New Reproductive Technology and Wisconsin Law: Fertility Clinics Making Law

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NEW REPRODUCTIVE TECHNOLOGY AND WISCONSIN LAW: FERTILITY CLINICS
MAKING LAW

I. INTRODUCTION

In a recent custody dispute, a Tennessee circuit court was asked to determine the disposition of seven cryogenically frozen embryos that were the product of in vitro fertilization (IVF) undertaken by prospective parents Mary Sue and Junior Davis. The circuit court decision, awarding sole custody to Mary Sue for the purpose of implantation, was subsequently reversed on appeal and modified to an award of joint custody.

Though somewhat inauspicious at first glance, the Davis decision is, nonetheless, an important precursor of cases to come. It teaches us that new legal relationships are born as a consequence of creating life extracorporeally. Davis is particularly significant not for its result, but for the fact that it focuses attention on the reproductive continuum. It is a poignant reminder that the concept of viability, as the measuring line for protecting prenatal rights, is slowly but steadily eroding in today's legal system.

Lawmakers must now contemplate whether the conceptual line should be

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2. Id. at 2098. Cryogenic preservation is a procedure whereby cells are subjected to freezing in a laboratory and thawed through a step by step procedure for later use. Liquid nitrogen is generally used as the freezing agent. Id.
3. Id. In vitro fertilization (IVF) is the procedure whereby the ovum and the sperm are placed in a petri dish in a special medium, and fertilization occurs. Id.
4. Id. at 2097.
5. Davis v. Davis, No. 180 (Tenn. Ct. App. Sept. 13, 1990) (LEXIS, States Library, Tenn. file). By the time the Davis appeal was heard, Mary Sue and Junior were remarried and neither wanted a child with the other as parent. On appeal, Mary Sue was seeking the authority to donate the embryos to a childless couple. The court held that, consistent with the viability approach in the abortion context, the circuit court was in error by granting the embryos a legal status equivalent to that of a person. Further, the court concluded that, absent pregnancy, neither party should be burdened with unwanted parenthood. To compel parenthood was held to be an impermissible infringement on procreative freedom. Custody was awarded jointly to the Davises, until such time as they could agree on what to do with their embryos. Id. at *3.

The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. . . . The Court adheres to the Roe framework because the doctrine of stare decisis demands respect in society governed by the rule of law. . . . Although we must be mindful of the “desirability of continuity of decision
pushed back, one step further. A myriad of legal rights is at stake. Is it possible to grant legal rights to the preimplantation embryos which will not infringe on the biological parents’ right of procreation? If human embryos are granted legal personhood, what standards for awarding custody should prevail? Should frozen embryos be available for adoption, and if so, must fertility clinics and hospitals be subject to current adoption regulations? Will embryos thawed long after a testator’s death be permitted to inherit?

Although the Davis court was faced only with the question of custody, Judge W. Dale Young, presiding as trier of fact, ultimately decided that the IVF embryos were human life which deserved the status of legal personhood. It is telling that he looked to what he perceived as the absence of in constitutional questions . . . when convinced of former error, this Court has never felt constrained to follow precedent.”

Id. at 458.

For a complete discussion on the underpinnings of Roe, see generally discussion and sources cited infra note 97.

Viability as the measuring line for protecting prenatal rights is evolving in the areas of criminal and tort law as well. Several states have revised their homicide statutes to include feticide; many protect the fetus from the moment of conception. See Ill. Ann. Stat. ch. 38., paras. 9-1.2, 9-2.1, & 9-3.2 (Smith-Hurd 1991) (defining “unborn child” as “any individual of the human species from fertilization until birth”); Cal. Penal Code § 187(a) (West 1989) (defining murder as “the wrongful killing of a human being, or a fetus, with malice aforethought”). Other states that have enacted specific feticide statutes include: Indiana, Ind. Code Ann. § 35-42-1-6 (Burns 1989); Iowa, Iowa Code Ann. § 707.7 (West 1979); Minnesota, Minn. Stat. § 609.2661-.2665 (1989); Nevada, Nev. Rev. Stat. § 200.210 (1988); New York, N.Y. Penal Law § 125.00 (McKinney 1988).


As early as 1977, in Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), the Supreme Court of Illinois held that an infant could maintain an action against a hospital and physician for any injuries sustained as a result of negligent transfusion of blood to the mother. This is a remarkable result in view of the fact that the transfusion occurred several years prior to the infant’s conception. Id. at 367 N.E.2d at 1251.

7. 15 Fam. L. Rep. (BNA) at 2097.

8. Id. at 2099 nn.13-16. In arriving at its decision, the trial court weighed the testimony of four experts: Dr. King, a medical doctor and specialist in the field of infertility/reproductive endocrinology; Dr. Shivers, an embryologist; Dr. Lejeune, a medical doctor and a specialist in the field of human genetics; and, John A. Robertson, professor of law, author of numerous scholarly treatises on various medical-legal subjects including IVF and cryopreservation. Id.

Each of these experts offered opinions as to when human life begins. King, Shivers, and Robertson agreed that the cell differentiation present in the preimplantation embryo was not sufficiently developed to constitute human life. Id. By contrast, Lejeune testified that “[w]hen the first cell exists, all the ‘tricks of the trade’ to build itself into an individual already exist . . . when the ovum is fertilized by the sperm, the result is ‘the most specialized cell under the sun. . . .’ and, ‘[a]s soon as he has been conceived, a man is a man.”’ Id. at 2100. The court was persuaded by Lejeune’s testimony that the individual’s genetic make-up, as evidenced by a deoxyribonucleic acid (DNA) test, is complete at the embryonic stage. Id. at 2102.
controlling state law and common law in arriving at his decision. In so doing, Judge Young implicitly rejected *Roe* and its progeny as controlling in the context of IVF.

Even though the circuit court decision was subsequently reversed by the Tennessee Court of Appeals, it nonetheless serves to remind that IVF technology demands nothing less than a comprehensive state policy that addresses the consequences of new reproductive technology. Current federal and state law primarily address the question of fetal research, and only mention IVF procedure tangentially. Thus, even as the demand for IVF and related technology increases, only one state has attempted to clarify the full spectrum of legal relationships which arise between the genetic parents, the embryo, and the clinic. In the absence of state law, important public policy will be left to the determination of the courts, or to the clinics themselves. Arguably, neither the participants in the new reproductive technology nor the public at large is benefitted by ad hoc administration.

Wisconsin is among those states which offer fertility clinics, but have no laws which define and delineate the legal rights of the participants. With no controlling statutory law, present IVF policy in Wisconsin is left to

9. *Id.* at 2103. The court looked to the Tennessee Wrongful Death Statute and the Tennessee Criminal Abortion Statute but found neither established a public policy with regard to the rights of a human embryo, in vitro, in a divorce case. *Id.*

10. *Id.* Addressing whether any precedent controlled in this area, the court observed "that both *Roe* and *Webster* dealt with questions of the constitutionality of abortion statutes and the Court's decisions in those cases have a profound effect on the states' compelling interest in the protection of human life, but only as it deals with the abortion issue." (citations omitted). *Id.*


12. 45 C.F.R. § 46.203(c) (1985) regulates fetal research and specifically defines a fetus as the product of conception following implantation; pregnancy is similarly defined as starting post-implantation.


For data on declining birth rate, increase in the infertility rate, and the declining availability of healthy infants, see Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. Cal. L. Rev. 1079 (1986).

14. Interview with Cindy Gunnarson, RN, Clinical Services Coordinator for the Advanced Institute of Fertility (AIOF), associated with Waukesha Memorial Hospital and Sinai-Samaritan Medical Center (Feb. 11, 1991) [hereinafter Gunnarson].

Ms. Gunnarson indicated that IVF clinics began operating in Wisconsin in 1983. The first clinic was associated with the University Medical Center in Madison, under the direction of Dr. Shapiro. Now, three additional clinics service Wisconsin: the AIOF (with offices at Waukesha Memorial and Sinai-Samaritan) under the direction of Dr. K. Paul Katayama, and a clinic in Appleton, Wisconsin. A fifth center may open shortly under the direction of Dr. Charles Koh. *Id.*

15. A thorough search through the index to the Wisconsin Statutes revealed no law on either fetal research or IVF procedure. This was confirmed by Ms. Gunnarson. *Id.*
the clinics, which operate pursuant to American Fertility Society (AFS) guidelines.16

This Comment will assess the impact of IVF and related technology on Wisconsin custody, adoption, and inheritance law. The analysis will encompass a two-prong approach: An evaluation of current Wisconsin law and its underlying presumptions and an evaluation of the policies presently imposed by Wisconsin fertility clinics on their clients. The statutory laws of other jurisdictions will be considered, as well as pertinent case law, in order to suggest that the unregulated status quo deserves legislative consideration. Before proceeding further, a brief overview of IVF and cryopreservation is provided for background.

II. NEW REPRODUCTIVE TECHNOLOGY: IN VITRO FERTILIZATION AND CRYOPRESERVATION

In vitro fertilization (IVF)17 is one of many elective procedures used today to treat infertility.18 It is unique insofar as it is the only infertility procedure that involves the extracorporeal union of the ova and the sperm. IVF is most often elected by couples to overcome the man's low sperm

16. Because there is no statutory law on point, the inference is logically sound that the consent forms provided by the infertility clinics to their patients are the only guidelines available to participants. Ms. Gunnarson stated that the consent forms presently in use, drafted by a local law firm, follow AFS policy guidelines. See Gunnarson, supra note 14.

17. See supra note 3 and accompanying text.

18. See John A. Robertson, Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 947 (1986). Other infertility treatments include microsurgery to repair fallopian tubes, artificial insemination, and fertility drugs used to stimulate ovarian follicular development. Id.

In addition to IVF, the AIOF also offers the following procedures: gamete intrafallopian transfer (GIFT); zygote intrafallopian transfer (ZIFT); and partial zona dissection (PZD). See Gunnarson, supra note 14. The GIFT procedure is similar to IVF insofar as eggs are removed from the female client. However, instead of placing the eggs in a petri dish for fertilization to occur, the egg and sperm are injected directly into the fallopian tube using a special syringe. Fertilization occurs in utero. See RICARDO H. ASCH & SERONO SYMPOSIA, GAMETE INTRA-FALLOPIAN TRANSFER 7 (1990) (pamphlet available at AIOF) [hereinafter Asch].

In the ZIFT procedure, eggs are fertilized in vitro and the embryo is transferred to the fallopian tube. See Sinai-Samaritan Medical Center, The Advanced Institute of Fertility, MILWAUKEE HEALTH, at 2 (1990) (quarterly brochure available at Sinai-Samaritan).

PZD is a technique used to cause a small rupture to either the egg or the embryo depending on the particular infertility problem. If the problem is sperm motility, PZD is used to create a tiny hole on the surface of the egg to allow sperm to penetrate. If, on the other hand, previous attempts at IVF implantation have been unsuccessful, PZD may be used to create a tiny gap on the surface of the embryo to facilitate adhesion to the uterine wall post-implantation. This procedure is also known as "assisted hatching". See AIOF, CONSENT FOR PARTIAL ZONA DISSECTION OF EMBRYO, and CONSENT FOR MICROMANIPULATION BY PARTIAL ZONA DISSECTION, at 1 (1990) (consent forms available at AIOF). See also Joe Manning, Local Baby is First in Midwest Born After Shell-Cutting Method, MILWAUKEE SENTINEL, June 16, 1990, at 1.
count or poor sperm motility, or to bypass the woman's blocked or damaged fallopian tubes.\textsuperscript{19} The first successful live birth occurred in England in 1978.\textsuperscript{20} Since then, more than 5,000 births have been reported worldwide.\textsuperscript{21} Success rates for the procedure vary. Some clinics report a twenty to twenty-five percent chance of pregnancy following the uterine implant, with two-thirds of those implants resulting in live births.\textsuperscript{22}

The IVF technique consists of four steps: (1) development of ovarian follicles (sac containing the eggs); (2) collection of the oocytes (eggs); (3) fertilization of the egg and growth of the embryo; and (4) replacement of the embryo to the uterus.\textsuperscript{23}

At the first stage, female candidates are given either a drug or a hormone to stimulate ovarian follicular development. Client-patients are counseled on the effects of the drugs they may choose: clomid is selected by participants who prefer to stimulate fewer eggs (two to four); and pergonal is selected by participants who wish to ensure a greater number of eggs. With the latter choice, the intent is to store some eggs for future implantation attempts.\textsuperscript{24} Shortly before ovulation, another hormonal drug is given by injection to maximize egg maturation.\textsuperscript{25}

Collecting the eggs is the most complex aspect of IVF. If a laparoscopy is performed, a light general anesthesia is administered. During the procedure, the eggs are aspirated from the follicular shell through an incision beneath the navel.\textsuperscript{26} An alternative to the laparoscopic procedure is ultra-

\textsuperscript{19} See Robertson, supra note 18, at 947.
\textsuperscript{20} Clifford Grobstein, \textit{Coming To Terms With Test-Tube Babies}, in \textit{TAKING SIDES, CLASHING VIEWS ON CONTROVERSIAL BIOETHICAL ISSUES} 25 (Carol Levine ed., 1989).
\textsuperscript{21} See Mark Curriden, \textit{Joint Custody of the Frozen Seven}, 76 A.B.A. J. 36 (1990). The author of this article states that 5,000 births have occurred since 1978. However, since he fails to cite to any authority, I include a citation to Lori B. Andrews, \textit{The Legal Status of the Embryo}, 32 Loy. L. Rev. 357, 365 (1986). Andrews states that as of 1986, 3,000 births occurred. This figure is cited to reports presented at the Fourth World Conference on In Vitro Fertilization, held in Melbourne, Australia. \textit{Id.} at n.43.
\textsuperscript{22} Reported success rates for the IVF procedure are dependent upon the screening procedure and policies of a given clinic. Clinics which operate a fulltime patient practice may have a higher success rate (up to 50%). See Gunnarson, supra note 14. See also Wurmbrand, supra note 13, at 1083 n.25.
\textsuperscript{23} See RICHARD P. MARRS & SERONO SYMPOSIA, \textit{IN VITRO FERTILIZATION AND EMBRYO REPLACEMENT} 3 (1990) (pamphlet available at AIOF) [hereinafter Marrs].
\textsuperscript{24} AIOF offers both clomid and pergonal to its clients. Clomid is ingested in pill form and is most often used to stimulate ovulation in women who have infrequent periods and long cycles. Pergonal (HMG, human menopausal gonadotropin) is administered by injection. Spouses can be taught to administer the injections if the couple is willing. See THE AMERICAN FERTILITY SOCIETY, \textit{OVULATION DRUGS, A GUIDE FOR PATIENTS} 8-13 (1990) (pamphlet available at any Wisconsin fertility clinic).
\textsuperscript{25} See Robertson, supra note 18, at 948.
\textsuperscript{26} See Marrs, supra note 23, at 6.
sound-directed needle aspiration. This technique is less intrusive because aspiration occurs vaginally, rather than through an incision, and requires only a local anesthetic.\textsuperscript{27} Once the eggs are retrieved, they are placed with the sperm in a petri dish, where they will be left alone to fertilize for approximately forty hours.\textsuperscript{28} If fertilization occurs normally, the female candidate will return to the clinic within one to three days for implantation of the embryos in her uterus.\textsuperscript{29} The procedure for implantation is simple and requires no anesthetic. A catheter is inserted into the uterus through the cervix and the embryos are transferred into the uterine cavity.\textsuperscript{30}

Among the variables in IVF procedure is the number of eggs initially aspirated. Some clinics will not aspirate more eggs than they would need to implant, thereby avoiding the dilemma posed by disposal of unused embryos.\textsuperscript{31} Other clinics leave this choice to their clients; excess eggs, once fertilized, may be frozen for later use.\textsuperscript{32} Generally, however, no more than four embryos are transferred to the womb to avoid the risk of multiple births.\textsuperscript{33}

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27. Id. See also Robertson, supra note 18, at 948 n.26. It is interesting to note that in 1986, at the time Robertson published his seminal work on IVF procedure, only one program in the United States used the ultrasound guided needle method to aspirate eggs. Robertson notes that in 1986, ultrasound was a less effective method for retrieving eggs. Id. Six years later, ultrasound has virtually replaced laparoscopic procedure, largely because it requires no surgical incision, no general anesthetic, it involves less discomfort to the patient, and is as effective in retrieving eggs. AIOF uses ultrasound almost exclusively. See Gunnarson, supra note 14.  
28. See MARRS, supra note 23, at 7. The sperm and egg are first visually examined approximately eighteen hours after insemination. Id.  
29. MARRS, supra note 23 at 7.  
30. Id. at 6.  
31. See Robertson, supra note 18, at 948 n.29.  
32. AIOF offers its client-patients either the IVF procedure alone or IVF in conjunction with cryopreservation. If the client prefers only IVF, between two to four eggs are aspirated and fertilized; if IFV and cryo are preferred, all eggs found in the uterus will be aspirated and fertilized; then two to four embryos will be implanted and the remainder will be frozen for future implantation attempts. See Gunnarson, supra note 14.  
In addition, AIOF follows a strict policy that no eggs or embryos will be destroyed. All participants must sign a variety of consent forms relinquishing their right to their genetic material; the clinic bears the self-imposed responsibility of finding donee recipients. Id.  
33. Multiple births are an accepted risk of the IVF procedure. The AIOF uses a standard consent form to inform its patients of the risk. The form is entitled "Number of Embryos to be Transferred" and it contains the following statistical information: per 3 embryo transplant, 31% of patients achieve pregnancy, and 10% of those are multiple pregnancies; per 4 or more embryo transplant, 39% achieve pregnancy, and 28% of those are multiple pregnancies. Below these statistics, there is a signature line for husband and wife. Id. (consent form available at AIOF).
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Cryopreservation is the process of freezing the fertilized embryos in liquid nitrogen. Experts in reproductive endocrinology disagree as to how long embryos may be safely stored. The American Fertility Society (AFS) presently recommends storage up to four years.

There are several advantages to using the cryogenic procedure. IVF is physically demanding on the woman, as well as time consuming and costly. The injections, tests, and preparatory steps that precede implantation may result in the retrieval of as many as eight to twelve eggs. Electing to fertilize and freeze the surplus avoids repeating the discomfort, time, and cost involved in IVF. The client pays a one time charge to cryopreserve the embryos. In addition, cryopreservation enables some patients to have a better chance of achieving pregnancy because the ovarian stimulants are no longer present in the patient's bloodstream.

With the advent of IVF and other advanced medical techniques, ninety percent of all infertile couples can conceive and bear biological offspring. Women who are without ovaries or fallopian tubes are today bearing children. Likewise, men who have had a vasectomy or who are paralyzed are fathering children.

In addition to reducing the problem of infertility, reproductive choice is also exponentially increased by IVF technology. Women could elect IVF

34. See Wurmbrand, supra note 13, at 1083. The form presently in use explains cryopreservation to clients in the following manner: "[O]nce fertilization has taken place and the embryo has reached the appropriate state of cell development, it is transferred to a controlled biologic freezer capable of cooling accurately to subzero temperatures and maintaining the frozen embryos at a constant temperature thereafter." Id.

35. Dr. King, testifying at the Davis trial, estimated safe storage up to two years. See supra note 8, at 2099 n.13. By contrast, Gunnarson, AIOF Clinical Services Coordinator, stated that there was no maximum amount of time that she was aware of, but that the AIOF followed the four year limit set forth in AFS guidelines. See Gunnarson, supra note 14.

36. See Robertson, supra note 18, at 949. Robertson's assessment that the patient-client is generally benefitted by full scale retrieval followed by fertilization and cryopreservation is supported by a cost analysis for IVF procedure today in Wisconsin. The preparatory work-up, lab fees, medications, retrieval and costs for the implantation procedure are generally $5,000. A substantial number of patients do not achieve pregnancy after one implantation attempt. The cost for cryopreservation at AIOF is $860 and this includes one year of storage. See Gunnarson, supra note 14.

37. See Gunnarson, supra note 14.

38. Cryopreservation allows for delayed embryo transplant. The delay enables the embryo to be transferred under more natural conditions and is believed to be more conducive to implantation. See AIOF, CONSENT FOR CRYOPRESERVATION 3 (1990) (consent form available from AIOF).


40. See generally Robertson, supra note 18, at 954-57. The thrust of Robertson's article is that although laws are necessary to clarify the legal framework for the new reproductive technologies, they must, by necessity, be limited. In most instances, the "interests of embryos, offspring,
to ensure later-life pregnancies by aspirating eggs in their twenties when egg production is higher. IVF could also be elected prior to known radiation treatments that could cause genetic damage to the ovaries.

The options available through IVF and related technology compel society to reevaluate the role of the family and the roles men and women traditionally play in the reproductive scheme. Many, however, are not prepared to accept these changes. They are against the procedure because they believe the sanctity of reproduction should remain in the womb. Some believe that creating life in vitro dehumanizes and denigrates the miracle of birth. The infertile couple and the clinics offering these techniques may counter with a right of privacy argument, grounded upon prior Supreme Court decisions which firmly establish the constitutional right to procreate, free from unwarranted governmental intrusion.

Thus far, access to IVF has been upheld by the courts. It is ethically condoned in fifteen countries. Cryopreservation, however, enjoys no such consensus. The most divisive issues focus on disturbing visions of genetic engineering and a general concern for the safety and efficacy of the procedure with respect to the potential damage freezing and thawing may do to the unborn life. To date, however, the incidence of genetically damaged the family, and others” do not justify interference with the individual's right to reproductive choice. Id. at 1040.

41. See Wurmbrand, supra note 13, at 1084.
42. See Elisa K. Poole, Allocation of Decision-Making Rights to Frozen Embryos, 4 AM. J. FAM. L. 67, 69 (1990). Members of Right-to-Life and the Catholic Church have spoken out against IVF and cryopreservation. See Bruss, infra note 152.
43. See generally Hans O. Tiefel, Human In Vitro Fertilization: A Conservative View, in TAKING SIDES, CLASHING VIEWS ON CONTROVERSIAL BIOETHICAL ISSUES 21 (Carol Levine ed., 1989). Hans O. Tiefel, professor of religion argues: “No one has the moral right to endanger a child while there is yet the option of whether the child shall come into existence.” Id. Tiefel also asserts that risk to the unborn is “the crucial and decisive ethical argument against the clinical use of in vitro fertilization . . . that also makes this procedure unnatural.” Id.
44. See Eisenstadt v. Baird, 405 U.S. 438 (1972). “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453 (citation omitted).
45. Few challenges have actually been brought. However, recently an Illinois statute on fetal research was struck down on the grounds that it was unconstitutionally vague and because it infringed on a woman’s right of privacy. See Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990). The Illinois statute purported to prohibit “nontherapeutic” and “experimental research” on fetuses, while specifically permitting IVF. Id. at 1363.
47. Id.
48. See generally Tiefel, supra note 43, at 22-23.
children from either IVF or cryopreservation is no higher than the statistical ratio found among womb-fertilized births. 49

Although the benefits of IVF are apparent to some, and experts admit the medical risks are uncertain, all participants share a common risk in that their legal relations to one another are ill-defined or virtually unspecified by statutory law. Most programs today follow AFS guidelines and proceed on a contractual basis. The most far-sighted contracts admit to the present uncertainties in the law and specify that any provision held to be unenforceable is severable from the remainder of the contract. 50 The client couple seeking to enter a fertility program is required to sign a variety of consent forms which typically contain the following provisions:

Developing laws may require changes in some of the Program’s policies, procedures and requirements, and we agree to be bound by any such changes. We understand that the legal uncertainties include, but are not limited to, the following:

(a) inheritance rights of embryos;
(b) legality of embryo donation and applicability of laws governing termination of parental rights and adoption;
(c) extent to which one spouse may exercise dominion and control over embryos without consent of the other spouse;
(d) the extent to which a court, in an action for divorce, might refuse to enforce the provision . . . for release upon divorce and might award custody of embryos to one spouse, holding the other spouse liable for child support in the event that the embryos are transferred and pregnancy occurs. 51

It is no accident that the attorneys who drafted this consent form address the legal uncertainties in the area of custody, adoption, and inheritance law. The language is taken from forms presently used by the Advanced Institute of Fertility (AIOF) in Wisconsin. Wisconsin presently permits clinics to set their own policies and guidelines. Participants proceed at their own risk. Whether and to what extent fertility clinics should set important social policy is discussed in the following sections.

49. See AIOF, CONSENT FOR IVF 1 (Sept. 1989) (consent form available at AIOF). Client-patients sign a consent which states the following: “We understand that the risks to the embryo associated with human embryo freezing, thawing and transfer are not well established at present. However, in the limited number of birth [sic] from frozen human embryos, no substantial increase of developmental defects has been reported.” Id.
50. See generally AIOF, CONSENT FOR IVF, at 2.
51. Id. at 2-3.
III. REPRODUCTIVE TECHNOLOGY: CUSTODY, ADOPTION, AND INHERITANCE LAW

A. IVF and Cryopreservation Available in Wisconsin Today

The first fertility clinic to offer IVF in Wisconsin began in 1983 at the University Medical Hospital in Madison. Today, four clinics provide both IVF and cryopreservation as well as other treatments including GIFT, ZIFT, and PZD.

Wisconsin's first birth through the implantation of a frozen embryo occurred in March 1988 through the efforts of Dr. K. Paul Katayama, director of the Advanced Institute of Fertility (AIOF). The AIOF program began in 1984 and has since resulted in more than 250 births using IVF procedures. Success rates at the Institute are high; approximately thirty percent of the couples treated will have a baby per single egg retrieval cycle. The institute serves hundreds of couples each year, but limits its services to those who are married.

The marriage requirement is only one of several policies that Wisconsin clinics have established which have no support in law. The central policy which forms the basis for the clinics, is that once an embryo is successfully fertilized (or an egg is successfully retrieved) it shall not be destroyed. To that end, clients must consent to relinquish custody of their embryos to the clinic for the purpose of donation and transplant to a donee client, selected

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52. See Gunnarson, supra note 14.
53. See Robertson, supra note 18.
55. See Sinai-Samaritan, supra note 18, at 2.
56. Id.
57. See Gunnarson, supra note 14. In the interview with Ms. Gunnarson, she was unable to report an exact number of clients who are treated at the AIOF annually; however, she was certain the aggregate amount was greater than 200.
58. AIOF's policy of requiring client-patients to be married corresponds to American Fertility Society (AFS) guidelines. The preamble to the policy statement published by the AIOF states:
      The In Vitro Fertilization (IVF) Program is an approved member of the In Vitro Fertilization Special Interest Group of the American Fertility Society (AFS). To achieve this status, the Program demonstrated compliance with AFS criteria. To maintain the approved status of the Program, the policies set forth below are adopted. . . . The IVF Program . . . will accept only married couples.

Id. (policy statement available at AIOF).
59. See generally Robertson, supra note 18, at 962-64, for a complete discussion on the rights of unmarried persons to elect alternative reproductive technologies including IVF and artificial insemination.
60. See supra note 57. The AIOF policy statement declares: “[C]lear documentation of the number of fertilized ova and their use by the physician(s) involved, in a written [sic] or dictated note is required. No fertilized ova will be destroyed.” Id.
by the clinic. The consent forms in use today require the embryos to be automatically released to the clinic under the following circumstances: (1) during marriage, if after the passage of four years the couple has not requested embryo transplant to the wife, and the couple has not requested an extension of the four year period; or (2) upon divorce (the couple must agree that neither will seek custody of their embryo); or (3) in the event that the wife undergoes a hysterectomy or otherwise becomes incapable of accepting transfer; or (4) in the event that either spouse dies (within the four year period) the embryo will remain with the survivor until the four year period lapses; or (5) in the event that both spouses die. The policy requires that embryo donation will be a completely anonymous procedure, wholly within the control of the clinic. The identity of the genetic parents remains confidential. The genetic parents relinquish their right to select a donee; they are not informed of the transfer, nor do they learn the identity of the donees selected.

There are several legal questions which arise as a consequence of this policy. The first is whether and to what extent the clinic may compel genetic parents to relinquish their genetic material. Under the aforementioned provisos, death, divorce, or incapacity result in automatic termination of parental rights. These provisions could be unenforceable, however, because they infringe on the fundamental right of procreative freedom. The second legal question concerns the absolute anonymity provision of donation. Current Wisconsin law permits biological parents to participate in the selection of the future home of children they wish to surrender and provides for a hearing to terminate parental rights. Arguably, the same right, should be extended to the genetic parents of an IVF embryo.

60. See AIOF, CONSENT FOR CRYOPRESERVATION 3 (1990) (consent form available at AIOF).
61. Id. at 4.
62. Id.
63. Id.
64. See id.
65. Id. at 5. The consent form requires that if the embryos are released under any of the provisions contained therein (divorce, death, incapacity), the physician may transfer them to donees "without any further authorization by or notice to us. We shall have no right to be informed of transfer, no right to learn the identity of any Embryo Donees, and no right to participate in the process of selecting Embryo Donees." Id.
66. See generally Andrews, supra note 21, at 358-66. Andrews argues that the only protections which may be extended to embryos are those that do not infringe upon the procreative autonomy of the parents. Banning experimentation with embryos or allowing suits on their behalf against third party tortfeasors would be permissible. Id. at 364.
Bearing in mind the terms under which patrons to Wisconsin fertility clinics participate, the following sections will examine the policy considerations which underlie state custody, adoption, and inheritance law. The extent to which clinic procedure is inconsistent with the policy of current statutory law will also be addressed.

B. Custody Law

On May 3, 1988, new laws relating to child custody determinations were enacted by the Wisconsin Legislature. The public policy which emerged as a result of these enactments may be gleaned from the directive which guided the special committee toward their study of, among other things: (1) existing laws relating to child custody determinations in actions affecting the family and the limitations of those laws; (2) ways to encourage shared parenting options, including imposing joint custody without the agreement of both parties; and (3) ways to provide support services to families involved in custody matters to ensure that the best interest of the child continues to be served after a child’s parents become divorced or separated.

Paramount to this legislative inquiry was the underlying belief that shared-parenting promotes the best interests of the child. To that end, the committee recommended separating the legal authority to make major decisions concerning the child (legal custody) from the question of with whom the child would reside (physical placement). Significantly, an award of “sole legal custody” will not necessarily preclude shared “physical placement.”

In addition, Wisconsin Statutes section 767.24 further mandates a number of significant factors that the court must follow or consider in any custody award. Especially important are: (1) gender and race may not be a factor in determining a custody award; (2) the court’s decision must in-

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71. *Id.* at 12. Grove observes that due to the flexibility of joint custody provisions, few cases are not resolved by some form of joint custody. Sole legal custody has become the exception. It will only be granted if the conditions precedent for an award of joint legal custody are not met.

72. *Wis. Stat.* § 767.24(5) (1987-88). This section provides: “The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian.” *Id.*
corporate the "best interest" factors set forth in the statute;\textsuperscript{73} (3) the child is entitled to periods of "physical placement" with both parents unless it may endanger the child's emotional, mental or physical well-being;\textsuperscript{74} and (4) the court may not base its decision of "physical placement" on a parent's failure to meet child support payments.\textsuperscript{75}

Implicitly this mandate requires the court to balance the needs of the child with the rights of the parents, underscored by the value judgment that two parents are better than one.\textsuperscript{76} To some extent, it presupposes the ability of post-divorce parents to set aside their differences in order to mutually cooperate in the ongoing process of parenting.\textsuperscript{77}

\textsuperscript{73} \textit{Id.} The "best interest" factors are set forth in subsections (a)-(k).

\textsuperscript{74} \textit{Wis. Stat.} § 767.24(4)(b) (1987-88). This section provides: "A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health." \textit{Id.}

\textsuperscript{75} \textit{Wis. Stat.} § 767.24(4)(c) (1987-88). This section provides: "No court may deny periods of physical placement for failure to meet, or grant periods of physical placement for meeting, any financial obligations to the child or the former spouse." \textit{Id.}

\textsuperscript{76} \textit{See supra} note 69. The special committee found existing laws on custody arrangements did not adequately stress "the significance to the child, in most cases, of a continuing meaningful relationship with both parents." \textit{Id.}

\textsuperscript{77} \textit{See generally} Grove, \textit{supra} note 70, at 11.

Optimally, it envisions that parents will be able to set aside personal differences and work together regarding the parenting of their children following a divorce. Without exception, researchers have found that the key variable affecting the satisfactory adjustment of children following a divorce is the extent of continuity of both parents' involvement in child
In addition to the shared-parenting presumption embodied in the Wisconsin law, the statute presupposes the live birth of a child who is at some stage of minority, and whose parents each request custody for themselves. There is no reason to doubt that custody disputes over frozen embryos could not arise under these circumstances. Many of the "best interest" factors listed in subsections (a) through (k) would be as appropriate in the IVF context as they are under traditional circumstances. The concept of shared-parenting would likewise be applicable and valid.

In order to render the statute applicable to IVF embryo, Wisconsin would need only to draft a custody statute specifically addressed to the situation. The statute should direct the court to apply the relevant "best interest" factors set forth in section 767.24. Custody arrangements per se do not constitute an impermissible infringement on the genetic parents' right to procreative liberty in situations where both parents request the opportunity to bring the embryo to term.

In the context of IVF, custody arrangements are left to the discretion of the clinics which perform the procedure. The genetic parents are required to give their written consent not to seek an award of custody in the event of divorce. This provision, not yet tested in the courts, would not likely withstand a constitutional challenge grounded on the right of reproductive autonomy. Moreover, it is inconsistent with the traditional belief that the biological parents are the preferred caretakers, unless it can be shown that they endanger the child mentally, physically, or emotionally. De facto regulation by fertility clinics raises a more serious question as well: Do we want private or quasi-public organizations formulating social policy for the state?
The *Davis* case is illustrative of the constitutionally problematic custody issue which may arise in the context of IVF—the right of one genetic parent to veto implantation altogether. In *Davis*, the circuit court held the frozen embryos were not property, but human life in its earliest stage of development. Sole custody was awarded to Mary Sue because she expressed to the court her desire to implant the embryos. Junior Davis preferred “destroying the embryos, or, as a last resort giving them to an anonymous third party. He was even willing to pay to keep them frozen forever.” Judge Young found Mary Sue's desire to bring the embryos to term more consonant with his ruling that the embryos were life, and as such, deserved the State's protection. Young, applying the “best interest” standard to the embryos, held that it serves the best interests of the child or children, in vitro, for their mother, Mrs. Davis, to be permitted the opportunity to bring them to term through implantation.

On appeal, Junior Davis objected to any future implantation by Mary Sue on the grounds that it forced unwanted parenthood upon him. The Tennessee Court of Appeals agreed with Junior Davis and observed:

> Awarding the fertilized ova to Mary Sue for implantation against Junior's will, in our view, constitutes impermissible state action in violation of Junior's constitutionally protected right not to beget a child where no pregnancy has taken place. We have carefully analyzed Tennessee's legislative Acts and case decisions and conclude that there is no compelling state interest to justify our ordering implantation against the will of either party.

The appellate decision explicitly drew a parallel between U.S. Supreme Court decisions on abortion and unwanted parenthood in the context of frozen embryos. Yet, it is arguable that the rights involved are not parallel at all. In the abortion context, once a pregnancy is in progress, state interference with the freedom of the mother to continue the pregnancy is limited. By contrast, IVF presents a circumstance where the genetic par-

85. In the first *Davis* trial, Junior Davis sought to prevent Mary Sue from future implantation attempts with their embryos. In a sense, he claimed that to permit her to become a parent against his will, was akin to genetic rape. For a discussion on the equal right to veto implantation, see generally Poole, *supra* note 42.


87. *Id.* at 2099.

88. *Id.* at 2104.


92. *Id.* at *5-*6.

93. *Id.* at *6.
ents are equal donors of their genetic material.\textsuperscript{94} The IVF context requires balancing the burdens of unwanted parenthood with the right of the other genetic parent to procreate when no pregnancy has occurred, and to some extent, requires considering the right of the frozen embryo to be born.\textsuperscript{95}

In reversing the circuit court decision, the Tennessee appellate court prioritized the fundamental rights of the parties. The right to control one's own genetic material, which implicitly derives from the right to procreate, was held to supersede the right of the other genetic parent to procreate and the right of the embryo to life.\textsuperscript{96} Until the Supreme Court speaks more directly to this issue, the appellate court's reasoning is tenable, but not absolute.\textsuperscript{97}

Moreover, under certain circumstances, the right to veto implantation might be unreasonable. Consider the situation where the frozen embryo represents one genetic parent's only opportunity to beget his or her own biological offspring. One legal scholar suggests that the power to veto should depend upon the equities of each case. Under this view, the genetic parent's interest in bearing a child with whom he or she shares a genetic link would presumably, in some circumstances, outweigh the burdens of unwanted parenthood.\textsuperscript{98}

\textsuperscript{94} Although men and women each contribute their genetic material for IVF, the woman's donation is arguably somewhat greater insofar as she is subjected to injections, pills, and the retrieval procedure in order to effectuate her donation. In absolute terms, however, the donors are considered to be equal to one another; no parallel can be drawn to the abortion context after a pregnancy is in progress.

\textsuperscript{95} Professor Robertson argues that the preimplantation embryo cannot be accorded the status of "personhood" because it is, in fact, less than a human life. Therefore, the embryos have no rights which may be balanced in the equation. \textit{See} Robertson, \textit{supra} note 18, at 968-70. This was also the gist of the testimony Professor Robertson gave at the \textit{Davis} trial. \textit{See supra} note 1, at 2100.

\textsuperscript{96} \textit{See supra} note 91 and accompanying text.

\textsuperscript{97} \textit{See} Poole, \textit{supra} note 42, at 75. Poole suggests the preimplantation embryo may be protected in light of \textit{Webster}.

Arguably, the rights and interests at stake in the abortion context are not precisely the same as those which are at stake in IVF, thus, the viability concept in abortion may not necessarily control in IVF. Moreover, a state could conceivably protect IVF embryos should the Supreme Court abandon "viability." \textit{See generally} Nancy K. Rhoden, \textit{Trimesters and Technology: Revamping Roe v. Wade}, 95 YALE L.J. 639 (1986). Rhoden suggests that the underpinnings of \textit{Roe} have eroded because the medical technology available in 1973 is outdated; thus, although the Court must reconsider the position it took in \textit{Roe}, law "should not be controlled by science. For while science seeks to be value-free, law is ultimately the articulation of social values. The judicial process cannot become value-free and remain judicial." \textit{Id.}

\textsuperscript{98} \textit{See} Poole, \textit{supra} note 42, at 86. John A. Robertson, professor of law at the University of Texas, Austin, and member of the Ethics Committee of the American Fertility Society, was an expert witness at the \textit{Davis} trial. Professor Robertson has written the seminal legal treatise in the area of IVF. \textit{See generally} Robertson, \textit{supra} note 18.
The allocation of rights between the genetic parents themselves and between the genetic parents and the embryo is difficult to resolve because IVF places the parties in a new relationship to one another. Although this suggests that no hard and fast rules should control, legislation could be enacted to clarify the legal relations of all participants. In addition, to the extent that the circumstances of a custody dispute parallel those which arise as a result of coital reproduction, and both parents request custody of their embryos, the “best interest” factors may be applied as easily to in vitro children as they apply to children in utero. It is difficult to imagine how the absence of law is beneficial to any of the parties involved.

C. Adoption Law

Independent adoption allows biological parents to directly place their children in the home of a non-relative. It became a reality in Wisconsin in 1981 and was codified under Wisconsin Statutes section 48.837. The statute sets forth the mandatory requirements for the petition and procedure which the biological and the adoptive parents must follow if they elect to pursue this form of adoption.99 The statute exists side by side with a traditional adoption statute, but is more inclusive because it encompasses children who are not yet born.100

By statutory mandate, the petition submitted for independent adoption must include the names of all relevant parties as well as any intermediary person or agency “which solicited, negotiated or arranged the placement of the child with the proposed adoptive parents.”101 No adoption under this statute is anonymous. In instances where the adoption is arranged prior to the birth of the child, hearings on the termination of parental rights and approval of the adoptive parents are postponed until the child is in being.102

Under the Wisconsin scheme, the child’s best interests are protected in two ways: A guardian ad litem (GAL) is appointed to represent the child,103 and the child welfare agency is directed to prepare an investigative

99. Wis. Stat. § 48.837 (1981). The statute requires that the parents and the adoptive family submit a joint petition alleging among other things, “the name, address and age of the child or the expected birth date of the child.” Id.

100. Id.


102. Wis. Stat. § 48.837(4)(a) (1981). This section provides: “Notwithstanding [sec.] 48.422(1), [the court] shall schedule a hearing within 60 days of the date of filing, except that the hearing may not be held before the birth of the child.”

103. Wis. Stat. § 48.837(4)(b) (1981). This section provides that the court “shall appoint counsel or guardians ad litem when required under [sec.] 48.23.”
report for the court. 104 Because of the finality of the decision, the rights and interests of the biological parents and the adoptive parents are best protected by independent counsel.105

At the first hearing, the court considers the recommendations of both the GAL and the welfare agency. A subsequent hearing is held to terminate parental rights if the court determines from the reports that placement in the adoptive home is in the best interests of the child.106

The underlying purpose of independent adoption is to offer biological parents a legal means through which they can meaningfully participate in the process of placing their child up for adoption.107 The detail and specificity of the statute ensures that the state will not abdicate its role as parens patriae.108

The independent adoption statute is reflective of a rivalry between two schools of thought: those who believe private and public agencies are best equipped to be the intermediary in adoption, and those who would argue that restricting the process to agency adoption is an impermissible infringement on a parental right of choice.109 The Wisconsin statute no doubt also reflects a growing concern that parents have to secretly place their children up for adoption, despite a lack of statutory authority to do so.110 At the very least, the law is a compromise reflecting parental rights on one hand and the public policy concerning the welfare of minors on the other.111

Although it would not be possible for the parents of a frozen embryo to secretly place their embryo up for adoption,112 most of the public policy

104. Wis. Stat. § 48.837(4)(c) (1981). This section provides that the court "[s]hall order the department or county department . . . to investigate the proposed adoption placement, to interview the petitioner, to provide counseling if requested and to report its recommendation to the court at least 5 days before the hearing on the petition."

105. See Judith S. Newton, Independent Adoption in Wisconsin, 5 Wis. J. Fam. L. 72 (March 1986).


108. See Newton, supra note 105, at 72; see also Black's Law Dictionary 1114 (6th ed 1990): "'Parens patriae,' literally 'parent of the country' refers traditionally to [the] role of state as sovereign and guardians of persons under legal disability, such as juveniles . . . ."

109. See Cooper, supra note 107, at 650 n.61.

110. Id.

111. See Newton, supra note 105, at 72.

112. This assertion is one of logical inference—the biologic freezer used by infertility clinics to cryopreserve could not be replaced by a mere household freezer. However, it is interesting to note that in York v. Jones, No. 89-373-N (E.D. Va. 1989), when the court ordered the clinic to turn the Yorks' frozen embryo over to the couple, the clinic packed the embryos in a "biologic dry
concerns present with in utero adoption apply to in vitro adoption as well. Adoption is very much an issue in the context of an IVF embryo because clinics are apt to aspirate, fertilize, and store more embryos than are immediately used for implantation. In cases where the initial or subsequent implants achieve pregnancy, a surplus of embryos will often result. Surplus may also occur if the couple gets divorced and no longer desires to implant the stored embryo, if both genetic parents die, or if one or both of the genetic parents become incapacitated. Another situation that would result in surplus could arise if a woman elects to donate ova. Whether infertility clinics would be permitted to fertilize anonymous ova and sperm in the first instance will depend upon restrictions imposed by the state. Consent forms presently in use, issued pursuant to AFS guidelines, permit client-patients to donate their genetic material.

"Donation," rather than "adoption," is a term of art in the infertility vernacular. Client-patients sign a variety of consent forms relinquishing their right to either the ovum or the embryo prior to IVF or IVF followed by cryopreservation. The consent form signed by the donee couple contains a telling warning:

We understand that there are also some legal risks in our participation in the program as donees, due to the lack of laws or judicial decisions dealing with the legal status of frozen embryos, oocyte donors and oocyte donees. We realize that some of our understandings and intentions, as set forth herein, may, at some future time, be held to have no legal effect.

Clinics are clearly aware that the legality of oocyte (egg) donation and the applicability of laws concerning termination of parental rights and adoption present a legal risk to patients. The risk will persist until either the court considers the enforceability of these consent forms, or the legislature acts to...
clarify the legal relations of all participants.121 Meanwhile, unlike adoption of children in utero, consenting donors terminate their parental rights to the embryo without a hearing.122 In addition, unlike Wisconsin’s independent adoption statute which removes anonymity from the process, anonymity is required by the clinic.123 The donor parents of fertilized embryos and the donor of oocytes must agree to relinquish any right to be informed of fertilization, implantation, or to participate in the process of selecting donees.124

The transfer of parenthood from donors to donees under AFS consent forms is similar to the provisions for paternity under Wisconsin’s artificial insemination statute.125 Attorneys for the clinic in Wisconsin did not fail to notice the parallel. The following provision is found in oocyte consent forms for donors and donees used by the AIOF:

We have been informed that Wisconsin law declares the consenting husband of an artificially inseminated woman to be the father of the child, and declares that the sperm donor shall have no parental rights, and it is our expectation and hope that a similar law may develop to govern the legal status of donors and donees of embryos.126

In a sense, the consent forms themselves bear the most persuasive argument for state action. Implicit in the various risks signaled is a myriad of unexpected and unwanted repercussions which may ensue in a court of law. The potential disruption to the lives of two sets of parents and the IVF offspring, which could result from a successful challenge, would not be in the best interest of any of the participants. Moreover, public policy is furthered when the legal interests of the parties are made more certain. Present law seeks to ensure that the child is placed in a stable environment, where continuity of relationships is the norm. Protecting the future of the in vitro child is no less compelling; protection will benefit the child and further public policy interests as well.

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121. Although Wisconsin courts to date have heard no cases in this area, litigation has occurred in Virginia, New York, Illinois, California, and Tennessee. See supra note 5; see infra notes 141-47 and accompanying text.

122. The AIOF, Consent By Applicants For Donated Oocytes provides: “The legal risks for us include . . . the legality of oocyte donation and applicability of laws governing termination of parental rights and adoption.” See supra note 120, at 3.

123. See AIOF, Consent Form For Cryopreservation, supra note 34, at 5.

124. Id.

125. Wisconsin’s artificial insemination statute provides: “the husband of the mother at the time of conception of the child shall be the natural father of a child conceived.” See Wis. Stat. § 891.41(1) (1979).

126. See supra note 120, at 10; AIOF, Consent For Oocyte Donation 2 (1989) (consent form available at AIOF).
D. Inheritance Law

Only under the law of property are the rights of the unborn presumptively valid. Early common law, generally codified by most states today, provided that a child in gestation at the death of the intestate was deemed to be in being, and might inherit a share equal to that of the class to which it was a member, if born alive. Under modern statutes, the right to property accrues at the moment of conception and vests upon birth. Granting legal rights to posthumous heirs conceived in utero places little if any burden on estates, because the gestational cycle of nine months is sufficiently short and not overly disruptive to the administration of estates.

Public policy, favoring swift and efficient probate, however, may be severely tested with the advent of cryogenically preserved embryos. Because the right to inherit is statutory, the rights of a thawed Wisconsin embryo will depend upon the wording of the posthumous heir statute. Present law provides that "a person may be an heir . . . even though born after the death of the decedent if that person was conceived before the decedent's death." Absent a qualification that the unborn be in utero prior to the intestate's death, the present law could be construed to allow children born years after an ancestor's death to claim against the estate. Although one could argue, citing legislative intent, that it is unlikely that any court would so interpret the statute, the mere possibility should suffice to remind lawmakers that they ought to review this law.

Unlike the right of procreation, there is no fundamental right to inherit. Should the legislature elect to limit the rights of frozen embryos by imposing a limit to the time allowed for claims against an estate, it could do so, and likely withstand an equal protection challenge. Treating a class of frozen embryos differently from embryos in utero would be acceptable if the classification were reasonable and not arbitrary, and if it rested upon some difference having a fair and substantial relationship to the purpose of the legislation. The need for finality in probate within a reasonably fixed period of time would certainly justify the imposition of a time limit. More-

129. See supra note 14.
131. See Andrews, supra note 21, at 393. Andrews contrasts the usual posthumous heir statute with Louisiana probate law, which requires the embryo to be "in utero" at the time of the testator's death in order to inherit. Id. at 393-94.
over, legislators could empower the courts to impose a trust on the property for the benefit of the frozen heirs for a reasonable period of time, after which, if no live birth occurred, the property would devolve through intestate succession. By contrast, it is unlikely that a statute designed specifically to deny the right to inherit to frozen embryos, born alive within a reasonable period of time, would survive an equal protection challenge. In addition, such a law may be vulnerable on due process grounds.\textsuperscript{133}

Until such time as legislation is enacted, only the private contractual agreements between the clinic and its client-patients address the uncertainty of inheritance rights of embryos.\textsuperscript{134} A donee couple who receives an oocyte or a fertilized embryo ready for implantation must agree that their prospective child is only entitled to inherit through them, and has no such rights to inherit from the donors.\textsuperscript{135} This provision parallels the presumptions enforced under adoption statutes following the hearing for termination of parental rights.\textsuperscript{136}

Donor parents face the same legal uncertainty. The risks are well illustrated by the language of the consent form:

\begin{quote}
[W]e understand that this release may or may not have an effect on the issue of the embryos' inheritance rights. If we have other children and have wills that make provision for our "children", it is possible that the term could be interpreted to include our embryos. If we die intestate (without wills), it is possible that our embryos could be held to be our "children" under the intestate succession laws and could therefore be entitled to share our property with our other children or to receive all of our property if we have no other children.\textsuperscript{137}
\end{quote}

In addition to these warnings, client-patients are counseled that by executing wills that specifically disinherit their embryos they may limit some of

\textsuperscript{133}. \textit{Id.} If a statute treated an in vitro embryo differently than an in utero embryo, the equal protection clause compels a court to determine whether the classification is reasonable and not arbitrary, and whether it rests upon some difference having a fair and substantial relationship to the purpose of the legislation. Should frozen embryos come into being within a reasonable period of time, perhaps 2 or 3 months after the intestates' death, a statute prohibiting inheritance may be considered unreasonable, and denial of property could be a deprivation without due process. \textit{Id.}

\textsuperscript{134}. Agreements between the AIOF and its client-patients specifically address the embryos inheritance rights; Wisconsin statutes, at present, do not. \textit{See infra} note 137 and accompanying text.

\textsuperscript{135}. \textit{See} AIOF, \textit{supra} note 120, at 9.

\textsuperscript{136}. \textit{Wis. STAT.} § 851.51 (1983). This section provides that the adopted child is to be treated as the natural child of the adopted parents for the purposes of intestate succession, by, through, and from the adopted person. \textit{Id.}

\textsuperscript{137}. \textit{See} AIOF, \textit{CONSENT FORM FOR CRYOPRESERVATION, supra} note 34, at 6.
the risks otherwise present in inheritance. As the drafters of the consent form acknowledge, failure to execute wills may, nonetheless, leave the intestate's estate vulnerable to challenge by after-born children.

Apart from whether or not probate administration would be unduly burdened by permitting inheritance rights to thawed embryos, legislators should consider whether the genetic parents have the right to devise or bequeath their embryos. Consent forms currently in use in Wisconsin deny parents this right, in light of the clinic's overall policy to donate rather than destroy frozen embryos.

Prior case law on point, although inconsistent, provides some guidance. In 1973, a New York district court held in Del Zio v. Columbia Presbyterian Medical Center, that the IVF embryo is not the property of the genetic parents. The Del Zio's donated their sperm and ova, which was fertilized at Columbia Presbyterian and subsequently was destroyed without the couples' permission by Dr. Raymond Vande Wiele, the department chairman. Vande Wiele removed the embryo from its culture because he believed the procedure was too experimental to involve human embryos. The Del Zio's sued, claiming infringement of property rights in the embryo and infliction of emotional distress. The jury verdict awarded the couple damages for emotional distress but rejected the property claim.

By contrast, in a 1989 case, York v. Jones, the parents of frozen embryos stored in a Virginia clinic requested their embryos be released to them for transfer to a California clinic. Despite contrary contract provisions between the Yorks and the clinic, the court held that a bailment existed and allowed the Yorks to remove their embryos from the Virginia clinic.

In the third case to consider the issue, Davis v. Davis, the circuit court held that frozen embryos were human life and not property. The

138. Id.
139. See Andrews, supra note 21, at 394. Andrews observes that "[i]t is unlikely that the embryo will be considered the property of the estate to be sold or distributed according to the executor's plan—after all, the executor has no procreative right to the embryo." Instead, she suggests that the fate of the embryos will depend upon prior private agreements made by its progenitors. Id.
140. See Gunnarson, supra note 14.
142. Id.
144. Id.
146. Id.
Davis case, subsequently reversed on appeal, may return to the court on yet another appeal because the plaintiff was dissatisfied with the judgment.\footnote{147} In another recent case, a California court held "that a person has a property right to his or her genetic material, even if it is outside the body."\footnote{148} In summary, any determination of what right of inheritance is appropriate for a frozen embryo must consider what the legal status of the embryo should be.

IV. REPRODUCTIVE TECHNOLOGY: LAWS OF OTHER JURISDICTIONS

A. Federal Law

Following the first successful birth by in vitro procedure (IVF), the Ethical Advisory Board, under the direction of the Department of Health, Education, and Welfare (HEW), published a report on embryo research, transplantation and in vitro procedures.\footnote{149} The Board determined that IVF was an ethically sound procedure, though it made no specific recommendation for federal support of the research. However, the Board, did suggest that model or uniform laws should be enacted to clarify the legal relations of all parties involved.\footnote{150}

B. The Lifchez Decision

During the next twelve years, with no federal guidance forthcoming, states began to enact their own laws which ranged from permissible laboratory uses of the IVF embryos\footnote{151} to mandatory health insurance coverage of the IVF procedure.\footnote{152} The trend towards regulation is most visible in the

\footnote{147. See Curriden, supra note 21, at 36. In an interview with Curriden, Kurt Erlenbach, (Mary Sue's attorney) said his client has filed an application to appeal the decision to the Tennessee Supreme Court.}
\footnote{148. See Andrews, supra note 112, at 26.}
\footnote{149. See Robertson, supra note 18, at 952 n.46.}
\footnote{150. See Poole, supra note 42, at 81.}
\footnote{151. See Andrews, supra note 21, at 396-97. Andrews lists twenty-five states with fetal research laws: Arizona, Arkansas, California, Florida, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Wyoming. Id. at 396-97 n.226.}
area of embryonic research. Twenty-five states have passed fetal research laws. Although the constitutionality of most of these statutes has not yet been tested, the District Court for the Northern District of Illinois recently struck down such an Illinois statute on two grounds: It violated Fourteenth Amendment due process principles first because it was vague, and second, because it infringed upon a woman's right of privacy and reproductive autonomy as established in *Roe v. Wade*.

In *Lifchez v. Hartigan*, the doctor who brought suit represented "a class of plaintiff physicians who specialize in reproductive endocrinology and fertility counselling." The plaintiff argued that the Illinois Legislature's failure to define "experimentation" and "therapeutic" forced physicians to guess at whether their conduct was lawful. Despite the legislative attempt to preclude IVF procedure from the ambit of the statute, the court accepted Dr. Lifchez's argument that there are sufficient variables a physician may employ in the IVF procedure itself, all of which attempt to further the objectives of the client, that render the procedure suspect under the statute's then-present wording.

The *Lifchez* decision will impact on almost all state laws pertaining to fetal research because most of them similarly prohibit nontherapeutic research on fetuses, without providing any definition. A second result of *Lifchez* reminds lawmakers that in order for laws to pass constitutional

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in addition to any other benefits for treating infertility, a one-time only benefit for all outpatient expenses arising from in vitro fertilization procedures performed on the insured or the insured's dependent spouse." The statute qualifies the coverage by requiring that the fertilization occurs with the patient spouse's sperm. It also requires that the patient has been unsuccessful in becoming pregnant through other infertility treatments and that the procedure is performed in a clinic which conforms to AFS guidelines. *Id.*


155. 410 U.S. 113 (1972), reh'g denied, 410 U.S. 959 (1973). The Illinois statute at issue in *Lifchez* provided:

No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of the section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.


157. *Id.* at 1363.

158. *Id.* at 1364.

159. *Id.* at 1368-69.

160. The *Lifchez* court provided Illinois with model statutes which could serve as a guide to cure the vagueness in its own statute: N.M. *STAT. ANN.* § 29-9A-1(D) (Michie 1985); R.I. *GEN. LAWS* § 11-54-1(b) (Supp. 1989); N.D. *CENT. CODE* § 14-02.2-01(3) (1989); *MASS. ANN. LAWS* ch. 112, § 125(a) (Law. Co-op. 1985). *Lifchez*, 735 F. Supp. at 1375 n.7.
muster, they may not protect IVF embryos by granting to them rights that
infringe upon the reproductive autonomy of couples seeking infertility
treatment.¹⁶¹

C. Tort Law

In addition to laws restricting fetal research, those laws which create an
independent duty requiring the physician to care for the embryo may be
found constitutionally infirm as well.¹⁶² Under the tenets of Roe, the ge-
netic parents would have the exclusive right to implant, donate, or other-
wise dispose of their embryos. The right to dispose of one’s genetic material
proceeds from the premise that the state has no compelling interest in the
conceptus before viability.¹⁶³

Another trend in laws pertaining to IVF reflects the continuing evolu-
tion of tort law. Recovery for prenatal injury, once limited to injury occur-
ring when the fetus was viable, has been extended by twelve states to
include any injury post conception.¹⁶⁴ In these jurisdictions, a new tort
liability may attend physicians who negligently perform IVF procedures or
fail to fully inform the genetic parents of the reasonably foreseeable risks of
the procedure. In reaction to this trend, five states prohibit children from
bringing wrongful life suits against IVF clinics or the staff.¹⁶⁵ Those same
states also prohibit a genetically defective child from bringing suit against
his or her parents.¹⁶⁶

D. Louisiana Law

State laws on IVF are usually found within the criminal code sections
on abortion, or within the civil code insurance section. By contrast, Louisi-
ana enacted a comprehensive law which includes thirteen subsections rang-

¹⁶¹ Lifchez, 735 F. Supp. at 1376-77.
¹⁶² By way of example, LA. REV. STAT. ANN. § 9:127 (West 1986), entitled “Responsibil-
ity”, provides: “Any physician or medical facility who causes in vitro fertilization of a human
ovum in vitro will be directly responsible for the in vitro safekeeping of the fertilized ovum.” See
also Andrews, supra note 21, at 400.
¹⁶³ See Poole, supra note 42, at 83-84.
¹⁶⁴ Twelve states that allow recovery for prenatal injury at any time after conception are:
¹⁶⁵ California, Idaho, Minnesota, North Dakota, South Dakota, and Utah. Id. at 385.
¹⁶⁶ Id.
ing from a working definition of "Human Embryo" to subsections on ownership, inheritance, and destruction.

The Louisiana scheme, complete in scope, nonetheless suffers from several constitutional flaws. Most notably, the law declares the IVF embryo to be a juridical person which shall not be destroyed by any person once it has existed for more than thirty-six hours. Granting legal personhood to IVF embryos is not per se unconstitutional. However, a state should avoid granting rights which arguably compete with the genetic parents' fundamental right of procreation.

The Louisiana law also purports to make the clinic or physician responsible for the embryos' safety after it has caused the embryos to come into being, which likewise may impinge on reproductive autonomy.

The flaws in the Louisiana law should not dissuade other states from adopting a comprehensive scheme which would ideally set forth a state policy addressing all the consequences of IVF. A state may find guidance in case law such as Lifchez and by analogy, in Roe and its progeny. A state may also look to the Louisiana model for scope and breadth, if not for content.

To its credit, the Louisiana law does not simply address fetal research but, in addition, seeks to clarify tangential issues of no less consequence: custody, adoption, and inheritance. Custody subsumed in a section

167. LA. REV. STAT. ANN. § 9:121 (West 1986). This section provides a definition for "Human Embryo", as "an in vitro fertilized human ovum, with certain rights granted by law, composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child." Id.


[sec. 126.] Ownership: An in vitro fertilized human is a biological human being which is not the property of the physician ... or the facility ... [sec. 129.] Destruction: [That the IVF] "human ovum is a juridical person which shall not be intentionally destroyed.... An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person. [sec. 133.] Inheritance Rights: Inheritance rights will not flow to the in vitro fertilized ovum ... unless the ... ovum develops into an unborn child that is born in a live birth.

Id.

170. See Poole, supra note 42, at 74-75.

171. LA. REV. STAT. ANN. § 9:127 (West 1986). The section entitled "Responsibility" provides: "Any physician or medical facility who causes in vitro fertilization ... will be directly responsible for the in vitro safekeeping of the fertilized ovum." Id.


174. See supra note 168 and accompanying text.

175. Id.

176. Id.
entitled "Ownership", recognizes that the IVF embryo belongs to the genetic parents in the first instance.\textsuperscript{177} If the embryos arise from an anonymous donation or the genetic parents fail to assert their parental rights, care and custody of the embryos devolve to the clinic which performed the procedure.\textsuperscript{178}

Implicit in this custody scenario is a high value placed on the potential human life and the recognition that the embryo belongs to the genetic parents. This subsection, standing apart from the chapter as a whole, clarifies the role of the parents and the clinic with respect to the embryos, and is careful to avoid infringing on any fundamental rights that would render it otherwise vulnerable to constitutional challenge.

Adoption is addressed in the "Duties of Donors" subsection.\textsuperscript{179} The law allows the genetic parents to renounce their parental right to implantation. Parents may select another couple to adopt the embryos subject to the caveat that the other couple is "willing and able to receive the in vitro fertilized ovum."\textsuperscript{180} The genetic parents may also renounce their rights in favor of the clinic whereupon the embryos "shall be available for adoptive implantation in accordance with written procedures of the facility."\textsuperscript{181} Under this subsection, the fundamental rights of the genetic parents are observed, while still providing for both independent and anonymous adoption procedures.

Louisiana's custody and adoption provisions are affected by the "best interest" standard imposed under subsection 131, entitled "Judicial Standard."\textsuperscript{182} The "best interest" mandate in itself is not constitutionally impermissible, as long as it is applied to a situation in which the parent's fundamental rights are duly protected at the outset. Applying the standard to the custody and adoption provisions causes no constitutional problems.

The inheritance provision of the Louisiana law grants the IVF embryo the contingent right to property upon live birth.\textsuperscript{183} The law also addresses the consequences of adoption by terminating the adopted child's right to inherit from his or her genetic parents.\textsuperscript{184} The presumptions and policies underlying the law are not unusual. However, the law fails to address the question whether a frozen embryo, thawed years after the testator's death,

\begin{itemize}
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} LA. REV. STAT. ANN. § 9:130 (West 1986).
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} LA. REV. STAT. ANN. § 9:131 (West 1986).
\item \textsuperscript{183} See supra note 168 and accompanying text.
\item \textsuperscript{184} Id.
\end{itemize}
could still inherit. 8 Facially, the law would permit the child to make a claim at any future time.

In summary, the Louisiana effort is a credible attempt to define and clarify the legal relations among the parties to IVF. It should be considered by other states, in conjunction with case law, for the parameters of practicable legislation.

V. FUTURE WISCONSIN LAW

The preceding background on IVF procedure and the accompanying discussion of case law and statutory enactments of various jurisdictions ultimately suggest that Wisconsin ought not to continue to permit its fertility clinics and their clients to proceed without clarifying the legal relations of all parties concerned.

Toward that end, Wisconsin should first recognize the competing interests that are at stake and the limitations on permissible legislation generated by these interests. Paramount to any responsible legislation is recognition of the genetic parents' fundamental right to reproductive autonomy. 6 Therefore, any attempt to clarify the status of the embryo must be limited in scope. Laws restricting fetal research, as well as laws concerning the disposal, destruction, or donation of embryos should be drafted in light of constitutional limitations. 7

Prospective legislation concerning in vitro procedure and fetal research should avoid vague, ambiguous, and undefined terminology. 8 In order for lawmakers to make informed decisions, any bill on these subjects should be drafted in consultation with experts. The state could appoint a special committee, comprised of personnel from the clinics presently operating in Wisconsin. The committee's role would be to apprise lawmakers on the safety and efficacy of the procedures they employ regularly, and to identify those which are on the cutting edge of technology. In addition to adopting laws designed to assure practitioners that their work is legally permissible, future Wisconsin law must address the consequences of in vitro procedure on custody, adoption, and inheritance.

Custody law geared toward in vitro procedure must balance the genetic parent's right to avoid unwanted parenthood with the right of the other spouse to bear his or her own biological child. The safest course for Wis-

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185. Id.
186. See Poole, supra note 42, at 74-75.
187. Id.
188. Future Wisconsin law may be guided by the suggested model statutes noted in the Lifchez opinion. See supra note 160 and accompanying text.
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Wisconsin to take would be to recognize that, absent a pregnancy, the genetic parents stand on an equal footing, and that joint legal custody is appropriate. Under the unusual circumstance where the IVF embryo represents the only opportunity for one parent to bear his or her own biological offspring, sole legal custody to that parent may be in order. Under typical circumstances, however, the best interest standards would be applicable to custody decisions on IVF children. The law must be flexible enough to permit a case by case review; hard and fast rules are not in any party's best interest.

The law must be flexible enough to permit a case by case review; hard and fast rules are not in any party's best interest. The controlling consideration in current Wisconsin adoption law is the welfare and best interests of the child. These same considerations should guide adoption procedures aimed at the in vitro embryos, with the caveat that the genetic parents' fundamental right to procreate must be observed. In addition, Wisconsin must consider to what extent it is permissible to burden clinics with required procedure. Because the frozen embryos must continue to be stored at an appropriate facility, the clinic is inexorably linked to the adoption process. Procedures which are reasonable in relation to the purpose of the legislation would be upheld.

In considering whether or not to update Wisconsin's posthumous heir statute to encompass children who were once frozen embryos, lawmakers are advised that the present statute could be construed to allow a claim years after the testator's death. This result could be avoided by adding to the present law the qualification that the embryo be in utero at the time of the testator's death in order for the later-born child to inherit. Limiting the right to inherit to the period of gestation is consonant with a public policy which favors expeditious probate. Alternatively, the state could expand the right to include a fixed period plus gestation, and use existing guardian ad litem (GAL) statutes to protect the rights of the unborn. If this position were adopted, Wisconsin could empower its courts to impose a trust on a certain portion of the estate for the benefit of the unborn, which

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190. *See supra* notes 103-04 and accompanying text.
192. *See supra* note 131 and accompanying text.
193. *Id.*
194. Wis. Stat. § 701.15(2) (1984). This section provides: "The court may appoint a guardian ad litem for any person interested who is legally incapacitated, unascertained or unborn . . . ." This provision is found within the chapter on trusts.
would pass by intestate succession after a specified, but reasonable, period of time.

IVF and its companion, cryopreservation, will raise issues within the areas of custody, adoption, and inheritance law, as well as many other areas which were not the focus of this discussion. The Wisconsin Legislature has yet to address in vitro procedure and its consequences. The present void is neither beneficial to the participants of infertility programs nor to the lawmakers who will inevitably be forced to deal with judge-made law if they refuse to act.

VI. CONCLUSION

The premise underlying this Comment has been that the new reproductive technologies of IVF and cryopreservation will generate a variety of legal issues which compel us to consider whether and to what extent present law is sufficient for their resolution.

At first glance, the absence of laws appears to be the ultimate sanction of procreative liberty. Yet, case law and statutory law persuade otherwise. All participants stand to benefit from judiciously drafted laws which adhere to permissible constitutional limitations. The clinic as well as the client is more secure in exercising permissible options when the legal framework is firmly in place.

Moreover, it is unreasonable to ignore the consequences of bringing life into the world. No matter what status is ultimately accorded to the IVF embryo, at a minimum, it represents potential human life. Much of the law already recognizes the rights of the unborn in utero. IVF merely focuses on an earlier point of the reproductive continuum. Society cannot ignore the questions of who shall be responsible for this potential life, or who shall provide his or her family, and the extent to which he or she is entitled to property by, through, or from a biological or adoptive parent. The state's role as parens patriae compels it to consider those consequences, which directly affect the well being of persons born to our community. Allowing fertility clinics to continue to establish public policy is ultimately an abdication of a responsibility which should be born by the state.

DEBBIE K. LERNER

195. It is this author's opinion that Del Zio, York, Lifchez, and Davis support the thesis that legislation on point is necessary to avoid future litigation.

196. Id. This conclusion flows as a logical inference from the right to procreate.

197. See supra notes 128 and 164.

198. See BLACK'S LAW DICTIONARY, supra note 108.