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**KASS v. KASS, BLAZING LEGAL TRAILS IN THE FIELD OF
HUMAN REPRODUCTIVE TECHNOLOGY**

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I. INTRODUCTION

On May 7, 1998, the Court of Appeals of New York entered uncharted legal territory. It decided the fate of a divorced couple’s five pre-zygotes that had been medically preserved for future attempts at achieving pregnancy.¹ In *Kass v. Kass*, the court upheld a ruling of the Appellate Division of the Supreme Court of New York and enforced a consent agreement signed by the couple prior to participating in a reproductive procedure known as in vitro fertilization (IVF).² Recognizing that it is the inherent role of the gamete donors to determine the disposition of their genetic offspring,³ the court reasoned that the terms of the prior consent agreement were sufficiently definite to ascertain the true meaning of the parties at the moment that the document was signed.⁴ Additionally, the court reinforced the determination of the Appellate Division, which overturned the initial decision of the trial court, and held that a woman does not have absolute authority with respect to the disposition of fertilized genetic material because her constitutional rights to privacy and bodily integrity are not implicated until the moment that implantation occurs.⁵

¹*Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

²Welden E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws which Govern That Technology*, 48 DEPAUL L. REV. 825, 833-34 n.67 (1999). “IVF literally means ‘fertilization in a glass.’ IVF is accomplished by combining sperm and ovum in a petri dish where fertilization occurs.” *Id.* at 833-34.

³*Kass v. Kass*, 663 N.Y.S.2d 581 (App. Div. 1997); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁴*Kass*, 696 N.E.2d at 175.

⁵*Id.* at 179.

The decision in *Kass* illustrates a situation where well-founded common law contract principles were applied to a novel reproductive issue in order to respond to rapidly evolving technological progress. However, this legal dilemma presents a variable that warrants special attention. This was not a case where two business colleagues sought redress from the court to resolve a dispute over the price of commercial goods. Instead, the parties involved in the case at hand struggled for control of a possible human life; Mrs. Kass hoped to preserve the pre-zygotes for future implantation attempts, and Mr. Kass sought to avoid the tribulations associated with compulsory parenthood. Bearing this in mind, this Comment will evaluate the decisions rendered by both the Supreme Court of New York and the New York Court of Appeals. Part II discusses the relevant facts considered by the court in determining the disposition of the Kass's five frozen pre-zygotes. Part III reviews the decision of the Supreme Court of New York, which held that a woman has the ultimate decisional authority with respect to frozen genetic material, because it implicates her constitutional rights to privacy and bodily integrity. Part IV analyzes the plurality opinion delivered by the Appellate Division of the Supreme Court of New York, which reversed the court's initial holding. Part V examines the decision of the New York Court of Appeals that reinforced the ruling of the Appellate Division. Finally, Part VI analyzes the holdings set forth by the New York courts and suggests alternative methods to resolve dispositional disputes in the future.

II. FACTS

Immediately after Maureen and Steven Kass consummated their marriage on July 4, 1988, the couple began trying to conceive a child.⁶ Mrs. Kass was worried that her prenatal exposure to a fertility drug known as diethylstilbestrol (DES) would complicate her ability to carry a baby to term.⁷ The couple soon discovered that the matter was far more serious – Mrs. Kass could not become pregnant.⁸

In August 1989, the couple contacted the John T. Mather Memorial Hospital in Port Jefferson, Long Island, to seek assistance for Mrs. Kass's medical complications. Following several unsuccessful attempts at artificial insemination, they enrolled in a hospital program designed to assist patients in becoming pregnant through IVF.⁹ As with any complex medical procedure, the egg retrieval process associated with IVF causes considerable physical pain.¹⁰ Additionally, the odds of a patient becoming pregnant during the first attempt are slim. These factors invariably inflict serious physical, emotional and financial burdens on a couple hoping to bear a

⁶*Id.* at 175.

⁷*Id.*

⁸*Id.*

⁹*Kass*, 696 N.E.2d at 175. “Typically, the IVF procedure begins with hormonal stimulation of a woman’s ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion - or pre-zygote - divides until it reaches the four - to - eight-cell stage, after which several pre-zygotes are transferred to the woman’s uterus by a cervical catheter.” *Id.*

¹⁰*Id.*

child. Modern science has responded to the complications associated with IVF by introducing a process known as “cryopreservation.”¹¹ In order to reduce the amount of pain that a patient must endure, several eggs are initially extracted from the woman’s uterus and immediately joined with the male donor’s sperm to complete the fertilization process.¹² Next, the fused genetic material divides to the eight-cell stage, and a doctor-recommended number of the pre-zygotes are implanted in the uterus in an attempt to impregnate the patient.¹³ The pre-zygotes that are not immediately implanted are frozen or “cryogenically preserved” for subsequent attempts.¹⁴

Maureen Kass underwent the process of egg retrieval five times and implantation nine times.¹⁵ She became pregnant twice, but was unable to carry either pregnancy to term.¹⁶ On May 12, 1993, before the final egg retrieval procedure, the Kassess signed an agreement to permit the hospital to cryopreseve any un-implanted pre-zygotes.¹⁷ Along with consent to the cryopreservation procedure, the couple executed a seven page “Additional Consent Form,” which described the future disposition of any un-implanted zygotes upon occurrence of circumstances that would render the parties unable to make a determination themselves.¹⁸ Mr. and Mrs. Kass resolved that, in the event of “death or any other unforeseen circumstance,” the cryopreserved pre-zygotes were to be donated to the hospital’s IVF program for approved research and investigation.¹⁹

¹¹*Id.*

¹²*Id.*

¹³*Kass*, 696 N.E.2d at 175.

¹⁴*Davis*, 842 S.W.2d at 592; *Kass*, 696 N.E.2d at 175.

¹⁵*Kass*, 696 N.E.2d at 175-76.

¹⁶*Id.* at 176.

¹⁷Donna M. Sheinbach, Comment, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV. 989, 1006 (1999). “On May 12, 1993, the couple gave their IVF physician permission to retrieve as many eggs as possible by signing Addendum No. 1-1 to the Clinic’s General Consent Form No. 1.” *Id.*

¹⁸*Kass*, 696 N.E.2d at 176. “The first two forms, ‘GENERAL INFORMED CONSENT FORM NO. 1: IN VITRO FERTILIZATION AND EMBRYO TRANSFER’ and ‘ADDENDUM NO. 1-1,’ consist of 12 single spaced typewritten pages explaining the procedure, its risks and benefits, at several points indicating that, before egg retrieval could begin, it was necessary for the parties to make informed decisions regarding the dispositions of the fertilized eggs” *Id.*

¹⁹*Id.* First, in pertinent part “Informed Consent Form No. 2: Cryopreservation of Human Pre-Zygotes” provides: “We understand that our frozen pre-zygotes will be stored for a maximum of five years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of *both* of us, consistent with the policies of the IVF Program and applicable law. 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-

Eight days after signing the agreements, Maureen Kass underwent her final egg retrieval procedure.²⁰ By this stage in the IVF process, Mr. and Mrs. Kass had changed their plans and decided that the pre-zygotes should be implanted into Maureen Kass's sister, who had volunteered to become a surrogate mother for the couple.²¹ Strain in the Kass's marriage soon mounted when it became apparent that the IVF procedure was again unsuccessful, and Mrs. Kass's sister opted not to continue the surrogacy contract.²² With their hopes of conceiving a child virtually shattered, the couple filed for divorce.²³

Without legal assistance, Maureen Kass drafted an uncontested divorce agreement that stated that the remaining five frozen pre-zygotes should be disposed of in the manner outlined in the Mather Hospital consent form.²⁴ Shortly thereafter, Mrs. Kass experienced a change of heart and wrote letters to both the hospital and to her IVF physician relaying her adamant opposition to the destruction of the five pre-zygotes.²⁵ Less than one month after sending the letters, Maureen Kass filed a matrimonial action requesting sole custody of the frozen pre-zygotes so that her physician could later attempt implantation.²⁶ Opposing Mrs. Kass's custodial claim,

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. THESE IMPORTANT DECISIONS MUST BE DISCUSSED WITH OUR IVF PHYSICIAN AND OUR WISHES MUST BE STATED (BEFORE EGG RETRIEVAL) ON THE ATTACHED ADDENDUM NO. 2-1, STATEMENT OF DISPOSITION. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM." *Id.* Second, "Informed Consent No. 2 - Addendum No. 2-1: Cryopreservation Statement of Disposition" states: "We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. *We are to indicate our choices by signing our initials where noted below.* 1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use ... by us in a future IVF cycle. . . . 2. In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of the stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to . . . (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." *Id.* at 176-77.

²⁰*Kass*, 696 N.E.2d at 177.

²¹*Id.*

²²*Id.*

²³*Id.* at 177.

²⁴*Id.* "'The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes.'" *Kass*, 696 N.E.2d at 177.

²⁵*Id.*

²⁶*Id.*

Mr. Kass filed a counterclaim requesting specific performance of the IVF agreement, which bestowed the pre-zygotes to the Mather Hospital IVF program.²⁷

The Kassés stipulated to a settlement with respect to all issues other than each party's claim regarding the disposition of the frozen pre-zygotes.²⁸ Though a judgment for divorce was rendered on May 16, 1994, the custodial issue remained unresolved.²⁹ Both parties agreed to permit the matter to be decided on the existing record.³⁰ The Supreme Court of New York granted custody of the five pre-zygotes to Maureen Kass and permitted her to have them implanted.³¹ A divided Appellate Division of the Supreme Court of New York reversed, unanimously agreeing that two of the three theories advanced by the Supreme Court were unsound.³² The decision of the Appellate Division was subsequently affirmed by the Court of Appeals of New York.³³

III. SUPREME COURT OF NEW YORK

On January 18, 1995, the Supreme Court of New York, Nassau County, entered a judgment awarding custody of the frozen pre-zygotes to Maureen Kass.³⁴ Relying on *Roe v. Wade* and its progeny,³⁵ the court held that a determination in Mr. Kass's favor would implicate Mrs. Kass's right to privacy and bodily integrity.³⁶ The court advanced three main propositions in support of its holding. First, the pre-zygotes, while not considered legal persons, nevertheless ought to be elevated to a legal status above property.³⁷ Second, because a husband's rights essentially terminate upon fertilization, regardless of whether the fertilization procedure takes place in vitro or in vivo,³⁸ the disposition of the pre-zygotes should be left solely to Maureen Kass's discretion.³⁹ Third, the pre-divorce agreements were not dispositive of the situation and were insufficiently clear to properly extract the intentions of the parties.⁴⁰ With

²⁷*Id.*

²⁸*Id.*

²⁹*Kass*, 696 N.E.2d at 177.

³⁰*Id.*

³¹*Kass*, 235 A.D.2d at 154.

³²*See generally, id.*

³³*Kass*, 696 N.E.2d at 175.

³⁴*Kass*, 235 A.D.2d at 154.

³⁵410 U.S. 113 (1973).

³⁶*Kass*, 235 A.D.2d at 154.

³⁷*Id.*

³⁸Havins & Dalessio, *supra* note 2, at 833 n.67. "In vitro fertilization means fertilization outside of the body. In vivo fertilization means fertilization within life or, as applied here, within the body." *Id.*

³⁹*Kass*, 235 A.D.2d at 154.

⁴⁰*Id.*

these determinations in mind, the court entered a judgment granting Maureen Kass the exclusive right to determine the fate of the genetic material in dispute.⁴¹

IV. SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Following an appeal by Steven Kass, the Appellate Division of the Supreme Court of New York delivered a plurality opinion holding that the Kassess' intentions set forth in the May 12, 1993 consent forms and the June 7, 1993 uncontested divorce agreement were sufficiently clear to properly determine the custodial disposition of the frozen pre-zygotes.⁴² All five justices who served on the appellate panel agreed that "the Supreme Court committed a fundamental error in equating a prospective mother's decision whether to undergo implantation of pre-zygotes, which are the product of her participation in an IVF procedure, with a pregnant woman's right to exercise exclusive control over the fate of her non-viable fetus."⁴³ Rejecting the application of *Roe v. Wade*, the Supreme Court reasoned that a woman's right to privacy is not implicated until implantation actually occurs, for it is only then that her bodily integrity is at issue.⁴⁴

A. Majority

Holding that the controversies that arise as a result of IVF are "intensely personal and essentially private matters which are appropriately resolved by the prospective parents rather than the courts," the majority applied standard theories of contract law in order to reveal the intent of the parties from the pre-existing agreements.⁴⁵ The first inquiry turned on whether there were any objectively verifiable manifestations of mutual intent by the parties.⁴⁶ The majority, extracting the intent of the parties from the document as a whole, determined that an unequivocal statement of intent did exist between the parties, which could be identified in the informed consent agreement.⁴⁷ Looking at the language of the document, the court noted numerous uses of plural subject tense such as 'we', 'us' and 'our.'⁴⁸ Additionally, at various times throughout the document the couple demonstrated their desire to maintain decisional authority, acknowledging "their joint right and obligation to provide for the disposition of any frozen pre-zygotes in the event that they cannot render such joint decision."⁴⁹

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.* at 155.

⁴⁴*Kass*, 235 A.D.2d at 155.

⁴⁵*Id.* at 162; see also John A. Robertson, *Meaning What You Sign; Kass v. Kass Regarding Disposition of Frozen Embryos*, THE HASTINGS CENTER REPORT, July 1, 1998, at 22 "Although it may not be easy for couples to envision accurately their future wishes when they are focused on achieving fertilization and pregnancy, the right to control future disposition by prior directive seems clearly preferable to having a court decide." *Id.*

⁴⁶*Kass*, 235 A.D.2d at 155.

⁴⁷*Id.* at 158, 163.

⁴⁸*Id.* at 158.

⁴⁹*Id.*

The court ultimately divided over the document's failure to specifically list divorce as a condition contemplated in the statement of intent for disposition. The majority viewed the document against the backdrop of general contract law and interpreted the provision as though death and incapacity were just examples of conditions that could prevent a joint decision, rendering consideration of the parties' intent appropriate.⁵⁰ This holding contradicted the concurring and dissenting justices' conclusions that the two scenarios set forth, namely death and incapacity, were the exclusive conditions that could trigger application of the provision in question.⁵¹

The court next considered whether another section of the informed consent document, which expressly addressed divorce, was binding. This portion of the agreement provided that in the event of divorce, the legal ownership of the pre-zygotes should be resolved in a property settlement in a court of proper jurisdiction.⁵² The majority held that it did not state the dispositional intentions of the parties.⁵³ Instead, the purpose of the provision was to confer jurisdiction upon a competent court and to shield the hospital from liability if a legal dispute arose during the couple's divorce proceedings.⁵⁴ The majority determined that the statement did not diminish the expressed intent of the parties, which granted authority to the IVF program to retain the pre-zygotes.⁵⁵

The majority finally concluded that the informed consent document, viewed in its entirety, "provides irrefutable evidence that the parties intended to have the IVF program retain the stored pre-zygotes for study in the event that, as here, they were unable to jointly agree on continued participation in the program."⁵⁶ Also, a consideration of further manifestations of assent expressed by the parties through drafting and signing the uncontested divorce agreement alleviated any doubts that may have arisen regarding the intent of the parties.⁵⁷

B. Concurrence

Finding the informed consent agreement to be "fatally ambiguous," one judge drafted a solo concurrence recognizing the financial and emotional burdens that necessarily assist compelled fatherhood.⁵⁸ The concurring judge reasoned that the

⁵⁰*Id.* at 159.

⁵¹*Kass*, 235 A.D.2d at 164, 176.

⁵²*Id.* at 160. Addendum No. 2-1 states, in pertinent part, "[I]n 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." *Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Kass*, 235 A.D.2d at 160.

⁵⁶*Id.* at 161.

⁵⁷*Id.* at 163. "The documentary evidence overwhelmingly demonstrates that the parties in this case made such a clear and unequivocal choice, and the plaintiff's subsequent change of heart cannot be permitted to unilaterally alter their mutual decision." *Id.*

⁵⁸*Id.* at 165-66. In New York, parents are compelled to support their children until they reach the age of 21. Currently, no means to voluntarily shield one parent from this obligation

document stipulating the disposition of the pre-zygotes in the event of divorce demonstrates that ambiguity exists within the pre-existing agreements because it was signed in December 1993, six months after the parties first signed the cryopreservation agreement.⁵⁹ Along with deeming the agreement to be fatally ambiguous, the opinion proposed that Steven Kass, as the objecting party, should have extended veto power over his former spouse's proposed efforts to implant the frozen pre-zygotes.⁶⁰

C. Dissent

Two judges joined in the dissent and emphasized the need to place weight on the Tennessee Supreme Court decision from *Davis v. Davis*,⁶¹ because the facts were almost analogous to the scenario in *Kass*.⁶² While Mary Sue and Junior Davis were also involved in a custody dispute over the disposition of their cryopreserved pre-zygotes, the scenario in *Davis* deviates slightly from *Kass* because the couple did not sign a dispositional agreement prior to participating in the IVF procedure.⁶³ Like the concurrence, the dissent professed that there was fatal ambiguity within the Kass's agreements that could not be resolved. Adopting the 'balancing of interests' approach proposed by the *Davis* court, the dissent departed from the concurring opinion and placed equal emphasis on the interests of both of the parties involved rather than giving the benefit of the doubt to the party protesting implantation.⁶⁴

V. COURT OF APPEALS OF NEW YORK

Chief Justice Kaye delivered the unanimous opinion of the Court of Appeals of New York affirming the decision of the Appellate Division and holding that "the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program."⁶⁵ Advancing the general rule that "agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute," the court reasoned that the prior consent forms between the parties expressed their intent with

exist. *Kass*, 235 A.D.2d at 178; *see also*, *Matter of Thomas S. v. Robin Y.*, 209 A.D.2d 298 (1994).

⁵⁹*Kass*, 235 A.D.2d at 164.

⁶⁰*Id.* at 165.

⁶¹842 S.W.2d 588 (Tenn. 1992).

⁶²*Kass*, 235 A.D.2d at 174.

⁶³*Davis*, 842 S.W.2d at 590.

⁶⁴*Kass*, 696 N.E.2d at 178. According to the dissent below, "the immediate question before [the court] is whether the burdens of unwanted paternity to the 'would-not-be father' exceed the deprivation of a possibly last opportunity for maternity to the 'would-be mother' in this case." *Kass*, 235 A.D.2d at 178.

⁶⁵*Kass*, 696 N.E.2d at 181.

sufficient clarity.⁶⁶ The court ordered that the pre-zygotes be given to the Mather Hospital IVF program for use in reasonable research practices.⁶⁷

Cryopreservation preserves fertilized genetic material for extended lengths of time, inescapably leading to the possibility that minds and circumstances will change while the pre-zygotes remain cryopreserved and ready for implantation. Reflecting on this concept, the Court of Appeals sought the true intentions of the parties before the couple's tensions began to escalate.⁶⁸ Chief Justice Kaye reinforced the underlying premise that dispositional decisions should be left to the progenitors rather than the courts and concluded that where an agreement exists that is sufficiently definite to determine the intentions of the parties, it should control.⁶⁹

The Court of Appeals employed reasoning similar to the Appellate Division and relied on three common law principles governing contracts in order to examine the prior consent agreement. First, the court professed to look within the four corners of the contract to determine whether ambiguity existed.⁷⁰ Second, examining the agreement in its entirety, the court considered both the relationship of the parties and the circumstances surrounding the agreement's execution.⁷¹ Third, the court determined that where the parties' overall intentions cannot be extracted from viewing the document in its entirety, the agreement should be construed to carry out the plain intentions and objections of the parties that the court gathers.⁷² Applying the three contract theories to analyze the agreement, Chief Justice Kaye concluded that Mr. and Mrs. Kass plainly and clearly expressed that they wanted the power to determine the disposition of the pre-zygotes to remain between them. This conclusion was supported by the fact that the couple signed a document to proscribe what should happen even in the event of unforeseen circumstances that would render the parties unable to make a decision on their own.⁷³

Finally, the court looked at the clause describing that in the event of divorce, the disposition of the pre-zygotes should be determined in a property settlement.⁷⁴ Acknowledging both the concurring and dissenting opinions from the Appellate Division, the court conceded that the clause introduced ambiguity into the agreement.⁷⁵ In order to alleviate this ambiguity, the court examined the clause in

⁶⁶*Id.* at 180.

⁶⁷*Id.* at 181.

⁶⁸*Id.* at 180.

⁶⁹*Id.*

⁷⁰*Kass*, 696 N.E.2d at 180 (citing *W.W.W. Assoc. v. Giancontieri*, 566 N.E.2d 639 (N.Y. 1990)).

⁷¹*Id.* The opinion quoted sound legal precedent derived from prior contract disputes holding that "particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *Id.* at 180-81 (quoting *Atwater & Co. v. Panama R.R. Co.*, 159 N.E. 418 (N.Y. 1927)).

⁷²*Id.* at 181 (citing *Williams Press v. New York*, 335 N.E.2d 299 (N.Y. 1975); *Empire Props Corp. v. Manufacturers Trust Co.*, 43 N.E.2d 25 (N.Y. 1942)).

⁷³*Id.*

⁷⁴*Kass*, 696 N.E.2d at 181.

⁷⁵*Id.*

light of the document as a whole and sought additional assistance from the uncontested divorce agreement drafted by Mrs. Kass.⁷⁶ Ultimately, the court determined that the intentions of the parties were clear enough to extract a dispositional decision from the agreement.⁷⁷

VI. ANALYSIS

The field of human reproductive technology is rapidly growing to meet the needs of prospective parents. In the United States alone, roughly 45,000 couples per year participate in IVF procedures in order to facilitate pregnancy and family life.⁷⁸ Nearly 9,000 of these procedures immediately result in actual birth, yet many fertilized eggs undergo the process of cryopreservation for future attempts at implantation.⁷⁹ Though the problem resolved in this case represents an issue of first impression, the fact that some 100,000 cryopreserved pre-zygotes currently exist in the United States⁸⁰ suggests that disputes arising over their dispositions will continue to occur. These astonishing statistics demonstrate a need to establish prudent guidelines addressing the legal status and future disposition of genetic material.⁸¹

A. *Balancing of Interests*

The New York Court of Appeals reinforced the crucial notion that decisional authority should be left to the parties, rather than the courts.⁸² If the parties' statements of intent are sufficiently definite, it is not the responsibility of the court to step in and overrule a pre-existing agreement. Nevertheless, after carefully reading the opinions delivered by the New York courts, two questions inevitably arise. First, did the parties contemplate divorce when signing the agreement that willed their genetic material to the Mather Hospital IVF program? Second, does the court's determination that "unforeseen circumstances" includes the event of divorce represent a sound legal conclusion? The Court of Appeals apparently engaged in a careful inquiry in order to ascertain the true intentions of the parties involved in the dispute. If, after observing all of the evidence, the court validly concluded that the agreements between the parties clearly and correctly stated their true intentions, then the decision was proper. However, if the court erroneously determined the sufficient clarity of the prior consent agreement, then the balancing of interests approach proposed by the court in *Davis* represents a better precedential analysis.

⁷⁶*Id.* at 182.

⁷⁷ *Id.*

⁷⁸ Judy Peres, *Couple's Divorce Entangles Frozen Embryos*, CHICAGO TRIBUNE, Aug. 7, 1999, at 1, Zone N.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Elizabeth Neff, *Behind Frozen Embryos Case Lies Consent Issue*, CHICAGO DAILY LAW BULLETIN, Sept. 30, 1999, at 3.

⁸² Robertson, *supra* note 45, at 22. "Such a rule has merit because it would 'maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision'. In addition, it would avoid costly litigation and 'provide the certainty needed for effective ... IVF programs.'" *Id.*

In 1992, the Supreme Court of Tennessee first addressed the issue regarding the post-divorce disposition of Mary Sue and Junior Davis's cryopreserved genetic material.⁸³ After thorough review of the situation, the court concluded the following:

Disputes involving the disposition of [pre-zygotes] produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning the disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using the [pre-zygotes] must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of [the pre-zygotes] in question.⁸⁴

In light of the fact that the couple in *Davis* did not sign a pre-existing agreement, the court applied a balancing of interests approach, taking into account the contentions of the relevant parties, the gravity of their interests, and the relative burdens that would be imposed by different solutions.⁸⁵ The court weighed Mrs. Davis's interest in donating the genetic material to another couple against Mr. Davis's desire to avoid compelled fatherhood. Finding for Mr. Davis, the court reasoned that "[d]onation, if a child came of it, would rob him twice – his procreational autonomy would be defeated and his relationship with his offspring would be prohibited."⁸⁶ Had Mrs. Davis opted to undergo implantation herself, the court would have placed more weight on her dispositional desire, providing that implantation was the only reasonable means by which she could obtain genetic motherhood.⁸⁷

Expanding upon the holding in *Davis*, where a pre-existing agreement exists that is fatally ambiguous and the parties' intentions cannot be determined from examining the document, the court should balance the interests of the parties in order to render a just decision. With respect to the *Kass* decision, Mrs. Kass wanted to attempt implantation.⁸⁸ In order to prevail, she would bear the burden of proving that she is without any other reasonable means of obtaining genetic parenthood. On the other hand, if Mrs. Kass failed to meet this burden, Mr. Kass, as the objecting party, would be afforded the presumption of having the greater interest and should prevail.

B. Careful Drafting and Legislation

As a result of the Court of Appeals decision in *Kass*, New York precedent now dictates that pre-existing agreements between couples that pronounce the disposition

⁸³*Davis*, 842 S.W.2d at 604.

⁸⁴*Id.*

⁸⁵*Id.* at 603.

⁸⁶*Id.* at 604.

⁸⁷*Id.*

⁸⁸*Davis*, 842 S.W.2d at 604.

of their genetic material are binding and enforceable.⁸⁹ Accordingly, other arms of the law must evolve to ensure that divorce is an enumerated contingency within a party's dispositional agreement.⁹⁰

In order to respond efficiently to the technological progress associated with human reproductive technology, and to cryopreservation specifically, a two-tiered approach is necessary to solve this novel legal dilemma.⁹¹ First, careful drafting by attorneys is imperative in order to inform the parties involved of the purpose of a pre-informed consent agreement.⁹² All foreseeable circumstances should be discussed with the parties involved in IVF so that explicit directions regarding the disposition of any genetic material can be expressly provided for in a written agreement.⁹³ Second, the human element involved in a cryopreservation scenario presents a vital need to attend to dispositional disputes over genetic material in a separate, non-judicial branch of government. Legislative action can and should be taken to force couples to contemplate foreseeable events such as divorce and to seek legal assistance in order to make binding agreements that emphatically state each party's intentions.⁹⁴

Five months after the *Kass* decision, Chief Justice Kaye delivered a lecture at the Fordham Law School, stating that "lawyering in a new age means, above all, lawyering in a time of innovation and flux."⁹⁵ Mentioning *Kass*, Justice Kaye spoke briefly about the effects that the rapidly growing and changing field of technology has had on the legal world. She reminded her audience that such progress was beyond contemplation only a few decades ago.⁹⁶ As lawyers, the principle way to respond to novel issues raised as a result of technological progress is to remember

⁸⁹Myrna Felder, *Issues Raised by New Reproductive Techniques: 'Kass v. Kass'*, NEW YORK L.J., June 10, 1998, at 3. "Any attorney counseling individuals about to participate in an IVF program will do well to focus on the consent documents their clients are about to sign, since we know from the Court of Appeals' opinion in *Kass* that, in New York State, those agreements will be valid and enforceable." *Id.*

⁹⁰Sheinbach, *supra* note 17, at 993. "Currently, no federal law exists to provide uniformity with respect to disputes over embryo ownership and few states have legislation to deal with the novel issues new reproductive technology presents." *Id.*

⁹¹See Neff, *supra* note 81, at 3. Recent court battles over frozen pre-zygotes demonstrates the need for well drafted consent forms as well as new legislation regulating their contents. *Id.*

⁹²See *id.*

⁹³Robertson, *supra* note 45, at 23. "By implication, *Kass* also means that IVF programs can rely on prior directives in disposing of frozen embryos, not just in the case of divorce, but in the case of abandonment, failure to pay storage fees, inability to agree and other contingencies." *Id.*

⁹⁴Neff, *supra* note 81, at 3.

⁹⁵Judith S. Kaye, *Remarks: Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 2 (1998). "Almost thirty years ago, Chief Justice Burger said that we could not afford to continue using cracker-barrel corner grocer methods to operate courts on a supermarket age." *Id.*

⁹⁶*Id.*

that efficiency is a key value, but it is not the only important concern.⁹⁷ Though issues that arise may seem legally simple, profound social circumstances often exist *beyond the surface*.⁹⁸ This notion is especially applicable to the field of reproductive science where lawyers can tailor their practices to address the highly sensitive human issues surrounding medical procedures such as cryopreservation. From this frame of reference, proper emphasis is focused on the need for attorneys to take time to inform their clients about the occurrence of not only divorce, but of all foreseeable conditions that may cause or prolong a marital dispute.⁹⁹ Attorneys could then draft agreements that clearly reflect the parties' intentions should such disputes arise.¹⁰⁰

This 'beyond the surface approach' used to address reproductive issues cannot be the sole responsibility of the attorney. Through the state legislature, citizens can proactively respond to legal issues that arise in conjunction with cryopreservation by implementing specific laws that act to safeguard couples from prospective dispositional disputes. Regulations mandating that couples seek legal assistance when drafting consent agreements will expedite the legal process by assuring the court that the intentions of the parties are clearly stated after foreseeable future occurrences have been contemplated. Several states have already begun to address the possibility of dispositional disputes over genetic material by incorporating the issue into state statutes.¹⁰¹

Florida and New Hampshire are two front-runner states that have passed legislation dealing with reproductive technology. Though the Florida legislature initiated minimal control over couples participating in IVF, New Hampshire exercised a more invasive approach, heavily legislating the field of reproductive technology. For example, Florida Statute § 742.17¹⁰² directs couples to execute a written agreement that addresses the disposition of frozen pre-zygotes in the event of several circumstances including divorce and death.¹⁰³ Where such a document does not exist, the statute grants all decisional authority to the donors of the genetic

⁹⁷*Id.* "When an ocean liner starts taking on water, you can devote a lot of your resources to efficient bailing operations. You might also, however, want to look around for where the leak is, or keep a closer watch for icebergs in the first place." *Id.*

⁹⁸Kaye, *supra* note 95, at 2.

⁹⁹*See* Neff, *supra* note 81, at 3. "Provisions should be included for scenarios of divorce, death, or incapacity. To think of every 'what if' scenario is part of a lawyers job. It's preventative legal work so hopefully you don't end up with a court case." *Id.*

¹⁰⁰*Id.*

¹⁰¹*See id.* The New York legislature, presumptively responding to the *Kass* decision, has initiated the drafting of a bill addressing this problem by requiring directives before treatment explaining what should be done with genetic material in the event of specific situations such as divorce, death, incapacity or abandonment. *Id.*

¹⁰²FLA. STAT. ch. 741.17 (1999) in relevant part states: "A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm and pre-embryos in the event of *divorce*, the death of a spouse, or any other unforeseen circumstance." *Id.*

¹⁰³Sheinbach, *supra* note 17, at 1006. "By prescribing a prior written agreement, Florida forces IVF patients to consider specifically how they wish to dispose of any resulting embryos before attempting to conceive through IVF." *Id.*

material; however, it does not address what should happen if the parties cannot reach an agreement. New Hampshire, on the other hand, passed N.H. RSA 168-B:21¹⁰⁴ to ensure that IVF participants make informed decisions after seeking counseling and exhibiting diligent reflection of all of the possible circumstances. The statute requires that (1) a prior agreement be executed between the parties, and (2) judicial authorization occur before any surgical procedure.¹⁰⁵ Furthermore, a second statute, N.H. RSA 168-B:18, calls for non-medical evaluation of the couple as well as a home study to assess the ability of the persons involved to provide for a child.¹⁰⁶ Perhaps a middle ground between these states' legislative efforts would better address the issue.

VII. CONCLUSION

Although the initial intentions of Mr. and Mrs. Kass were the appropriate starting point to begin a legal analysis, the human element involved in this dispute necessarily warrants further examination of the interests of the parties involved. When courts are called upon in the future to render a decision regarding the destiny of genetic material, a pre-existing agreement should be strongly considered, but

¹⁰⁴N.H. REV. STAT. ANN. § 168-B:13 (1999). "Eligibility" In vitro fertilization and pre-embryo transfer shall be performed in accordance with rules adopted by the department of health and human services and shall be available only to a woman: II. Who has been medically evaluated and the results, documented in accordance with rules adopted by the department of health and human services, demonstrate the medical acceptability of a woman to undergo the in vitro fertilization or pre-embryo transfer procedure; III. Who receives counseling pursuant to RSA 168-B:18, and provides written certification of the counseling and evaluation to the health care provider performing the in vitro fertilization or pre-embryo transfer procedure; and IV. Whose husband, if the recipient if married, receives appropriate counseling, pursuant to RSA 168-B:18, and: (a) Successfully completes the medical evaluation, if he is the gamete donor in the in vitro fertilization or pre-embryo transfer procedure; (b) Provides written certification of the non-medical counseling and any evaluation to the health care provider performing the in vitro fertilization or pre-embryo transfer procedure; and (c) Indicates, by a writing, acceptance of the legal rights and responsibilities of parenthood for any resulting child, unless the husband contributes his sperm for the in vitro fertilization or pre-embryo transfer procedure. *Id.*

¹⁰⁵Sheinbach, *supra* note 17, at 1006.

¹⁰⁶N.H. REV. STAT. ANN. § 168-B:18 (1999). I. A non-medical evaluation shall be performed on each party by a psychiatrist, psychologist, pastoral counselor or social worker, who is licensed, certified, or authorized to practice under the laws and rules of the state of New Hampshire, who shall maintain a record of the findings and conclusions and make a copy available to the person evaluated. Each party shall waive any privilege against disclosure of confidential communications and disclose a copy of the findings to the other parties prior to entering the contract. A copy of the findings shall be filed with the court by each party, unless good cause is shown. II. The person conducting the non-medical examination shall determine the party's suitability to parent by considering: (a) The ability and disposition of the person being evaluated to give a child love, affection and guidance. (b) The ability of the person to adjust to and assume the inherent risks of the contract. III. A home study if each party involved shall be conducted by a licensed child placing agency or the department of health and human services to assess the ability and disposition of the person to provide the child with food, clothing, shelter, medical care and other basic necessities. A copy of the findings shall be filed with the court by each party. *Id.*

where ambiguity exists, it should not be dispositive. Instead, a functional approach that seeks to balance the parties' interests represents a better legal framework for analyzing dispositional disputes. Additionally, if courts intend to enforce such agreements as legally binding contracts, then lawyers must place emphasis on careful drafting that demonstrates that the parties involved in reproductive technology have made informed decisions. To help facilitate this procedure, state legislation must evolve along with precedent to ensure that all foreseeable circumstances are expressly provided for.

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