

*Collaborative Law in Pennsylvania and the Frozen Embryo
Debate*

Christina L. Preville*

I. INTRODUCTION

It is becoming more common for couples in the United States to have children with the help of In-Vitro Fertilization (IVF). One such couple turned to IVF when the wife was diagnosed with breast cancer. Delaying cancer treatment, the couple underwent IVF and cultivated 13 embryos for future use.¹ After several months of aggressive cancer treatment, the wife recovered but was left unable to bear children naturally.² Two years later, the couple divorced.³ Faced with distributing the frozen embryos, the couple reached an impasse: grant the embryos to the wife so that she could try to have children or grant them to the husband for donation or destruction.⁴ This couple's legal battle over the frozen embryos eventually reached the Pennsylvania Superior Court in *Reber v. Reiss*.⁵

An issue of first impression, the Superior Court was faced with a common issue among state courts: how should frozen embryos, the products of assisted reproductive treatment, be distributed upon the divorce of the parents-to-be? The national debate regarding the legal status of embryos rages

* The author is a third-year student at the University of Pittsburgh School of Law. She would like to thank her family, friends and the staff of the Pittsburgh Journal of Environmental and Public Health for their support and guidance.

¹ *Reber v. Reiss*, 42 A.3d 1131, 1132 (Pa. Super. 2012).

² *Id.* at 1133.

³ *Id.*

⁴ *Id.* at 1134.

⁵ *Id.*

on, wavering from Louisiana's treatment of the embryos as a "biological human,"⁶ to Florida and California taking property-based contractual approaches.⁷ In addition to the implications to family law, the distribution of the embryos also creates unique implications for public health. Divorce, an already stressful and disruptive event for the American family,⁸ can be made more stressful by questions of ownership of frozen embryos. The future use of frozen embryos by parents who may wish to continue reproductive goals post-divorce are at stake in an already divisive and emotional process. This note will discuss the advantages of contract-based agreements to determine the distribution of frozen embryos upon divorce. Additionally, this note will make the argument that where contracts are unavailable, a special opportunity exists for the collaborative law process to take the place of the adversarial system in these disputes should contracts not be available.

II. INFERTILITY AND DIVORCE ARE PUBLIC HEALTH ISSUES

Infertility is not only a private medical struggle, but also a public health issue. According to the National Center for Health Statistics, "the general fertility rate declined to the lowest rate ever reported for the United States in

⁶ LA. REV. STAT. § 9:126 (2012). *See also* LA. REV. STAT. § 9:123 (2012) ("An in vitro fertilized human ovum exists as a juridical person").

⁷ *See generally* F.S.A. § 742.17 (West 2013) ("Disposition of eggs, sperm, or pre-embryos; rights of inheritance"); CAL. HEALTH & SAFETY CODE § 125315 (West 2013).

⁸ A number of studies have shown that divorce has its own public health concerns including a higher correlation of divorcees having chronic conditions, limited mobility, depression in later life and higher mortality rates. *See generally* Mary Elizabeth Hughes & Linda J. Waite, *Marital Biography and Health at Mid-life*, 50 J. HEALTH & SOC. BEHAVIOR 344 (2009); David A. Sbarra & Paul J. Nietert, *Divorce and Death: Forty Years of the Charleston Heart Study*, 20 PSYCHOL. SCI. 107 (2009).

2011."⁹ Prevention of infertility often includes public health concerns regarding the prevention and treatment of sexually transmitted diseases, obesity and weight-gain, exercise, and use of tobacco products and alcohol.¹⁰ Furthermore, "environmental agents, delayed childbearing . . . and certain diseases" contribute to the presence of infertility.¹¹ A system of prevention and treatment has grown so great that now not only is infertility a public health issue, but the potentially adverse effects of aggressive treatment are also public health concerns.¹² While many people will seek to prevent infertility, many will engage in assisted reproductive treatment, or ART, which has public health consequences of its own.¹³ As the cost of treatment is borne individually, there are also disparate economic impacts of treatment on women and minorities; this is another concern for public health officials who administer public health programs.¹⁴ Additionally, preventing adverse effects

⁹ Brady E. Hamilton, Joyce A. Martin & Stephanie J. Ventura, *Births: Preliminary Data for 2011*, 61 NAT'L VITAL STAT. REP., no. 5, 2012 at 1, available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_05.pdf.

¹⁰ Anne T. Fidler & Judith Bernstein, *Infertility: From a Personal to a Public Health Problem*, 114 PUB. HEALTH REP. 495, 498–500 (1999).

¹¹ Maurizio Macaluso et al., *A Public Health Focus on Infertility Prevention, Detection, and Management*, 93 FERTILITY & STERILITY 16.e1 (2010).

¹² *Id.* at 16.e3–16.e4.

¹³ At least one study has shown that not only do couples undergoing IVF and other forms of ART suffer from anxiety and emotional distress at higher rates than the general population, but also from a lower health-related quality of life, particularly in women with lower levels of education. Batool Rashidi, Ali Montazeri, Fatemeh Ramezanzadeh, Mamak Shariat, Nasrin Abedinia & Mahnaz Ashrafi, *Health-related Quality of Life in Infertile Couples Receiving IVF or ICSI Treatment*, 8:186 BMC HEALTH SERVICES RES. (2008), available at <http://www.biomedcentral.com/content/pdf/1472-6963-8-186.pdf>.

¹⁴ Macaluso et al., *supra* note 11, at 16.e1.

resulting from infertility treatment may require the "implementation of tertiary prevention programs."¹⁵

Delaying childbirth also has implications for infertility rates.¹⁶ The current economic recession has led couples in the United States to delay childbearing.¹⁷ Birth rates in 2011 were low in the United States—the preliminary number of births was 1% less than in 2010.¹⁸ This may be indicative of a trend toward lower birth rate overall.¹⁹ While some would argue that limiting our population has benefits for our society, there has been no conclusive study showing that families want children less.²⁰ Economic circumstances and infertility come together to create a situation in which couples are delaying childbirth. The majority of our society has recognized that building a family is the wish of many couples.²¹ The likelihood of a successful pregnancy in later years has improved over time, but risks persist and couples will continue to turn to assisted fertility treatment to seek a family.

While infertility has negative public health effects, divorce has also been strongly linked with declining health. A 2009 study examining the effects of

¹⁵ *Id.* at 16.e3.

¹⁶ *Id.* at 5.e1.

¹⁷ Josh Sanburn, *Why the Falling U.S. Birthrates Are So Troubling*, TIME (Oct. 4, 2012), <http://business.time.com/2012/10/04/why-the-falling-u-s-birth-rates-are-so-troubling/>.

¹⁸ Hamilton, Martin & Ventura, *supra* note 9, at 3.

¹⁹ Sanburn, *supra* note 17.

²⁰ *Id.*

²¹ *See* *Bragdon v. Abbot*, 524 U.S. 624, 638–39 (1998), for a discussion of reproduction as a "major life activity" under the Americans with Disabilities Act.

changing marital status on four aspects of health,²² including chronic illness and depressive mood, revealed that those individuals in the study who had been previously married were in significantly worse health than those individuals who were currently married.²³ Previously married individuals experienced 20% more chronic conditions and higher ratings of depressive symptoms than those who were married.²⁴ In addition, stress resulting from divorce has lasting effects on their families. Restructuring of the family unit, changes to the financial responsibilities of each spouse, and stress resulting from separation may negatively impact children as well as the divorced spouses.²⁵

Advances in reproductive treatment have produced a number of treatment options under the ART umbrella, including In-Vitro Fertilization with Embryo Transfer ("IVF").²⁶ The Society for Assisted Reproductive Treatment found that 99% of ART procedures are IVF.²⁷ The popularity of IVF procedures stems from their overall effectiveness, low cost, and their availability for women with damaged fallopian tubes.²⁸ The procedure is quite simple: the woman takes rounds of fertility drugs to promote the release of multiple eggs. Thereafter, the eggs are removed in an outpatient

²² The Four Aspects of Health include chronic conditions, mobility limitations, self-rated health, and depressive symptoms.

²³ Hughes & Waite, *supra* note 8, at 352, available at <http://hsb.sagepub.com/content/50/3/344.full.pdf+html>.

²⁴ *Id.*

²⁵ Lesia Oesterreich, *Divorce Matters: Coping with Stress and Change*, NATIONAL NETWORK FOR CHILDCARE, <http://www.nncc.org/parent/copestress.html> (last visited Feb. 2, 2013).

²⁶ *Assisted Reproductive Technologies*, SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGY, http://www.sart.org/SART_Assisted_Reproductive_Technologies (last visited Oct. 29, 2012).

²⁷ *Id.*

²⁸ *Id.*

procedure—a needle inserted trans-vaginally, with ultrasound support, removes the eggs. These eggs are placed with the father's sperm in a petri dish and fertilization occurs.²⁹ Because a number of eggs can be collected at one time and fertilized, patients may decide to freeze a number of embryos not immediately used after collection to facilitate treatment later on and reduce the number of invasive procedures. The treatment of these frozen

²⁹ *In-Vitro Fertilization Embryo-Transfer Explained*, FERTILITY AUTHORITY, <http://www.fertilityauthority.com/treatment/vitro-fertilization-ivf> (last visited Oct. 29, 2012); *see also* *Kass v. Kass*, 696 N.E.2d. 174, 175 (Ct. App. N.Y. 1998). The Court describes the process in more detail,

Typically, the IVF procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion—or pre-zygote—divides until it reaches the four- to eight-cell stage, after which several pre-zygotes are transferred to the woman's uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate and develop into a fetus. As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use. Cryopreservation serves to reduce both medical and physical costs because eggs do not have to be retrieved with each attempted implantation, and delay may actually improve the chances of pregnancy.

Id. at 175.

embryos³⁰ in divorce of the couple that created them is the subject of much dispute in Pennsylvania and throughout the Nation.³¹

III. PRE-EMBRYO CONTRACTS ARE NOT ENOUGH

There are many advantages to using contractual agreements before beginning ART treatments, but this particular use of contracts is not yet widespread and does not fully encompass changing attitudes and circumstances. The contractual model has been adopted by a number of courts addressing the distribution of frozen embryos. The case of *Davis v. Davis* first established that agreements between progenitors³² are valid, binding and enforceable when disagreements arise between parties.³³ In *Davis*, the Supreme Court of Tennessee examined a dispute between a husband and wife regarding the disposition of their frozen embryos upon divorce. At the trial court level, Mary Davis wished to implant the embryos and bear more children. Junior Davis wished to leave the embryos in their frozen state until he could make a decision about becoming a father outside of

³⁰ The fertilized eggs at this stage are called a variety of names including "pre-embryo" in frozen embryo debate case law, the Centers for Disease Control (CDC) uses the term "embryo" to denote a fertilized egg, *Infertility FAQs*, CDC, <http://www.cdc.gov/reproductivehealth/Infertility/Index.htm> (last visited Dec. 19, 2013). This note will refer to fertilized eggs frozen for future use as "embryos."

³¹ See generally *Reber*, 42 A.3d 1131 (Pa. Super. Ct. 2012); Marisa G. Zizzi, *The Pre-embryo Prenup: A Proposed Pennsylvania Statute Adopting Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391 (2012); John Springer, *Divorced Couple Battles over Frozen Embryos*, TODAY NEWS (May 31, 2007), http://today.msnbc.msn.com/id/18958324/ns/today-today_news/t/divorced-couple-battles-over-frozen-embryos/#.UI17-xGk6Xok.

³² Progenitor—an ancestor in the direct line. MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/progenitor>. In frozen embryo disputes, a "progenitor" refers to a party who has donated biological material to create an embryo.

³³ *Davis v. Davis*, 824 S.W.2d 588 (Tenn. 1992).

marriage.³⁴ The trial court found in favor of Mary Davis, but the Court of Appeals reversed deciding that Junior Davis had a "constitutionally protected right not to beget a child where no pregnancy has taken place."³⁵ On appeal, the circumstances between the couple had changed as Mary Davis no longer wished to implant the embryos, but instead wanted to donate the embryos to another couple. Junior Davis wished to have the embryos destroyed.³⁶ The Supreme Court of Tennessee did not view embryos as "persons" or "property," and found that where the couples lacked a contract providing for some kind of procedure for disposition of the embryos upon divorce, the interests of both parties must be balanced.³⁷ Applying the balancing test, the Court affirmed the decision of the court of appeal reasoning that Junior Davis' interest in avoiding parenthood and fathering a child that would not live with both parents outweighed Mary Davis' interest in donating the pre-embryos to another couple.³⁸

In *Davis*, the Court concluded that where an agreement regarding disposition has been made in the event of any contingencies such as death, divorce, and financial problems, the agreement "should be presumed valid and should be enforced as between the progenitors."³⁹ Additionally, where changed circumstances arise, modifications to the agreement may clarify the wishes of the parties. But, if no modifications are made, the original agreement should be enforced.⁴⁰ Many other courts have relied upon the ruling in *Davis* with regard to the enforceability of contracts governing the disposition of embryos.

³⁴ *Id.* at 589.

³⁵ *Id.* (citing *Davis v. Davis*, 1990 WL 130807, at 2 (Tenn. Ct. App. 1990)).

³⁶ *Id.* at 590.

³⁷ *Id.* at 597 and 603.

³⁸ *Davis*, 824 S.W.2d at 604.

³⁹ *Id.* at 597.

⁴⁰ *Id.*

In 1998, the Court of Appeals in New York also addressed the issue of contracts governing the distribution of embryos,⁴¹ finding that where an agreement specifically discussed the distribution of frozen embryos, a contractual interpretation of ambiguous terms in a consent form and written disposition agreement was appropriate.⁴² In *Kass v. Kass*, a couple entered into an IVF contract when the wife began experiencing infertility and an inability to bear children naturally. One of the four contracts signed by the parties before beginning IVF, titled "INFORMED CONSENT FORM No.2—ADDENDUM NO. 2 1: CRYOPRESERVATION—STATEMENT OF DISPOSITION" stated,

In the event that we no longer wish to initiate a pregnancy *or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes*, we now indicate our desire for the disposition of our pre-zygotes 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.⁴³

The court of appeals adopted the view of the Supreme Court of Tennessee that written agreements between progenitors are valid and should be enforced.⁴⁴ The court of appeals engaged in contract interpretation, finding the parties clearly expressed their intent in the contracts, and affirmed the decision of the trial court to enforce the agreement.⁴⁵ The Supreme Court of Washington also addressed the merits of contract interpretation in *Litowitz v. Litowitz*. The Court found that where one spouse is a progenitor of the embryo and one is not, a valid contract may establish ownership rights in the

⁴¹ *Kass v. Kass*, 696 N.E.2d 174, 174 (Ct. App. N.Y. 1998).

⁴² *Id.* at 180.

⁴³ *Id.* at 176–77 (emphasis added).

⁴⁴ *Id.* at 180.

⁴⁵ *Id.* at 182.

other spouse, and not the egg donor, in the event of disposition upon divorce.⁴⁶

While contract interpretation provides a clear test for determining the distribution of frozen embryos post-divorce, some courts have rejected the enforceability of certain consent form contract provisions.⁴⁷ For example, the Supreme Court of Massachusetts found that IVF Clinic consent forms, the most common form of contract used by parties in embryo distribution cases, were unenforceable when they failed to indicate that they were binding on the parties and where couples had no intent to be bound by the contract.⁴⁸ Even though contracts can in some situations be enforceable and provide a clear solution for distribution, problems remain. Generally, consent forms vary between IVF providers, and there is the possibility that couples are not seeking legal advice when signing these agreements. Further, the uncomfortable nature of discussing a potential, future divorce during the stress of choosing to undergo IVF, may prevent contract formation in the first place.

Although IVF consent forms serve as medical informed consent, it has been argued that making a contractual decision regarding disposition before the major life events that follow IVF treatment (pregnancy, pregnancy loss, interpersonal events, and separation) amounts to uninformed consent.⁴⁹ During IVF, parties generally do not think about the effect of major life

⁴⁶ Litowitz v. Litowitz, 48 P.3d 261, 269 (Wash. 2002).

⁴⁷ Contract interpretation as well as alternative dispute resolution may avoid the necessity of determining legal status of frozen embryos. *See Davis*, 824 S.W.2d at 774 (declining to define the legal status of frozen embryos); *See generally* Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 400 (2005).

⁴⁸ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000).

⁴⁹ Brandon J. Bankowski, Ann D. Lyerly, Ruth R. Faden & Edward E. Wallach, *The Social Implications of Embryo Cryopreservation*, 84 FERTILITY & STERILITY 823, 827–28 (2005).

events that could lead to divorce.⁵⁰ One study has shown that as many as 71% of couples change their preferences for disposition from their initial preferences before treatment.⁵¹ In *In re Marriage of Witten*, the Supreme Court of Iowa discussed and adopted the contemporaneous mutual consent model, an alternative to the contractual model and balancing interests test.⁵² In *Witten*, the parties signed an informed consent document providing that release or disposition of the embryos would only take place with the signed approval of both parties.⁵³ The Wittens could not come to an agreement regarding the treatment of the embryos.⁵⁴ The district court enforced the contract provision and the wife appealed.⁵⁵ After discussing the merits of the three approaches (contract, contemporaneous mutual consent, and balancing test), the court declined to enforce the contract. Instead the Court followed the contemporaneous mutual consent model to reach the same conclusion as the District Court, and enjoined the parties from transferring, releasing, or using the frozen embryos.⁵⁶ The contemporaneous mutual consent model is based on the concept that, in decisions where people tend to act more on feeling rather than rational logic, it may be impossible to make an informed decision to "relinquish a right in advance of the time the right is to be exercised."⁵⁷ Under this approach, if a couple cannot come to an agreement on the distribution of their frozen embryos, nothing will be done until an agreement

⁵⁰ *Id.*

⁵¹ Susan C. Klock, Sandra Sheinin & Ralph R. Kazer, *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69, 69–70 (2001).

⁵² *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁵³ *Id.* at 772–73.

⁵⁴ *Id.*

⁵⁵ *Id.* at 773.

⁵⁶ *Id.* at 783.

⁵⁷ *Id.* at 777 (citing Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 48 MINN. L. REV. 55, 98 (1999)).

is reached, and the embryos will remain frozen until they are no longer viable or storage is no longer available.⁵⁸

Even though the court in *Witten* declined to enforce the terms of the contract and adopted the contemporaneous mutual consent model, some issues still arise from the holding. With its application, it becomes clear that the parties may be stuck in a limbo without reaching a mutual decision for the foreseeable future. This can be particularly difficult for parties without children who intend to divorce quickly and move on. Additionally, if an agreement cannot be reached before storage becomes unavailable or the embryos become unviable there will be pressure to make a decision and parties may suffer as a result of having to make a hasty decision. While judgments in adversarial divorce situations can include appreciation of the concerns about choice, changed circumstances, and binding parties when their attitudes have changed, collaborative law may provide answers that not only promote justice but also mediate public health policy concerns in these disputes.

IV. COLLABORATIVE LAW'S PLACE FOLLOWING *REBER V. REISS*

Collaborative law is a form of alternative dispute resolution that focuses on allowing each party to feel empowered in the divorce process. There is a unique opportunity for using collaborative law in frozen embryo disputes in divorce, rather than other forms of ADR or contract resolution. First, this section will proceed with an analysis of property distribution under Pennsylvania law and an explanation of related alternative dispute resolution methods. Second, this section will present an argument for the use of collaborative law in frozen embryo disputes.

⁵⁸ *Id.* at 782.

A. DISTRIBUTION OF MARITAL PROPERTY IN PENNSYLVANIA

With some exceptions, Pennsylvania law defines marital property as all property acquired by either party during the marriage.⁵⁹ Frozen embryos

⁵⁹ Marital Property is defined as,

... "marital property" means all property acquired by either party during the marriage and the increase in value of any nonmarital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1). However, marital property does not include:

(1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property.

(4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.

(6) Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229), as amended, except for those benefits received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans' compensation.

(7) Property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation.

acquired during marriage have been determined to be marital property.⁶⁰ Pennsylvania, like many states, takes the equitable distribution approach to distributing marital property upon divorce.⁶¹ Under this regime, certain considerations are taken to balance the interests of the parties in dividing marital property. Considerations include age, health, income, liabilities and needs of the parties,⁶² economic circumstances of each party,⁶³ and whether the party retains custody of any dependent minor children.⁶⁴ However, where frozen embryos are the property to be divided, there are additional considerations including infertility of one or both spouses, potential opportunities to have new children, and remarriage of the divorced spouses. With the decision in *Reber v. Reiss*, the Superior Court of Pennsylvania incorporated the balancing test approach adopted in *Davis*, concluding that the infertility and interest in conceiving of defendant Reiss outweighed the interest of Reber to not procreate.⁶⁵ While the trial court before *Reber v. Reiss* touched on public health concerns, including future child support and custody should Reiss die, this case did not eliminate public health concerns for distribution. The adversarial divorce continues to promote stress, ill will, and clouded judgment regarding important decisions such as embryo distribution.

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

23 PA. CONS. STAT. § 3501(a) (2005).

⁶⁰ *Reber*, 42 A.3d at 1133 (where both parties and trial court agreed that the pre-embryos are marital property subject to equitable distribution).

⁶¹ 23 PA. CONS. STAT. § 3502 (2005).

⁶² 23 PA. CONS. STAT. § 3502(a)(3) (2005).

⁶³ 23 PA. CONS. STAT. § 3502(a)(10) (2005).

⁶⁴ 23 PA. CONS. STAT. § 3502(a)(11) (2005).

⁶⁵ *Reber*, 42 A.3d at 1142.

B. ISSUES WITH THE ADVERSARIAL SYSTEM IN DIVORCE

As previously mentioned, the adversarial system fails to address the greater social implications and emotional stress that a dispute over the disposition of frozen embryos raises. As of 2005, as many as 88% of frozen embryos were stored, awaiting the future use intended by the parents who created them.⁶⁶ When divorce arises, tensions are high and often the adversarial format of divorce proceedings exacerbates the stresses that come from leaving a long term, significant marital relationship. Divorces are generally matters of public record, so the parties feel a lack of privacy in what has always been considered a personal matter.⁶⁷ Lawyers may oversimplify the matter into legal issues, where the clients experience a more complicated dispute based on emotional reactions and marital history. Furthermore, the monetary cost of divorce, including attorney fees, is enough to set both parties on edge.⁶⁸

In her 2005 law review article, *Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, Angela Upchurch argues that the adversarial court system in past decisions has focused on the biological parenthood consequences of distributing frozen embryos, rather than looking at the actual intentions and motivations of the progenitors.⁶⁹ This reliance of the court in examining the biological relationship between the parents and the potential life completely disregards the parties' actual beliefs, motives, and intentions when determining what to do with their frozen embryos.⁷⁰ In her article, Upchurch offers alternative dispute resolution (ADR) as a solution to the failings of the adversarial system. Often the court in embryo distribution cases fails to "pinpoint, after

⁶⁶ Bankowski, Lyerly, Faden & Wallach, *supra* note 49, at 825.

⁶⁷ PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 1 (2d ed. 2001).

⁶⁸ *Id.*

⁶⁹ Upchurch, *supra* note 47, at 422–24.

⁷⁰ *Id.* at 424.

the relationship between the progenitors has deteriorated, the basis for each progenitor's decision to undergo IVF."⁷¹ The court, taking a narrow approach by examining the dispute through the lens of property law, may not provide the couples with as positive a determination as that which can be found in ADR.⁷² Upchurch points out that a form of ADR could more successfully help the couple reach a decision by examining a broader arsenal of interests such as religious beliefs regarding the status of the embryo and any hierarchy of interests the couple would like to establish.⁷³ In addition, Pauline Tesler, collaborative divorce lawyer and author, argues that depending on a judge or lawyer to have the "special capacity to resolve the most difficult, the most complex of all family problems" perhaps assumes too much of our adversarial system.⁷⁴ With divorce becoming more prevalent, alternative dispute resolution has been a helpful advancement in family law to ease couples into the divorce transition.

As a substitute to the adversarial approach to family law disputes, many couples turn to various forms of ADR. ADR places the decision making power with the parties themselves, not a judge, and includes third parties that are not judges who may provide support in the process.⁷⁵ Parties who engaged in alternative dispute resolution experienced more satisfaction, were more willing to comply with the agreement, and had an overall more pleasant experience than those engaged in adversarial litigation.⁷⁶

⁷¹ *Id.* at 433–34.

⁷² *See id.* at 434.

⁷³ *Id.*

⁷⁴ TESLER, *supra* note 67, at 2 (citing JANET JOHNSON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD* 223 (1998)).

⁷⁵ Janet A. Flaccus, *Mediation of Divorce Disputes—Is This the Solution?*, 2009 ARK. L. NOTES 79, 79 (2009).

⁷⁶ *Id.* at 80.

C. MEDIATION AND COLLABORATIVE LAW, GENERALLY

Mediation is a popular form of ADR often utilized in family law settings, and is generally characterized as allowing, "parties [to] participate in a negotiation using a neutral third party as an aid for communicating their offers."⁷⁷ The disputing parties, along with legal counsel (if desired), work with a third party to come to a signed, written agreement.⁷⁸ The process can take as little time as one day or as long as a number of weeks.⁷⁹ The advantage of mediation is the flexibility the clients have regarding the cost and the outcome of the mediation. Specifically, the parties may or may not come to a binding agreement, and may engage in mediation in "the very early stages of their dispute or days before trial."⁸⁰ While mediation is a beneficial form of ADR, issues have emerged that keep it from becoming the foremost choice in addressing family law disputes. For example, "imbalances in power . . . emotional attitude and stability of parties, as well as dishonesty, foot-dragging and other less-than-good faith orientations to the mediation . . . can compromise the even-handedness and stability of the mediated outcome."⁸¹

Collaborative law is a relatively new development in ADR that seeks to remedy some of the criticisms of mediation. Unlike mediation, collaborative law requires that an attorney who serves "as [an] active legal [advisor] and negotiator" represent each party.⁸² The collaborative law process begins with an agreement between the parties, stipulating that the goal of the process is to reach a settlement and that the parties will respectfully and voluntarily

⁷⁷ Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303, 310 (2008).

⁷⁸ *Id.* at 311.

⁷⁹ *Id.*

⁸⁰ *Id.* at 314.

⁸¹ TESLER, *supra* note 67, at 3 n.8.

⁸² *Id.* at 9.

participate in this process to reach that goal.⁸³ The collaborative law process is one involving a number of meetings, including meetings between a particular party and their collaborative attorney, meetings between the two collaborative attorneys representing the parties, and four-way meetings involving both parties and their respective counsel.⁸⁴ Unlike the adversarial system, collaborative law utilizes many factors in addition to established legal principles. Past experiences, needs and wishes, and future interests of the parties are all laid out on the table and whatever weight the parties feel is appropriate in their circumstance is afforded to each.

Furthermore, the attorneys engaged in the process are prevented from ethical dilemmas regarding pushing clients toward litigation. Through the use of a "no court" agreement signed by the parties and their collaborative attorneys, it is agreed that the attorneys of both parties are barred from participating in any legal proceedings if an agreement cannot be reached.⁸⁵ While there are concerns about parties being coerced into an undesirable settlement and higher costs associated with seeking new counsel for trial, proponents of the collaborative model see it as a powerful tool for maintaining civility in divorce proceedings. Many proponents believe it is the only way for the parties to be empowered and confident in negotiations.⁸⁶

With both parties and their attorneys focused on reaching a peaceful settlement and the threat of litigation staved off, "advice, representation, and advocacy" become the essence of the process.⁸⁷ Collaborative law, therefore, provides greater support to clients than mediation because the parties' attorneys are truly advocates, rather than neutral third parties. The additional

⁸³ *Id.* at 4.

⁸⁴ KATHERINE E. STONER, DIVORCE WITHOUT COURT: A GUIDE TO MEDIATION & COLLABORATIVE LAW 91 (Emily Doskow ed., 2d ed. 2009).

⁸⁵ *Id.*

⁸⁶ *Id.* at 56.

⁸⁷ TESLER, *supra* note 67, at 9.

training often required by collaborative law organizations,⁸⁸ can increase the confidence of the parties to reach a peaceful settlement while addressing the emotionally taxing circumstances.⁸⁹ Further, collaborative attorneys may introduce other parties to help negotiations between the spouses, such as a financial analyst or mental health professional who will work with both clients, often in a group session.⁹⁰ In addition to significantly reducing the costs of traditional divorce, collaborative systems also produce a collaborative team that supports the couple and reinforces the goals and wishes of the parties. The collaborative team establishes an effective dynamic through which the couple can seek to negotiate, communicate, and reach peaceful determinations of not only property distribution but also custody agreements, financial settlements, and the relationship the parties will have following divorce.

D. WHY COLLABORATIVE DIVORCE SHOULD BE UTILIZED IN DISPUTES INVOLVING FROZEN EMBRYOS

While there may be preventative measures such as contract formation that couples should utilize before entering into IVF or other means of ART, many couples are facing divorce with no such agreements. A process that will address both the emotional and social implications of engaging in IVF and the reasons for divorce will achieve greater results than those offered by the adversarial system.⁹¹ While mediation allows the parties to reach a decision with a neutral party mediator, collaborative law provides greater incentives to

⁸⁸ Some collaborative law organizations in Pennsylvania include Collaborative Lawyers of Southern Pennsylvania, <http://clasplaw.org>; Pennsylvania Collaborative Law Practice, <http://www.pacollaborativepractice.com>; and Collaborative Professionals of Central Pennsylvania, <http://www.collaborativelawpa.com>.

⁸⁹ See generally TESLER, *supra* note 67.

⁹⁰ Kate Scharff & Lisa Herrick, *Navigating Emotional Currents in Collaborative Divorce* xxi (American Bar Association 2010).

⁹¹ Upchurch, *supra* note 47, at 433.

reach a result both parties can comply with.⁹² Particularly where conflicting interests, such as the interest in conceiving a child versus the right to not procreate, exist, collaborative law can provide a better basis for negotiation.

Where the parties suffer from a power imbalance regarding particular issues up for discussion, the presence of a collaborative professional provides structure and confidence to each party.⁹³ A collaborative attorney will be able to support their client when he or she is expressing their wishes in the face of the other party's disagreement.⁹⁴ Where a couple is battling over the right to own or use the frozen embryos, a power imbalance may arise, especially when combined with the balancing test used in *Davis and Reber*. In *Reber*, the wife's wish to use the frozen embryos outweighed the husband's right to not procreate. There is an imbalance when pitting these rights against each other. The couple may benefit from collaborative divorce where they each have a trained collaborative attorney to support them and mitigate the imbalance. Without taking on a biological parenthood perspective, the couple may have been able to discuss this issue with the privacy of a non-disclosure agreement.⁹⁵ The parties are more empowered when they are able to make their own decisions regarding the results of the IVF treatment. That empowerment is diminished when the parties engage in adversarial divorce.⁹⁶

Ultimately, public health interests will be promoted by instituting a statutory provision providing for collaborative divorce in cases where couples cannot agree on embryo distribution. As previously mentioned, when collaborative attorneys bring other collaborative professionals into the process, particularly mental health professionals, couples may benefit from these counselors' deeper understanding of the unconscious attitudes and

⁹² TESLER, *supra* note 67, at 16–17.

⁹³ See STONER, *supra* note 84, at 92.

⁹⁴ *Id.*

⁹⁵ *Id.* at 25.

⁹⁶ *Id.* at 28.

beliefs that are emphasized in collaborative divorce.⁹⁷ An attention to not only the individual parties seeking divorce, but also the third entity created by their marriage and union as a couple may assuage the negative emotional and physical repercussions that are exacerbated by adversarial divorce.⁹⁸ Results from the four-way conferences in collaborative divorce are maximized when the attorneys focus on reducing anger, hostility, and other negative emotions that result from the breakdown of the marital relationship.⁹⁹ Simply put, having collaborative law focus on the certain feelings, emotions, and circumstances of a couple seeking divorce after IVF treatment will most likely leave the couple with a less negative mental and physical health response to the divorce.¹⁰⁰

Additionally, collaborative divorce with regard to the distribution of frozen embryos may also promote responsible and careful treatment of the embryos. *Davis* established a property interest in the embryos with "special respect" and collaborative law may be able to provide that standard by focusing more holistically on the effects of divorce on the family unit. Should a couple seeking divorce post-IVF treatment, collaborative professionals may be more equipped to assist couples in a decision to distribute, destroy, or store frozen embryos particularly when blended families and existing children are involved. The collaborative approach utilizes a number of factors beyond those typically used by courts such as subjective fairness, past experiences, previous actions of the parties, and changed circumstances. Therefore the collaborative approach may more flexibly address the concerns of the entire family unit than the balancing approaches used in *Davis* and *Reber*.¹⁰¹

⁹⁷ Scharff & Herrick, *supra* note 90, at xxiii–xxiv.

⁹⁸ *See id.* at 18–20.

⁹⁹ SUSAN SWAIM DAICOFF, *COMPREHENSIVE LAW PRACTICE* 166 (Carolina Academic Press 2011).

¹⁰⁰ *Id.*

¹⁰¹ *See generally* Upchurch, *supra* note 47.

V. PROPOSED SOLUTION

In states where contracts have been held to be binding and enforceable,¹⁰² providing clearer guidelines for consent agreements signed by the parties when they participate in an IVF procedure, would be an excellent way to promote clear interpretation of progenitors' wishes upon divorce. These contracts should address not only the disposition in the event a spouse should die or the couple no longer requires or wishes to continue treatment, but should also address the distribution in the event of divorce. Counselors or attorneys should be available to discuss the consequences of these provisions and encourage thoughtful, respectful, open, and honest communication between the couple regarding negative life events that may occur during the time between beginning and the end of the IVF process.¹⁰³ In addition, consent agreements should include a provision stipulating that it is binding upon the parties, and, as this article has argued, should provide for collaborative divorce proceedings if an agreement on the treatment of the frozen embryos cannot be reached.

States such as Pennsylvania, which have not adopted statutory provisions for the distribution of frozen human embryos, should consider adopting a statutory provision recommending some form of alternative dispute resolution, particularly collaborative law. While mediation is cost-effective for those parties who do not wish to acquire legal counsel, the collaborative law process provides greater incentives to reach an amicable settlement and avoid litigation at a more cost effective rate than traditional divorce.¹⁰⁴ Having both parties represented by a legal advocate who is bound

¹⁰² See, e.g., *Kass*, 696 N.E.2d at 174; *Litowitz*, 48 P.3d at 269.

¹⁰³ As discussed previously, it has been argued that the occurrence of negative life events makes making an "informed decision" regarding future events difficult. However, engaging in this discussion before entering treatment may educate the couple and promote a more peaceful agreement process later. See *Kass*, 696 N.E.2d at 180.

¹⁰⁴ STONER, *supra* note 84, at 25.

by the collaborative law agreement to seek a peaceful settlement will encourage open and honest participation of both parties.¹⁰⁵

Although litigation will provide a consistent ruling on the issue of frozen embryo distribution in divorce, as *Reber v. Reiss* has begun to do, collaborative law will help courts avoid the need to define the legal status of frozen embryos. In addition, couples who wish to refrain from using contracts memorializing their intents and beliefs before IVF would benefit from a collaborative process that takes more than the black letter of the law into account. Particularly where a jurisdiction has adopted the contemporaneous mutual consent model, if both parties have equally compelling interests in the frozen embryos collaborative law may help avoid deadlock of these disputes.

VI. CONCLUSION

The distribution of frozen embryos upon divorce is varied across the board. Courts have encouraged and interpreted contracts entered into by the hopeful parents. Others have engaged in balancing tests. Others still encourage maintaining the status quo until a mutual agreement can be reached. Regardless of these court-adopted solutions, little is being done to truly address the very real emotions, interests, intents, and ultimately public health consequences of distributing frozen embryos. This article has posited that, following *Reber v. Reiss*, the interest-based collaborative law approach may serve as a better, more economical means of divorce than adversarial divorce where frozen embryos are concerned. Infertility is a public health issue in this country because it has negative mental and physical health effects on those who suffer from it. Additionally, prevention and treatment of infertility also have their own negative health effects. A number of studies have shown that negative life events, such as divorce, may have lasting medical repercussions on the divorcing population. These repercussions are likely exacerbated by the adversarial system.

¹⁰⁵ See TESLER, *supra* note 67, at 115 (describing collaborative law as an interest-based negotiation, rather than positional bargaining).

In sum, the distribution of embryos in the adversarial system may lead to more negative health results than positive. Through collaborative divorce, couples may experience a more civil, less stressful, and less expensive means of determining exactly what to do with frozen embryos when the marital relationship has fallen apart. The Pennsylvania legislature should take the public health concerns discussed in this paper seriously, and develop a statutory provision recommending collaborative divorce for these emotional and sometimes hostile situations involving frozen embryos.