THE LEGALITY OF CONTRACTS GOVERNING THE DISPOSITION OF EMBRYOS: UNENFORCEABLE INTRA-FAMILY AGREEMENTS

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To some students of the law, contract law represents a mystery. The first and often biggest mystery is consideration. At one time, not too long ago, only contracts supported by a particular form of consideration were enforceable by courts because consideration served a functional or formal role in the creation of an enforceable contract.1 Subsequently, consideration was accomplished through a very formalistic procedure requiring that some "thing" be transferred from one party to the other in exchange for another

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1. See Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800-01 (1941) (consideration is the legal formality in that it provides the evidentiary, cautionary and channeling functions which are necessary to support an enforceable contract). Before this particular form of consideration was required and up until recently in many states consideration could be supplied in many states via the promisor's use of a seal—a legal device signifying the promisor's intent to be bound and legally obligating the promisor even given the absence of whatever form or type of consideration is or was required at the time. Richard A. Posner, Gratuitous Promises in Economics and Law, 6 J. LEGAL STUD. 411, 419-20 (1977): Promises under seal are a traditional and, again, an economically appropriate exception to the requirement that an enforceable promise must be supported by consideration. The requirement of the seal eliminates the major administrative costs associated with the enforcement of unilateral promises. The formalities and written character of the promise reduce both the costs of determining the content of the promise and the probability that the promise was not made or was not intended to be binding.

The decline and outright abolition of the use of the seal by most states (although a seal is allowed pursuant to RESTATEMENT (SECOND) OF CONTRACTS §95) is therefore puzzling and perhaps inefficient. Id. at 420. I provide an alternative explanation to the decline and abolition of the use of the seal in Alex M. Johnson, Jr., Contracts and the Requirement of Consideration: Positing a Unified Normative Treatment of Contracts, Gifts and Testamentary Transfers, (December 24, 2013) (unpublished manuscript) (on file with author).
"thing." Determining whether consideration was present—in which case the contract is enforceable—in a dispute between two parties became the first and often most important question that courts addressed in contractual disputes. Did something physically move from one party to the other party that caused the other party to act (transfer something else in response), promise to act, or forbear from acting? Once consideration was proven, the contract was deemed enforceable and the court could address other issues such as breach and provide a remedy therefore.²

But, that was a while ago. As the consideration doctrine evolved, courts began enforcing agreements that were not supported by this formalistic version of consideration as long as the promises exchanged by and between the parties were "bargained for."³ Or, to be more precise, consideration which was once viewed as an exchange of things—the items, goods, etc., that passed between the parties (in law school hypotheticals, always a "peppercorn" in exchange for something else) that caused the promise to be enforceable, became literally a "process" rather than a thing. The process that creates an enforceable contract between two parties occurs when the two parties make promises (bilateral as opposed to unilateral)⁴ and it is their individual intent that the promise be given or received in exchange for the other or return promise.⁵

Although not explicitly stated in the Restatement of Contracts Second (hereinafter referred to as Restatement Second), most courts translate the

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2. Enforceable in this context simply means that the mechanisms of the State, i.e., the courts, can be successfully employed to enforce the agreement or determine and enforce an appropriate remedy if the contract is breached by one of the parties.

3. See infra note 9 and accompanying text.

4. A bilateral contract is formed when both parties have made promises. Consequently, each party to the agreement is both a promisor and a promisee. See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 57 (6th ed. 2009).

5. Unilateral contracts by comparison are contracts where only one party acts as promisor and invites performance by the other party but does not require a reciprocal promise in exchange, i.e., as part of the bargain. Unilateral promises become enforceable contracts when the promisee begins performance per the terms of the offer. See RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).


   (1) To constitute consideration, a performance or a return promise must be bargained for.
   (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
   (3) The performance may consist of
      (a) an act other than a promise, or
      (b) a forbearance, or
      (c) the creation, modification, or destruction of a legal relation.
   (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.
Restatement Second’s definition of consideration by employing the so-called benefit/detriment test to determine that a bargained for promise is supported by the magical legal glue denominated consideration. In other words, the promisee must suffer some legal detriment—that is, do or promise to do something that the promisee was not legally obligated to before the promise was received. Concomitantly, the promisor obtains a legal benefit that was not present prior to the execution of the initial promise. This benefit/detriment requirement in bargained for exchanges represents the view of consideration currently in vogue in a majority of courts.⁷

Even though a majority of courts continue to follow the view that consideration is produced by this process in which promises are bargained for and exchanged, some modern contract theorists support the view that contracts should be enforceable simply if the parties intend them to be enforceable.⁸ A full endorsement of this latter theory could produce the result that any promise, including perhaps a gratuitous promise, becomes enforceable as long as the parties’ intent is sufficiently proven.⁹

Ah, that raises the second mystery: even those who support this latter view agree that certain promises—so-called gratuitous promises are not

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⁷. The weakness of the benefit/detriment is that almost any promise or act can be manipulated so that the promise or promisor, as the case may be, can suffer a legal detriment or obtain a legal benefit. For example, since a donee is not legally required to accept a gift, the donee’s acceptance of the gift can be construed as a legal benefit conferred on the donor thereby collapsing the distinction between gratuitous transfers and bargained for exchanges. For a discussion of gratuitous transfers, see infra notes 9-11 and accompanying text.

⁸. We want to replace the bargain theory with a less dogmatic, more responsive theory of contracts. In the two preceding examples, enforceability of the contract apparently makes two people better off, as measured by their own desires, without making anyone worse off. Whenever a change in the law makes someone better off without making anyone worse off, ‘Pareto efficiency’ requires changing the law. . . . In general, economic efficiency requires enforcing a promise if the promisor and promisee both wanted enforceability when it was made.


⁹. This distinctly economic theory has not been embraced by the courts or a majority of contract theorists. However, the view that contracts should be enforced when the promisor wishes it to be so has been embraced in part by the Uniform Commercial Code (UCC) in § 2-205 Firm Offers:

An offer by a merchant to buy or sell goods in a signed writing which by its term gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months . . . (emphasis added).

See U.C.C. § 2-205 (2002). It is interesting, of course, that the UCC, unlike the Restatement Second, expressly repudiates the use of seals in § 2-203 Seals Inoperative thereby rendering unenforceable promises not supported by consideration except “firm offers” pursuant to § 2-205.
enforceable. Courts fixate on the lack of consideration (no item or thing is transferred under the common law formalistic view, no process pursuant to which bargained for promises are exchanged under the view adopted by the Restatement Second) to find donative transactions gratuitous and unenforceable. Those who contend that contracts should be enforceable if the parties so intend come to the same conclusion, that so-called gratuitous promises are unenforceable per se, albeit for different reasons.

Thus, what begins as a puzzle, ends in unanimity. Whether you understand the need for consideration or not, whether you apply one requirement of the rule for consideration or the other, and lastly, whether you focus on the parties' intent, there are a whole host/class of promises that are deemed unenforceable. Promises can therefore be divided into those that are enforceable and, hence, deemed non-gratuitous, and those clearly not enforceable, no matter what the promisor's intent, i.e., those promises that are gratuitous. Determining what is gratuitous and, hence, unenforceable is something of a tautology, and worthy of a lengthy

10. The starting point is that donative promises generally are not enforced. This is a tenable position. In addition to difficulties of proof, the injury in this type of case is relatively slight; there are no significant costs on the part of the promisee and no enrichment on the part of the promisor at the expense of the promisee. Furthermore, a donative promise may be made without sufficient deliberation and, even deliberated, there might be reason not to enforce it if it was made improvidently or if the promisee showed ingratitude. PERILLO, supra note 4, at 149; see also Melvin Eisenberg, The World of Contract and the World of Gift, 85 CALIF. L. REV. 821 (1997); Posner, supra note 1.

11. In brief, there are three views why gratuitous promises should not be enforced: 1) societal resources should not be employed to enforce promises when no economic gain is created by the transfer or transaction (gifts represent a sterile transaction); 2) courts are not capable of enforcing promises made with, say, love or affection because there is no appropriate remedy in case of breach; and 3) somewhat counterfactually and gaining ground among academic theorists, certain promises are by their very nature only valuable and valid if they are not enforceable by the courts (the value of the promise—the gift—is that it is given and executed even though it is unenforceable). For a discussion of these three very different reasons, see infra Part III and accompanying notes 205-207. These are also addressed in great detail in my forthcoming article. Johnson, supra note 1.

12. Promises or agreements presuppose the existence of two parties and a meeting of the minds. That meeting of the minds normally produces what is typically referred to as a bilateral contract if both agreeing parties make or exchange promises. Conversely, a promise made by one promisor can serve to create a unilateral contract if consideration is later supplied or a promise may be deemed to be a unilateral gratuitous promise unsupported by consideration. Finally a contract is an agreement or promise, either unilateral or bilateral, that is enforceable by a court and represents a conclusion that the requirement of consideration has been met or dispensed with by the adjudicatory body. Here I refer to all three types of promises in order to capture enforceable promises and unenforceable promises and to highlight the fact that the act of promising or agreeing is not necessarily important or key to determining whether an enforceable contract has been created by the promise.

13. See, e.g., COOTER & ULEN, supra note 8, at 197. (According to the bargain theory, consideration makes the promise enforceable ... Instead of renouncing the principle of
analysis that is beyond the purview of this article. Suffice it to say, a promise by a father at his daughter’s birthday to pay for her law school tuition that is not induced by any action or forbearance on the daughter’s part is just such a gratuitous promise—unenforceable ex ante.\(^\text{14}\)

So, notwithstanding the rationale to support the result, the result is universally accepted. That is, gratuitous promises, whether one argues they are lacking consideration or not,\(^\text{15}\) however they are defined, are not enforceable by legal action.\(^\text{16}\) Hence, the presence or absence of consideration becomes irrelevant to the question of the enforceability of gratuitous promises. These promises are not within the province of contract law and are justifiably policed, if at all, by moral as opposed to legal suasion.\(^\text{17}\)

Whether that policy is a good one is also beyond the ken of this article.\(^\text{18}\) What puzzles me, and this is the focal point of this article, is the judicial and academic treatment of a class of cases that heretofore have not been deemed to be gratuitous promises—cases involving agreements,

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14. I state “ex ante” because if the daughter subsequently relies on the promise to her detriment she may be able to state a claim based on estoppel or reliance. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Reliance-based claims may also play a role in the claim for enforceability of in vitro fertilization agreements. See infra Part V.

15. Although it seems illogical and redundant to refer to gratuitous promises as supported by consideration, given that they are gratuitous promises, under the economic theory that certain promises should be enforced when the promisor intends to be bound and both parties are better off if the promise is enforced. See supra note 8 and accompanying text. It is possible to argue that certain gratuitous promises are supported by consideration. Better yet, given that donees have to accept a gift before it is valid, it can be argued that by doing so the donee is conferring a benefit on the donor. Hence, under the benefit/detriment test employed by many courts to find consideration, one could argue that there is consideration present in many gratuitous transfers. See supra note 7. Although that seems counterintuitive, it points out the malleability and tautological nature of the definition of consideration. For a discussion of the tautology presented by consideration, see supra note 13.


17. Again, the thesis is that the import or the value of the promise is derived from the fact that it is unenforceable and not part of any bargain or deal struck between the promisor and the promisee. See supra note 11.

18. I do address these issues and concerns in my forthcoming article. Johnson, supra note 1.
typically between husband and wife, to dispose of unused embryos produced during in vitro fertilization (IVF) procedures upon the dissolution of a marriage or the death of one of the parties to the IVF procedure. I contend these cases, although not involving traditional gratuitous or gift promises, invoke the same underlying principles as those involving gratuitous promises. What is intriguing and mystifying is that there has been little to no treatment of these cases involving IVF as invoking similar principles involving the issue of consideration and its requirement for enforceability of agreements. In other words, courts have not treated these agreements as unenforceable gratuitous promises lacking consideration.

Instead, these IVF cases are treated as traditional contracts cases invoking traditional principles of contract interpretation—and as agreements supported by consideration. As a result, much judicial and academic ink has been spilt over the enforceability of these agreements and a brief recapitulation is in order for those unfamiliar with the debate. The debate has been framed as one involving the enforceability of contracts versus the public policy arguments employed by the person (usually, the ex-husband) who participates in the IVF procedure and who does not want to become a parent against his wishes.

In the typical situation, husband and wife (substitute domestic partners or unmarried couple if you prefer) have been trying unsuccessfully for years to have a baby. Eventually they consult a fertility expert. They subsequently undergo a very expensive and (for the female) painful procedure in which eggs are removed from the wife, sperm is obtained from the husband and both products are mixed in a Petri dish and implantable gametes are produced that are reintroduced to the wife’s uterus at the eight-cell stage. If successful, the process results in pregnancy and childbirth. As part of the multiple procedures, many implantable eggs are produced and not all are used in the successful implantation procedure. In most cases,
the remaining eggs or ova are either used or disposed of according to the parties' wishes and no controversy ensues. Indeed, it is estimated that there are hundreds of thousands of gamete and other implantable material in storage in the United States pursuant to these processes.\(^\text{23}\)

However, since divorce is such an integral part of American marriages,\(^\text{24}\) it stands to reason that some couples (married and not) who have undergone IVF procedures will come to a parting of the ways after their genetic material is harvested, but before all of that material is used. Consequently, questions will be raised regarding disposition of unused biological or genetic (I use the terms interchangeably hereafter) material at the time of parting.

And, given the nature of divorce and other types of permanent separations, it stands to reason that there will not be agreements between the parties ex-post (that is, during or after the split or divorce) regarding what should be done with the biological or genetic material that remains in existence as a result of the IVF procedures. Disputes, whether strategic or real, will ensue and the parties, including the third party with custody of the embryos (the "medical facility or "IVF lab"), will look first to any "contract" or "agreement" that the parties entered into ex ante prior to undergoing the procedure, which I refer to hereafter as Point A to determine what should be done with said material post dissolution of the relationship, which is hereafter referred to as Point B.

But even if there is an agreement detailing exactly what should be done when the anticipated situation occurs\(^\text{25}\) (and in many cases there are no

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23. While there are "no national data on the number of frozen embryos, '[t]ens of thousands of embryos are frozen at fertility centers...[and] almost every embryo is spoken for.' These thousands of embryos all represent potential legal disputes between the parties that created them should the parties ever disagree over embryo disposition after marital dissolution." Sara D. Peterson, Note, Dealing with Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations, 50 UCLA L. REV. 1065, 1069-70 (2003) (citation omitted). See also Carl T. Hall, The Forgotten Embryo: Fertility Clinics Must Store or Destroy the Surplus that is Part of the Process, S.F. CHRON., Aug. 20, 2001 at A1 (noting estimates that there are approximately 200,000 frozen embryos then in existence).

24. The American divorce rate is currently declining, but the best guess is still that 40-50% of all marriages will end in divorce prior to the death of either spouse. See Why Marriage Matters Facts and Figures, FORYOURMARRIAGE.ORG, http://www.foryourmarriage.org/factsfigures/ (last visited Oct. 17, 2013).

25. Here, when I refer to "anticipated" I am not making the claim that the parties actually believe and have fully internalized the situation that will occur when they sign or enter into the agreement at the ex-ante position. In other words, I question whether this is truly fully informed consent to an agreement that the parties were capable of fully comprehending at Point A. Quite the contrary, given cognitive dissonance and the presence of over-optimism bias, the parties may sign an agreement that they fully expect will never be operational. For further discussion of this point see infra note 236 and accompanying text. The situation is accurately described as "anticipated"
agreements\textsuperscript{26}, and even if that agreement is crystal clear regarding the disposition of remnant genetic material upon dissolution, debates and litigation will ensue over the viability, validity, and subsequent enforceability of the agreement in light of the changed conditions that have occurred since the agreement was entered.\textsuperscript{27} Is the agreement a contract or something else? If it is a contract, is it enforceable? If one party objects to the use of the contributed biological material at Point B can that party be forced to be a biological parent against his or her will?\textsuperscript{28} What factors should be taken into account in balancing the claims of one progenitor against the other? The questions are endless.

Moreover, given the import of the issue (with its overtones to abortion if the material is destroyed), the costs associated with the procedures, the irreversibility of the decision once made,\textsuperscript{29} these are high visibility cases that generate plenty of discussion and controversy regarding the correct disposition of the issues raised by these unique and emotional cases. These cases, fraught with ethical and moral issues, produce disparate views regarding what should be the appropriate outcome. To date, unfortunately, none of the cases or academic commentators has correctly characterized these cases as invoking the same principles underlying gratuitous promise cases or intra-family agreements. As a result, both the cases and their subsequent analysis and critique have incorrectly attempted to treat these cases as those involving typical contract principles applied to an atypical fact situation—IVF.

Consequently, the cases to date have attempted to resolve these difficult issues with a framework that I contend is inapposite and one that inevitably leads to differing and conflicting outcomes. The purpose of this Article is to demonstrate that although "agreements" are at the heart of

\textsuperscript{26} See infra note 49 and accompanying text for such a case.

\textsuperscript{27} The fact that the changed condition was anticipated by the agreement signed by and between the parties is largely irrelevant in these disputes. See infra note 141 and accompanying text.

\textsuperscript{28} What is interesting given how this Article began with a rendition of the evolution of the doctrine of consideration and the distinction between enforceable and gratuitous contracts is that none of the five iconic cases addressed infra in Part V ever raises or addresses the issue of whether the consideration requirement was satisfied in order to find an enforceable agreement. The courts in these cases simply assume that consideration was present and the agreement is enforceable.

\textsuperscript{29} To state the obvious, if the genetic material is destroyed, no new life will ever be created with the same genetic material for plenty of reasons most notably the fact that the parties are splitsville. Conversely, if the genetic material is used and a new life is created, that life, with all of its attendant responsibilities, is now irreversibly a life in being that cannot be terminated by the parties whatever subsequently occurs.
these cases, these voluntary agreements should be treated akin to gratuitous promises and not be enforced by the courts for the same reasons that gratuitous promises are deemed largely unenforceable. In other words, the rationale for not enforcing these agreements is normative rather than prescriptive. Instead, I argue that to the extent the agreements are enforceable at all, the basis for such enforcement is the promisee’s reliance interest in the agreement. And as I will detail infra, a valid and enforceable reliance interest is not typically present in cases involving divorce or dissolution, but may be present in rare cases involving the death of one of the parties before successful completion of the IVF procedure.\textsuperscript{30}

To prove my point, I divide this Article into five very concise parts. Part I summarizes what I characterize as the five iconic cases that represent the myriad of fact patterns that arise when an agreement to undergo IVF ultimately results in divorce or dissolution and subsequently produces a dispute over what should be done with remnant genetic material at Point B.\textsuperscript{31} These five cases are the cases that set the precedents and that commentators and, more importantly, courts have analyzed in addressing these issues most recently. These cases also present the varied factual frameworks found in IVF cases and can be viewed as representative of most, if not all, IVF cases.\textsuperscript{32} These five cases are also informative because of their commonality. Each case involves parties seeking a court determination of the disposition of embryos upon divorce rather than death.\textsuperscript{33} Each also ultimately results in the non-use of the gametic material, albeit for different reasons. Cases involving death of one of the parties raise different issues, and judging by the lack of published opinions, raise no controversy—at least no litigated controversy—over the use of the deceased’s remnant genetic material.\textsuperscript{34}

\textsuperscript{30} See infra note 256 and accompanying text for further elaboration of this point.

\textsuperscript{31} I am limiting the term dissolution to be used only in cases of divorce and/or separation of the parties and treat the death of one of the parties to the agreement quite differently. In the case of the death of one of the parties, it may be totally appropriate to enforce the agreements given the reliance interest at stake. See infra Part V and accompanying note 256. It must be noted at this point that there are no cases involving the enforceability of IVF agreements when one of the parties to the agreement has died and the survivor seeks to enforce the agreement. This lacuna may be created because the death of one of the parties does not equal divorce and subsequent disagreement over the use of gametic material. To the contrary, there may be no dispute over the use of the material. This is discussed further, see infra note 256 and accompanying text.

\textsuperscript{32} See, e.g., In Re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003) as a non-conforming case representing unique issues.

\textsuperscript{33} As I discuss infra in Part V, there is a more than adequate rationale that supports the view that any “agreement” entered into between the parties should be enforced when one party dies without repudiating the agreement, i.e., dies in compliance with the agreement.

\textsuperscript{34} See supra note 28; see infra Part V.
Part II pivots to the academic literature to demarcate the existing theories regarding the resolution of these issues. Although these views coalesce around five disparate positions, I hope to demonstrate that each of these five views is incorrect because of the normative framework applied. That framework treats these agreements as standard and enforceable contracts subject to the usual rules of Contract Law. These arguments therefore focus on whether traditional doctrinal Contract Law should be strictly applied in these situations or whether exceptions should be carved into existing Contract Law to take into account the atypical fact situation at hand.

Instead, in Part III I detail why these agreements should be treated akin to gratuitous promises due to the nature of the relationship of the parties, the subject matter of the agreement, and the issues created by its enforceability by the courts. Analyzing the theories that defend and explain the lack of enforceability of gratuitous promises, I demonstrate that the same rationales apply with equal force to the five iconic cases involving IVF and the disposition of remnant genetic material. Taking this approach, I conclude that these cases involve agreements that entail moral suasion, but lack the requisite elements to induce the application of traditional Contract Law doctrines and principles.

Indeed as the five iconic cases typify, disagreements regarding the disposition of embryonic material most often arise when a married couple separates and divorces. None of the cases or the academic literature addressing this issue focus precisely on what that special relationship entails and how it impacts the resolution of this emotional issue. Building on the work of Professors Robert and Elizabeth Scott, I argue in Part III that the marriage relationship is a special one in which promises are often made that, because of the ease of exit from that relationship, are always deemed gratuitous and therefore revocable. I contend it would be ironic and counterproductive to enforce the IVF agreement that the parties entered into while married when the promise that represents the marriage is so easily repudiated and evaded by the action of the parties. Buttressing this conclusion by analogy to the dissolution of a business, it makes little sense to require the business to remain in existence and operation in part when the principals have dissolved the business and removed their respective assets from their joint enterprise.


36. By that I mean if marriage is considered a business arrangement, which most believe it is, the initial agreement to undergo IVF to hopefully produce a child represents both parties agreement to enter into a long term relationship the product of which is a child which will be
In Part IV, however, I reluctantly return to contract principles to analyze the issues presented by this unique fact situation. In other words, if contract principles must be deployed to analyze these issues by the courts, I argue that the resolution of these issues still results in the non-enforceability of these agreements, but not for the reasons articulated by the courts thus far. Putting aside the theory that marriage and the agreements produced within it are unique, I demonstrate that at the time of formation of the IVF agreement the parties were operating under the equivalent of a mutual mistake of fact pursuant to traditional contract doctrine. Enforcing any ex ante agreement (defined as the agreement made by the parties prior to undergoing the IVF procedure) between the parties ex post or at Point B (defined as the time of divorce of dissolution) would result in enforcing an agreement made at Point A pursuant to a mistaken assumption that the parties would remain together to raise their child would be both factually inapposite and inequitable.

In addition to mutual mistake of fact, an additional valid argument against enforcing any agreement entered into by the parties is the theory of frustration of purpose. That doctrine precludes enforcement of an agreement when the purpose of the contract has been frustrated (akin to "made impossible") because of the occurrence of an event, in this case divorce or separation, that was the basic assumption for making the underlying agreement or contract. Indeed, pursuant to the doctrine of

raised to adulthood. This business has a joint goal in this effort: to raise the child to the best of their ability and means. When the business is terminated by divorce, it makes little sense to enforce the goal of that business when the principals have parted or are about to part and go their separate ways. Of course, scads of couples get married, have children and subsequently divorce leaving the divorced (parted) couple to raise their progeny post-marital dissolution. As discussed below in Part III requiring a couple to maintain their parental roles upon divorce after children have been born is very different than requiring that the now defunct business produce a child after the business has been terminated. See infra Part IV.

37. Here I am adopting a realist's view that although academic theorists may embrace the tenets of my thesis that these promises or agreements should not be enforced because they are the equivalent of gratuitous promises, courts may nevertheless feel more comfortable justifying and explaining their decision and opinion to lay persons based on easily understood contract principles.

38. It seems counterfactual to claim that the parties are acting under a mistaken assumption regarding their future status when the parties have expressly agreed to the disposition of the genetic material upon divorce or separation. The key is in recognizing that although the parties executed the agreement, that execution represents a type of cognitive dissonance that should not later bind the parties. See infra notes 236-239 and accompanying text for further elaboration of this contention.

39. As discussed infra in notes 236-239 and accompanying text, the fact that the agreement expressly contemplated the divorce or split does not mean that the parties properly internalized this eventuality. Quite the contrary, the parties believe that this eventuality will not befall them.
frustration of purpose, the frustrating event might have been foreseeable, or even foreseen, as long as the occurrence of the event is unexpected.\textsuperscript{40}

As a result, I contend that no rational individual would agree to be a parent against his or her will if they anticipate or expect that they will become permanently separated from the partner with whom they agreed to produce their progeny. Thus, notwithstanding the express language contained in the IVF agreement, a closer examination of the parties' mindset at the time they enter into the agreement leads to the conclusion that the agreement to later bind themselves to produce a child when the couple is no longer a couple should be deemed unenforceable. Hence, my ultimate conclusion is that unless the parties reach a mutual agreement regarding the disposition of the embryos upon divorce or dissolution—at Point B, the embryos must be destroyed or donated for research and not used to create new life.

On the other hand, even if the parties have entered into an unenforceable agreement that does not end the discussion of whether one party may seek a remedy given the nature of the agreement and subsequent action taken by the parties in reliance thereof. As modern contract law has evolved, the reliance remedy provided by section 90 of the Restatement Second has been used (some contend used in any context in order to achieve “justice”\textsuperscript{41}) to fill the remedial lacuna created by unenforceable agreements.\textsuperscript{42} I therefore contend in Part V that the only basis for enforcing an agreement to dispose of embryos upon divorce or dissolution is if a case can be made by one of the parties that they have justifiably relied on the enforceability of the agreement and failure to enforce will result in irreparable harm.

As noted and discussed, the death of one of the parties to the IVF agreement constitutes a change that results in the termination of the partnership, but should not be treated similar to the termination that occurs upon divorce or separation. Balancing the respective interests of the parties upon death, a case can be made that both parties have justifiably relied on

\begin{footnotesize}
\begin{enumerate}
\item See infra Part IV.
\item Section 90 (1) of the Restatement Second of Contracts states:
\begin{quote}A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.\end{quote}
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the enforceability of the agreement given this development and the agreement should be enforced as contemplated and agreed to by the parties ex ante—at Point A. Similarly, the relative priorities of the parties change when one party to the agreement—typically the female—has no other opportunity to have a child except through the contested IVF procedure.43

Consequently, the real issue in these contested cases involving the disposition of unused embryos is when to find reliance per Section 90 of the Restatement Second and craft an appropriate remedy as a result. I contend reliance may warrant enforceability of the agreement, then, in one of two situations: 1) death of one the parties to the agreement without having repudiated the agreement; or 2) the inability of one of the parties to exercise their reproductive ability in the future without the use of the gametic material that is the subject of the disputed agreement, which fact is known to the other contributor of gametic material at the time of contribution.44

However, before turning to the academic theories and their alleged shortfalls and weaknesses one must first be conversant with the facts and issues raised by IVF disputes. The best way to do that is with a brief review of the five iconic cases. As previously noted, these cases represent the myriad fact patterns that can arise in the situation and detail the courts’ differing approach to the resolution of this complex issue. What is interesting, of course, is that notwithstanding the fact pattern, the posture of the agreement (if there is one), the theory deployed by the court to resolve the issue, in the five iconic cases the courts are unwilling to force one to become a parent against his or her will.

I. THE FIVE ICONIC CASES

A. Davis v. Davis45 (No Agreement Paradigm)

In this rather pedestrian divorce case, the Supreme Court of Tennessee decided an interesting question of first impression: what should be done with seven fertilized ova commonly known as “frozen embryos” upon the divorce of a married couple who executed a fairly limited ex ante agreement46 that did not address divorce or dissolution but detailed their

43. For a discussion of this unique scenario, see infra notes 252-257 and accompanying text.
44. Indeed, this is the only situation in which I support the use of gametic material in a divorce or dissolution proceeding against the will of one of the parties. See infra Parts IV and V.
45. 842 S.W.2d 588 (Tenn. 1992).
46. By referring to the agreement as an “ex ante” agreement I intend to demarcate those agreements that the parties may enter into contemporaneous with or immediately prior to the divorce or separation process. Agreements made after the IVF procedure is completed and the parties are splitting or divorced are referred to as “ex post” agreements.
voluntary participation in the IVF procedure? In this particular case, no child was produced as a result of the IVF procedure, but seven viable frozen embryos existed at the time the husband sought a divorce. Although the parties were able to agree to all of the other terms of the divorce, they were unable to agree on the disposition of the embryos, with the wife requesting that they not be destroyed but donated to a childless couple for implantation.

What is important about this case is the absence of any agreement by and between the parties—husband and wife—regarding the parties’ individual or collective choice regarding the disposition of embryos upon the dissolution of the marriage. In this very early case, the absence of an applicable agreement allowed the court to choose a default rule that would be applied in similar situations in future cases. In so doing, the court carefully considered the following options available to it in this atypical situation.

Those models [for the disposition of frozen embryos when unanticipated contingencies arise] range from a rule requiring, at one extreme, that all embryos be used by the gamete-providers or donated for uterine transfer, and, at the other extreme, that any unused embryos be automatically discarded. Other formulations would vest control in the female gamete-provider in every case, because of her greater physical and emotional contribution to the IVF process, or perhaps only in the event that she wishes to use them herself. There are also two “implied contract” models: one would infer from enrollment in an IVF program that the IVF clinic has authority to decide in the event of impasse whether to donate, discard, or use the “frozen embryos” for research; the other would infer from the parties’ participation in the creation of the embryos that they had made an irrevocable commitment to reproduction and would require transfer to either the female provider or to a donee. There are so-called “equity models:” one would avoid the conflict altogether by dividing the “frozen embryos” equally between the parties, to do with as they wish; the other would award veto power to the party wishing to avoid parenthood, whether it be the female or the male progenitor.

47. This differs from the situation in which one or both parties do not contribute biological material to the process such as when a sperm or egg donor is used to create the gametic material.

48. “[Mary Sue Davis, plaintiff] no longer wishes to utilize the ‘frozen embryos’ herself, but wants authority to donate them to a childless couple.” Id. at 590.

49. I call this scenario with no signed agreement by the parties detailing the disposition of embryos upon separation or divorce as Option Number 1 for disposition of the embryos.


51. Davis, 842 S.W.2d at 590-91 (citations omitted).
After going through this rather lengthy and exhaustive laundry list of alternative dispositions of the embryos, the court persuasively chose the last option—allowing the husband in the case to exercise his veto power to require the non-use and subsequent destruction of the embryos in question.\(^2\) Ruling that the embryos could not be considered as "people" under Tennessee law, the court relying on ethical standards set by the American Fertility Society, took the intermediate position that the frozen embryos deserve "respect greater than that accorded to human tissue but not the respect accorded to actual persons."\(^5\) The court instead focused on the parties' procreational autonomy to conclude that one party could not force the other party to become a "biological parent"\(^5\) against that party's wishes. The court did note one caveat in dicta: although the preference of the party opposing procreation is preferred when there is no preexisting agreement by and between the parties, that preference may be weakened or destroyed if the party seeking procreation has no possibility of achieving parenthood by means other than the use of the embryos at the center of the dispute.\(^5\)

**B. Kass v. Kass**\(^5\) (Prior Agreement to Destroy Controls)

In 1998 the Court of Appeals New York, one of the most influential courts in the land, addressed the issue anew in a custody dispute over five

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\(^2\) Id. at 604-05.

\(^3\) Id. at 596 (citation omitted).

\(^4\) Id. at 601-04. I use the term biological parent here as a term of art to refer to the donor of the biological material used in the IVF procedure and to connote that said donor has no legal or other responsibility as a parent to raise or provide support for the child created by the biological material.

\(^5\) Id. at 604. This court, then, actually predicted the outcome in, *Reber v. Reiss*, 42 A.3d 1131, 1142 (Pa. Super Ct. 2012), in which the court employed a balancing approach to award the ova to the former wife because she was otherwise unable to conceive due to the treatment she received for cancer. For further discussion of this case and its resolution, see *infra* Part V. It is interesting to note that in dicta the court in *Davis* also stated that it preferred to enforce any agreement between the parties made regarding the disposition of the embryos which agreement was absent in the instant case:

We believe, as a starting point, that an agreement regarding disposition of any transferred pre-embryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that progenitors, having provided the genetic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.

*Id.* at 597 (citation omitted).

cryopreserved pre-zygotes produced as a result of a married couple’s participation in an IVF program. In this case, the wife sought the use of the embryos upon dissolution of the marriage claiming that this was her only option to produce a genetic child. To the contrary, the husband alleged that he had no desire to become a genetic parent following divorce.

The important difference between this case and Davis, however, is that at the time the then married couple entered the IVF program they signed an agreement (which the court and others referred to as a contract) that allegedly dictated the disposition of the embryos upon divorce. In brief, the form that the parties signed to control the disposition of the embryos was part of the “informed consent” process that the then married couple entered into in order to participate in the IVF procedure. That form provided that “[i]n the event of divorce, we understand the legal ownership of any stored prezygotes [embryos] must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction.”

In an addendum to the informed consent the parties indicated their “wishes” for the disposition of the embryos upon divorce. The relevant part of the form stated:

2. In the event we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one): ***

(b) Our frozen pre-zygotes may be examined by the IVF program for biological studies and be disposed of by the IVF program for approved research investigation as determined by the IVF Program.[]" The Court of Appeals gave much weight to the “agreement” between the parties likening the consent forms to contractual agreements and applying contract principles to the agreement to hold that the agreement (it should continue to be noted that the signatures appeared on “informed consent forms,” not agreements or contracts per se) by and between the

57. Pre-zygotes were defined by the court as fertilized eggs which “have not yet joined genetic material.” Id. at 569 n.1. As best as I can tell from a review of the record this simply means that the fertilized eggs have not been implanted.
58. Id. at 557.
59. Id.
60. See infra Part III regarding whether said agreement should be regarded as an enforceable contract. I contend that this agreement is not an enforceable contract and be treated by the legal system like any other gratuitous promise. As discussed infra that means one party may rely on the agreement to his or her detriment and have a remedy based on that reliance.
62. Id.
63. Id. at 559-60.
parties was unambiguous. Moreover, the court held that the agreement or contract clearly expressed the parties' intent to contribute the embryos to the IVF program for biological research. For the purpose of this article, this disposition of the embryos—their use for research is denominated option #2 or the research option as contrasted with option #1 represented by Davis v. Davis.

C. A.Z. v. B.Z. (Prior Agreement to Deliver to Wife Invalidated)

The third and perhaps most controversial case involves facts similar to Kass, but comes to the opposite outcome rejecting the enforceability of an explicit ex ante agreement to control the disposition of the embryos upon divorce. Like Kass, the agreements were consent forms that the parties were required to sign in order to participate in the IVF program. Indeed, they were required to sign the consent form before each such procedure and did so for a total of seven forms for seven procedures. The seven procedures ultimately produced numerous fertilized eggs (ovum), some of which were implanted in the wife and which resulted in the wife conceiving and producing twin daughters. Of course, upon divorce the parties were unable to agree on the disposition of the four remaining embryos in storage at the IVF clinic.

64. Some consider it surprising and unrealistic that the court would even consider informed consent agreements, which are tripartite agreements designed to protect the IVF facility from liability, as contracts that raise a question of enforceability. However, the way the issue is framed by the litigants and treated by the courts can create what I characterize as a presumption of contractual ability. A case in point is Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006), in which the issue was framed as whether the IVF agreement was ambiguous with respect to the disposition of embryo upon divorce.

65. "Where the document makes clear the parties' over-all intention, courts examining isolated provisions 'should then choose that construction which will carry out the plain purpose and object of the [agreement].' Applying these principles, we agree 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."

Id. at 567 (citations omitted).

66. The research option or option #2 is similar to the third option, discussed infra at notes 67-78 and accompanying text, in that the embryos are not allowed to be used by one party over the objection of the other in an attempt to create a child. In other words, there is no implantation or use of the genetic material. It differs, however, in that a productive use of the gametic material is achieved (rather than its destruction) as a result of the impasse of the parties.

67. 725 N.E.2d 1051 (Mass. 2000)
68. Id. at 1053.
69. Id. at 1054.
70. Id. at 1053.
71. Id.
The former wife claimed the right to use the embryos for implantation purposes because each consent form succinctly stated: "that if they 's]hould become separated, [they] both agree[d] to have the embryo(s) . . . return[ed] to[the] wife for implant." Although questions could be raised regarding the meaningfulness and the quality of the then husband’s consent since he allegedly signed a blank consent form, and the wife filled in the form later with the language quoted above, the court nevertheless treated the consent as freely, knowingly and validly given.

Although some of the reasons given by the court for not enforcing the agreement are implausible and do not withstand scrutiny, the gist of the court’s rationale (and the reason for its inclusion herein) is that forcing the husband to become a parent against his will violates public policy. Consequently, the court denied the former wife’s claim to the use of the pre-embryos pursuant to the agreement.

With this said, we conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy. While courts are hesitant to invalidate contracts on these public policy grounds, the public

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72. *Id.* at 1054 (emphasis added).


74. The court unbelievably stated that the language quoted above regarding the disposition of the embryos when the parties “separated” did not include divorce because a separation, legal or otherwise, is not a divorce:

Third, the form uses the term "[s]hould we become separated" in referring to the disposition of the frozen preembryos without defining "become separated." Because this dispute arose in the context of a divorce, we cannot conclude that the consent form was designed to govern in these circumstances. Separation and divorce have distinct legal meanings. Legal changes occur by operation of law when a couple divorces that do not occur when a couple separate. Because divorce legally ends a couple’s marriage, we shall not assume, in the absence of any evidence to the contrary, that an agreement on this issue providing for separation was meant to govern in the event of a divorce.

75. *Id.* at 1057-58.
interest in freedom of contract is sometimes outweighed by other public policy considerations; in those cases the contract will not be enforced.\textsuperscript{76}

Focusing on the intimate nature of the relationship between the parties and the rights and responsibilities created by procreation, the court distinguished its case from \textit{Kass} and concluded that a prior unambiguous agreement cannot be enforced ex post when individuals reconsider their decision.\textsuperscript{77} As a result of the opinion, which granted the former husband a permanent injunction against the former wife’s use of the preembryos, it is presumed that the embryos are ultimately destroyed given the costs associated with their maintenance in a storage facility.\textsuperscript{78}

\textbf{D. J.B. v. M.B.\textsuperscript{79} (Conditional Disposition Provided by the Contract—No Clear Intent)}

In this New Jersey Supreme Court case the court was called upon to decide a case regarding the disposition of embryos when the language used by the parties to address the situation is “conditional.”\textsuperscript{80} Also, this case is unique and distinct from the other iconic cases in that it was the former husband who sought the use of the embryos to be implanted in a surrogate.\textsuperscript{81} The former wife objected and requested the destruction of the embryos claiming it was her intent that the embryos, to which they both committed their genetic material, be used solely during their marriage.\textsuperscript{82} The relevant language of the consent form states:

“I, J.B. (patient), and M.B. (partner), agree that all control direction, and ownership of our tissues will be relinquished to the IVF Program under the following circumstances:

1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues . . .”\textsuperscript{83}

The court determined that this language was \textit{conditional} when contrasted with the language used in \textit{Kass} and ruled as follows:

The consent form, and more important, the attachment, do not manifest a clear intent by J.B. and M.B. regarding disposition of the preembryos in

\textsuperscript{76} \textit{Id.} (citations and footnote omitted).
\textsuperscript{77} \textit{Id.} at 1059.
\textsuperscript{78} The assumption that the embryos will be destroyed if the parties do not reach an agreement on their use within a reasonable time after dissolution or divorce is designated option \#3—destruction of embryos.
\textsuperscript{79} 783 A.2d 707 (N.J. 2001).
\textsuperscript{80} \textit{Id.} at 708.
\textsuperscript{81} \textit{Id.} at 710.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
the event of "[a] dissolution of [their] marriage." Although the attachment indicates that the preembryos "will be relinquished" to the clinic if the parties divorce, it carves out an exception that permits the parties to obtain a court order directing disposition of the pre-embryos . . . Clearly, the thrust of the document signed by J.B. and M.B. is that the Cooper Center [the IVF facility] obtains control over the preembryos unless these parties choose otherwise in a writing, or unless a court specifically directs otherwise in an order of divorce.\textsuperscript{84}

The court's opinion presents two rather unique options for disposition of the embryos upon divorce or separation when compared to the prior iconic cases. First, this opinion requires the ex post consent of both parties to divest the IVF facility of its control of the embryos—mutual consent that clearly is not usually forthcoming in this setting. Consequently, this opinion represents for want of a better term, option \#4 of the courts' resolution of this issue.\textsuperscript{85} Second, the court's reference to the order directing disposition of the pre-embryos upon divorce must likewise be taken to mean that such an order disposing of the pre-embryos will only be given if the parties agree and stipulate to that disposition as part of a larger, comprehensive divorce agreement. Given the perceived ambiguity in the language of the IVF agreement, the court's opinion cannot be read to give the trial court discretion to override that agreement by unilaterally imposing its views as to the disposition of the pre-embryos in the divorce case.

As a result, my view is that this case stands for the proposition that the change in circumstances created by the divorce or dissolution requires a new agreement by and between the parties to dispose of or use the pre-embryos subsequent to the divorce of dissolution of the relationship.\textsuperscript{86} Failure to do so, however, results in an impasse that guarantees non-use of the pre-embryos. Further, given that this genetic material degrades over time, the ultimate result is destruction of the embryos.

\textsuperscript{84} Id. at 713.

\textsuperscript{85} Option \#1 is no use of embryos when no agreement, see Davis v. Davis, 842 S.W.2d 588, 604-05 (Tenn.), on reh'g in part per curiam, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992); option \#2 is agreement to destroy embryos enforced, see Kass v. Kass, 696 N.E.2d 174, 175 (N.Y. 1998); and option \#3 is agreement to provide embryos to ex-wife not enforced, see A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000). What unites the three options, indeed all four options discussed thus far, is that the embryos are not used.

\textsuperscript{86} This subsequent mutual agreement is very similar to the bilateral monopoly solution that I contend is optimal in this setting. See infra Part V. The difference with my position is that I do not rely on an ambiguous agreement to create a bilateral monopoly and instead prefer it as a mandatory default rule that cannot be waived or altered by the parties.
E. Litowitz v. Litowitz87 (Mutual Agreement Required by Contract with One Progenitor)

In Litowitz v. Litowitz, the soon to be former spouse had previously undergone an hysterectomy following the birth of the couples' one biological child.88 Desiring more children, the couple entered into an agreement with an egg donor for the supply of eggs to be fertilized with the soon to be former husband's sperm.89 Hence, in the argot of the biological industry only one party, the husband, was a progenitor since only he contributed gamete to the process.

Most importantly, the Litowitzs entered into a valid and enforceable agreement with the egg donor (the third party) by which the wife-Litowitz was characterized as the "Intended Mother" and the husband-Litowitz was characterized as the "Natural Father."90 That agreement gave both parties, the Intended Mother and Natural Father, equal rights with respect to the disposition of the eggs supplied by the egg donor.91 The Litowitz's entered into a separate agreement (the second contract) with the IVF facility providing that "any decision regarding the disposition of our pre-embryos will be made by mutual consent"92 and that if the parties could not reach mutual agreement, they must petition the court for instructions regarding the disposition of the embryos. The agreement also provided that unless the parties made a mutual request to maintain the embryos, the embryos would be destroyed (thawed out) after five years.93 At the time of the opinion more than five years had elapsed since the cryopreservation of the embryos and the court assumed that the embryos were destroyed since the record did not demonstrate any request had been made to the IVF facility to maintain them in cryopreservation beyond the five-year period.94

In this case, the court reversed the Court of Appeals which had awarded the remaining eggs to the husband based on the rationale that the soon to be former husband was the sole progenitor.95 Instead, the Supreme Court of Washington based its decision to the contrary on the language contained in both contracts or agreements. The contract between the egg

87. 48 P.3d 261 (Wash.) (en banc), amended sub nom. In re of Marriage of Litowitz, 53 P.3d 516 (Wash. 2002).
88. Id. at 262.
89. Id.
90. Id. at 263.
91. Id.
92. Id.
93. Id. at 263-64.
94. Id. at 268-69.
95. Id. at 265.
donor and the couple treated the parties equally with respect to the fertilized eggs and the court chose to do the same by not privileging the husband’s right as the sole progenitor.\textsuperscript{96} With respect to the second contract, the court placed heavy emphasis on the fact that the parties had previously agreed to petition the court for instructions regarding the disposition of the embryos should the parties not reach mutual agreement.\textsuperscript{97} It is fair to conclude that any agreement requiring mutual consent for the use of the embryos will result in their non-use when the parties are in the throes of divorce or their union has been permanently dissolved.\textsuperscript{98}

\textbf{F. My Take on the Five Iconic Cases}

What is interesting and obvious from a review of the five iconic cases is that they all resulted in the destruction or non-use of the remnant genetic material. Hence, no matter what contractual analysis is employed by the court, the outcome seems preordained: until very recently no court, at least no American court, was willing to force one to become a parent against his or her wishes notwithstanding what the contract provides.\textsuperscript{99} If there is an agreement, whether ambiguous or clear, the court in interpreting same, universally finds that the ova should not be used by the requesting former spouse to produce issue.

Indeed, the one fact that can be garnered from a review of the five iconic cases and the four options they present is that one will not be forced to become a parent—Option 1, no agreement equals destruction of the embryos; Option 2, agreement to destroy the embryos enforced; Option 3, agreement to transfer embryos to former wife not enforced; and Option 4, ambiguous agreement ultimately results in destruction of embryos.\textsuperscript{100} It is

\textsuperscript{96} Id at 267-68.

\textsuperscript{97} Id. at 268.

\textsuperscript{98} This is akin to Option #4—ambiguous agreement resulting in destruction of the embryos. The only unique factor, and the reason for the characterization of Litowitz as an iconic case, is that it addresses the seminal issue when only one of the partners is a biological progenitor and refuses to privilege that progenitor’s claim to the genetic material. See Litowitz 48 P.3d 261 at 271.

\textsuperscript{99} There is one Israeli case, a Supreme Court decision rendered en banc, which did rule in favor of the ex-wife providing her with the ex-husband’s zygotes over his objection. CFH 2401/95 Nahmani v. Nahmani 50(4) PD 661 [1996] (Isr.), summarized in Helene S. Shapiro, Frozen Pre-Embryos and the Right to Change One’s Mind, 12 DUKE J. COMP. & INT’L L. 75, 77-80 (2002). See also Reber v. Reiss, 42 A.3d 1131, 1142 (Pa. Super. Ct.), appeal denied, 62 A.3d 380 (Pa. 2012), the trial court in a published opinion employed a balancing approach to award the ova to the former wife. I refer to this outcome, when no agreement is involved, and the embryos are awarded to the claimant as Option #5.

\textsuperscript{100} See supra note 85 and accompanying text.
only Option 5, which is addressed infra,\textsuperscript{101} when there is no agreement and there is significant reliance interest on the part of the wife, coupled with the fact that she has no other option to conceive, that the court finds for the former wife and allows the embryos to be used going forward against the wishes of the other party.\textsuperscript{102}

The fact that the cases are almost uniform in their disposition of the material, but disparate in their analysis of the issues presented and their resolution, provides the first clue that the method of analysis, treating these “agreements” as contracts, is inapposite. Instead, courts should examine the relationship that produced that agreement and ask whether that agreement can be given effect when the relationship is terminated. I turn to this precise question in Part III.

First, however, the academics weigh in with their analysis of the issues presented by the enforceability of IVF agreements upon divorce or dissolution. Again what unifies the academics, to a large degree, like the five iconic cases, is the assumption or treatment of the agreement by and between the parties as a contract calling into question its enforceability given the changed conditions that have occurred since the parties entered into the agreement.

II. THE ACADEMICS AND COURTS WEIGH IN—FIVE (AGAIN!) THEORIES DOMINATE

As one might imagine these very interesting and controversial cases have not gone unnoticed by legal academics, as well as others,\textsuperscript{103} who have parsed these cases and come to their own conclusions regarding what should be the appropriate outcome in these disputes. In this part, I recount the five prevailing views among academics: 1) IVF agreements should be enforced as agreed to because these are valid contracts; 2) IVF agreements should not be enforced as contracts or agreements because of the changed conditions that have occurred since the parties entered into the agreement;\textsuperscript{104} 3)
public policy precludes enforcing an agreement when one chooses not to be a procreative partner and, therefore, IVF agreements or contracts should only be enforced subsequently when the parties mutually agree to the disposition provided by the contract (given the fact that very few divorcing couples agree on anything, especially something as important and relational as raising a child, this alternative, in reality, is very similar if not identical to the second view that these contracts should never be enforced); 4) contracts should be analyzed from a critical feminist perspective and acknowledge the female partner’s subordinated position when analyzing the enforceability of the agreement; and 5) a balancing approach should be used taking into account the reliance and expectation interests of the former spouse seeking use of the embryos and his/her ability or inability to conceive in the future.

This last approach is epitomized by a recent case *Reiber v. Reiss*, in which the court explicitly employed a balancing approach to privilege the former wife’s right to the embryos over those of the objecting former husband. This case represents the vindication of the reliance approach favored by some academics and commentators who argue that if one party unduly relies on the procedure for future procreative ability, that reliance interest should be validated. Although closely related to the view of feminist theorists that the female’s rights should be privileged over that of the male in the process, the rationale for that privilege is not the subordinated position of the female but rather the reliance interest involved and validated by the process. As discussed, *infra*, this reliance approach is also used when one of the parties (typically, the male) to the IVF agreement

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I argue in, *infra* Part IV, that the courts in this context are not really employing an appropriate version of the changed conditions doctrine but instead applying a normative or policy argument that one should not be forced to be a parent against his or her will. Alternately, courts should find that the agreement is an unenforceable gratuitous promise. See *infra* notes 222 et. seq.

105. For a discussion of the relational nature of the arrangement that arises when two divorcing or separating parties are nevertheless in agreement that an embryo should be used to produce a child, see *infra* notes 186-187 and accompanying text.

106. As one might imagine, no court has explicitly embraced this approach and articulated a rationale for an outcome premised on the female partner’s subordinated position. Hence, no cases or further discussion of this approach will be made herein and reference is made to the academic position that the woman’s rights should be elevated above the man’s since she is in a subordinated position or role vis-à-vis her partner. See *infra* Part II.D.

107. See *infra* Part II.E. The balancing approach employed by courts and some commentators focuses on the harm to the woman in denying her the use of the embryos. As discussed *infra* Part II.E, there are two different types of balancing approaches—absolutist and relativistic.


109. This represents the equivalent of employing the *RESTATEMENT (SECOND) OF CONTRACTS* § 90 in these IVF agreement disputes and is addressed *infra* Part V.
dies, leaving surviving a partner who still wishes to use the gametic material contributed by the deceased progenitor.\textsuperscript{110}

What is important for all of these views or theories espoused to resolve these situations is the acceptance and treatment of this issue as one involving the validity or invalidity of an alleged contractual agreement that is later challenged as a result of the changed positions of the parties when they are separating or divorcing.\textsuperscript{111} The paradigm which unifies all these theories focuses the issue on the agreement rather than the underlying partnership or marriage which should be the focal point of analysis addressing this issue.\textsuperscript{112}

\textbf{A. The Contracts-Based Approach}

Perhaps the most visible and prolific scholar working in this area is Professor John A. Robertson of the University of Texas Law School. In Professor Robertson’s first article, \textit{In the Beginning: The Legal Status of Early Embryos},\textsuperscript{113} he analyzed two cases and began to develop his analysis of the complicated issues prevented by IVF when the parties subsequently decide to go their separate ways. In his second article, \textit{Prior Agreements for Disposition of Frozen Embryos},\textsuperscript{114} he addressed directly the issues presented herein which he characterized as “the role of prior directives” in the disposition of frozen embryos.

In brief, Professor Robertson reviews the embryo cryopreservation programs in existence at the time of the second article and discovers that

\begin{itemize}
  \item \textsuperscript{110} See infra note 256.
  \item \textsuperscript{111} Although I was tempted to state “changed conditions not anticipated by the parties” this would not be factually correct in that many of these so-called agreement/contracts explicitly acknowledge and anticipate the situation that ensues: divorce. Hence, it is incorrect to state that unanticipated changed conditions either require the nullification or validation of the contract. To be more precise, what is really at issue in the cases involving the enforceability of an agreement is one party’s objection—their changed position—to the agreement that they freely signed and acknowledged. In cases where there is no existing agreement, e.g., Davis v. Davis, 842 S.W.2d 588 (Tenn.), \textit{on reh’g in part per curiam}, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992), neither party is arguing for either a changed condition or a changed position, since none was previously taken. In those cases, it is the application of the default rule, in this case an immutable default rule, which governs the disposition of the outcome. For a discussion of the immutable default rule that should be applied in this situation, see infra Part II.A-B and note 139.
  \item \textsuperscript{112} See infra Part III.
  \item \textsuperscript{113} John A. Robertson, \textit{In the Beginning: The Legal Status of Early Embryos}, 76 VA. L. REV. 465 (1990) (providing a detailed account of, Davis v. Davis, 842 S.W.2d 588, and, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (involving a couple who wished to move an embryo from Los Angeles to Norfolk against the objection of the medical facility)).
\end{itemize}
twenty-three of the twenty-seven existing programs required the parties to the IVF to designate the disposition of the embryos in the case of divorce or death. Professor Robertson characterizes these designations as: "These directions are as much prior directives as agreements between the couple. They are agreements between the couple and the program for disposition when certain events occur, and are assumed to be legally binding." What is important to note at this point are the two critical assumptions made by Professor Robertson in his careful and thoughtful analysis of the cases addressed in the article: that these directives or agreements are contract-like in their operation and that they are and should be enforceable by the courts as "agreed" upon by the parties ex ante upon entering the IVF procedure.

Starting from a baseline perspective that in the absence of an agreement no party should be forced to go forward with the IVF procedure unless the party seeking to use the embryo has no other alternative to conception, Professor Robertson concludes that it is in the best interests of all the parties to treat the agreement akin to a contract.

Reliance on the prior agreement for discard of embryos thus provides a sound and certain resolution to the controversy in Wendel, and in other cases that are likely to arise over disposition of frozen embryos. In making the agreement the parties had the opportunity jointly to determine their reproductive futures. Holding them to the agreement recognizes their procreative liberty, gives the couple and the IVF program clear guidance, and also provides courts with an efficient means of resolving such disputes. The issue in such cases should be whether in fact there was a validly made agreement that covers the issue at hand, and not whether such agreements should be enforced despite a party's change of mind or circumstance.

115. Id. at 410.
116. Id.
117. Id. at 424. In addition to Davis, 842 S.W.2d 588, Professor Robertson analyzes the following case in his article, Wendel v. Wendel, No. D 191962 (Ohio C.P. Dom. Rel. Ct., Cuyahoga County, filed July 21, 1989) (a couple signed an embryo freezing agreement in which the parties agreed to dispose of frozen embryos upon divorce).
118. Id. at 413. This situation of desperation and need on the part of one party to enforce the agreement because—typically—she has no other alternative, may raise the issue of reliance irrespective of whether there is an existing agreement. For a discussion of the unique issue of reliance, see Reiber v. Reiss, 42 A.3d 1131 (Pa. 2012), a Superior Court case discussed infra note 175 and text accompanying. Assuming that adoption remains a viable option to procreation—even artificial procreation—this reliance interest espoused in Reiber and in Part V when a partner dies can only be based on the assertion that one has the desire and right to become a biological parent.
119. Robertson, supra note 114, at 424.
120. Id. at 414.
Turning to the enforceability of the agreements, Professor Robertson persuasively argues that such agreements should be enforced by the courts. His argument is based, in large part, on two distinct and complementary rationales. Professor Robertson contends first that enforcing these agreements promotes the benefit of certainty. Second, he argues that enforcement of IVF agreements maximizes the parties’ procreative freedom by allowing them to choose, ex ante, what to do with the embryos should death or divorce subsequently occur. Indeed, heavy reliance is placed on the maximization of procreative freedom:

To exercise maximum control over their procreative interests, it is essential that gamete providers have the power to make binding agreements for future disposition of the embryos. Without such authority, decisions about embryos will be made by others in ways which might insufficiently value the reproductive concerns of the persons involved. For example, the state or the IVF program may then determine what happens to the embryos, rather than the parties themselves. It would seem to be in the best interest of the couple to reserve this right by their prior agreement.

Crucial to Professor Robertson’s analysis and argument is the conclusion that if the parties’ agreement is not given effect, some third party, the court, the legislature, or the IVF medical facility will make the decision for them. The fallacy of Professor Robertson’s analysis, as I address infra, is that his analysis of the IVF agreement is static, fully informed and knowing, and not dynamic in that it equates the non-use of the embryos upon divorce as reducing party autonomy. He views the execution of the agreement between the parties as fixing in place the parties rights and responsibilities with respect to the future use of embryos and the court’s subsequent refusal to give effect to that decision as an act that violates the parties’ autonomy. I contend, however, that respecting the parties’ autonomy requires the court to recognize that the parties’ decision made ex ante at Point A—at the time they begin the IVF process should not necessarily bind the parties at Point B, upon divorce if the parties could not

121. Id. at 424.
122. Id. at 416.
123. Id. at 415.
124. Id.
125. Id.
126. See infra Part II.A.
127. Robertson, supra note 114, at 416-17.
128. Id. at 415-16.
properly internalize and knowingly and intentionally pre-commit to bind
themselves at Point B.\textsuperscript{129}

To the contrary, I make the case that a decision not to use the embryos
at this later time—Point B—returns the parties to the ex ante status quo and
given the circumstances, divorce and not death, is the correct position to put
the parties in at that time. This result best respects the parties’ autonomy in
light of the changed relationship between the parties that is reflective of the
divorce or separation. Hence, I view the determination not to go forward
unless there is a consensus of the parties as a decision that minimizes the
harm to the parties and which can only be modified against one partner’s
wishes in exigent circumstances calling forth reliance principles.\textsuperscript{130}

Finally, Professor Robertson addresses the argument that changed
conditions, i.e., the divorce, should vitiate the prior agreement—the position
taken by the American Medical Association (AMA).\textsuperscript{131} Professor
Robertson rejects that view and contends that the “changed circumstances”
were explicitly anticipated by the agreement and addressed in the
agreement.\textsuperscript{132} Second, he claims that the parties relied on the agreement in
undergoing the procedure and it should therefore be enforced.\textsuperscript{133} Third and
most importantly, he argues that not enforcing the prior agreement would,
again, undermine the certainty provided by enforcing the agreement.\textsuperscript{134}
Suffice it to say at this point, one has to balance the benefits of certainty
with the results produced by the product of certainty.\textsuperscript{135}

Relatedly in a complex analysis, Professor Glenn Cohen argues that
one has a right not to be a genetic or attributional parent, but that right can

\textsuperscript{129} This point is discussed in greater detail infra at notes 136-137 and accompanying text.

\textsuperscript{130} Again, see infra Part II.E-F and notes accompanying for the reliance issue.

\textsuperscript{131} Robertson, supra note 114, at 419-20. The AMA’s position is described thusly: “In
general these agreements should be enforced. However, the decision to go forward with pre-
embryo transfer can have such profound consequences that either gamete provider should be able
to show that changed circumstances make enforcement of the agreement unreasonable.” Id. at 419
(footnote omitted).

\textsuperscript{132} Id. at 420. On this point, I find myself in agreement with Professor Robertson. See supra
note 25 and accompanying text. See also infra Part IV for my discussion of the applicability or
inapplicability of the changed conditions doctrine in this situation.

\textsuperscript{133} See Robertson, supra note 114, at 420. This reliance argument is similar to my reliance
argument discussed infra at notes 244-255 and text accompanying. Where we differ, however, is
the scope of the applicability of the reliance argument. I would apply it only in what could at best
be characterized as exigent circumstances. Apparently, Professor Robertson would apply reliance
in most if not all cases in which the parties have reached a prior agreement.

\textsuperscript{134} Robertson, supra note 114, at 420.

\textsuperscript{135} Note, here I am referring to the fact that certain rules can interfere with the instrumental
end or the normative goal sought to be achieved. For further discussion of this point, see infra
notes 193-194 and accompanying text.
be waived by a *knowing* contractual waiver.\textsuperscript{136} He contends that there are many situations in which a party may contract in a way that will have a significant effect on his or her welfare and sees no reason why in this IVF situation, assuming proper precautions are taken—that is, consent is knowingly given and informed—that one should not enforce the agreement even if one later regrets their prior agreement because of the changed circumstances.\textsuperscript{137} However, in choosing a default rule,\textsuperscript{138} Professor Cohen comes to the more sensible view that non-use of embryonic material is preferred unless mutual consent is obtained later when the parties are seeking a divorce or their relationship is being terminated.\textsuperscript{139} Indeed,

\begin{enumerate}
\item \textsuperscript{136} Glenn Cohen, *The Right Not to Be a Genetic Parent*, 81 S. Cal. L. Rev. 1115, 1196 (2008). My own view, expressed infra at notes 234-237 and accompanying text, is somewhat similar to Professor Cohen’s in that I argue that the agreement entered into by the parties when undergoing IVF should not be enforced later because of the cognitive dissonance that occurs when executing the agreement: the parties are not able to fully internalize the possibility that they will later be divorced or separating and believe that the agreement they entered into will never become operational as a result.

\item \textsuperscript{137} Cohen, supra note 136, at 1180-81. Although this issue is part of a larger debate that is beyond the ken of this article, the contract approach essentially boils down to whether an individual in the present can bind his or her action in the future, notwithstanding changed circumstances that the party may or may not have been able to rationally internalize at the time of contracting. Another way to phrase the issue is whether an individual can rationally commit himself or herself to action in the future when the future self will claim that such action was not fully rational and should not be enforced. I am of the view that individuals are boundedly rational and cannot properly internalize the myriad of factors one would need to assess to make a rational choice on a complex decision like the use of genetic material to produce a child after the individual and his or her partner have split up. On bounded rationality, see the Nobel Prize winning work of Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 Am. Econ. Rev. 1449 (2003) (consisting of a revised version of the lecture Professor Kahneman delivered in Stockholm, Sweden on December 8, 2002 when he received the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel). See also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003) (contending that individuals executing standard form contracts only internalize those terms that are salient (immediate) to them at the time of contracting). Given the bounded rationality of consumers and the complexity of the decision, I reject the contract approach and instead embrace a reliance-based approach that properly balances the rights of all parties. *See infra* Part V.

\item \textsuperscript{138} On the use of default rules in contractual settings, see supra notes 50-51 and accompanying text.

\item \textsuperscript{139} In other words, what should the default rule be? Relying primarily on the majoritarian default approach, I endorse non-use as a general default rule. I also examine whether a system might do even better by adopting a more sophisticated default—for example, by permitting an individual to use the preembryos when he or she would otherwise not be able to have any genetic children—although I find the case for such rule less determinate.

Cohen, supra note 136, at 1187-88. *See infra* notes 176-177 and accompanying text, for further discussion with respect to the argument that the party seeking the embryo, who cannot now otherwise conceive or produce new genetic material, has superior or elevated rights.
Professor Cohen proposes this as a penalty default rule that the parties can bargain around with a default subrule permitting the use of embryos when an individual progenitor would be unable to have children without the use of those embryos.140

B. Rejecting Contracts for Mutuality of Agreement: A Focus on Changed Conditions

In his article, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes,141 Carl Coleman, the Executive Director of the New York Task Force on Life and the Law, adopts what he contends is a contracts-based approach that is somewhat similar to Professor Robertson’s approach, but comes to a decidedly different conclusion on this issue. Focusing on the autonomy of each party to the IVF procedure and the changed conditions that have occurred since the agreement—the divorce or dissolution, Coleman concludes that mutual consent is needed for the use of embryos following the dissolution of the partnership that initially agreed to undergo the process:

The basic point... is that, in the absence of the partners’ mutual consent, carrying out any of the affirmative disposition options outlined above—use by one partner [without consent of the other], donation to another patient [without both parties’ consent], destruction [again, without both parties’ consent], or use in research [without mutual consent]—would impose greater burdens on the objecting partner than keeping the embryo frozen would impose on the partner whose preferred disposition option is not enforced. Thus, any rules for the disposition of frozen embryos should require the consent of both partners before any of these irrevocable dispositions is carried out.142

Taking this balancing approach, the harms occasioned to the objecting partner are weighed against the harms of not taking the preferred action of the other partner, Coleman argues that when one partner wishes to proceed with fertilization (presumably the female) while her former partner objects, the objecting partner has a strong, very strong interest in avoiding genetic parenthood.143 In the situation where the party seeking the material for IVF use is unable to otherwise conceive (typically, the female) Coleman rejects

140. Cohen, supra note 136, at 1196.
142. *Id.* at 81 (footnote omitted).
143. *Id.* at 81-82. The thesis that one cannot be forced to become a parent against one’s wishes is explored fuller in Cohen, supra at notes 136-40 and accompanying text.
the argument made by some\textsuperscript{144} that this elevates that party’s right to the material above the objecting partner.\textsuperscript{145} Instead he claims that one party’s desire to have children, by whatever means, cannot trump the other party’s right not to be a genetic parent.\textsuperscript{146} Coleman makes similar arguments to reject one party’s right to donate to another or for research and to make the unilateral decision to destroy the material.\textsuperscript{147} What is required, according to Coleman, is mutual consent to respect the rights of both parties.\textsuperscript{148}

Turning specifically to the “contracts-based” approach preferred by Professor Robertson,\textsuperscript{149} Coleman contends it insufficiently protects the societal and individual interests at stake in this dispute. He rejects the contention that the parties’ ex ante mutual consent must later be respected when circumstances have changed and the partnership has been dissolved. He focuses on the parties’ contemporaneous wishes, the difficulty of predicting one’s future response to life-altering events like parenthood, the lack of authenticity of the parties’ original agreement,\textsuperscript{150} and finally the contention that enforcing these agreements as binding contracts undermines important societal values.\textsuperscript{151} Thus, Coleman contends that the right to consent or withhold consent to the disposition of embryos should be viewed as “an inalienable right” that cannot be contracted away under any

\begin{footnotesize}
\begin{enumerate}
  \item See infra notes 178-79 and accompanying text.
  \item I address the same argument below in Part V focusing on the parties’ reliance interests and how these should be addressed in this situation.
  \item Coleman, supra note 141, at 83 (emphasis added) (footnote omitted) (“If the partner seeking to use the embryos is unable to have children through other means, her desire to use the couple’s remaining frozen embryos may seem stronger. Yet, the fact that a person has a deep desire to have genetic offspring does not mean that she has a right to do so through any possible means. The embryos would not exist but for the contribution of both partners’ genetic material. Because the embryos are the products of the couple’s shared procreative activity, any decision to use them should be the result of the couple’s mutual choice.”).
  \item Id. at 86-88.
  \item Id.
  \item See supra Part II.A.
  \item Coleman, supra note 141, at 88-89. Here, the contention is that the original agreement may be the product of coercion and pressure—although no evidence is given that either or both parties are coerced into signing the agreement. See id. at 102-04. A stronger argument is that one party to the agreement, say the husband, given the relational nature of the contract between him and his spouse, may consent to the subsequent disposition of the embryos only to save and maintain that relationship, and that his consent to allow the use of the embryos by the dominant spouse after divorce of dissolution could and was not adequately consented to at the time of contracting. This point is discussed further infra note 188 and accompanying text.
  \item Coleman, supra note 141, at 89, 104-05.
\end{enumerate}
\end{footnotesize}
circumstances. That inalienable right can be waived later, but the right to exercise it cannot be conveyed away ex ante.

C. Focusing on Procreative Rights or the Right Not to Become a Father Against One’s Will

Others have concluded that the so-called contract is unenforceable and violative of public policy when the parties have separated or divorced because it forces one party (normally, the male) to become a parent against his or her will. This is also reflected in *A.Z. v. B.Z.*, in which the court refused to enforce the parties’ agreement to deliver the embryonic material to the wife upon divorce because to do so would make the ex-husband a genetic father against his express wishes at Point B. Those embracing this non-contract point of view then address directly the public policy issue presented by the question of enforceability of IVF agreements over the current objections of one of the contracting parties: that is, whether one can be forced to become an attributional parent against one’s current wishes given their prior consent.

This comes pretty close to saying that as a matter of public policy we should not respect the voluntary wishes of the individual to contract for the disposition of embryos. This public policy argument is addressed and rejected infra Part II.C.

What this means, essentially, is that if the action agreed to is taken contemporaneous with the “waiver” of the right, i.e., the divorced husband subsequently consents to the former wife’s right to use the embryos and she uses them before the consent is revoked, that use is consistent with the holder’s inalienable right to withhold consent or waive his right to withhold consent. See *Coleman*, supra note 141, at 94-95. Compare, however, the situation where the former husband gives written consent a year after the divorce for a procedure scheduled a month hence. Per Coleman’s analysis, since the former husband has an inalienable right presumably his consent can be revoked a week before the procedure. Coleman concedes this by stating:

Similarly, making the right to decide about the disposition of one’s frozen embryos inalienable would not prevent individuals from consenting to the donation, destruction, or research use of their embryos at the time those decisions would actually be enforced. It would simply prevent persons from being forced to adhere to advance commitments regarding their embryos if they change their minds before the disposition decision has been effectuated.

Id. at 94-95 (footnote omitted). Consequently, Professor Coleman, like Professor Cohen, supra notes 136-40 and accompanying text, would agree with the outcomes (not necessarily the rationale employed by the court to reach same) in Options 1-4 and disagree with balancing approach employed in Option 5.

**Id.** at 94-95 (footnote omitted). Consequently, Professor Coleman, like Professor Cohen, supra notes 136-40 and accompanying text, would agree with the outcomes (not necessarily the rationale employed by the court to reach same) in Options 1-4 and disagree with balancing approach employed in Option 5.


See id. To be clear, those supporting the policy argument that one should not be forced to be a parent against his or her wishes eschews the balancing approach that is Option 5 and discussed infra Part II.E. The real issue in Option 5 cases is whether the balancing approach should be used when there is no agreement between the parties or whether the balancing approach should be used in contravention of the parties’ agreement. In the former situation, the fact that one
The fact that the agreement executed at Point A explicitly contemplated the exact fact situation that later arose and that the agreement attempted to pre-commit the parties to an express course of action is deemed irrelevant given the issue at stake. For example, the court in *A.Z.* ignored the events surrounding the execution of the agreement and made no determination regarding whether the agreement conferred or transferred vested rights from one party to the other. Instead, and this is the strong version of the argument, the court focused on the parties' respective rights at point B—at the time of divorce or dissolution—and accepted the policy argument that no one should be forced to be a parent against his or her will.

Suffice it to say, the issue posed by this article—how to dispose of embryonic material upon divorce when the parties do not agree or death when one of the parties cannot agree—is a difficult one to resolve involving different competing interests and views. It is also fraught with difficulty because of, for want of a better term the different time horizons that are implicated by the issue. At Point A the couple seeking to exploit IVF technology is united and at Point B the couple is separating or divorcing and dividing the assets of their partnership prior to pursuing their separate futures with the desire that the other party take no part in that future. Turning a blind eye to the changes that have taken place in the relationship between the parties is unrealistic and inapposite given the subject matter of the agreement—the attempted production of a human being.

Part of the stated rationale, which I agree with is that the so-called agreement or contract should not be enforced as a contract because they are more akin to informed consent forms that does not reflect deliberate and

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party opts not to be a parent can be taken into account. In the latter case, that choice may be overridden.

156. See id.

157. See id. at 1059. To be clear, I am assuming that the court and the commentators and academics who support this view treat the gametic material as property as opposed to a living entity or at least as a fetus. Treating the gametic material as a fetus would raise issues regarding the legality and morality of abortion and the claim that one cannot be forced to be a parent against his or her will would privilege a female to abort the fetus on that basis. I do not believe the courts or commentators are making this rather different claim.

158. The focus to this point has been what to do with the embryonic material upon divorce, not death. The cases reflect this fact as well. However and as I argue below, death of one of the parties presents a very different situation involving a very different outcome. See note 257 and accompanying text.

159. This raises the changed conditions approach which is discussed *infra* Part IV. In addition, the fact that two distinct time horizons are involved in the resolution of this issue raises unique issues involving the parties' emotional states or affects at each time in the horizon and how, if at all, that should affect the enforceability of the agreement. This point is discussed in greater detail *infra* Part IV.
informed choice on the part of the “patient” signing the same. Professor Waldman presents the most telling arguments in favor of not enforcing the agreement that the parties signed as a contract and employing a balancing approach (presumably relativistic and not absolutist) instead. She correctly points out that the facts surrounding the execution of these agreements undermine their authority as contracts.

D. The Feminist Approach: Valuing the Subordinated Position of Women

Others argue that gender should play an explicit role in the decision to award the embryo to the former spouse either because of the invasiveness of the medical procedure to remove the embryos and the difficulty encountered in repeating the procedure or because focusing on the nature of consent imposes a male model of parenthood and ignores the unique contribution of gestational material by the female and the importance of motherhood. For example, Professor Ruth Colker presents the most sophisticated defense of the feminist approach emphasizing the different costs to the male and female incurred in undergoing IVF procedures—it is far more difficult to retrieve an egg than obtain sperm from the male—arguing that “we should generally decide these cases in favor of the woman when she desires to use the frozen embryos to further her reproductive capacity.”

Somewhat related to and building upon the work of Professor Colker, some have employed the prism of critical feminist theory to analyze the issues addressed in this article. Given that most, but not all IVF agreements involve a male/female relationship and it is difficult to ignore certain biological facts, that is it is easier for the man to produce sperm than it is for the woman to have eggs developed and societal roles

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160. See Ellen A. Waldman, Disputing Over Embryos: Of Contracts and Consents, 32 ARIZ. ST. L.J. 897, 918 (2000). One weakness of this argument and other arguments invaliding the contract because of lack of informed consent is that much contracts scholarship proves definitively that individuals rarely exercise deliberative informed consent when signing or executing form contracts. See W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 530 (1971). In fact, in most cases they rarely read the contracts. Id. Consequently, if informed consent is required to enforce contracts, very few if any contracts would be enforced. Id. at 532.

161. See Waldman, supra note 160, at 935-36.

162. Id.

163. See Ruth Colker, Pregnant Men Revisited or Sperm is Cheap, Eggs are Not, 47 HASTINGS L.J. 1063, 1071-74 (1996).

164. Id. at 1073-74, 1079.

165. See supra notes 163-64 and accompanying text.

166. This is similar to the “balancing approach” which is discussed infra Part II.E.
and our cultural history, that is women have often been oppressed and treated worse than their male partners in many milieus including the milieu of divorce and dissolution, it is hard to ignore that the result in four of the five iconic cases (and most of the other cases) favor the male partner to the agreement. This fact has not been lost on some observers and leads some to claim that the contract based theory discussed supra, as well as those theories requiring mutual assent upon divorce and dissolution or those requiring a balancing of the parties’ respective interests, results in reinforcing and privileging male hegemony and control over women’s reproductive rights.

E. The Balancing Approach: The Courts Weigh In on the Reliance Theory

Somewhat related to the critical feminist theory approach is the view that the courts should employ a balancing test to determine whether the embryos should be destroyed or used following a divorce or split. What is interesting about the balancing approach is that it calls for an inquiry into whether one of the parties, albeit, irrespective of gender but typically the former spouse, should be awarded the embryos because of that party’s inability to conceive without the embryos. In other words, balanced against the former husband’s (partner’s) right not to be a biological parent is the former wife’s (partner’s) right to be a parent and what denial of the use of the embryo’s will have on this right. Also weighed in the balancing is the difficulty each party will have in the future in conceiving children, which normally favors the former spouse who is unable to conceive for some medical reason. This differs from the feminist point of view in that

167. In the fifth case that “favored” the male, J.B. v. M.B., supra Part II.D, the outcome was the same as the four other iconic cases in that the embryonic material was not used since the parties did not mutually agree to its use.

168. See Colker, supra note 163, at 1069-71. Of course, the same claim can be leveled against my analysis in Parts III and IV in which I argue that the unique partnership forged by a marriage calls for a different analysis of the IVF issue (Part III) and that traditional contract law principles should be deployed to vitiate the parties’ agreement upon divorce or dissolution but not death (Part IV). The fact that the agreement is nullified and no child is produced as a result per my analyses in Parts III and IV can only be deemed sexist if the right to motherhood is elevated above that of the males’ right not to be an attributional parent. I find it somewhat odd that a claim that is based in critical feminist theory is premised on the stereotypical notion that motherhood is special and a right that should be privileged in women.


170. See id. at 1140. This appears to impact women more than men who, given recent medical advances, can have their sperm withdrawn and stored prior to undergoing medical treatment that may result in sterility to an extent not consonant with the production and harvesting of ova. Indeed, it is only when the male is sterile that there is a biological impossibility in conceiving for the male. And in this situation, a sterile male, sperm donation, which is easily obtainable, can
the privileged position that may be afforded to the female partner is largely a result of biologic fact whereas the privileged position of the female pursuant to feminist theory is largely a product of her cultural subordination and the alleged presence of male hegemony.

The argument that a balancing approach should be used appears to have two different rationales in support thereof: one is absolutist and the other is relativistic. The absolutist approach takes seriously the position that one should not be forced to be a parent against his or her will. Indeed, the absolutist position takes as a given that the agreement signed by the parties is a valid contract, but a contract that the court is free to ignore given the public policy issue at stake. In A.Z. v. B.Z., the court equated enforcing the agreement and providing the embryos to the soon to be ex-wife against the soon to be ex-husband's wishes would amount to judicially enforced procreation.

This absolutist position must be contrasted with the relativistic approach epitomized in J.B. v. M.B. In J.B., the court was confronted with an agreement that it deemed conditional. The court, however, concluded that even if the conditional agreement was applicable and governing in this situation, it would refuse to enforce the same because to do so would violate public policy. The Supreme Court of New Jersey engaged in balancing the couple's interest and held that the burden of forcing the ex-wife to become a genetic mother against her wishes outweighed the harm to the ex-husband if the embryos were destroyed. Key to the court's determination was the fact that the ex-husband seeking placement of the embryos in a surrogate was still capable of fathering a child with another woman or with other donated eggs and was already a biological father.

result in the conception of a child. In addition, given how the gametic material is produced, the woman partner can clearly demonstrate the difficult lengths and painful procedures she has undergone to produce the embryos when contrasted with the male's production of gametic material. See Colker, supra note 163, at 1072-74 & n.62.

171. See, e.g., A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000) (holding that it would not enforce even an unambiguous agreement where it would compel a partner to become a parent against his or her will).

172. Id. at 1051.

173. Id. at 1057-58.

174. See supra Part II.D.


176. Id. at 717. As discussed infra Part V, this relativistic balancing test comes close to duplicating the reliance based approach used by the courts to justify the use of the embryos when one party dies or when one party is otherwise unable to conceive. The different focus, however, is on the procreative ability of one of the two partners instead of the procreative inability of one or both of the partners in the IVF procedure. Compare J.B., 783 A.2d at 716-17 (focusing on fact that
Finally, it should be noted that some academics in employing a balancing approach come to the conclusion that in most cases it results in a draw—the ex-wife's reliance right to become a parent does not normally outweigh the ex-husband's right not to become a genetic parent. However, some go further and advocate a case-by-case analysis in which an additional question is asked: whether the party seeking to use the embryos is physically unable to produce additional genetic material? If so, that party's reliance interest triumphs; if not, the other party's right not to become a genetic parent—the public policy approach triumphs. Thus, in employing the balancing approach to weigh the claims of the former partners with discordant wishes for the use of embryos commentators and courts also examine the reliance interest of each of the parties to the IVF agreement.

In this respect, the balancing approach can somewhat be likened to the use of §90 of the Restatement Second to provide a remedy even though there clearly is not enforceable contract. The absence of an enforceable contract becomes irrelevant when reliance is proven and a remedy is sought based on that reasonable reliance. As noted and discussed infra, the reliance approach epitomized by § 90 of the Restatement Second also comes into play (to favor the surviving spouse) when one of the parties to the IVF agreement dies leaving genetic material and the surviving party to the agreement claims that the death of her partner robs her of the opportunity to become a genetic parent with that particular partner. The fact that she can reproduce biologically with other partners becomes largely irrelevant. Hence, the relativistic balancing approach, which is used in several different guises, in effect collapses into a reliance argument that can take one of several forms. The absolutist approach, to the contrary, gives each party a veto over the use of the embryos.

husband can still procreate even if he is denied opportunity to use embryos) with Reber v. Reiss, 42 A.3d 1131, 1137, 1142 (Pa. Super. Ct. 2012) (finding wife's interests in procreation superior to husband's because she was no longer able to procreate biologically).

177. See Coleman, supra note 141, at 81-83.


179. See id. at 614-15.

180. Reliance raises its ugly head almost everywhere in contract law. Promissory estoppel is commonly asserted as an outlet to provide a remedy even when no enforceable agreement is present. See infra notes 247-50 and accompanying text. As a result, it is not surprising that reliance plays a role in disputes involving the enforceability of IVF agreements.

181. See infra Part V.
F. Some Tentative Conclusions

A review of the literature (cases and academic theories) addressing this issue leaves one with two valid observations. First, in analyzing the cases and the issues presented herein, the major focus seems to be whether the contracts-based approach is a correct one or not. That is, whether the wishes of the parties expressed at Point A, at the inception of the IVF procedure, should be respected at Point B, when the parties are about to become ex-partners? If not, what alternative approach should be adopted to deal with this knotty and complex issue? However, once the contracts-based approach is rejected, theories abound regarding how this issue should be resolved with no consensus regarding its resolution (although mutual consent at Point B seems to be gaining ground). The primary objection to enforcing these IVF agreements as the parties are splitting is the specter of forcing one of the parties to become a parent against one’s current wishes and what that forced parenthood would mean for one of the participants balanced against the other partner’s ability to have children in the future with others.

The second observation is more subtle. Having carefully read most of the cases and the articles published to date on this topic, I am struck by how none of them seem to address the fact that this is essentially an intra-family agreement addressing a topic, procreation, that is usually beyond the ken of the court for some very good and valid reasons. It is hornbook law that the two prototypical agreements entered into between partners that are enforced by the courts are antenuptial agreements and separation or divorce agreements. It is quite interesting and telling that agreements made

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182. To be clear, and as Professor Colker notes in her article, these agreements are not typical contracts and should be really viewed as part of the informed consent process that patients are exposed to before they undergo medical procedures to inform the patient of possible consequences and to insulate the medical provider from future liability. See Colker, supra note 163, at 1079. The fact remains, however, that the parties engaging in the informed consent procedure do express their wishes regarding the disposition of unused embryos given the occurrence of future events. The real question is whether those wishes should later be respected.

183. The alternative seems to focus on public policy arguments not to force someone to be a parent against (typically) his or her will with some support for the view that if the woman has no other choice to procreate and has relied on the use of the material in the future, she should be allowed to do so. See supra notes 172-75 and accompanying text.

184. For the sake of simplicity and based on my belief that the presence or absence of a marriage certificate makes little difference regarding the issues presented by this situation, I am treating same sex couples and unmarried couples like married couples and am referring to the paired set as “family.”

185. By this I mean the courts are never involved in the decision to have or not have children. Indeed given the decision in Griswold v. Connecticut, 381 U.S. 479, 499 (1965), and like cases, that decision is said to be beyond the reach of the government and one that the parties’ control.
when embarking upon a permanent relationship—prenuptial agreements—and agreements made by the parties exiting the relationship—separation or divorce agreements—are deemed valid and enforceable. Agreements made, however, during marriage or during the parties’ partnership raise different issues involving their enforceability and it is to those agreements that we turn because an IVF agreement is made during the relationship although it allegedly governs what happens at the end of that relationship.186

III. AGREEMENTS BETWEEN SPOUSES (PARTNERS): ENFORCEABLE CONTRACTS OR GRATUITOUS PROMISES?

What is striking about the iconic and other cases that address the IVF disposition issue is that none to date has acknowledged that the agreement or ‘contract’ entered into by the parties to dispose of gametic material is made by the parties who have already embarked upon another long term relational contract—the contract of marriage.187 Moreover, that contract of

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186. As Dean Saul Levmore has explained, courts do not provide remedies to spouses during the marriage for contractual and other disputes that occur while the marriage is still valid. A complaining party’s only recourse is, in his words, to “leave it” that is, terminate the marriage and settle any and all disputes as part of that separation process.

In the law of domestic relations, we do not expect a court to award contract damages to a plaintiff who complains about a spouse’s misconduct or laziness or breach of an interspousal promise. Such a remedy might accompany or be part of a divorce settlement, or might simply be unavailable because of the exclusive character of the divorce remedy. The judicial practice is not simply the result of adhering to a nonmarket conception of a woman’s traditional work as wife and mother; a husband would also have trouble collecting damages from a wife who broke a promise concerning the maintenance of hearth and home (and had property with which to pay a judgment). And either spouse would find it impossible to collect damages or gain specific performance from a spouse who for selfish reasons failed to maximize his or her earnings. Whether courts aim to encourage compromise with a love-it-or-leave-it rule or simply refuse to monetize or otherwise become entwined in ongoing spousal relations, there is little doubt that this is an area of law where the expected outcomes are limited to self-help, private negotiation, or the extreme step of dissolution.


187. A relational contract is defined as follows:

A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance... [L]ong-term contracts are more likely than short-term agreements to fit this conceptualization, but temporal extension per se is not the defining characteristic.

marriage is regulated by norms that are important to understanding and analyzing the IVF agreement and determining its enforceability at Point B when the parties are split asunder.\textsuperscript{188}

Relational contract theory largely resolves this puzzle [the law’s peculiar pattern of enforcement and nonenforcement of promises (wedding vows) made as a result of the marriage]. The marriage vows express the couple’s emotional commitment and use hortatory language to emphasize the seriousness of the undertaking. They describe a standard of performance in idealized and general terms, and remind the parties of their goal of maintaining a caring, cooperative relationship. But emotional commitments are difficult to translate into quantifiable standards of performance, and assessing responsibility for breach proves to be vexingly difficult. Thus, the law relies on social and relational norms to promote cooperation and to enforce intra-marital promises. Indeed, relational theory suggests that formal legal enforcement of all the terms of a “marital bargain” is inadvisable, because legal intervention risks undermining the parties’ cooperative equilibrium, and ultimately subverts their efforts to sustain a lasting relationship. Thus, legal enforcement is limited to policing massive defections from the cooperative norm and to resolving economic and parental claims upon termination of the marriage (when the extralegal incentives to cooperate are greatly diminished). Law’s domain is the area beyond the boundaries of social and relational norms.\textsuperscript{189}

What is striking about the marriage contract is the ease of entry (at least for different sex couples),\textsuperscript{190} the long-term commitment discussed
above expressed and entered into by the parties at the time of the entry into marriage, and the utter non-enforcement of the promises made at the time of entry when only one of the parties, for whatever reason or no reason whatsoever, chooses to opt out of the partnership that represents the marriage contract.

The premises of contract and the premises that underlie the current right of unilateral divorce rest upon very different conceptions of individual autonomy. To the extent that modern divorce law exalts unilateral termination and declines to enforce promises to stay married, it elevates the freedom to renege on a promise (what we might call "ex post autonomy"). But the freedom to renege necessarily forecloses the freedom to make binding commitments (what we might call "ex ante autonomy"). Since the freedom to commit [marry] includes the freedom not to commit [divorce], ex ante autonomy is a more robust conception of personal freedom. In short, the very essence of contract [marriage]—the notion that the law will coercively enforce a promise that is voluntarily undertaken even after the promisor has come to regret the promise—is inconsistent with the freedom to renege.

Consequently, the ease by which one can evade the long-term commitment of marriage is entirely inconsistent with enforcing later a promise made to allow the use of gametic material when the basis for that promise, i.e., the marriage promise, is itself unenforceable. In other words, the same societal norms that support the ex post autonomy that grants each party the freedom to renege on his or her long-term commitment to the other party should similarly be deployed at the time of divorce or dissolution to allow a party to evade his or her previous promise to become a biological parent.

It would be quixotic, to say the least, to force the parties to continue to maintain their relationship to the extent necessary to raise a child, when each party to the agreement has unilateral exit rights which preclude

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191. Indeed some attempt to pre-commit to remain married no matter what events occur via the use of a so-called covenant marriage in which the parties expressly agree not to later divorce or separate. See Melissa Lawton, The Constitutionality of Covenant Marriage Laws, 66 FORDHAM L. REV. 2471, 2473-74 (1998) (defining "covenant marriage" and providing as an example Louisiana's statutory declaration).

192. Even covenant marriages do not preclude a party from later reneging on that express promise and seeking a divorce, it simply eliminates the rather quick no-fault divorce which has become the normal process for dissolution of a marriage. Id. at 2473-75.

commitment. This is especially true if the couple that is separating or divorcing has at that time no children produced as a result of that union. To tie these two separating individuals together over the life of a child to be born on the cusp of or after separation seems needlessly cruel for all concerned, including the prospective child. Indeed, it seems like a recipe for a familial disaster.

On the other hand, if the soon to be separated couple already has children, the parties will presumably continue to have a relationship as a result of their joint interest in raising those children. Hence, the question in this scenario is whether the presence of those children and the continuation of the couple’s relationship as a result, dictate a different outcome when one of the divorcing or separating parties seeks the use of embryonic material? The answer is no because the presence of previously produced children by the couple will not prevent either party from exiting the relationship. Their presence complicates that exit, but does not preclude it. Hence, a contrary argument can be made that since exit exists when they are existing children, the availability of exit and its deployment by one of the parties should have no impact on a preexisting agreement to contribute gametic material to the future production of children. That argument, however, misstates and conflates two very different situations.

The introduction of a child or children to a partnership or marriage raises the cost of exit to the long-term relationship which is marriage. In addition, it introduces a costly complication to the use of the exit in that the decision to exit no longer only implicates the contracting party, it also implicates the rights of children who were the product of the union. Exit in this setting is not only costly, it is fairly complicated and produces costs that are not borne by the parties to the original agreement—the children impacted by the divorce or dissolution.

Thus, comparing the situation in which the parties to the IVF agreement either have no children or are contemplating the production of additional children when entering into the IVF agreement reveals a difference without a distinction as it pertains to the issue at hand. Once the parties’ relationship has gone asunder, it makes little sense to require the parties to adhere to an agreement that increases the cost and complexity of the parties’ joint or unilateral decision to exit when that exit decision cannot be hindered. The court’s goal in terminating or separating the parties

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194. Awards of custody and monitoring child support payments represent the extent to which a court will insert itself in a marital relationship upon dissolution of that relationship. Court will not, however, insert themselves into an ongoing marital relationship to resolve disputes between the parties if their dispute involves no public policy issue like maintenance of family obligations. See Levmore, supra note 186, at 245.
should be the minimization of error and adjudicative costs associated with ending the relationship, not increasing the opportunity for same. Consequently, the answer to the question posed at the beginning of this part: Agreements Between Spouses (Partners): Enforceable Contracts or Gratuitous Promises?, also provides the answer to the seminal question posed by this Article: should agreements between IVF providers be considered contracts and subsequently enforceable when the parties later separate and disagree regarding the ultimate disposition of genetic material? Think of a hypothetical in which a wife promises her husband to buy him a new car if she receives a promotion to tenured professor. Sure enough, she receives the promotion, but reneges on her promise. Does the husband have an actionable claim based on a valid contract which he can enforce against his wife? Absent some sort of reliance interest, most, if not all, would say surely not. The wife’s promise, standing alone, is a gratuitous one and unenforceable. Indeed, almost all intra-familial promises will be found to be gratuitous and unenforceable. So, why would anyone assume an agreement between the parties regarding the disposition of embryos is dissimilarly enforceable? Is it the bilateral nature of the agreement—the fact that mutual promises are made—which differentiates this situation from the promise to buy a car? If so, that would support a theory of enforceable bilateral promises but unenforceable gratuitous unilateral promises. But the distinction between bilateral and unilateral promises is largely irrelevant in contemporary Contract Law and rightfully so. But recall, this is not truly a negotiated bilateral contract. Instead, the agreement between the parties is a product of an informed consent process that is designed to insulate the IVF facility from liability should problems subsequently ensue.

However, if the promises made during the initiation of the IVF procedure are deemed independent promises made by and between husband and wife, it is hornbook law that donative or gratuitous promises are unenforceable because they lack consideration. This is especially true in intra-family promises or transfers. Indeed, in many states there are

195. For a recent discussion of error and adjudicative costs and their role in limiting judicial action, see Samuel L. Bray, Preventive Adjudication, 77 U. CHI. L. REV. 1275 (2010).
196. See discussion of gratuitous promises supra notes 10-17. See also, Levmore, supra note 186 and text accompanying.
197. The distinction between a bilateral and unilateral contract was abandoned by the Restatement Second. See RESTATEMENT (SECOND) OF CONTRACTS §1 cmt. f (1981).
198. See supra notes 64, 182 and accompanying text. See also Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006) (discussing whether an informed consent form, calling for destruction of embryos in the event of divorce, was enforceable in the absence of a negotiated bilateral contract).
199. See supra notes 1-14 and text accompanying.
prohibitions on the spouses entering into contracts with each other. Although the origin of such cases appears to be the enactment of the Married Woman’s Property Act and its conferral of equal contractual rights on the wife, recent cases have extended the rationale and found an outright ban on agreements between husband and wife during marriage. And although many of the cases involve the enforceability of what today would be characterized as postnuptial agreements, and may be of questionable validity given the recent enforceability of postnuptial agreements, they do raise the issue of the enforceability of any agreement entered into between the spouses and whether those agreements should be treated as contracts—something ignored in the five iconic cases and the other IVF cases reviewed herein.

As to why donative or gratuitous promises are unenforceable and how that should impact the enforceability of IVF agreements when both parties are alive, divorcing and disagree about what should be done with the embryonic material upon dissolution, I start not with a search for consideration, which I believe is chimerical and tautological, but with a focus on the three most prevalent reasons why commentators believe gratuitous promises should not be enforced. To wit: 1) these promises are unimportant from a societal perspective in that they do not create anything of value (these sterile transactions are redistributive rather than productive or wealth maximizing); 2) it is inefficient for courts to enforce gratuitous

200. See, e.g., In Re Mikolajewski, 83 A.2d 750, 752 (Del. Super. Ct. 1951) (finding “that the right of a wife and her husband to contract with each other is not expressly granted in [the Delaware Married Women’s Act]; that, therefore, the common-law disability remains as to contracts between husband and wife; and that, accordingly, such contracts are not enforceable at law”); VT. STAT. ANN. tit. 15 §61 (1989) (excludes wife from contracting with husband, although it allows her to form a partnership with him).


202. See, e.g., Romeo v. Romeo, 418 A.2d 258, 302-03 (1980) (finding that although contracts between husband and wife are void and unenforceable at common law they are enforceable in equity to the extent that they are fair and just).


204. See Sean Hannon Williams, Postnuptial Agreements, 2007 WIS. L. REV. 827 (arguing that postnuptial agreements, like prenuptial agreements, should be enforceable if they meet certain process requirements).

205. See supra note 13 and accompanying text.

206. This thesis was most famously asserted by Lon Fuller in his article Consideration and Form, supra note 1, at 815 (“While an exchange of goods is a transaction which conduces to the production of wealth and the division of labor, a gift is, in Bufnoir’s words, a ‘sterile transmission.’”) (quoting CLAUDE BUFNOIR, PROPRIÉTÉ ET CONTRAT 487 (2d ed. 1924)).
promises given the subject of much donative promises and the error costs that could be created by judicial enforcement;207 and 3) these promises are too important to be enforced by societal sanction (the promises lose value if they are viewed and treated as contracts), that is, certain promises are by their nature only valuable and valid if they are not enforceable by the courts or some third party.208

Probably the least persuasive rationale for the unenforceability of gratuitous or donative promises is the notion or theory that this class of promises is sterile or unimportant from a societal perspective because they

also Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 YALE L. J. 1261, 1265-66 (1980) ("A nonreciprocal promise, on the other hand, is frequently labeled as a 'sterile transaction,' which does not facility the movement of resources to more valued uses.") (citation omitted).

207. Promises should not be enforced where the enforcement cost—to the extent not borne by the promisor—exceeds the gain from enforcement . . . . Another category of enforcement costs that are not fully internalized consists of the costs of legal error. Here the focus is not on the promisor but on the mistaken or dishonest “promisee” who imposes on his “promisor” the costs of defending a groundless suit, at the same time incurring litigation costs of his own which have no social value either . . . . Where the utility of promises being exchanged is small, the gains from legal enforcement are likely to be swamped by the costs of enforcement. The law recognizes this and refuses to enforce trivial social promises, especially within the family—where an additional factor, pointing in the same direction, is the existence of an inexpensive alternative to legal enforcement: refusal to engage in promissory transactions in the future . . . . Perhaps, then, the real reason for the law’s generally not enforcing gratuitous promises is not a belief, which would be economically unsound, that there is a difference in kind between the gratuitous and the bargained-for promise, but an empirical hunch that gratuitous promises tend both to involve small stakes and to made in family settings where there are economically superior alternatives to legal enforcement.


208. The option of nonperformance also imposes costs on the promisor in two situations. The first case is when the promisor exhibits some welfare interdependence with the promisee; that is, he is to some extent altruistic and cares about costs incurred by the promisee. Then, the detrimental reliance costs imposed by nonperformance become, to some degree, costs to the promisor himself. Intrafamilial promises and promises between close friends are most likely to exemplify this phenomenon. In addition, and closely related, guilt may accompany the promisor’s imposition of harmful results on others. In any event, this class of breach-related costs, which arise out of an altruistic or ethical sense, may be termed “self-sanctions.”

The second extra-legal sanction arises when nonperformance would produce some post-breach reaction, either from the promisee or others, that is costly to the promisor. The resulting costs may range from hostile, retributive behavior to a mere loss of others’ esteem to foreclosure of future beneficial dealings.

What are the effects of these extra-legal sanctions for breaking promises? To the extent that such sanctions are effective, their prospect acts as a “cost” of promising and deters such promises that are worth less to the promisor than the prospective cost. Thus, extra-legal sanctions are a supplement to, or substitute for, legal sanctions.

Goetz & Scott, supra note 187, at 1272 (citations omitted).
simply redistribute assets instead of creating same. This rationale is both over and under inclusive in that many promises—contracts—that are enforced have this same attribute in that they simply redistribute assets and many donative or gratuitous promises that are deemed unenforceable are wealth producing or enhancing, instead of simply redistributive. To determine whether the gratuitous or donative promise is redistributive rather than wealth producing, each promise would have to be analyzed and classified. Instead, all donative and gratuitous promises are deemed unenforceable. Perhaps more importantly, even if it is assumed that redistributive promises can be differentiated from wealth producing donative and gratuitous promises, it still begs the question of why redistributive promises are not worthy of enforceability. Redistribution may serve a laudable goal. For example, transferring wealth from one generation to the next is normally deemed to be a laudable goal.

More directly to the point, society already enforces certain redistributive promises when consideration is clearly lacking. Thus far I have made no distinction between gratuitous promises which are not completed for which enforcement is sought—so-called promises to give in the future, the legendary mere nudum pactum which is unenforceable for lack of consideration at common law, and completed gifts in which the donor intends to give, effectuates a valid delivery and the gift is accepted.209 The latter is a valid and enforceable transaction which cannot be undone by the donor’s later change of mind. Once the gift is accomplished, the transaction has legal validity. The former, the mere nudum pactum, can be vitiated by a change in the donor’s mind.210

What separates the mere nudum pactum (unenforceable) from the completed gift (enforceable)? Traditionalists contend that the completed gift differs from the mere nudum pactum because the completed gift satisfies the ritualistic, evidentiary, corroborative and channeling functions necessary to satisfy the requirements for a valid gift.211 By focusing on the wrench of delivery and the physical transfer of whatever is given from the donor to the donee, the courts validate these transactions as giving effect to the donor’s intent. The weakness of this approach is obvious. One can have intent to transfer without completing a delivery. One can also satisfy the evidentiary, corroborative and channeling functions without making a completed gift (see wills below) once the channeling function is defined. Finally, certain gifts are valid even when there is no present delivery of an

210. BLACK’S LAW DICTIONARY 1171 (9th ed. 2009).
211. Ashbel & Tilson, supra note 209, at 16.
item as when there is a present delivery of a future interest. 212 There is no wrench of delivery and why should there be? With respect to most executory contracts, performance takes place in the future. These contracts, some oral, most in writing are enforceable because we choose to enforce them. There may be less evidence, less ritual, less corroboration but they are deemed enforceable because society chooses to enforce them. It is a policy decision, nothing more, nothing less that separates enforceable from unenforceable promises.

Wills, for example, are revocable by definition and represent, at base, a promise to give assets in the future, upon the death of the testator. 213 Yet, these promises are enforceable even though they are by definition redistributive future promises lacking in consideration that are revocable at the whim of the testator by act (revocation) or by a writing (execution of a subsequent will expressly revoking prior will or revoking same by inconsistency 214). What makes these future promises enforceable is again policy. Nothing differentiates a grantor's intent when she uses a written letter expressing the desire to leave property to her daughter upon her death (unenforceable unless executed with testamentary intent and the testamentary formalities) and a holographic will leaving the same property to her daughter (enforceable in about half the states). 215

Why are transfers via a validly executed holographic (handwritten) will enforceable and the transfer by the hypothetical letter not? Once again, it is a matter of policy, not of evidence, intent, ritual or form. These attributes are secondary to societal norms that attempt to demarcate certain transactions (between strangers—valid with consideration 216) and others (between family members or those with a pre-existing relationship—invalid lacking consideration) for reasons having to do with the relationship

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212. See, e.g., Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986) (finding that letters from father to son referring to gift were sufficient for delivery, even where the father reserved a life estate in the property).

213. See Johnson, supra note 1, at n.121.


215. In those states that do not allow holographic wills, that is wills that are entirely in the handwriting of the testator but lacking any attestation or witnesses, the letter can be witnessed by two or more individuals, thus satisfying the evidentiary and channeling function of the Statue of Wills but may not be valid if it is later decided that it lacks testamentary intent. The fact that it is witnessed by two or more individuals will normally suffice to establish that the scrivener has testamentary intent. See Katheleen R. Guzman, Intents and Purposes, 60 U. KAN. L. REV. 305, 313-14 & n.33 (2011).

216. Those parties who are brought together by the transaction versus those individuals whose relationship would exist or continue to exist even in the absence of the transaction. See supra note 6.
between the parties rather than the asset being transferred or how the asset is transferred.

The key and fundamental difference is the relationship between the parties. In other words, we should require something formalistic like consideration when the agreement is between strangers or those that have no long-term familial relationship. That formalistic requirement is necessary to demarcate agreements that should be enforced from those not by signifying to the parties to the transaction the seriousness of their commitment and agreement. Those same formalisms are not evident when family members or loved ones make promises because their preexisting relationship (their reputational credit, if you will) allows the promisee to verify the worth and value of the promise and respond accordingly.

What does this theory mean for IVF agreements? It should be obvious. It is hard to characterize the traditional IVF procedure as a “sterile transaction” (pun intended). However, the fact that the agreement looks to the production of life and not widgets indicates that this is not an economic transaction that should be commodified and treated as a bargain transaction. Quite the contrary, this most intimate biological transaction is one dependent on the mutual will of two parties who are uniting their respective reproductive products (gametes) to produce yet a third product. But this transaction is dependent on mutual will and mutual cooperation.

Moreover, consider the following hypothetical: let us assume that the parties have agreed to undergo the IVF procedure and the husband, per the terms of the agreement, has contributed his sperm for that purpose. The wife, however, on the eve of her much more invasive and difficult procedure, opts not to proceed and refuses to undergo the egg extraction. Would a court, in the absence of a divorce or separation, order the wife to specifically perform her agreement to provide ovum for the IVF procedure? I think not for good and valid reasons.

Any harm occasioned to the husband by the wife’s refusal to proceed in this hypothetical will result in an adjustment of their relationship but would not be remediable by a damage or any other action on the part of the court. Can you imagine the costs that would be incurred if the wife was ordered by a court to undergo the procedure and she suffers irreparable

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217. See, e.g., Fuller, supra note 1, at 804.
218. Indeed, it would be insulting for a daughter to require her mother to place in writing the promise to purchase for her an automobile when she successfully completes law school. The daughter believes the mother will purchase the automobile because the mother has always kept her promise if possible. This issue is addressed in great detail in Johnson, supra note 1, at Part II.
harm or death as a result? Plus, how would the court supervise the procedure or determine how many eggs must be taken? Both the nature of the transaction and the error and adjudicative costs are valid reasons why the agreement would never be enforced against the wife's wishes in this hypothetical when the marriage is ongoing. Hence, it would be odd to support a rationale that an IVF agreement is enforceable upon divorce or separation, but not so if the parties remain married or continue their relationship as a couple.

Following traditional theories, then, one should enforce the IVF agreement when both parties are in contemporaneous and mutual agreement that the agreement IVF is valid and reflective of their wishes. In other words, where there is mutual agreement. That state of affair rarely or never exists when the partners are in the process of divorce or separating. The real issue is whether the parties can precommit and bind themselves to a resolution at Point A to a resolution at Point B when Point A represents a harmonious state of affairs and Point B is discordant. I think not given the costs that would be incurred as a result and for the policy reason that should not be forced to be an attributional parent against his or her will.\footnote{220}

Turning to the other reasons why gratuitous promises are unenforceable some contend correctly, I believe, that gratuitous or donative promises are unenforceable because they are too important to be enforced by courts or independent third parties. In other words, the value of the donative or gratuitous promise lies in completion of the gift or performance of the promise absent the enforcement sanction. The very value and benefit of the promise to the promisee is that it is performed even though it is legally unenforceable. If the promise is not performed, that lack of performance conveys useful information about the promisor and the relationship's value to the promisor of the promisee.\footnote{221}

What does that mean for IVF agreements? Again, it should be obvious. If a promise to give a gift is too important to warrant judicial enforcement, a promise to begat life or attempt to begat life would likewise be sacrosanct and immune from judicial involvement or meddling. The parties themselves must remain committed to their joint enterprise for each promise to have value to the other. And what is important is that the parties voluntarily choose to become parents as opposed to having it imposed on them. Their choice has value because it is their choice and theirs alone to make. Court intervention defeats the value of that choice.

\footnote{220}{See supra notes 99, 154 and accompanying text.}
\footnote{221}{See supra notes 216-17 and accompanying text.}
So far, the reference and discussion has been to donative and gratuitous promises without regard to the identity of the parties to that promise. In other words, in categorizing the law’s treatment and lack of enforceability of gratuitous promises no distinction has been made between promises made between a husband and wife and a mother and daughter. The law by and large treats them the same. The IVF cases, however, involve a more specialized relationship, the one typically between a husband and wife that itself is based on a contract. In most IVF cases, indeed all of the iconic cases, the IVF agreement or contract was preceded by another very important contract: the marital contract. Most importantly, the IVF agreement or contract cannot be properly analyzed unless the context within which that agreement is made is acknowledged and recognized.

IV. WHITHER TRADITIONAL CONTRACT LAW: IS CHANGED CONDITIONS, MUTUAL MISTAKE OR FRUSTRATION OF PURPOSE THE APPROPRIATE HEURISTIC TO ANALYZE THE IVF ISSUE?

As discussed above and addressed by some of the commentators, one key fact present in the IVF cases is the change of circumstances which has occurred after execution of the IVF agreement—that is, the divorce or dissolution of the marriage or partnership—and how that change of circumstances may impact the resolution of the issue that is the focal point of this article. Indeed, it is quite obvious and apparent that the parties who made the agreement, stylized by most courts as a “contract,” are not in the same place or, more to the point, same relationship that they were in at the time they made the agreement. In brief, at the time of making the agreement one would presume that the parties are in an amicable long-term cooperative relationship that is the epitome of a relational contract. Why else would the parties embark on a joint endeavor to accomplish one of the most important and life-altering decisions if they are not then on good and harmonious terms? It would make little sense to attempt to produce and raise a new life in such a deliberate, concerted and expensive manner (the IVF procedure) with an uncooperative or recalcitrant partner.

222. In most states, same sex couples cannot legally marry. When these couples enter into IVF agreements they should be treated similarly to married couples because it is only the legal bar of the state that denies them the same status rights as that provided to husband and wife. They are not allowed to wed or enter into the same ‘contract’ as opposite sex couples for, again, policy reasons. 1 KAREN MOULDING & NAT’L LAWYERS GUILD, LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMM., SEXUAL ORIENTATION AND THE LAW § 2:2.

223. See supra notes 186–87 and accompanying text.
However, fast-forward to the rather similar facts presented by the five iconic cases. At the time the court is called upon to adjudicate the issue, the relational contract that is the marriage is all but over and the parties are squabbling over the detritus of the relationship prior to going their separate ways. To put it another way, it would stretch credulity to assume that at this stage in their relationship the parties would voluntarily enter into the IVF procedure with the same partner. Quite the contrary, the person with whom the original IVF procedure was undertaken may now be the least attractive party to enter into a new IVF procedure given what has previously transpired between the parties. Hence, it is logical that changed circumstances may require a different treatment of the IVF agreement than that contemplated by the parties at the time of the execution of the agreement. In other words, a strong case can be made that the changed conditions should be used to negate any attempt to enforce the agreement.

However, there are some problems with arguing that the changed circumstances or conditions occasioned by divorce or dissolution should have any effect on whether a previously executed IVF agreement should be enforced at the end of a parties’ relationship. It seems facially inapposite since the IVF agreement expressly contemplates the condition that subsequently becomes reality. Consequently, the argument that there are changed circumstances or conditions which would vitiate or modify the agreement requires a more subtle argument.

But who can argue that these changed circumstances are unanticipated when they are ipso facto the rationale for the execution of the agreement detailing what should happen to the gametes when the parties divorce or separate? To put it more bluntly, the agreement or contract is executed to deal with the situation that occurs—the parties are in the process of obtaining a divorce in the typical situation. How, then, can a party later claim that since the anticipated event comes to pass, the very event that was anticipated should result in the negation of the agreement? In Contract Law, the doctrines of impossibility, impracticability and frustration of purpose have been developed to ascertain whether a change in circumstances should excuse a party’s performance required by a valid contract.

Turning to those doctrines and their appropriate use, it quickly becomes apparent that change of circumstances, even if anticipated by the agreement, should not be a factor in deciding whether an IVF agreement should be enforced upon divorce or dissolution. Indeed, a review of these

224. See supra Part I.A–F.
theories supports the rejection of the use of change of circumstances as a basis for not enforcing these agreements.

Change of circumstances doctrine has developed to address the issues that arise when parties to agreements make inaccurate predictions about future events. In effect, the changed circumstances doctrine law allows parties to escape their contractual obligations in limited situations when the circumstances later change in a manner that is totally inconsistent with their shared assumptions at the time they entered into the contract and the risk of that change in circumstances has not been allocated to one party or the other.225 Consequently, the unanticipated destruction of the subject matter of the contract, which prevented performance of the contract, provides the parties with the defense of impossibility.226 Related to impossibility, commercial impossibility evolved to cover situations not contemplated by the parties at the time of contracting which makes performance unduly harsh or burdensome, but not literally impossible.227 To employ the doctrines of impossibility or commercial impracticability the change of circumstances must be beyond the control of the parties and, as noted above, may not represent a risk assumed by the party seeking to excuse performance.228

The last doctrine subsumed under the rubric of "change of circumstances" is the doctrine of frustration of purpose. Frustration of purpose arises when the subsequent unanticipated and unallocated events (risk) do not make performance either impossible or unduly harsh or burdensome.229 Instead, the subsequent events merely "frustrate" the purpose of the contract. The prototypical case is Krell v. Henry,230 in which the prospective tenant agreed to a short term (one day) lease of premises to view the coronation parade of King Edward VII. As a result of the King's illness, the coronation was cancelled and the lessor sought to recover the


228. See N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 276 (7th Cir. 1986) (J. Posner held that a utility assumed the risk of increased coal prices when it agreed to fixed-price long-term contract that provided for an increase in coal prices pegged to an index that caused the prices to go up above the market price for coal and, as a result, the price at which electricity could be purchased from other suppliers to be provided to the utility's customers).


balance due under the contract. Given the fact that the apartment could be occupied although the coronation parade would not be view as a result, the court held that the contract was frustrated given that the parade was the basic foundation of the contract.

A quick and cursory review of the change of circumstances doctrine appears to support the view that it is inapplicable to the issues raised by IVF agreements as addressed in the five iconic cases. The key variable in all cases excusing performance via the use of the doctrine is a change of circumstances that is unanticipated and a risk that is not allocated to either party at the time the contract or agreement is executed. Clearly, the parties to the IVF agreement, by entering into the agreement to dispose of embryonic material, have anticipated the issue—the change of circumstances—their separation and subsequent divorce, that has occurred and have attempted to address the consequences occasioned by that change of circumstance. The basis for the view by some academics that the IVF agreement is a valid and enforceable contract is premised on the assertion that the parties have themselves pre-committed to a resolution of their dispute by entering into the IVF agreement.

Those that argue that a change of circumstances between the execution of the IVF agreement and its call for enforceability at the time of divorce or dissolution conflate the fact that there has been a change in circumstances—unity to severance—with the doctrine of change of circumstances that not only requires that there be a change of circumstances but that the change of circumstances be unforeseen or unanticipated. When the parties have expressly addressed the change that subsequently occurs it is difficult to contend that the circumstances are unforeseen or unanticipated. Quite the contrary, the parties have addressed the change explicitly via their agreement. Employing the doctrine of change of circumstances to vitiate the parties' agreement, which explicitly contemplates the change of circumstances that has occurred, seems counterfactual and intuitively wrong.

But what if the parties truly do not contemplate the change of circumstances even though it is ostensibly addressed in the agreement? I contend that is not the change in circumstances that causes some to argue that IVF agreements should not be enforced even though they explicitly contemplate and address the issue presented in the five iconic cases. Given that divorce occurs in approximately half of all marriages, it stands to

231. See supra notes 25–27 and accompanying text.
reason that parties will recognize at the portal of their relationship that there
is a non-trivial chance that the relationship will not be lifelong, but instead
may represent one of perhaps several marital assignations. And, they may
plan accordingly by executing antenuptial agreements (which are
enforceable) prior to marriage and other agreements during the marriage,
including IVF agreements. The key question, then, is why are some of
these agreements enforceable and some not? What differentiates IVF
agreements from the enforceable antenuptial agreements?

The answer is not change of circumstances, but the doctrines of mutual
mistake and frustration of purpose. Mutual mistake occurs when both
parties to an agreement enter into that agreement with a shared mistaken
factual assumption about the state of the current world.

Another important type of mistake in contract law consists of a mistaken
factual assumption about the present state of the the world outside of the
mind of the actor who holds the assumption . . . A mistaken factual
assumption may either be shared by both parties to the contract or held by
only one of the parties . . . Traditionally, shared mistaken factual
assumptions have been treated under the heading of mutual mistake,
meaning a mistake that is shared by both parties.233

If the parties to the contract share a mistaken factual assumption and
that fact is material to the agreement, the party adversely affected by the
mistaken factual assumption (in the five iconic cases the person seeking to
preclude the use of the embryonic material) will be granted relief—in this
case non-enforcement of the contract.234

I contend that the IVF cases present a classic case of mutual mistake.
The shared mistaken factual assumption is the belief that the parties will not
be one of the approximately fifty percent of couples who will be divorced.
There are two related reasons to support my assertion that the parties share
a mistaken factual assumption: common sense and psychology. The
common sense rationale is easy enough to explain by positing one question:
Which parties would rationally enter into an agreement to produce and rear
a child with the foreknowledge that the same couple will be divorced or
separated at the time they attempt to achieve contraception? Or, put it

(emphasis added).

234. By the adversely affected party, I mean a party who would suffer a loss if the contract was
enforced, because due to the mistake, either (1) the performance he is to receive is worth
much less than he agreed to pay and reasonably expected the performance would be worth, or
(2) his own performance would cost much more that the price he is to be paid and the costs
he reasonably expected to incur.

Id. at 1623 (emphasis added).
another way, who would agree to conceive a child with a divorced ex-spouse? Not very many would ever reach that agreement.

If one posits that the same two parties would not enter into the IVF agreement at the time its enforcement is sought upon dissolution or divorce, a question naturally arises regarding why the parties would enter into the agreement at the beginning of the IVF process? The answer is practical and rational. To begin with, IVF clinics require the parties to make a determination regarding the disposition of embryos given the change of marital circumstances that can occur following the execution of the initial agreement. The parties, when faced with the options provided by the agreement, cannot rationally be expected to correctly internalize the possibility of divorce and its effect on their agreement at the very time they are embarking upon the joint endeavor that represents the IVF process.

The counter argument to my assertion that mutual mistake should provide a basis for relief in the IVF setting is very similar to the argument that the change of circumstances doctrine should not be used by either party to the agreement since the agreement explicitly contemplates the changes that subsequently occur. In other words, where's the mistake? What is the shared mistaken factual assumption? Upon entering matrimony, statistically there is a fifty/fifty chance the parties will be divorced. In response to that non-trivial chance of dissolution, and given the import of the decision and its ramifications, the parties enter into an agreement that addresses and details what should occur should the anticipated event—divorce—occur. That is not a mistake; that is great and efficient planning not for the unexpected, but the expected or at least the possible.

Only if that were true. Although the parties may execute an agreement that details the disposition of embryonic material upon divorce or dissolution, that agreement is chimerical because at the time of execution the parties do not believe they will be one of the approximately fifty percent of couples who divorce. They suffer from a form of cognitive dissonance, which is quite rational given their mindset at the time they execute the IVF agreement. Moreover, this cognitive dissonance is not unique to married couples that are about to embark upon an IVF procedure.

Research reveals that American couples greatly overstate their own odds of sustaining marital unity—what is called a bounded-rationality objection. In one recent study, all survey respondents rejected the

235. See supra note 231 and accompanying text.

236. The second objection, a bounded-rationality objection, focuses on cognitive psychology's finding that individuals tend to underestimate the likelihood of negative future events, which is called overoptimism bias... Overoptimism bias leads those applying for marriage licenses to underestimate the likelihood that they themselves will divorce, even when they
possibility of their own divorce.\textsuperscript{237} In another study, over 80\% expressed a belief that they would remain married to the same person for their entire life.\textsuperscript{238} At the time that the couple is most united and committed to their relationship (committed enough to spend several thousands of dollars and to undergo emotionally and physically painful procedures that expose both their biological imperfections and their expectations for an enhanced future) it stands to reason that the last thing the parties would believe is that they would subsequently be divorced. (If divorce is a realistic eventuality for one or both parties at the time the parties begin their IVF procedures, why would the parties agree to conceive and raise a child?)

Moreover, the parties' decision to enter into the IVF agreement is itself the product of a type of cognitive impairment that biases their current state of marital bliss against the future marital discord that is fated to befall almost half of the couples who enter into wedded bliss.\textsuperscript{239} The emotional connection between the parties at the time of execution of the agreement and the emotional costs and benefits created by attributional parenthood require a more nuanced approach that recognizes that the benefits of the production of a child in this setting is far outweighed by the costs to the objecting party and the costs imposed on the non-consenting child.

Consequently, the rationale and doctrine of changed conditions should not be totally rejected by the courts as a basis for not enforcing an agreement that is characterized as a contract—this notwithstanding the fact that the contract specifically contemplates the condition that changed. A mutual mistake of fact causes the parties to believe that the changed conditions or circumstances will never occur to them. The confluence of bounded rationality and the over-optimism bias exhibited by the parties at

\begin{quote}
Cohen, supra note 136, at 1173 (emphasis added) (footnotes omitted).


239. Consider, for example, the now familiar anchoring phenomenon which suggests that the way choices are framed affects individuals' assessments of the gains and losses of exercising any particular option. Prospective marital partners may suffer from such a cognitive bias if the benefits of the marriage commitment are anchored to the prospect of a long and happy life together and not to the prospect of discord and strife—a prospect that may seem remote when the [marriage] bargain is struck.

Scott & Scott, supra note 35, at 1258-59 (footnote omitted).\end{quote}
the time they enter into the agreement—at Point A—work in this setting to convince the couple that the changed conditions that trigger the operation of the agreement at Point B will not occur. As a result, that clause in the agreement disposing of the embryos must be negated and regarded as a nullity based on mutual mistake of fact.

Finally, there is another reason why this alleged contract should not be enforced: Instead of supporting the argument that the IVF agreement should be enforced, the doctrine of frustration of purpose is the perfect antidote to the claim that any agreement entered into by the parties at Point A when they are at the onset of the IVF procedure should be enforced at Point B when the parties are at the brink or have actually separated. According to the Restatement Second, four requirements must be met in order to establish frustration as a defense to a claim for enforcement of a contract: 1) the object of one of the parties in entering into the contract must be frustrated by a supervening event; 2) the other party must also have contracted on the basis of the attainment of the common object; 3) the attainment of that common object was the basic assumption underlying the agreement; and 4) the frustration must be total. As interpreted by the courts, frustration of purpose can be used as a defense even when the event that frustrates the purpose of the contract is foreseen or anticipated by the parties at the time of contracting. Indeed, the frustrating event must only be unexpected, not unforeseen.

Mapping the doctrine of frustration of purpose on the IVF procedure and the dispute that is the focal point of this article, it provides a perfect defense to the claim that the contract or agreement should be enforced at Point B based on a valid agreement executed at Point A that expressly addresses a foreseen contingency that subsequently occurs. Clearly the purpose of the IVF agreement at the time of Point A is the creation (procreation) of new life and the subsequent rearing of that life to adulthood and beyond. What is contemplated at Point A is a joint enterprise in which both parties typically create genetic material and each party contemplates

240. See Krell v. Henry, (1903) 2 K.B. 740 (Eng.).
242. JEFF FERRIELL, UNDERSTANDING CONTRACTS 691 (2d ed. 2009); see also supra note 40 and accompanying text.
243. The elements of frustration of purpose as an excuse are nearly identical to those for impracticability. Excuse is warranted only when the purpose of the contract has been frustrated because of the occurrence of an event the nonoccurrence of which was a basic assumption for making the contract. The frustrating event might have been foreseeable, or even foreseen, as long as its occurrence was unexpected.

Id.
acting in the parental role in raising the child. It is beyond cavil that the parties would not agree to create and raise a child at the time they are divorcing or divorced. And as discussed supra,\textsuperscript{244} even though the parties expressly reference the fact that they may divorce or separate in the agreement at Point A, their bounded rationality and over-optimism belie that fact.

Quite the contrary, the parties believe that the divorce or agreement that is addressed in the agreement is an event that will not occur to their relationship and the occurrence of that event, even though “foreseen” by the agreement, frustrates the underlying purpose of the IVF agreement which is the joint production and parenting of the life that is produced as a result. The basic purpose of the contract, having this couple or these two people produce and raise a child, is by definition frustrated if not destroyed when the parties are in the midst of a divorce proceeding that contemplates their leading separate lives once the divorce is finalized.

V. PROMISSORY ESTOPPEL: RELIANCE

The only valid basis for enforcing an agreement entered into at Point A for the future use of embryos upon the occurrence of death or divorce (separation) (at Point B) is to remedy the harm created by one party’s harmful and reasonable reliance on that agreement. In other words, the only valid basis for enforcing the IVF agreement later against one party’s current wishes not to be a genetic parent is based on the concept of promissory estoppel. Promissory estoppel, which was first developed by Samuel Williston in his treatise,\textsuperscript{245} has become ingrained in Contract Law to enforce a promise, and to provide a remedy, when there is no consideration. In effect, promissory estoppel serves as substitute for consideration.\textsuperscript{246} As used by the courts, and as formulated in Section 90 of the Restatement Second, if the promisor makes a promise that induces action or forbearance on the part of the promisee, and that action or forbearance is reasonable, the promise will be enforced and “[t]he remedy granted for breach may be limited as justice requires.”\textsuperscript{247}

And although scores of articles have been written about the creation, efficacy, use and scope of promissory estoppel,\textsuperscript{248} what is important to note

\begin{footnotesize}
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  \item \textsuperscript{244} See supra notes 234-38 and accompanying text.
  \item \textsuperscript{245} SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1920).
  \item \textsuperscript{246} JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 218 (6TH ED. 2009).
  \item \textsuperscript{247} RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
  \item \textsuperscript{248} See, e.g., Stanley D. Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343 (1969); Patrick Atiyah, Consideration and Estoppel: The Thawing of
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herein is that when the promisor—in this case the person who agrees to allow the use of embryos at Point B—makes that express promise that induces reasonable reliance on the part of the other party at Point A—for example, the party foregoes other opportunities with other parties to engage in an IVF procedure—the courts will enforce that promise notwithstanding the absence of a valid contract or an agreement supported by consideration given the harm created by the promisee’s reliance on the promise. This reliance-based argument is premised on the express notion that the parties have not entered into a valid and enforceable contract but an agreement that nevertheless justifiably calls for the court’s intervention and enforcement to prevent harm notwithstanding the absence of said contract.

As an expansion of the doctrine of equitable estoppel, it is quite telling to note that promissory estoppel first developed in cases involving unenforceable intra-family promises. A case in point, known to most first year law students, is Ricketts v. Scothorn, in which a grandfather gave his granddaughter a promissory note that obligated him to pay her a certain sum of money annually so that she would not have to continue working. As a result of the promise, which was not bargained for, the granddaughter quit her job and when the grandfather’s executor refused to honor the note after his death, the court enforced the note on the grounds of estoppel in pais.

Consequently, it is not surprising that the doctrine of promissory estoppel has been used—correctly—by courts in the intra-family situations involving IVF agreements where the promise can demonstrate reliance and harm. The two cases to date that have come to this conclusion are the Israeli case of Nachmani v. Nachmani and the recent Superior Court case of Reiber v. Reiss. In Nachmani II the Supreme Court of Israel reheard the case and reversed its prior decision that enforcing the former husband’s prior agreement (at Point A) to allow his soon to be ex-wife the use of frozen pre-embryos (at Point B) would violate his fundamental right not to become a parent. Instead, the court employed a balancing approach and held that the ex-wife’s reliance on the ex-husband’s representations, her lack of alternatives to achieve procreation, and the harm to the ex-wife in


249. PERILLO, supra note 246, at 222.

250. 77 N.W. 365, 365-66 (1898).

251. Id. at 367.


denying her the chance to become a biological parent outweighed the harm occasioned to the ex-husband in forcing him to become a parent against his wishes.\textsuperscript{254}

In \textit{Reiber v. Reiss}, the Superior Court of Pennsylvania employed a similar balancing approach and held that the ex-wife was entitled to use the embryos upon the couple’s divorce and against the soon to be ex-husband’s wishes when the IVF procedure was occasioned by the wife’s diagnosis of breast cancer and the wife deferred her cancer treatment for several months to undergo the IVF procedure. Due to the radiation necessitated by the breast cancer treatment, the wife was unable to conceive or produce any new ova for future IVF treatments. Noting that the parties had not signed any agreement, the court decided that the balancing approach was best suited to resolve the dispute.\textsuperscript{255} As a result, the court held that since the use of the pre-embryos was the wife’s only chance at becoming a genetic parent, her interest outweighed the husband’s interest to avoid unwanted procreation.\textsuperscript{256}

The doctrine of promissory estoppel has also been advocated in situations in which one party to the agreement dies prior to successful use of the genetic material and the surviving member of the IVF procedure seeks to use that material to achieve procreation.\textsuperscript{257} Given the death and resultant inability of the deceased partner to contribute new genetic material, courts are urged in this situation to allow the use of the material against the wishes of the executor of the deceased IVF participant or against the contention by the IVF facility that the material must be destroyed. Because there are to date no reported cases involving this exact situation, i.e., death of one progenitor then a dispute involving the use of that

\textsuperscript{254} Nachmani II is addressed in greater detail in Shapo, supra note 99, at 77-80.
\textsuperscript{255} Indeed, the court correctly decided that the informed consent form that the parties signed prior to undergoing the IVF procedure was not a contract that governed their rights.

The section of the informed consent regarding the duration of storage cannot be read as an agreement between Husband and Wife to destroy the pre-embryos at the end of three years; rather, it is an agreement between the two of them and RSI [the IVF facility] about the storage of pre-embryos . . . Because the parties never agreed to a disposition of the pre-embryos in the event of death or divorce, Husband’s contention that the trial court erred by not applying the three-year destruction provision is without merit.

\textit{Reber}, 42 A.3d at 1136.
\textsuperscript{256} \textit{Id.} at 1142.
\textsuperscript{257} See Coleman, supra note 141, at 113 (“When one of the parties is no longer able to indicate an opinion about the disposition of the embryos, whether because of death, disappearance, or loss of decision-making capacity, the law should respect the most recent expression of that person’s wishes.”).
progenitor’s contribution in a subsequent procedure, this state of affair is more hypothetical than real (possibly due to the fact that if this fact situation develops the decedent’s heirs and legal representatives are not likely to object to the continuation of the deceased DNA in new life produced by the IVF procedure).

Hence, the fact that IVF agreements are not contracts or enforceable agreements does not resolve all of the cases or issues raised by their execution and subsequent attempt to enforce same. As with other settings, parties can sometimes rely on the exception to enforceable contracts, promissory estoppel, as the basis to call upon the courts to provide a remedy when there is clearly no enforceable agreement.

CONCLUSION

The issues raised by the enforceability of IVF upon divorce or dissolution of the “contracting parties” is a vexing one. However, it is but one situation where Contract Law has been called upon to enforce agreements that implicate marriage, procreational autonomy and the creation or destruction of family or what is traditionally perceived as a family unit. In cases involving the enforceability of IVF agreements when the parties are divorcing, my proposed resolution—lack of enforceability for public policy reasons—intentionally creates a bilateral monopoly and gives each party to the IVF enterprise a veto power over the disposition of his or her genetic material. Employing this rationale will preclude the use of genetic material in almost all cases. Given the issues at stake, and the ramifications of the decision, I contend that a bilateral monopoly is pareto efficient to any of the other potential alternatives.258

Just as unanimity is required by the parties ex ante to begin the IVF procedure, unanimity of thought and practice is required ex post (following dissolution) to allow for use of the ova and sperm in an attempt to create new life. Although it is impossible to return the parties to the proceedings to their ex ante positions,259 requiring destruction of the embryos upon divorce or dissolution, unless there is mutual agreement to the contrary post-dissolution, returns the parties to the position that two rational

258. For a discussion of pareto efficiency, which occurs when it is impossible to change a situation so as to make at least one person better off without making any other person worse off (named after the Italian political scientist and economist Vilfredo Pareto), see, COOTER & ULEN, supra note 8, at 16 & n.1.

259. This occurs because of the costs incurred by the parties, the painful and serious surgical procedures employed on the wife to retrieve the eggs in the procedure, and the time devoted by the couple to the endeavor. All of this is addressed in great detail in the Five Iconic Cases that are addressed above. See supra Part I.A–F.
individuals would agree to absent any emotional investment in the process. Indeed, the only rational solution presented is destruction of the embryos when the two parties who once were joined together have gone their separate ways and can no longer act jointly to raise the child to which they both contributed genetic material.