

FROZEN IN TIME: THAWING THE LEGAL ISSUES SURROUNDING CRYOPRESERVED EMBRYOS

Comment

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I. PREFACE	102
II. IN VITRO FERTILIZATION AND THE PROCESS OF CRYOPRESERVATION—AN INTRODUCTION	103
III. THE PROBLEMS AND CONCERNS REVOLVING AROUND EMBRYO CRYOPRESERVATION	104
A. <i>Embryo Classification</i>	105
1. <i>Round One—Embryos as Property</i>	105
2. <i>Round Two—Embryos as Persons</i>	106
3. <i>Round Three—Embryos as Deserving of Special Respect</i>	108
B. <i>Are Embryos Community Property or Separate Property?</i>	109
C. <i>Estate Planning When Cryopreserved Embryos Are Involved</i>	110
D. <i>The Storage and Disposition of Cryopreserved Embryos</i>	111
1. <i>Ethical, Religious, and Moral Concerns Surrounding the Storage and Disposition of Cryopreserved Embryos</i>	112
a. <i>Option One—Keep Them Frozen</i>	112
b. <i>Option Two—Dispose of the Embryos</i>	112
c. <i>Option Three—Donate the Embryos to Another Couple</i>	113
d. <i>Option Four—Donate the Embryos to Research</i>	113
e. <i>Option Five—Do Nothing</i>	114
2. <i>Embryo Storage</i>	114
3. <i>Embryo Disposition</i>	115
a. <i>Disposition Around the Globe</i>	116
i. <i>Causes of Action for the Unauthorized Disposal of Frozen Embryos</i>	117
ii. <i>Causes of Action Round One—The Persuasive</i>	117
iii. <i>Causes of Action Round Two—The Unpersuasive</i> ...	123
iv. <i>Causes of Action Round Three—The Defenses</i>	124
v. <i>Causes of Action Final Round—The Damages</i>	124
(a) <i>Sentimental Damages</i>	125
(b) <i>Intrinsic Value</i>	125
(c) <i>Mental Anguish</i>	126

E. *Children by Intestacy—Enacting Time Limits on the Use of Cryopreserved Embryos*..... 126
 IV. SOLUTIONS FOR TEXAS..... 127
 V. CONCLUSION 129

I. PREFACE

Mr. and Mrs. Hamilton—a hypothetical married couple who lived in Texas—were married for seven years and had been unsuccessful in their attempts to have children. They chose to try assisted reproductive technology (ART) and decided on a method called in vitro fertilization (IVF). The IVF process resulted in eleven embryos. The IVF physician implanted three of the embryos, and the couple froze the remaining embryos in case they decided to have more children in the future. Before the couple was able to use the remaining embryos, Mr. Hamilton passed away. Mr. Hamilton’s death was unexpected, and he did not have an estate plan. Mrs. Hamilton moved several states away to be with her family during that difficult time and remained with her family for five years. During the first part of that time, the cryopreserved embryos remained in the storage facility.

The problem, however, was that Mrs. Hamilton did not pay the storage fees for the embryos to remain frozen, and the storage facility did not have her contact information and was unable to reach her. The storage facility destroyed the embryos by removing them from the freezer and allowing them to thaw. Mrs. Hamilton moved back to the city where she and her late husband established their lives, and she approached the IVF facility to use the embryos for the purposes of creating more children. Upon learning of the unauthorized destruction of the embryos, Mrs. Hamilton sued the IVF facility.

This comment will attempt to answer the following questions:

- How does the law classify Mrs. Hamilton’s embryos?¹
- Will Mrs. Hamilton prevail against the IVF facility?²
- Did the IVF facility have the right to destroy the embryos?³
- Would the outcome be different if Mr. Hamilton had an estate plan?⁴
- Would the embryos have had inheritance rights if the IVF facility had not destroyed them?⁵
- How could Mrs. Hamilton and the IVF facility have prevented this situation?⁶

1. See *infra* Part III.A.
 2. See *infra* Part III.D.
 3. See *infra* Part III.D.
 4. See *infra* Part III.C.
 5. See *infra* Part III.E.
 6. See *infra* Part IV.

II. IN VITRO FERTILIZATION AND THE PROCESS OF CRYOPRESERVATION— AN INTRODUCTION

A couple is considered infertile after one year of having unprotected intercourse and not becoming pregnant.⁷ A relatively high number of Americans, 10%, both men and women, are affected by infertility.⁸ Conditions causing infertility in women include: ovulation problems, advanced maternal age, damaged fallopian tubes or cervix, and endometriosis.⁹ Men can suffer from infertility due to decreased sperm count and blockage.¹⁰

IVF is a form of assisted reproduction used to help couples experiencing infertility conceive children.¹¹ Harvard scientist Gregory Pincus first tested IVF on rabbits in 1934, and the first baby born via IVF was born in Oldham, England on July 25, 1978.¹² IVF is now a common way for infertile couples to conceive.¹³

The IVF process is quite grueling, beginning with fertility drug injections that cause multiple eggs to grow at one time instead of the single egg that usually develops each month.¹⁴ During this time, the IVF physician evaluates the woman's ovaries by ultrasound, and blood tests track the progress of the medications.¹⁵ The next step is egg retrieval, which is accomplished through a procedure known as transvaginal ultrasound aspiration.¹⁶ Combining the man's sperm and the woman's eggs—both called oocytes prior to fertilization—in a laboratory dish then creates fertilized eggs.¹⁷ A selected number of the fertilized eggs—now called embryos—are transferred into the woman's uterus.¹⁸ If the implantation is successful, the woman will continue progesterone medication throughout the

7. Molly Robinson, *Causes of Infertility in Women*, THE IVF INFORMANT (June 16, 2012), <http://ivf-info.org/causes-of-infertility-in-women-1>.

8. *Id.*

9. *See id.*; *see also* Susan Storck, *In Vitro Fertilization*, MEDICINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/007279.htm> (last updated Mar. 11, 2014); *see Infertility: An Overview*, AM. SOC'Y FOR REPROD. MED., available at http://sart.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/infertility_overview.pdf, (last updated 2012).

10. *See* Storck, *supra* note 9; *Infertility: An Overview*, *supra* note 9.

11. *See* Storck, *supra* note 9.

12. *See Timeline: The History of In Vitro Fertilization*, PBS, <http://www.pbs.org/wgbh/american-experience/features/timeline/babies>.

13. *See* Storck, *supra* note 9.

14. *Assisted Reproductive Technologies*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, available at http://sart.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf (last updated 2011).

15. *See id.*

16. *See id.*; *see also* Rachel Gurevich, *Understanding IVF Treatment Step by Step*, ABOUT.COMFERTILITY, http://infertility.about.com/od/infertilitytreatments/ss/ivf_treatment_9.htm (last updated Feb. 5, 2015).

17. *See Assisted Reproductive Technologies*, *supra* note 14.

18. *Id.*

pregnancy.¹⁹ If the implantation is unsuccessful, the process can be repeated.²⁰ Of the fresh embryos transferred into the uterus, between six and forty-seven percent result in a live birth in the United States.²¹

Cryopreservation of the excess embryos for future use is common.²² Cryopreservation is achieved by freezing the embryos in liquid nitrogen at 321 degrees below zero.²³ Of the frozen embryos transferred into the uterus after being thawed for use, between sixteen and forty percent result in a live birth.²⁴ Cryopreservation is beneficial because the process of IVF is expensive, costing between \$10,000 and \$15,000 per cycle.²⁵ Cryopreservation lessens the expense for future IVF cycles (lowering the price to an average of \$3,000 per transfer) and makes future cycles less invasive.²⁶

III. THE PROBLEMS AND CONCERNS REVOLVING AROUND EMBRYO CRYOPRESERVATION

There are several unresolved issues within this innovative topic.²⁷ The first, and perhaps most relevant issue, is whether embryos should be classified as property, persons, or in an interim category deserving “special respect.”²⁸ A second issue is whether embryos are separate property or community property.²⁹ Another pertinent concern is how to appropriately plan the estate of a client who has cryopreserved embryos.³⁰ The topic of the storage and disposition of cryopreserved embryos also warrants discussion.³¹ A final topic—and one of growing concern—revolves around enacting time limits on the use of cryopreserved embryos for intestacy purposes.³²

19. Robinson, *supra* note 7.

20. Molly O'Brien, *An Intersection of Ethics and Law: The Frozen Embryo Dilemma and the Chilling Choice Between Life and Death*, 32 WHITTIER L. REV. 171, 175–76 (2010).

21. *Clinic Summary Report: All SART Member Clinics*, SART CORS, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last updated 2011).

22. *See Assisted Reproductive Technologies*, *supra* note 14.

23. Daniel Schorn, *A Surplus of Embryos: What Should Happen With Extra Embryos?*, CBSNEWS (Feb. 9, 2006), http://www.cbsnews.com/8301-18560_162-1300667.html.

24. *Clinic Summary Report: All SART Member Clinics*, *supra* note 21.

25. Karen Synesiou, *An Open Discussion – The Dilemma of Remaining Frozen Embryos*, CENTER FOR SURROGATE PARENTING, INC., http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=174; Rachel Gurevich, *How Much Does IVF Cost?*, ABOUT.COM FERTILITY, http://infertility.about.com/od/ivf/f/ivf_cost.htm (last updated Aug. 6, 2011).

26. *See Assisted Reproductive Technologies*, *supra* note 14; Gurevich, *supra* note 16.

27. *See discussion infra* Part III.

28. *See discussion infra* Part III.A.

29. *See discussion infra* Part III.B.

30. *See discussion infra* Part III.C.

31. *See discussion infra* Part III.D.

32. *See discussion infra* Part III.E.

A. Embryo Classification

There are three competing views regarding the status of a human embryo.³³ Under the first view, embryos are property and have no protection except for under the legal principles of contracts.³⁴ The second view classifies embryos as persons, affording them independent rights guaranteed by the law.³⁵ The third view, considers embryos as neither property nor persons, but rather considers them as holding an interim status deserving of special respect—embryos given this classification have some protection under the law.³⁶

An understanding of the above classifications is vital in order for courts and legislatures to create laws regarding embryos.³⁷ Of equal importance regarding embryo classification is “the legal status of the embryo effects not only how people view embryos but also the choices a couple has for the disposition of their embryos.”³⁸ Current statutes and case law make the classifications unclear, which in turn makes them difficult to apply.³⁹ Which class these embryos fit into largely depends on the jurisdiction and the specific facts of a particular case that is before a court.⁴⁰ However, Texas legislation does not indicate which class embryos fit into, nor has there been any Texas court decision specifically addressing classification; in fact, Texas courts have avoided this question by framing specific issues very narrowly.⁴¹

1. Round One—Embryos as Property

The owner of property holds the entire bundle of sticks for that property, including, but not limited to, the rights to use, enjoy, possess, and dispose of the property.⁴² The legal focus of property is contract law and the progenitors’ rights; therefore, classifying embryos under a property theory focuses on either the donors or the legally adopting party as the owners who

33. Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOKLYN L. REV. 853, 866 (2003).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Jodi L. Bender, *Snowflakes in Texas? Enacting Legislation to Allow for Embryo Adoption*, 16 TEX. WESLEYAN L. REV. 413, 414 (2010).

39. See generally Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is An Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 506 (2009) (discussing the classification of pre-embryos).

40. See *id.*

41. In re O.G.M., 988 S.W.2d 473, 475 (Tex. App.—Houston [1st Dist.] 1999, pet. dismissed); Roman v. Roman, 193 S.W.3d 40 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); Bender, *supra* note 38, at 432.

42. See O’Brien, *supra* note 20, at 178.

have decision making power over the embryos.⁴³ A compelling argument against a property model for human embryos is that one of the sticks included in the bundle of property ownership is the right to profit from the property—property rights of embryos stop short of being able to sell the embryos for a profit, and therefore, one of the essential sticks of the bundle is missing.⁴⁴ However, the opposing argument is just as compelling:

[Classifying embryos as property does] not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage, discard, donation, use in research, and placement in a uterus. Although the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.⁴⁵

Some states have labeled embryos as property through court decisions.⁴⁶ Virginia did so in *York v. Jones*; Rhode Island made this designation in *Frisina v. Women and Infants Hospital*; New York followed a property model for embryos in *Kass v. Kass*.⁴⁷ Other states treat embryos as property, even though those states have not officially labeled them as such; these states contract law when dealing with embryos.⁴⁸ Texas has traditionally used contract law to determine the fate of embryos, perhaps unofficially labeling them as property as well.⁴⁹ However, to date, no Texas court decision or legislation designates Texas' position on the classification of embryos.

2. Round Two—Embryos as Persons

Classification of embryos as persons imposes a legal framework revolving around the best interest of the embryo, custody of the embryo, and protection of the embryo's rights.⁵⁰ Proponents of this view feel that embryos should have the same rights as children.⁵¹ Louisiana is the only state that has

43. *Id.* at 867.

44. Bender, *supra* note 38, at 422.

45. Johnson, *supra* note 33, at 867 (quoting commentator John Robertson).

46. See *York v. Jones*, 717 F. Supp. 421 (Ed. Va. 1989); *Frisina v. Women & Infants Hosp. of R.I.*, No. Civ. A. 95-4037, No. 95-4469, 2002 WL 1288784 (R.I. Super. May 30, 2002); *Kass v. Kass*, 91 N.Y.2d 554 (N.Y. 1998); *Frisina v. Women & Infants Hosp. of R.I.*, C.A. No. 95-4037, No. 95-4469, No. 95-5827, 2002 R.I. Super. LEXIS 73 (May 30, 2002); *Kass v. Kass*, 91 N.Y.2d 554 (N.Y. 1998).

47. See *York*, 717 F. Supp. 421; *Frisina*, 2002 WL 1288784; *Kass*, 91 N.Y.2d 554.

48. See generally Bender, *supra* note 38, at 422 (discussing Kansas, Connecticut, California, and Colorado statutes regarding embryos). See also *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (treating sperm as property—to date, this jurisdiction has not determined the classification of other reproductive material, such as embryos).

49. Bender, *supra* note 38, at 414.

50. O'Brien, *supra* note 20, at 180.

51. Johnson, *supra* note 33, at 868.

enacted legislation designating embryos as persons.⁵² Louisiana defines an embryo as “a juridical person” who has rights under the law and who may be available for adoptive implantation.⁵³ Louisiana adheres to the best interest of the child standard.⁵⁴

Although there are moral implications involved in classifying an embryo as either property or having a status deserving of special respect, a persuasive argument against classifying embryos as persons is that embryos do not have nervous systems and they cannot sustain life on their own.⁵⁵ Additionally, considering an embryo as a person can have serious implications on the future of cryopreservation because there are serious ethical concerns involved with freezing a human indefinitely.⁵⁶ If embryos are persons, the donors may have little control over embryo disposition—the donors may have limited ability to destroy the embryos or donate them to research.⁵⁷ For example, in Louisiana, the intentional destruction of an embryo or its creation strictly for purposes of research is against the law, and embryos are not the property of the physician or fertility clinic.⁵⁸ However, under specific circumstances, the physician may become the guardian of the embryos until adoptive implantation can occur.⁵⁹ The purpose the guardianship law is to protect the embryo’s rights, which places a very heavy burden upon the physician or fertility clinic.⁶⁰

Louisiana’s statute specifically states that the donors do not own the embryos, but they do have parental rights to the embryos unless they sign those rights away.⁶¹ This poses a serious potential problem for donors because it could impact their ability to determine the fate of the embryos they created.⁶²

Although Texas has traditionally treated embryos as property by solving disputes under contract law, there may be a shift toward treating embryos as persons. In 2003, the Texas legislature passed the Prenatal Protection Act, amending Texas’s wrongful death statute and the penal code—the amendments defined an “individual” to include “an unborn child at every stage of gestation from fertilization until birth.”⁶³ In 2007, however, the filing and expiration of House Bill 1703 took place—this bill proposed that

52. See Falker, *supra* note 39, at 506.

53. See Falker, *supra* note 39, at 506; LA. REV. STAT. ANN. §§ 9:123, 9:130.

54. LA. REV. STAT. ANN. § 9:131.

55. O’Brien, *supra* note 20, at 178–79.

56. *Id.* at 180.

57. *Id.*

58. LA. REV. STAT. ANN. §§ 9:122, 9:126.

59. LA. REV. STAT. ANN. § 9:126.

60. *Id.*

61. *Id.*

62. Bender, *supra* note 38, at 422.

63. See TEX. CIV. PRAC. & REM. CODE § 71.001; TEX. PENAL CODE § 1.07(a)(26); Bender, *supra* note 38, at 431.

embryos be classified as persons in Texas.⁶⁴ Although a shift away from classifying embryos as strictly property may be occurring, the failure of the house bill to pass may signify that the legislature does not consider embryos as persons at this time.⁶⁵

3. Round Three—Embryos as Deserving of Special Respect

The third view is to classify embryos as neither property nor persons but rather in an interim category deserving of special respect view; proponents of this model view the model as a compromise between two extremes that allows embryos to have legal rights somewhere between that of persons and property.⁶⁶ The American Society for Reproductive Medicine (ASRM) views embryos as belonging to this category, stating that embryos have the potential for human life and are symbolic of human life, but they (1) cannot sustain life on their own, (2) have not yet “developed the features of personhood,” and (2) may never become a living thing.⁶⁷

The American Bar Association Model Act Governing Assisted Reproductive Technology also holds this view and classifies an embryo as “a cell or group of cells containing a diploid complement of chromosomes or groups of such cells . . . that has the potential to develop into a live-born human being if transferred into the body of a woman under conditions in which gestation may be reasonably expected to occur.”⁶⁸ Some courts have followed this view as well.⁶⁹ Tennessee designated embryos as having special respect status in *Davis v. Davis*; Massachusetts decided the same in *A.Z. v. B.Z.*; Arizona also held that embryos deserve special respect in *Jeter v. Mayo Clinic Arizona*.⁷⁰

The parameters of this interim category have been relatively undefined, and more guidance is needed in order to define the specific rights of the embryos within this category.⁷¹ However, some believe that classification could be a better choice instead of placing embryos into a rigid category of either persons or property.⁷²

64. Bender, *supra* note 38, at 434.

65. Bender, *supra* note 38, at 433.

66. See Johnson, *supra* note 33, at 870; O'Brien, *supra* note 20, at 180.

67. See Johnson, *supra* note 33, at 870–71.

68. American Bar Association Model Act Governing Assisted Reproductive Technology (Feb. 2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

69. See *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992); *A.Z. v. B.Z.*, 431 Mass. 150 (Mass. 2000); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386 (Ariz. Ct. App. 2005).

70. See *Davis*, 842 S.W. 2d 588; *A.Z.*, 431 Mass. 150; *Jeter*, 211 Ariz. 386.

71. See generally *Davis*, 842 S.W. 2d 588; *A.Z.*, 431 Mass. 150; *Jeter*, 211 Ariz. 386 (discussing special respect status but declining the embryos' specific rights under this classification).

72. See discussion *supra* Part III.A.3.

B. Are Embryos Community Property or Separate Property?

In states that consider embryos property, of vital importance is whether those embryos are community property or separate property. Information regarding whether genetic material—such as eggs, sperm, and embryos—are community or separate property is sparse.⁷³ Community property is defined as “[p]roperty held jointly by a husband and wife . . .” “[, and] property acquired by either spouse during the marriage may be deemed to belong to each spouse as an undivided one-half interest.”⁷⁴ Conversely, “assets are categorized as separate property if [they were] acquired before marriage, [they were] acquired by inheritance, [they were] gift[s], [they] consist[] of assets traceable to other separate property such as money received from sale of a house owned before marriage, and the spouses agree [they are] separate property.”⁷⁵

In order to analyze whether cryopreserved embryos are community property or separate property, it is important to first discuss the gametes that create them—sperm and eggs. It is arguable that sperm is considered separate property, regardless of marital status, because the individual produces the sperm himself.⁷⁶ However, just as the production of new blood takes place every day, the creation of new sperm also occurs daily; therefore, an equally reasonable argument is that since the creation of the genetic material takes place after marriage, it should be treated as community property because it no longer fits into the definition of separate property.⁷⁷ Eggs, however, are already created at birth, and a woman does not have the ability to create any more eggs than what she is born with.⁷⁸ Therefore, by the same logic, eggs should be considered separate property.⁷⁹ Under this analysis, although sperm and eggs have opposite classification, the joining of those gametes after marriage to create an embryo would create community property.⁸⁰

73. See Interview with Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, Tex. Tech Univ. Sch. of Law, in Lubbock, Tex. (Feb. 5, 2014) (discussing the emergence of issues revolving around cryopreserved embryos).

74. Merriam-Webster, <http://www.merriam-webster.com/dictionary/community%20property> (last visited Feb. 5, 2014); *Community Property*, SEADICT.COM, <http://www.seadict.com/en/en/community%20property> (last visited Feb. 23, 2014).

75. Separate Property Law & Legal Definition, U.S. LEGAL, <http://definitions.uslegal.com/separate-property/> (last visited Fe. 23, 2015).

76. *Sperm Cryopreservation*, OHSU CENTER FOR WOMEN'S HEALTH, <http://www.ohsu.edu/xd/health/services/women/services/fertility/fertility-services/fertility-preservation/semen-cryopreservation.cfm> (last visited Feb. 5, 2014).

77. See Interview with Gerry W. Beyer, *supra* note 73 (discussing the possibility that newly created sperm is community property if the individual is married).

78. Gerald M. DiLeo, *Q&A: Do Women Have All Their Eggs at Birth?*, BABYZONE, http://www.babyzone.com/getting-pregnant/how-to-get-pregnant/old-eggs-or-new-eggs_78930 (last visited Feb. 5, 2014).

79. See Interview with Gerry W. Beyer, *supra* note 73 (discussing how eggs are created, and therefore, why they could be considered separate property).

80. See *id.*

Another argument contends the law should consider both sperm and eggs as community property because § 2-316 of the Uniform Commercial Code (UCC) states that the sale of human blood, tissue, or organs is a service.⁸¹ The UCC, classifies services are classified as community property.⁸² Section 2-316, written in 1967, does not include any mention of sperm, eggs, or embryos; this is most likely due to the fact that methods of artificial reproductive technology (ART) were rather nonexistent at that time.⁸³ However, if § 2-316 was updated and revised, genetic material such as sperm, eggs, and embryos would most likely be included in the UCC due to the growing popularity of donating, using, and freezing genetic material.⁸⁴ Under this analysis, because both of the gametes are community property, the joining of those gametes to create embryo would also result in community property.⁸⁵

C. Estate Planning When Cryopreserved Embryos Are Involved

Due to the novelty of cryopreservation, most attorneys and their clients fail to account for cryopreserved embryos when making an estate plan.⁸⁶ However, it is important to account for frozen embryos in an estate plan and address topics such as, whether to continue payment of the annual storage fees and whether donation of the cryopreserved embryos upon the client's death is appropriate.⁸⁷ In order to create an effective estate plan for a client with cryopreserved embryos, it is crucial to be aware of the laws in the state where the client lives.⁸⁸ The first step in planning the estate for a client with cryopreserved embryos is to determine how the relevant jurisdiction classifies embryos: property, persons, or deserving of special respect.⁸⁹ If a jurisdiction considers embryos as property, such as in Rhode Island and New York, the client can leave the embryos to another person in an estate plan, just as the client may leave any other property—including pets.⁹⁰ The client can also include the embryos in either a will or a trust.⁹¹ If an existing will

81. U.C.C. § 2-316 (1967).

82. See Interview with Gerry W. Beyer, *supra* note 73.

83. See *id.*

84. See *id.*

85. See *id.*

86. Lori Murphy & Lauren Keenan, *Safeguarding Frozen Embryos Through Estate Planning*, BEAN, KINNEY, AND KORMAN, PC (Feb. 2012), <http://www.beankinney.com/publications-articles-safeguard-frozen-embryos-estate-planning.html>.

87. *Id.*

88. *Id.*

89. *Id.*

90. See discussion *supra* Part II.A.1; see also Interview with Gerry W. Beyer, *supra* note 73 (explaining that whether the embryos are placed in a will or a trust would have the same result after the death of the client); Murphy & Keenan, *supra* note 86.

91. *Plan Real Property Transfers to Reduce Taxes and Headache*; LAWYERS.COM, (last visited Feb. 5, 2014), <http://trusts-estates.lawyers.com/estate-planning/plan-real-property-transfers-to-reduce-taxes->

or trust does not address the cryopreserved embryos, they will pass through intestate succession, and the burden of deciding what to do with them will fall on the shoulders of the client's family.⁹² Although the cryopreservation of embryos remains an innovative idea, it is crucial for an attorney to inquire with his clients whether such embryos exist and to plan accordingly.⁹³

If, however embryos are persons in the client's jurisdiction, such as in Louisiana, estate planning becomes more complicated because the ownership of people is in direct contradiction to the Thirteenth Amendment of the United States Constitution.⁹⁴ Therefore, including embryos in an estate plan would be forbidden if they were persons; however, if embryos are classified as persons, the client may address the cryopreserved embryos' inheritance rights in an estate plan.⁹⁵

In jurisdictions where embryos are in the interim category deserving special respect—such as Tennessee, Massachusetts, and Arizona—there is no clear-cut and established method of estate planning, and therefore, the attorney should plan in the same way as if the embryo was considered property.⁹⁶ It is possible, however, that an estate plan ordering destruction of the embryos would be invalid in these jurisdictions because of the embryos' status of special respect due to the potential for human life.⁹⁷ There is currently no information available on the validity of such estate plans.

D. The Storage and Disposition of Cryopreserved Embryos

After a couple has chosen to cryopreserve their embryos, questions regarding the storage and disposal of those embryos will arise.⁹⁸ The couple must choose whether to continue to store the embryos or relinquish them in some way.⁹⁹ If the couple chooses to continue storing the embryos, problems may arise with overpopulation of the storage facility and abandonment of the frozen embryos.¹⁰⁰ Furthermore, if the couple chooses to continue storing the

and-headaches.html; *see also* Interview with Gerry W. Beyer, *supra* note 73 (explaining that whether the embryos are placed in a will or a trust would have the same result after the death of the client).

92. Molly O'Brien, Wills and Trusts with Regards to Frozen Embryos and Posthumous Reproduction, Center for Surrogate Parenting, Inc. (last visited Feb. 5, 2014), *available at* http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=201.

93. *See id.*

94. *See* Interview with Gerry W. Beyer, *supra* note 73 (noting the complexities of estate planning for clients in states where embryos are considered persons); U.S. CONST. amend. XIII § 1.

95. *See* discussion *infra* Part III.E; *see also* Interview with Gerry W. Beyer, *supra* note 73 (discussing time limits on children by intestacy).

96. *See* Interview with Gerry W. Beyer, *supra* note 73.

97. *See id.* (discussing the uncertainty revolving around estate planning in jurisdictions where embryos deserve special respect).

98. *See* discussion *infra* Part III.D.1.

99. *See* discussion *infra* Part III.D.1.

100. *See* discussion *infra* Part III.D.2.

embryos, they may bring claims for damages if those embryos are destroyed without the couple's consent.¹⁰¹

1. Ethical, Religious, and Moral Concerns Surrounding the Storage and Disposition of Cryopreserved Embryos

Once a couple has either completed their family or chosen not to use their cryopreserved embryos for some other reason, there are several options for the remaining embryos: (1) keep them frozen; (2) dispose of them; (3) donate them to another couple; (4) donate them to research; or (5) do nothing.¹⁰² This decision is a very personal one, and a discussion of why a client may choose each option is below.¹⁰³

a. Option One—Keep Them Frozen

Couples often save cryopreserved embryos for future use.¹⁰⁴ Couples who chose this option continue to pay storage fees in order to keep the embryos frozen.¹⁰⁵ Couples often select this option when they are afraid to make any other decision because of moral considerations.¹⁰⁶ An estimated twenty percent of couples with cryopreserved embryos choose to keep them frozen indefinitely.¹⁰⁷ Fertility doctors understand the reasoning behind this option, often justifying this position by stating, “[w]hen you’re pouring your money, your heart, and your soul into creating an embryo and creating a life, the last thing you want to think about is how you’re going to dispose of it.”¹⁰⁸

b. Option Two—Dispose of the Embryos

Couples often battle a moral dilemma when deciding whether to dispose of embryos.¹⁰⁹ The couple may ask themselves whether life begins at conception, at implantation, at the time of fetal brain development, or at birth.¹¹⁰ Many people do not believe that embryos are humans, but because

101. See discussion *infra* Part III.D.3.

102. See Synesiou, *supra* note 25.

103. See discussion *infra* Part III.D.1.a–e.

104. Andis Robeznieks, *Ethics for Extra Embryos: Doctors Face a Dilemma*, AMERICAN MEDICAL NEWS (Feb. 14, 2005), <http://www.amednews.com/article/20050214/profession/302149957/4/>.

105. Laura Beil, *The Fate of Frozen Embryos*, PARENTING, <http://www.parenting.com/article/the-fate-of-frozen-embryos> (last visited Feb. 5, 2014).

106. *Id.*

107. *Id.*

108. *Id.*

109. See Synesiou, *supra* note 25.

110. See *id.*

that they still deserve respect because of their potential for future use.¹¹¹ This group of people is not as concerned with the ethical questions associated with the disposal of frozen embryos.¹¹²

Many parents feel as though they are harming their “children” if they destroy the embryos.¹¹³ Some clients feel religious convictions because they feel like they are destroying human life.¹¹⁴ Some even feel as though disposing of cryopreserved embryos constitutes murder.¹¹⁵

c. Option Three—Donate the Embryos to Another Couple

When considering this option, the question arises as to whether it is ethical to consider factors such as race, religion, age, financial background, and how many other children an adoptive couple has.¹¹⁶ Pro-lifers consider this option to be ideal in lieu of destroying the frozen embryos.¹¹⁷

Despite federal grants toward the embryo adoption movement, proposed legislation that would make the embryo adoption process more difficult could cause the movement to become futile if the legislation makes the process of adopting embryos too difficult.¹¹⁸ The chair of the AMA Council on Ethical and Judicial Affairs, Michael Goldrich, MD, has suggested that couples should use predetermination agreements—which address potential uses of the embryos as well as their storage—when exercising this option.¹¹⁹

d. Option Four—Donate the Embryos to Research

The same moral question of when life begins may burden a couple when deciding whether this option is the right choice.¹²⁰ This moral question can be balanced with the possibility of the embryos curing infertility and other diseases after donation.¹²¹ Research indicates that many IVF clients feel that disposing of unused embryos is a waste and that donation to research is a better option.¹²²

111. B.A. Robinson, *Handling Surplus Embryos in Fertility Clinics—Ethical Concerns About Discarding Surplus Embryos*, RELIGIOUS TOLERANCE (Sept. 25, 2002), http://www.religioustolerance.org/res_stem10a.htm#.

112. *Id.*

113. See Synesiou, *supra* note 25.

114. Giuliana Fuscaldo, et al., *How to Facilitate Decisions About Surplus Embryos: Patients' Views*, HUMAN REPRODUCTION (Dec. 2007), <http://humrep.oxfordjournals.org/content/22/12/3129.long>.

115. See Robinson, *supra* note 111.

116. See Synesiou, *supra* note 25.

117. See Robinson, *supra* note 111.

118. See Robeznieks, *supra* note 104.

119. See *id.*

120. See Synesiou, *supra* note 25.

121. See *id.*

122. See Fuscaldo, *supra* note 114.

e. Option Five—Do Nothing

Many couples forgo any of the options discussed above and avoid the decision altogether by ignoring correspondence from the IVF clinic and not paying storage fees.¹²³ Some couples do nothing because they feel uncomfortable making a decision.¹²⁴ Couples report that they thought making a decision regarding the fate of their embryos was “difficult and emotionally too stressful.”¹²⁵ Exercising this option, however, can lead to abandonment of the embryos.¹²⁶ In turn, this places the burden of deciding what to do with the embryos directly on the doctors and the fertility clinic.¹²⁷

Additionally, in jurisdictions where embryos are assets of the estate, the heirs of the estate will inherit the embryos upon death of the donors.¹²⁸ Therefore, the burden of deciding the fate of the embryos is placed directly on the shoulders of the donor’s heirs at the time of death.¹²⁹ This is a very heavy burden for the heirs to bear; instead, the donors should include the embryos in their estate plan.¹³⁰ The IVF clinic will eventually destroy cryopreserved embryos after a client’s death if financial arrangements are not addressed in the client’s will.¹³¹ A similar solution would be for the clients to have advanced directives stating what the clinic should do with the cryopreserved embryos in the event of divorce, death, and abandonment.¹³²

2. Embryo Storage

Of recent concern are issues regarding embryos storage.¹³³ The Society for Reproductive Technology has reported that IVF clinics in the United States were storing nearly 400,000 cryopreserved embryos as of 2010.¹³⁴ Of the stored embryos, 4.5% “were in limbo due to loss of contact with a patient, patient death, abandonment, [or] divorce.”¹³⁵

Typically, storage fees for cryopreserved embryos are roughly \$400 per year.¹³⁶ Embryo storage facilities often face the ethical dilemma of whether it is appropriate to continue storage of abandoned embryos—continued

123. See Synesiou, *supra* note 25.

124. See Fuscaldo, *supra* note 114.

125. See *id.*

126. See Synesiou, *supra* note 25.

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. Abandoned Embryos, Fertility Lab Insider (July 31, 2010 8:35 AM), <http://fertilitylabinsider.com/2010/07/abandoned-embryos/>.

132. See *id.*

133. See *id.*

134. See *id.*

135. *Id.*

136. *Id.*

storage of cryopreserved embryos for which storage fees have not been paid while raising the cost of paying clients in order to subsidize for the nonpaying clients.¹³⁷ Embryo abandonment occurs when (1) the client cannot be contacted or (2) the client informs the IVF clinic that they do not want any further association with the embryos.¹³⁸ At this time, there are approximately 20,000 abandoned embryos in the United States.¹³⁹

According to a recent statement by the ASRM, “it is ‘ethically acceptable’ for clinics to deem embryos abandoned if at least five years have passed since contact with the couple, reasonable attempts have been made to reach them and no written instructions from the couple exist concerning how to dispose of their leftover embryos.”¹⁴⁰ Because of the burden on the IVF facility to decide what to do with the abandoned embryos, this issue has become a problem for facilities, and the problem is growing as the number of cryopreserved embryos increases.¹⁴¹ Some suggestions have been made—such as embryo adoption programs—to reduce the number of cryopreserved embryos across the nation, but as of now, no decision has been made addressing the solution to this concern.¹⁴²

3. Embryo Disposition

Two issues in particular arise in regard to the disposition of cryopreserved embryos.¹⁴³ First, other countries have placed time limits on the length of time embryos may be stored before either the IVF patient or the clinic may dispose of them.¹⁴⁴ Although no United States jurisdiction has implemented such a law, attorneys and potential IVF patients should be aware of these laws.¹⁴⁵ Secondly, throughout the United States, claims have been brought for the accidental and intentional destruction of cryopreserved embryos.¹⁴⁶ A number of these causes of action have been successful, but others have been unsuccessful.¹⁴⁷

137. *Id.*

138. See *Disposition of Abandoned Embryos: A Committee Opinion*, THE ETHICS COMMITTEE OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (Mar. 1, 2013 10:08 AM), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/abandonedembryos.pdf.

139. Sharon Kirkey, *Frozen Embryo Disposal Not Unethical: Group Medicine: Leading Reproductive Organization Says Clinics Within Bounds to Destroy ‘Abandoned’ Embryos*, THE PROVINCE (Sept. 9, 2013), <http://www.theprovince.com/health/Frozen+embryo+disposal+unethical+Group/8886215/story.html>.

140. See *id.*; *Disposition of Abandoned Embryos: A Committee Opinion*, *supra* note 138.

141. Abandoned Embryos, FERTILITY LAB INSIDER (July 31, 2010 8:35 AM), <http://fertilitylabinsider.com/2010/07/abandoned-embryos/>.

142. See Robeznieks, *supra* note 104.

143. See discussion *infra* Part III.D.3.

144. See discussion *infra* Part III.D.3.a.

145. See discussion *infra* Part III.D.3.a.

146. See discussion *infra* Part III.D.3.iii.

147. See discussion *infra* Part III.D.3.iii.

a. Disposition Around the Globe

The unauthorized disposal of cryopreserved embryos has been a growing problem around the world for several decades.¹⁴⁸ Several countries outside of the United States have implemented guidelines for the storage and disposal of frozen embryos.¹⁴⁹ For instance, England employed a deadline for the storage of frozen embryos.¹⁵⁰ Great Britain passed a law in 1990, stating that embryos may only be cryopreserved for five years unless the donors request an extension before that five year period is over.¹⁵¹ Great Britain passed the new law because the country's "Human and Fertilization Embryology Authority said it was impractical to keep every embryo indefinitely."¹⁵²

Australia also has ethical guidelines stating that embryos can only be frozen for five years with an option to renew consent to freeze for an additional five years.¹⁵³ After this time period, the clinic or facility storing the embryos can arrange for the disposal of the embryos if there are no alternative arrangements, but the clinic must dispose of the embryos in a respectful manner.¹⁵⁴

Recognition of this problem also recently took place in a Canadian report.¹⁵⁵ The news report suggests that Canada is beginning to look for solutions to this problem, and referenced a statement published in an American journal stating "it is 'ethically acceptable' for clinics to deem embryos abandoned if at least five years have passed since contact with the couple, reasonable attempts have been made to reach them and no written instructions from the couple exist concerning how to dispose of their leftover embryos."¹⁵⁶ The article also suggests that it is acceptable to destroy abandoned embryos.¹⁵⁷ As of the date of this article, Canada does not have a solution for this growing problem.¹⁵⁸

Spain implemented a fertility program to allow other couples to adopt abandoned embryos; this is done without the consent of the clients who

148. See Synesiou, *supra* note 25.

149. See *id.*

150. *Id.*

151. Don Kladstrup, 'Adoption' An Alternative to Embryo Disposal?, CNN INTERACTIVE (July 30, 1996, 1:15 AM), <http://www.cnn.com/WORLD/9607/30/uk.embryo/>.

152. *Id.*

153. Position Statement—Storage and Disposal of Embryos, FLINDERSFERTILITY, <http://flindersfertility.com.au/Media-News/Position-Statements/FF-Position-Statement-Storage-and-Disposal> (last visited Feb. 5 2014).

154. *Id.*

155. See Kirkey, *supra* note 139.

156. *Id.*

157. *Id.*

158. *Id.*

cryopreserved the embryos.¹⁵⁹ Under this program, the clinic sent out annual paperwork, and if the client did not return the paperwork stating what they would like to do with the embryos, the embryos became available for adoption.¹⁶⁰ A similar program exists in Britain.¹⁶¹

The ASRM has taken the stand that while clients should have the right to decide what to do with their embryos, if frozen embryos become abandoned, the law should allow clinics to dispose of the embryos.¹⁶² The clinics may not, however, donate the embryos without the consent of the clients.¹⁶³ ASRM suggests that clinics should take legal steps to solve the uncertainty surrounding this issue.¹⁶⁴

i. Causes of Action for the Unauthorized Disposal of Frozen Embryos

Since the commencement of IVF, there have been a handful of cases concerning either the accidental or intentional unauthorized destruction of cryopreserved embryos.¹⁶⁵ In some instances, the court held the IVF clinic or physician liable, while other times the courts have been reluctant to grant the IVF patient relief.¹⁶⁶

ii. Causes of Action Round One—The Persuasive

Although case law on the unauthorized disposition of frozen embryos is sparse, there are a number of claims that have proven to be successful.¹⁶⁷ When deciding on these causes of action, a court must answer several questions, such as: who is the claimant, how are embryos classified, who is responsible, was there a duty not to dispose of the embryos, and are pre-freeze agreements binding?¹⁶⁸

Courts have upheld healthcare liability claims for destroyed embryos.¹⁶⁹ Texas Civil Practice and Remedies Code defines a healthcare liability claim as:

159. *Abandoned Embryos*, FERTILITY LAB INSIDER (July 31, 2010 8:35 AM), <http://fertilitylabinsider.com/2010/07/abandoned-embryos/>.

160. *Id.*

161. *See id.*

162. *See id.*; *Disposition of Abandoned Embryos: A Committee Opinion*, *supra* note 138.

163. *Abandoned Embryos*, *supra* note 159.

164. *See Disposition of Abandoned Embryos: A Committee Opinion*, *supra* note 138.

165. *See* discussion *infra* Part III.D.3.iii

166. *See* discussion *infra* Part III.D.3.ii–iii.

167. *See generally* Inst. for Women’s Health, P.L.L.C. v. Imad, No. 04-05-00555-CV, 2006 WL 334013 (Tex. App.—San Antonio, Feb. 15, 2006, reh’g denied).

168. *See id.*; *Frisina v. Women & Infants Hosp. of R.I.*, No. Civ. A. 95-4037, 2002 WL 1288784 (R.I. Super. May 30, 2002) (May 30, 2002); *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386 (Ariz. Ct. App. 2005).

169. *See generally* *Imad*, No. 04-05-00555-C, 2006 WL 334013; *Saleh v. Hollinger*, 355 S.W.3d 368 (Tex. App.—Dallas 2011, pet. denied).

[A] cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.¹⁷⁰

In *Institute for Women's Health, P.L.L.C. v. Imad*, a health clinic dropped a tray of embryos, destroying all but one.¹⁷¹ The plaintiffs argued that their claim was not a healthcare liability claim, and therefore, they did not provide an expert report as required in a healthcare liability claim.¹⁷² They argued that the embryos did not meet the definition of a person and that a reasonably prudent person standard was appropriate.¹⁷³ The court disagreed, stating that this was in fact a healthcare liability claim, for which the claimants were not the destroyed embryos, but the parents.¹⁷⁴

The plaintiff argued for the court to apply a reasonably prudent person standard, but the court stated that "in determining what is proper handling, storing, and transporting of embryos, specialized knowledge of health care is clearly necessary; it is not within a juror's ordinary understanding or experience."¹⁷⁵ Claims with this increased standard requiring an expert report are, in fact, healthcare liability claims; the plaintiffs, therefore, should have filed an expert report, because (1) the claimant sought treatment specifically for fertilization, (2) the acts and omissions of the defendants were an inseparable part of the rendition of medical and healthcare services, and (3) IVF involves special knowledge beyond a layman's understanding.¹⁷⁶

A Rhode Island court allowed a claim for emotional harm due to the loss of irreplaceable property when a hospital participating in IVF lost and accidentally destroyed the cryopreserved embryos of several clients.¹⁷⁷ Under Rhode Island law, embryos are classified as property.¹⁷⁸ The only way for a claim for the loss of irreplaceable property to survive in Texas is for cryopreserved embryos to be classified as property.¹⁷⁹ At this time, however, frozen embryos do not hold a definite status in Texas.¹⁸⁰ A claim of this type

170. TEX. CIV. PRAC. & REM. CODE § 74.001.

171. See *Imad*, No. 04-05-00555-C, 2006 WL 334013 at *1.

172. See *id.* at *2.

173. See *id.* at *3.

174. See *id.* at *3.

175. *Id.* at *3.

176. *Saleh v. Hollinger*, 335 S.W.3d 368, 375 (Tex. App.—Dallas 2011, pet. denied).

177. See *Frisina v. Women & Infants Hosp. of R.I., C.A. No. 95-4037, No. 95-4469, No. 95-5827*, 2002 R.I. Super. LEXIS 73 at *4–5 (May 30, 2002).

178. *Id.* at *32.

179. See discussion *supra* Part III.A.1.

180. See discussion *infra* Part IV.

could force Texas courts to rule on the classification of cryopreserved embryos.¹⁸¹

In 2005, the Arizona Court of Appeals heard a case where the plaintiffs transferred ten of their embryos from one facility to another: *Jeter v. Mayo Clinic Arizona*.¹⁸² Five of the plaintiffs' ten embryos were either lost or destroyed during the process of transfer, and the IVF facility could not account for the missing embryos.¹⁸³ The plaintiffs filed a claim for negligent loss or destruction based on the Third Restatement of Torts section 323, which states that when someone undertakes a duty, that person will be liable for physical or economic harm caused if "(a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."¹⁸⁴ The Arizona Court of Appeals allowed this claim to stand because Arizona has adopted Restatement of Torts § 323.¹⁸⁵

Texas has also adopted section 323 of the Restatement of Torts.¹⁸⁶ Therefore, one can infer that if this claim were brought in Texas, the court would allow it to stand. However, because this claim did not refer to the classification of cryopreserved embryos, it is unlikely that a claim such as this, if brought in Texas, would aid the courts in determining the classification of frozen embryos.¹⁸⁷

The plaintiffs in *Jeter* also brought a cause of action for breach of fiduciary duty.¹⁸⁸ The lower court held that the Medical Malpractice Act barred a claim for breach of fiduciary duty, but the court of appeals said that determination was premature.¹⁸⁹ Because the lower court dismissed this claim before any factual development could take place to determine if the Act barred this claim, the court reversed the dismissal.¹⁹⁰ If the plaintiffs' claim "[did] not arise out of [the] rendering of 'medial' or 'health-related' services by [the facility] . . . such a claim would not be within the ambit of or barred by [the Act]."¹⁹¹

Once again, however, a claim for breach of fiduciary duty does not refer to the classification of cryopreserved embryos; therefore, if brought in Texas, this claim could aid the courts in determining the classification of frozen embryos.¹⁹² It is important to note, however, that the classification of

181. See discussion *supra* Part III.A.1.

182. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 388 (Ariz. Ct. App. 2005).

183. *Id.*

184. *Id.* at 402.

185. See *id.*

186. RESTATEMENT (THIRD) OF TORTS § 323 (1965).

187. See discussion *supra* Part III.A.

188. See *Jeter*, 211 Ariz. at 386.

189. See *id.* at 403.

190. See *id.*

191. *Id.* at 405.

192. See discussion *infra* Part IV.

cryopreserved embryos is not the only concern.¹⁹³ Texas must also decide how to protect both in vitro fertilization facilities and clients who have cryopreserved embryos.¹⁹⁴ Claims such as negligent loss or destruction and breach of fiduciary duty could aid with this protective concern.¹⁹⁵

The plaintiffs in *Jeter* also filed a successful claim for breach of bailment.¹⁹⁶ The court found that the pre-freeze agreement documents that the plaintiffs signed prior to their treatment at the IVF facility reflected an agreement between the in vitro fertilization facility and the plaintiffs.¹⁹⁷ The agreement declared that the facility would store the embryos until the plaintiffs either wished to use them or until the facility received other instructions regarding their disposition.¹⁹⁸ Thus, the courts found that the lower court improperly dismissed the breach of bailment claim, and the court of appeals reversed.¹⁹⁹

New York and Connecticut courts have heard claims for intentional infliction of emotional distress (IIED) resulting from the unauthorized destruction of cryopreserved embryos and other genetic tissue.²⁰⁰ In *Del Zio v. Presbyterian Hospital in New York*, the plaintiffs were having difficulty conceiving a child.²⁰¹ After seeking medical advice about IVF, the physician placed the couple's embryos in an incubator, where they were to remain for four days.²⁰² The next day, the Chief of the Department of Obstetrics and Gynecology of the hospital learned about the procedure—he did not approve of cryopreservation—and ordered that the procedure be stopped immediately.²⁰³ The hospital did not inform the plaintiffs of the Chairman's actions prior to the destruction of their embryos.²⁰⁴

According to New York law, three elements need to be met for IIED in order for the court to find for the plaintiffs:

[(1)] [The] . . . defendants' conduct was so extreme[ly] outrageous[,] and shocking that it exceeded all reasonable bounds of decency, [(2)] [the] defendant[s] acted with the intent to inflict emotional distress or . . . that [they] acted recklessly and with utter disregard of the consequences that

193. See discussion *infra* Part IV.

194. See discussion *infra* Part IV.

195. See discussion *infra* Part IV.

196. See *Jeter*, 211 Ariz. at 403.

197. See *Jeter*, 211 Ariz. at 405.

198. See *id.*

199. See *id.*

200. See *Del Zio v. Presbyterian Hosp. in New York*, No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450 at *1 (S.D.N.Y. Nov. 14, 1978); *Witt v. Yale-New Haven Hosp.*, 51 Conn. Supp. 155, 156 (Conn. Super. Ct. 2008).

201. See *Del Zio*, No. 74 Civ. 3588 (CES), at *3.

202. See *id.* at 2–3.

203. See *id.* at 3–4.

204. See *id.* at *7.

might follow[,] and [(3)] the defendants' conduct caused severe [emotional] distress to the plaintiffs.²⁰⁵

The lower court found for the plaintiffs on the claim of intentional infliction of emotional distress and awarded the plaintiffs a total of \$50,003 between the three defendants.²⁰⁶ The appellate court decided "that the verdict was fair, reasonable[,] and lawful."²⁰⁷

In *Witt v. Yale-New Haven Hospital*, the plaintiffs decided to have ovarian tissue frozen and stored so that the couple could conceive a child after the wife underwent treatment for breast cancer, which would likely cause infertility.²⁰⁸ The hospital disposed of Mrs. Witt's ovarian tissue without her permission.²⁰⁹ She sued for infliction of emotional distress.²¹⁰

In Connecticut there are four elements for IIED:

(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe.²¹¹

The court allowed this claim with regard to Mrs. Witt, but denied the claim with regard to Mr. Witt.²¹²

The elements for intentional infliction of emotional distress in Texas are (1) the defendant acted intentionally or recklessly, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's conduct caused distress, and (4) the emotional distress was severe.²¹³ Texas allows a stand-alone claim for intentional infliction of emotional distress.²¹⁴

In *Frisina*, discussed above, the plaintiffs also brought a claim for negligent infliction of emotional distress (NIED), for which the elements in Rhode Island are that "a party must (1) be a close relative of the victim, (2) be present at the scene of the accident and be aware that the victim is

205. *Id.* at *5.

206. *Id.* at *11 (Mrs. Del Zio was awarded \$50,000, but the court only awarded Mr. Del Zio \$3.00 in damages).

207. *Id.* at *24.

208. *See Witt v. Yale-New Haven Hosp.*, 51 Conn. Supp. 155, 157 (Conn. Super. Ct. 2008).

209. *See id.*

210. *See id.* at 158.

211. *Id.* at 179.

212. *Id.* at 182 (concluding that both plaintiffs met the first three criteria, but that Mr. Witt did not meet the fourth criterion because he did not support his claim with facts regarding the severity of the emotional distress he suffered).

213. *See Dan B. Dobbs et al., Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 511 (6th ed. 2009).

214. *See id.* at 515.

being injured, and (3) as a result of experiencing the accident, suffer serious emotional injury that is accompanied by physical symptomatology.”²¹⁵

The court stated that it would be unlikely for the plaintiffs to qualify the pre-embryos as victims due to (1) the definition of person under the Rhode Island wrongful death statute, (2) the fact that the plaintiffs did not witness the actual loss or destruction of the embryos, and (3) the fact that the plaintiffs did not suffer any physical symptoms of their emotional distress.²¹⁶ The court denied the claim for negligent infliction of emotional distress.²¹⁷

In *Witt*, the plaintiffs also brought a claim for NIED.²¹⁸ The elements for NIED in Connecticut are: “(1) the defendant’s conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff’s distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant’s conduct was the cause of the plaintiff’s distress.”²¹⁹ To determine if Mrs. Witt met these elements, the court focused on whether the couples’ anxiety and fear to conceive was sufficiently foreseeable.²²⁰ To determine if Mr. Witt met these elements, the court focused on whether the hospital owed him a legal duty as a matter of policy.²²¹ Thus, the court found that it was reasonably foreseeable that both plaintiffs would have overwhelming anxiety in this case.²²² The court allowed the claim for negligent infliction of emotional distress.²²³

Texas adopted the elements of negligent infliction of emotional distress from *Dillon v. Legg*.²²⁴ Under *Dillon*, to find for the plaintiffs, a Texas court must evaluate the following:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it; (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.²²⁵

215. *Frisina v. Women & Infants Hosp. of R.I.*, C.A. No. 95-4037, No. 95-4469, No. 95-5827, 2002 R.I. Super. LEXIS 73 at *12 (Super. Ct. May 30, 2002).

216. *Id.* at *29–30.

217. *Id.* at *30.

218. *Witt v. Yale-New Haven Hosp.*, 51 Conn. Supp. 155, 155 (Conn. Super. Ct. 2008).

219. *Id.* at 162 (quoting *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 444, 815 A.2d 119 (2003)).

220. *Id.* at 163.

221. *Id.* at 171.

222. *Id.* at 179.

223. *Id.* at 169.

224. *See Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993) (citing *Dillon v. Legg*, 68 Cal. 2d 728 (Cal. 1968)).

225. *Id.*

Texas does not allow for a stand-alone claim for NIED.²²⁶

iii. Causes of Action Round Two—The Unpersuasive

In *Jeter*, discussed above, the plaintiffs also brought a claim for wrongful death.²²⁷ The court held that the cryopreserved pre-embryos did not meet the definition of a person, under Arizona law, and that it is best left to the Legislature to redefine the term, if it wished to include embryos in that category.²²⁸ Arizona does not consider pre-embryos as persons or property; they are instead in the category deserving special respect.²²⁹

Under Texas's wrongful death statute, it is unlikely that cryopreserved embryos will be considered persons.²³⁰ Texas Civil Practice and Remedies Code gives the following definitions: "(2) 'Person' means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation. (4) 'Individual' includes an unborn child at every stage of gestation from fertilization until birth."²³¹ The term "gestation" has not been defined by the court, but commonly refers to a time during pregnancy beginning when an embryo is implanted into the uterus and develops in the mother's womb, which has not begun at the time of fertilization in in vitro fertilization.²³² Under the common definition of gestation, a claim for wrongful death would probably not survive in Texas for the unauthorized destruction of frozen embryos.²³³

In *Del Zio*, discussed above, the plaintiffs also brought a claim for conversion.²³⁴ In order to find for the plaintiffs, the lower court would have had to find that (1) ". . . the defendants intended to exercise control over the property[,] . . . [(2)] the defendants interfered with plaintiffs' use of the property[;] . . . [and (3)] the plaintiffs either possessed, had the right to immediate possession or were entitled to future possession of the property."²³⁵ The lower court denied the conversion claim, and the court of appeals confirmed.²³⁶

226. *Id.* at 597; *Tex. Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 612 (Tex. 2002).

227. *See Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 390 (Ariz. Ct. App. 2005).

228. *See id.* at 391.

229. *See id.* at 401.

230. *See generally* TEX. CIV. PRAC. & REM. CODE § 71.001 (discussing the terms included in different sections of the chapter).

231. TEX. CIV. PRAC. & REM. CODE § 71.001.

232. *See* Merriam Webster, available at <http://www.merriam-webster.com/dictionary/gestation> (last visited Oct. 11, 2013).

233. *See* TEX. CIV. PRAC. & REM. CODE § 71.001.

234. *See Del Zio v. Presbyterian Hosp. in New York*, No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450 at *11 (Nov. 14, 1978).

235. *Id.*

236. *Id.* at *24.

iv. Causes of Action Round Three—The Defenses

In states that recognize the loss of chance doctrine, a plaintiff may not recover for lost chance of survival if the adverse result probably would have happened anyway.²³⁷ The Supreme Court of Texas has described the loss of chance doctrine by stating that

“[W]here preexisting illnesses or injuries have made a patient’s chance of avoiding the ultimate harm improbable even before the allegedly negligent conduct occurs—i.e., the patient would die or suffer impairment anyway—the application of these traditional causation principles will totally bar recovery, even if such negligence has deprived the patient of a chance of avoiding the harm.”²³⁸

Therefore, in the event of unauthorized destruction of cryopreserved embryos, since the chance of a live birth is less than 50%, this defense could be a viable option for the IVF facility to assert.²³⁹

In *Frisina*, the IVF facility brought the affirmative defense of assumption of the risk.²⁴⁰ In that case, the plaintiffs all signed various pre-freeze agreements.²⁴¹ However, the plaintiffs contended that they only assumed the risk of an accident occurring when due care was exercised.²⁴² They did not assume the risk when the defendant’s actions resulted from negligence.²⁴³ The court agreed with the plaintiffs and denied the IVF facility’s motion for summary judgment on this affirmative defense.²⁴⁴

v. Causes of Action Final Round—The Damages

Another issue worth addressing is the appropriate amount of damages for a successful claim of the unauthorized disposal of cryopreserved embryos. Although this question has not been directly in front of Texas courts, one can draw inferences by referring to other, similar cases that have

237. See *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 398 (Tex. 1993); *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 854 (Tex. 2009).

238. See *Kramer*, 858 S.W.2d at 400.

239. See *Clinical Summary Report*, SART CORS, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Feb. 5, 2014).

240. *Frisina v. Women & Infants Hosp. of R.I.*, No. Civ. A. 95-4037, 2002 R.I. Super. LEXIS 73 at *38-39 (May 30, 2002).

241. *Id.*

242. *Id.* at *39.

243. *Id.*

244. *Id.* at *46.

been before Texas courts.²⁴⁵ Such cases include claims for sentimental damage, intrinsic value, and mental anguish.²⁴⁶

(a) *Sentimental Damages*

Texas courts may allow for sentimental damages for the disposal of cryopreserved embryos.²⁴⁷ In *City of Tyler v. Likes*, the plaintiff's home flooded.²⁴⁸ The flood ruined personal records, family correspondence, family photographs, and keepsakes.²⁴⁹ The plaintiff sued the city and the trial court granted summary judgment for the city.²⁵⁰ The Supreme Court of Texas remanded the case to the lower court, ruling that there are special rules to recover damages for items of low market value with their primary value in sentiment.²⁵¹ The court stated, "In such cases . . . the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property."²⁵² For property with little or no market value, the measurement of damages is the loss in value to the property owner.²⁵³

(b) *Intrinsic Value*

Another option for Texas courts is to allow damages for the intrinsic value of cryopreserved embryos.²⁵⁴ *Gulf States Utilities Company v. Low* discussed damages for household goods that have no recognized market value.²⁵⁵ In its opinion, the court stated

[T]he measure of damages is the value to the owner. . . [and] the trier of fact may consider, in determining the actual value to the owner at time of loss, the original cost, cost of replacement, opinions of qualified witnesses, including the owner, the use to which the property was put, as well as any other reasonably relevant facts.²⁵⁶

245. See generally *City of Tyler v. Likes*, 962 S.W.2d 489, (Tex. 1997); *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561 (Tex. 2002); *Krishnan v. Sepulveda*, 916 S.W.2d 478, (Tex. 1995) (discussing damages of the above-listed claims).

246. See generally *City of Tyler v. Likes*, 962 S.W.2d 489, (Tex. 1997); *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561 (Tex. 2002); *Krishnan v. Sepulveda*, 916 S.W.2d 478, (Tex. 1995) (discussing damages of the above-listed claims).

247. See generally *City of Tyler v. Likes*, 962 S.W.2d 489, (Tex. 1997).

248. *Id.* at 493.

249. *Id.* at 493.

250. *Id.*

251. *Id.*

252. *Id.* at 497.

253. *Id.*

254. See *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002).

255. *Id.*

256. *Id.*

“The measure of damages for the destruction of such items is the ‘actual worth or value of the articles to the owner for use in the condition in which they were at the time of [the injury] excluding any fanciful or sentimental considerations.’”²⁵⁷

(c) *Mental Anguish*

Lastly, when frozen embryos are destroyed without authorization, Texas courts allow damages for mental anguish.²⁵⁸ In *Krishnan v. Sepulveda*, the plaintiffs alleged that the defendant’s negligent diagnosis, prenatal supervision, and treatment resulted in the birth of a stillborn child.²⁵⁹ The plaintiffs sued for mental anguish and loss of society, companionship, and affection of the child.²⁶⁰ Importantly, the plaintiffs alleged that the defendant was negligent in caring for the mother, not the fetus.²⁶¹ The court held that a mother may recover mental anguish damages for the loss of a fetus as a result of a negligent physician causing injury to the mother.²⁶² With regard to the father of the child, however, no physician-patient relationship existed, thus the court precluded the father from recovering damages for mental anguish.²⁶³

At the time of *Krishnan*, Texas’s wrongful death statute did not include a fetus.²⁶⁴ The court said that the wrongful death statute did not allow for damages for loss of companionship and society that results from the loss of a fetus.²⁶⁵ The court concluded that the mother could recover for mental anguish, the father could not recover for mental anguish, and neither parent could recover for loss of society, companionship, and affection of the child.²⁶⁶

E. Children by Intestacy—Enacting Time Limits on the Use of Cryopreserved Embryos

Very few states have considered the cutting-edge concept of limiting the amount of time a spouse can use cryopreserved embryos after the death of either the egg or sperm donor.²⁶⁷ The Restatement of Property does,

257. *Id.*

258. *Krishnan v. Sepulveda*, 916 S.W.2d 478, 479 (Tex. 1995).

259. *Id.*

260. *Id.* at 490.

261. *Id.* at 489.

262. *See id.*

263. *See id.* at 488.

264. *See id.* at 487.

265. *See id.* at 488.

266. *See id.* at 489.

267. *See* Interview with Gerry W. Beyer, *supra* note 65 (noting that although no statutes regarding time limit for inheritance rights of cryopreserved embryos currently exist, Texas is considering a proposal for such a statute); *E-mails and Embryos: 21st Century Estate Planning*, SECURESAFE (Jan. 6, 2012), <http://www.securesafe.com/en/in-the-media/2012/01/06/e-mails-and-embryos-21st-century-estate->

however, address this limitation, stating that posthumous children are not heirs.²⁶⁸ Despite the Restatement, the trend is moving in the direction of allowing inheritance rights if the posthumous child is born within a reasonable time after the death of one of the parents.²⁶⁹ In Michigan, the term “children” includes adopted children and children created by ART.²⁷⁰ One commentator suggests “including a time limit in which these children can be conceived after the death of one parent, allowing the surviving spouse to grieve, but not allowing the estate to be open indefinitely.”²⁷¹

Although there is no active legislation regarding the time limitation in Texas, the Real Estate Probate of Trust Law Council of Texas is currently reviewing a proposal suggesting a two-year time limit.²⁷² Under the suggested legislation, any child created by cryopreserved embryos later than two years after either parent’s death will not have inheritance rights.²⁷³ During the most recent meeting discussing the proposal, the Council shortened the time limit to ten months.²⁷⁴ One reason for a shorter time limit is to reduce the uncertainty revolving around property distribution under the estate.²⁷⁵ Additionally, another of the legislature’s goals is to prevent surviving spouses from creating children for the sole purpose of impacting who inherits certain property of the deceased parent.²⁷⁶ The proposed legislature would not require the destruction of the embryos at the end of the time limit; instead, it only addresses inheritance rights of children born in intestacy.²⁷⁷ The surviving spouse would still have the right to use the embryos, but any resulting children would only have inheritance rights if born within the specified time limit.²⁷⁸

IV. SOLUTIONS FOR TEXAS

IVF facilities, IVF patients, and attorneys who represent both the IVF facility and patients should carefully consider each of the issues discussed above.²⁷⁹ Furthermore, the Texas legislature should take these issues into account and create legislation to answer the questions presented above.²⁸⁰

planning/ (discussing Michigan law).

268. O’Brien, *supra* note 92.

269. *Id.*

270. *See E-mails and Embryos: 21st Century Estate Planning*, *supra* note 267.

271. *See id.* (quoting Lawrence W. Waggoner, a professor of law at the University of Michigan).

272. *See* Interview with Gerry W. Beyer, *supra* note 73.

273. *See id.*

274. *See id.* (discussing the Council’s meeting that was held on February 1, 2014).

275. *See id.*

276. *See id.*

277. *See id.*

278. *See id.*

279. *See supra* Part III.

280. *See supra* Part IV.

Embryos should be considered property in Texas because, as indicated above, classifying them as property would not undermine the embryos' potential for human life.²⁸¹ Instead, this designation would only settle the dispute over who holds the bundle of sticks to the embryos.²⁸² If embryos were considered persons under Texas law, rights of the parents would be seriously undermined—the parents may be forbidden from destroying the embryos or donating them to research.²⁸³ Designating embryos as holding special respect status could also have negative consequences because the parameters of that category have not been carefully laid out.²⁸⁴

It is crucial for Texas to classify embryos in order for attorneys to address cryopreserved embryos in an estate plan.²⁸⁵ If Texas classifies embryos as property, any cryopreserved embryos that the client owns can be addressed in the same way as other property in a will or trust.²⁸⁶ If, however, embryos are persons, the parents may only address the inheritance rights in a will or trust—and as noted above, those inheritance rights may be limited by future legislation regarding time limits on children created by intestacy.²⁸⁷ If embryos are afforded special respect status, the methods of estate planning are unclear due to the undefined boundaries of that classification.²⁸⁸

The discussion above set out two analyses of determining whether embryos should be community property or separate property.²⁸⁹ The first analysis discussed the biological nature of embryos and their gametes.²⁹⁰ The second analysis applied the UCC.²⁹¹ Regardless of which analysis is used, the result is the same: embryos are community property.²⁹² The Legislature should address this issue as well and set out which analysis it uses to reach the conclusion that embryos are community property.²⁹³ If, however, the legislature uses the analysis under the UCC, it will be necessary to revise § 2-316 to include sperm, eggs, and embryos.²⁹⁴

As discussed, the IVF patient has a variety of options regarding the continued storage or disposal of cryopreserved embryos.²⁹⁵ The only problematic option is the last one—for the patient to do nothing—because this option places the burden on shoulders that should never have to endure

281. *See supra* text accompanying note 37.

282. *See supra* text accompanying note 34.

283. *See supra* text accompanying note 54.

284. *See supra* text accompanying note 63.

285. *See supra* text accompanying note 78.

286. *See supra* text accompanying note 81.

287. *See supra* text accompanying notes 85–86.

288. *See supra* text accompanying notes 87–88.

289. *See discussion supra* Part III.C.

290. *See supra* text accompanying notes 67–71.

291. *See supra* text accompanying notes 72–76.

292. *See supra* text accompanying note 71, 76.

293. *See discussion supra* Part III.C.

294. *See supra* text accompanying note 75.

295. *See discussion supra* Part III.D.1.

it.²⁹⁶ Additionally, this option leads to increased numbers of abandoned embryos, causing additional problems for the IVF storage facility.²⁹⁷ Texas should follow the ASRM's view by enacting legislation to allow IVF facilities to dispose of abandoned embryos.²⁹⁸

In the event of the unauthorized destruction of cryopreserved embryos, there are a variety of claims a patient may bring against the IVF facility.²⁹⁹ Once again, classifying embryos would assist attorneys and courts to determine which claims should prevail.³⁰⁰ If embryos are property, it is likely that the following claims would be successful: healthcare liability claims, loss of irreplaceable property, negligent loss or destruction, breach of fiduciary duty, breach of bailment, and IIED.³⁰¹ A claim for NIED could prevail if it survived the factors under *Dillon* and was attached to another valid claim.³⁰²

Lastly, Texas should approve the proposed legislation regarding children by intestacy.³⁰³ Allowing children born by intestacy inheritance rights only if they are born within two years after the death of one of the parent's death would allow the estate to be distributed within a reasonable amount of time while allowing the other parent adequate time to grieve.³⁰⁴

V. CONCLUSION

If Texas passed the above-suggested laws, Mrs. Hamilton—the hypothetical widow—could easily obtain answers from her attorney regarding her rights under the law.³⁰⁵ Because cryopreservation is a developing field, it is essential that IVF clients can easily understand their rights, that IVF facilities have guidance on how to lawfully address concerns, and that attorneys are aware of how to represent either party.³⁰⁶ The many unanswered questions regarding the legal rights of the parents and IVF facilities simply must be addressed.³⁰⁷

296. See *supra* text accompanying notes 114–23.

297. *Id.*

298. See *supra* text accompanying notes 153–55.

299. See discussion *supra* Part III.D.3.a.(i).

300. See *supra* Part III.C.

301. See discussion *supra* Part III.D.3.a.(i).

302. See *supra* text accompanying notes 214–16.

303. See discussion *supra* Part III.E.

304. See discussion *supra* Part III.E.

305. See discussion *supra* Part I.

306. See *supra* Part III.

307. See *supra* Part III.