DIVERGENT CONCEPTIONS: PROCREATIONAL RIGHTS AND DISPUTES OVER THE FATE OF FROZEN EMBRYOS*

I. INTRODUCTION

Modern reproductive technologies raise complex issues which are no longer new to legislators and the concerned public. Processes such as *in vitro* fertilization (IVF), surrogate motherhood, and the cryopreservation of embryos are the subject of much discussion in both the popular press and legal and medical journals.[1]

A Massachusetts court recently confronted a thorny issue involving reproductive technology. The case, *AZ v. BZ*,[2] involved a divorcing couple who could not agree on the disposition of eight cryogenically-preserved preembryos.[3] According the frozen embryos an intermediate "special status" between that of humans and that of property,[4] the court found for the plaintiff-husband despite the existence of properly signed and witnessed informed consent forms.[5] While some lauded the court's decision as methodical and well thought-out,[6] the decision ultimately raised more questions than it answered. If the appellate court upholds the lower

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* This Note is dedicated to the greatest teachers I have had in my twenty years of education, my parents, Ira and Jean Steinberg. I owe additional thanks to my father for suggesting the topic and to Cory Cassarino for her editorial and personal support.

[1] *See, e.g.*, George J. Annas, *Using Genes to Define Motherhood - The California Solution*, 326 NEW ENG. J. MED. 417 (1992); Kristine E. Luongo, Comment, *The Big Chill:* Davis v. Davis *and the Protection of "Potential Life"?*, 29 NEW ENG. L. REV. 1011 (Summer 1995); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990); Sharon Begley, *Little Lamb, Who Made Thee?*, NEWSWEEK, Mar. 10, 1997, at 53 (discussing cloning as a reproductive technique); Denise Grady, *How to Coax New Life*, TIME, Sept. 18, 1996, at 37 (discussing IVF treatment); Richard Jerome Giovanna Breu et al., *Mortal Choices with the Increased Success of Fertility Drugs and In Vitro Fertilization, Multiple Births are Soaring - and Raising Life-or-Death Questions,* PEOPLE, Oct. 7, 1996, at 96 (profiling two families who have each given birth to quintuplets conceived with the aid of reproductive technology); William Miller, *Widow Takes Fight for Sperm to Court: Briton Seeks to Have Husband's Baby,* BOSTON GLOBE, Oct. 1, 1996, at A5.

[2] The court released the case using fictitious initials in order to preserve litigants' privacy. *See AZ* v. BZ, MASS. LAWYERS WEEKLY No. 15-008-96 (Suffolk County Prob. Ct. Mar. 25, 1996).

[3] *See id.*

[4] *See id.* at 19.

[5] *See id.* at 3-4.

[6] *See* David L. Yas, *Estranged Wife Denied Use of Frozen Embryos*, MASS. LAWYERS WEEKLY, Oct. 7, 1996, 1, at 35 (comments of Paul G. Farrell, former chair of the Massachusetts Bar Association's Family Law Section).

court's decision on appeal, the touchstone of future decisions will be the issue of forced paternity (or maternity), eclipsing the traditionally weightier issues of the "right-to-life" doctrine and informed consent. These implications of the Massachusetts decision are significant and worth close examination.

Part II of this note outlines the legally relevant aspects of IVF treatment and cryopreservation. Issues analyzed in this section include their relevance to the general public, the disparity between the impact of the treatment on the male and female gamete providers, the significance of the appellation "preembryo," and the frequent failure of the IVF procedure.

Part III discusses *Davis v. Davis*, a Tennessee case that proceeded from the trial level[7] to the appellate level[8] to the Tennessee Supreme Court.[9] At each stage of the litigation, the court analyzed the property interest in the frozen embryos differently, using methods that I will call the "Right-to-Life" approach, the "Pure Property" approach, and the "Special Status" approach. These modes of analysis are currently the only three methods courts use to consider marital property/custody disputes over frozen embryos.[10]

Part IV reviews the facts and analysis of *AZ v. BZ*. The case is significant in several ways. First, in relying on the doctrine of "forced paternity," it further strengthened the argument that the primary consideration in these decisions is the right to avoid procreation.[11] Second, the court's cursory consideration and rejection of the "Right-to-Life" issues may have sounded the death knell for this mode of analysis in future cases. Third, the court attached significance to the embryo's position outside the mother's body.[12] Under these conditions, the court gave equal weight to the spouses' privacy considerations, ultimately holding that forced parenthood is a greater privacy intrusion than denying a spouse use of the preembryos.[13] Finally, and perhaps most significantly, the court's rejection of the informed consent forms as binding represented a radical weakening of the doctrine of informed consent in reproductive technology cases.

In Part V, this Note contends that the courts considering these cases have not gone far enough in protecting people from becoming parents against their will. In their holdings, the *Davis* and *AZ* courts admitted that the "special status" approach does not differ greatly from a pure property analysis. Both courts claimed to consider other factors in their analysis besides the issue of forced parenthood, such as pre-existing agreements and the greater physical participation in the IVF process of the egg donor. Despite the presence of these factors in both cases, the courts still did not find for the mother wishing for the implantation and use of the embryo. In these property disputes, courts should look only to the issue of

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[7] Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641 (Tenn. Cir. Ct., Sept. 21, 1989).

[8] Davis v. Davis, No. 180, 1990 WL 130807 (Tenn. App. Sept. 13, 1990).

[9] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[10] *See AZ v. BZ* at 17-19.

[11] *See id.* at 27-28.

[12] *See id.* at 22.

[13] *See id.* at 21-22.

forced paternity and not assume the pretense of "balancing" other interests. Either the courts or the legislature need to courageously and unambiguously protect the constitutional liberty from coerced parenthood and identify it as the sole basis for deciding these cases.

II. IVF TREATMENT AND CRYOPRESERVATION

While claimants have litigated only a small handful of cases concerning the distribution of morulae,[14] the issues those cases raise affect tens of thousands of Americans. Over two million couples in America are infertile,[15] and Americans spend over one billion dollars each year on medical and surgical fertility procedures.[16] Cases such *Davis*[17] and *AZ v. BZ*[18] raise a variety of issues that will affect every patient seeking IVF treatment. Fertility specialists commonly suggest IVF procedures, especially when both the male and female are capable of producing gametes.[19] In these cases, pregnancy is often impossible for physical or mechanical reasons, such as where the male partner has low sperm motility or where the female partner has had a salpingectomy[20] following a tubal pregnancy.[21]

While IVF treatment is frequently successful, the procedure is invasive and traumatic for the woman seeking implantation. Initially, she receives a series of painful injections in order to temporarily stop her pituitary gland from functioning.[22] Medical personnel then aspirate several ova through a catheter from the woman's body.[23] The technique used for aspiration, called laparscotomy, is also invasive and uncomfortable, but normally needs to occur only once. Since the

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[14] A *morula* (pl. *morulae*) is the biological term for the four-to-eight cell stage of a developing fertilized egg. *See* STEDMAN'S MEDICAL DICTIONARY 889 (24th ed. 1982). I use the term here preferentially but interchangeably with *pre-embryo*, which connotes a court's sympathy for the "special status" approach.

[15] *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 3, 87 (Table II-10) (1988).

[16] *See id.* at 5, 83 (Table II-6).

[17] *See generally Davis*, 842 S.W.2d 588.

[18] *See generally AZ v. BZ, supra* note 2, at 27.

[19] *See id.* at 5. *Gametes* are reproductive cells, containing a single copy of each chromosome. *See* STEDMAN'S MEDICAL DICTIONARY, *supra* n. 14, at 571. Human gametes are sperm cells in males and ova in females. *See id.* at 1009, 1311.

[20] A *salpingectomy* is the removal of a fallopian tube. *See* STEDMAN'S MEDICAL DICTIONARY, *supra* n.14, at 1251. In a tubal pregnancy, the fertilized egg implants itself along the wall of the fallopian tube, which can be dangerous to the health of the mother and prevents the development of the embryo to the point of viability.

[21] *See Davis*, 842 S.W.2d at 591.

[22] *See* Sam Thatcher and Alan DeCherney, *Pregnancy-Inducing Technologies: Biological and Medical Implications, in* WOMEN & NEW REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL DILEMMAS 27, 29 (Judith Rodin & Aila Collins eds., 1991).

[23] *See id.* at 30.

advent of cryopreservation,[24] several ova can be extracted, fertilized, and frozen during the course of a single treatment.[25] The male donor does not need to receive any injections or undergo any surgical procedure, leading some courts to conclude that the male patient has a lesser "sweat equity" in the morulae.[26]

The remainder of the IVF freezing process requires no physical participation by either spouse. The ova are then combined in a Petri dish with the male donor's sperm.[27] The fertilized egg then begins dividing and developing.[28] After three to four days, the fertilized egg reaches the morula stage of four to eight cells.[29] At this stage, the morulae may be frozen in liquid nitrogen for preservation and storage.[30]

Part of the legal complexity of these cases concerns the exact nature of the morula at the moment of freezing. Under normal developmental conditions—that is, unless the morulae are frozen—the primitive streak appears on or about the fourteenth day.[31] This thickened tissue septum marks where the left- and right-halves of the body will be. Until this point, the morula is often referred to in legal context as a "preembryo."[32] The appellation is a compromise in the sense that it connotes acknowledgment that morulae have the potential to develop into humans, yet it also implies that the tissue at that stage contains few of the characteristics associated with humanity and life.

The relative infrequency of the successful development of frozen morulae[33] weakens the argument that they should be accorded status as "humans." While fertilization of ova *in vitro* is greatly successful, only one in ten implanted preembryos results in pregnancy.[34] This figure does not include pregnancies that result in miscarriage or stillbirth.[35] Most IVF programs are unable to implant frozen embryos stored for more than five years.[36] Litigation in both the *Davis* and *AZ* cases lasted for longer periods, leaving the question of the use of the morulae largely moot.[37] Many commentators have used these statistics to reject the

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[24] *Cryopreservation* is the term used for the freezing and storing of live tissue samples, including morulae. *See id.* at 34.

[25] *See* Robertson, *supra* note 1, at 469.

[26] *See, e.g., Davis*, 842 S.W.2d at 590, n.4, & 601.

[27] *See* Joseph J. Saltarelli, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021, 1021 (1985).

[28] *See* Thatcher and DeCherney, *supra* note 22, at 32.

[29] *See id.* at 32.

[30] *See id.* at 34. *See also* Clifton Perry and L. Kristen Schneider, *Cryopreserved Embryos: Who Shall Decide Their Fate?*, 13 J. LEGAL MED. 463, 468 (1992).

[31] *See* Thatcher & DeCherney, *supra* note 22, at 32.

[32] Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 210-11 (1996).

[33] *See* Robertson, *supra* note 1, at 443.

[34] *See id.*

[35] *See id.*

[36] *See id.* at 494.

[37] See *Davis*, 842 S.W.2d at 592 (setting the date of cryopreservation in 1988, four years before the Tennessee Supreme Court's decision); *AZ v. BZ* at 4 (cryopreservation

assignment of "human" qualities of the pre-embryo, as it has only a "weak potentiality" of becoming a human life.

III. THE *DAVIS* CASE

While many couples have sought this procedure and have used cryopreserved embryos in attempts to become pregnant, only one couple has litigated a marital property dispute over preserved embryos to the highest court possible.[38] In 1989, Mary Sue Stowe and Junior Davis of Tennessee argued over the disposition of seven cryopreserved preembryos.[39] At the heart of their disagreement was the Stowes' fundamentally different conceptions of what the frozen preembryos were.

Mary Sue argued that the frozen cells were human beings, which deserved preservation as human lives.[40] Junior claimed that the frozen cells were mere marital property with the "potential for life,"[41] and that the clinic should not implant them unless the resulting children were to be born to himself and Mary Sue inside a stable marriage.[42]

At each stage of the litigation, the Tenessee courts characterized the frozen morulae in distinctly different ways. Multiple commentators have dubbed these approaches the "right-to-life" approach, the "pure property" approach, and the "interim" or "special status" approach.[43] The *AZ v. BZ* court, the only other court to consider this exact issue to date, relied exclusively on these modes of analysis.

A. *Tennessee Circuit Court: The "Right-to-Life" Approach*

The Tennessee Circuit Court agreed with Mary Sue that the cryopreserved cells were human lives, and awarded her the right to implant them and attempt to carry them to term.[44] Under this approach, an egg becomes a human life at the moment of fertilization, whether in- or outside a woman's body, and whether or not cryopreservation has suspended the egg's development.[45]

The court was persuaded by the evidence that the eggs already contained all the genetic information necessary to facilitate their development into human beings, and determined that Junior and Mary Sue had succeeded in having a child when the egg was fertilized.[46] While the court acknowledged that Junior no longer desired fatherhood, it concluded that he already had become a parent dur-

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took place five years before litigation; case is still under appeal).

[38] *See* Davis v. Davis, *cert. denied,* 61 U.S.L.W. 3437 (U.S. Feb. 22, 1993).

[39] *See Davis,* 842 S.W.2d 588.

[40] *See Davis,* 1989 Tenn. App. LEXIS 641, at *29.

[41] *Id.*

[42] *See Davis,* 842 S.W.2d at 589.

[43] *See, e.g.* Luongo, *supra* note 1, at 1013.

[44] *See Davis,* 1989 Tenn App. LEXIS 641 at *28-29.

[45] *See id.* at *30 (see also summary of expert testimony at *12-16).

[46] *See id.* at *30.

ing the IVF process.[47] Treating the remaining discussion as a custody battle, the court invoked the doctrine of *parens patriae*—"the best interests of the child"—and awarded custody to Mary Sue.[48]

B. *Tennessee Court of Appeals: the "Pure Property" Approach*

The Tennessee Court of Appeals rejected the lower court's approach. While not explicitly terming the preembryos "property," it treated the dispute as one over marital property, to be divided as all other fungible goods.[49] The Court of Appeals reversed the trial court and found that Junior had not yet begun the process of fatherhood.[50]

In employing the pure property approach, the court focused on the desires of the parents, and deemed a *parens patriae* approach unnecessary.[51] Reluctant to force anyone into parenthood against their wishes, the court awarded joint control to Junior and Mary Sue.[52] Significantly, the court referred to their decision as one awarding "joint control" and not "joint custody".[53] This terminology reflects the court's characterization of the embryos as objects, which are "controlled" rather than living beings over which one has "custody." The court did not, however, ultimately resolve the issue of what was to become of the seven frozen pre-embryos.[54]

C. *Tennessee Supreme Court: The "Special Status" or "Interim" Approach*

The Tennessee Supreme Court, granting Mary Sue Stowe's request for review, attempted to adopt a position intermediate between the lower courts' divergent opinions. Although the court did not explicitly call the preembryos either property or individual lives,[55] it effectively overturned the trial court's decision while attempting to consider more completely the exact nature of the cells.[56]

The court determined that the symbolic significance of the preembryos, as well as their potentiality to become full-fledged individuals, imparted them a "special significance" greater than that of personal property.[57] While not entitled to the full rights of people or even late-term fetuses, the preembryos did deserve a special respect and a greater status than inanimate, fungible objects, and even greater respect than other biological objects, such as donated organs or blood.[58]

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[47] *See id.*
[48] *See id.* at *34-37.
[49] *See* Davis v. Davis, 1990 WL 130807 (Tenn. App. Sept. 13, 1990), at *3.
[50] *See id.* at *2.
[51] *See id.* at *3.
[52] *See id.*
[53] *See id.*
[54] *See id.* at *3. *See also Davis*, 842 S.W.2d at 595-96.
[55] *See id.*
[56] *See id.* at 594.
[57] *See id.* at 597.
[58] *See id.*

The court developed a six-step test to determine the disposition of frozen embryos.[59] First, a court must consider the wishes of the gamete-providers above any other decision-making authority, including any health care organization, legislative body, or fertility clinic.[60] This acknowledgment of the gamete-providers' rights distinguishes this approach from the pure property approach. Under this approach, participants in artificial reproduction are not only not compelled but also unable to alienate their interest in their own reproductive cells. Second, if the gamete-providers cannot agree on how to dispose of the frozen embryos, the court should enforce any prior contractual agreement.[61] Third, the court must balance the interests of the parties in using or not using the preembryos.[62] Fourth, the party who wishes the preembryo destroyed should prevail, unless the other party has no other way of having a child.[63] Fifth, the court should consider arguments made by the party who wishes to have the embryos implanted in either themselves or a willing donor.[64] Finally, if the couple's dispute is over whether or not to donate the embryos to a third party, the party opposed to donation should prevail.[65] Significantly, the court gives an advantage to the party wishing to destroy the preembryo, preserving the principle against forced parenthood.[66]

The *Davis* case, while providing a framework for discussing the ownership of preserved embryos, is not completely instructive. The six-step test would not be determinative if, for example, a female divorcee was unable to have children with the aid of a sperm donor or with a new spouse and the frozen morulae represented her last chance at motherhood. Further complications would arise if a woman solicited a surrogate mother to carry the embryos, if the court had reason to suspect one spouse of contriving to impose support payments or inheritance obligations on the other, or if the two gamete-providers wished to donate the morulae to separate, specific couples.

The Supreme Court denied certiorari in the *Davis* case,[67] leaving an absence of federal law in this area. Individual states, therefore, are left to balance the gamete-providers' rights on a virtually *ad hoc* basis. The great variety of interests and possible parental desires in these cases suggests that a body of law will only slowly develop to determine the property and liberty rights in this area. While the *AZ v. BZ* case in Massachusetts brings some new perspectives to the debate, no comprehensive, anticipatory policy yet exists to aid courts in the disposition of frozen embryos.

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[59] *See id.* at 604. For an insightful commentary on the court's analysis, *see* Luongo, *supra* note 1, at 1036.

[60] *See Davis*, 842 S.W.2d at 604.

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See id.* at 604; *see also* Luongo, *supra* note 1, at 1036.

[67] *Davis, cert. denied,* 61 U.S.L.W. 3437.

IV. THE *AZ v. BZ* CASE

In March of 1996, Massachusetts' Suffolk County Probate Court reinforced the ultimate result in *Davis* by again awarding control of frozen embryos to the gamete donor who did not desire them to be implanted. That court released the case using fictitious initials instead of the full names of the divorcing couple, their children, and their doctors, in an attempt to preserve the parties' privacy.[68] While the case relied on *Davis* as precedent, *AZ v. BZ* was distinguishable because the couple had signed a standard consent form which assigned the rights to the frozen embryos in the event of divorce.[69] The probate judge nevertheless overrode the agreement, stating that the couple's divorce represented a "change in circumstances" that neither party foresaw when the document was signed.[70] The existence of this "change in circumstances" rendered the agreement invalid.[71]

A. *Facts of the Case*

The husband and plaintiff in the case, AZ, married the defendant BZ in 1977.[72] The couple had enlisted the aid of a fertility clinic in their attempts to conceive since 1988.[73] By 1991, the husband had provided the clinic with a sperm sample and clinicians aspirated oocytes from the wife's body.[74] The clinicians combined the gametes and froze the resulting preembryos in two vials.[75] The couple conceived two children through IVF, twins who were born in 1992.[76] In July 1995, the clinic thawed one vial and transferred a preembryo to the wife.[77] No pregnancy resulted.[78] The couple separated in 1995, and agreed to separate this issue from other elements of their divorce proceeding.[79] The husband brought this action in the form of a Motion for an Ex-Parte Restraining Order.[80] At trial, the wife testified that "she did not wish the marriage to end but realized that realistically, it was over."[81]

The husband and wife signed many informed consent forms, including, on seven occasions, a document entitled "Consent Form for Freezing (Cry-

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[68] *See* AZ v. BZ, MASS. LAWYERS WEEKLY NO. 15-008-96 (Suffolk County Prob. Ct. Mar. 25, 1996).

[69] *See id.* at 7-11 (listing the dates of each signing).

[70] *See id.* at 24-25.

[71] *See id.*

[72] *See id.* at 4.

[73] *See id.* at 5.

[74] *See id.* at 13.

[75] *See id.*

[76] *See id.* at 14.

[77] *See id.*

[78] *See id.* at 15.

[79] *See id.* at 1.

[80] *See id.* at 1.

[81] *Id.* at 15.

opreservation) of Embryos."[82] The couple indicated on all seven forms that in the event of the couple's divorce or separation, they would award the preembryos to the wife for implantation. Both signed all seven forms.[83] All seven forms were signed by a witness, sometimes by a staff nurse at the fertility clinic.[84] Neither the husband nor the wife had an attorney, and the husband received no counseling prior to signing the forms.[85]

Noting that seven years had passed between the couple's signing of the forms and the current litigation, as well as the subsequent divorce, the judge granted the husband the restraining order and ordered that his decision be incorporated into the final divorce proceeding.[86] Notably, the decision merely restrains the wife from implanting the preembryos. The court was silent as to the husband's custody rights or to the issues of the destruction or donation of the preembryos.

B. *The Court's Reliance on* Davis v. Davis

The Suffolk County Probate Court considered all three conceptions of the nature of frozen morulae as typified by the three courts that considered the *Davis* case. The court acknowledged the right-to-life approach of the Tennessee trial court, but rejected it on the grounds that prior abortion decisions hinged on the fetus' position inside the woman's body.[87] The judge, citing the Tennessee Supreme Court's *Davis* decision, noted that "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions [are] applicable here."[88] As in *Davis*, the IVF procedure in the *AZ* case did not concern a currently implanted embryo.[89]

In considering the pure property approach, the court did not look to the *Davis* case, but to a Virginia case that implicitly embraced it.[90] In that case, a couple was attempting to retrieve their frozen embryos from a fertility clinic.[91] The Virginia court held that the fertility clinic and the couple had a "bailor-bailee" relationship, such as one has over property.[92] The Massachusetts court did not explicitly state its reason for rejecting the pure property approach. Implicitly, however, the court rejected such an approach by holding that the "special status" approach "best recognizes the dual characteristics of the preembryo and will therefore be applied to the preembryos at issue in accordance with the *Davis* definition."[93]

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[82] *See id.* at 3.
[83] *See id.* at 8-11.
[84] *See id.*
[85] *See id.* at 11.
[86] *See id.* at 28.
[87] *See id.* at 21-22.
[88] *See id.* at 21 (citing *Davis* 842 S.W.2d at 601 n.24).
[89] *See id.* at 15-16.
[90] *See id.* at 17.
[91] *See* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).
[92] *See id.* at 425.
[93] *AZ v. BZ* at 19.

Despite embracing the *Davis* court's definition of the preembryo, the court did not adhere to that court's "six step" test.[94] While observing that the couple did have a "prior agreement," the court refused to enforce it, albeit for rather convoluted reasons.[95] The court acknowledged the wife's "sweat equity" interest and her lack of opportunities to have children without using reproductive technologies.[96] While both of these interests were present in this case, the court was not compelled to treat them as controlling interests.

C. *The Doctrine of Forced Paternity*

The Suffolk County Probate Court found for the husband, holding that "the party who wishes to avoid parenthood should prevail when weighing the relative interests, so long as the other party has a 'reasonable possibility' of achieving parenthood through other means."[97] This approach advances the court's interests in ensuring that children receive the love and support of two parents (married or divorced), in avoiding encumbering an unwilling parent with an unwanted financial burden, and in protecting the fundamental right to autonomy over procreative decisions.

The court considered this result to be consistent with the best interests of the child who would result from the implantation of the frozen preembryo.[98] The court noted that should the preembryo result in a live birth, the burden of parenthood would be "unfair not only to the parent but also unfair to a child who would enter the world unwanted by one of his or her parents."[99] This argument is superficially compelling, but somewhat speculative. The record contains no evidence that the husband, AZ, was unwilling or unable to provide *emotional* support to the child. Conceivably, the plaintiff-husband might be willing to assume the responsibilities of fatherhood if the court allowed him no other choice.

Significantly, the Suffolk County Probate Court acknowledged the likelihood of the plaintiff-husband becoming financially and emotionally burdened against his will.[100] No Massachusetts case has explicitly ruled on the father's duty to a child conceived through IVF or any other means after divorce proceedings have begun. Other case law, however, strongly suggests that the father, AZ, would be responsible for the child's welfare.[101] Under Massachusetts case law, a father

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[94] Two steps of the six-step test were not relevant here. The first step concerns disputes between gamete-providers and third-parties, and the sixth concerns conflicting donation interests.

[95] *See AZ v. BZ* at 24. For an analysis of the court's rationale for not enforcing the couple's informed consent forms, *see infra* Section IV.D.

[96] *See AZ v. BZ* at 26. The court noted specifically that BZ's "chance of going through more procedures is decreasing due to her age and alternate means will be psychologically and financially taxing on her." *Id.*

[97] *Id.* at 28.

[98] *See id.*

[99] *Id.* at 28.

[100] *See id.* at 27.

[101] *See id.* at 27, n.2 (citing Knox v. Remick, 371 Mass. 433, 437, "[p]arents may not

cannot bargain away or relinquish his duties as a parent, even with the mother's consent.[102] Furthermore, a child has an inalienable right to parental financial support enforceable by the state of Massachusetts.[103] No compelling argument exists to deny AZ's status as a father to the child which would result from completion of the IVF procedure, and gamete contribution alone is enough, in Massachusetts law, to define parenthood.[104] The husband, AZ, would therefore involuntarily assume the heavy burden of supporting the child until the age of majority.

The court's main consideration, however, was the protection of the interest of the parent who did not wish to procreate. To date, the husband in "frozen embryo" cases has invariably been the party resisting parenthood. The *AZ* decision supports those fathers, and jibes with the currently popular belief in the need for two-parent families with strong paternal participation.[105] The case also strengthens the idea that in the absence of the mother's assumption of the risks and physical encumbrances of pregnancy, fathers have an equal interest and right in procreative decisions. The case also supports the contention that the "negative" right to avoid procreation is superior to the "positive" right to procreate. While all procreative decisions involve issues of personal autonomy and privacy, the negative right to avoid procreation eliminates burdens on both the unwilling parent and potential child.

Not all jurisdictions would reach the same result. A New York trial court, for example, has held that a husband accepts the duty of paternity after "participation in an in vitro program just as he does after intercourse intended to result in procreation."[106] The New York court's judgment is sound to the extent that participating in an *in vitro* fertilization (IVF) program seems to indicate a stronger intention to accept the responsibilities of parenthood than coitus because coitus is not invariably intended to result in the birth of a child. In this sense, the couple's dilemma is comparable to a divorce occurring late in the wife's pregnancy. While acknowledging this argument, the Massachusetts court apparently found that the need for both parents to actively desire parenthood was the most important factor in the case then under consideration.[107]

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bargain away the rights of their children to support from either one of them.").

[102] *See id.*

[103] *See AZ v. BZ* at 27.

[104] *See id.*

[105] A much-discussed 1993 *Atlantic Monthly* article strongly supports this contention. In 1992, then-Vice President Dan Quayle criticized the decision of the fictional television charcter Murphy Brown to have a child as a single parent. While many (including the show's producers) rebuked Quayle, he was later vindicated by the *Atlantic Monthly* article, which demonstrated that children of single-parent families tend more often to be poor, to drop out of school, and to have emotional or behavioral problems than children of two-parent families. Barbara Dafoe Whitehead, *Dan Quayle was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47.

[106] Kass v. Kass, No. 19658-93, 1995 WL 110368, at *3 (N.Y., Nassau County Sup. Ct. Jan. 19, 1995).

[107] *See AZ v. BZ* at 27-28.

D. *"Right to Life" Issues in* AZ v. BZ

The controversy over the definition of the beginning of life is one of the most passionate and divisive of our time. Elections are swayed based on a candidate's position on the issue;[108] zealots commit acts of sabotage, vandalism, violence and even murder[109] in misguided attempts to advance their beliefs. Representatives of various camps lobby and participate in mass demonstrations. Federal legislation now balances the right of free speech with the potential for violence, and bars such demonstrations from taking place close enough to abortion clinics to deter or harass patients.[110]

Parties seeking to resolve the fate of frozen preembryos have also raised right-to-life concerns.[111] The right-to-life doctrine asserts that life begins at the moment of conception, that is, the moment that a sperm cell breaks through the outer *zona pellucida* of the ovum.[112] Mary Sue Davis raised this line of argument in the Tennessee case.[113] Mary Sue had remarried by the time the case reached the Tennessee Supreme Court and no longer wished to have the embryos implanted in herself, but continued to believe that the preembryos were "human lives" and wished to donate them to an infertile couple.[114] The Tennessee Supreme Court,[115] however, did not classify the morulae as "human lives," nor did the Massachusetts *AZ* court.[116]

E. *Informed Consent in* AZ v. BZ

In *AZ v. BZ*, the court might reasonably have stopped at the second step of the *Davis* analysis, and awarded the wife custody of the morulae in accordance with the informed consent forms both husband and wife signed. On the seven informed consent forms they signed over the three-year period of the treatment, the husband and wife indicated that the morulae would be awarded to the wife

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[108] *See, e.g.*, RAYMOND TATALOVICH AND BYRON W. DANES, THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING 159 (1981).

[109] *See, e.g.*, Michael Browning, *Anti-Abortion Demonstrator Found Guilty: Jurors Quickly Convict Man of Killing 2 at Florida Clinic*, HOUSTON CHRONICLE, Nov. 11, 1994, at A1; Michael D. Lemonick, *An Armed Fanatic Raises the Stakes: A Deadly Rampage at Two Clinics Shakes Boston,* TIME, Jan. 9, 1995, at 34.

[110] *See* Schenck v. Pro-Choice Network of Western New York, 117 S. Ct. 855 (1997).

[111] *See Davis*, 842 S.W.2d at 588 (Expert testimony of Dr. LeJeune, who called the frozen embryos "early human beings" and "tiny persons."). *See also* Davis v. Davis, No. 34, 1992 WL 341632, at *1 (Tenn. Nov. 23, 1992) (petition for rehearing on the grounds that the Tennessee Supreme Court's decision violated President Ronald Reagan's Presidential Proclamation No. 5761, "proclaim[ing] and declar[ing] the unalienable personhood of every American, from the moment of conception until natural death." *Id.* The petition was denied. *See id.* at *5.).

[112] *See* Robertson, *supra* note 1, at 444.

[113] *Davis*, 1989 Tenn. App. LEXIS 641, at *28.

[114] *See id.*

[115] *See Davis*, 842 S.W.2d at 594.

[116] *See AZ v. BZ* at 19.

in the event that the couple divorced.[117] A reasonable judge may have viewed this course of behavior over an extended period as proof of a carefully considered decision. Furthermore, a reasonable judge might have presumed that the couple had willingly anticipated the ramifications of such an occurrence, and awarded custody to the wife.

Instead, Judge Nesi, writing for the court, held that the forms constituted an unenforceable contract under the doctrine of "changed conditions."[118] Judge Nesi noted that over seven years had passed since the time the husband had last signed a consent form in 1988. Moreover, the current situation of both spouses was significantly different from those under which they signed the form.

Judge Nesi admitted that one could have foreseen most aspects of the current case. He wrote, "[I]t was foreseeable that the implantation would not result in a pregnancy and the frozen preembryos could be used for additional IVF. . . .[and] that the couple would conceive children from the procedure and seek to use the frozen preembryos in an attempt to have additional children. . . .[I]t was [also] foreseeable that the couple would separate."[119] The foreseeability of these conditions alone would normally dictate enforcement of the consent form.

But Judge Nesi believed that the *chronology* of the facts of the case dictated a different result. Nesi wrote, "[w]hat this court finds was never contemplated by the couple is that these events would be compounded: that the couple would have twins as a result of the IVF procedure, the wife would file a restraining order against the husband, the husband would file for a divorce and *then* the wife would seek to thaw the preembryos for implantation. . . ."[120] Most of these events, however, are hardly extraordinary in a divorce process. The informed consent form specified that in the event of divorce the wife would have the right to implant the embryos, but did not restrict her from implanting them after the commencement of divorce proceedings. Judge Nesi's decision on this issue is unclear. He may have been suggesting that one could not have foreseen the cumulative effects of all the conditions, or that no reasonable person could have envisioned their future emotional state in such extraordinary, rare events.

A possible third interpretation exists. The judge may have impermissibly ignored the effects of the consent form and made a strictly political decision. Perhaps the judge attached weight to the wife's testimony—that she regretted the dissolution of the marriage—and believed that her use of the embryos was an attempt at reconciliation or manipulation of the husband. This interpretation would explain the judge's emphasis on the order of events in the case, and his inclusion of that passage of the wife's testimony in his decision.[121] If the appellate

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[117] *See id.* at 8-11.

[118] *See id.* at 23-25.

[119] *See id.* at 24.

[120] *See id.* at 24-25 (emphasis by the court).

[121] In writing the summary of the facts of the case, Judge Nesi recounted that the wife had testified "she did not wish to end the marriage but it seems beyond question that this marriage is over." *AZ v. BZ* at 15.

court interprets the judge's comments as an attempt to deny the wife's right to use the morulae on the basis of his own value judgment of her motives, the case stands a good chance of being overturned on appeal.

If the case stands on appeal, the application of a "changed conditions" doctrine to an informed consent form may disempower those that seek to avoid these kinds of disputes in advance of their occurrence. In essence the "changed condition" in the *AZ* case was the couple's divorce, exactly the condition for which the informed consent form was designed to provide a contingency plan. The only fundamental state that changed was the couple's emotional status.

V. FURTHER IMPLICATIONS OF *DAVIS* and *AZ v. BZ*

Both the *Davis* and *AZ* courts found the issue of avoiding forced parenthood persuasive. If courts or legislatures could establish this interest as the governing principle in frozen embryo cases, courts could address this issue with an unambiguous rule. A court seeking to state such a rule would be able to provide at least four powerful arguments. First, in these cases, both disputants are similarly situated, and bodily integrity ceases to be a key issue. In the absence of a question about bodily integrity, the constitutional right to control one's own procreation should prevail. Second, none of the court's supposed "balancing" interests are compelling enough to dictate a different result. Third, the "special status" approach which the *Davis* and *AZ* courts both embrace does not afford the embryo a status that dictates a different result. Finally, the "right to life" analysis is especially uncompelling in cases involving frozen preembryos.

A. *Bodily Integrity*

Before the advent of reproductive technology, courts only needed to consider the fate of embryos in abortion cases. In these cases the fate of the embryo was inextricably tied to the physical integrity of the pregnant woman, and based on traditional constitutional analysis courts drew the right to decide the fate of embryos along gender lines. In frozen embryo cases, however, the male and female participants are on more equal footing, and the court's analysis should focus not on gender, but procreative intent.

In the majority of abortion cases, the issue before the court is the woman's right to avoid parenthood. The right to procreate is a "fundamental right" under the Constitution. Denying such a right represents a violation of substantive due process rights under the Fourteenth Amendment.[122] *Roe v. Wade* established a mother's inviolable privacy right to decide whether or not to carry her pregnancy to term.[123] Frozen embryo cases raise the same issue for the father and his right to avoid parenthood.

In "frozen embryo" disputes, the destruction of the morulae does not require the compromise of the woman's bodily integrity. The *destruction* or *failure* to

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[122] *See* Roe v. Wade, 410 U.S. 113 (1973).

[123] *See id.* at 164-5.

implant the embryos requires no surgical or bodily intrusion on either spouse. An abortion is an invasive procedure, invariably affecting the woman's interest in maintaining her physical autonomy. A frozen embryo exists physically independent of either spouse, and the decision to dispose of it involves a physical intrusion on neither parent. The male gamete-provider in these cases therefore should hold the right to determine the fate morulae equally with the female.

In the absence of the bodily integrity issue, the husband's right to control when and whether he becomes a parent is equal to his wife's, unlike a standard abortion case such as *Roe v. Wade*.[124] The court should not impose the physical, emotional, and financial strains of parenthood on either parent. Nor should one miscontrue this issue as one of gender politics. One can easily envision a dispute between an ex-husband who believes in the right-to-life approach attempting to secure the right to have a morula donated for implantation over the objections of his ex-wife. In this instance, the wife's interest in avoiding procreation is superior to her husband's interest.

B. *"Sweat Equity" and Reproductive Opportunities*

The so-called "balancing interests" of sweat equity[125] and reproductive opportunities have not yet compelled a court to find for a woman wishing to implant morulae, nor should it. These interests are worthy of acknowledgment and respect. They do not, however, trump the interest in avoiding procreation.

In an IVF case, the woman does have a greater "sweat equity" in the morulae produced than the man, but no court has considered this issue dispositive. The court must make an "all-or-nothing" determination: the embryo either will or will not be implanted. A court cannot make an apportioned decision here, as it could when disposing of an item which might be sold with proceeds divided according to the parties' interests. While both the *Davis* and *AZ* courts acknowledged women's efforts, thus far "sweat equity" has not swayed the courts' decisions.

Courts considering this issue have been appropriately sympathetic to those who desire children but are unable to have them without using these procedures. The inability to have children is regrettable, but the potential parents desiring children are not suffering an extraordinary or unusual loss. In addition, such a child could be born with only one interested parent. This situation is far from unusual, as well, but courts here have a unique opportunity to avoid the birth of partially-unwanted children.

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[124] *Roe*, 410 U.S. 113. In fact, the *Roe* court decided that the crucial aspect of procreative rights is the interest in privacy and not bodily integrity. *See id.*

[125] Because IVF treatments require greater investments of energy, time and sacrifice from the female participant than the male (*see supra* Section III), some might argue that she has a greater or controlling property interest. Commentators have often described this interest as the wife's "sweat equity" in the morulae. *See* Robertson, *supra* note 1, at 476 n. 95.

Perhaps these courts could clarify their positions by offering an appropriate analogy. In cases such as *Davis* and *AZ*, the parents desiring implantation may have viewed themselves to be in the same situation as women who become pregnant *in utero* and then participate in divorce proceedings. In that situation, the woman has an inalienable right to carry her baby to term and expect support from the father. This analogy is, however, a false one. The woman's position is more analogous to a woman who was *attempting* to conceive a child at the time divorce proceedings began who then insists that her husband continue to assist in the attempt. This analogy is especially apt because the "last act" necessary to begin pregnancy has not occurred in frozen embryo cases. A "complete attempt" at conception in IVF cases has not occurred until after thawing and implantation. Couples may freeze away embryos and either change their minds or conceive normally, and never give birth to children through IVF. Parenthood is not inevitable at the stage of cryopreservation.

C. *Limitations of the "Special Status"*

The special status does not give embryos the same rights that the law accords children. Courts must make an "all-or-nothing" decision in determining the morula's status. The morula is either a full-fledged human, in which case destroying it is tantamount to murder, or it is something less, in which case destroying it may sometimes or always be morally permissible.

In *Davis* and *AZ*, the special status only affects the comparative rights between the gamete-providers and "bailees." The fate of frozen embryos when parents dispute over their use, however, has not diverged from that of property. Both *Davis*[126] and *AZ*[127] employed the special status approach and nominally accorded morulae statuses intermediate between that of simple property and that of human beings. But this "intermediate" status has not yet dictated the morula's right to birth, a pure "best interest of the child" analysis, or rights of "custody" rather than control.

The "greater respect" shown has mostly consisted of rendering morulae inalienable to third parties, a status shared by other bodily-derived objects like organs.[128] The special status has not lead courts to protect morulae as they would lives. Beyond this consideration, the only clear distinction between the "special status" and "pure property" approaches is the court's acknowledgment of the need for reverence in writing their decisions. This sensitivity is appropriate, but the ultimate result has been the same as under the "pure property" approach.

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[126] *See Davis*, 842 S.W.2d at 597.

[127] *See* AZ v. BZ at 19.

[128] *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (1996). Society often perceives matter derived from humans as inalienable and personal. This perception extends not only to the "ownership" of babies and slaves, but to organs. *See id.*

D. *Right-to-Life Interests*

Courts thus far have considered whether embryos are more like organs or children in their property analyses. The special status is consistent with the former and not the latter conclusion.

Constitutional analysis of the right-to-life interest would not support a different finding. *Davis*[129] cites *Roe v. Wade* as a controlling decision of the "right to life" issue, and *AZ* cites *Planned Parenthood v. Casey*, the 1992 case that affirmed *Roe*.[130] *Roe v. Wade* held, in part, that the rights of the fetus during the first "trimester" (three months of gestation) are negligible, and during that trimester the state could not interfere with the mother's right to seek an abortion.[131] At the stage when a morula is frozen, it consists of approximately four to eight cells, the stage which it would have achieved in the mother's body at day four.[132] While the preembryo may remain frozen for months or even years, its development is suspended and it does not develop past the morula stage while frozen.[133] The key to the trimester framework is the development to the point of viability rather than the mere passage of time. An embryo can be frozen for far longer than three months, but will not pass the first trimester until it has developed *in utero* for three months. The *Roe* and *Casey* decisions still govern the Constitutional right-to-life aspects. The frozen embryo should have no legal status and no "right" to be implanted.

Using traditional right-to-life analysis, the frozen morula's interest is negligible because of its "weak potentiality" of reaching full development. Right-to-life proponents often distinguish the moment of conception as the moment when the possibility of developing into life makes an immense quantum leap upward. A sperm or ovum has no chance of becoming a human independently, but the two joined do. The fertilized egg has a "strong potentiality" for developing into a human life.[134] A frozen embryo has a negligible probability of developing any further. Even when implanted, only one in ten morulae successfully gestate and are born alive.[135] The probability of development decreases if the preembryo spends a longer time in cryopreservation, and some authorities consider the preembryo unusable after two years.[136] Expert testimony in the *AZ* case estimated the probability of successful implantation of the embryos, then five years

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[129] *See Davis*, 842 S.W.2d at 594-595 (citing Roe v. Wade, 410 U.S. 113 (1973)).

[130] *See AZ v. BZ* at 21 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

[131] *See Roe*, 410 U.S. at 136. While the Supreme Court no longer uses the "trimester" framework, it has reaffirmed that the state may not deny a woman the right to seek an abortion before the point of viability. *See Casey*, 505 U.S. 833 (1992).

[132] *See* Davis, 842 S.W.2d at 592.

[133] *See id.* at 594.

[134] *See, e.g.* Webster v. Reproductive Health Services, 492 U.S. 490, 509 (1988) (describing "the protection of the potentiality of human life" as a legitimate state interest); Harris v. McRae, 448 U.S. 299, 315 (1979) (the same).

[135] *See* Robertson, *supra* note 1, at 443.

[136] *See, e.g.* Luongo, *supra* note 1, at 1016.

old, as less than twenty percent.[137] While semantically the preembryo has a far greater potentiality for life than separate gametes, its isolation when frozen as well as the limited success rate of the procedure give it a far weaker potentiality than an embryo *in utero*. Its weak potentiality diminishes the "right to life" interest.

VI. CONCLUSION

The implications of *AZ v. BZ* at the probate level are far-reaching. Because of the absence of cases regarding disputes over frozen embryos at the federal level, as well as the sparsity of cases state appellate courts have considered, other courts considering the issue must make decisions based on the limited case law currently in existence. While few couples have litigated the issue, the technology is still in its adolescence, and many couples may consider using the procedure as it becomes cheaper and more accessible. As America's divorce rate rises, many more disputes over frozen embryos may transpire in the future. Considering that commentators have considered the *Davis* case significant even at the trial level,[138] the reasoning of *AZ v. BZ* may be instructive to other courts even if it is overturned on appeal.

Perhaps a clarification of the doctrine is unnecessary. Courts may seek to pacify the public by couching their decisions in euphemisms and insubstantial "balancing tests" and yet still reach constitutional, just results. But if this is indeed what the courts want to do, they are shirking their duty to clarify the issues, and perhaps end up being condescendingly paternalistic. While we may expect future courts to decide consistently with *Davis*, the nation's courts lack a compelling precedent, placing at risk the constitutional right to avoid procreation. Absent anticipatory federal legislation, the next judge to confront this thorny problem should courageously state a clear, unequivocal common law principle.

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[137] *See* AZ v. BZ, Mass. Lawyers Weekly No. 15-008-96 (Suffolk County Prob. Ct. Mar. 25, 1996), p.16.

[138] *See, e.g.* Luongo, *supra* note 1, at 1028.