The ART of Calculating Damages for Negligence

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I. INTRODUCTION

Fifteen-year-old Rachel was diagnosed with breast cancer during her first year of high school. Unfortunately, the chemotherapy treatment she needed to save her life would leave her incapable of biological reproduction. Graduating high school, not starting a family, was Rachel's goal; however, she knew someday she would want to have children of her own. As a result, Rachel was referred to a fertility clinic where she had her eggs extracted, frozen, and stored using Assisted Reproductive Technology (ART).[1] Rachel then successfully underwent her chemotherapy treatments.

Ten years later, Rachel was happily married and eager to start a family. She contacted the fertility clinic to discuss the procedure for using her frozen eggs to conceive a child. The fertility clinic then informed Rachel that her frozen eggs had been discarded. This news was devastating to Rachel because the fertility clinic took away her only chance of ever having children of her own. Consequently, she suffered from depression, sleep disturbances, and post-traumatic stress disorder. This hypothetical situation, based on Carolyn Witt in *Witt v. Yale-New*

1. ART involves taking eggs from a female's ovaries, fertilizing the eggs with sperm and implanting the resulting zygote into the female's body, freezing them for future use, or donating them for adoption. *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/whatis.html (last updated Oct. 8, 2019). For an example of a fertility clinic that offers these services, see *CDC Ranks L.A. Based Fertility Clinic Number 1 with the Highest IVF Success Rates in the United States*, W. FERTILITY INST. (Oct. 4, 2018, 2:36 PM), https://www.prnewswire.com/news-releases/cdc-ranks-la-based-fertility-clinic-number-1-with-the-highest-ivf-success-rates-in-the-united-states-300724796. *See also* Reproductive Med. Assocs., *RMA Allentown, PA*, RMA, https://rmanetwork.com/clinics/allentown/ (last visited Sept. 4, 2021) (RMA Lehigh Valley is one of the top specialists in fertility treatments); *A Fertile Future*, ST. JUDE CHILDS. RSCH. HOSP., stjude.org/about-st-jude/stories/promise-magazine/winter-2015/a-fertile-future.html (last visited Sept. 4, 2021) (explaining that in June 2014, St. Jude Children's Research Hospital in Memphis, Tennessee, opened a fertility clinic for their patients, many of whom are teenage girls and boys who are at risk of lifelong infertility due to the side effects of cancer treatment. The clinic is open to current and former patients, and the hospital "covers the cost of harvesting eggs or sperm" and "of storing those samples until patients reach age 35").

Haven Hospital, demonstrates a genuine problem facing many young women like Rachel.[2]

ART procedures are rarely well regulated, and the power is usually in the hands of the facility. This leaves patients like Rachel, referred to in the field as "progenitors,"[3] "ill equipped to bargain, litigate, or insure against bad outcomes."[4] Fertility clinics, sperm banks, and laboratories often negligently destroy, lose, mislabel, contaminate, or otherwise cause reproductive materials to become defective, and the way they draft contracts leaves patients with few options.[5] In a widespread study of fertility clinics in the United States, the Genetics and Public Policy Center at the Johns Hopkins Berman Institute of Bioethics discovered twenty-one percent of fertility clinics "report errors in diagnosing, labeling, and handling donor samples and embryos for implantation."[6] These issues have led to an increase in debates among intended parents, donors, storage facilities, and fertility clinics,

2. See Witt v. Yale-New Haven Hosp., 977 A.2d 779 (Conn. Super. Ct. 2008) (discussing Carolyn's claims for negligent and intentional infliction of emotional distress against a hospital that disposed of her frozen ovarian tissue).

3. A progenitor is defined as an "ancestor in the direct line." *See Progenitor*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2019). The term "progenitor" is often used to refer to the individuals whose sexual gamete cells were used during IVF procedures to create the frozen embryos. Lauren Russo, Comment, *"Microscopic Americans?" A New Conception of the Right to Recover for the Loss of a Pre-Embryo in Tort Law*, 2009 MICH. ST. L. REV. 789, 791 n.11 (2009).

4. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 152 (2017).

5. *Id.* at 152–54.

6. *Id.* at 152 (citing Susannah Baruch, David Kaufman, & Kathy Hudson, *Genetic Testing of Embryos: Practices and Perspectives of U.S. In Vitro Fertilization Clinics*, 89 FERTILITY & STERILITY 1053, 1055 (2008) ("21% of [in vitro fertilization-preimplantation genetic diagnosis] clinics report that they have been aware of inconsistencies between the results of genetic analysis of embryos and later genetic testing.")). In his article on ART-related negligence, Professor Fox also points to other sources that support this study's findings. *See* Hebert v. Ochsner Fertility Clinic, 102 So. 3d 913, 915 (La. Ct. App. 2012) (recognizing "inadequate control and supervision of the procedures used at the fertility clinic, [and] that it did not institute standard operating procedures"); SHARON T. MORTIMER & DAVID MORTIMER, QUALITY AND RISK MANAGEMENT IN THE IVF LABORATORY 40–44 (2d ed. 2015) (discussing ways to improve training, technical failures, and careless documenting that would make unwanted reproductive outcomes less probable).

demonstrating the need for judicial reform to address the negligence associated with ART.[7]

Legal doctrines and practices have failed to keep pace with advances in medicine in the field of ART.[8] However heinous the departure from the accepted standard of care in ART procedures, interference with such procedures is not acknowledged as an element of damages or an independent cause of action.[9] Most jurisdictions do not have current statutes or procedural rules to resolve these problems.[10] Consequently, the majority of courts "punt" on the question of how to resolve ART negligence instead of offering a solution.[11] The courts that have addressed this issue have created three different classifications for the legal status of embryos, including: (1) the personhood legal status; (2) the property legal status; and (3) the entity deserving special respect legal status.[12] Most courts remain undecided about the legal status of embryos, and though politicians have attempted to resolve this issue,

7. Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAWS. 55, 59, 73 (2018).

8. *Id.* at 59.

9. *See, e.g.*, Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 270–71 (Tenn. 2015) (holding that a woman failed to prove her claim of negligent infliction of emotional distress after a fertility clinic failed to provide her with requested reproductive services).

10. Debele & Crockin, *supra* note 7, at 59; Tamar Lewin, *Anti-Abortion Groups Join Battles Over Frozen Embryos*, N.Y. TIMES (Jan. 19, 2016), https://www.nytimes.com/2016/01/20/us/anti-abortion-groups-join-battles-over-frozen-embryos.html.

11. Erika N. Auger, Note, *The "Art" of Future Life: Rethinking Personal Injury Law for the Negligent Deprivation of a Patient's Right to Procreation in the Age of Assisted Reproductive Technologies*, 94 CHI.-KENT L. REV. 51, 62 (2019) ("[S]ome courts have explicitly recognized the dearth of case law in the area of ART negligence and have accordingly failed to address these unique and important issues—punting the issues back down to the lower courts to be resolved.").

12. Caroline A. Harman, Comment, *Defining the Third Way—The Special-Respect Legal Status of Frozen Embryos*, 26 GEO. MASON L. REV. 515, 525 (2018); Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 73–87 (2009).

strong personal views of the beginning of life stall or stop the process of resolution.[13]

The judicial system should view ART-related negligence as a wrongdoing against which the courts safeguard victims and compensate losses.[14] As these procedures continue to increase in popularity, the number of victims who go without compensation for negligence associated with ART increases as well.[15] With a lack of cohesive procedural rules, ART matters remain ongoing topics of dispute in need of resolution.[16]

This Note asserts that current judicial methods of calculating damages are insufficient for fully compensating victims for the loss or destruction of their frozen embryos.[17] The inconsistency among courts in determining what, if any, legal status should apply to frozen embryos adds to the difficulties in providing an adequate remedy.[18] For the courts that apply a classification to lost or destroyed frozen embryos, those legal classifications have pitfalls: the personhood approach does

13. Debele & Crockin, *supra* note 7, at 61; *see also* Lewin, *supra* note 10 ("Politicians and state legislatures have followed these trends and have tried to address these issues, colliding in the process with the complex issues, and strongly held views of many people, of determining when human life begins and dealing with those opposed to assisted reproduction on religious and ethical grounds or positions flowing from the abortion culture wars. Some constituencies see ART as a direct assault on adoption.").

14. *See* Fox, *supra* note 4, at 155 ("The result is a legal system that treats heedlessly switched sperm, lost embryos, and misdiagnosed fetuses not as misconduct that it protects against and compensates victims for, but as misfortune that it tolerates and forces them to abide.").

15. Debele & Crockin, *supra* note 7, at 61.

16. *Id.*

17. The fertilized egg pre-implantation is medically referred to as "pre-embryo." *See Pre-Embryos,* OXFORD ENGLISH DICTIONARY (3d ed. 2010). However, legal scholars typically refer to the pre-embryo as "frozen embryo." Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992) (stating that "popular press and legal journals" refer to "the cryogenically-preserved product of *in vitro* fertilization" as "frozen embryos"). Following the typical legal classification, this Note refers to pre-embryos as "frozen embryos."

18. *See, e.g.*, *Davis*, 842 S.W.2d at 603–04 ("[D]isputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed.").

not compensate for the actual cost of ART procedures, the property approach encompasses contractual issues and fails to compensate for emotional harm suffered, and the special respect approach is overly broad. Accordingly, this Note proposes a judicial solution: courts should apply an improved special respect legal status that incorporates well-defined factors for calculating damages in ART-related negligence cases. Part II of this Note discusses the context in which the legal issues surrounding the storage, use, and ultimate disposition of frozen embryos arose and the development of relevant law. Part III asserts that current classifications fail to address an appropriate remedy for negligence associated with frozen embryos because there is not a suitable legal status for widespread application when calculating damages. Part IV offers a clearer path for calculating damages as the best means of addressing negligence associated with frozen embryos and resolving current discrepancies.

II. BACKGROUND ON ART PROCEDURES

According to the Centers for Disease Control and Prevention (CDC), "about 12% of women aged 15 to 44 years in the United States have difficulty getting pregnant or carrying a pregnancy to term."[19] After a year of trying, about six percent of the married women in that age group are still not able to conceive, deeming them infertile.[20] Fortunately, infertility can be addressed using ART, enabling many people to have children.[21] As a result, many Americans turn to healthcare professionals to help plan their family lives, and almost two percent of all babies born in the United State are conceived using ART.[22]

ART procedures have increasingly gained popularity since the 1980s,[23] and not all procedures are implemented with the immediate

19. *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/index.htm (last updated Apr. 13, 2021).

20. *Id.*

21. *Id.*

22. Fox, *supra* note 4, at 151 n.3 (citing *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/artdata/index.html (last updated Apr. 20, 2021)).

23. Marie E. Thoma, Sheree Boulet, Joyce A. Martin, & Dmitry Kissin, *Births Resulting from Assisted Reproductive Technology: Comparing Birth Certificate and*

goal of creating life—many are performed with the intent to have the embryos frozen for later implantation.[24] In vitro fertilization (IVF), or more specifically, In Vitro Fertilization-Embryo Transfer (IVF-ET), is the most common form of ART.[25] In vitro fertilization is "the process of fertilization by extracting eggs, retrieving a sperm sample, and then manually combining an egg and sperm in a laboratory dish."[26] Once this process is complete, the embryo is transferred to the uterus.[27] In most cases, the intended mother follows a regimen of fertility drugs to stimulate production of multiple eggs, which are then fertilized by the sperm.[28] After the selected number of embryos are implanted into the woman, any leftover embryos can be frozen, donated, adopted, used for science, or destroyed.[29]

Freezing additional embryos for future use can be beneficial when undergoing IVF procedures, as the chance of achieving a resulting pregnancy upon initial implantation is only forty percent.[30] Thus, multiple rounds of IVF using the remaining embryo is needed in most circumstances.[31] The negligence of fertility clinics can affect the

National ART Surveillance System Data, 2011, 63 NAT'L VITAL STAT. REPS. 1, 1 (2014), https://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_08.pdf.

24. Harman, *supra* note 12, at 518; CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., 2015 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 3 (2017), ://www.cdc.gov/art/pdf/2015-report/ART-2015-National-Summary-Report.pdf.

25. *Assisted Reproductive Technologies*, SOC'Y FOR ASSISTED REPROD. TECH., http://www.sart.org/patients/a-patients-guide-to-assisted-reproductive-technology/general-information/assisted-reproductive-technologies (last visited Oct. 6, 2021) (reporting that about "99 percent of ART cycles performed are IVF-ET"); Harman, *supra* note 12, at 519 ("While IVF is the most common, other forms of ART remain, including gamete intrafallopian transfer, pronuclear stage tubal transfer, tubal embryo transfer, and zygote intrafallopian transfer, in which the location of transfer, length of time between fertilization and implantation, and the material transferred differs.").

26. *IVF – In Vitro Fertilization*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization/ (last visited Oct. 6, 2021).

27. *Id.*

28. Harman, *supra* note 12, at 519.

29. *Id.* at 520.

30. Jennifer Gerson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility*, FORBES (Feb. 6, 2014, 3:00 PM), https://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility.

31. *See id.*

success rate of ART procedures—it is vital, therefore, to carefully handle the frozen embryos of progenitors.[32]

A. Regulation and Recourse

Only very limited state and federal regulation currently exists for the fertility industry.[33] As a result, many clinics are solely self-regulated or subject to broader legislation by the courts.[34] The few states that are involved in regulation, have passed statutes that govern matters concerning disclosure requirements and insurance coverage.[35] For example, before commencement of a reproductive procedure, Virginia requires fertility clinics to disclose their success rates for specific procedures performed at each hospital or clinic where the patient will undergo treatment.[36] However, disclosure requirements do not assist patients in holding clinics accountable for reproductive negligence.[37]

Most ART regulations currently available are provided by private organizations, such as the American Society for Reproductive Medicine, which set forth professional guidelines.[38] Nonetheless, these guidelines are voluntary and do not provide any official procedures,

32. *See* Fox, *supra* note 4, at 155.

33. Steve P. Calandrillo & Chryssa V. Deliganis, *In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough*, 57 ARIZ. L. REV. 311, 329 (2015).

34. *Id.* (stating "a comparison of the American Society for Reproductive Medicine's United States guidelines to those issued by the organization's counterpart in the United Kingdom suggests that the United States guidelines are somewhat less stringent" and "the [ART] industry mostly operates as a free market and there is little that restricts or controls choices made by physicians, patients, or donors").

35. *Id.* at 331.

36. VA. CODE ANN. § 54.1-2971.1 (West 2021) ("[A] disclosure form shall have been executed by the patient which includes, but need not be limited to, the rates of success for the particular procedure at the clinic or hospital where the procedure is to be performed. The information disclosed to the patient shall include the testing protocol . . . the total number of live births . . . and the rates for clinical pregnancy and delivery . . . .").

37. *See* Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 419, 425 (2020) [hereinafter *Redressing*].

38. *See, e.g.*, *Practice Committee Documents*, AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/Guidelines/?filterbycategoryid=154 (last visited Oct. 7, 2021) (providing various ART-related guideline documents).

enforceable by law.[39] The guidelines are also not helpful for alleviating the undesirable effects of individual physicians who are only concerned with making a profit.[40]

Additionally, the personal nature of ART and the lack of positive case law leads families to feel less inclined to pursue legal recourse in situations where their "frozen embryos are negligently destroyed" or lost.[41] In some cases, families may not even be able to pursue a lawsuit when they still have viable embryos remaining, despite the negligent destruction of *some* of their embryos.[42] Even if progenitors do attempt to seek remedies due to negligence, the absence of viable guidelines for calculating damage creates difficulties for courts. [43]

B. Classification of Frozen Embryos

When presented with frozen embryo disputes between progenitors and fertility clinics, courts are faced with attributing a legal status to the frozen embryo prior to resolving the case.[44] The legal status will determine the rights of the progenitors, as well as provide legal framework for the court when deciding what cause of action is appropriate to remedy reproductive negligence.[45] However, only a few states have

39. Am. Soc'y for Reprod. Med., *Foreward*, 86 FERTILITY & STERILITY A3, A3 (2006), https://www.fertstert.org/action/showPdf?pii=S0015-0282%2806%2904108-2.

40. *See* Calandrillo & Deliganis, *supra* note 33, at 313 ("The perverse financial incentives, paired with the pressure for reproductive clinics to advertise better outcomes . . . have led some to engage in practices that are not only questionable, but that are sometimes even quite dangerous for their patients . . . .").

41. Harman, *supra* note 12, at 516.

42. Frisina v. Women & Infants Hosp. of R.I., No. CIV. A. 95-4037, 2002 WL 1288784, at *1 (R.I. Super. Ct. May 30, 2002). In this case, for example, an individual had three embryos implanted and the in vitro fertilization facility lost two of the four leftover frozen embryos. *Id.*

43. *Cf.* Harman, *supra* note 12, at 527 (explaining that one shortcoming of the personhood approach involves "how damages for the wrongful death of a frozen embryo will be calculated").

44. *Id.* at 525.

45. *See id.* at 525.

decided to classify the legal status of frozen embryos, while the majority of states remain undecided on the topic.[46]

States have had difficulty adopting positions regarding a frozen embryo's legal status mostly due to the many conflicting social and legal views surrounding embryos.[47] For example, giving frozen embryos a "personhood" legal status has presented abortion related concerns,[48] and giving frozen embryos a "property" legal status has raised problems related to the sale of human body parts.[49] Currently, states use one of three alternative legal statuses for frozen embryos: personhood, property, and an entity deserving special respect.[50]

1. "Personhood" Legal Status

Under the "personhood" classification, the frozen embryo is given the legal status of "human being."[51] Louisiana, a state which

46. *Id.* at 525; *see also* Green, *supra* note 12, at 73–87 (providing a state-by-state summary of embryo disposition).

47. Harman, *supra* note 12, at 525–26.

48. Ann Marie Noonan, *The Uncertainty of Embryo Disposition Law: How Alterations to* Roe *Could Change Everything*, 40 SUFFOLK UNIV. L. REV. 485, 502 (2007) (explaining that if a frozen embryo or fetus is given the legal classification of "human being," it will be "entitled to the same constitutional protections and guarantees as every other human being. Thus, under the Fifth and Fourteenth Amendments, one could not 'kill' a fetus without first providing it due process of law. Under this theory, abortion could be outlawed in all circumstances"); *see also* Roe v. Wade, 410 U.S. 113,156–57 (1973) ("If this suggestion of personhood is established . . . the fetus' right to life would then be guaranteed specifically by the Amendment."); Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT UNIV. L. REV. 67, 72–74 (2002) (discussing due process requirements for all persons in the United States).

49. *See* Russo, *supra* note 3, at 792 (discussing issues raised by granting an individual property rights in body parts).

50. Harman, *supra* note 12 at 517; *see also* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) ("We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.").

51. Harman, *supra* note 12 at 526; Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 411–12 (2013) ("[T]he frozen embryo is nothing less than human life, albeit at its earliest stage . . . . Thus far, only two American states, both having large Catholic populations, have adopted the moral position that a frozen embryo is fully human."). Some scholars hypothesize the states that use the "personhood" legal status

utilizes the personhood classification, was the first state to pass statutes incorporating the human being status with IVF procedures.[52] The statutes say that the frozen embryo "exists as a juridical person" and is owed a "high duty of care."[53] Consequently, Louisiana prohibits the intentional destruction of frozen embryos, and if progenitors choose to relinquish their parental rights, the frozen embryos must be donated.[54] Further, the frozen embryos are not considered property owned by the physician, facility, or donors, but belong to the progenitors instead.[55]

Although New Mexico has yet to overtly decide on a legal status, the courts would likely consider frozen embryos to be human in this jurisdiction.[56] This is because New Mexico's statute forbids destruction of frozen embryos, stating that IVF procedures "shall include provisions to ensure that each living . . . embryo is implanted in a human female recipient."[57] Therefore, if a dispute over the character of a frozen embryo arises in Louisiana (and likely in New Mexico) courts employ the "best interest of the [in vitro fertilized] ovum" standard.[58] Under this standard, courts are likely to rule in favor of a party interested in becoming a parent, over a party wishing to discard or donate the frozen embryos to other people.[59]

for embryos have a greater religious population than those states that use the alternative classifications. *See* ROBERT GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 50 (2008) (discussing how the personhood legal status reflects the views of the Roman Catholic Church).

52. LA. STAT. ANN. §§ 9:123, 9:129–130 (2021); *see also* Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549, 550 (2005).

53. LA. STAT. ANN. §§ 9:123, 9:130.

54. *Id.* at §§ 9:129, 9:130.

55. *Id.* at § 9:126.

56. Harman, *supra* note 12, at 526–27.

57. N.M. STAT. ANN. § 24-9A-1(D) (West 2021).

58. Noonan, *supra* note 48, at 489–90; LA. REV. STAT. ANN. § 9:131 (using the identical standard applied in child custody disputes for frozen embryo disputes).

59. *See* LA. REV. STAT. ANN. § 9:122 (narrowing the use of frozen embryos to the complete development of human in utero implantation); *see also* § 9:126 (indicating if an in vitro fertilization patient rejects their rights to a frozen embryo, a physician shall be deemed to be the appointed guardian of the frozen embryo until adoptive implantation occurs); § 9:127 (holding physicians and medical facilities responsible for the safety of the frozen embryos).

These statutes currently remain enforced, but opponents have raised arguments questioning their validity.[60] In a recent Louisiana case involving the rights and legal status of frozen embryos, *Loeb v. Vergara*, Sofia Vergara asserted that the Louisiana laws regarding IVF procedures are unconstitutional.[61] Vergara referenced *Roe v. Wade* to emphasize that the right to terminate pregnancy is within one's personal liberty protected by the due process clause of the Fourteenth Amendment.[62] While this case was dismissed for lack of personal jurisdiction, it is uncertain whether the Louisiana and New Mexico statutes would be considered constitutional, especially regarding their language mandating implantation of frozen embryos.[63]

In situations involving an IVF facility's damage or loss of a frozen embryo, the personhood classification allows a progenitor to sue the facility for wrongful death and negligent infliction of emotional distress.[64] However, some states will require a showing of bodily harm to the plaintiff for negligent infliction of emotional distress claims.[65] In these states, negligent infliction of emotional distress claims will likely not be successful because no medical procedure or injury was undergone by the progenitor.[66] Nonetheless, several courts have allowed claims for emotional distress caused by negligently deprived reproduction.[67]

In *Witt v. Yale-New Haven Hospital*, Carolyn Witt was diagnosed with cancer, and the chemotherapy she needed would leave her

60. Harman, *supra* note 12, at 523–24.

61. This case involves a dispute over frozen embryos between *Modern Family* actress Sofia Vergara and her ex-fiancé Nick Loeb. Loeb v. Vergara, 326 F. Supp. 3d 295, 301 (E.D. La. 2018).

62. *Id.* at 302; *see also* Roe v. Wade, 410 U.S. 113, 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 873 (1992). At this point, *Roe* and its progeny are well-settled. However, one cannot help but speculate if the issue were to reappear before the current Supreme Court whether *Roe's* precedent would continue.

63. Harman, *supra* note 12, at 526–28.

64. Harman, *supra* note 12, at 528.

65. Fox, *supra* note 4, at 154.

66. *See id*.

67. *See, e.g.*, Witt v. Yale-New Haven Hosp., 977 A.2d 779 (Conn. Super. Ct. 2008); Martinez v. Long Island Jewish Hillside Med. Ctr., 512 N.E.2d 538 (N.Y. 1987); *In re* Quinlan, 355 A.2d 647 (N.J. 1976); *see also Redressing*, *supra* note 37, at 452.

infertile.[68] In an attempt to still have a child, she had reproductive tissue removed and frozen for later use, much like our hypothetical Rachel.[69] The hospital discarded the tissue without informing Carolyn or her husband, thus Carolyn forever lost the ability to conceive, carry, birth, and raise her biological child.[70] Despite no finding of bodily harm, the court held the hospital liable for both negligent infliction of emotional distress and intentional infliction of emotional distress.[71] The court reasoned that the hospital owed a duty of care and "created an unreasonable risk of causing emotional distress" which was foreseeable.[72] Ultimately, *Witt* exemplifies that courts applying the "personhood" classification to reproductive tissue might allow hospitals to be held liable for the emotional harm suffered in cases involving discarded ART materials, despite the lack of bodily harm. [73]

Regarding wrongful death suits, courts vary on where to draw the line for recovery.[74] Some courts look to whether the embryo was viable, as a non-viable fetus will typically not be considered a "person" under many states' wrongful death statutes.[75] Other courts do not consider viability as a factor. Nonetheless, courts continuously reject wrongful death claims for frozen embryos.[76]

One example of a court rejecting a wrongful death claim includes *Miller v. American Infertility Group of Illinois.*[77] In this case,

68. *Witt*, 977 A.2d at 782.

69. *Id.*

70. *Id.*

71. *Id.* at 795–96.

72. *Id.* at 788.

73. *Witt*, 977 A.2d at 795–96; *see also*, *Redressing*, *supra* note 37, at 454.

74. *See, e.g.*, Gentry v. Gilmore, 613 So.2d 1241, 1244 (Ala. 1993). *Gentry* involved a wrongful death claim of a thirteen-week-old fetus, and the court looked to *Roe v. Wade* for deciding when women can have an abortion. *Id.* at 1242–43. The court held that a wrongful death claim is not obtainable for a non-viable fetus. *Id.* at 1242; *see also* Russo, supra note 3, at 799.

75. Russo, *supra* note 3, at 799. Some courts restrict "the meaning of the word 'person' to a viable stillborn fetus, as it was speculative whether or not a fertilized egg outside the womb would ever become a human being." *Id.* at 801; *see also* Miccolis v. AMICA Mut. Ins. Co., 587 A.2d 67, 71 (R.I. 1991) (noting that most courts hold that "a nonviable fetus has no right to bring an action for wrongful death").

76. Russo, *supra* note 3, at 798–99.

77. 897 N.E.2d 837, 845–46 (Ill. App. Ct. 2008) (rejecting wrongful death claims for frozen embryos).

the family brought a wrongful death claim against a fertility clinic for failing to freeze their embryos after undergoing IVF.[78] The court held that the state's Wrongful Death Act does not apply to situations involving the loss of frozen embryos that have not yet been implanted.[79] The court reasoned that the Act was intended to protect pregnancies in the mother's body irrespective of a fetus's viability.[80]

2. "Property" Legal Status

Frozen embryos that are considered "property" are treated the same as chattel, "a moveable piece of personal property," which the progenitors own and have complete control over.[81] As with chattel, the frozen embryos are susceptible to conversion by a third party, who would then be liable for the fair market value of the property.[82] This classification enables courts to use principles of both contract and property law in resolving disputes, as "the embryos can be the subject of a contract."[83] Unless otherwise stated in the statute, courts will initially assess the contract between the progenitors and the IVF facility to establish ownership of the frozen embryo.[84]

This approach was applied in *York v. Jones*, a case of first impression for Virginia, involving conflicting property interests between an IVF facility and progenitors.[85] In *York*, six eggs were collected from Risa Adler-York to be frozen through an IVF procedure.[86] The Yorks then asked the facility to transfer one of the frozen embryos to a medical facility in California, their new home, but they were denied their

78. *Id.* at 838–39

79. *Id.* at 845–46.

80. *Id.*

81. Howell, *supra* note 51, at 413 ("The owners could sell the embryos, throw them away, or trade them for something else. A third party could convert the embryos and become liable for the fair market value of the embryo.").

82. *Id.*

83. Harman, *supra* note 12, at 529–30.

84. *Id.* at 529 (citing York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989)). In *York*, the court looked at the contract between the parties, ultimately finding that the embryos were the property of the progenitors, not the medical facility. 717 F. Supp at 427.

85. Harman, *supra* note 12, at 529–30 (citing *York*, 717 F. Supp. at 422).

86. 717 F. Supp. at 424.

request.[87] The court applied the property approach and held that the agreement between the parties had created a bailor-bailee relationship.[88] Therefore, the facility had a legal duty to return the frozen embryo to the Yorks.[89] This case recognized that progenitors of frozen embryos should have control over the disposition of their frozen embryos and gave rise to establishing property rights in the frozen embryos as well.[90]

Even in cases involving negligence disputes over the loss of ART materials, damages are limited when frozen embryos are considered "'property' of progenitors."[91] In *Frisina v. Women & Infants Hospital of Rhode Island*, a hospital negligently destroyed the frozen embryos of three different couples.[92] Prior to undergoing the IVF procedures, the progenitors signed consent forms noting that damage or loss to a frozen embryo may result from a laboratory accident.[93] Despite noting that agreements between fertility clinics and progenitors containing exculpatory provisions are typically upheld, the court found that this language was too vague to cover situations in which loss or damage was a result of the hospital's negligence.[94]

87. *Id.*

88. *Id.* at 425; *see also* Melinda Troeger, Comment, *The Legal Status of Frozen Pre-Embryos When a Dispute Arises During Divorce*, 18 J. AM. ACAD. MATRIM. LAWS. 563, 569–70 (2003). Troeger's comment explains:

> The court stressed that the essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. The court found the requisite elements of a bailment present in this case as the Institute had possession of the pre-embryo, recognized their duty to account for the pre-embryo in the Cryopreservation Agreement, and consistently referred to the pre-embryo as the property of the Yorks in the agreement. The court essentially found that the Yorks possessed a property interest in the pre-embryo and also a right to immediate possession.

Id.

89. *York*, 717 F. Supp. at 425; *see also* Troeger, *supra* note 88, at 569.

90. *York*, 717 F. Supp. at 426–27.

91. *See, e.g.*, Frisina v. Women & Infants Hosp. of R.I., No. CIV. A. 95-4037, 2002 WL 1288784, at *9 (R.I. Super. Ct. May 30, 2002).

92. *Id.* at *1.

93. *Id.* at *1.

94. *Id.* at *13.

The *Frisina* court held that the progenitors could not establish a claim for negligent infliction of emotional distress; still, the court did find merit in the progenitors claim for emotional distress based on the loss of irreplaceable property.[95] Ultimately, *Frisina* offers an example of a court allowing progenitors' claims to proceed because of the "physical loss" of the frozen embryos, instead of the emotional loss under the property approach.[96]

At least one court has attempted to avoid classifying frozen embryos altogether, arguing that it is not necessary.[97] In *Kass v. Kass*, a contract approach was used to reach a resolution between the parties concerning the disposition of frozen embryos.[98] The court reasoned that the issue of who had dispositional authority over the frozen embryos was answered in the parties' agreement.[99] Therefore, there was no reason to designate a legal status to the frozen embryos as the parties could still enforce the agreement.[100] Nevertheless, the court acknowledged the progenitor's ability to contract for the frozen embryo's disposition, implicitly holding that frozen embryos are property.[101]

3. "Entity Deserving Special Respect" Legal Status

The "special respect" legal status is often referred to as the interim or intermediate legal status of frozen embryos.[102] This status purports to depict the frozen embryo's unique ability to become human once it undergoes implantation and gestation, unlike the property approach.[103] Additionally, the court does not have to resolve disputes by looking to the best interest of the frozen embryo under this approach,

95. *Id.* at *10.

96. *Id.*

97. *See* Kass v. Kass, 91 N.Y.2d 554, 564 (N.Y. 1998) (refusing to determine whether the pre-zygotes in question were property); *see also* Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33. FLA. ST. U. L. REV. 395, 406 (2005).

98. 91 N.Y.2d at 556, 566.

99. *Id.* at 564.

100. Upchurch, *supra* note 97 at 406 (citing *Kass*, 91 N.Y.2d at 566–67).

101. *Id.*

102. Harman, *supra* note 12, at 536–37; Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

103. Harman, *supra* note 12, at 536.

as the frozen embryo does not retain any legal rights,[104] distinguishing the special respect approach from the personhood approach, as well.[105]

The Tennessee Supreme Court was the first to introduce the special respect characterization in *Davis v. Davis*.[106] Further, the Court in *Jeter v. Mayo Clinic Arizona* used the reasoning from *Davis* to argue that "pre-embryos occupy an interim category between mere human tissue and persons because of their potential to become persons. Accordingly, such embryos are due varying degrees of special respect dependent on the issue involved."[107]

When resolving disputes under this approach, the *Davis* Court instructed to first look at the contract between the progenitors and the IVF facility.[108] If the contract does not address the disposition of the embryos, the Court will then use a balancing test.[109] The balancing test weighs the interest of each party to the dispute, including the interests of the parents and the rights of the IVF facility; the parents might also point to the frozen embryo's potential for life and potential quality of life.[110] Under the special respect status, progenitors have a unique ownership interest in the frozen embryos.[111] This interest allows for the right to contract and to make decisions regarding the disposition or intended use of the frozen embryos.[112] Additionally, progenitors have constitutional interests in procreation triggered by the creation of frozen embryos.[113]

Following Tennessee's lead, the Arizona Court of Appeals has also adopted the special respect characterization of ART materials.[114]

104. Upchurch, *supra* note 97, at 404 ("The status of special respect is distinct form the status of personhood because it does not view the embryo as possessing unique interests itself.").

105. *Id.* at 403–04.

106. *Id.*

107. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005) (citing *Davis*, 842 S.W.2d at 596–98).

108. *Davis*, 842 S.W.2d at 597–98.

109. *Id.*

110. *Id.* at 603–04.

111. Angela K. Upchurch, *A Postmodern Deconstruction of Frozen Embryo Disputes*, 39 CONN. L. REV. 2107, 2123 (2007) (citing *Davis*, 842 S.W.2d at 597) [hereinafter *Postmodern*].

112. *Id.*

113. *Id.*; *see also Davis*, 842 S.W.2d at 600.

114. Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1271 (Ariz. Ct. App. 2005).

In *Jeter*, the progenitors brought multiple claims against a clinic due to the loss of their frozen embryos.[115] Acknowledging the holding in *Davis*, the court classified the frozen embryos as the interim category.[116] The court reasoned that the word "person" is restricted to a viable stillborn fetus because "it [is] speculative whether or not a fertilized egg outside the womb would ever become a human being."[117] Accordingly, the court dismissed the progenitor's wrongful death claim.[118] The court recognized that a party could not bring a negligent infliction of emotional distress claim for the negligent destruction of property but that recovery for emotional distress due to tortious loss of property is possible.[119]

However, the *Jeter* court did not decide whether the progenitors' loss would allow damages for emotional distress and instead permitted suit for negligent loss or destruction of the frozen embryos under the RESTATEMENT (SECOND) OF TORTS section 323.[120] By classifying a frozen embryo as property deserving special respect, the court could safely navigate a middle ground.[121] As a result, the frozen embryos are afforded greater respect than mere property under this approach,[122] yet the embryos are not so rigidly guarded as they are under the personhood approach.

The Missouri Court of Appeals implicitly adopted the special respect status in *McQueen v. Gadberry*, viewing "the frozen embryos as 'marital property of a special character.'"[123] In this case, Jalesia

115. *Id.* at 1260.

116. *Id.* at 1271 (citing *Davis*, 842 S.W.2d at 596–98); *see also* Russo, *supra* note 3, at 801 ("[T]he Jeter court reasoned that the Supreme Court of Arizona restricted the meaning of the word 'person' to a viable stillborn fetus, as it was speculative whether or not a fertilized egg outside the womb would ever become a human being.").

117. Russo, *supra* note 3, at 801.

118. *Jeter*, 121 P.3d at 1276.

119. *Id.* at 1273.

120. *Id.* at 1272–73 (explaining that the Restatement permits recovery for the loss of a person's belonging); RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW. INST. 1965)

121. Russo, *supra* note 3, at 810–11. This article discusses a "custom-made suit" that would allow courts to decide damages based on "the actual value to the progenitors." *Id.* at 811.

122. *Id.*

123. McQueen v. Gadberry, 507 S.W.3d 127, 158 (Mo. Ct. App. 2016).

McQueen and Justin Gadberry disagreed about what to do with their frozen embryos upon divorce—McQueen wanted them implanted and Gadberry wanted them to be donated, destroyed, or stored.[124] The court decided the frozen embryos would remain frozen until the parties were able to agree on their disposition, recognizing the frozen embryos were owed a "special respect."[125] The court also acknowledged the parties' right to procreation and the right to avoid procreation, thus choosing not to rule on the validity of entering into an enforceable agreement regarding the disposition of frozen embryos.[126]

III. INADEQUATE APPROACHES

Legislatures' hesitancy to give clear policies and guidance for causes of action related to frozen embryos has left it up to the courts to develop this area of law.[127] Although some courts have chosen to adopt the personhood or property approaches, others have adopted the special respect legal status.[128] The personhood and property classifications may have a more bright-line approach, but they are accompanied by more complications than that of the special respect status.

A. Complications with the Personhood Approach

While the personhood approach attempts to grant greater rights to frozen embryos, it actually presents numerous challenges for progenitors and IVF facilities.[129] These additional rights give rise to many concerns, including the chance that a frozen embryo that is prevented from being born could obtain greater legal rights than that of a fetus.[130] This would place more liability on facilities for its failure to regulate

124. *Id.* at 135–36.

125. *Id.* at 149.

126. *Id.* at 158.

127. Harman, *supra* note 12, at 542–43; Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1275–76 (Ariz. Ct. App. 2005).

128. Harman, *supra* note 12, at 518.

129. *Id.* at 542–43.

130. *Id.* at 543 ("Depending on the state's law, a frozen embryo could possibly have more legal rights than a fetus, should something prevent [the embryo] from being born.").

and follow legally-mandated practices.[131] Consequently, facilities would likely raise the cost of IVF procedures to cover the liability expenses.[132]

As argued in *Loeb v. Vergara*, state statutes embracing this view present numerous constitutional problems.[133] The Louisiana and New Mexico statutes, mandating frozen embryos to either be implanted or stored until adoption, conflict with the holdings in *Roe v. Wade* and its progeny.[134] *Roe* recognized a woman's right to abort her non-viable fetus, reasoning that women have a privacy interest in their own bodily integrity.[135] Thus, the holdings in *Roe* arguably frustrate the purpose of the Louisiana and New Mexico statutes, as the states could not force implantation and a woman could nevertheless abort the fetus if it was implanted.[136]

There are also practical concerns with these statutes, as they fail to consider the possibility of the frozen embryos being abandoned by their donors or never adopted.[137] Under these statutes, therefore, the IVF facilities must store frozen embryos indefinitely.[138] This could lead to the rise of IVF procedural costs for facilities to cover the price of storage.[139]

Although the personhood classification appropriately considers the emotional harm suffered in cases of negligence to frozen embryos, it does not provide progenitors with adequate compensation.[140] First, this view does not take into account the costs associated with IVF procedures, making it difficult for progenitors to recover in negligence

131. *Id.*

132. *Id.*

133. Loeb v. Vergara, 326 F. Supp. 3d 295, 301 (E.D. La. 2018).

134. Roe v. Wade, 410 U.S. 113, 127, 185 (1973).

135. *Id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (noting that a woman has a right to a previability abortion); La. Rev. Stat. Ann. §§9:125, 9:126 (2011); N.M. Stat. Ann. §24-9A-1(D) (2012).

136. *Roe*, 410 U.S. at 153.

137. Howell, *supra* note 51, at 412–13.

138. *Id.* at 413.

139. *Id.* at 413.

140. Harman, *supra* note 12, at 528–29.

cases with regard to the destruction of frozen embryos.[141] Second, negligent infliction of emotional distress claims present challenges in states that require a manifestation of physical harm to the plaintiff. [142] Challenges arise because plaintiffs typically do not endure a physical harm to their own body due to the IVF facility's negligence.[143] It is difficult to show physical harm to the plaintiffs because the plaintiffs will likely not have knowledge of the incident at the time the negligence occurred.[144] Even in cases where courts have allowed claims of emotional distress for loss or damage to frozen embryos, victims were sometimes still not able to recover.[145] Progenitors have likewise been unsuccessful with asserting claims of wrongful death because frozen embryos do not fall under a state's Wrongful Death Act's definition of "human."[146]

The majority of states will not classify frozen embryos as persons.[147] This is because embryos have not yet been implanted into the womb and do not have the ability survive independently of the mother.[148] For these reasons, courts will likely not expand the legal

141. *Cf.* Sell v. Ward, 81 Ill. App. 675, 677–78 (Ill. App. Ct. 1898). In *Sell*, damages are measured according to the actual value of a unique piece of property to its owner such that the "actual value" would then be the measure of damages for the progenitors.

142. Harman, *supra* note 12, at 528, n.116. *See generally* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1276 (Ariz. Ct. App. 2005).

143. Harman, *supra* note 12, at 528, n.116.

144. *Id.*

145. *See, e.g.*, Witt v. Yale-New Haven Hosp., 977 A.2d 779, 795–96 (Conn. Super. Ct. 2008); *Redressing*, *supra* note 37, at 454, n.208 ("The [*Witt*] court let the case move forward on counts of negligent infliction of emotional distress to both Carolyn and her husband (as well as intentional infliction to Carolyn). The action was withdrawn before ever going to trial.").

146. *See, e.g.*, Miller v. Am. Infertility Grp. of Ill., 897 N.E.2d 837, 846 (Ill. App. Ct. 2008) ("The Wrongful Death Act does not allow a cause of action or recovery under the Act for the loss of an embryo created by *in vitro* fertilization that has not been implanted into the mother.").

147. Roe v. Wade, 410 U.S. 113, 113, 162 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (affirming the holding of *Roe* by stating that women can have an abortion before their fetus has reached viability); Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998) (concluding that frozen embryos are not persons); Russo, *supra* note 3, at 798–99 (stating that the majority of states do not permit wrongful death claims for non-viable fetuses).

148. *See* Russo, *supra* note 3, at 798–99.

status of embryos to personhood.[149] Ultimately, the personhood classification negatively affects future progenitors by conflicting with Supreme Court procreation precedent, increasing the costs of procedures, and limiting the amount of recoverable damages in cases of negligence to the frozen embryos.[150]

B. Complications with the Property Approach

Unlike the personhood approach, the property approach allows progenitors to recover for the costs of IVF procedures, increasing the amount of recoverable damages.[151] It does not, however, take into consideration the emotional and unique nature of the frozen embryo's potential of coming to life.[152] These claims can devalue reproductive injuries by calculating damages according to the lost market value of the entities and the costs of the procedures alone.[153]

Those arguing in favor of the property approach often cite to cases which solely illustrate the relationship concerning the IVF facility and progenitors.[154] However, these cases do not have the equivalent emotional aspect of cases regarding negligent loss of frozen embryos.[155] Therefore, in arguing for frozen embryos to be given a property classification, cases like these fail to be persuasive.[156]

Even in cases where the court considers the loss of frozen embryos to be "'loss of irreplaceable property,'" such that additional

149. Emma D. McBride, *"I'd Like My Eggs Frozen": Negligent Emotional Distress Compensation for Lost Frozen Human Eggs*, 61 B.C. L. REV. 749, 769–70 (2020).

150. Harman, *supra* note 12, at 543. *See generally Roe*, 410 U.S. at 160 (discussing the viability of embryos).

151. Russo, *supra* note 3, at 808.

152. Harman, *supra* note 12, at 543.

153. *See id.*

154. *See, e.g.*, York v. Jones, 717 F. Supp. 421, 425–27 (E.D. Va. 1989). In *York*, the progenitors simply sought to have their frozen embryo transported to a new state. *Id.* at 424. *York* is the most frequently cited case used in favor of the property approach. Troeger, *supra* note 88, at 568.

155. *York*, 717 F. Supp. at 423, n.2.

156. Harman, *supra* note 12, at 531; *see also* Frisina v. Women & Infants Hosp. of Rhode Island, No. CIV. A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002) (acknowledging the emotional component of damage to frozen embryos).

damages are attainable,[157] it arguably does not compensate for the loss of potential life. The loss of frozen embryos has been analogized to a case where a family was negligently deprived use and enjoyment of their home and were able to recover damages due to the "inconvenience, discomfort, and annoyance."[158] However, comparing the loss of one's chance to reproduce to an "annoyance" does not accurately portray the injury suffered, nor does it provide suitable compensation.[159] This comparison diminishes the kinds of harm that result from ART negligence, as "[b]eing robbed one's prospects for procreation is a weightier kind of injury, one whose repercussions reach further than inconveniences or sentimentalities."[160]

Additional problems arise under the property approach with regard to courts looking to the agreement between the progenitors and the IVF facility when deciding whose property right over the frozen embryo is superior.[161] Facilities will often include provisions in the agreements purporting to release themselves from liability in the case of any loss or destruction of the frozen embryos.[162] Progenitors will then have to contract their right to recovery away to proceed with the IVF procedures.[163]

Families enter these contracts when they are in a "vulnerable and oftentimes desperate state" due to their desire to have children, so they sign these contracts without fully considering the pertinent medical information and legal consequences of the contract, and thus severely "limit[] their bargaining power."[164] For example, progenitors may be unaware they are signing "a binding legal contract giving up future legal rights should future harm arise" and instead may be under the "belie[f] that they are signing a medical consent form."[165] Although it would seem the involuntary aspect could make these agreements

157. *Frisina*, 2002 WL 1288784, at *2.

158. *Id.* at *8–9 (quoting Hawkins v. Scituate Oil Co., 723 A.2d 771, 773 (R.I. 1999)).

159. Auger, *supra* note 11, at 63 (quoting *Hawkins*, 723 A.2d at 773).

160. *Redressing*, *supra* note 37, at 448.

161. *See, e.g.*, Kass v. Kass, 91 N.Y.2d 554, 566 (N.Y. 1998). The court solely looked to the contract to resolve the dispute. *Id.* at 180.

162. Harman, *supra* note 12, at 535.

163. *Id.*

164. Auger, *supra* note 11, at 65; *see also* Fox, *supra* note 4, at 173.

165. Harman, *supra* note 12, at 529–30.

unenforceable, courts have not made this distinction, such that a breach of contract theory would not be effective.[166] Therefore, the complications with the personhood and property approaches leave the special respect legal status as the superior approach.

IV. PROPOSED JUDICIAL SOLUTION

For the reasons outlined above, the personhood and property approaches make for an ill-fitting legal status. When considering the personhood or property approaches, courts are left with the decision to either award damages based on "the loss of life or compensation for the costs associated with creating a potential life."[167] An "interim category," such as the special respect legal status introduced in *Davis v. Davis*, provides a superior approach for progenitors as well as IVF facilities.[168]

The special respect legal status acknowledges the value of frozen embryos as "more than property but less than human."[169] As a result, this approach utilizes concepts from both the personhood and property classifications, providing courts with the greatest flexibility.[170] This is demonstrated in *Davis*, as the Court first looked to the contract between the parties, and then considered the parties' interests to resolve the dispute.[171]

In contrast to other approaches, the special respect status does not expressly exclude any suitable legal standard for remedying frozen embryo disputes.[172] Courts which have adopted this view are therefore able to award progenitors greater compensation in situations of damage or loss to their frozen embryos.[173] As in *Jeter v. Mayo Clinic Arizona*,

166. Auger, *supra* note 11, at 65; Frisina v. Women & Infants Hosp. of Rhode Island, No. CIV. A. 95-4037, 2002 WL 1288784, at *10 (R.I. May 30, 2002) (quoting Buenzle v. Newport Amusement Ass'n, 68 A. 721, 722–23 (R.I. 1908)); Fox, *supra* note 4, at 173.

167. Harman, *supra* note 12, at 543.

168. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

169. Harman, *supra* note 12, at 535 n.182.

170. *Postmodern*, *supra* note 111, at 2123.

171. *Davis*, 842 S.W.2d at 604.

172. *Postmodern*, *supra* note 111, at 2123.

173. *See, e.g.*, Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1261–62 (Ariz. Ct. App. 2005). The adoption of this interim approach set forth in *Davis* precluded the

where a claim for negligent loss of the frozen embryos was allowed, the progenitors were granted more in damages than they would have received under a property approach.[174]

The special respect approach is a better approach for progenitors and IVF facilities, but uncertainty remains for courts regarding what this classification entails and how a court should calculate damages if negligence occurs.[175] While the balancing test introduced in *Davis* is an improvement over the more restrictive methods of calculating damages under the property or personhood approaches, the test as a whole is too broad, putting courts at a disadvantage because it fails to provide clear factors.[176] With IVF procedures continuing to become more common, it is vital for courts to have a definitive way to apply this balancing test.

A. The Need for Consistency and Judicial Action

Under *Davis*, courts look first to the contract to see if it can resolve the conflict, and, if not, they balance the interests of the parties.[177] This balancing test is typically conducted under property law.[178] When courts use this approach, they have the most discretion in resolving the case, but they also have the least guidance.[179] This lack of guidance

court from dismissing the plaintiff's claims for negligent loss or destruction of the preembryos, breach of fiduciary duty, and breach of a bailment contract. *Id.* at 1258.

174. *Id.* at 1261. When frozen embryos are considered "irreplaceable property" recovery is still limited because, arguably, it does not adequately compensate progenitors for the loss of their potential to have a biological child. Fox, *supra* note 4, at 175 (discussing Frisina v. Women & Infants Hosp. of Rhode Island., No. CIV. A. 95-4037, 2002 WL1288784, at *10 (R.I. May 30, 2002)).

175. Harman, *supra* note 12, at 542.

176. *See, e.g.*, *Jeter*, 121 P.3d at 1274.

177. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992). However, in this case, there was no written agreement between the parties: "[T]hey did not execute a written agreement specifying what disposition should be made of any embryos that might result from the cryopreservation process." *Id.*

178. *Postmodern*, *supra* note 111, at 2123 ("Despite the flexibility of the 'property deserving special respect status, courts have tended to implicitly treat the embryo like property.'").

179. Harman, *supra* note 12, at 542.

ultimately makes it very difficult for IVF facilities and progenitors to understand their legal rights and liabilities.[180]

While the special respect approach does not expressly reject any applicable legal standard for remedying frozen embryo disputes, it also does not clearly suggest any.[181] As a result, this approach is challenging to apply because courts are left uncertain of what legal framework to utilize.[182] Courts have therefore implicitly treated frozen embryos more like property, instead of giving them the special respect they deserve under this approach.[183]

Since *Davis* was decided, only two state trial courts have commenced adoption of this interim legal classification.[184] Thus, inconsistency remains with regard to state treatment of frozen embryos due to lack of both adequate guidelines for analysis, as well as "consideration given to the many competing interests, emotions, and in-concrete future expectations of the parties."[185] Although there are benefits to a case-by-case analysis, which allows for judicial discretion, the benefits do not outweigh the lack of uniformity and regulation in case law that results.[186]

B. Urging Adoption of an "Improved" Special Respect Approach

Courts should adopt an "improved" special respect legal status. Courts adopting this approach will still follow the *Davis* decision by first looking at the contract.[187] If the contract does not speak to the

180. *Id.*

181. *Id*.

182. *Id.*

183. *Postmodern*, *supra* note 111, at 2123 n.102 (citing Upchurch, *supra* note 97) ("In acknowledging the progenitors ownership interests and ability to dispose of the embryo in any manner consistent with the law, the court in *Davis*, ultimately treated the embryo like property despite holding it was entitled to special respect."); *see also* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

184. Harman, *supra* note 12, at 541.

185. *Id.*

186. Jessica R. Hoffman, *You Say Adoption, I Say Objection: Why the World War Over Embryo Disposition is More Than Just Semantics*, 46 FAM. L.Q. 397, 405 (2012).

187. In her Comment, Caroline Harman also argues that states should adopt an "improved" special-respect legal status for frozen embryos. Harman, *supra* note 12, at 544. While my proposed solution also argues that state courts should first look to

issue, then courts should balance the interests of the parties.[188] These interests include the rights of the IVF facility, the rights of the progenitors, and the frozen embryos' potential for life.[189]

Having courts first look to the contract in all disputes regarding frozen embryos, IVF facilities will have greater incentives to ensure that legal issues and questions are addressed in the contract.[190] If the dispute can be resolved through the contract, it ends there.[191] If clinics are allowed to contract around negligence, it is vital that information about the clinic's clinical and laboratory experience and success rates be made available. Higher regulatory requirements for clinics, including mandating the release of success rates, information about current pending law suits, and reviews from dissatisfied customers, would provide progenitors with additional knowledge about what rights they are giving up.[192] These contracts should nevertheless be invalidated if there is not clear notice about what rights parties are giving up.[193] Additionally, lack of disclosure and duress are concepts that can possibly limit a clinic's ability to add waivers into contracts.[194] If the contract

the contract between the progenitors and the IVF facility in all disputes regarding frozen embryos, my solution proposes two specific factors that courts should consider when analyzing such a dispute. *See id*. Harman's solution, however, simply calls for courts to "look more broadly and consider the interests of the progenitors, the IVF facility, *and* society at large when conducting the balancing test." *Id.* Such a solution does not go far enough in protecting the rights of progenitors. Without specific balancing factors, such as the two that I suggest, courts will continue to award progenitors damages that do not fully compensate for the ART-related negligence they suffer. *See infra* notes 196–97 and accompanying text.

188. *Davis*, 842 S.W.2d at 601.

189. *Id.* at 597.

190. Harman, *supra* note 12, at 544.

191. *Id.*

192. Debele & Crockin, *supra* note 7, at 115 ("Programs should provide both general and clinic-specific success rates for their various protocols, and patients should be made aware of the clinic's clinical and laboratory experience in oocyte and embryo cryopreservation methods and success rates.").

193. *Id.*

194. Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. RICH. L. REV. 419, 441 (2017) ("[C]ontract law already contains protections against exploitative and unfair contract provisions: the defenses of economic duress, undue influence, and unconscionability. All three defenses ask the factual question of whether the weaker party effectively had alternative courses of action available and whether she entered into the

does not resolve the dispute or if the court voids the contract due to unconscionability or vagueness, for example, then the balancing test should be used.[195]

To better define the balancing test and give guidance for calculating damages, courts should look to two factors: (1) the severity of the reproductive injury caused by the defendant,[196] and (2) the procedural costs associated with creating the first, destroyed, batch of preembryos.[197] Additionally, progenitors would need to show that the injury was significant, and that competent treatment would have given them a reasonable opportunity to procreate. The court would then calculate damages accordingly, while also including the time, money, and resources spent to create the embryo.

Though it would be appealing for all states to adopt this standard for uniformity, this issue is predominantly a state issue.[198] Therefore, the states should retain flexibility in applying this approach in a manner according to their state.[199] However, more regulatory standards should be set by the American Medical Association, such as requiring clinics to disclose their success rates. [200]

1. Severity of Injuries Factor

To determine the severity of a progenitor's injuries, courts should look to the extent to which her life will be impaired "from the perspective of [her] own . . . values and circumstances."[201] This

contract voluntarily with full knowledge."); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 177, 208 cmt. d (AM. L. INST. 1981).

195. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. L. INST. 1981).

196. Fox, *supra* note 4, at 212.

197. Russo, *supra* note 3, at 811; *see also* United States v. Arora, 860 F. Supp. 1091, 1100 (D. Md. 1994).

198. Harman, *supra* note 12, at 544; *see also* Judith Daar, *Federalizing Embryo Transfers: Taming the Wild West of Reproductive Medicine?*, 23 COLUM. J. GENDER & L. 257, 285 (2012).

199. Harman, *supra* note 12, at 545; *see also* Daar, *supra* note 198, at 285.

200. Debele & Crockin, *supra* note 7, at 115 ("Programs should provide both general and clinic-specific success rates for their various protocols, and patients should be made aware of the clinic's clinical and laboratory experience in oocyte and embryo cryopreservation methods and success rates.").

201. Fox, *supra* note 4, at 226.

includes consideration of the progenitor's interest in parenthood and having biological children.[202] Distinguishing the severity of the reproductive injury would thus be done on a case-by-case basis.[203]

Professional misconduct would also be relevant.[204] Courts should examine if the medical professional recklessly disregarded an obligation or if the professional fell below the standard of care.[205] Further, courts should examine the facility's degree of fault in causing the reproductive negligence.[206]

Misfortunes such as "[d]isease, accidents, cancer treatment, prenatal history, and passing years leave one in eight American couples today unable to conceive or gestate without the help of [ART]."[207] Consequently, the plaintiff's pre-injury opportunities for gestation or live birth will also play a role in assessing the severity of the injury, in the event that the treatment went correctly.[208] The compensation for plaintiffs should be reduced when factors besides the fault of the defendant cause the reproductive failure, such as patient infertility or genetic uncertainty.[209] The patients with pre-existing conditions would still be provided the chance to recover for "the harm of losing their opportunity for a better outcome."[210] This remedy would be similar to the loss of chance doctrine and would allow progenitors to recover for the foreseeable emotional harm of losing out on the chance to reproduce.[211]

Those going through IVF procedures often will experience emotional and physical tensions.[212] The multiple steps involved in the IVF

202. *Id.* at 222.

203. *Id.* at 226.

204. *Id.* at 153.

205. *Id.* at 215–16.

206. *Id.* at 228 (citing Dickhoff v. Green, 836 N.W.2d 321, 335 (Minn. 2013).

207. *Redressing*, *supra* note 37, at 462–63 (citing CTRS. FOR DISEASE CONTROL & PREVENTION ET AL., 2012 *ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT* 23 (2014), http://www.cdc.gov/art/pdf/2012-report/art-2012-fertility-clinic-report.pdf).

208. *Id.* at 463 (citing William J. Stewart & Randi Lynn Scheinblum, *Deprivation of Parenthood – A New Tort?*, 6 W. St. L. Rev. 229, 244–45 (1979)).

209. *See e.g.*, *id.*

210. Matsuyama v. Birnbaum, 890 N.E.2d 819, 830 (Mass. 2008), *abrogated by* Doull v. Foster, 163 N.E.3d 976 (Mass. 2021).

211. Fox, *supra* note 4, at 227.

212. Harman, *supra* note 12, at 520–21.

process can take around twenty-one days,[213] and it is not uncommon for couples to be emotional and become attached to their frozen embryos as they look forward to parenthood.[214] The loss of chance to reproduce causes "[a]nxiety, disappointment, and sorrow" to most patients.[215] If courts continue to punt these legal issues and not set forth a proper remedy, they are inadvertently taking sides on the issues and not considering these injuries authentic or grave enough to matter.[216] The injury-causing negligence cannot reasonably be dismissed as harmless errors, because the "misconduct shatters, now or forever" a progenitor's "longed-for dreams of pregnancy and genetic parenthood."[217]

Reproductive negligence is a harm in fact, not just in theory, and "intangible injuries can nevertheless be concrete."[218] It is unreasonable for courts not to acknowledge the loss of chance as an injury which extends outside the field of malpractice to reproductive negligence.[219] The doctrine asks plaintiffs to show that "negligence more likely than not caused a substantially reduced probability of a more favorable outcome," setting the bar low for patients to show causation.[220]

2. Procedural Costs Factor

The court should include the ART-related financial costs when measuring damages for the loss of negligently destroyed frozen embryos. The application of the procedural costs factor would be similar to a conversion suit, looking to the time, money, and resources spent to

213. *Microdose Lupron Flare Protocol for IVF – Sample Calendar In Vitro Fertilization Microflare Protocol*, ADVANCED FERTILITY CTR. OF CHI., https://advancedfertility.com/2020/09/21/microdose-lupron-flare-protocol-for-ivf-sample-calendarin-vitro-fertilization-microflare-protocol/ (last visited Sept. 17, 2021).

214. Tanya Feliciano, Davis v. Davis*: What About Future Disputes?*, 26 CONN. L. REV. 305, 309 (1993) ("Clinics report that couples attempting IVF often show an abnormal attachment to the embryos, sometimes even naming them, and experience deep depression if successful implantation does not occur.").

215. *Redressing*, *supra* note 37, at 455.

216. *Id.*

217. *Id.*

218. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

219. Fox, *supra* note 4, at 227.

220. *Id.*

produce the frozen embryo.[221] If a court is unwilling to calculate the fiscal value of "creating" the frozen embryo, then the court could measure damages by the actual value of the frozen embryo to the progenitors.[222] Although this calculation would not be as exact as the cost of replacement, conversion suits are "used in . . . cases involving chattels of great sentimental value and such damages would correspond closely in the minds of litigants with damages for emotional distress."[223]

IVF has become a "multi-billion-dollar industry."[224] Freezing and transferring embryos during IVF is a relatively long process that can cost up to fifty-thousand dollars, on top of the additional medical expenses associated with the procedure.[225] Preceding the IVF procedure, progenitors must pay for the costs of OB/GYN appointments, referrals to specialists, preliminary testing, rounds of medication, and much more that insurance may not cover.[226] An IVF procedure alone,

221. Russo, *supra* note 3, at 811.

222. *Cf.* Sell v. Ward, 81 Ill. App. 675, 677–78 (Ill. App. Ct. 1898). In *Sell*, the actual value of the property was looked at to measure damages for the owner of the property: "The jury may consider the cost of replacing the property." *Id.* at 676.

223. Russo, *supra* note 3, at 811.

224. Michael Ollove, *Lightly Regulated In Vitro Fertilization Yields Thousands of Babies Annually*, WASH. POST (Apr. 13, 2015), https://www.washingtonpost.com/national/health-science/lightly-regulated-in-vitro-fertilization-yields-thousands-of-babies-annually/2015/04/13/f1f3fa36-d8a2-11e4-8103-fa84725dbf9d_story.html (noting that assisted reproduction is a multi-billion-dollar industry).

225. Nicole M. Mattson, *On Ice: The Slippery Slope of Employer-Paid Egg Freezing,* 32 ABA J. LAB. & EMP. L. 255, 262 (2017) (discussing the cost of freezing eggs then thawing for insemination to create an embryo).

226. *See* Rachel Strodel, *Fertility Clinics Are Being Taken Over by For-Profit Companies Selling False Hope*, NBC NEWS: THINK (Mar. 1, 2020, 3:32 AM), https://www.nbcnews.com/think/opinion/fertility-clinics-are-being-taken-over-profit-companies-selling-false-ncna1145671 ("There are also pricey drugs and disruptive side effects that often accompany the egg-freezing process . . . . Add-ons such as 'endometrial scratching' tack on thousands of dollars to IVF treatments that already reach five figures."); *Before IVF, Ask Your OB/GYN About Infertility Options*, ADVENTHEALTH ORLANDO BLOG (Sept. 26, 2018), https://www.adventhealth.com/hospital/adventhealth-orlando/blog/ivf-ask-your-ob/gyn-about-infertility-options (emphasizing the need for conversations with your OB/GYN before IVF procedures); *How Much Does It Cost to See a Fertility Specialist?*, LAUREL FERTILITY CARE, https://www.laurelfertility.com/cost-to-see-a-fertility-specialist/ (last visited Sept. 4, 2021) ("With consideration to the processes for both men and women during an initial consultation, hopeful couples can expect to pay roughly $2,000 for

involving the use of an embryo that has never been frozen, can cost around twelve-thousand dollars.[227] If additional transfers of frozen embryos are needed, they can cost up to five-thousand dollars per procedure, and progenitors must also pay for the storage of their frozen embryos which can cost several hundred dollars a year.[228] Moreover, if progenitors decide to use a gestational surrogate, costs can increase tremendously—a gestational surrogate can be almost $150,000 depending on the individual arrangements.[229]

Considering the amount of time, money, and resources spent will assist courts in calculating damages. IVF facilities have records of the charges associated with procedures, so it should be simple to calculate monetary damages when using the conversion suit formula.[230] While a conversion theory alone would not allow an individual to recover for the emotional loss suffered due to the destruction of the embryo, the procedural costs factor coupled with the severity of the injury factor would fully compensate the individual.

Furthermore, the conversion theory provides more protection for facilities by not leaving them vulnerable to large, uncapped damages liability.[231] Although the procedural costs factor is still somewhat broad with respect to calculating damages for the emotional and personal aspects, the overall approach sets forth clear guidelines. Ultimately, this approach will eliminate confusion of application and allow for greater recovery for progenitors than current remedies allow.

C. Application of Factors

The hypothetical case of Rachel discussed in the introduction demonstrates how the proposed factors could be applied to assess

preliminary testing. More advanced procedures (biopsies, X-rays, laparoscopy, etc.) can spike the cost even more with ranges nearing $5,000 and above.").

227. Uffalussy, *supra* note 30.

228. *Id.*

229. Elizabeth Fuller, *Gestational Carriers (Surrogacy)*, BABYCENTER, https://www.babycenter.com/surrogacy (last visited Oct. 12, 2021) ("The cost for gestational surrogacy depends on factors including your health insurance, the gestational surrogate's expenses, and the cost of IVF where you live.").

230. *See* United States v. Arora, 860 F. Supp. 1091, 1100 (D. Md. 1994). "The cost of creating the cells was compensable" in *Arora*, and analogously the cost of creating the frozen embryos would be compensable as well. *See id.*

231. *See id.*

damages.[232] When considering the severity of injuries in this case, the likelihood Rachel would have reproduced successfully had her clinic not discarded her reproductive material would be reasonably high. Although Rachel had been diagnosed with cancer before she had her reproductive materials frozen for later use, she did not undergo chemotherapy until after this procedure. Therefore, because Rachel was fertile before chemotherapy, a pre-existing injury was not available to consider had the treatment gone correctly.

Professional misconduct is very relevant in this hypothetical, as the fertility clinic recklessly disregarded its obligation to store the reproductive materials without informing Rachel or her husband. The failure of the clinic significantly impaired Rachel's life as she became forever unable to have children of her own. If the hospital had not negligently discarded the reproductive materials, Rachel would likely be able to produce a child of her own.

A jury could likely determine that disposing of frozen embryos without prior notice or consent is "the 'kind of deliberate, shocking and reckless conduct' necessary to ground a claim for intentional infliction of emotional distress."[233] Rachel would likely be able to show that her emotional distress was severe enough to support the claim for intentional infliction of emotional distress by alleging that she endured depression, sleep disturbances, and post-traumatic stress disorder.[234] Additionally, finding that the clinic owed a duty of care and was at fault for causing severe emotional distress, which was foreseeable, would prospectively allow for a negligent infliction of emotional distress claim.[235]

Finally, when assessing the financial costs, a conversion suit could be used to calculate the time, money, and resources spent to produce the frozen embryo.[236] This calculation would be achievable by simply looking to the clinic's records of the charges associated with the procedure.[237] After consideration of these factors, damages would be

232. *See* discussion *supra* Section I.

233. Witt v. Yale-New Haven Hosp., 977 A.2d 779, 795 (Conn. Super. Ct. 2008) (quoting Del Zio v. Presbyterian Hosp. in New York, No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450, at *13 (S.D.N.Y. Nov. 9, 1978)).

234. *See id.* at 795–96.

235. *Id.* at 793–94.

236. Russo, *supra* note 3, at 811; *Arora*, 860 F. Supp. at 1100.

237. *Arora*, 860 F. Supp. at 1100.

awarded to adequately compensate Rachel for the severe reproductive injuries caused by the clinic and for their procedural costs.

V. CONCLUSION

As ART continues to become more common, reproductive negligence lawsuits will grow, and courts need to have clear procedural rules to address ART-related negligence. Most states have had trouble adopting a view regarding the legal classification of frozen embryos due to the many controversial opinions surrounding ART-related negligence.[238] The indecisiveness has consequently made it difficult for courts to determine what cause of action is appropriate to remedy reproductive negligence.[239]

Having a set legal classification for frozen embryos and a more defined way to calculate damages will ensure that IVF facilities and progenitors understand their legal rights and liabilities. Improving the balancing test of the existing application of the interim legal classification may help prevent courts from "punting" these issues. Courts should consider two factors to achieve this goal: (1) the severity of the reproductive injury caused by the defendant,[240] and (2) the procedural costs associated with creating the batch of destroyed pre-embryos.[241] Legal recourse will be more attainable if courts have a consistent application of the law. Additionally, litigation costs will likely decrease as there is less uncertainty in knowing which legal status the court will apply.[242] The implementation of consistent legal rules will provide both the users and providers of IVF facilities with parameters to plan and act within their rights and responsibilities.

238. Harman, *supra* note 12, at 521–22.

239. *Id.*

240. *See* Fox, *supra* note 4, at 227.

241. *See* Russo, *supra* note 3, at 811; *Arora*, 860 F. Supp. at 1100.

242. Harman, *supra* note 12, at 548.