centers and sperm banks, would address the multiple dispositional possibilities. For example, Fertility Options mandates a "contractual agreement between you and your fertility assistant . . . before any reproductive procedures begin."[22]

While these agreements clearly express the intent of the parties at the time they are signed, the problem is that they still may leave some issues open. It is difficult to anticipate all contingencies in an agreement of this nature. But even if the agreements do anticipate divorce or death, the question is whether people should be bound at the time they are signing these agreements, or whether they can subsequently change their mind.[23] It is often quite difficult to imagine one's death or divorce. Moreover, intimacy and mutual dependence make spouses vulnerable to one another,[24] and the particular circumstances of

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22. http://www.fertilityoptions.com/html_pub/guid_li.htm (last visited May 20, 2002). Fertility Options is a national registry for egg and sperm providers and potential surrogates. On its web site, it explains that there is comparatively little legislation or case law concerning assisted reproduction techniques, but that courts look at the parties' intent. *Id.*

23. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 71–76, 117–26 (1999) (discussing problems with enforcing agreements after change in circumstances).

24. *See, e.g.*, Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 186–87 (1998); MARGARET BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (Harv. Univ. Press 2000); Margaret Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994) (reviewing MILTON REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY (1993)); Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 111–12 (1998); Marjorie M. Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207, 291–307 (1982); Sally Burnett Sharp, *Semantics As Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 326 (1991) (explaining that separation agreements differ from other contracts, and, consequently, the state has an interest in ensuring that these agreements are fair and reasonable); Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132

contracting about reproduction provide additional complexities and stress.

B. Statutory Solutions

Where the parties have not addressed the issues themselves, legislation can provide default rules. Even where the parties have decided what to do, statutes may also serve an override function.

1. Sperm Providers

Most states have statutes on situations involving sperm donors, specifying that men who provide sperm to sperm banks are not the father of any resulting child.[25] There is, however, confusion when the insemination is not conducted by a doctor or when the woman is not married.[26] Like the original Uniform Parentage Act, the revised Act addresses insemination only in marital families.[27]

U. PA. L. REV. 1399, 1420 (1984); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119–24 (1993).

25. There are statutes in thirty-five states that address artificial insemination. Polikoff, *supra* note 16, at 63; *see* JOAN HEIFETZ HOLLINGER, ADOPTION LAW & PRACTICE § 14.20[2] (Volume 2) (2001). For an overview of the new reproductive technologies, see LORI B. ANDREWS, THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY (Henry Holt and Co. 1999), and Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 661 (1991).

26. *See, e.g.*, HOLLINGER, *supra* note 25, §14; Polikoff, *supra* note 16, at 63–64; Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision Making* 93 (2002) (unpublished manuscript on file with author) (setting out the different approaches to parenthood via sperm providers, and noting the existence of considerable "uncertainty").

27. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 386, 407–08 (1973). Interestingly, the Act provides that a man who provides semen "to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." *Id.* § 5(b). The Act does not address whether the semen provider might, in fact, be deemed a father if an unmarried woman is inseminated. Indeed, in the Comment, the drafters note that they have not dealt with many of the "complex and serious legal problems" raised by alternative insemination. *Id.* § 5 cmt.

Indeed, a recent Illinois case held that a boyfriend who had encouraged and financially supported his girlfriend's use of provider sperm was not the father of the resulting children because he had not consented in writing.[28]

Where a man makes a sperm deposit that he intends to use later, the sperm banks themselves establish the terms of use.[29] In addition, the man may provide other expressions of intent such as a will or other signed statement. In the absence of such documentation, it may be unclear whether the man is simply banking sperm with the intent of making a reproductive decision in the future, or is banking sperm with the explicit intent that this material be used to create children without any further actions from him.[30] Sperm may also be extracted from a dead or comatose man, with or without his explicit permission either to the extraction or to the support of any resulting children.[31]

2. Egg Providers

The ability for one woman to provide eggs for another is a comparatively recent medical phenomenon that has been possible for less than twenty years.[32] Consequently, there has been relatively little regulation of egg providers.[33] Few states have laws

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28. Mitchell v. Banary, No. 1-00-0590 (Ill. App. Ct. Oct. 10, 2001) *available at* http://pub.bna.com/fl/1000590.htm. The couple had agreed to use sperm designed to enhance the perception that the boyfriend was the father, and the boyfriend supported the children for three years. *Id.*

29. *See, e.g.*, www.spermbankdirectory.com/faq_3.htm.

30. *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 271–72 (Mass. 2002). The Massachusetts Supreme Court held that depositing sperm does not provide the requisite showing of intent to become a father and to support any resulting children. *Id.* at 272.

31. *See, e.g.*, Lori Andrews, *The Sperminator*, N.Y. TIMES MAG., Mar. 28, 1999, at 62. Since 1980, there have been more than ninety cases involving requests for sperm harvesting from dead or comatose men for procreative purposes. Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J. L. MED. & ETHICS 347, 348 (1999) (arguing that the appropriate standard for collection is reasonably inferred consent).

32. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 110 n.12. (2001).

33. *See, e.g.*, Marsha Garrison, *Law Making for Baby Making: An*

concerning the actual sale of oocytes.[34] Similarly, only a small number of states have regulated legal parenthood through the use of egg provision.

3. Zygote Provision

Few states have enacted legislation addressing the implications of zygote provision. A 1998 ABA report found that only two states had enacted legislation addressing zygote disposition agreements.[35] These two state statutes, which take very different approaches, are of limited practical value. In Florida, couples undergoing in vitro fertilization must enter into a written agreement that provides for the disposition of zygotes in the event of death, divorce, or other "unforeseen circumstances"; and in the absence of a written agreement, the gamete providers are given joint dispositional authority.[36] When one provider dies, the other provider has control over the zygote.[37] Notwithstanding the

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Interpretive Approach to the Determination of Legal Parenting, 113 HARV. L. REV. 835, 897 n.283 (2000).

34. *See* Baum, *supra* note 32, at 126 (noting that Louisiana is the only state with an explicit prohibition on payment, while Virginia is the only state with explicit permission for payment); *see also* Fink & Carbone, *supra* note 26, at 75 (stating that "the law that applies to sperm donors may or may not apply with equal force to egg donors").

35. Robyn Shapiro, *Who Owns Your Frozen Embryo? Promises and Pitfalls of Emerging Reproductive Organs*, ABA Network Website, *available at* http://www.abanet.org/irr/hr/sp98shapiro.html. Many other states are considering such legislation. *See, e.g.*, Shelley Emling, *Frozen Embryos Creating Legal, Ethical Dilemma*, COX NEWS SERVICE, March 3, 2001 (reporting that New Jersey legislators were considering a statute that would require couples to sign a contract prior to undergoing in vitro fertilization procedures, but that many states "have been hesitant to take up the issue because it could stir passions on both sides of the thorny abortion debate"). Anti-abortion groups have mobilized to prevent the destruction of zygotes. *See* Randy Diamond, *Justices Question Fight to Preserve Ex-Wife's Embryos*, THE RECORD, Feb. 27, 2001, at A1 (reporting on brief filed by New Jersey League for Families arguing for preservation of zygotes).

36. FLA. STAT. ANN. § 742.17(2) (West 1997).

37. *Id.* § 742.17(3). Florida is one of the few states that addresses the post-death disposition of gametic material in any detail. Its statute provides:

> A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of

seemingly mandatory nature of such an agreement, in those situations where the parties have not agreed in advance, they have joint authority, which creates a highly problematic situation. While Texas does not address "ownership" issues, its statute allows a spouse to withdraw consent before the zygotes have been placed.[38]

Louisiana absolutely precludes the destruction of zygotes. A 1986 Louisiana law declares that an in vitro fertilized ovum is a juridical person to whom the in vitro fertilization patients "owe [] a high duty of care and prudent administration."[39] If the patients renounce their "parental rights," then the juridical person is available for. "adoptive implantation."[40] The zygote can be disposed of only through implantation.[41] After the renunciation, but prior to implantation, the physician is deemed the zygote's

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> the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.
>
> (1) Absent a written agreement, any remaining eggs or sperm shall remain under the control of the party that provides the eggs or sperm.
>
> (2) Absent a written agreement, decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.
>
> (3) Absent a written agreement, in the case of the death of one member of the commissioning couple, any eggs, sperm, or preembryos shall remain under the control of the surviving member of the commissioning couple.
>
> (4) A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.

Id. § 742.17.

38. TEX. FAM. CODE ANN. § 160.706(b) (Vernon 1996). The Texas code does address parenthood. *See infra* notes 100 and 109 and accompanying text.

39. LA. REV. STAT. ANN. § 9:130 (West 2001). The *Davis* trial court found that eggs became human beings at the moment of fertilization and awarded custody of them to the wife. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

40. LA. REV. STAT. ANN. § 9:130 (West 2001).

41. *Id.*

temporary guardian until adoptive implantation can occur.[42] In Louisiana, then, an agreement may not direct zygote disposition other than implantation. Other options, such as donation for research or destruction, are prohibited. Under this approach, frozen zygotes cannot be destroyed because this is destroying life.[43] The constitutionality of this law is questionable in light of current abortion jurisprudence.[44] In Australia, zygotes must be freed for surrogate implantation and cannot be destroyed.[45]

A few other states have legislation concerning zygote donation, payment, and confidentiality.[46] California requires informed consent before the use of sperm, eggs, or zygotes, but does not specify the terms of the informed consent, nor otherwise require that the parties address the disposition of this gametic material.[47] More recently, New Jersey and New York have

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42. *Id.* § 9:126.

43. *See* Nicole L. Cucci, Note, *Constitutional Implication of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 434–35 (1998) (discussing this position).

44. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 901 (1992); Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000).

45. *See* Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 41–43 (1996); Jennifer M. Stolier, Comment, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT'L & COMP. L. 459, 477–79 (2001).

46. Some states provide that a child conceived through zygote provision is a child of the intending parents, not the gamete providers. FLA. STAT. ANN. § 742.11 (West 2001); OKLA. STAT. ANN. tit. 10, § 556(B)(1) (West 2001); TEX. FAM. CODE ANN. §151.103(a) (Vernon 1996). Correspondingly, several states require the gamete providers must relinquish all parental rights. FLA. STAT. ANN. § 742.12; OKLA. STAT. ANN. tit.10, § 556(B)(2) (West 2001).

47. Section 367(g) of the California Penal Code states as follows:

> (a) It shall be unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form.
>
> (b) It shall be unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient.

CAL. PENAL CODE § 367g (2001).

considered legislation that would require medical facilities that perform IVF and zygote cryopreservation to obtain from each couple, prior to their undergoing these procedures, information regarding what the couples would like done with any cryopreserved zygotes in case of death or divorce; the couples' statements, however, are all part of the informed consent process and do not stand alone as separate agreements.

C. Judicial Solutions

Courts have developed a variety of approaches to deal with these issues in the absence of legislative guidance, and, somewhat surprisingly, even in the presence of contracts. In both sets of cases, courts are concerned with the issue of whether someone should be coerced into parenthood. Similarly, in both family law and estates law, if there are differing intents, then courts generally seem to find in favor of the person who does not want to procreate, regardless of the existence of prior agreements or statements of intent.[48]

Initially, the first group of cases supported the enforcement of express agreements relating to zygote disposition. In *Davis v. Davis*,[49] although there was no contract, the court indicated its preference for an enforceable contract over a seeming failure to anticipate the contingency of divorce.[50] In *Kass v. Kass*,[51] the contract was not for procreation, but for donation of the prezygotes to research.[52]

In *Davis*, probably the best-known divorce case, the court developed the quasi-property analysis that was useful in *Hecht*.[53] There was no pre-IVF agreement on what to do with excess zygotes.[54] The court pointed out that the zygotes' value was in

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48. *See* Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285, 290 (1988).

49. 842 S.W.2d 588 (Tenn. 1992).

50. *Id.* at 590.

51. 696 N.E.2d 174 (N.Y. 1998).

52. *Id.* at 176–77.

53. *Davis*, 842 S.W.2d at 595–96 (citing York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (discussing bailment of pre-embryos)).

54. *Id.* at 597. The court speculates at end on whether it would enforce an agreement—it says that initially, such an agreement would be presumed valid,

their potential to become children, so the "essential dispute here [was not over property but] . . . whether the parties [would] become parents."[55] The court concluded that ordinarily, the party seeking to avoid parenthood should prevail.[56] In *Kass*, the contract provided:

> In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage. . . .
>
> The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM
>
> . . . .
>
> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the

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but that the

> parties' initial "informed consent" to IVF procedures will often not be truly informed because of the near impossibility of anticipating . . . all the turns that events may take as the IVF process unfolds. Providing that the initial agreements may later be modified by agreement will, we think, protect the parties against some of the risks they face in this regard. But, in the absence of such agreed modification, we conclude that their prior agreements should be considered binding.

Id.

55. *Id.* at 598.

56. *Id.* at 604.

> disposition of our pre-zygotes and direct the IVF program to (choose one):
>
> . . . .
>
> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program.[57]

Although the wife subsequently expressed her opposition to destruction of the zygotes or release to the IVF program, the court upheld the contract, analogizing the parties' choice at death to the intended choice upon divorce.[58]

Nonetheless, relying on public policy considerations, courts in later cases refused to enforce prior express and unambiguous contracts that would compel one donor to become a parent against his or her will.[59] The underlying theme in these cases is judicial respect for the right not to procreate, regardless of the potential existence of a contract to the contrary.

In *A.Z. v. B.Z.*, the previously signed agreement stated that if the parties "[s]hould become separated, [they] both agree[d] to have the embryo[s] . . . return[ed] to [the] wife for implant."[60] When the couple divorced, the husband objected to being coerced into parenthood.[61] The trial court refused to enforce the agreement, referring to the unforeseen changes in circumstances between the signing of the agreement and the divorce four years later.[62] On appeal, the Massachusetts Supreme Court also refused to enforce

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57. Kass v. Kass, 696 N.E.2d 174, 176–77 (N.Y. 1998).

58. *Id.* at 178.

59. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000); J.B. v. M.B., 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff'd as modified*, 783 A.2d 707, 720 (N.J. 2001); Litowitz v. Litowitz, 10 P.3d 1086, 1093 (Wash. Ct. App. 2000).

60. *A.Z.*, 725 N.E.2d at 1054. The court also found that the contract itself was not necessarily binding, terming the agreement less of a contract than an effort by the clinic to provide information about the reproductive technologies at issue, and observing that the husband had signed blank forms, with the wife filling in the relevant details. *Id.* at 1057–58.

61. *Id.* at 1056.

62. *Id.* at 1055.

this agreement, holding that it was a violation of public policy to force someone to become a parent.[63] This policy consideration trumped the express terms of the agreement.[64] The court concluded, "we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."[65]

Similarly, in *J.B. v. M.B.*, a New Jersey state court agreed not to enforce the "alleged contract" because it was a contract to procreate.[66] The agreement provided that parties would relinquish all control of their gametic material to the IVF program upon divorce (unless a court order provided otherwise) or upon death of both of the parties (unless a will provided otherwise).[67] Unlike most of the other cases, it was the husband who wanted to enforce the agreement, seeking to preserve the zygotes for his future use or for donation to an infertile couple.[68] The wife opposed any use of the zygotes.[69] The court refused even to let the issue of whether the wife had earlier agreed to donate unused zygotes to go to trial because the husband's right to procreate remained unaffected, whereas implanting the zygote would infringe upon the wife's ability not to procreate.[70] The court agreed with the rationale of *A.Z.* and concluded "that a contract to procreate is contrary to New Jersey public policy and is unenforceable."[71]

The trend of unenforceable contracts is further noted in the most recent case, *Litowitz v. Litowitz*,[72] decided by a Washington state court. The couple created a zygote using the husband's sperm

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63. *Id.* at 1057–58.

64. *Id.* at 1059.

65. *Id.* at 1057–58.

66. J.B. v. M.B., 757 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff'd* 783 A.2d 707 (N.J. Sup. Ct. 2001).

67. *Id.* at 616.

68. *Id.* at 615.

69. *Id.*

70. *Id.* at 619. "Even if the wife were relieved of the financial and custodial responsibility for her child, the fact that her biological child would exist in an environment controlled by strangers is understandably unacceptable to the wife." *Id.*

71. *Id.*

72. 10 P.3d 1086 (Wash. Ct. App. 2000).

and an egg provided by another woman.[73] The wife sought enforcement of an implied contract allegedly constructed by the couple's "plan" to parent other children evidenced by their prior decision to preserve the zygotes created by a surrogate egg donor.[74] The contract provided that upon death of both parents, the zygotes would be disposed of, but said nothing about divorce.[75] The contract stated that a court could make a decision upon the parties' petition.[76] The court ruled in favor of the husband who did not want to procreate or become primary parent, but who instead wanted to donate pre-embryos to someone else.[77] The court followed *Davis*, holding that they would not "read into the contracts an implied promise that [the husband] would continue with the parties' family planning after the dissolution."[78] "Absent any evidence that [the husband] 'intended to pursue reproduction outside the . . . marital relationship' with [the wife]," the court was "unwilling to create such an obligation."[79] The court does say in dicta that "at least one court, because of public policy concerns, has said it would not enforce even an unambiguous agreement 'that would compel one donor to become a parent against his or her will.'"[80]

While it may appear that *Litowitz* does not concern the right to procreate, it did implicate the parties' desires to have children.[81] The husband did not want to be a parent and instead sought to donate the zygotes for adoption; the wife wanted the zygotes so that she could arrange a surrogate pregnancy.[82]

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73. *Id.* at 1087.
74. *Id.* at 1091.
75. *Id.* at 1089.
76. *Id.* at 1091.
77. *Id.* at 1093.
78. *Id.* at 1091.
79. *Id.*
80. *Id.*
81. Chi Steve Kwok, Note, *Baby Contracts*—Litowitz v. Litowitz, 10 P.3d 1086 (Wash. Ct. App. 2000), 110 YALE L.J. 1287, 1289 (2001). The author compared *Litowitz* to a custody dispute rather than a dispute over the right to procreate. *Id.* In *Litowitz*, however, the husband did not want to be a parent and, instead, sought to donate the zygotes for adoption; the wife wanted the zygotes so that she could arrange a surrogate pregnancy. *Litowitz*, 10 P.3d at 1089.
82. *Litowitz*, 10 P.3d at 1088.

It is evident, however, that courts recognized the tensions in their decisions between contract enforcement and respect for the right not to procreate. As the New Jersey court explained in *J.B. v. M.B.*, "[o]ur conclusion is not inconsistent with *Davis* . . . or *Kass* . . . because neither decision enforced a contract to procreate, despite expansive dicta regarding the enforceability of agreements between progenitors."[83] Nonetheless, courts have overridden clearly stated intent, in support of a public policy that privileges one party's right not to procreate over the other party's right to procreate.[84]

In the death context, courts have attempted to examine the decedents' lifetime intent, and, in the few published cases, they have not universally privileged either the right to procreate or the right not to procreate. In *Hecht*, the issues concerned the disposition of Kane's frozen sperm.[85] Throughout his life, he had indicated that he wanted his girlfriend to have the option of using the sperm upon his death; he even wrote a letter to his unborn child.[86] At the time, California law clearly established that any non-marital children born would have no inheritance rights against his estate.[87] The court held that Ms. Hecht could use the sperm.[88] By contrast, in the Louisiana case of *Hall v. Fertility Institute*,[89] the decedent executed an Act of Donation of sperm to his girlfriend and appointed his girlfriend as his health care agent; while these acts appeared to indicate an intent to procreate, the trial court judge examined intent as expressed by other factors (such as failure to leave anything under his will to his girlfriend and his failure to take

83. J.B. v. M.B., 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff'd as modified*, 783 A.2d 707, 720 (N.J. 2001) (citations omitted).

84. *See* Fink & Carbone, *supra* note 26, at 93.

85. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

86. *Id.* at 276.

87. CAL. PROB. CODE § 6408(f)(2) (West 1991) (repealed 1993) (stating that nonmarital child could establish paternity only through court order entered during the father's lifetime, or if the father had held out the child as his own). *See* JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES, 111–12 (Princeton Univ. Press 1994) (discussing the 1984 Australian *Rios* case concerning inheritance rights of frozen embryos).

88. *Hecht*, 20 Cal. Rptr. 2d at 284.

89. 647 So. 2d 1348 (La. Ct. App. 1994).

additional actions when alive), and his competence, questioning whether he was unduly influenced by the girlfriend.[90]

> Should [his girlfriend] be allowed to obtain Hall's sperm deposits during the pendency of this action, one or more embryos could well come into existence. Depending on the length of time the matter requires prior to final conclusion, the possible development of human beings is such a serious consequence that the irreparable nature of the risk at issue is clear. The emotional damage to the decedent's mother and Executrix should the donation prove to have been illegally obtained and children sired against the wishes of her dead son is obvious and cannot be compensated adequately. Further, the determination of the validity of the act of donation should be made without the influence of the existence of embryos or an actual pregnancy.[91]

While there are some factual distinctions between the two cases—one could argue that Kane's intentions were unambiguous—it is unclear whether the facts provide an adequate explanation for the differing results in the two cases. It appears, instead, that the judges used two different approaches in deciding whether to permit the posthumous use of a boyfriend's sperm.

Ultimately, these cases present a mixture of intent (contract or will), quasi-property, and public policy in both divorce and death situations. This occurs against the background of a constitutional right to privacy that includes procreational decisions, both the right to procreate and the right not to procreate. Courts somewhat consistently try to examine intent, and where intent is conflicting, they side with the person who does not want to

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90. *Id.* at 1350. For articles on undue influence and family members, see, e.g., Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 PITT. L. REV. 225 (1981); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278–85 (1999).

91. *Hall*, 647 So. 2d at 1351.

procreate.[92]

III. WHO ARE THE PARENTS?

The first issue is whether an individual can be coerced into parenthood; the second is whether biological parenthood is equivalent to social parenthood. In her talk at the AALS Millennium Workshop, Professor Joan Heifetz Hollinger discussed this issue in the context of living or divorcing parents. Within the estates context, it is important to examine what the Uniform Parentage Act (UPA) provides with respect to the distinction between biological and social parenthood. The UPA is relevant, actually, to both family law and trusts and estates—the Uniform Probate Code (UPC) explicitly refers to the UPA in deciding how to define the parent/child relationship in section 2-114(a).[93] The new UPA separates legal from genetic parenthood, providing that an after-born child is not the child of the decedent or of a divorcing spouse who has contributed gametic material, but has not affirmatively consented to becoming a parent.[94] Indeed, this was

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92. A final issue concerns the dead hand. After a sperm or egg provider, or zygote contributor dies, should that person have the same control over disposition as any potential living partner? Should we respect the dead person's wishes in the same manner as a divorcing spouse's?

Professor Robertson argues that the right to procreate posthumously is questionable. John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1045, 1064 (1994). *But see* Strong, *supra* note 31, at 350 (noting that "persons can give significant reasons for valuing procreation after death"). For some of the controversy on dead hand control of other "assets," see, e.g., Jeffrey Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273 (1999).

93. UNIF. PROBATE CODE § 2-114(a) (allowing jurisdictions to define the parent-child relationship by referring to the UPA). The UPC also includes a section defining "afterborn heirs" as "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." *Id.* § 2-108.

94. Section 706 of the UPA provides:

> EFFECT OF DISSOLUTION OF MARRIAGE.
>
> (a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

the result of a case recently decided by the Massachusetts Supreme Court. In *Woodward v. Commissioner of Social Security*,[95] the husband developed leukemia; prior to undergoing treatment, he deposited sperm with a sperm bank.[96] After his death, his wife used the sperm to become pregnant; after the child's birth, she obtained a paternity order, and sued for Social Security benefits for the child.[97] The court held that, while it was possible for a man to have posthumous heirs, a child could not inherit from a deceased father unless he had affirmatively consented to posthumous reproduction and had agreed to support any resulting children.[98] Thus, proof that the child was genetically related to the deceased husband was insufficient; either the mother or the resulting child must also affirmatively show the father's consent to reproduction as well as to the attendant support obligations.[99]

Similarly, a Florida statute provides that, in the absence of a will providing otherwise, a child conceived after the death of the gamete provider has no inheritance rights against the decedent.[100]

(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

UNIF. PARENTAGE ACT § 706 (2000). The commentary observes that it is possible for a child to have a legal mother, and a genetic, but not a legal, father. *Id.* cmt. The next section of the UPA provides:

PARENTAL STATUS OF DECEASED SPOUSE.

If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

Id. § 707. The UPA respects intent, but also allows the procreation-seeking spouse to procreate as a single parent. It is limited, however, to marital relationships, and does not address parenthood created by artificial reproductive techniques outside of marriage.

95. 760 N.E.2d 257 (Mass. 2002).

96. *Id.* at 260.

97. *Id.*

98. *Id.* at 271–72.

99. *Id.* at 270–71. The court intimated that there was insufficient evidence on the existing factual record, which included the wife's statement that that the "husband 'agreed' with her that 'if something should happen . . . I would still be able to have his children.'" *Id.* at 271 n.24.

100. 43 FLA. STAT. ANN. § 742.17(4) (2002). In Texas, the decedent

These laws recognize the possibility of separating genetic parenthood from legal parenthood after the death of the gamete provider.

There is, however, case law to the contrary. In *Estate of Kolacy*,[101] children born eighteen months after their father's death[102] were held to be his heirs under New Jersey law.[103] The only relevant New Jersey probate provisions dealt with conceptions before death and the relevant parentage act dealt only with insemination not by a husband.[104] The court reasoned that, given his intent to have a child, the twins born after his death were his heirs.[105] His intent was established through the wife's assertion "that her husband unequivocally expressed his desire that she use his stored sperm after his death."[106]

In contrast to the posthumous parenting situation, where intent is deemed critical, the law has not been so hospitable to the claims of living men who allege they were tricked into parenthood without any intent to become fathers. In such cases, courts order the men to assume all obligations of fatherhood, including child support.[107] And, as discussed earlier, upon divorce, courts are wary of separating legal and genetic parenthood, ordering, instead, the destruction of gametic material.[108]

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gamete provider is not a parent unless the decedent consented in a "record." TEX. FAM. CODE ANN. § 160.707 (2002).

101. 753 A.2d 1257 (N.J. 2000).

102. The decedent and his wife had decided that he would store sperm after he was diagnosed with leukemia. *Id.* at 1258.

103. *Id.* at 1264; *see* Ronald R. Volkmer, *After-Born Heirs and Reproductive Technology*, 28 EST. PLAN. 39 (2001).

104. *Kolacy*, 753 A.2d at 1261–63.

105. *Id.* at 1264.

106. *Id.* at 1263.

107. *See* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 621 (Ct. App. 1980); *In re* L. Pamela P. v. Frank S., 449 N.E.2d 713, 714 (N.Y. 1983); Garrison, *supra* note 33, at 860–61. Also, courts do not respect the intent as expressed in agreements that limit or terminate the rights of sperm providers to lesbian couples. *See infra* notes 155–63 and accompanying text.

108. It is interesting to speculate, however, whether sex, which results in absolute liability for any resulting child, is equivalent to producing gametic material in a fertility clinic context. *See* e-mail from June Carbone, Professor, Santa Clara Law School, dated Feb. 11, 2002, on file with author. It is unclear whether either situation should result in legal parenthood; on the other hand, if

Where zygotes are donated, there are a few states that have laws directing that the intending parents, not the providing parents, are in fact the parents of any resulting child. A Texas statute provides, "[i]f a donor oocyte that has been fertilized with her husband's sperm implants in a wife's uterus, a resulting child is not the child of the donor of the oocyte."[109]

IV. PRIVACY AND BIOLOGY

Any solution to the disposition of G and Z material must recognize the "nature" of the material. As the *Davis* court so eloquently explained about zygotes, they have attributes of property and personhood;[110] sperm and eggs similarly have the capacity to develop into people. Courts and statutes that preclude use of this material by focusing on the risks of having genetically, but emotionally, unrelated children are recognizing the capacity for personhood rather than the property aspect of this genetic material; yet they are also struggling with the tensions between the rights to procreate and not to procreate.

A. Biology

What makes these cases so interesting is not just their tests of our contemporary scientific capabilities, but the underlying issues involving the creation and preservation of life-producing material. Indeed, this whole area raises serious issues of genetic essentialism, or genetic determinism. Genetic essentialism is a concept that suggests that a person is merely the sum of her genes, and that behavior can be predicted based on genetic information.[111] It might follow then, that the parent-child relationship is primarily

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we respect intent in the fertility clinic context, perhaps we should also respect intent in the unintentional fatherhood cases.

109. TEX. FAM. CODE ANN. § 151.102(b) (West 1997) (repealed 2001). Instead, the parents of the child are the husband, who provided the sperm, and the wife, in whom the donor oocyte was implanted. *Id.* § 151.102(a). The assumption in Texas, as well as in many other states, is that the intending couple are married to each other.

110. *See generally* Rhadika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 259 (2000).

111. *See* Rao, *supra* note 110.

genetically, rather than functionally, based.[112] As Professors Dorothy Nelkin and Susan Lindee explain, "DNA in popular culture functions, in many respects, as a secular equivalent of the Christian soul . . . . Fundamental to identity, DNA seems to explain individual differences, moral order, and human fate . . . relevant to the problems of personal authenticity."[113] The gene has been seen as the "unifying concept" of the field of biology, with a virtually "iconic status" that makes it capable of explaining human existence.[114] Basing parenthood on a genetic connection suggests that blood kinship is superior and infinitely preferable to adoptive relationships.[115] Similarly, basing the right not to procreate on a fear of having genetically related offspring makes genes the central and defining aspect of the parent-child relationship.[116]

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112. Professor John Robertson explains the significance of biology to the parenting relationship as follows: "Although adoption and foster parenting can provide parenting experiences, only [artificial reproductive techniques] enable one or both partners to have some biologic tie" to their children. John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 912 (1996).

113. DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON 2 (1995); *see also* Janet Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523 (2000) (critiquing a vision of the family that relies solely on genetic information).

114. *See* Anne Magurran, *Backseat Drivers*, N.Y. TIMES, Dec. 10, 2000, at 26 (reviewing EVELYN FOX KELLER, THE CENTURY OF THE GENE (2000)).

115. *See* ELIZABETH BARTHOLET, FAMILY BONDS 59 (1993); E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998) ("One of the central tenets of the [Adoption Rights Movement]'s ideology rests on the superiority of blood ties and the denigration of adoptive kinship."); *see also* NELKIN & LINDEE, *supra* note 113, at 70 ("The preoccupation with genetic relationships can stigmatize the experience of adoption."). Kenneth Baum explains: "the strongest rationales for the existence of assisted reproductive technologies are the implications of procreative liberty and the social desirability of preserving the unique nature of the genetic and gestational bonds between parents and children." Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 113.

116. As Professor Robertson explains:

> Laws that require donation of unwanted embryos in lieu of discard force people to have biologic offspring against their will, thus infringing the right not to procreate. Even if no child-rearing obligations follow . . . the couple would still face

This approach misstates the power of genes and biological parenthood[117] and privileges one person's genetic connection over another's. Genes are complex and can only be understood in a larger biological and social context.[118] In this area, it becomes critical to separate out the concept of genetic parenthood from social or legal parenthood.[119] Just because a man has contributed sperm, or a woman has contributed an egg, the providers need not be deemed the legal parents of the resulting child. Indeed, many noncustodial, albeit biological, parents fail to act as social parents following separation from the custodial parent.[120] On the other hand, sociobiologists note that men often invest parental resources in the children of the woman with whom they are currently living,

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> the possibility that they had produced genetic offspring. One could argue that genetic reproduction is such a significant personal event that it should be included in the fundamental right not to procreate.

ROBERTSON, *supra* note 87, at 108; *see* Davis v. Davis, 842 S.W.2d 588, 598–603 (Tenn. 1992).

117. *See* Rochelle C. Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 320 (1992); Sonia Suter, *The Allure and Peril of Genetics Exceptionalism: Do We Need Special Genetics Legislation?*, 79 WASH. U. L.Q. 669, 675 (2001).

118. *See* Suter, *supra* note 117, at 675; EVELYN FOX KELLER, THE CENTURY OF THE GENE (2000); *see also* Baum, *supra* note 115, at 120–21 (separating the effects of genotype from phenotype).

119. The marital presumption in family law—that a husband is the legal father of his wife's child—is a common law manifestation of this concept. In 1989, the Supreme Court held that the constitution does not require states to recognize biological parenthood at the expense of marital parenthood. Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989); Janet Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 663–72 (1993). The common law concept that a child born out of wedlock was the child of no one is another example of the disjuncture between biological and legal parenthood. On the other hand, pursuant to such doctrines as equitable adoption and common law marriage, there is legal recognition of social relationships.

120. *See* Janet Bowermaster, *Sympathizing with Solomon: Choosing Between Parents in a Mobile Society*, 31 U. LOUISVILLE J. FAM. L. 791, 871 (1992); W. Glenn Clingempeel & N. Dickson Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOL. BULL. 102 (1982) (discussing the major issues involved in joint custody and its effects on children); Mark Matthew, *Curing the "Every-Other-Weekend Syndrome": Why Visitation Should be Considered Separate and Apart From Custody*, 5 WM. & MARY J. WOMEN & L. 411, 438–439 (1999).

at the expense of biologically-related children with whom they are no longer living.[121] Mere genes, while powerful, are not sufficient in these situations.

Moreover, men and women may value genetic connection differently. Mary Mahowald studied whether gender affected a preference for gestational or genetic parenthood.[122] When she asked men and women whether they would prefer that the female partner be genetically or gestationally related to a resulting child, she found that almost 75% of the men preferred genetic parenthood to gestational parenthood, while less than 50% of the women chose this option.[123] Assumptions about the significance of genetic connection may turn out to be gendered.[124] To base legal parenthood simply on genetic contribution, or to allow a gamete provider to veto possible parenthood for another person, relies too strongly on the presumptive biological connection based solely on genes.[125]

The significance of genes to parenthood or to creating bonds between parents and children is unquestioned. Genetic

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121. Kermyt Andersen studied four different types of father-child relationships: (1) father and genetically-related child live together; (2) father and genetic child no longer live together; (3) man lives with woman and her biological children; (4) man no longer lives with step-child. Kermyt G. Anderson et al., *Paternal Care by Genetic Fathers and Stepfathers: Reports from Albuquerque Men*, 20 EVOL. & HUM. BEHAV. 405, 410–11 (1999). The authors found that the first category of children received the most time and financial investments, and the fourth received the least. On the other hand, they found that "[m]en spend more time with and money on resident offspring, regardless of relatedness." *Id.* at 425.

122. MARY BRIODY MAHOWALD, GENES, WOMEN, EQUALITY 127–42 (2000).

123. *Id.* at 132. Men chose genetic connection by 73.5% to 26.5%; women chose genetic connection by 48.6% to 51.4%. That is, while men were almost three times as likely to choose genetic connection, women were less likely to choose it.

124. *See generally* ROBIN WEST, CARING FOR JUSTICE (1997) (suggesting differences between how men and women view the law and that the law is gendered male).

125. As Professor Mulholland points out, women can be related to children through genes, gestation, and/or lactation, while men can be related only genetically. MAHOWALD, *supra* note 122, at 128. Genetic parenthood for women without gestational parenthood does, however, make the lactation connection much more difficult.

contributions, however, in every situation, should not be equated with parenthood.[126]

B. Privacy

We lack a coherent theoretical framework for addressing issues involving human gametic material. This material differs from other body parts because of its capacity to create human life, rather than sustain it, and thus should be treated sui generis. Existing legal analyses rely on the property/privacy framework, attempting to categorize the material as protected by a property or privacy or "quasi-property" framework.[127] Professor Rhadika Rao argues that privacy protects a person's identity, while property "protects the autonomy of an owner over the object of ownership."[128] Professor Rao suggests that the right of privacy protects individuals' relationships to their frozen zygotes where the individuals attempt to establish a personal relationship with the zygotes, while the law of property applies more appropriately where individuals want to sell frozen zygotes because they have no personal relationship to the zygotes.[129] This analysis provides useful insights into the sale of gametic material and starts to uncouple genetic connection from parenthood; mere contribution to the creation of a zygote does not necessarily translate into parental rights and obligations.

The property/privacy distinction does not, however, resolve many issues concerning contested material. A property analysis applied to a dead woman's eggs or a dead man's sperm does support the right to will this material, although it overlooks the

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126. The precise line-drawing is left to future articles. *See* June Carbone and Naomi Cahn, *Paternity Determination in an Age of Biological Certainty*, ___WM. & MARY BILL OF RTS. L.J.___ (forthcoming 2003).

127. *See e.g.*, MARGARET RADIN, CONTESTED COMMODITIES (Harv. Univ. Press 1998); Rao, *supra* note 110, at 443; Robertson, *supra* note 92, at 1038–39 (arguing that while a property right exists in gametes, the scope of that property right is less than clear). The *Davis* court deemed the zygotes "quasi-property," but analyzed them based on the interests of the gamete providers. *See* Davis v. Davis, 842 S.W.2d 588, 597, 602 (Tenn. 1992); Ellen Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 898 n.5 (2000).

128. Rao, *supra* note 110, at 444.

129. *Id.* at 458.

interests of other children and relatives. With respect to disputed eggs, sperm, and zygotes, however, where there is a "personal relationship" with the material, a privacy analysis does not determine who wins and controls the ultimate outcome. One can identify conflicting privacy interests in the right to procreate versus the right not to procreate, and the process of definition clarifies the impact of the decision, but does not decide which right prevails. To decide, as the New Jersey Supreme Court did in *J.B.*, that a woman's right not to procreate would be "irrevocably extinguished" if a surrogate carried zygotes created through her gametic material, confuses biology, privacy, and parenthood.[130]

The whole notion of privacy—the right to be let alone—has developed as protection for individuals from state interference. The term "privacy" includes a series of different "rights," some of which have been recognized by the federal constitution, some of which have developed in other contexts.[131] Jeffrey Rosen argues that, in the reproductive rights area, the Supreme Court has labeled as privacy what is better conceived of as an individual's right to make reproductive decisions, in contrast to a "more focused vision of privacy that has to do with our ability to control the conditions under which we make different aspects of ourselves accessible to others."[132] Thus, the objection against allowing procreation depends on a person's right to control what comes from his or her body.

The right of privacy protects against government

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130. J.B. v. M.B., 751 A.2d 613, 620 (N.J. Super. Ct. App. Div. 2000), *aff'd as modified*, 783 A.2d 707, 720 (N.J. 2001).

131. *See* Fineman, Remarks at the Assoc. of Am. Law Schs. Workshop Defining the Family in the Millennium (Mar. 2000); Martha A. Fineman, *What Place for Family* Privacy, 67 GEO. WASH. L. REV. 1207 (1999); *see* Naomi Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1999); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HAR. L. REV. 1419 (1991); Professor Rhadika Rao has recently suggested that the concepts of privacy and property, while safeguarding different interests, may become "confused with one another." Rao, *supra* note, 110, at 443. She argues that privacy protects a person's identity, while property "protects the autonomy of an owner over the object of ownership." *Id.* at 444.

132. JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 15 (2000).

overreaching and against undue state interference with fundamental personal decisions and beliefs. As constitutional law scholar Robin West has explained:

> We are concerned . . . with the freedom to be ourselves within some defined sphere—the freedom to make our own decisions, think our own thoughts, worship our own deities, and choose our own way of life within some sphere the boundaries of which admittedly are not clearly discernible but which are absolutely inviolable once drawn.[133]

Because disposition of gametic material involves relationships both within and between families, the traditional formulation of the doctrine is problematic.[134] While privacy appears to include both the right to procreate and the right not to procreate,[135] these rights conflict when partners disagree. The Supreme Court has considered clashes between the procreation decisions of husbands and wives in the context of abortion. Although it has recognized the husband's interest in his potential child, the Court has repeatedly held that, pre-birth, the woman's interest in preventing procreation is stronger than the husband's in vetoing her decision.[136] The privacy invasion implicates the

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133. Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 447 (1992); *see* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). For a general philosophical discussion of the distinction between positive and negative liberty, see SIR ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY (1969).

134. *See* Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. PA. J. CONST. L. 150 (1999) (discussing conflicting rights in comparable context).

135. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–54 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846–53 (1992); *see also* Bragdon v. Abbott, 524 U.S. 624, 638 (1999) ("Reproduction and the sexual dynamics surrounding it are central to the life process itself."); Robertson, *supra* note 48, at 290–91.

136. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily

woman's body; she is the one who must carry the child and then give birth.

This resolution, in favor of the person whose "bodily integrity" is more compromised, is not applicable in the context of reproductive technology. While it is clear that neither partner can force the other to produce gametic material, nor to gestate a zygote, once the partners have produced egg and sperm, there is no further need to protect physical integrity. A solution would respect both rights, but redefine the meaning of the right not to procreate such that procreation need not result in legal parenthood.

C. Two-Parent Families

Courts today generally use the two-parent family as the template against which to measure, and conform, other families.[137] Repeatedly, sperm donors have received extensive visitation over the objections of the biological mother and her partner,[138] based on analogizing the parent-child relationship to existing familial forms. Courts have explained that children need one mother and one father who will care for them.[139] Similarly, Professor Marsha Garrison has attempted to conform alternative families into the nuclear family model.[140] She argues that contemporary family law

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integrity of the pregnant woman. *Cf.* Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 281 (1990). The Court has held:

> [W]hen the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Casey, 505 U.S. at 896 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976)).

137. *See, e.g.*, Polikoff, *supra* note 16, at 57.

138. *See* Carbone and Cahn, *supra* note 126.

139. In a recent case, a sperm donor successfully sought additional visitation rights beyond those to which he had previously agreed in writing. *In re* Matter of William "TT" v. Siobhan "HH," 701 N.Y.S.2d 611 (N.Y. Fam. Ct. 1999). The court explained that the children "were fortunate to have two biological parents [the mother and the father] who love and care for them."

140. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835

fosters two parents for every child, regardless of the parents' marital status; thus, for single women who choose artificial insemination by donor, Professor Garrison believes that the applicable paternity rules should be the same as for conception by sexual means, and the "donor" should be deemed the legal father.[141] The newly revised UPA uses the two-parent heterosexual family as the model to which all other families should conform.[142] For example, in its discussion of the validity of gestational agreements, the UPA requires that the intending parents be married to each other,[143] thereby precluding same-sex partners or single individuals from entering into binding surrogacy contracts. In cases involving both traditional and gestational surrogacy arrangements, courts have carefully tried to designate one mother and one father for each child.[144]

When the partners have divorced or one has died, allowing one partner to procreate results in a single-parent family. Because many states encourage two-parent families, courts may use public policy to justify their conclusions precluding procreation with frozen material.

V. SOLUTIONS

Any resolution of the disposition of gametic material must recognize privacy, intent, and biology. The different issues concern: (1) agreements: Should states require agreements on disposition of gametic material at the time of the material's creation? Should these agreements be binding regardless of changes in future circumstances? (2) biology: What connection

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(2000).

141. *Id.* at 903–05.

142. *See generally* UNIF. PARENTAGE ACT (amended 2000), *available at* http://www.law.upenn.edu/bll/ulc/upa/final00.htm.

143. *Id.* § 801(b).

144. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994). Courts may have nontraditional reasoning, such as focusing on intent, rather than biology. *See* Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691, 699–700 (1999). Nonetheless, they achieve the traditional result of identifying only one parent of each sex to receive primary custody of the child.

should exist between provision of gametic material and parenthood? Does contribution of gametic material provide a veto power over another person's right to procreate?

Sperm and eggs, because they require the contribution of only one person, should probably remain under that person's control in the event of divorce. When the sperm or egg provider dies, however, some indicia of intent to allow posthumous procreation should exist.[145] Zygotes, because they require the contribution of two people, need a distinct set of rules that, in turn, may provide for different default or override rules in the event of divorce or death. This section focuses primarily on zygotes because they raise the more complex issues.

A. Existing Proposals

There are a series of suggestions on how to resolve these issues. Some have suggested using existing formulations of the right to procreation, providing criteria for how to balance the existing rights.[146] Many of these proposals, however, are based on respect for the procreation provider's right not to have an unwanted child.[147] New York State and the American Bar Association have each issued task force reports providing legislative solutions. Both the New York and ABA approaches offer innovative suggestions, which, when considered together, offer a method that does not focus exclusively on either intent or biology.[148]

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145. *See infra* Part V.B.1. for discussion of the form that this statement of intent might take.

146. *E.g.*, Jennifer L. Medenwald, Comment, *A "Frozen Exception" for the Frozen Embryo: The* Davis *"Reasonable Alternatives Exception,"* 76 IND. L.J. 507, 519–24 (2001) (providing standards for a court's determination of when there is no "reasonable" alternative to use of zygotes with respect to a person's right to procreate).

147. While these contexts appear, for men who wish to avoid procreation, to be somewhat analogous to a woman's right to an abortion, use of frozen zygotes or sperm still does not implicate the same issues of "bodily integrity" as a forced pregnancy. For use of forced pregnancy as a war crime, see ANNE GOLDSTEIN, INTERNATIONAL HUMAN RIGHTS LAW GROUP REPORT (1993).

148. Because I utterly reject the position that zygotes themselves have rights as future persons, I do not consider solutions that would either prevent the creation of zygotes, or that would prevent them from ever being destroyed. *See*

The general approach of the ABA's model statute is to preclude inheritance unless the zygote transfer has occurred prior to the death of the intending parent, or the deceased parent has executed a will consenting to inheritance.[149] The statute also provides that if a deceased zygote creator has consented to posthumous use, then a child must be born within three years of the death of the intending parent for that child to be an heir.[150] It also says, with respect to zygote agreements, that there must be binding written agreements as to the use and disposition of the zygotes in the event of divorce, death, or other change in circumstances. It then further provides that if there is a subsequent disagreement and a divorce, then the parent who wants to use the zygote to create a child, if such a situation was contemplated under the agreement, may do so, but without any parental rights granted to the non-consenting partner.[151]

Critique of this proposal centers on the idea of allowing one

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ROBERTSON, *supra* note 87, at 103–04 (stating that embryos have not been recognized as "rights-bearing entities"); R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 6 STAN. L. & POL'Y REV. 11, 16 (1995) (discussing the difficulties of using moral approaches to the status of an embryo as a means of policy-making, and recommending a process-based approach to issues such as embryo research). In a nuanced use of the possibility of gametic material for life, Professor Mary Shanley has argued that respect for the "person-to-be" should limit the market in gametes. P. 3-27. *See* Shanley, *infra* note 170, at 3-27. I agree that the potential for human life is what makes gametic material different from other body parts, although I do not characterize the material as a "person."

149. ABA Model Assisted Reprod. Technologies § 1.07 says generally: "Inheritance: In the absence of a testamentary document executed by an intended parent . . . if an intended parent dies before embryo transfer . . . [or] before the time of transfer of gametes or embryos, then the resulting child is not the heir of the deceased intended parent."

150. *Id.* at § 1.05, Subs. 1(c)(5). ("If one or both intended parents die after the transfer of an embryo or gamete, but before birth of the child, the resulting child is an heir of both parents.").

Professor Robertson suggests that frozen embryos, not implanted before the death of one creator, be absolutely precluded from inheritance even where the creator has indicated an intent to permit inheritance, in order to facilitate estate administration. ROBERTSON, *supra* note 87, at 112. While I agree with Professor Robertson on the need not to keep estates in limbo, I think, instead, there should be a time limit on how long after the creator's death such a child can inherit.

151. Model Assisted Reprod. Technologies § 1.05, Subs. 1(c)(4).

party to proceed unilaterally against the objections of the other person. A counterproposal would say that, if one party objects, regardless of what the prior agreement says, then that party's right not to procreate should control. Here, the argument is that someone should not be forced to become a genetic parent regardless of legal duties because there is a right not to procreate that overrides any prior contract.[152] People should be free to change their minds at any time when it comes to proceeding with procreation, as well as be allowed to withdraw consent to procreation, despite an earlier agreement, when circumstances change.[153] Given that zygotes are created within the context of a relationship, once that relationship dissolves, the zygotes should similarly be destroyed.

The influential New York State Task Force suggested that couples have "joint decision-making" authority over the disposition of zygotes created with gametic material from both partners, although it suggests a different authority structure for zygotes created with some donated material.[154] This solution, however, may result in deadlock. It privileges the partner who wants to destroy the zygotes; that partner can oppose all solutions but zygote destruction, thereby resulting in that person's right not to procreate trumping the other person's desire to procreate or enable others to do so. Again, this has echoes of genetic essentialism.

B. Respecting Intent and Procreation

Any solution must confront situations where there is an

152. *See, e.g.*, ROBERTSON, *supra* note 87, at 24–25.

153. Forster et al., *Comment on ABA's Proposed Frozen Embryo Disposition Policy*, 71 FERTILITY AND STERILITY 994 (1999).

154. New York State Task Force on Life & Law, *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* 12 (1998) *available at* http://health.state.ny.us/nysdoh/taskfce/index.htm. During marriage, both parties would retain decisionmaking authority. If one partner's gametic material is united with donor gametic material, then, upon divorce, the partner who contributed the gametic material would have decisionmaking authority. If the embryo is created completely through donated gametes, then the Task Force recommends that "either partner should have the right to use the embryo to create a child, but no embryo should be destroyed, used in research, or donated to another person over either partner's objection." *Id.*

agreement, but one partner seeks to change it, as well as situations where there is no prior agreement.

1. Agreement Already in Place

Ultimately, it is possible to respect the intent[155] of both parties, whether the provider of the contested gametic material is alive or dead. This does not have to be done, however, at the expense of a surviving partner who wants to procreate. If an agreement provides for procreative uses of gametic material, and, subsequently, upon divorce or death, one partner (the "procreation-seeking partner") wants to proceed, then the other partner (the "procreation-blocking partner") should not be able to block completely this use through court action or execution of a testamentary document. That is, if one partner—either a divorced spouse or a surviving partner—wants to use another person's gametic material which was provided when the other partner was alive or married, and it is clear that the other partner opposes (or would have opposed) this use, then the procreating-seeking partner himself or herself should be able to use the material. To protect the procreation-blocking partner, however, that person should have no parental rights or obligations; for example, that partner would have no custody, visitation, or support rights, nor would any resulting child be able to inherit from that partner. The procreation-blocking partner should simply not be designated a "legal parent."[156]

The fear frequently articulated in response to this position observes that the procreation-blocking partner would have his or her genetic material literally walking around without consent. As the *J.B.* court phrased it, regardless of any legal obligations that she might incur, the wife risked "having a genetically-related child

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155. This is the approach adopted by the RESTATEMENT (THIRD) OF PROPERTY, Tent. Draft, Wills and other Donative Transfers on the Parent and Child relationship, which counsels states to use common sense in finding "such a child should be treated as part of the family of the parent . . . who treat the child as their own . . . one or both of whom might not be the child's genetic parent." RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 2.5, cmt. l (1999).

156. *See* Shapo, *supra* note 8, at 1100 (discussing significance of designation of individual as a "legal parent").

living in an environment controlled by strangers."[157]

One response is to provide that, in this particular situation, one partner's genetic contribution does not make that partner the legal parent, who is then responsible for child support.[158] This response does not, however, address the underlying fear concerning use of genetic material. On the other hand, fear of a genetically related child at every corner places too much emphasis on genetics. Moreover, it ignores the reality of adoption—where the same situation occurs, quite frequently with both biological parents maintaining no legal connection to the child—and of other situations where a child has been created without one parent's consent.[159] While this fear is deeply rooted,[160] it should not necessarily prevent use of zygotes by the procreation-seeking partner.

In recognition of concerns about settling estates, the ABA correctly states that there must be limits on the rights of a posthumous heir. The ABA draft recommends a statute of limitations of three years, a time that should be subject to discussion as to its reasonableness. Moreover, each state must enact legislation requiring sperm and egg banks and IVF centers not to proceed unless they have written directions from the gamete providers as to disposition in case of death or divorce. Gametic material shares the characteristics of property in some ways, but is different from other forms of property as well as other body parts because of its well-recognized potential for human life. It is not, of

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157. J.B. v. M.B., 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000), *aff'd as modified*, 783 A.2d 707, 720 (N.J. 2001).

158. Although genetic contributions do require release of identity once the resulting child reaches maturity. *See* Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1 (2001).

159. The multiple contraceptive failure cases provide an example of this scenario. In those cases, however, men are held responsible for child support where they allegedly believed that their partner was preventing conception. *See supra* note 108 and accompanying text.

160. Evolutionary biologists explain that most behavior is based on a desire to perpetuate one's genes; having no control over genes would, on this perspective, be deeply threatening. Moreover, blood-based kinship has been at the center of English and American inheritance and family law. *See* Cahn, *supra* note 158, at 27; Cahn & Carbone, *supra* note 126.

course, like live children—although one can imagine either of the following scenarios: a court determining the best interests of the embryos, or a divorce settlement that says "honey, you take the kids, I get the embryos."

Where two partners have consented to the creation of a zygote, regardless of whose gametic material is included, the same principles applicable to a zygote composed of both parties' gametic material should control the disposition. There appears to be a legal presumption that the person who did not contribute gametic material should have a "lesser stake" in the ultimate disposition when the parties disagree.[161] This again privileges genetic connection over the intent to create the zygote, and the actions undertaken to produce it. These actions include not just the costs of zygote production, but also the time and emotional effort involved in the process.[162] While intent should not be the definitive principle to resolve all such disputes,[163] neither should biology. The legal focus should be on the intent both at the time of creation of the material and at the time of dispute, without regard to biological contribution.

C. The Use of Agreements

The increasing privatization of family law certainly supports the requirement of a contract prior to use of eggs, sperm, or zygotes. Enforcing these agreements regardless of changes in the partners' circumstances provides certainty and predictability.[164] Not only the partners, but also the medical clinic, can rely on a prior dispositional agreement.[165] Nonetheless, given the nature of

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161. Coleman, *supra* note 23, at 115–16; New York Task Forceon Life & Law, *supra* note 154. Professor Coleman argues that where partners have created an embryo without providing any gametic material, then neither of the creators has a "significant stake" in the ultimate distribution. Coleman, *supra* note 23, at 117.

162. Infertility takes an enormous emotional toll on its patients. *See* Waldman, *infra* note 127, at 922–23 nn.148–53 (citing studies).

163. *But see* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 413–20 (1991).

164. *See, e.g.*, ROBERTSON, *supra* note 87, at 106–07, 113–14.

165. For an argument that clinics should be assessed court costs when their

intimate relationships, these contracts must be subject to limited override rules with externally imposed norms, and providers must be able to withdraw consent prior to the actual use of the G & Z material.[166]

Within family law, many scholars have noted a trend towards increasing privatization and autonomy. Individuals within family law have had increasing authority to define their own relationships, a move toward more contracting in the private life of the family.[167] There are many areas in which private contracting has replaced more public ordering, particularly with respect to the intimate relationships between adults. The movement towards freedom of contract represents the shift in family law towards recognition of the rights of individuals who choose to form families, rather than the rights that flow from a family status.

While there is a trend towards recognizing and enforcing contracts in intimate relationships, this exists within a system of state-imposed public norms. For example, the mandatory nature of child support laws restricts individual autonomy when it comes to supporting children.[168] There are social consequences to having children; child support enforcement prevents noncustodial parents from not taking responsibility for their offspring. While parties have more autonomy through prenuptial and separation

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agreements fail to anticipate a subsequently litigated contingency, see Kwok, *supra* note 81, at 1287.

166. *See* New York State Task Force on Life & Law, *supra* note 154, at 314, 319–20 (allowing individual with decision making authority to withdraw their consent to use of G & Z material at any time prior to the beginning of an assisted reproduction cycle, but placing burden of notification of change upon that individual).

167. Dean Lee Teitelbaum asserts that "the very form of discourse about family law has changed . . . [one of the two major developments] is a change in the location of responsibility from the law itself to the individuals whom law once regulated." Lee E. Teitelbaum, *The Last Decade(s) of American Family Law*, 46 J. LEGAL EDUC. 546, 547 (1996); *see generally* Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537 (critiquing the move towards privatization and suggesting a re-conceptualization of the family as an ongoing and contextualized relationship).

168. *Cf.* JOHN STUART MILL, ON LIBERTY 175 (1985) (1859) (observing the reluctance of the law to interfere with a parent's control over a child, but arguing that perhaps liberty should be withheld in order to compel parents to educate their children).

agreements, these agreements occur against a background of publicly-defined default rules. Within trusts and estates law, the freedom to will one's property is subject to a spousal elective share, which entitles a surviving spouse to take property regardless of what a will provides.[169] Thus, within both trusts and estates and family law, intent is qualified by state-imposed norms.

Contracts relating to zygote creation should be encouraged because they cause parties to the agreement to review carefully their options. If, however, upon divorce or death of one of the parties, one party changes his or her mind, then the presumption of enforceability can be rebutted,[170] with override rules coming into play. For example, while all provisions of prenuptial contracts are generally enforced, courts will not enforce any child custody arrangements in these agreements. While use of gametic material is different from child custody because it does not implicate the state's role as *parens patriae*, the exemption of child custody from generally enforceable provisions does show the possibility of overriding particular sections; moreover, the use of gametic material implicates a right to procreate, a state-protected status. Because of the significance of this right, the state may need to step in.

Furthermore, when people enter into these agreements, they are under enormous stress in the quest to have a child.[171] Under most circumstances, it is difficult for couples to understand their own risk of divorce.[172] In light of the inherent anxiety in the

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169. *See generally* Susan N. Gary, *Share and Share Alike? The UPC's Elective Share,* 12 PROB. & PROP., 18, 19 (1998); Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Tax Law Provides a Solution* 49 U. MIAMI L. REV. 567 (1995); Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487 (2000).

170. Professor Mary Shanley discusses similar issues in her analysis of the enforceability of surrogacy agreements. MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGY, SURROGACY, ADOPTION, AND SAME-SEX AND SINGLE PARENTS' RIGHTS 4–16 (2001).

171. *See* Waldman, *supra* note 127, at 925.

172. *See* Lynn Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

situation and the difficulty of imagining divorce or death, the chosen disposition should be subject to rebuttal upon a showing of substantial injustice to change the agreement. While, of course, it was two people together who initially decided to create a child, and that agreement has subsequently broken apart, neither should have veto power over the other's actions as provided in the agreement. Instead, where the agreement contemplates procreation post-divorce or death, then the balancing of equities lies in favor of the person who wishes to procreate; that person can do so, with adequate protection and minimal cost to the other. By contrast, preventing procreation may have devastating emotional and financial consequences to the procreation-seeking partner.[173]

The proposed draft of the ALI's principles governing family dissolution is generally supportive of contracts,[174] although it does not subject intrafamilial agreements to the same standards as business agreements.[175] In addition to various procedural protections, the ALI also precludes enforcement of a provision if this would "work a substantial injustice" at the time of enforcement.[176] Typically, when contracts are voided for unconscionability, the court examines the situation at the time the

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173. The Author is not suggesting that a procreation-seeking partner can reproduce at will, regardless of the consent of the other partner. But, where there was an intent to create a child together, even though the adult intimate relationship has dissolved, the parenting intent may still remain.

174. *See, e.g.*, Principles of the Law of Family Dissolution: Analysis and Recommendations (Tent. Draft No. 4, 2000) § 7.02 ("The objective of this Chapter is to allow spouses, those planning to marry, and those who are or plan to become domestic partners, to accommodate their particular needs and circumstances by contractually altering or confirming the legal rights and principles" to which they would be subject).

175. Brian Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y. 231, 235 (2001).

176. Principles of the Law of Family Dissolution: Analysis and Recommendations, *supra* note 174, § 7.07(1). This special inquiry is triggered only when enforcement is sought beyond a fixed period of years, a child has been born, or there has been a significant change in life circumstances. *Id.* § 7.07(2). I think the "substantial injustice" at time of enforcement standard should apply, however, whenever an agreement concerning gametic material is enforced. Obviously, the actual death or divorce itself would not be a basis for voiding the agreement.

contract was signed.[177] When it comes to intrafamilial contracting, however, this may be the inappropriate time for evaluation; couples are notoriously bad at anticipating divorce,[178] and individuals are similarly bad at planning for their own incapacity and death.

D. Legal Parenthood

The status of parents entails a series of obligations for the parent, such as child support, and confers various rights upon the child, such as the right to inherit.[179] The mere contribution of genetic material is not sufficient, however, to create a legal parent-child relationship. This is clear in the Supreme Court's decisions on unwed fathers and in state courts' opinions in surrogacy cases.[180] While courts seek to find one father and one mother for every child,[181] this resolution is inappropriate in families created through reproductive technology.[182] Repeatedly, sperm donors

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177. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208; Principles of the Law of Family Dissolution: Analysis and Recommendations, *supra* note 174, § 7.07 cmt. a.

178. *See, e.g.*, Baker & Emery, *supra* note 172, at 443; *see supra* note 175.

179. Historically, fathers were entitled to the services of their children. *See* Cahn, *Adoption History* (unpublished manuscript 2002).

180. In *Buzzanca*, only the intentional mother, who had neither a genetic nor a gestational relationship to the child, was legally defined as the mother. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998); *see also* 8 U.S.C. § 1409(a)–(c) (2001); Nguyen v. INS, 533 U.S. 53 (2001) (upholding statutory restrictions on right of unwed U.S. citizen father to confer citizenship of his child where there were no comparable restrictions for U.S. citizen mothers).

181. *See, e.g.*, Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. (1997); Polikoff, *supra* note 16, at 57. In a recent case, a sperm donor sought additional visitation rights beyond those to which he had previously agreed in writing. *In re* Matter of William "TT" v. Siobhon "HH", NYLJ, Oct. 2, 2000 (Albany Fam. Ct). The court awarded him additional rights because the children "were fortunate to have two biological parents [the mother and the father] who love and care for them." Courts have a tendency to try to find two parents of the opposite sex for children. *See* Cahn, *Reframing Child Custody Decisionmaking*, *supra* note 181.

182. As I have discussed elsewhere, it is inappropriate in other familial situations as well. *See* Cahn, *Reframing Child Custody Decisionmaking*, *supra* note 181 at 44–45; Katherine Bartlett, *Rethinking Parenthood as an Exclusive*

have received extensive visitation over the objections of the biological mother and her partner,[183] based on analogizing the parent-child relationship to existing familial forms.

In the case of death, legislatures have appropriately begun to separate genetics from the status of legal parent, providing limits on the length of time after a provider's death during which the decedent can be deemed a parent. Even if a decedent's sperm was used for the insemination, he is not necessarily the legal father. The Massachusetts Supreme Court has required that there be credible evidence of specific intent for both reproduction and subsequent child support before deeming a deceased sperm provider the legal parent.[184] While the need for a showing of intent beyond the mere banking of sperm or eggs should be required, requiring written documentation should not be mandatory. A more flexible standard that would admit oral declarations of intent should be utilized.[185] On the other hand, it is critical for all gamete banks to mandate that depositors fill out detailed agreements setting out their decisions on the ultimate disposal of the material in the event of death or other circumstances.

Where both parties are still alive, and there has been an

Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 VA. L. REV. 879 (1984).

183. *See* Cahn & Carbone, *supra* note 126 (listing cases).

184. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002). In addition, the Uniform Parentage Act requires written consent to find the decedent a parent. UNIF. PARENTAGE ACT § 707.

185. This is the approach taken by the *Restatement (Third) of Property*, which comments:

> This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit. A clear case would be that of a child produced by artificial insemination of the decedent's widow with his frozen sperm. If the AIH procedure occurs after the husband's death, and if the child is born within a reasonable time after the husband's death, the child should be treated as the husband's child for purposes of inheritance from the husband.

RESTATEMENT (THIRD) OF PROPERTY § 2.5 cmt. l (1999).

agreement to allow one spouse to use the zygotes upon divorce, even if the other party objects, the use should be allowed.[186] On the other hand, the objecting spouse, just as in the case of a dead partner, should not be deemed the legal parent,[187] subject to all of the responsibilities and privileges traditionally accorded to parenthood. If legal and genetic parenthood can be separated for a dead partner, then such a separation should be possible as well while the partner is still living.

VI. CONCLUSION

An excessive, and obsessive, focus on genetic parenthood precludes creative solutions to the disposition of gametes and zygotes once the progenitors disagree (or are presumed to disagree). This Article has argued that the process of informed consent to egg or sperm provision, and to IVF, requires detailed agreements on disposition of the material upon divorce or death.[188] While these agreements should be presumptively enforceable, they may also be reexamined at the time of death or relationship dissolution to ensure that they would not work a "substantial hardship"[189] at the time of enforcement, with the understanding that having one's genetic children exist without a legal obligation

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186. In the absence of an agreement, the default rule should be that the IVF institution has discretion to destroy the zygotes or use them for research (but not allow their use for procreational purposes). *Cf.* Recent Cases, *Family Law—Contract—Supreme Court of New Jersey Holds that Pre-Embryo Disposition Agreements Are Not Binding When One Party Later Objects*, 115 HARV. L. REV. 701, 708 (2001) (advocating default rule of destruction of the zygotes). Such a rule would apply to both death and divorce. For gametes, the provider should have control. Where the provider has died, there should be a presumption for destruction, which could be overcome with credible evidence showing an intent to procreate.

187. "I advocate the legal authority to create families with only one legal parent." Polikoff, *supra* note 16, at 59; Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375 (1996).

188. *See* Waldman, *supra* note 127, at 936–39 (setting out a rigorous process for ensuring that couples give adequate attention to zygote dispositional agreements).

189. This is the ALI's language. *See supra* notes 174–78 and accompanying text.

to support them is not a "substantial hardship." To ensure legal certainty, the same procedures should apply when the relationship dissolves or when one party dies. Finally, in the absence of an agreement or statements to the contrary, the presumption should be in favor of destroying the gametes or zygotes.