The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2018 CO 85

Supreme Court Case No. 16SC906
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 15CA990

In re the Marriage of

Petitioner:

Mandy Rooks,

and

Respondent:

Drake Rooks.

Judgment Reversed
en banc
October 29, 2018

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.

JUSTICE HOOD dissents, and **CHIEF JUSTICE COATS** and **JUSTICE SAMOUR** join in the dissent.

¶1 In vitro fertilization ("IVF") has given individuals and couples who are unable to conceive conventionally the opportunity to have genetic children. IVF technology permits the pre-embryos created through this process to be cryogenically frozen and later implanted in the carrier's uterus to be brought to term. IVF thus allows individuals and couples to delay childbearing while preserving the pre-embryos and the possibility of future children. However, when married couples turn to this technology and later divorce, IVF can present a host of legal dilemmas, including how to resolve disagreements over the disposition of cryogenically preserved pre-embryos that remain at the time of dissolution.

¶2 Here, a written agreement with the fertility clinic signed by Ms. Mandy Rooks and Mr. Drake Rooks fails to specify what should be done with their remaining pre-embryos in the event of divorce. Instead, per their agreement, the couple has turned to the dissolution court to resolve their dispute. Ms. Rooks wishes to keep the couple's pre-embryos to use them to become pregnant. Mr. Rooks does not want to have genetic children using the pre-embryos and wishes to have them discarded.

¶3 We are asked to decide how a court should determine, in dissolution of marriage proceedings, which

spouse should receive remaining cryogenically preserved pre-embryos produced by the couple during their marriage.[1] Although this case fundamentally concerns the disposition of a couple's marital property, it presents difficult issues of procreational autonomy for which there are no easy answers because it pits one spouse's right to procreate directly against the other spouse's equivalently important right to avoid procreation, and because the fundamental liberty and privacy interests at stake are deeply personal and emotionally charged. And although Colorado statutes touch on some aspects of assisted reproduction, they do not address what should happen with a couple's cryogenically preserved pre-embryos when the couple divorces. Thus, in the absence of specific legislative guidance in these circumstances, we adopt an approach that seeks to balance the parties' interests given the legislature's general command in dissolution proceedings requiring the court to divide the marital property equitably.

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[1] We granted certiorari to review the following issues:

1. Whether, in the absence of an agreement between the parties, the court of appeals erred in its adoption of the balancing of interests approach to determine the disposition of the parties' cryogenically frozen pre-embryos in a dissolution of marriage.
2. Whether the court of appeals erred in applying an abuse of discretion standard of review in reviewing the trial court's determination of the disposition of a couple's cryogenically frozen pre-embryos in a dissolution of marriage.

¶4 Considering the nature and equivalency of the underlying liberty and privacy interests at stake, a court presiding over dissolution proceedings should strive, where possible, to honor both parties' interests in procreational autonomy when resolving disputes over a couple's cryogenically preserved pre-embryos. Thus, we hold that a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce. In the absence of such an agreement, a court should seek to balance the parties' interests when awarding the pre-embryos. In so doing, a court should consider (1) the intended use of the pre-embryos by the spouse who wants to preserve them (for example, whether the spouse wants to use the pre-embryos to become a genetic parent him- or herself, or instead wants to donate them); (2) the demonstrated physical ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means; (3) the parties' original reasons for undertaking IVF (for example, whether the couple sought to preserve a spouse's future ability to bear children in the face of fertility-implicating medical treatment); (4) the hardship for the spouse seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations; (5) a spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings; and (6) other considerations relevant to the parties' specific situation. However, a court should not consider whether the spouse seeking to use the pre-embryos to become a genetic parent can afford a child. Nor shall

the sheer number of a party's existing children, standing alone, be a reason to preclude implantation of the pre-embryos. Finally, a court should not consider whether the spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children.

¶5 Here, the parties' written agreement does not squarely resolve how remaining cryogenically preserved pre-embryos should be allocated in the event of divorce, and thus, for purposes of this dissolution proceeding, the disposition of these remaining pre-embryos must be resolved by balancing the parties' interests. Because the trial court and court of appeals considered certain inappropriate factors in attempting to balance the parties' interests here, we reverse the judgment of the court of appeals and remand the case with directions to return the matter to the trial court to balance the parties' interests under the framework we adopt today.

I. Facts and Procedural History

¶6 Petitioner Ms. Mandy Rooks and Respondent Mr. Drake Rooks married in 2002. They separated in August 2014, and Mr. Rooks filed a petition for dissolution of marriage the following month. When the trial court entered its final orders in the dissolution proceedings in 2015, Mr. and Ms. Rooks had three children, and Ms. Rooks was not pregnant.

¶7 Mr. and Ms. Rooks used IVF to have their three children. In 2011, and again in 2013, they entered into

agreements with the Colorado Center for Reproductive Medicine ("CCRM") and Fertility Laboratories of Colorado ("FLC") for the IVF services. The agreements identify Ms. Rooks as the "Female Patient" and Mr. Rooks as the "Spouse/Partner." These agreements provide information about the IVF and cryopreservation process.

¶8 IVF is a procedure that helps those facing fertility issues to become pregnant. The technique involves several steps: (1) developing eggs in the contributor's ovaries using hormones to stimulate ovulation, (2) removing the eggs from the contributor's ovaries, (3) placing the eggs and sperm together in a laboratory to allow fertilization to occur, and (4) transferring fertilized pre-embryos into the carrier's uterus.

¶9 As described in the agreements with CCRM and FLC, the purpose of cryopreservation is to preserve excess pre-embryos produced in an IVF treatment cycle in order to (1) reduce the risks of multiple gestation, (2) preserve fertility potential in the face of certain medical procedures, and (3) minimize the medical risk and cost to the patient by decreasing the number of hormone stimulation cycles and egg retrievals.

¶10 According to the agreements, pre-embryos are frozen on day 1, 2, 3, 5, or 6 after fertilization. The pre-embryos frozen on day 1 are at the pronuclear stage, when the single cell zygote has two nuclei. Pre-embryos frozen on day 2 or day 3 are at the multicellular stage, when the pre-embryo has four to eight cells. In most cases, pre-embryos are frozen on day 5 or 6 at

the blastocyst stage, when the pre-embryo has eighty or more cells, an inner fluid-filled cavity, and a small cluster of inner cells. The FLC embryologists transfer the pre-embryos to a special solution where they are cooled to -35° C in a machine designed to control the rate of freezing. The pre-embryos are then plunged directly into liquid nitrogen at -196° C (-321° F). Finally, the frozen pre-embryos are transferred to storage containers and maintained at a temperature of -196° C (-321° F) until they are thawed.

¶11 Although the couple's agreements with CCRM and FLC use the terms "embryo" and "pre-embryo" interchangeably,[2] we use the term "pre-embryos" in this opinion to refer to eggs that have been fertilized using the IVF process but not implanted in a uterus. The hearings before the trial court did not include testimony regarding the medical aspects of the IVF process or the stages of development of the pre-embryos at issue in this case. In the absence of such trial testimony, other courts have looked to secondary sources discussing the correct terminology. *See McQueen v. Gadberry*, 507 S.W.3d 127, 134 n.4 (Mo. Ct. App. 2016) ("'Pre-embryo' is a medically accurate term for a zygote or fertilized egg that has not been implanted in a uterus. It refers to the approximately 14-day period of

[2] The agreement with FLC states that "in this consent and agreement, anywhere the word 'embryo' is used the word 'pre-embryo' would also apply." The agreement further states that "[p]atient and partner acknowledge the 'cryopreserved embryos' will have no capacity to produce human life until by proper thawing and ascertainment of survival an embryo has been produced and properly transferred into the patient's uterus."

development from fertilization to the time when the embryo implants in the uterine wall and the 'primitive streak,' the precursor to the nervous system, appears. An embryo proper develops only after implantation. The term 'frozen embryos' is a term of art denoting cryogenically preserved pre-embryos." (quoting Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R. 5th 253 (2001))). As the court of appeals noted below, the medically accurate term for the not-yet-implanted fertilized eggs at issue here is "pre-embryos." *See In re Marriage of Rooks*, 2016 COA 153, ¶ 1, ___ P.3d ___.

¶12 Both the 2011 and 2013 agreements with CCRM and FLC include an "Embryo and Pre-Embryo Cryopreservation/Storage Consent" form with a "Disposition Plan" recording the couple's decisions regarding the disposition of the frozen pre-embryos under certain scenarios. Mr. and Ms. Rooks selected the same options in both the 2011 and 2013 disposition plans. For example, in the event of Mr. Rooks's death, the couple agreed the pre-embryos should be "[t]ransferred to the care of the female partner if she wishes," but in the event of Ms. Rooks's death, the pre-embryos should be "[t]hawed and discarded." In the event they both died, the couple agreed the pre-embryos should be discarded.

¶13 The disposition plans further state that in the event of divorce or dissolution of marriage, "the disposition of our embryos will be part of the divorce/

dissolution decree paperwork," and that FLC may deal exclusively with the person to whom all rights in the pre-embryos are awarded. The plans also provide that "[i]n the event that the divorce/dissolution decree paperwork does not address the disposition of the embryo(s)," the pre-embryos should be thawed and discarded.

¶14 In 2015, the trial court held an evidentiary hearing and issued its final orders in the dissolution of marriage case. Relevant here, the couple disagreed about what to do with the pre-embryos that were still in storage under the 2011 and 2013 agreements with CCRM and FLC. Ms. Rooks wished to preserve the pre-embryos for future implantation; at the hearing, she testified that she wished to have more children but, to her knowledge, she was not able to have further children "naturally." Mr. Rooks wished to thaw and discard the pre-embryos; he testified that he did not wish to have more children from his relationship with Ms. Rooks.

¶15 The trial court devoted nearly twenty pages of discussion in its final orders to the disposition of the couple's six remaining cryogenically preserved pre-embryos. It first reasoned that the pre-embryos are not "persons" under Colorado law. Although it referenced other states' treatment of pre-embryos in judicial opinions, it based this conclusion on Colorado statutes and case law.

¶16 After surveying the law regarding frozen pre-embryo disputes in other jurisdictions, the trial court identified three approaches for resolving such

disputes: (1) the contract approach, which looks to a prior agreement between the parties to determine their intent regarding the disposition of the pre-embryos; (2) the balancing of interests approach, which evaluates the parties' competing interests in receiving the pre-embryos; and (3) the contemporaneous mutual consent approach, which prevents any use or disposition of the pre-embryos without the written consent of both parties. The trial court was most persuaded by the application of the contract approach and concluded that it is most consistent with Colorado law. The court further reasoned that if the parties' agreement did not specifically address the disposition of the pre-embryos, or was "so ambiguous as to be unenforceable," the court would apply the balancing approach. It rejected the contemporaneous mutual consent approach, reasoning that such an approach "merely grants one party the right to make a decision by default."

¶17 Starting with the contract approach, the court reviewed the text of the parties' 2011 and 2013 agreements with CCRM and FLC. It noted that the disposition plans did not specify *how* the dissolution court should determine which spouse should receive the pre-embryos. Rather, the plans stated that if the dissolution decree awarded the pre-embryos to one spouse, the clinic would deal exclusively with that spouse regarding disposition of the pre-embryos. Alternatively, the plans provided that if the parties' divorce decree did not address disposition of the pre-embryos, the pre-embryos would be thawed and discarded. To determine which spouse should receive the pre-embryos, the court

looked to the agreement as a whole and concluded that (1) the agreement did not allow either spouse to "unilaterally" thaw and implant the pre-embryos without the other's consent, and (2) the couple intended that the pre-embryos should be thawed and discarded in the event of divorce where they could not achieve "mutual resolution." Therefore, the court concluded that under the contract approach, Mr. Rooks should receive the pre-embryos.

¶18 The trial court then proceeded to evaluate the dispute under the balancing of interests approach as well, weighing Mr. Rooks's "inherent privacy right not to conceive children" against Ms. Rooks's "right to become a parent."

¶19 The court reasoned that Mr. Rooks had the right to avoid the burdens of parenthood. It observed that although Colorado "does not statutorily impose support and other parental obligations on a non-consenting genetic parent," Mr. Rooks could potentially face financial obligations based on a credit for an additional child on Ms. Rooks's child support worksheet. It further observed that the laws in North Carolina (where Ms. Rooks had since relocated) could be different from those in Colorado and could potentially subject Mr. Rooks to financial obligations should Ms. Rooks seek to modify or enforce her support order there. The court also noted the emotional and psychological implications for Mr. Rooks of having a biological child, stating that, "Even if [Mr. Rooks] is not legally obligated to support the new child, there are moral and social obligations that cannot be ignored."

¶20 In addition to these concerns, the trial court considered the potential effects of an additional child on the best interests of the three existing children from the marriage. The court posited that, for parenting time and other reasons, it could be detrimental for the existing children to have an additional sibling who would be the genetic but not legal child of Mr. Rooks.

¶21 Regarding Ms. Rooks's desire to use the pre-embryos to have additional children, the court reasoned that because Ms. Rooks already had three children, discarding the pre-embryos would not deprive her of her only chance to become a mother. It also expressed concerns about Ms. Rooks's financial ability to provide for another child, noting that she has no income and that one of the couple's three children has a significant medical condition.

¶22 Overall, the court found that Mr. Rooks's right "not to be forced to become a genetic parent" outweighed Ms. Rooks's "desire to preserve the [pre-]embryos and possibly have more children." Thus, the court determined that the balancing of interests approach also weighed in favor of awarding the pre-embryos to Mr. Rooks.

¶23 Ms. Rooks appealed from the portion of the permanent orders awarding the pre-embryos to Mr. Rooks, contending that (1) the trial court erred in its interpretation of the agreements regarding the disposition of the pre-embryos, (2) the trial court erred as a matter of law in considering certain factors in its balancing of interests calculation, and (3) the trial court's

consideration of her other children and financial situation violated her constitutional rights.[3]

¶24 The court of appeals affirmed the trial court's ruling. Like the trial court, the court of appeals discussed the three basic approaches used in other jurisdictions for determining the disposition of divorcing spouses' cryopreserved pre-embryos: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach. *Marriage of Rooks*, ¶¶ 14–22. The court of appeals concurred with those courts that have adopted the contract approach but also concluded that, in the absence of a valid agreement between the spouses regarding the disposition of remaining pre-embryos in the event of divorce, the court should seek to balance the parties' interests. *Id.* at ¶ 24.

¶25 Reviewing the trial court's interpretation of the written storage agreement de novo, the court of appeals concluded that the trial court erred by inferring contract terms that did not exist. *Id.* at ¶¶ 28, 31, 36. "Given the absence of enforceable contract terms on the issue," the court of appeals construed the agreement to require the dissolution court to determine who should receive the pre-embryos. *Id.* at ¶ 37.

¶26 The court of appeals then reviewed the trial court's decision under the balancing of interests test for an abuse of discretion, reasoning that the application

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[3] Ms. Rooks obtained a stay in the trial court to permit the pre-embryos to remain in cryo-storage pending resolution of appellate proceedings.

of that test is an exercise of the court's equitable discretion. *Id.* at ¶ 40. It concluded that the trial court properly exercised its discretion in balancing the parties' competing interests and awarding the pre-embryos to Mr. Rooks. *Id.* at ¶ 41.

¶27 The court of appeals observed that the pre-embryos did not present Ms. Rooks's only opportunity to bear a child; Ms. Rooks had already borne three children. *Id.* at ¶ 44. Accordingly, it reasoned, the trial court could reasonably conclude that Mr. Rooks's interest in not producing additional offspring prevailed over Ms. Rooks's interest in having a fourth child. *Id.* at ¶ 45. The court of appeals also concluded that the trial court "appropriately considered [Mr. Rooks's] emotional and psychological well-being, in that he would likely feel a moral and social obligation for a fourth biological child, even though he may have no legal obligation to the child." *Id.* at ¶ 46. It rejected Ms. Rooks's argument that the trial court erred as a matter of law by considering the potential risk that Mr. Rooks could face financial obligations for a child eventually born using the pre-embryos. *Id.* at ¶¶ 47–49. And it disagreed with Ms. Rooks that the trial court impermissibly implied that she should not have another child; rather, the trial court properly considered the inevitable financial consequences of another child for Mr. Rooks. *Id.* at ¶ 49.

¶28 The court of appeals further concluded that, in balancing the couple's competing interests, the trial

court did not violate Ms. Rooks's constitutional rights[4] when it discussed the fact that she already had three children; considered the potential economic impact of another child; raised concerns about the impact of another child on the parties' existing children; and remarked on Ms. Rooks's ability to manage "such a large family" as a single parent, given her lack of employment and financial resources and the significant health issues faced by one of the children. *Id.* at ¶ 56. The court of appeals rejected Ms. Rooks's contention that the trial court impermissibly limited the number of children she could have, reasoning that, "To the extent that the permanent orders may *result* in a limitation on the number of children [Ms. Rooks] may ultimately wind up bearing through biological means, that is simply a consequence of the parties' having left it up to the court to decide who gets the remaining [pre-]embryos." *Id.* at ¶ 58.

¶29 Finally, the court of appeals rejected Ms. Rooks's argument that Mr. Rooks relinquished his constitutional right not to procreate by consenting to the use of his sperm to fertilize Ms. Rooks's eggs. It reasoned that the agreement specifically provides for allocation of the pre-embryos to be decided in the dissolution decree and noted that section 19-4-106(7)(b), C.R.S. (2018), expressly allows Mr. Rooks, as a former spouse, to

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[4] Ms. Rooks asserted a violation of her rights to equal protection, due process, procreational autonomy, privacy, and of her liberty interest in the care, custody, and management of her children. *Marriage of Rooks*, ¶ 52.

withdraw his consent for placement of the pre-embryos "at any time" before they are placed. *Id.* at ¶ 60.

¶30 The court of appeals thus affirmed the trial court's judgment awarding the pre-embryos to Mr. Rooks under the balancing of interests approach.

¶31 After this court granted certiorari review of the court of appeals' ruling, Ms. Rooks notified this court that she had become pregnant, but that she still wishes to use the cryogenically frozen pre-embryos to have more children.[5]

II. Analysis

¶32 We begin by briefly reviewing the U.S. Supreme Court's and this court's reproductive rights decisions to identify the nature of the rights that underlie this marital property dispute. Because this case presents an issue of first impression in Colorado, we then examine case law from courts in other jurisdictions that have confronted similar disputes. These courts have taken various approaches, but all the approaches generally seek to (1) secure both parties' consent where possible and (2) avoid results that compel one party to become a genetic parent against his or her will except in rare circumstances. Turning next to Colorado law, we discuss the Colorado statutes relevant to assisted reproduction. These statutes demonstrate the General Assembly's intent to allow an individual to opt out of

[5] At oral argument, the parties noted that Ms. Rooks had since given birth.

legal parenthood of a child born of assisted reproduction in the event of divorce or where the individual no longer consents to assisted reproduction. However, these statutes do not provide a method for resolving disputes over which spouse should be awarded a couple's remaining pre-embryos in the event of divorce. In the absence of specific legislative guidance in these circumstances, we look to the general statutory command in dissolution proceedings requiring a court to divide the marital property equitably after considering all relevant factors.

¶33 Consistent with this requirement, we follow a number of courts in adopting a balancing of interests approach to determine the proper disposition of a couple's pre-embryos where, as here, the parties' written agreement does not address disposition of the pre-embryos in the event of divorce. In crafting the framework we adopt today, we emphasize that, where possible, courts should strive to award pre-embryos in a manner that allows both parties to exercise their rights to procreational autonomy.

¶34 Here, the parties' written agreement does not resolve how the pre-embryos should be allocated in the event of divorce, and thus, for purposes of this dissolution proceeding, the disposition of these remaining pre-embryos must be resolved by balancing the parties' interests. Because the trial court and court of appeals considered certain inappropriate factors in attempting to balance the parties' interests here, we reverse the judgment of the court of appeals and remand the case

with directions to return the matter to the trial court to apply the framework we adopt today.

A. Reproductive Rights and Autonomy

¶35 Although this case concerns the equitable division of marital property in a divorce proceeding, we recognize that the parties' competing interests in the disputed pre-embryos derive from constitutional rights in the realm of reproductive choice. We therefore briefly discuss the governing case law in this area.

¶36 The U.S. Supreme Court has recognized the importance of individual autonomy over decisions involving reproduction. Over seventy-five years ago, the Court recognized that procreation is "one of the basic civil rights" and that marriage and procreation are fundamental to human existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). As the Court considered new questions involving reproductive rights, such as the right to access contraception, it began to articulate those rights as part of a cluster of privacy rights grounded in several fundamental constitutional guarantees. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Court also began to acknowledge an individual's privacy right to control decisions regarding procreation and family relationships: "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." *Eisenstadt v.*

Baird, 405 U.S. 438, 453 (1972). In addition to encompassing choices relating to "marriage," "procreation," "contraception," "family relationships," and "child rearing and education," the right of privacy "encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

¶37 The Supreme Court's more recent opinions in this area have preserved an individual's ability to make his or her own decisions regarding matters involving procreation and reproduction. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976) ("[W]e cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right."); *Bellotti v. Baird*, 443 U.S. 622, 639–43 (1979) (reaffirming that a state may not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("[A] statute which . . . has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion))).

¶38 This court has similarly recognized the importance of individual choice and consent in exercising such rights. In addressing a petition to sterilize an incapacitated woman, this court recognized an individual's fundamental right to procreate and to avoid procreation, noting that "[t]he decision whether to

bear or beget a child is a constitutionally protected choice." *Matter of Romero*, 790 P.2d 819, 822 (Colo. 1990). Although practices such as compulsory sterilization amount to an unconstitutional infringement of the fundamental right to procreate, the "right to bear or beget children implies a more general right to reproductive autonomy which must include under certain circumstances the opportunity to prevent procreation through a variety of means including non-compulsory sterilization." *Matter of A.W.*, 637 P.2d 366, 369 (Colo. 1981). We have observed that the cases addressing restrictions on abortions "also have as their basis the constitutional right of individual control over procreative decisions." *Id.* "Reading [the abortion] cases in conjunction with *Skinner* leads to the conclusion that an individual has the fundamental right not only to bear children, but to decide not to be the source of another life as well." *Id.*

¶39 We note that the right to procreate or to avoid procreation does not depend on the means by which that right is exercised. An individual may exercise her right to procreate through conventional conception or IVF – or she may exercise her right to avoid procreation through abstinence, contraception, voluntary sterilization, or even abortion – but the nature of the right itself (to procreate or to avoid procreation) remains the same.

B. Other Jurisdictions

¶40 Having acknowledged the rights that underlie the parties' dispute here, we turn to case law from courts in other jurisdictions that have confronted similar disputes. These courts have adhered to or combined aspects of three main approaches: (1) interpreting the parties' contract or agreement regarding disposition of the pre-embryos; (2) balancing the parties' respective interests in receiving the pre-embryos; or (3) requiring the parties' mutual contemporaneous consent regarding disposition of the pre-embryos.

¶41 Many jurisdictions begin by looking for a preexisting agreement between the parties regarding disposition of remaining pre-embryos, as evidenced by consent or storage agreements between the IVF facility and the parties. *See*, *e.g.*, *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."); *In re Marriage of Dahl & Angle*, 194 P.3d 834, 842 (Or. Ct. App. 2008) ("Absent a countervailing policy, it is just and proper to dispose of the [pre-]embryos in the manner that the parties chose at the time that they underwent the IVF process."); *Roman v. Roman*, 193 S.W.3d 40, 49–50 (Tex. App. 2006) (recognizing that "the public policy of [Texas] would permit a husband and wife to enter voluntarily into an agreement, before implantation, that would provide for a[ ] [pre-]embryo's disposition in the event of a contingency, such as divorce, death, or changed circumstances" and that such

agreements should be presumed valid and enforced).[6] In *Kass*, the New York Court of Appeals determined that the IVF program consent forms signed by the couple during their marriage manifested their mutual intent that, in the event of divorce, the pre-embryos should be donated for research to the IVF program. 696 N.E.2d at 180–81. The court thus ordered that the agreement be enforced. *Id.* 696 N.E.2d at 182. Similarly, in *Marriage of Dahl & Angle* and *Roman*, the courts resolved the dispute by interpreting the agreements the parties signed with the IVF clinics when they created the pre-embryos. *See Marriage of Dahl & Angle*, 194 P.3d at 842; *Roman*, 193 S.W.3d at 54–55.

¶42 In some cases, courts have concluded that no enforceable agreement existed or that an existing agreement did not address who should receive the remaining pre-embryos in the event of divorce. For example, in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), the parties did not execute a written agreement regarding the disposition of any preserved pre-embryos

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[6] Some courts have concluded that such agreements are unenforceable for public policy reasons. *See*, *e.g.*, *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056–57 (Mass. 2000) (concluding it was "dubious at best that [the clinic consent form] represents the intent of the husband and the wife regarding disposition of the [pre-embryos] in the case of a dispute between them," and that, in any event, the court "would not enforce an agreement that would compel one donor to become a parent against his or her will"); *see also J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (adopting rule that, for public policy reasons, courts should "enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored [pre-embryos]").

when they signed up for the IVF program. *Id.* at 590; *see also McQueen*, 507 S.W.3d at 155–56 (affirming finding that agreement regarding disposition of pre-embryos upon divorce was "not entered into freely, fairly, knowingly, understandingly, and in good faith with full disclosure" and was therefore not enforceable); *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) (finding no enforceable agreement where neither party signed portion of consent form related to disposition of pre-embryos upon divorce).

¶43 In cases where no enforceable agreement exists, many courts have conducted what has been termed a "balancing of interests" test to decide how to award or dispose of the pre-embryos. The Supreme Court of Tennessee employed such an approach in *Davis*. 842 S.W.2d at 603. There, the court acknowledged that the conflicting interests at stake were of "equal significance – the right to procreate and the right to avoid procreation." *Id.* at 601. Given the absence of an enforceable agreement, the court resolved the dispute by considering "the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions." *Id.* at 603. In balancing these interests, the court considered several factors, including (1) the burden of unwanted parenthood on the ex-husband who wished to discard the pre-embryos, particularly in light of his own childhood experience of being separated from his parents; (2) the ex-wife's interest in donating the pre-embryos to another couple to avoid the emotional burden of knowing that the IVF procedures were futile; and (3)

the ex-wife's ability to become a parent by other reasonable means in the future. *Id.* at 603–04. Ultimately, the *Davis* court concluded that the balance of interests weighed in favor of the ex-husband's desire to discard the pre-embryos. *Id.* at 604.

¶44 Other courts have employed a similar balancing of interests approach where no enforceable agreement exists, including in cases where one party wishes to implant the pre-embryos to have a child. *See J.B.*, 783 A.2d at 719 (evaluating the interests of both parties); *Reber*, 42 A.3d at 1137 (balancing wife's interest in having a biological child against husband's interest in avoiding unwanted procreation); *Szafranski v. Dunston*, 34 N.E.3d 1132, 1162 (Ill. Ct. App. 2015) (reviewing the trial court's balancing of one partner's interest in having a biological child against the other partner's interest in avoiding becoming a parent). In balancing the parties' interests, these courts have considered whether the party wishing to use the pre-embryos to procreate has alternate means to become a biological parent. *See J.B.*, 783 A.2d at 717 (reasoning that the ex-husband was already a father and was capable of fathering additional children and thus affirming the ex-wife's right to prevent implantation of the [pre-]embryos); *Reber*, 42 A.3d at 1142 (reasoning that the balance of interests weighed in wife's favor where the "pre-embryos are likely Wife's only opportunity to achieve biological parenthood"); *Szafranski*, 34 N.E.3d at 1162 (affirming the lower court's determination that the female partner's interest in using the pre-embryos outweighed the male partner's interest in not using

them because "the sole purpose for using [his] sperm to fertilize [her] last viable eggs was to preserve her ability to have a biological child in the future at some point after her chemotherapy treatment ended").

¶45 Finally, a small minority of courts have adopted a "mutual contemporaneous consent" approach, under which the court will not award the pre-embryos over the objection of either party. Instead, "no transfer, release, disposition, or use of the [pre-]embryos can occur without the signed authorization of both donors." *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003); *see also McQueen*, 507 S.W.3d at 157 (affirming the trial court's judgment awarding the pre-embryos to the parties jointly and ordering that no transfer, release, or use shall occur without the signed authorization of both parties). This approach recognizes that disputed pre-embryos are "not easily susceptible to a just division because conflicting constitutional rights are at issue." *McQueen*, 507 S.W.3d at 157. In theory, the mutual contemporaneous consent approach purportedly "subjects neither party to any unwarranted governmental intrusion but rather leaves the intimate decision of whether to potentially have more children to the parties alone." *Id*.

¶46 However, the mutual contemporaneous consent approach has been criticized by other courts as being "totally unrealistic" because if the parties were capable of reaching an agreement, then they would not be in court. *Reber*, 42 A.3d at 1135 n.5. As both the trial court and court of appeals recognized in this case, the mutual contemporaneous consent approach gives one

party a de facto veto over the other party by avoiding any resolution until the issue is eventually mooted by the passage of time. *See Marriage of Rooks*, ¶ 23. And as at least one scholar has pointed out, this de facto veto creates incentives for one party to leverage his or her power unfairly. *See* Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 Buff. L. Rev. 1159, 1210 (2009) ("[O]ne could imagine such a person imposing continuing psychic damage by hinting that he or she might consent to the ex-spouse's use of the [pre-]embryos sometime in the future – the ex-spouse might well continue to be on an emotional rollercoaster when considering the possibility of finally becoming a parent. Or the [pre-]embryos might in effect be held hostage – they would be released for use only if the ex-spouse were willing to give up something valuable in return, for example, in a property settlement or in exchange for more favorable support terms."). Because the mutual contemporaneous consent approach allows one party to "change his or her mind about disposition up to the point of use or destruction of any stored [pre-]embryo," regardless of any preexisting agreement, *see Marriage of Witten*, 672 N.W.2d at 782, it injects legal uncertainty into the process. Thus, this approach potentially increases litigation in already emotionally charged and fundamentally private matters.

¶47 Although these three approaches have been characterized and discussed as three different "rules" or "methods" for resolving disputes over

frozen pre-embryos, we note that the approaches share conceptual underpinnings and reflect common goals. Both the contract approach and the mutual contemporaneous consent approach prioritize the parties' mutual consent and agreement. The contract approach simply encourages the parties to arrive at agreement regarding the disposition of the pre-embryos in advance of divorce. By contrast, the mutual contemporaneous consent approach requires the parties' mutual consent whenever a disposition occurs – regardless of any preexisting agreements. *See Marriage of Witten*, 672 N.W.2d at 777–78 (explaining that although the two approaches share an underlying premise, the important question is "at what time does the partners' consent matter?" (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L. Rev. 55, 91 (1999))). (Indeed, the mutual contemporaneous consent approach eliminates any incentive for parties to agree up front about what should happen with the pre-embryos in the event of divorce and thereby avoid litigation.)

¶48 Further, many courts combine one or more of the approaches in order to resolve disputes – e.g., applying the contract approach first and, if no enforceable agreement exists, then balancing the parties' competing interests. *See*, *e.g.*, *Davis*, 842 S.W.2d at 604 (holding that disputes involving the disposition of frozen pre-embryos should be resolved first by looking to an agreement between the parties but that "[i]f no prior agreement exists, then the relative interests of the

parties in using or not using the [pre-embryos] must be weighed").

C. Colorado Statutes

¶49 Keeping in mind the approaches taken in other jurisdictions, we now turn to Colorado statutes for direction in resolving the case before us.

¶50 The Colorado Probate Code addresses legal parenthood in the context of assisted reproduction. Relevant here, section 15-11-120(4), C.R.S. (2018), provides that "a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction." However, this provision acknowledges two exceptions to this general rule of legal parenthood. First, section 15-11-120(9) provides, "[i]f a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child." Second, section 15-11-120(10) provides that "[i]f, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual." In other words, subsections (9) and (10) make clear that a spouse who either divorces or withdraws consent to assisted

reproduction prior to the placement of eggs, sperm, or embryos is not the legal parent of a resulting child. Importantly, subsections (9) and (10) show that the legislature has implicitly rejected the mutual contemporaneous consent approach. If mutual contemporaneous consent were required to proceed with implantation, there would be no need to address the legal relationship between a non-consenting party and a resulting child because that child could not be born in the first place. That these provisions refer to a "resulting" child despite a divorce or a spouse's withdrawal of "consent" shows that the consent contemplated is to legal parenthood of the resulting child, not to implantation of the couple's pre-embryo.

¶51 Article 4 of the Colorado Children's Code, titled the "Uniform Parentage Act," similarly addresses consent to legal parenthood in the context of assisted reproduction. Section 19-4-106(1), C.R.S. (2018), which addresses assisted reproduction by married couples using sperm or eggs donated by a third party, states that when a married couple "consents" to such assisted reproduction, the spouse who does not contribute eggs or sperm is nevertheless "treated in law as if [they] were the natural [parent] of a child thereby conceived." Section 19-4-106(7)(a) goes on to provide that "[i]f a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child." Section 19-4-106(7)(b) adds

that "[t]he consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos."

¶52 Amicus Colorado Chapter of the American Academy of Matrimonial Lawyers reads subsection (7)(b) to convey a public policy that, like the contemporaneous mutual consent approach, requires a former spouse's consent to the placement of eggs, sperm, or embryos. We disagree. We "must read and consider the statutory scheme as a whole to give consistent, harmonious[,] and sensible effect to all its parts." *People v. Stellabotte*, 2018 CO 66, ¶ 32, 421 P.3d 174, 180 (quoting *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001)). If paragraph (b) were instead its own subsection, amicus might have a point. But paragraph (b) is not a freestanding subsection. It is part of subsection (7) and therefore must be read accordingly. Read in conjunction with subsection (7)(a), the "consent" in subsection (7)(b) logically refers to the former spouse's consent to legal parenthood of a "resulting child" conceived by assisted reproduction.[7]

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[7] The 2000 version (amended in 2002) of the Uniform Parentage Act promulgated by the National Conference of Commissioners on Uniform State Laws contains a similar provision addressing the effect of dissolution or withdrawal of consent on legal parenthood of a resulting child:

> (a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

¶53 Section 19-4-106(8) does not alter our view. Subsection (8) provides that "[i]f a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child." This provision simply terminates a spouse's consent to be a legal parent upon that spouse's death, unless the spouse affirmatively agrees in a record that his or her consent to be the legal parent of a resulting child will extend beyond that spouse's death.

¶54 In sum, the legislature's repeated references in both the Probate Code and Children's Code to the resulting "child," *see* §§ 15-11-120(9)-(10); § 19-4-106(7), make clear that these provisions address the legal parentage of a child eventually born using assisted reproduction – and not whether the assisted reproduction process may continue (via implantation of preserved pre-embryos) over one partner's objection.

¶55 Thus, Colorado statutes provide that an individual is not obligated to be the legal parent of a child eventually born as a result of their contribution of genetic material where the couple divorces, or where one

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> (b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.

Effect of Dissolution of Marriage or Withdrawal of Consent., Unif. Parentage Act (2000) § 706.

party withdraws consent. Although these statutes address the resulting legal relationships with any children eventually born using assisted reproductive technology, they do not address how a trial court should resolve disputes over how to allocate remaining cryogenically preserved pre-embryos in a dissolution of marriage proceeding. In the absence of instructions from the legislature in these specific circumstances, it falls to us provide a framework for courts to apply when addressing these disputes.

¶56 Before turning to that task, we note that Colorado law generally provides that pre-embryos are not "persons," as a legal matter. *See* § 13-21-1204, C.R.S. (2018) ("Nothing in this part [Damages for Unlawful Termination of Pregnancy] shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth."); § 18-3.5-110, C.R.S. (2018) ("Nothing in this article [Offenses Against Pregnant Women] shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth.").

¶57 At the same time, we acknowledge that pre-embryos contain the potential for human life and are formed using genetic material from two parties with significant, but potentially competing, interests in their ultimate disposition. Thus, we agree with courts that have categorized pre-embryos as marital property of a special character. *See Davis*, 842 S.W.2d at 597 ("We conclude that pre-embryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim

category that entitles them to special respect. . . ."); *McQueen*, 507 S.W.3d at 149 (trial court did not err in classifying pre-embryos as marital property of a special character instead of children).

¶58 Although Colorado statutes do not address the proper disposition of marital pre-embryos upon divorce, the Uniform Dissolution of Marriage Act ("UMDA") does generally direct a court presiding over dissolution proceedings to "divide the marital property . . . in such proportions as the court deems just." § 14-10-113(1), C.R.S. (2018); *see also In re Balanson*, 25 P.3d 28, 35 (Colo. 2001) (a court must make an equitable distribution of marital property after considering all relevant factors). That the UMDA requires the court to divide the marital property "in such proportions as the court deems just" directs that some sort of balancing is appropriate here. *See* § 14-10-113(1).

D. Resolving Pre-Embryo Disputes in Colorado

¶59 With these legal principles in mind – which derive from the foregoing discussion of case law regarding constitutional rights in the realm of reproductive choice, case law from other jurisdictions resolving similar disputes, and applicable Colorado statutes – we now address how courts in Colorado should resolve disagreements over a couple's cryogenically preserved pre-embryos when that couple divorces.

¶60 First, we reject the mutual contemporaneous consent approach. As discussed above, the repeated references in both the Probate Code and Children's

Code to a resulting child, *see* §§ 15-11-120(9)-(10); § 19-4-106(7), reflect the legislature's implicit rejection of the mutual contemporaneous consent approach. Again, if the parties' mutual contemporaneous consent were required to proceed with implantation, there would be no need to address the legal relationship between a non-consenting party and a resulting child, because that child could not exist. We also agree with those courts that have criticized the mutual contemporaneous consent approach as being "totally unrealistic" because if the parties were capable of reaching an agreement, they would not be in court. *Reber*, 42 A.3d at 1135 n.5. It is similarly unrealistic to think that parties who cannot reach agreement on a topic so emotionally charged will somehow reach resolution after a divorce is finalized. In addition, we share the concern expressed by the trial court and court of appeals that the mutual contemporaneous consent approach gives one party a de facto veto over the other party by avoiding any resolution until the issue is eventually mooted by the passage of time. *See Marriage of Rooks*, ¶ 23. And we worry that this de facto veto creates incentives for a party to leverage this issue unfairly in divorce proceedings. Moreover, because it disregards the parties' preexisting agreements, the mutual contemporaneous consent approach injects legal uncertainty into the process and eliminates any incentive for the parties to avoid litigation by agreeing in advance about disposition of remaining pre-embryos in the event of divorce. Finally, the mutual contemporaneous consent approach essentially requires us to abdicate our judicial responsibilities by ignoring the legislature's

directive to distribute equitably the parties' marital property in a dissolution proceeding. The parties here have turned to the courts to resolve their dispute. We cannot simply do nothing.

¶61 Instead, considering the nature and equivalency of the underlying liberty and privacy interests at stake, we conclude that a court presiding over dissolution proceedings should strive, where possible, to honor both parties' interests in procreational autonomy when resolving these disputes. Thus, we hold that a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the couple's remaining pre-embryos in the event of divorce. In the absence of such an agreement, a court should seek to balance the parties' respective interests when awarding the pre-embryos, as discussed more fully below.

¶62 We agree with those courts that first look for an enforceable agreement between the parties regarding the disposition of the pre-embryos upon divorce. We do not interpret a party's commencement of the IVF process, on its own, to establish the party's automatic consent to become the genetic parent of all possible children that could result from successful implantation of the pre-embryos. In fact, the forms that ask parties to elect specific disposition options for various contingencies recognize that, by undergoing IVF, parties do not automatically consent to use of the pre-embryos potentially years later, under changed circumstances. Additionally, the statutes addressing legal parenthood in this context recognize that divorce likely

alters the parties' mutual intent to become parents that existed when the couple embarked on the IVF process. *See* § 15-11-120(9) (if a married couple divorces before pre-embryos are implanted, "a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record"); *see also* § 19-4-106(7)(a).

¶63 On the other hand, binding agreements "minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision." *Kass*, 696 N.E.2d at 180. We agree that, "[t]o the extent possible, it should be the progenitors – not the State and not the courts – who by their prior directive make this deeply personal life choice." *Id.*; *see also Davis*, 842 S.W.2d at 597 (noting that starting with a prior agreement regarding the disposition of the pre-embryos "is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition"). Thus, disputes in dissolution proceedings over the disposition of cryogenically preserved pre-embryos should be resolved first by looking to an existing agreement expressing the spouses' intent in the event of divorce.

¶64 However, in the absence of an enforceable agreement regarding disposition of the pre-embryos, and where the parties have turned to the courts to resolve their dispute, the dissolution court should balance the parties' respective interests and award the pre-embryos accordingly. Recognizing a couple's cryogenically

preserved pre-embryos as marital property of a special character, *see Davis*, 842 S.W.2d at 597, the underlying principle that informs our balancing test is autonomy over decisions involving reproduction. Thus, the framework we adopt in this special context is distinct from, and more narrow than, the trial court's consideration of various factors in determining equitable distribution of other forms of marital property. *See Balanson*, 25 P.3d at 35. Here, underlying the court's disposition of this special form of property are the parties' individual interests in either achieving or avoiding genetic parenthood through use of the disputed pre-embryos.

¶65 We first discuss a non-exhaustive list of considerations that a court should weigh in disposing of the marital pre-embryos. Factors not discussed here may also be relevant to the analysis depending on the circumstances of the parties before the dissolution court. We then identify certain factors that should never be taken into account.

¶66 To begin with, courts should consider the intended use of the party seeking to preserve the disputed pre-embryos. A party who seeks to become a genetic parent through implantation of the pre-embryos, for example, has a weightier interest than one who seeks to donate the pre-embryos to another couple. *See Davis*, 842 S.W.2d at 603–04 (concluding that ex-husband's interest in avoiding becoming a genetic parent outweighed wife's interest in donating the pre-embryos to another couple); *J.B.*, 783 A.2d at 717 (prioritizing ex-wife's interest in preventing further use of

the pre-embryos over ex-husband's desire to donate them).

¶67 A court should also consider the demonstrated physical ability (or, conversely, inability) of the party seeking to implant the disputed pre-embryos to have biological children through other means.[8] *Compare J.B.*, 783 A.2d at 717 (observing that ex-husband's opportunity to have additional genetic children did not depend on the pre-embryos), *with Reber*, 42 A.3d at 1137 (considering that ex-wife had "no ability to procreate biologically without the use of the disputed pre-embryos").

¶68 Relatedly, the court should consider the parties' original reasons for pursuing IVF, which may favor preservation over disposition. For example, the couple may have turned to IVF to preserve a spouse's future ability to have biological children in the face of fertility-implicating medical treatment, such as chemotherapy. *See Szafranski*, 34 N.E.3d at 1162 ("[T]he sole purpose for [undergoing IVF] was to preserve [one partner's] ability to have a biological child in the future at some point after her chemotherapy treatment ended. The parties both recognized this when they agreed to create the pre-embryos together."); *Reber*, 42 A.3d at 1137 ("Wife testified that she underwent IVF

[8] Courts in other jurisdictions have resolved the factual question regarding one party's ability reasonably to achieve genetic parenthood without the preserved pre-embryos by looking to testimony from the parties regarding their medical history and consultations with medical professionals. *See Reber*, 42 A.3d at 1138; *Szafranski*, 34 N.E.3d at 1162.

only after she was diagnosed with breast cancer, after consultation with her doctor, and then she delayed chemotherapy by two to three weeks to undergo the process.").

¶69 The court's analysis should also include consideration of hardship for the person seeking to avoid becoming a genetic parent, including emotional, financial, or logistical considerations. *See Davis*, 842 S.W.2d at 603–04 (considering ex-husband's opposition to fathering a child who would not live with both parents because of his own childhood experiences involving separation from his parents).

¶70 In addition, a court should consider either spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings. *See In re Marriage of Manzo*, 659 P.2d 669, 674 (Colo. 1983) ("[B]efore a court incorporates property division provisions of a separation agreement into a dissolution decree, it should first review the provisions for fraud, overreaching, . . . or sharp dealing not consistent with the obligations of marital partners to deal fairly with each other. . . .").

¶71 Factors other than the ones described above may be relevant on a case-by-case basis. That said, we hold that the following are improper considerations in a dissolution court's allocation of a couple's cryogenically preserved pre-embryos. First, we decline to adopt a test that would allow courts to limit the size of a family based on financial and economic distinctions. *Cf. Skinner*, 316 U.S. at 541 (discussing procreation as "one of

the basic civil rights of man"). Thus, a dissolution court should not assess whether the party seeking to become a genetic parent using the pre-embryos can afford another child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude preservation or use of the pre-embryos. Finally, we note that some courts have mentioned adoption as an alternative to biological or genetic parenthood through conventional or assisted reproduction. *See Davis*, 842 S.W.2d at 604. However, because we conclude the relevant interest at stake is the interest in achieving or avoiding *genetic* parenthood, courts should not consider whether a spouse seeking to use the pre-embryos to become a genetic parent could instead adopt a child or otherwise parent non-biological children. *See Reber*, 42 A.3d at 1138 ("There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available . . . does not mean that such options should be given equal weight in a balancing test.").

¶72 The framework that we adopt today recognizes that both spouses have equally valid, constitutionally based interests in procreational autonomy. It encourages couples to record their mutual consent regarding the disposition of remaining pre-embryos in the event of divorce by an express agreement. Under such an agreement, if one spouse has consented to awarding the pre-embryos to the other spouse or to donating them to another couple for implantation, courts should give effect to that decision. Where the parties' consent

to disposition of the pre-embryos in the event of divorce is not memorialized in an enforceable agreement, and the parties therefore must turn to a court to resolve their dispute, the approach we adopt today tasks the dissolution court with weighing the interests at stake and awarding the pre-embryos accordingly. Importantly, the balancing of interests approach we adopt is consistent with Colorado law directing dissolution courts to divide marital property based on a consideration of relevant factors, while taking into account that pre-embryos are marital property of a special character.

E. Application

¶73 Here, Mr. and Ms. Rooks reached agreement regarding the disposition of pre-embryos in the event of certain contingencies (such as the death of one or both of the spouses). However, they failed to agree in advance how remaining cryogenically preserved pre-embryos should be allocated in the event of divorce. Instead, as the court of appeals correctly concluded, their written agreement left it to the dissolution court to determine how to allocate the pre-embryos. *Marriage of Rooks*, ¶ 31. Thus, awarding the pre-embryos in accordance with law governing the distribution of marital property also satisfies the expectations of the parties, who specified that in the event of divorce, the dissolution decree would address the disposition of any remaining cryogenically preserved pre-embryos. Because we announce a new framework for resolving disputes regarding the disposition of pre-embryos frozen

during marriage in the event of divorce, and because the trial court and court of appeals considered certain inappropriate factors in attempting to balance the parties' interests here, we reverse the judgment of the court of appeals and remand the case with instructions to return the matter to the trial court to balance the parties' interests under the approach we adopt today.

III. Conclusion

¶74 In the absence of more specific legislative guidance in these circumstances, we adopt a balancing framework for courts to apply in allocating disputed pre-embryos in divorce proceedings. Because the underlying interests at stake are the equivalently important, yet competing, right to procreate and right to avoid procreation, courts should strive, where possible, to honor both parties' interests in procreational autonomy. Thus, we hold that courts should award pre-embryos first by looking to an existing enforceable agreement addressing the parties' wishes regarding disposition of remaining pre-embryos in the event of divorce. In the absence of such an agreement, a dissolution court tasked with resolving such a dispute should weigh the parties' respective interests in receipt of the pre-embryos. In balancing those interests, courts should consider the intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reasons for undertaking IVF in the first place; the emotional, financial, or logistical

hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation. However, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos can afford a child. Nor shall the sheer number of a party's existing children, standing alone, be a reason to preclude preservation or use of the pre-embryos. Finally, courts should not consider whether the party seeking to become a genetic parent using the pre-embryos could instead adopt a child or otherwise parent non-biological children.

¶75 We reverse the judgment of the court of appeals and remand with directions to return the matter to the trial court to apply the balancing framework we adopt today.

JUSTICE HOOD dissents, and **CHIEF JUSTICE COATS** and **JUSTICE SAMOUR** join in the dissent.

JUSTICE HOOD, dissenting.

¶76 This case requires us to consider the proper role of courts when parties disagree during a divorce about whether to use their cryogenically frozen pre-embryos to procreate through in vitro fertilization ("IVF"). Because I believe a court should never infringe on a person's constitutional right to avoid procreation through IVF, I disagree with the majority's decision to entangle

our courts in such deeply personal disputes by employing a multi-factor balancing test. Instead, I would embrace the contemporaneous mutual consent approach outlined by the majority. Maj. op. ¶ 45. Doing so would not only avoid invading citizens' constitutional rights but also comport with relevant Colorado statutes and advance sound public policy. Therefore, I respectfully dissent.

I. Freedom from Government Infringement on a Person's Decision to Not Procreate

¶77 The majority has provided a comprehensive overview of the relevant case law. Maj. op. ¶¶ 36–48. Therefore, I will refrain from simply echoing it now. Instead, I focus on how the tenets of constitutional law outlined by the majority should apply to IVF cases.

¶78 As the majority discusses, there are two fundamental rights implicated when considering this type of IVF dispute: (1) the right to procreate of the party who wants to implant the pre-embryo and (2) the right to avoid procreation of the party who does not want to implant the pre-embryo. *Id.* at ¶ 3. When there is such disagreement, only one party can prevail. Here, as to these pre-embryos, either Mr. Rooks will exercise his right to not procreate or Ms. Rooks will exercise her right to procreate. So, what is the role of the courts in this legal minefield?

¶79 To answer this question, we must first consider whether we really must balance constitutional rights at all. Stated differently: Would a court's inaction

infringe on any right of the party who wishes to procreate? My answer is no, because while the U.S. Constitution affords many protections related to procreation, there exists no constitutional right to use the coercive power of the state to compel procreation. Indeed, "[i]f 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." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). "[T]he right to bear or beget children implies a more general right to reproductive autonomy which must include under certain circumstances the opportunity to prevent procreation through a variety of means. . . ." *In re A. W.*, 637 P.2d 366, 369 (Colo. 1981).

¶80 Here, the impediment to Ms. Rooks exercising her right to procreate is not the court, it is Mr. Rooks. In order for a person to exercise his or her right to procreate, obviously a second party is needed. Whether it be two parties through conventional procreation or two parties through IVF, procreation cannot occur without a sperm and an egg. The fact that the person wanting to procreate does not have a second party also willing to procreate does not mean the court has infringed on anyone's rights. It is not the role of the court to compel the second party to consent. Here, Ms. Rooks cannot exercise her right to procreate, not because of any state action but, instead, because Mr. Rooks is exercising his right to avoid procreation.

¶81 Under the majority's test, the courts are forced to mediate a fundamentally personal decision and, in the process, infringe on a litigant's constitutional rights. In some contexts, this judicial choice may be unavoidable. Not so here. The contemporaneous mutual consent approach appropriately minimizes the government's role in resolving this constitutional dilemma.

II. Contemporaneous Mutual Consent Approach

¶82 Of the approaches outlined by the majority, only the contemporaneous mutual consent approach adequately shields citizens from unwarranted governmental intrusion. *See In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003); *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057–59 (Mass. 2000); *McQueen v. Gadberry*, 507 S.W.3d 127, 157 (Mo. Ct. App. 2016). Under this test:

> no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs. Thus, any expense associated with maintaining the status quo should logically be borne by the person opposing destruction.

Witten, 672 N.W.2d at 783. By emphasizing that consent is always essential, the mutual contemporaneous consent approach leaves this highly personal choice in the hands of donors. *Id.* at 783 (reasoning that balancing tests in this context merely "substitute[ ] the

court as decision maker"); *A.Z.*, 725 N.E.2d at 1058 ("[F]orced procreation is not an area amenable to judicial enforcement."); *McQueen*, 507 S.W.3d at 157 (finding that mutual consent "subjects neither party to any unwarranted governmental intrusion"). At the same time, this approach recognizes the validity of agreements between donors and clinics. *Witten*, 672 N.W.2d at 782. Thus, under contemporaneous mutual consent, one or both partners can change their minds at any time before placement of the pre-embryos, while simultaneously protecting contractual interests between donors and clinics. *Id.*

¶83 Some of those jurisdictions that purport to adopt a balancing test still recognize the dangerous implications of forcing a non-consenting donor to procreate. For example, the New Jersey Supreme Court found that implantation could have "life-long emotional and psychological repercussions." *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001). Because of these significant concerns, the court held that disposition agreements were subject to revision "up to the point of use or destruction of any stored pre-embryos." *Id.* at 719. If that occurred, the court would look to "the interests of both parties," but nevertheless reasoned that "ordinarily the party choosing not to become a biological parent will prevail." *Id.* Thus, although the New Jersey Supreme Court seems to adopt a balancing test like the majority's here, it still recognizes the significant costs of doing so and presumes that the right to not procreate would triumph in most circumstances.

¶84 Even the *Davis* court, which endorsed and spearheaded the balancing test approach to pre-embryo disputes, noted that "decisional authority rests in the gamete-providers alone." *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992). Therefore, "no other person has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that gamete-providers do." *Id.* Adopting the contemporaneous mutual consent approach would ensure that "gamete-providers alone" make the "decision to continue or terminate the IVF process." *Id.*

A. Protection Against Constitutional Harm

¶85 Yet what exactly is it that the contemporaneous mutual consent test guards against? True, it keeps the courts from intruding on a donor's constitutional right to not procreate. But to properly understand this right, we must see what types of harms a violation of it would engender. This is vital given that, even if a court were to award the pre-embryos to Ms. Rooks, Mr. Rooks will not become the legal parent of Ms. Rooks's eventual children. *See* 19-4-106(7)(a), C.R.S. (2018) (allowing an ex-spouse to withdraw consent to legal parentage); *see also infra* Section II.B. So, how will Mr. Rooks be harmed by a decision granting Ms. Rooks the pre-embryos given that he will have no legal responsibilities to his genetic children?

¶86 For the non-consenting donor, there are several harms that may be inflicted, each of which derives "from the unwanted existence of a child to whom one stands in relationship of parent." *See* I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. Cal. L. Rev. 1115, 1135 (2008). While Mr. Rooks will not be the legal or (obviously) the gestational parent, he will still have some residual, societal parenthood attached to him by both the nature of his previous relationship with Ms. Rooks and his genetic tie to the child.

¶87 First, how is Mr. Rooks to respond when someone tells him how brilliant or troubled his new daughter is growing up to be? *See id.* at 1136. Should he be required to explain that he is not the child's legal parent and that he only became a genetic parent over his objection? Or must he simply smile and nod? Either one is a constitutional harm against which the right to not procreate protects. But the majority's test may very well require the state to inflict these harms.

¶88 Second, Ms. Rooks's resulting child could, quite understandably, perceive Mr. Rooks as her father, irrespective of the legal technicalities we discuss today. *See id.* Adopted children and children born of sperm donors sometimes seek out their genetic parents. *Id.* There is no guarantee that the new child will not discover and want to explore her genetic circumstances. Mr. Rooks then must endure another constitutional harm: the potential for pressure to be placed on him by his unwanted genetic child.

¶89 Third, Mr. Rooks, himself, may view the resulting child as his own, even though the law does not recognize him as the parent. *See id.* at 1137. Presumably, a consenting spouse does not view a child born from IVF as his or her own simply because the law bestows legal parentage. Rather, it is more typically the social and genetic tie that causes the spouse to care for and love the child. But both are still present in the case of the non-consenting former spouse. And that former spouse is stuck with the "powerful attendant reverberations of guilt, attachment, or responsibility which . . . knowledge [of the resulting child] can ignite." John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437, 479 (1990). It seems reasonable to infer that, if Mr. Rooks didn't fear such reverberations, we probably wouldn't be here today.

¶90 As each of these examples demonstrates, the majority's test permits the state to use its power to inflict constitutional harm. Citizens are meant to be "free from unwarranted governmental intrusion" when deciding "whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. But instead of unfettering citizens, the majority's test places the state directly between two people in a decision that "fundamentally affect[s]" their lives. *Id.* It is true that some harm is suffered by the parent wanting to procreate under the contemporaneous mutual consent approach.

¶91 [1] The crucial difference is that the state has no role in perpetrating it. Ms. Rooks has the right to be free from "unwarranted governmental intrusion" in exercising her right to procreate. *Eisenstadt*, 405 U.S. at 453. She does not have the right to compel genetic procreation against another person's will.

B. Colorado Statutory Scheme

¶92 That the state should avoid inflicting constitutional harms on its citizens should be enough to caution this court away from adopting any sort of test that forces it to choose sides. If that concern is insufficient, a portion of the Colorado Uniform Parentage Act, specifically section 19-4-106(7)(b), arguably codifies the contemporaneous mutual consent approach. At the very least, this statutory provision sheds light on the policy preference of the Colorado General Assembly. Subsection (7) reads, in whole, as follows:

> (7)(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child.

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[1] Indeed, the donor wishing to implant would be required to "try again," with all its attendant monetary costs and physical invasions. In some cases, a donor may lose the ability to have more children or any children at all. These harms are real. But under the contemporaneous mutual consent approach, they are not inflicted by the state.

> (b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

§ 19-4-106(7).

¶93 Subsection (7)(b) seems to embrace the contemporaneous mutual consent approach, stating that a former spouse maintains the power to veto assisted reproduction at any point before placement of the preembryo.

¶94 The majority argues that (7)(b) should be read to modify (7)(a), referring to the same "consent" as in (7)(a), or consent to be a legal parent, not consent to placement. Maj. op. ¶¶ 51–52. Under the majority's reading, (7)(a) permits a former spouse to consent to be a legal parent, and (7)(b) empowers a former spouse who has previously given that consent to withdraw it. *Id.*

¶95 I am not persuaded by the majority's limited reading. As I see it, the two subsections describe precisely the type of consent at issue for each subsection. And the two types of consent are different. Subsection (7)(a) frames the consent in more narrow language, "that if the assisted reproduction were to occur after the dissolution of marriage, the former spouse would be a parent of the child." § 19-4-106(7)(a). In contrast, the "consent" in (7)(b) is framed more broadly as consent "to assisted reproduction." § 19-4-106(7)(b). Thus, I read subsection (7)(a) to encompass consent to be a legal parent, whereas I read subsection (7)(b) to refer

generally to consent to have one's genetic material used in assisted reproduction.

¶96 My reading ensures that no portion of the statute is rendered superfluous. *See Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005) ("[W]e must interpret a statute to give effect to all its parts and avoid interpretations that render statutory provisions redundant or superfluous."). Subsection (8) contains language nearly identical to subsection (7)(a): "If a spouse dies before placement . . . the deceased spouse is not a parent . . . unless the deceased spouse consented. . . ." § 19-4-106(8).[2] Subsection (8), however, does not contain a subsection (7)(b) equivalent. *Id.* Even without a subsection (8)(b), the natural implication of subsection (8)'s language is that a spouse could revoke consent prior to death and ensure that no legal parentage posthumously results. Any other interpretation would leave the deceased spouse's estate at the whims of the surviving spouse's posthumous procreational decisions. Thus, I read subsection (8) to authorize a spouse to both give and revoke consent prior to death. And because "identical words used in different parts of the same act are intended to have the same meaning," subsection (7)(a) must be read correspondingly. *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994).

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[2] The full text reads: "If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child." § 19-4-106(8).

¶97 Reading subsection (7)(a) consistently with subsection (8) means that subsection (7)(a) must also allow for the withdrawal of consent to be a legal parent. If subsection (7)(a) and subsection (8) are not both construed to authorize withdrawal of consent to be a legal parent, we wouldn't be giving "identical words . . . the same meaning." *Id.* But because subsection (7)(a) already provides a process for withdrawing such consent – as the previous paragraph demonstrates it must – then subsection (7)(b) must do something different to avoid becoming "mere surplusage." *Colo. Med. Bd. v. Office of Admin. Courts*, 2014 CO 51, ¶ 19, 333 P.3d 70, 74. What subsection (7)(b) does differently is clear from its plain text: It empowers a former spouse to withdraw consent to assisted reproduction.[3]

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[3] It is worth noting that the comment to the subsection (7) equivalent of the Uniform Parentage Act ("UPA") states that the UPA does not attempt to resolve issues regarding disputed preembryos, but leaves such decisions to the states. Unif. Parentage Act § 706 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2002). However, the comment to section 707, the subsection (8) equivalent, does state that section 707 seeks to avoid posthumous effects on intestate succession. *Id.* § 707 cmt. Thus, even though the framers of the UPA did not attempt to explicitly resolve preembryo disputes, they did insert language for deceased spouses that does allow for the withdrawal of consent, and subsequently used that same language for former spouses. This, at a minimum, demonstrates that the UPA framers knew that the section 706 language was capable of an interpretation that pertained to preembryo disputes. And, given that our General Assembly wanted to ensure that IVF consent laws are "balanced and fair," and sought to address "all . . . contingencies" regarding withdrawal of consent, the UPA comment to section 706 is inapposite to a proper interpretation of the Colorado statute. *See* Hearings on S.B.03-79 before H. Comm. on Info. & Tech., 64th General Assembly (Mar. 17, 2003).

¶98 The majority suggests that the General Assembly's use of "resulting child" renders this reading implausible. Maj. op. ¶ 54. But the "resulting child" language that the majority relies on is from sections 15-11-120(9) and (10), C.R.S. (2018), of the Colorado Probate Code and subsection (7)(a). It does not appear in subsection (7)(b). Its absence in subsection (7)(b) is central to understanding the statutory scheme. Subsection (7)(a) refers to the narrower consent relevant in divorce proceedings where consent to assisted reproduction has not been withdrawn. It simply enables ex-spouses to amicably choose to continue with IVF without a former spouse becoming a legal parent.

¶99 The Colorado Probate Code, however, deals with situations where ex-spouses or now-deceased spouses are unable to withdraw their consent (unless they happened to do so in a will or other instrument). *See* § 15-11-120(9)-(10). In fact, the sections that the majority quotes come from that act's "intestate succession" provisions. Thus, these sections, which refer to a "resulting child," just ensure that a deceased spouse or ex-spouse, who is unable to withdraw consent to assisted reproduction, does not bear posthumous legal children. That's also why the "resulting child" language is used in subsection (8). The "resulting child" language appears exactly where it makes sense to appear – where a child could still result from IVF, either because consent has already been given or because someone is physically unable to withdraw consent.

¶100 Conspicuously absent is any "resulting child" language in subsection (7)(b), which deals directly with

consent to assisted reproduction. The language isn't there because there's no reason for it to be. If a former spouse withdraws consent, then there is no resulting child. It would make little sense to place such language in a provision that prohibits a former spouse from implanting pre-embryos in the first place.

¶101 Even if one might question whether the General Assembly intended to create a contemporaneous mutual consent rule in subsection (7)(b), that does not give us license to craft a test that inflicts constitutional harm. If the General Assembly has not embraced the contemporaneous mutual consent rule, as the majority contends, courts should still steer away from decisions that compel procreation. *See* Maj. op. ¶ 55.

¶102 So, mutual consent is essential. This begs the question of when the mutual consent must occur for it to be binding.

C. When Must Both Parties Consent?

¶103 Some proponents of other approaches argue that the parties consent when they allow the sperm and eggs to be harvested and united. This strikes me as simplistic, as it suggests that a party supplying an egg or sperm for IVF forever consents to becoming a genetic parent. Instead, parties should be allowed to withdraw consent until the last point at which an additional affirmative step must be taken in the IVF process in order to produce a child. Before placement, both parties should retain veto power. From a practical point, to hold otherwise would suggest that a person

who provides sperm or eggs during IVF consents to procreate as to each and every sperm or egg harvested at any point in the future. As the amicus brief for the American Academy of Matrimonial Lawyers states, eight to twenty-five eggs are often harvested at a time. Amicus Br. Colorado Chapter of the American Academy of Matrimonial Lawyers 4–5. Imagine twenty-five eggs are successfully fertilized. Do we really want to say that partners who agree to IVF thereby forever consent to genetically parent all children resulting from successful implantation of any of those pre-embryos? My answer is no.

D. The Contemporaneous Mutual Consent Approach Advances Public Policy

¶104 While the constitutional right of a person to not procreate should drive this discussion, I note that the contemporaneous mutual consent approach advances sound public policy. First, I address the two critiques of this model that the majority highlights. Maj. op. ¶ 46. Then I address the inevitable difficulty that courts will have in applying the majority's test to the numerous situations in which these disputes could arise.

¶105 The majority describes how some find the contemporaneous mutual consent approach unrealistic. After all, they say, if the parties could reach an agreement, they would not be in court. *Id.* But this pragmatic observation ignores another: After the dissolution of a marriage, rancor typically subsides.

However unlikely it might seem that these parties will eventually reach agreement about these pre-embryos, common ground might not prove so elusive in other cases, particularly with the passage of time after dissolution. Moreover, by adopting the contemporaneous mutual consent model, the parties do leave the divorce process with some resolution. If there is no agreement, there is no change. The status quo is simply preserved. And that is a resolution that will engender far less contentiousness and potentially wrenching litigation. *Cf.* § 14-10-102(2)(b), C.R.S. (2018) (noting that one of the underlying purposes of the Uniform Dissolution of Marriage Act is to mitigate the potential harm to spouses and their children caused by the process of legal dissolution of marriage).

¶106 The majority also points out that some argue the contemporaneous mutual consent approach would give one partner undue leverage in divorce proceedings. Maj. op. ¶ 46. For example, a husband might use a wife's desire for pre-embryos to obtain a more beneficial outcome on division of assets or debt, or allocation of parental responsibilities as to existing children of the marriage. While this is a legitimate concern, surely it is better to let trial courts address the potential for such misbehavior on an ad hoc basis through the vast discretion trial courts have under the Uniform Dissolution of Marriage Act rather than to endow courts with the authority to violate a person's constitutional right to avoid procreation.[4] The majority

[4] Colorado's Uniform Dissolution of Marriage Act (UDMA), §§ 14-10-101 to -133, C.R.S. (2018), provides trial courts the

approves of the trial court's discretion to do so, as their balancing test explicitly requires courts to look at "a

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power to make certain "inextricably intertwined" determinations related to a dissolution of marriage, including property distribution, maintenance, and attorney fees. *See In re Marriage of de Koning*, 2016 CO 2, ¶ 26, 364 P.3d 494, 498 (describing how "awards of spousal maintenance and attorney's fees flow from the property distribution"). In making the required determinations after a contested hearing, trial courts have latitude to ensure a just resolution. *See*, *e.g.*, § 14-10-114(3)(c)(XIII) (stating that courts should determine an amount of spousal maintenance that is fair and equitable after considering relevant factors, including "[a]ny other factor that the court deems relevant"); *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997) ("The district court then apportions [attorney] fees and costs in light of the statute's equitable purpose. . . ."). And for some decisions, the legislature has expressly directed the trial court to consider a parent's behavior as related to children and the other party. *See* § 14-10-124(1.5)(a)(VI) (listing one factor for the court to consider when determining the best interest of the child as "[t]he ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party"). In the event that parties are able to reach an out-of-court settlement and present a separation agreement to the court, the court still has the ability to review the agreement for unconscionability. *See* § 14-10-112(2). "If the court finds the separation agreement unconscionable, the court may request the parties to submit a revised separation agreement, or the court may make orders for the disposition of property, support, and maintenance." § 14-10-112(3); *see also In re Marriage of Manzo*, 659 P.2d 669, 674 (Colo. 1983) (describing that before the court incorporates the property division provisions of a separation agreement into a dissolution decree, the court should review the agreement for "sharp dealing not consistent with the obligation of marital partners to deal fairly with each other" and determine "whether under the totality of the circumstances the property disposition is fair, just and reasonable"). It follows, then, that when one party tries to use pre-embryos as an unfair negotiating tool, the trial court would be able to intervene through the various provisions of the UDMA to ensure a just result.

spouse's demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce proceedings." Maj. op. ¶ 4.

¶107 Whatever the shortcomings of the contemporaneous mutual consent approach, it remains a workable test that keeps donors free from governmental intrusion. For example, the court need not enter the fray as to whether a person is capable of genetically reproducing, as the majority's approach requires. *Id.* That is no small matter. Consider that here Ms. Rooks alleged in the lower courts that she could not procreate without use of these pre-embryos, only to discover during the course of her appearance before us that she could.

¶108 Or consider the amorphous requirement to look to the "hardship" of the spouse seeking to avoid becoming a genetic parent, which includes "emotional, financial, or logistical considerations." *Id.* Which "emotional" factors are relevant? And in which direction should such factors cut? The majority cites favorably *Davis*, which considered the ex-husband's childhood experiences involving divorce. *Id.* at ¶ 68 (citing *Davis*, 842 S.W.2d at 603–04). Is the court now to probe the intimate early childhood experiences of non-consenting donors just so they can avoid being compelled to produce genetic offspring? These factors leave too much undecided – particularly because the majority expressly makes the list of factors in the balancing test "non-exhaustive." Maj. op. ¶ 65. Rather than limiting litigation, the majority invites predictable appeals. Inevitably, the losing party will appeal and claim that the

lower court misapplied the relevant factors, further enmeshing the government.

III. Conclusion

¶109 The decision to have children is one of the most consequential choices people make in life. The considerations that go into it are numerous and personal; it is not a decision that most would leave to their dearest friends, let alone the state. It is difficult, if not impossible, for a court to properly determine whose constitutional rights should prevail in cases like the one before us. Sometimes courts are left with no choice but to balance and choose competing constitutional rights. But here, where the decision is ultimately a private one between two people, the court need not get involved. Only once the court involves itself is there any constitutional violation. Up to and until that point, it is an intimate, personal decision.

¶110 Because the contemporaneous mutual consent approach better protects the constitutional rights at stake, aligns with Colorado law, and is more sound as a matter of policy, I respectfully dissent.

I am authorized to state that CHIEF JUSTICE COATS and JUSTICE SAMOUR join in this dissent.

COLORADO COURT OF APPEALS **2016COA153**

Court of Appeals No. 15CA0990
Garfield County District Court No. 14DR30080
Honorable John F. Neiley, Judge

DATE FILED: October 20, 2016
CASE NUMBER: 2015CA990

In re the Marriage of

Drake F. Rooks,

Appellee,

and

Mandy Rooks,

Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE TERRY
Hawthorne and Fox, JJ., concur

Announced October 20, 2016

James W. Giese, P.C., James W. Giese, Grand Junction, Colorado, for Appellee

Azizpour Donnelly LLC, Katayoun A. Donnelly, Denver, Colorado, for Appellant

¶ 1 This appeal from the permanent orders entered in the dissolution of marriage proceedings between Mandy Rooks (wife) and Drake F. Rooks (husband) presents an issue of first impression in Colorado: how to determine who gets the couple's cryogenically frozen embryos on dissolution of their marriage. (Though the

accurate medical term for such unimplanted embryos is "preembryos," we will refer to them as "embryos" for simplicity.)

¶ 2 The parties already have three children together. It is undisputed that wife used her last eggs to create the embryos.

¶ 3 Husband and wife agreed in their storage agreement with the fertility clinic that the embryos should be discarded if certain events (inapplicable here) occurred. But if they dissolved their marriage, unless they could agree who would get the embryos, the agreement left it up to the trial court to award them. Wife argued at the permanent orders hearing that the embryos should remain frozen in cryo-storage so that she can have another child in the future, because otherwise she would be infertile. Husband argued that the embryos should be discarded.

¶ 4 In its lengthy, detailed, and carefully reasoned permanent orders, the trial court awarded the embryos to husband. The court relied on two alternative theories derived from the case law of our sister states:

(1) Applying the "contract approach," the court construed the parties' intent as requiring the embryos to be discarded on dissolution of their marriage, unless they could agree otherwise.

(2) Applying the "balancing of interests approach," the court determined that husband's interest in not having more children with wife outweighed wife's interest in having another child.

¶ 5 The court determined that both approaches weighed in favor of awarding the embryos to husband.

¶ 6 Wife appeals from the portion of the permanent orders awarding the embryos. She obtained a stay in the trial court to permit the embryos to remain in cryo-storage pending completion of appellate proceedings. We affirm the trial court's judgment under the balancing of interests approach.

I. Background

¶ 7 The parties married in 2002, and husband petitioned for dissolution of the marriage in 2014. The major issues decided in this dissolution case concerned property division and the wife's plan to relocate with the parties' children to North Carolina. The parties spent relatively little time addressing the issues now raised on appeal.

¶ 8 All three of the parties' children were conceived using in vitro fertilization (IVF) techniques, and in that process, six additional embryos were created and placed in cryo-storage. Together with the fertility clinic, the parties signed two agreements pertaining to the embryos: a participation agreement and a storage consent agreement.

¶ 9 The participation agreement advises the parties that they can choose to leave the cryopreserved embryos in storage indefinitely for future use, or they can donate or discard them. The agreement describes the embryos as a "unique form of 'property,'" about which

the law is still developing, and alerts the parties that it is important to have a disposition plan for the embryos in case of the parties' death, separation, or divorce.

¶ 10 The storage agreement addresses disposition of the cryopreserved embryos in the event of dissolution of the parties' marriage or a party's death.

II. Colorado Law

¶ 11 The Colorado General Assembly has determined that embryos are not "persons" and therefore are also not "children." *See* § 13-21-1204, C.R.S. 2016 (construing Civil Remedy for Unlawful Termination of Pregnancy Act as not "confer[ring] the status of 'person' upon a human embryo"); § 18-3.5-110, C.R.S. 2016 (similarly construing Offenses Against Pregnant Women statutes); *see also* Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 Colum. J. Gender & L. 378, 423 (2013) ("All appellate decisions to date have rejected the notion that embryos are 'children' under the law. . . .").

¶ 12 The Uniform Parentage Act (UPA) provides that a former spouse will not be a parent of any child born as a result of the placement of embryos through assisted reproduction *after dissolution of marriage* unless the former spouse consents to be a parent. *See* § 19-4-106(7)(a), C.R.S. 2016. The Colorado Probate Code provides that such a child will not be considered a former spouse's child, unless the former spouse gives

consent to that effect and the consent is specific to assisted reproduction occurring after divorce. *See* § 15-11-120(9), C.R.S. 2016. Under the UPA, a former spouse may withdraw consent to placement of embryos "at any time" before they are placed. § 19-4-106(7)(b); *see also* § 15-11-120(10).

¶ 13 Because there is no Colorado statute or appellate decision addressing the specific issue raised here, namely, the disposition of cryopreserved embryos on dissolution of marriage, *see* Suzanne Griffiths & Logan Martin, *Assisted Reproduction and Colorado Law: Unanswered Questions and Future Challenges*, 35 Colo. Law. 39 (Nov. 2006), we look to other jurisdictions that have addressed the issue. *See P.W. v. Children's Hosp. Colo.*, 2016 CO 6, ¶ 23, 364 P.3d 891 ("With no Colorado case directly on point, we look to the decisions of other jurisdictions for persuasive guidance.").

III. Other Jurisdictions

¶ 14 Courts in other jurisdictions have adopted three different approaches for determining the disposition of divorcing spouses' cryopreserved embryos: the contract approach, the balancing of interests approach, and the contemporaneous mutual consent approach. *See Szafranski v. Dunston*, 993 N.E.2d 502, 506 (Ill. 2013) (*Szafranski I*); *see also* Michael T. Flannery, *"Rethinking" Embryo Disposition Upon Divorce*, 29 J. Contemp. Health L. & Pol'y 233, 237-38 (2013); Forman, 24 Colum. J. Gender & L. at 383-86.

A. The Contract Approach

¶ 15 Under the contract approach, an agreement between spouses that was entered into when the embryos were created and cryo-stored will be enforced as to the disposition of the embryos on dissolution of marriage. *See Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). In *Davis*, the divorcing spouses had agreed on all terms relating to the dissolution of their marriage except one: who was to have "custody" of their seven cryopreserved embryos held in storage at a fertility clinic. *Id.* at 589. The Tennessee court held that, "as a starting point" in resolving such a dispute, an agreement regarding disposition of the embryos in the event of divorce "should be presumed valid and should be enforced as between the progenitors." *Id.* at 597.

¶ 16 Other states have since followed Tennessee's lead and have ruled, citing *Davis*, that agreements between spouses that are entered into at the time of IVF are enforceable with respect to any agreed-upon disposition of cryopreserved embryos on dissolution of marriage. *See Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *In re Marriage of Dahl*, 194 P.3d 834, 840 (Or. Ct. App. 2008); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006); *but see A.Z. v. B.Z.*, 725 N.E.2d 1051, 1053-59 (Mass. 2000) (refusing to enforce parties' agreement that if they separated, the wife, who had already given birth to two children using the parties' embryos, would receive their remaining embryos for implantation).

¶ 17 Advantages of the contract approach, as the New York court observed in *Kass*, are that it "reserv[es]

to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision"; it avoids litigation in "personal matters of reproductive choice"; and it "provide[s] the certainty needed for effective operation of IVF programs." 673 N.Y.S.2d 350, 696 N.E.2d at 180; *see also Szafranski I*, 993 N.E.2d at 515; *Roman*, 193 S.W.3d at 50.

B. The Balancing of Interests Approach

¶ 18 Though the Tennessee Supreme Court in *Davis* endorsed a contract approach, it was unable to use that approach to guide its decision because the spouses had not entered into an agreement regarding disposition of their embryos. This led the court to use a balancing of interests approach, and it ultimately weighed the husband's interest in avoiding procreation more heavily than the wife's interest in wanting to donate the embryos to another couple. *Davis*, 842 S.W.2d at 598, 603-04.

¶ 19 Other courts have also held that, when the parties have not agreed as to who should receive cryopreserved embryos on dissolution of marriage, the trial court must balance the parties' interests to resolve the issue. *See J.B. v. M.B.*, 783 A.2d 707, 713-14, 719-20 (N.J. 2001); *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012).

¶ 20 In applying this approach, the *Davis* court said, "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by

means other than use of the [ ]embryos in question." 842 S.W.2d at 604; *accord Szafranski I*, 993 N.E.2d at 514-15; *see also Szafranski v. Dunston*, 34 N.E.3d 1132, 1161-64 (Ill. App. Ct. 2015) (*Szafranski II*) (upholding lower court's ruling that the interests of a woman, who had embryos created with a male friend before undergoing chemotherapy, were paramount because she had no other option for having a biological child); *J.B.*, 783 A.2d at 719-20 (ruling in favor of the wife's interest to avoid procreation after considering that the husband was already a father and was capable of fathering other children); *Reber*, 42 A.3d at 1132-43 (upholding ruling in favor of forty-four-year-old wife, who had no children and had undergone IVF before cancer treatment in order to preserve her ability to conceive a child).

C. The Contemporaneous Mutual Consent Approach

¶ 21 Iowa employs a contemporaneous mutual consent approach. There, if the parties have not previously agreed how to allocate their cryopreserved embryos on dissolution of marriage, the dissolution court will not allocate them. Instead, the embryos are left in storage indefinitely until the parties can agree as to their disposition. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003); *see Szafranski I*, 993 N.E.2d at 510-11.

¶ 22 The Iowa court rejected the contract approach, reasoning that judicial enforcement of an embryo disposition agreement "in this highly personal area of reproductive choice" would be against public policy.

Witten, 672 N.W.2d at 781. The court also noted its "grave public policy concerns" with the balancing test, which "substitute[s] the courts as decision makers in this highly emotional and personal area." *Id.* at 779, 783.

¶ 23 The Iowa court's approach has been criticized as being "totally unrealistic," because if the parties had any ability to reach an agreement on disposition of their embryos, they would not need a court's ruling. *Reber*, 42 A.3d at 1135 n.5; *see Szafranski I*, 993 N.E.2d at 511. As the trial court aptly noted in rejecting the Iowa approach in this case, it "essentially gives one party a *de facto* veto over the other party" because the issue will inevitably be determined by the passage of time. *See Szafranski I*, 993 N.E.2d at 512 (noting that Iowa's approach may provide a bargaining chip for an ex-spouse to effectively hold embryos hostage to punish the other ex-spouse or to gain other advantages). We join the *Reber* and *Szafranski* courts in rejecting the contemporaneous mutual consent approach.

IV. Application of the Contract and Balancing Approaches

¶ 24 We concur with those courts that have adopted the contract approach and have enforced a valid agreement entered into between the spouses as to disposition of the embryos on dissolution of marriage. We are also in accord that, where there is no such agreement between the parties, a balancing of interests approach should be taken.

A. The Trial Court's Application of the Contract Approach

¶ 25 As argued by wife on appeal, the contract approach has two components: an oral agreement between her and husband, and the written storage agreement.

¶ 26 Wife's appellate briefs argue that the trial court erred by failing to enforce an alleged oral agreement between the parties that she could have a total of four children using the embryos. Because wife did not raise this issue in the district court and did not obtain a ruling on it, we do not address it. *See Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992) ("Arguments never presented to, considered [by,] or ruled upon by a trial court may not be raised for the first time on appeal."). And because the record does not show that she preserved her related promissory estoppel argument, we will not address that argument, either. *See id.*

¶ 27 We agree, however, with wife's contention that the trial court erred in interpreting the written storage agreement.

¶ 28 We review de novo the trial court's interpretation of the parties' written storage agreement, including the court's determination that the agreement is ambiguous. *See Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376-77 (Colo. 2000); *In re Marriage of Crowder*, 77 P.3d 858, 860 (Colo. App. 2003).

¶ 29 The goal in interpreting the agreement is to give effect to the parties' intent as discerned from the contract language. *Ad Two*, 9 P.3d at 376; *Crowder*, 77 P.3d at 860-61. Extraneous evidence of such intent may be considered only if the written agreement is ambiguous, meaning that it is fairly susceptible of more than one reasonable interpretation. *Ad Two*, 9 P.3d at 376-77; *Crowder*, 77 P.3d at 861.

¶ 30 A court may not rewrite an agreement under the guise of interpreting it. *See Bledsoe Land Co. v. Forest Oil Corp.*, 277 P.3d 838, 842 (Colo. App. 2011); *see also In re Marriage of Stokes*, 43 Colo. App. 461, 466, 608 P.2d 824, 829 (1979) ("Courts cannot rewrite contracts or add terms thereto.").

¶ 31 We conclude that the storage agreement leaves it to the dissolution court to decide which party should receive the embryos in the event of dissolution of their marriage.

¶ 32 The pertinent language is as follows:

> In the event of divorce or dissolution of our marriage, we acknowledge that the disposition of our embryos will be part of the divorce/dissolution decree paperwork.
>
> . . . [I]f any court of competent jurisdiction award[s] to either Husband or Wife all rights with respect to the Cryopreserved embryos to the exclusion of the other spouse, by an order or decree which is final and binding to them, the [laboratory] shall have the right to deal

> exclusively with him or her to whom such rights were awarded (the prevailing party). . . .
>
> In the event that the divorce/dissolution decree paperwork does not address the disposition of the embryo(s), we elect the following disposition of our embryo(s):
>
> . . . .
>
> [Parties' initials] Thawed and discarded without undergoing any further development for any purpose.

¶ 33 Both husband and wife initialed the above-quoted "thawed and discarded" option, and one of them apparently underlined the word "discarded."

¶ 34 We construe this contract provision to mean:

1. The parties elected a default option of discarding the embryos *if* they did not make any other provision for the embryos in a stipulation in their dissolution proceeding *and if* the dissolution court did not rule on the issue.

2. In their dissolution proceeding, the parties could stipulate to a disposition *other than* discarding the embryos.

3. If the parties disagreed about the disposition of the embryos in their dissolution proceeding and sought a ruling from the dissolution court on the issue, that court would decide which party would be awarded the embryos.

¶ 35 The trial court found that the contract was ambiguous as to how the court should award the embryos in the event of dissolution. It resolved the ambiguity by construing the agreement to require *both* parties' mutual agreement before any of the embryos could be thawed and implanted, and it therefore ruled that absent such an agreement, the embryos would be thawed and discarded on dissolution of the parties' marriage. According to the court, "[t]he fact that the parties agreed to mutually approve any reproductive transfer or use of the embryos is a strong indication of their intent that [wife] should not now be awarded that exclusive right in the event of divorce."

¶ 36 We conclude that the court erred in attempting to infer contract terms that did not exist. The contract gives no guidance as to how the court is to make the decision regarding who will be awarded control over the embryos in the event of divorce if the parties disagree on the issue. The contract approach employed by other courts could not be used because there was no agreement that could be enforced as to who should receive the embryos.

¶ 37 Given the absence of enforceable contract terms on the issue, we construe the contract as requiring the dissolution court to exercise its inherent equitable power to determine whom to award the embryos to if the parties cannot agree on that point. *See In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001) (noting trial court's role in ordering equitable distribution of marital property based upon facts and circumstances of an individual case); *see also Szafranski II*, 34 N.E.3d

at 1161; *J.B.*, 783 A.2d at 713-19 (where a contract did not manifest a clear intent by the parties regarding disposition of their embryos on dissolution of their marriage, but instead permitted them to obtain a court order directing such disposition, "the interests of both parties must be evaluated" by the court); *Reber*, 42 A.3d at 1136; *Davis*, 842 S.W.2d at 604; *but cf. Roman*, 193 S.W.3d at 52-54 (the parties were well aware of other options when they chose the option to have embryos destroyed in the event of divorce).

¶ 38 Because the court had to rely on its equitable discretion to determine how to award the embryos, it necessarily had to employ the balancing approach. *See Davis*, 842 S.W.2d at 598, 603-04 (using balancing approach where spouses had not agreed on disposition of embryos in event of divorce).

B. The Trial Court's Application of the Balancing Approach

¶ 39 Given that there was no enforceable agreement between the parties as to disposition of the embryos on dissolution, the court was required to balance the parties' interests. We reject wife's contention that the trial court erred in doing so.

¶ 40 Application of the balancing test is an exercise of the trial court's equitable discretion, and we therefore review its decision for an abuse of discretion. *See Balanson*, 25 P.3d at 35 (trial court has great latitude to effect an equitable distribution of marital property based on facts and circumstances of each case, and an

appellate court will not disturb a trial court's decision absent a clear abuse of discretion); *Szafranski II*, 34 N.E.3d at 1161-62 (balancing of interests approach involves "a fact-intensive inquiry into each party's interest in using or preventing the use of the [ ]embryos"); *cf. In re Marriage of Ciesluk*, 113 P.3d 135, 142, 147-48 (Colo. 2005) (in parental relocation case, conducting abuse of discretion review of trial court's balancing of child's best interests with relocating parent's constitutional right to travel and other parent's constitutional right to parent).

¶ 41 Wife argues that some of the factors the trial court applied in its balancing approach are legally erroneous and that others violate her constitutional rights. We conclude that the trial court properly exercised its discretion in balancing the parties' competing interests in the embryos and in deciding to award them to husband.

1. Wife's Interest in Having a Fourth Child

¶ 42 As previously discussed, we do not address wife's contention that she had a binding agreement with husband to have four children because she failed to preserve that issue for appeal.

¶ 43 Nevertheless, she argues that the court was required to balance her desire to have another child with husband's desire not to father additional children with her. We conclude that the court appropriately balanced the parties' competing interests.

¶ 44 Given that wife has already borne three children, this is not a situation like *Davis*, 842 S.W.2d at 591-92, *Szafranski I*, 993 N.E.2d at 503-05, or *Reber*, 42 A.3d at 1132-33, where the woman's only opportunity to bear children would be foreclosed if the court did not award the embryos to her. *See J.B.*, 783 A.2d at 717 (considering, when balancing parties' interests, that the husband was already a father); *cf. A.Z.*, 725 N.E.2d at 1053-55, 1057-59 (upholding lower court's refusal to enforce contract allowing the wife, who had already conceived and given birth to twins during the marriage, to implant the parties' four remaining cryopreserved embryos on the parties' separation).

¶ 45 Accordingly, under the balancing of interests approach, the court could reasonably conclude that husband's interest in not producing additional offspring prevails over wife's interest in having a fourth child. *See Davis*, 842 S.W.2d at 603-04; *see also Szafranski I*, 993 N.E.2d at 515; *J.B.*, 783 A.2d at 719-20; *but cf. Szafranski II*, 34 N.E.3d at 1162-63 (upholding ruling that childless woman's interest in using embryos she created with friend before she underwent fertility-destroying chemotherapy was paramount over friend's interest in not procreating); *Reber*, 42 A.3d at 1140-42 (holding that balancing of interests tipped in favor of the wife because the embryos were "likely her only chance at genetic parenthood").

¶ 46 The court appropriately considered husband's emotional and psychological well-being, in that he would likely feel a moral and social obligation for a fourth biological child, even though he may have no

legal obligation to the child. This finding further supports the court's allocation of the embryos to husband under the balancing of interests approach. *See J.B.*, 783 A.2d at 717 (noting "life-long emotional and psychological repercussions" for the wife if her biological child is born in the future to the husband and a surrogate mother).

2. Financial Responsibility for Additional Children Born of the Embryos

¶ 47 Wife next argues that the trial court erred as a matter of law by considering the potential risk that husband could face financial obligations for a child born in the future using the embryos. We are not persuaded.

¶ 48 The court noted that wife declared her intention to relocate to North Carolina, and that the court allocated parental responsibilities to allow the parties' three children to move there with her. According to the court, North Carolina does not have statutory provisions, such as Colorado's sections 19-4-106(7) and 15-11-120(10), that would relieve husband of financial responsibility for a future child born using the embryos without his consent.

¶ 49 To the extent wife further argues that the trial court erred by considering the potential increase in husband's child support obligation for the parties' existing children if wife chooses to have a fourth child, we discern no abuse of discretion by the court in considering this factor. We disagree that, in doing so, the

court impermissibly implied that wife should not have another child. Rather, the court merely noted an inevitable financial consequence for husband if wife chooses to have another child using the embryos – an appropriate consideration when balancing the parties' interests.

3. Wife's Constitutional Arguments

¶ 50 Wife relies on various provisions of the constitutions of the United States and Colorado to raise numerous challenges to the trial court's balancing of interests. She contends that she was not required to take specific action to preserve those arguments in the trial court because they arose from the trial court's various comments in its permanent orders. We agree that her arguments are sufficiently preserved, but we disagree that her constitutional rights were violated by the permanent orders.

¶ 51 To the extent that the Colorado Constitution may have provisions different from those of the United States Constitution, wife has not identified any different analysis that would be required under the state constitution. We therefore confine our analysis to the United States Constitution's provisions. *See Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001).

¶ 52 Wife asserts that the following rights were violated, and that these rights derive from the United States Constitution:

- the right to equal protection of the law;
- the right to due process;
- the right to "procreational autonomy";
- the right of privacy;
- the "freedom of choice in procreation"; and
- the "fundamental liberty interest in the care, custody, and management of her children."

¶ 53 We begin by recognizing that for every one of the rights identified by wife, husband has corresponding and equal rights, including the right to determine that he does not want to have additional children who are joint genetic offspring of husband and wife. *See Davis*, 842 S.W.2d at 601 (noting that "right of procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation"); Forman, 24 Colum. J. Gender & L. at 425 ("[B]oth parties have constitutional procreation rights at stake.").

¶ 54 Wife argues that husband would have no future financial responsibility for any additional children born from the embryos. Even if she were correct about that – and it is not entirely clear under the law of North Carolina where she now lives whether that is so – it is nevertheless true that father would in fact (though not in law) be the father of any such children. And any such children would be the siblings of father's three existing children, and would be part of their lives.

¶ 55 The trial court's task, then, was to balance all of those competing rights of wife and husband and come to a difficult, discretionary decision. We conclude that, in reaching that decision, it did not violate wife's constitutional rights.

¶ 56 Specifically, it was not a violation of her constitutional rights for the trial court to discuss the following matters in its final orders:

- The fact that wife already has three children. As other courts applying the balancing approach have recognized, it may weigh in a party's favor if preserving the embryos would provide a party's only chance to create genetic offspring. *See Szafranski II*, 34 N.E.3d at 1161-64 (considering woman's infertility in weighing competing interest of male friend who no longer wanted to procreate); *Reber*, 42 A.3d at 1132-43 (ruling that interests of divorcing wife, who was forty-four, had no children, and had undergone IVF before cancer treatment in order to preserve her ability to conceive a child, prevailed over those of the husband); *cf. J.B.*, 783 A.2d at 719-20 (ruling that divorcing wife's interest in avoiding procreation outweighed the husband's where he was already a father and was capable of fathering other children).
- What would happen if wife had another child (or children) from the embryos. The court noted that if she were to have more children, she would get a credit on any child support worksheet, which would indirectly increase the amount of child support owed by husband

to wife. Given that husband's constitutional rights in not having additional children were implicated by the court's decision, we see no abuse of discretion in the court's consideration of the potential economic impact on the parties.

- How the addition of another child (or children) might affect the parties' existing children, and whether such an addition might challenge wife's ability to "manage such a large family alone as a single parent," given her lack of employment and financial resources, and the significant health issues faced by one of the children. The court remarked on those circumstances as part of its ruminations on how the parties might fare in the future. We see no constitutional impediment to the court's discussion of the practicalities of wife's situation. Contrary to her assertions on appeal, there is no indication that the court ruled in favor of husband based on improper considerations, i.e., because wife is poor. It is clear to us that the court did not base its decision on wife's economic or social circumstances. Rather, it carefully balanced the parties' competing interests.

¶ 57 Though wife argues that the trial court improperly injected a "best interest of the child" test in the final orders, we find no instance where the court applied such a test. The court merely mentioned the potential impacts of various factual circumstances on the parties' existing children, and we discern no constitutional violation or abuse of its discretion in doing so.

¶ 58 Wife cites *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), which dealt with involuntary sterilization of persons convicted of certain felonies, and argues that "the court may not dictate to American citizens the number of children they may have." To the extent that the permanent orders may *result* in a limitation on the number of children wife may ultimately wind up bearing through biological means, that is simply a consequence of the parties' having left it up to the court to decide who gets the remaining embryos. Wife could have contracted to receive the embryos on dissolution of the marriage, but did not do so, and instead requested in her supplemental trial brief that the court decide the issue based on a balancing of the parties' interests.

¶ 59 By leaving such an important decision up to the court, the parties should have expected the court to thoroughly examine the parties' desires, life circumstances, and financial state, as it does in balancing the interests in every permanent orders case. *See Balanson*, 25 P.3d at 35.

¶ 60 We reject wife's unsupported argument that husband relinquished his constitutional right not to procreate by consenting to the use of his sperm to fertilize wife's "last eggs." The storage agreement contradicts this theory by specifically providing for allocation of the embryos on dissolution to be decided in the "divorce/dissolution decree paperwork." Moreover, the UPA expressly allows husband, as a former spouse, to withdraw his consent for placement of the embryos "at any time" before they are placed. § 19-4-106(7)(b).

¶ 61 Wife and husband have equal claim to constitutional and other rights. The decision allocating the embryos required the court to balance those competing interests, and the court did so appropriately.

¶ 62 Accordingly, we perceive no constitutional violation. *See Szafranski I*, 993 N.E.2d at 516 (finding no constitutional obstacle to contract or balancing of interests approach because friend who participated in creating embryos did not have unilateral constitutional right to prohibit their use without regard to the woman's equal rights); *see also Szafranski II*, 34 N.E.3d at 1163-64.

V. Conclusion

¶ 63 The trial court's judgment awarding the parties' embryos to husband under the balancing of interests approach is affirmed.

JUDGE HAWTHORNE and JUDGE FOX concur.

DISTRICT COURT, GARFIELD COUNTY, COLORADO 109 8th Street, Glenwood Springs, CO 81601	[Filed: Apr. 29, 2015]
In re the Marriage of: **DRAKE F. ROOKS, Petitioner,** **and** **MANDY ROOKS, Respondent.**	**COURT USE ONLY** Case Number: 2014 DR 30080 Division F
FINAL ORDERS	

BACKGROUND

This matter came before the Court on February 23 and 24, 2015, for a hearing on Final Orders relating to the issues of parenting time, decision-making, spousal maintenance, allocation of debts and assets, and child support. At the Final Orders hearing, the Petitioner and Respondent both appeared with counsel, Mr. Giese appeared for the Petitioner Mr. Rooks, and Mr. Kalamaya appeared for the Respondent Mrs. Rooks.

Both parties were sworn and testified.

[Redacted as to children's names and pages concerning parenting time, decision making, allocation of property and debts, maintenance, child-support and attorneys fees.]

6. The Disputed Embryos

The parties disagree over the disposition of six frozen embryos that are currently being maintained in cryo-storage. Respondent wishes to retain the embryos for potential future implantation so she can have more children. Petitioner does not wish to become a genetic parent of any more children with Respondent and requests that the embryos be thawed and discarded. The dispute raises issues related to parents' fundamental right to make decisions concerning the care, custody, and control of their children, *Troxel v. Granville*, 530 U.S. 57, 57, 120 S. Ct. 2054, 2056, 147 L. Ed. 2d 49 (2000), and an individual's privacy right to avoid procreation. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In this case, the issue is stark and involves two contrary views of procreational autonomy—the affirmative right to procreate and become a parent and the countervailing negative right to avoid procreation. The dispute presents a question of first impression in Colorado as there is no appellate decision addressing the issue. There are Colorado statutes that address assisted reproduction and parenting issues.

A. The Statutory Law Regarding Assisted Reproduction in Colorado

Colorado statutes address the issue of assisted reproduction as it pertains to marital dissolution and parentage at §19-4-106(7)(a) and (b), C.R.S. as follows:

> (7)(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former

> spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a dissolution of marriage, the former spouse would be a parent of the child.
>
> (b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

Since Title 19 imposes legal obligations for support, the allocation of parental responsibilities, guardianships, and parenting time, it is clear that the statute is intended to relieve a non-consenting spouse from the obligations of a defined "parent" in the context of assisted reproduction and divorce.

A similar statutory provision is found at §§ 15-11-120(10), C.R.S., which states for the purposes of intestate succession and wills:

> If in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (6) of this section.

Just as Title 19 allows a party in an assisted reproduction case to avoid the status of a legal "parent", Title 15 allows that same party to avoid having offspring from a non-consensual assisted reproduction procedure considered a legal "child" for inheritance

purposes, notwithstanding the fact that such offspring is the genetic child of that genetic parent.

These statutes obviously do not directly address the issue of how to resolve a dispute over the disposition of embryos that have not yet been implanted in the mother's womb, but they do indicate that consideration should be granted for a spouse or donor's consent or lack of consent to become a legal parent with respect to an assisted reproduction procedure. The statutory framework at least implies a legislative recognition that where the creation of non-consensual genetic parentage occurs, a balancing of interests requires that the non-consenting parent not be burdened with the imposition of unwanted legal obligations for the genetic offspring.

B. Legal Status of the Embryos

To determine the manner of allocating the embryos, it matters how they are characterized. Of the relatively few courts that have addressed the issue, not all of them have applied the same analysis. Some courts have treated the embryos as a form of property, some as a form of person, and others as some middle ground between personhood and property that entitles them to a higher level of protection than mere property. See *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."); *Kass v. Kass*, 673 N.Y.S.2d 350, 696 N.E.2d 174, 180 (1998)

(Five cryopreserved pre-zygotes would not be recognized as "persons" for constitutional purposes in a matrimonial action in which the wife was seeking sole custody of the pre-zygotes); *In re Estate of Kievernagel*, 166 Cal. App. 4th 1024, 83 Cal. Rptr. 3d 311 (2008) (Gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death); *In re Marriage of Dahl*, 222 Or.App. 572, 194 P.3d 834, 840–41 (2008) (Contractual right to possess or dispose of frozen embryos created during marriage was "personal property" that was subject to a just and proper disposition in dissolution proceeding; *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (Under Virginia law, cryopreservation agreement between parents and medical college, whereby college retained parents' frozen pre-zygote, created bailor-bailee relationship between parties who referred to pre-zygote as "property" of parents.)

For purposes of this decision, the Court does not rely primarily on the law of other jurisdictions to resolve how embryos should be characterized. Colorado law provides some guidance on that question in other contexts besides marital dissolution. It is indisputable that under Colorado criminal statutes, an embryo or fetus is not a "person". Section § [sic] 18-3.5-110 states unequivocally that "[n]othing in this article shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth." In *People v. Lage*, 232 P.3d 138, 140 (Colo. App. 2009), the Court of Appeals held that:

> We agree with the trial court that section 18–3–101(2) is clear and unambiguous. As the trial court observed, in order for a child to be a "person" under the definition of that term, he or she must have been born and alive at the time of the homicidal act. That is the clear, plain, and unambiguous meaning of section 183–101(2). While here the child was alive at the time of defendant's alleged criminal acts, she had not been born. Therefore, she was not a "person" within the meaning of section 18–3–101(2) and, thus, cannot be the victim of a homicide or related crimes.

Similarly, in the context of civil cases, the Court of Appeals determined that a mother's unborn child did not constitute a child, for the purpose of a child dependency or neglect proceeding. An earlier statute defining a child had been amended to delete any reference to an unborn child, and the current definition of a child only applied to a child after birth. *People ex rel. H.*, 74 P.3d 494 (Colo. App. 2003); §§ 19–1–103(18), 19–3-502(2), 19–3–508, C.R.S.

For purposes of wrongful death torts, an unborn child who has yet been born alive is likewise not considered a "person" under Colorado law. See *Gonzales v. Mascarenas*, 190 P.3d 826, 830 (Colo. App. 2008) ("Therefore, we hold that a child who is born alive and subsequently dies is a person within the meaning of our wrongful death statute, and a wrongful death action can be maintained regardless of whether the child was viable at the time of the injury or whether the child was viable at the time of birth"). The issue was

also resolved by *Roe v. Wade*, 410 U.S. 113, 153 (1973) (a fetus is not a "person" entitled to due process or equal protection rights under the United States Constitution.).

Thus, from the forgoing analysis, the Court finds that our legislature has recognized the following: at least in the context of the criminal law, dependency and neglect, and wrongful death tort cases, and the U.S. Constitution, fetuses and therefore embryos are not considered "persons". Under Title 19, former spouses who donate genetic materials are not considered legal "parents" of offspring produced through in-vitro fertilization if the former spouse has not consented to the implantation procedure. Likewise, under Title 15 the genetic offspring of in-vitro fertilization are not considered legal "children" of any genetic parent who has not consented to the implantation procedure.

Therefore if an embryo is not a "person", and a non-consenting partner contributing genetic material is not a legal "parent", and such offspring is not considered a "child", it seems axiomatic that for purposes of this dispute, the embryos cannot be considered a "person", notwithstanding the fact that they are biologically and scientifically "life".

Finally, the parties' signed contract itself describes the embryos as property. As discussed further below, the contract, at pages 4 and 5, states: "Embryos are a unique form of 'property', and the law is still developing as to the rules which govern them. . . . FLC treats

all cryopreserved embryos as the joint property of the patient and partner and will not participate in any use of the embryos without the consent of both." From the signed contract, it appears that the parties themselves acknowledged that the embryos were a form of joint property and, as discussed below, contemplated that the property could be allocated by contract or by court order.

Accordingly, the Court finds that the embryos are a form of property that may be allocated between the parties to this dissolution proceeding. Since the embryos are property and not persons, (or children), the statutory rubric under Title 14 of the best interests standard is simply inapplicable with regard to how the embryos should be allocated. The embryos are not persons under our statutes, so they must be a form of property, and the disposition of property in the context of a dissolution case is a matter of contract as well as the exercise of the Court's inherent equitable authority.

C. The Law of Frozen Embryo Disputes in Other Jurisdictions

At least twelve other courts have considered the question of how to properly allocate frozen embryos or other gametic material where parties to a dissolution proceeding cannot agree. A review of those cases and numerous law review articles by the Court reveals that three analytic models have been developed to address the issue: 1) the contract model; 2) the balancing test

model; and 3) the contemporaneous mutual consent model.

Of the cases reviewed by the Court, seven were resolved primarily by the application of the contract model or otherwise cited that model with approval. This approach looks to the written agreement between the parties to determine their intent with regard to the disposition of the disputed embryos. In large part, the courts applying this methodology consider the embryos the joint property of the parties subject to disposition by the terms of the written or verbal agreement they entered into when the assisted reproduction contract was signed. See, *Kass v. Kass*, 673 N.Y.S.2d 350, 696 N.E.2d 174, 180 (1998) (Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them); *In re Marriage of Dahl*, 222 Or.App. 572, 194 P.3d 834, 840-41 (2008) (Embryo storage agreement indicated that husband, wife, and storage facility understood their right to contract for the exclusive right to possess, use, enjoy, or dispose of frozen embryos); *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (Agreement regarding disposition of any untransferred embryos in the event of divorce should be presumed valid and should be enforced as between the progenitors); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 2006) (Where neither party withdrew their consent to the disposition contract, the frozen embryos were still in the program, and the embryo agreement was still in effect when the parties divorced, the frozen embryos were to be

discarded pursuant to the contract); *In re Marriage of Litowitz*, 146 Wash.2d 514, 48 P.3d 261, 268 (2002), *amended by* 53 P.3d 516 (Wash. 2002) (Where petitioner and respondent could not reach a mutual decision regarding disposition of the embryos, it was appropriate for the court to determine disposition of the embryos under the cryopreservation contract); *Szafranski v. Dunston*, 2013 IL App (1st) 122975, ¶ 20, 993 N.E.2d 502, 507 *appeal denied*, 996 N.E.2d 24 (Ill. 2013) (The approach for resolving disputes over the disposition of embryos is to honor the parties' own mutually expressed intent as set forth in their prior agreements); *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001) (Agreement regarding disposition of cryopreserved embryos is enforceable, unless a party affirmatively notifies a clinic in writing of a change in intention, only then should the disposition issue be reopened); But see *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000) (Even had husband and the wife entered into an unambiguous agreement regarding the disposition of embryos, court would not enforce an agreement that would compel one donor to become a parent against his or her will; as a matter of public policy, forced procreation was not an area amenable to judicial enforcement).

Under the balancing test model, courts have applied a comparative evaluation of the benefits and burdens imposed on either party in determining the disposition of the embryos. The balancing approach has been applied in circumstances where the parties either failed to enter into a written agreement relating

to the disposition of the embryos or the court determined that the written agreement was ambiguous or unenforceable. The balancing approach has been applied in three states. See, *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707, 719 (2001) (If one party has reconsidered his or her earlier decision at time of IVF, interests of both parties must be evaluated); *Reber v. Reiss*, 42 A.3d 1131, 1135 (Pa.Super.Ct.2012) (Because husband and wife never made an agreement regarding the embryos, the trial court properly applied the balancing of the interests [sic] wife's favor); *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn.1992) (Where the parties never reached an agreement on disposition, application of a balancing test was appropriate). Factors that the courts have balanced in resolving these disputes include the relative positions of the parties, the significance of their interests, the relative burdens that will be imposed by differing resolutions, whether one parent has lost the ability to procreate without the use of the embryo, the financial or legal burdens that may be imposed on either party, and the emotion and psychological impact on each.

Finally, one court has rejected the contract and balancing analysis and has instead applied the contemporaneous mutual consent model See *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003):

> That brings us, then, to the dilemma presented when one or both partners change their minds and the parties cannot reach a mutual decision on disposition. We have already explained the grave public policy

> concerns we have with the balancing test, which simply substitutes the court as decision maker. A better principle to apply, we think, is the requirement of contemporaneous mutual consent. Under that model, no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the status quo would be maintained. The practical effect will be that the embryos are stored indefinitely unless both parties can agree to destroy the fertilized eggs.

The *Witten* case is the only case to have adopted the contemporaneous mutual consent model.

Based on the foregoing cases, the Court finds that the contract model is the most persuasive and further that it is most consistent with Colorado law. Colorado statutes recognize and enforce marital agreements and separation agreements between the parties provided that such agreements do not violate public policy or are not otherwise unconscionable or unenforceable. A marital agreement is enforceable unless it was executed involuntarily or there was not a fair and reasonable disclosure of the property or financial obligations involved. Section 14–2–301, C.R.S. *et seq.*; *In re Marriage of Goldin*, 923 P.2d 376 (Colo. App. 1996). A separation agreement is enforceable unless it is found to be unconscionable. Section 14–10–112(2), C.R.S.; *In re Marriage of Smith*, 928 P.2d 828 (Colo. App.1996). *In re Marriage of Bisque*, 31 P.3d 175, 178 (Colo. App. 2001). Considering the Court's determination that the embryos are property and not persons, the Court

perceives nothing that would contravene public policy by recognizing that pre-embryos are a form of marital property that may be allocated pursuant to a valid contract between the parties to a marriage.

In this case, the applicable contract for assisted reproduction services was originally signed by the parties in April 2011 and re-executed by the parties on July 15, 2013. This was well over a year before the parties filed for divorce. The contract was also entered into at a time when the parties were contemplating remaining married and producing children. Accordingly the Court finds the contract is a "marital agreement" and not a separation agreement because the agreement was not "connected with" or "attendant upon" a contemplated dissolution of marriage or legal separation." See *In re Marriage of Bisque*, 31 P.3d 175, 178 (Colo. App. 2001). Consequently, an unconscionability standard of review for the contract is not applicable. Unless the contract was executed involuntarily or there was not a fair and reasonable disclosure of the property or financial obligations involved, the contract should be enforced as written. Therefore the Court will first apply a contract analysis to the parties' agreement for reproductive services.

If it should appear, based on that review that the Contract does not specifically address the disposition issue or if the Contract is so ambiguous as to be unenforceable, the Court will evaluate the disposition under the balancing approach. The Court specifically rejects the contemporaneous mutual consent approach as a model for resolving disputes of this nature. That

approach, as ordered by the court in *In re Marriage of Witten* would require the Court to maintain the status quo indefinitely or until such time as the parties subsequently agree. That is an impractical solution that essentially gives one party a *de facto* veto over the other party. The embryos cannot be maintained indefinitely. The information provided to the parties in this case indicates that the viability of the embryos has a limit of approximately five years. Similarly, the biological clock is ticking with regard to the viability of the mother having a successful implant. Simply retaining the embryos in cryogenic freeze until they either die or the mother can no longer use them is not an equitable solution, and the Court will therefore not avoid the issue in the name of resolving it through contemporaneous mutual consent. A decision not to make a decision is still a decision. The contemporaneous mutual consent approach merely grants one party the right to make the decision by default. The Court will not go there.

D. Application of the Contract Model to the Specific Facts in this Case

In April 2011, the parties entered into a contract with Colorado Center for Reproductive Medicine ("CCRM") and Fertility Laboratories of Colorado ("FLC") for in-vitro fertilization ("IVF") services to produce and "transfer" or implant (and also store cryogenically), fertilized embryos produced from the parties' sperm and egg. The CCRM/FLC contract was renewed in July 2013. The IVF procedure was successful and

resulted in the parties current three children as described above. In addition, six other embryos were produced and frozen.

In most respects, the 2011 and the 2013 contracts are identical. Both agreements consist of 12 pages. The first six pages of each contract consist of the "Embryo and Pre-Embryo Cryopreservation Program Information, Participation Agreement and Informed Consent" form]. Each page was initialed by Respondent and Petitioner and signed on page 6. As mentioned above, the parties acknowledged that the frozen embryos were a form of joint property. In relevant part, the contract states as follows:

> Because of the possibility of you and/or your partner's separation, death, or incapacitation, it is important to decide on the disposition of any embryo(s), fresh or cryopreserved that remain in the laboratory. Since this is a rapidly evolving field, both medically and legally, FLC cannot guarantee what the available or acceptable avenues for disposition will be at any future date. At the present time, the alternatives are:
>
> 1) Discarding the cryopreserved embryo(s)
>
> 2) Donating the cryopreserved embryo(s) for approved research studies
>
> 3) Donating the cryopreserved embryos to another couple in order to attempt pregnancy (You may be asked to undergo additional infectious disease

testing and screening recommended
by the FDA if you select this option)

The contract then goes on to explain that the usual length of preservation is 5 years and that after that time, the embryos must be thawed and transferred, donated to another couple, donated to research, discarded, or transferred to another storage facility. The parties are then advised of the need to execute a "disposition plan" that will "govern the future of the embryos in the event that there is a change in the relationship of the patients. PLC's consent form asks the patients to elect who will have the right to embryos in the event of death of one of the patients or in the event of divorce."

Pages 7 through 11 of the contract consist of the "Embryo and Pre-Embryo Cryopreservation/Storage Consent" and the "Disposition Plan". As relevant to this case, paragraph 1 of the "Embryo and Pre-Embryo Cryopreservation/Storage Consent" states that: "Patient and partner agree that prior to FLC thawing Cryopreserved Material, both must sign a separate, notarized consent expressly requesting and authorizing the thawing and transfer of each attempt to achieving pregnancy." The contract contemplates a variety of other possible modifications or options regarding the frozen embryos that would require the mutual signed consent of both parties. As of the date of this proceeding, none of those potential events has occurred.

Paragraph 4.H. of the contract requires that some disposition of the embryos must be made on or before

the Respondent reaches 53 years of age (September 9, 2029). The contract options are that the embryos must be thawed and transferred, donated to another couple, donated to research, discarded, or transferred to another storage facility. If no disposition has occurred by that date the parties agree to waive all interest in the embryos, and the embryos become FLC's exclusive property. In that event the parties have the option of checking two possible options either: "1) Discard the cryopreserved embryo(s)" or "2) Donate the cryopreserved embryo(s) to research." Both Respondent and Petitioner initialed the Discard option.

Under the "Disposition Plan" at page 9, the parties were given four options in the event of a termination of their participation in the cryopreservation program. The options were to donate the embryos to another couple, use them in research, allow FLC to use the embryos at their discretion or "(iv) For thawing and discarding without undergoing any further development or utilization for any purpose." Respondent and Petitioner selected option (iv), thaw and discard, and signed at the bottom of page 9.

Under the "Disposition Plan" at page 10, the parties were given options relating to five possible scenarios that "[i]n the event of the death of one or both of the patients or in the case of divorce, we agree on the following choices:" In scenario number (i), in the event of Petitioner's death the options were to transfer the embryos to Respondent, use in research at FLC, allow FLC to use the embryos at their discretion, or thawing and discarding. In this scenario the parties checked the

first option: "Transferred to the care of the female partner if she wishes."

Under the "Disposition Plan" under scenario (ii), in the event of Respondent's death, the options were to transfer the embryos to Petitioner, use in research at FLC, allow FLC to use the embryos at their discretion, or thawing and discarding. The parties initialed "thawed and discarded without undergoing any further development or utilization for any purpose."

Under the "Disposition Plan" scenario (iii), in the event of both their deaths, the option was limited by the contract to thawing and discarding the embryos. Both parties signed this option.

Under scenario (iv) of the "Disposition Plan", in the event of divorce or dissolution, the "Disposition Plan" provided that the "disposition of our embryos will be part of the divorce/dissolution decree paperwork." The "Disposition Plan" then explains what happens if the dissolution decree awards the embryos to either spouse to the exclusion of the other spouse. In that event, the Disposition Plan grants FLC the authority to deal exclusively with that spouse (the "prevailing party") with regard to termination of the contract, transferring the embryos, continuing in the program or otherwise complying with the decree. The "Disposition Plan" then provides that if the dissolution decree *does not* address the embryos, the embryos may be either used in FLC research, used at FLC's discretion, or "thawed and discarded without undergoing any further development or utilization for any purpose."

Both parties initialed and signed the last option to thaw or discard.

Finally, under scenario (v), if the parties were determined to not be legally married, and thus no dissolution decree could enter, the parties would be obligated to sign a new authorization for continuation of the program or alternatively elect one of three options to either allow FLC to use the embryos for research, use the embryos at FLC's discretion, or "thawed and discarded without undergoing any further development or utilization for any purpose." Again, the parties initialed the third option, thaw and discard. The final page of the contract is an authorization form and criteria for donation of the embryos. On the 2011 contract the last page has be [sic] stricken through.

The selected options in the 2013 Contract are virtually identical with two exceptions. In the 2013 contract the fifth option under scenario (v) where the parties are deemed not legally married, options are not checked and the entire paragraph is stricken out. This indicates that the parties believed this scenario was not applicable since they were married. The second alteration is the last page of the contract which governs donations. In the 2013 contract there is a hand written note "No Donation No Research Discard Only". This page is also initialed by both parties.

The contract at section (iv) of the Disposition Plan specifically deals with the issue divorce. It provides two possible outcomes. If the parties divorce and the

divorce decree is silent as to the disposition of the embryos, the parties jointly selected the thaw and discard option without any further development or utilization for any purpose. This portion of the Disposition Plan is clear and unambiguous. The embryos are to be thawed and discarded in the event of a divorce where the dissolution decree fails to address the embryos.

The other possible outcome in a divorce is that the divorce decree awards the embryos to only one party. In that event, the "prevailing party" has the option of dealing exclusively with FLC and directing how the embryos are to be used. This provision is also clear and unambiguous, but it does not specifically direct how the court is to determine which party is to be awarded the embryos. To that extent, the contract and the Disposition Plan are unclear and leave the ultimate disposition of the embryos to the discretion of the court, should the court elect to decide the issue. If the court fails to address the issue, the embryos would be thawed and discarded. Because the Disposition Plan and the Contract fail to provide explicit guidance as how the court should award the embryos, the Court finds that provision of the Contract and Disposition Plan ambiguous. "Silence does not by itself necessarily create ambiguity as a matter of law. Silence does create ambiguity, however, when it involves a matter naturally within the scope of the contract." *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993).

Whether a contract is ambiguous is a question of law and the interpretation of a written contract is also

question of law for the court. *City of Colorado Springs v. Mountain View Elec. Ass'n, Inc.*, 925 P.2d 1378, 1388 (Colo. App. 1995), *as modified on denial of reh'g* (Apr. 25, 1996). If a contract is susceptible of more than one reasonable interpretation, it is ambiguous, and its meaning must be determined as an issue of fact. *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373, 376 (Colo. 2000). Contracts should be construed to give effect to the intent of the parties. *Fox v. I-10, Ltd.*, 936 P.2d 580, 582 (Colo. App. 1996), *as modified on denial of reh'g* (June 20, 1996), *aff'd and remanded*, 957 P.2d 1018 (Colo. 1998). In resolving an ambiguity, a court should follow the construction placed upon it by the parties themselves before the controversy arose. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 625 (Colo. App. 2004). "One of the most reliable indications of the true intent of the parties to a contract is their behavior and interpretation of the contract before a controversy arises." *Blecker v. Kofoed*, 672 P.2d 526, 528 (Colo. 1983).

In this case, the conduct of the parties prior to the time the dissolution controversy arose indicates that they intended that the decision to implant the embryos should only be made mutually and that the embryos should be thawed and discarded in the event of divorce. The parties clearly stated that the decision to implant an embryo had to be mutual. This finding is supported by Paragraph 1 of the "Embryo and Pre-Embryo Cryopreservation/Storage Consent" which states that: "Patient and partner agree that prior to FLC thawing Cryopreserved Material, both must sign a separate,

notarized consent expressly requesting and authorizing the thawing and transfer[1] of each attempt to achieving pregnancy." The intent of this paragraph is clear. Neither parent (especially the Petitioner who would not be the party receiving the implants or bearing the child) could unilaterally order the transfer and implantation of the embryos without the other parent's consent. If the Court were to now add a provision that grants the Respondent the unilateral right to implant an embryo without the Petitioner's consent, the Court would be creating a contract right that is clearly inconsistent with the other terms in the agreement. The Court cannot add terms to the contract that are inconsistent with the parties' prior conduct and expressed intent. "Courts may not rewrite clear and unambiguous contract provisions." *Bledsoe Land Co. LLLP v. Forest Oil Corp.*, 277 P.3d 838, 842 (Colo. App. 2011). The fact that the parties agreed to mutually approve any reproductive transfer or use of the embryos is a strong indication of their intent that Respondent should not now be awarded that exclusive right in the event of divorce.

The terms of the Disposition Plan further demonstrate this intent for a mutual agreement to utilize the embryos for reproductive purposes. Out of the seven options in the contract where inserting initials was required, the parties elected to thaw and discard the embryos six times: if the Respondent died, if the Respondent reached age 53 before implantation, if the

[1] In the Contract, "transfer" means implantation into the mother's womb.

contract was terminated, if the dissolution order failed to address the embryos, if the parties were determined not to be legally married, or if donation or research became an option. The parties consistently and jointly agreed that the embryos should be discarded. The only scenario in which the embryos would be preserved would be if Petitioner died, in which case Respondent would retain the authority to do as she wished with the frozen embryos. This makes sense considering that out of the two parties, only the Respondent could physically carry a child to term.

The fact that the marital dissolution section of the Disposition Plan specifically defaults to the thaw and discard option if the Court order fails to address the embryos further indicates that the parties intended that outcome in the event of divorce. On the 2013 contract the parties also added a handwritten notation to "Discard Only" in lieu of donation or research. The language used in a contract "must be examined and construed in harmony with the plain and generally accepted meaning of the words employed and by reference to all the parts and provisions of the agreement and the nature of the transaction which forms its subject matter." *Christmas v. Cooley*, 158 Colo. 297, 301, 406 P.2d 333, 335 (1965). Looking at all the terms of the contract and the Disposition Plan, it appears that the parties intended that if there was no mutual agreement as how the embryos should be used, even in the event of a divorce, the embryos should be thawed and discarded.

Accordingly, applying the contract approach to the embryos in question, the Court finds that the Contract provides that neither party has the right to unilaterally elect to thaw and transfer the embryos for purpose of producing offspring without the other's consent. The Court further finds that the parties intended that the embryos should be thawed and discarded in the event of divorce where a mutual resolution could not be achieved. Accordingly, the frozen embryos are awarded to the Petitioner pursuant to paragraph (iv), page 10 of the Disposition Plan for thawing and discarding.

E. Application of the Balancing Approach to the Specific Facts in this Case

In the event that the Contract terms analyzed above should ever be found to be unambiguous or interpreted in a manner inconsistent with the Court's current interpretation, the Court will also evaluate the embryo issue under the balancing approach The balancing approach recognizes that embryos can be treated as marital property and involves weighing the parties' respective rights and burdens to determine who is entitled to use embryos absent an agreement regarding disposition. "The equitable division of marital property is a matter within the trial court's discretion." *In re Marriage of Cardona & Castro*, 2014 CO 3, ¶ 9, 316 P.3d 626, 629. The Court must balance the competing equitable interests of the Petitioner's inherent privacy right not to conceive children against the Respondent's right to become a parent.

Petitioner has a "negative right" to avoid the burdens of genetic parenthood, including the right to avoid the financial burdens and other obligations that may be imposed as a result of being forced to become the genetic parent of a child he does not want to conceive. Even though Colorado does not statutorily impose support and other parental obligations on a non-consenting genetic parent, that does not mean Petitioner is totally free from financial risk. The Court has imposed a support order in this case. Under § 14-10-115(6)(b)(1), Respondent is provided a credit on the child support worksheet for any support obligation that she has for any child for whom she is legally responsible regardless of whether it is the biological child of her ex-spouse. If Respondent successfully has another child using the embryos, this credit would indirectly increase the amount of child support owed by Petitioner to Respondent even though Petitioner is not legally responsible for child support for the new child.

Petitioner may also be exposed to potential financial obligations for the new child under the laws of jurisdictions other than Colorado. For example, North Carolina, where Respondent is relocating, does not have statutory provisions similar to § 19-4-106(7)(a) and (b) or §§ 15-11-120(10) relieving Petitioner from legal and financial liability for non-consensual offspring from assisted reproduction.[2] If Respondent seeks to

[2] See N.C. Gen. Stat. Ann. § 49A-1: "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."

modify or enforce this Colorado Order in North Carolina, Petitioner has no assurance that under the UCCJEA, the North Carolina court might assume jurisdiction and impose support and other obligations on Petitioner under North Carolina law regardless of the fact that such financial obligations cannot be imposed under Colorado law.

Nor is the Court's concern for Petitioner's rights solely financial. Petitioner's rights are also implicated emotionally and psychologically. Even if Petitioner is not legally obligated to support the new child, there are moral and social obligations that cannot be ignored. The knowledge that Petitioner has another genetic child may carry all the weight and responsibility of parenthood regardless of whether our statutes and case law impose such responsibilities. Based on the Petitioner's courtroom demeanor and testimony, the Court finds that it is unlikely that he would simply shirk his genetic ties regardless of what the legal system might permit. Being a parent is more than just writing a check. It typically carries a host of social and psychological burdens. Petitioner should not have those burdens foisted upon him without his consent.

The Court must also consider the potential effects an unwanted genetic child might have on the best interests of the existing three children of the marriage. [redacted], [redacted] and [redacted] would have another sibling(s) if Respondent successfully implants the embryo(s) and gives birth. What would Petitioner's parenting time with the three existing children look like with a new child for whom he is not a legal parent?

If the parenting time under this Order was subsequently modified, this Court could only make such modification with regard to the three children. This could mean that Petitioner has increased parenting time with those three but none with the new child. This could adversely affect the three children's ties with their new biological sibling if Petitioner's parenting time in Colorado is increased. It also has the potential to adversely affect the children's relationship with Petitioner whom they might perceive as uncaring or heartless with respect to the new sibling. Similar problems could arise if Respondent were to unexpectedly die before the children are adults. Petitioner would have standing as a legal and biological parent for the three existing children but none with regard to the new child, (unless he willingly takes on that burden and the court allows it). The financial burdens and emotional and legal obligations that could potentially affect Petitioner with regard to his existing family and a potentially new genetic child are significant.

As for the Respondent's desire to procreate, one factor that courts consider is whether the allocation of the embryos to the mother would safeguard her the only chance at becoming a parent. *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1137 (2012) (Wife had no ability to procreate biologically without the use of the disputed pre-embryos due to cancer treatments). In situations where, because of disease or medical treatments, the mother has lost the ability to produce children through any means other than assisted reproduction, the mother's concerns assume substantial

significance. That is not the case here. Respondent has already successfully produced three children through assisted reproduction. This is not her only shot at becoming a parent; she is already a successful parent with three young children.

The Court also must consider the effect on the remaining siblings' best interests if Respondent were to be allocated the embryos and successfully give birth to another child. [redacted] suffers from [redacted] and requires significant care and monitoring. Respondent has chosen to relocate to North Carolina in part because of her concerns for his welfare. She also has young twins who require substantial care. Respondent is unemployed. She has no income. Petitioner would not be obligated to pay child support for the new child under Colorado law. Adding another child or possibly more (the in-vitro fertilization procedure has a high percentage of multiple-child births) would obviously strain her time, finances, and emotional wellbeing. Would [redacted] care suffer? Would the twins' care suffer? How will Respondent manage such a large family alone as single parent? The Court is significantly concerned about these issues, and Respondent provided no solid answers or evidence at the trial to address these concerns.

Accordingly, after balancing the above factors, the Court finds that the right of Petitioner not to be forced to become a genetic parent outweighs the Respondent's desire to preserve the embryos and possibly have more children. The Court makes this finding based on the real and potential harm to the Petitioner and the

Respondent, and the real and potential harm to the best interests of the three existing children of the marriage. The Court also factors in the interest of the Respondent to have more children, but does not accord that as much weight because of the fact that she already has three children and so will not be completely deprived of the opportunity to be a parent. The Court therefore awards the embryos [sic] the Petitioner to dispose of as he wishes under the balancing approach.

7. Attorneys' Fees

[Redacted]

The Court retains jurisdiction [sic] modify or amend these orders as appropriate and for all other purposes as provided by law.

SO ORDERED this 29th day of April, 2015.

BY THE COURT:

/s/ John F. Neiley
John F. Neiley
District Court Judge