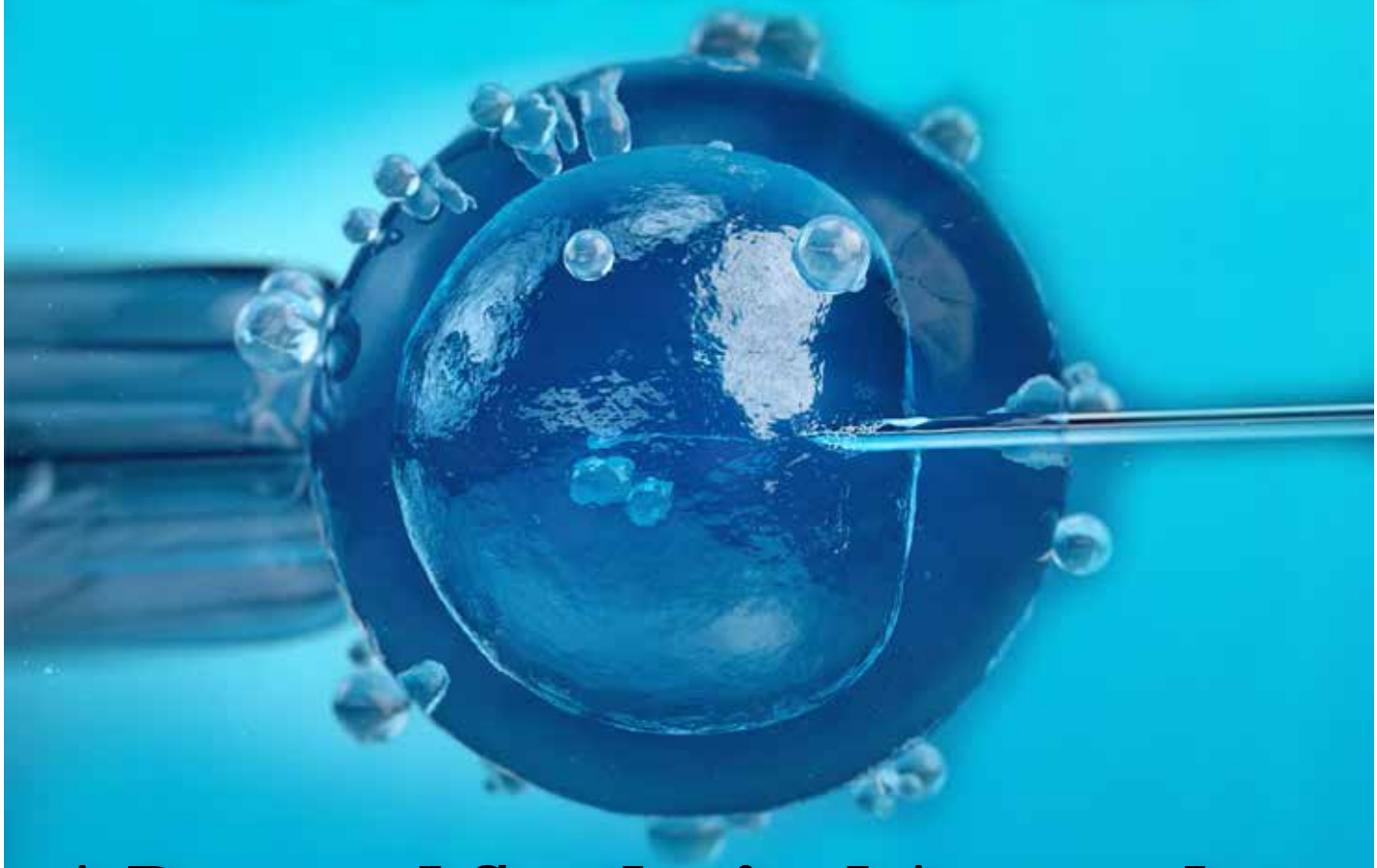
Winner of the Louisiana State Bar Association's Family Law Section Writing Competition

EMBRYOTIC CUSTODY:



A Proposed Synthesized Approach to Properly Balance Procreative Freedom

By Caroline C. Strohe

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Assisted Reproductive Technologies (ART) allow for couples around the world to achieve biological parenthood in the face of infertility. The most commonly used form of ART is *in vitro* fertilization (IVF), which has provided a successful alternative from the "non-traditional" way to build a family since 1978.[1] Nevertheless, the development of reproductive medicine has placed challenges on the legal system. Such challenges typically arise when a couple decides to end their relationship and disagrees over what should be done with their cryogenically frozen genetic material. In turn, this disagreement implicates competing constitutional interests between the couple requiring courts across the country to balance these opposing constitutional rights.

The United States Constitution affords "protection to personal decisions relating to marriage, procreation, contraception, family relationship, child rearing, and education."[2] Typically, disputes involving personal decisions arise when the *government* unlawfully intrudes into matters fundamentally affecting a person.[3] In contrast, disputes over the disposition of frozen embryos involve competing liberty interests between *individuals*. These competing liberty interests stem from the right to privacy and are comprised of the coextensive rights to procreate and to avoid procreation.[4] These two rights have attained large recognition by the Supreme Court, which highlights the significant importance of the "procreative autonomy" rights at stake when disputes over frozen embryos arise.[5]

Courts typically tackle disputes over frozen embryos by utilizing a "balancing of the interest approach" that weighs the benefits and burdens of the parties' requests for disposition, while simultaneously respecting the coextensive rights to procreate and to avoid procreation.[6] Generally, state jurisdictions use the balancing approach when the preferences of both gamete providers cannot be met, the disposition agreement they entered into cannot be honored, or no disposition agreement exists.[7] Thus, now that the parties have turned to the judiciary to resolve their dispute, the balancing test honors the right to privacy and the right to procreative freedom in embryotic-custody cases.

In 1992, the Tennessee Supreme Court decided the first case involving custody of IVF embryos in *Davis v. Davis*.[8] The *Davis* decision affirmed the right of procreative freedom that exists in the right to privacy in the context of disputes over cryopreserved embryos.[9] Most importantly, the *Davis* decision set out a workable framework that respects the wishes of both parties when the fate of their genetic material is contested.[10]

In *Davis*, the Tennessee Supreme Court decided the dispute over cryopreserved embryos in favor of Mr. Davis by honoring his wish to have the embryos destroyed over the objections of his former wife.[11] The court determined that the answer to the couple's disagreement existed in their constitutional right to privacy.[12] Although the right to privacy is not specifically mentioned in either the federal or the Tennessee state constitution, the court relied on the liberty interests of the right to privacy as reflected in the 14th Amendment.[13] The issue before the court was not whether to keep or discard the frozen embryos, but whether Mr. and Mrs. Davis became parents.[14] With this in mind, the Tennessee Supreme Court held that the individual liberty in dispute between the Davis couple was the right to procreate, which is "a vital part of an individual's right to privacy" under both Tennessee law and federal law.[15]

In order to protect the Davises coextensive rights to either procreate or avoid procreation, the court set forth a roadmap for embryotic custody cases to honor and balance these competing interests.[16] In outlining this framework, the court concluded that disputes involving the disposition of IVF embryos should be resolved, first, by honoring the preferences of the gamete providers because the interest "in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood."[17] In the event that gamete providers disagree over the disposition of the frozen embryos, the court further reasoned that the liberty interests in using or not using the embryos must be weighed, as well as the relative burdens of the court's decision.[18] The court determined that the burdens on the party seeking to avoid procreation are obvious: unwanted parenthood, and all the financial and psychological consequences that go along with becoming a gestational parent.[19] In the event that the embryos

were donated to a childless couple, Mr. Davis would face a lifetime of "either wondering about his parental status or knowing about his parental status but having no control over it."[20] The court further found that had Mrs. Davis wished to use the embryos herself because "she could not achieve parenthood by any other *reasonable* means," her interest in procreation would have been greater.[21]

Thus, despite the lack of legislative and judicial guidance, the Tennessee Supreme Court held that disposition disputes over frozen embryos following IVF "should be resolved, first, by looking to the preferences of the progenitors."[22] Then, if their wishes cannot be met, or if the parties cannot agree, courts should look to prior disposition agreements between the parties.[23] In the absence of a prior disposition agreement, the court held that the "relative interests of the parties in using or not using the pre-embryos must be weighed."[24] The *Davis* court concluded with the following holding that is most prevalent in utilizing this balancing of the interests approach:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[25]

The *Davis* opinion confirmed that the right to privacy encompasses the right of procreative autonomy, and the court also set out a workable framework to properly balance these rights.[26] Still, this framework only provided guidance for other states and jurisdictions as they began to take on disputes involving cryogenically preserved embryos.

In October 2018, the Colorado Supreme Court in *Rooks v. Rooks* also balanced one's constitutional right to procreate against another's countervailing constitutional right to not procreate.[27] The court declined to rule on the competing constitutional rights and issued an opinion consistent with the embryotic custody framework set forth in *Davis*.[28] However, the *Rooks* decision provides much needed clarity for disposition cases by outlining a list of factors that should be considered, as well as certain factors that should be excluded when courts are faced with frozen embryo custody.[29]

In *Rooks*, the couple used IVF both in 2011 and 2013 and had three children born during their marriage in Colorado.[30] Mrs. Rooks wished to preserve the parties' remaining embryos in order to implant them at a later date because, to her knowledge, she was unable to get pregnant "naturally" again.[31] Mr. Rooks, however, did not want to have more children and wished to thaw and discard the remaining frozen embryos.[32] Ultimately, the trial court awarded the frozen embryos to Mr. Rooks by finding that Mr. Rooks' right to avoid procreation outweighed Mrs. Rooks' desire to preserve the frozen embryos.[33]

After the trial court's decision was affirmed on appeal, the Colorado Supreme Court granted a writ of certiorari. Upon review, the court decided to utilize the balancing of the interests approach because the couple lacked an enforceable agreement regarding disposition of the frozen embryos.[34] Moreover, the court outlined a non-exhaustive list of factors that a reviewing court should weigh in disposing frozen embryos.[35] These factors include: (1) the intended use of the genetic material by the spouse who wishes to preserve them; (2) the physical ability (or inability) demonstrated by the party seeking to use the frozen embryos

for implantation; (3) the couple's original intent for undergoing IVF; (4) the burden of the parent seeking to avoid parenthood, including emotional, financial or logistical reasons; (5) whether a spouse demonstrated bad faith or attempted to use the frozen embryos as unfair leverage in the dissolution proceedings; and (6) other considerations relevant to the specific parties' situation.[36]

Notably, the court recognized in the second and third factors that certain extenuating circumstances may come into play when a party has no other *reasonable* means to secure biological parenthood — the party's reason for undergoing IVF in the first place.[37] The clearest example of these two factors weighing heavily in favor of one party is when an ex-wife is unable to procreate biologically after chemotherapy treatments.[38] This is consistent with the *Davis* court's holding that "[i]f no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered."[39]

The court further noted improper considerations in allocating frozen embryos in a dissolution proceeding and listed three factors that courts should not consider.[40] Specifically, a dissolution court should not assess whether the party seeking to use the embryos can afford another child, nor should the number of the party's existing children be considered.[41] Finally, the court concluded that the availability of adoption as an alternative to biological parenthood is not relevant to the "interest in achieving or avoiding genetic parenthood."[42]

By adopting this factor-based approach, the Colorado Supreme Court recognized the equally valid constitutional-based interests in procreative autonomy that both spouses possess.[43] Further, this approach encourages couples to enter into disposition agreements to protect their mutual consent regarding the fate of their genetic material in the event that the marriage leads to divorce.[44] In the event that an enforceable contract is not available to settle the dispute, the *Rooks* court clearly detailed what considerations are proper and improper when weighing the parties' procreative freedom against each other.[45]

Until state legislators can properly protect the procreative liberty interests of both participants of IVF, courts should resolve disposition disputes by synthesizing the *Davis* framework and the *Rooks* factors. This synthesized approach is preferred because it acknowledges the fundamental liberty of procreative freedom that falls under the right to privacy and narrowly weighs each party's right to procreative freedom. Further, by utilizing the factor-based test outlined in *Rooks*, this synthesized approach prevents the party seeking to avoid procreation from having the scale tipped automatically in his/her favor.[46] This approach also encourages couples to record their mutual consent in valid disposition agreements in the event of a divorce. Honoring binding agreements maximizes procreative liberty by respecting the gamete-providers' original intent of a personal, private decision. Where the parties' consent is not memorialized in an enforceable agreement, or the agreement does not account for disposition upon divorce, this framework further weighs the interest at stake in an appropriate manner. Finally, 26 years later, the *Davis* framework has evolved from a set of embryo-custody guidelines to a functional factor-based test that should be utilized on a case-by-case basis in all jurisdictions.[47]

FOOTNOTES

1. *See*, Meena Lal, "The Role of the Federal Government in Assisted Reproductive Technologies," 13 Santa Clara Computer & High Tech. L.J. 519, 520 (1997) (Louise Brown, born July 25, 1978, in Great Britain, was the first successful birth resulting from *in vitro* fertilization).

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2. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851; 112 S.Ct. 2791, 2807 (1992).

3. *See*, Eisenstadt v. Baird, 405 U.S. 438, 453; 92 S.Ct. 1029, 1038 (1972) (emphasis added).

4. Jennifer L. Carow, "*Davis v. Davis*: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology," 43 DePaul L. Rev. 523 (1994); *see also*, Skinner v. Oklahoma, 316 U.S. 535, 54; 62 S.Ct. 1110, 11131 (1942) (finding marriage and procreation to be "fundamental to the very existence and survival of race," and that they involve "the basic civil rights of man").

5. *See e.g.*, Meyer v. Nebraska, 262 U.S. 390; 43 S.Ct. 390 (1923); Olmstead v. United States, 277 U.S. 438; 48 S.Ct. 564 (1928).

6. *See*, Mary Ziegler, "Beyond Balancing: Rethinking the Law of Embryo Disposition," 68 Am. U. L. Rev. 515 (2018).

7. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), *cert. denied*, 113 S.Ct. 1259 (1993); The Ethics Committee for the American Society for Reproductive Medicine recommends that all assisted reproductive programs "create and enforce written policies on the designation, retention, and disposal of abandoned embryos." Despite this recommendation, policies and practices differ amongst fertility clinics. *See*, Ethics Comm. of the Am. Soc'y for Reprod. Med., "Disposition of Abandoned Embryos: A Committee Opinion," 99 Fertility & Sterility 1848, 1848-49 (2013).

8. *Id.* at 598-600.

9. *Id.*

10. *Id.* at 604; Stephanie J. Owen, "*Davis v. Davis*: Establishing Guidelines for Resolving Disputes over Frozen Embryos," 10 J. Contemp. Health L. & Pol'y 493, 510 (1994).

11. *Id.* at 589.

12. *Id.* at 598.

13. *Id.* (*citing* Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

14. *Id.*

15. Davis, 842 S.W.2d at 600. The *Davis* court found that the right to privacy is reflected in Sections 3, 7, 19 and 27 of the Tennessee Declaration of Rights. *Id.* The court determined that the drafters of the Tennessee Constitution of 1796 "foresaw the need to protect individuals from unwarranted governmental intrusion into matters . . . involving intimate questions of personal and family concern." *Id.*

16. *Id.* at 602. The court realized that the tension between these two competing interests is most prevalent in the context of *in vitro* fertilization because no other person or entity bears the consequences of a court's decisions the way gamete providers do. *Id.*

17. *Id.* at 603. The court explained having biologically related children born to an unknown person could have profound impact on both the genetic parent and the child, thus the right to make decisions on whether or not to gestate the embryos should remain solely with the gamete providers. *Id.*

18. *Id.*

19. *Id.*

20. Davis, 842 S.W.2d at 604.

21. *Id.* (emphasis added). The court recognized the trauma Mrs. Davis endured through her IVF attempts but concluded that she could always try again to achieve parenthood, either through "genetic, gestational, bearing, [or] rearing" methods. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *see e.g.,* J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

26. Carow, *supra* note 4.

27. In re Marriage of Rooks, 429 P.3d 579 (Colo. 2018), *cert. denied sub nom.* Rooks v. Rooks, 139 S.Ct. 1447 (2019).

28. *Id.* at 602.

29. *Id.* at 593-94.

30. *Id.* at 581.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 592. The court emphasized that an award granting custody of frozen embryos should strive to protect each party's right to procreative autonomy. *Id.*

35. *Id.* at 593.

36. *Id.* at 593-94.

37. *Id.* at 593-94 (stating that courts should consider the physical ability demonstrated by the party seeking to use the frozen embryos for implantation, and couple's original intent for undergoing IVF).

38. *See*, Reber v. Reiss, 42 A.3d 1131 (Pa. Super. Ct. 2012). In *Reber*, the court awarded the embryos to the wife after the parties' divorce because she was unable to have children biologically after having undergone chemotherapy. *Id.* The embryos were created so that she could conceive after her cancer treatment was completed, and, based on these circumstances, the court found that the wife's interest in procreating outweighed her ex-husband's in avoiding procreation. *Id.*

39. Davis, 842 S.W.2d at 604.

40. Rooks, 429 P.3d at 594.

41. *Id.*

42. *Id.*

43. Rooks, 429 P.3d at 594.

44. *Id.*

45. *Id.*

46. Davis, 842 S.W.2d at 604; Meagan R. Marold, "Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce," 25 Hastings Women's L. R. 179, 198 (2014) (explaining that critics of the balancing approach find that it is "predictable . . . since the party wishing to avoid parenthood always prevails, save the exception one party is infertile").

47. Rooks, 429 P.3d at 594.

Caroline C. Strohe, a native of Lafayette and a graduate of Louisiana State University with a BA degree in political science, is currently completing her legal education as a third-year law student at Loyola University New Orleans College of Law. During her first year of law school, she discovered a passion for legal writing and oral advocacy. She was chosen for membership on the Loyola Law Review *and the Moot Court staff and also serves as a research assistant to Professor Monica Hof Wallace. Following her graduation in May 2020, she will sit for the Louisiana Bar Exam.*