

Inheritance of Frozen Reproductive Material

Elise N. McQuain

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Inheritance of Frozen Reproductive Material

ELISE N. MCQUAIN*

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* Associate Attorney, Goodwin & Goodwin, LLP, Charleston, West Virginia; Ohio Northern University, J.D., 2013; George Mason University, B.A. in Philosophy, B.A. in Dance, 2010. I would like to thank my husband for his unwavering support and belief in all that I could accomplish, especially when life was uncertain. I would also like to thank Professor John H. Martin for his persistent dedication in encouraging me to produce a better comment.

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I. INTRODUCTION

No obvious similarities exist between a soldier leaving for war, a woman seeking a graduate degree, a same sex couple, and a man diagnosed with cancer. Closer examination, however, reveals that these people may all have reasons to take advantage of cryopreservation. Cryopreservation can make conception a technological possibility when it is no longer possible naturally.¹ Many people cherish the idea of having children; however, a considerable number face situations that jeopardize that idea.²

Cryopreservation is the freezing of reproductive material and is used concurrently with artificial insemination to produce children.³ Questions regarding disposition of the frozen reproductive cells arise when a depositor of reproductive material dies and leaves behind the frozen cells.⁴ Courts have struggled to address this challenge, which technological advances have

1. See *infra* Part II.A-B.

2. See *infra* Part II.B.

3. See *infra* note 18; see also *Sperm Cryopreservation*, VAIF AND ANDROLOGY CENTER, <http://www.vaivf.com/sperm-cryopreservation.html> (last visited Oct. 17, 2013).

4. See generally *Hall v. Fertility Inst.*, 647 So. 2d 1348, 1349 (La. Ct. App. 1994); see also generally *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 287-91 (Cal. Ct. App. 1993).

created.⁵ Traditional estate solutions relating to property and money seem inadequate when addressing cells with the potential for human life.

This article argues that depositors have the fundamental right to control whether they procreate after death. The best method of protecting that right is to ensure that fertility clinics, sperm banks, loved ones, executors, and courts know and honor a depositor's wishes concerning the disposition of his or her reproductive material after death.⁶ The best way to effectuate that protection is to require all depositors to execute a "death clause document" at the fertility clinic or storage bank used for storage.⁷ A "death clause document" is an instrument that clearly states the wishes of the depositor in case the depositor dies while his or her reproductive material is still in storage.⁸ This article lays out the appropriate format and execution procedure for the death clause document in order to ensure that it will be recognized as a will substitute. Using a uniform document that addresses all of the concerns and contingencies of depositor death permits the fertility clinic or storage bank to easily ascertain and follow the individual's wishes regarding disposition of his or her reproductive cells.

Part II.A of this article sets out the basics about cryopreservation of sperm and eggs.⁹ Part II.B explains who uses cryopreservation, including some of the most common motivations for taking advantage of the technology.¹⁰ Part III discusses the current state of the law regarding reproductive material and the variety of approaches courts have used to address cases regarding disposition of reproductive material.¹¹ This Part demonstrates the need for certainty and uniformity regarding the handling of such innovative problems.¹² Part IV.A discusses the manner in which the current contracts that fertility clinics and sperm banks use differ greatly, and the inadequacies of those contracts.¹³ Part IV concludes with a discussion of the current federal regulations in place and argues that the federal government should adopt a law mandating closer regulation of Artificial Reproductive Technologies ("ART").¹⁴ Part V provides a sample death clause document and accompanying execution procedures.¹⁵ Part VI argues

5. See generally *Hall*, 647 So. 2d at 1352-53; *Hecht*, 20 Cal. Rptr. 2d at 287-91.

6. See *infra* Parts III.C, VI.C.

7. See *infra* notes 203.

8. See *infra* note 203.

9. See *infra* Part II.A.

10. See *infra* Part II.B.

11. See *infra* Part III.

12. See *infra* Part III.D.

13. See *infra* Part IV.A.

14. See *infra* Part IV.C.

15. See *infra* Part V.

that the death clause document meets all of the functions of the formalities of a will and should be treated like other will substitutes.¹⁶

II. THE BASICS ABOUT CRYOPRESERVATION OF REPRODUCTIVE MATERIAL

In order to understand the problem this article addresses, it is important to be familiar with the science of cryopreservation, the mechanics of the procedure, and the motivations that cause people to use cryopreservation. This section briefly explains the history and technology of cryopreservation.

A. *The Procedure and the Science*

i. *Artificial Insemination*

Artificial insemination has existed for over 200 years.¹⁷ Artificial insemination is the “introduction of semen into the uterus or oviduct by other than natural means.”¹⁸ In 1779, Lazzaro Spallanzani, an Italian priest and physiologist, conducted the first successful procedure.¹⁹ He inseminated animals, including dogs, frogs, and fish.²⁰ Eleven years later, a Scottish scientist recorded the first successful insemination of a human female.²¹ From this technology, cryopreservation developed to preserve reproductive material beyond its initial period of viability outside the body.²²

ii. *Cryopreservation of Sperm Cells*

The freezing of human sperm cells is a relatively new practice when compared to the history of artificial insemination.²³ “It is believed that Spallanzani was the first to” record that sperm becomes motionless when cooled.²⁴ Virtually no one explored his observation until the twentieth

16. See *infra* Part VI.A.

17. Sonia Fader, *Sperm Banking: A Reproductive History*, CALIFORNIA CRYOBANK, <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History/> (last visited Jan. 2, 2014).

18. *Artificial Insemination*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/artificial%20insemination> (last visited Jan. 2, 2014).

19. Fader, *supra* note 17. Spallanzani posited that animal and human reproduction was not akin to plant growth and that the male seed was not simply placed in the soil of the female to grow. *Id.* Instead, he hypothesized that there must be physical contact between the sperm, the male contribution, and the egg, the female contribution. *Id.*

20. *Id.*

21. *Id.*

22. See *infra* notes 26-39 and accompanying text.

23. See Fader, *supra* note 17; see also WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 103 (2d ed. 1976); see also MARK S. FRANKEL, THE PUBLIC POLICY DIMENSIONS OF ARTIFICIAL INSEMINATION AND HUMAN-SEMEN CRYOBANKING 4, 9 (1973).

24. FRANKEL, *supra* note 23, at 4; Fader, *supra* note 17.

century.²⁵ Cryopreservation means “preservation (as of cells) by subjection to extremely low temperatures.”²⁶ This involves freezing the reproductive cells in order to preserve the cells for an extended period of time.²⁷ In 1938, scientists began exploring the effects of freezing on sperm cells.²⁸ Scientists attempted a variety of techniques during the subsequent fifteen years, a time of experimentation in the field.²⁹ The first successful insemination of a human female with frozen sperm was in 1953.³⁰

Many initially considered the technology “contrary to public policy and good morals” because it raised a number of ethical and religious questions.³¹ As a result, the technology was not immediately popular.³² The first commercial bank for frozen sperm was not established until 1970.³³ In 1976, only about twenty clinics and private physicians used sperm banks, and only approximately 600 pregnancies resulted from the use of frozen sperm cells.³⁴ However, over the next eleven years, the practice of artificial insemination grew quickly. In 1987, approximately 172,000 women took advantage of artificial insemination technology provided by 11,000 doctors.³⁵

Naturally, all sperm cryopreservation must begin with collection of sperm. The below descriptions presume that the sperm is available outside the body. The current technology for cryopreservation uses liquid nitrogen.³⁶ The samples are frozen and immersed in liquid nitrogen at -196 degrees Celsius.³⁷ Liquid nitrogen does not require a power source, thereby

25. See FRANKEL, *supra* note 23, at 4; Fader, *supra* note 17.

26. *Cryopreservation*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/cryopreservation> (last visited Jan. 2, 2014).

27. See *id.*

28. Fader, *supra* note 17.

29. See JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 550 (2006); FRANKEL, *supra* note 23, at 4-5; Fader, *supra* note 17.

30. DAAR, *supra* note 29, at 550; Fader, *supra* note 17.

31. Fader, *supra* note 17 (explaining that in 1954 the Supreme Court of Cook County ruled that donor insemination, which is insemination with sperm other than that of the woman’s husband, was “contrary to public policy and good morals, and considered adultery on the mother’s part.” (quoting *Doornbos v. Doornbos*, 139 N.E.2d 844 (Ill. App. Ct. 1956))). See generally FINEGOLD, *supra* note 23, at 79-89 (discussing the views of various religions on artificial insemination). The majority of the religious views previously against artificial insemination involved the manner of extracting sperm from the man. *Id.* at 79. Any sexual act other than natural intercourse was suspect, so theological debates concentrated on the methods used by donors to provide the sperm. *Id.* at 79-89.

32. Fader, *supra* note 17.

33. FRANKEL, *supra* note 23, at 9.

34. FINEGOLD, *supra* note 23, at 103-04.

35. Fader, *supra* note 17.

36. See *infra* note 37.

37. Marlea Di Santo et al., *Human Sperm Cryopreservation: Update on Techniques, Effect on DNA Integrity, and Implications for ART*, ADVANCES IN UROLOGY 2 (2011); Stacey Sutton, Note, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN’S L. REV. 857, 869 (1999); *Sperm Banking & Cryopreservation*, SPERM BANK OF CALIFORNIA, <http://www.spermbankcalifornia.com/bank-sperm.html> (last visited Dec. 29, 2012). J.K. Sherman first

decreasing the risk that the samples will unintentionally thaw as a result of power outage or other electrical malfunctions.³⁸ Current research reveals that sperm banks can store sperm in this manner for approximately ten years without damage.³⁹

Nevertheless, risks exist that cryopreservation will detrimentally affect the sperm.⁴⁰ Ice crystals formed during the freezing process pose the greatest risk, as they can negatively affect cell functions and structures and damage the sperm.⁴¹ However, a proper cooling rate can decrease the risk of such damage.⁴²

One of the least understood risks of cryopreservation is the danger to DNA.⁴³ Studies have been inconsistent in projecting whether the freezing and cooling processes affect the sperm's DNA.⁴⁴ As most individuals freeze sperm with the intention to preserve the opportunity to become a parent, the integrity of the DNA is an extremely important and valuable consideration.⁴⁵ This unknown risk is a drawback of cryopreservation;⁴⁶ however, when an individual is faced with losing his fertility, this risk is willingly assumed.⁴⁷ Despite the common nature of the procedure, more research is necessary to better understand the risks.

Notwithstanding the risks associated with the technology, individuals continue to use cryopreservation.⁴⁸ The value of cryopreservation is in

introduced this procedure in the 1960s. FRANKEL, *supra* note 23, at 5; Di Santo et al., *supra* note 37, at 1. There are two traditional ways to freeze sperm cells. *Id.* at 2; *Sperm Freezing*, TENNESSEE REPRODUCTIVE MEDICINE, <http://trmbaby.com/for-patients/library/preservation/sperm-freezing> (last visited Jan. 2, 2014). The first technique for freezing sperm cells is called slow freezing. Di Santo et al., *supra* note 37, at 2; *Sperm Freezing*, *supra* note 37. This involves freezing the sperm in two or three progressive steps over a two to four hour time period. Di Santo et al., *supra* note 37, at 2; *Sperm Freezing*, *supra* note 37. The second technique is rapid freezing. Di Santo et al., *supra* note 37, at 2; *Sperm Freezing*, *supra* note 37. That procedure involves freezing the samples in nitrogen vapors for eight to ten minutes and then immediately placing them in the liquid nitrogen. Di Santo et al., *supra* note 37, at 2; *Sperm Freezing*, *supra* note 37.

38. See *Sperm Banking & Cryopreservation*, *supra* note 37.

39. Sutton, *supra* note 37, at 869.

40. Di Santo et al., *supra* note 37, at 3-5.

41. *Id.* at 3-4; *Sperm Freezing*, *supra* note 37. The freezing process can negatively affect the cell's ability to move materials through cell membranes, change the volume of cell structures, and move water through the cell at an unnatural rate. Di Santo et al., *supra* note 37, at 4.

42. See Di Santo et al., *supra* note 37, at 4. Too rapid or too slow cooling rates can be equally damaging because both cause water flow in and around the cells that is not typical. *Id.*

43. See *id.*

44. *Id.*

45. See *id.* at 1, 4.

46. See *id.* at 4-5.

47. See Daniel H. Williams, IV, *Sperm Banking and the Cancer Patient*, 2 THERAPEUTIC ADVANCES IN UROLOGY 19, 24 (2010) (citing K. Saito et al., *Sperm Cryopreservation Before Cancer Chemotherapy Helps in the Emotional Battle Against Cancer*, 104 CANCER 521, 521-24 (2005)).

48. See *Sperm Banks - Where I Can Find A Sperm Bank?*, CO-PARENT MATCH, <http://www.coparentmatch.com/sperm-banks.aspx> (last visited Jan. 2, 2014).

allowing frozen cells to survive the individual who deposited the material.⁴⁹ Hence, as individuals continue to take advantage of cryopreservation, the issue of the inheritance of the frozen sperm will arise with greater frequency as those persons die, leaving behind their genetic material.⁵⁰

iii. Cryopreservation of eggs

The freezing of eggs, the female reproductive cells, is an emerging technology compared to the freezing of sperm.⁵¹ This risk of damage during freezing increases greatly with eggs due to the significant amount of water contained in the female cells.⁵² The procedure to extract and freeze eggs is more complex than extraction and freezing of sperm.⁵³ Drugs prompt the woman's body to produce multiple eggs at once, and then the eggs are extracted from the ovaries with a needle.⁵⁴ The eggs are dehydrated and bathed in a solution to prevent freezing.⁵⁵ Then the eggs are frozen and stored in liquid nitrogen.⁵⁶ Due to these challenges, the technology is less developed, less common, and considerably more expensive than the freezing of sperm.⁵⁷ The combination of the drugs used, the procedures involved, and the novelty of the technology results in a price tag of approximately \$15,000.⁵⁸

The infancy of the research leaves uncertainties concerning the risks to the DNA, the length of time that eggs can safely remain frozen, and the percentage of successful pregnancies using the technology.⁵⁹ Although an American egg bank heralds the present technology as allowing women to

49. See *supra* Part I.

50. See generally Helen Weathers, *How Dare another Woman Try to have My Dead Husband's Baby? Widow Reveals Her Extraordinary Battle over Frozen Sperm*, MAIL ONLINE, <http://www.dailymail.co.uk/femail/article-1270143/Millionaires-widow-reveals-extraordinary-battle-frozen-sperm.html> (last visited Jan. 2, 2014).

51. DAAR, *supra* note 29, at 568; see also Sally Wadyka, *For Women Worried about Fertility, Egg Bank is a New Option*, N.Y. TIMES (Sept. 21, 2004), http://www.nytimes.com/2004/09/21/health/21egg.html?_r=0; *Egg Freezing*, EXTEND FERTILITY, <http://www.extendfertility.com/egg-freezing.htm> (last visited Jan. 2, 2014).

52. DAAR, *supra* note 29, at 568; Wadyka, *supra* note 51; *Egg Freezing*, *supra* note 51.

53. See *infra* notes 54-56 and accompanying text.

54. *Egg Freezing*, *supra* note 51.

55. *Id.*

56. *Id.* Just as with sperm cells, the eggs can be frozen using a rapid freezing technique or a slow freezing technique. *Id.*; see *supra* note 37.

57. See *infra* notes 58-62 and accompany text.

58. Wadyka, *supra* note 51. This is in contrast to cryopreservation of sperm cells, which costs considerably less since extracting the cells is considerably less difficult and the technology is further developed. See *How Much Does it Cost to Freeze Sperm?*, SPERM CENTER (Feb. 22, 2011), <http://www.spermcenter.com/content/how-much-does-it-cost-freeze-sperm>; *Parenthood Options: Men*, FERTILE HOPE, <http://www.fertilehope.org/learn-more/cancer-and-fertility-info/parenthood-options-men.cfm> (last visited Jan. 2, 2014); *List of Available Services and Fees*, SPERM BANK OF CALIFORNIA, <http://www.spermbankcalifornia.com/sperm-bank-cost.html> (last updated Jan. 2, 2014).

59. See DAAR, *supra* note 29, at 568-69; Sutton, *supra* note 37, at 869; Wadyka, *supra* note 51.

“slow down their biological clocks,”⁶⁰ the American Society for Reproductive Medicine (“ASRM”) views the technology with skepticism.⁶¹ The ASRM stated, “At the present time, oocyte cryopreservation should not be marketed or offered as a means to defer reproductive aging.”⁶²

However, research will continue and cryopreservation of eggs will become more common.⁶³ For this reason, the problem this article addresses will only increase and the proposed solution will become more relevant and important as the technology advances.

B. Who Does It and Why?

There are a number of reasons individuals may wish to preserve their reproductive material.⁶⁴ Such reasons often arise in circumstances that may jeopardize a person’s ability to become a parent.⁶⁵ Cryopreservation evidences a person’s desire to preserve his or her choice to become a parent either during life or after death.⁶⁶

Anticipated adverse effects of medical treatments are a primary reason for cryopreservation.⁶⁷ Treatment or surgery may pose a threat to fertility.⁶⁸ Chemotherapy and radiation can result in testicular failure or ejaculatory dysfunction in men and can severely harm ovarian function in women.⁶⁹ Cryopreservation allows the individual to preserve reproductive cells before treatment can damage them.⁷⁰ Diseases, such as diabetes and autoimmune disorders and their corresponding treatments, likewise may have negative, permanent effects on fertility.⁷¹ Some individuals freeze reproductive cells when faced with a disease with a high mortality rate.⁷² Cryopreservation

60. *Egg Freezing*, *supra* note 51.

61. DAAR, *supra* note 29, at 568-69; Wadyka, *supra* note 51.

62. Wadyka, *supra* note 51; *see also* Samantha Pfeifer et al., *Mature Oocyte Cryopreservation: A Guideline*, 99 AM. SOC’Y FOR REPROD. MED. 37, 41 (2013).

63. *See* DAAR, *supra* note 29, at 568-69; Wadyka, *supra* note 51; *Egg Freezing*, *supra* note 51.

64. *See infra* Part I.B.

65. *See infra* Part I.B.

66. *See infra* Part I.B.

67. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE* 376-77 (2d ed. 2011); Di Santo et al., *supra* note 37, at 1; *Sperm Banking & Cryopreservation*, *supra* note 37.

68. *See* KINDREGAN & MCBRIEN, *supra* note 67, at 376-77; *Fertility Preservation for Cancer Patients*, PACIFIC FERTILITY CENTER, <http://www.pacificfertilitycenter.com/treatment-care/fertility-preservation-cancer-patients> (last visited Jan. 2, 2014); *Sperm Banking & Cryopreservation*, *supra* note 37; *Sperm Freezing*, *supra* note 37.

69. Di Santo et al., *supra* note 37, at 1; *Fertility Preservation for Cancer Patients*, *supra* note 68; *Sperm Freezing*, *supra* note 37.

70. KINDREGAN & MCBRIEN, *supra* note 67, at 377; Di Santo et al., *supra* note 37, at 1; *Sperm Freezing*, *supra* note 37.

71. Di Santo et al., *supra* note 37, at 1.

72. *See id.*

allows a depositor to give a spouse or partner the gift of having children with the depositor even after he or she is dead.⁷³

Another common reason for cryopreservation is employment in a profession that carries a risk of repeated exposure to radiation or dangerous chemicals that may jeopardize fertility.⁷⁴ Similarly, military individuals and first responders use cryopreservation to counter the greater risk of bodily harm such jobs present.⁷⁵ Also, military members and first responders face a greater risk of death, so cryopreservation permits a spouse or partner to conceive the depositor's child after the death of the depositor.⁷⁶ Further, since military personnel are often separated from their partners for long periods of time, cryopreservation allows a couple to conceive on their own time frame despite the inability to be together physically.⁷⁷

Also, cryopreservation can help a same sex couple have a child.⁷⁸ As same sex couples are unable to reproduce naturally, cryopreservation expands the options available to them.⁷⁹ For a female couple, cryopreservation allows the use of a designated donor who freezes his sperm for later use by the couple.⁸⁰ Both partners in a male couple may freeze their sperm and allow the extensive testing done before storage determine the quality of both samples to determine the healthiest sperm for use at a later date.⁸¹ Cryopreservation allows same sex couples to reproduce without the constraints of sperm and egg viability outside the body.⁸²

Despite the skepticism in the medical field concerning the viability of egg cryopreservation,⁸³ a woman may freeze her eggs in an attempt to extend her reproductive time.⁸⁴ A woman is born with her lifetime supply

73. See *supra* Part I.A.

74. Di Santo et al., *supra* note 37, at 1-2.

75. See *id.* at 1; *Sperm Banking & Cryopreservation*, *supra* note 37. Some sperm banks and fertility clinics also offer a discount to military personnel and first responders. *War-Bound Soldiers Urged to Bank Sperm before Deployment: California Cryobank Offers Discounted Semen Storage and Post-Mortem Retrieval Programs for All Military Men and First Responders*, CALIFORNIA CRYOBANK (Nov. 3, 2008), <http://www.cryobank.com/About-Us/Press-Releases/War-Bound-Soldiers-Urged-To-Bank-Sperm-Before-Deployment/> [hereinafter *War-Bound Soldiers*].

76. See *War-Bound Soldiers*, *supra* note 75.

77. See *id.*

78. *Cryopreservation Services for Same Sex Couples*, IVF ORANGE (Sept. 6, 2012), <http://www.ivforange.com/cryopreservation-services-for-same-sex-couples/> [hereinafter *Same Sex Couples*].

79. *Id.*

80. *Id.*

81. See *id.*

82. See *id.*

83. See *supra* notes 59-62 and accompanying text.

84. *Egg Freezing*, *supra* note 51; *Fertility Preservation: Egg and Embryo Freezing, Preservation and Thawing*, PACIFIC FERTILITY CENTER, <http://www.pacificfertilitycenter.com/treatment-care/fertility-preservation-egg-freezing> (last visited Jan. 2, 2014); *Why Freeze Eggs? Importance of the Egg*, EXTEND FERTILITY, <http://www.extendfertility.com/why/importance.php> (last visited Jan. 3, 2012) [hereinafter *Importance of the Egg*]

of eggs, which diminishes in quality and quantity as she ages.⁸⁵ A woman generally has no eggs left by her mid-forties; therefore, she is no longer able to conceive naturally.⁸⁶ Freezing a woman's eggs at an earlier date preserves the quality of those eggs so that a doctor can implant them when no viable eggs are left in the woman's body.⁸⁷ The prospect of slowing down one's biological clock appeals to women who want to pursue advanced degrees and careers before starting a family.⁸⁸

The prior discussion shows clearly that a variety of individuals in a number of different situations choose cryopreservation.⁸⁹ This diversity makes it imperative that protections are in place to honor the depositor's intentions.⁹⁰ There may be a stronger emotional appeal to protect the wishes of a soldier going to war, but all depositors of reproductive material should receive that protection.⁹¹ People use the technology to preserve the ability to have a family.⁹² The importance of that objective places a significant responsibility on banks and clinics involved in cryopreservation.⁹³ They play a significant role in a fundamental human desire.⁹⁴ Fulfillment of that role in a responsible manner demands the greatest protections and assurances.⁹⁵ There must be safeguards to ensure that sperm banks and fertility clinics follow the depositor's wishes after death.

III. THE CURRENT LAW

A. *Property v. Not Property*

The legal status of frozen sperm and eggs is largely undeveloped.⁹⁶ The depositor of reproductive material clearly has the right to access the material if it was deposited for personal use, and all contractual obligations are met.⁹⁷ Whether that right translates into a property right is far less certain.⁹⁸

85. *Fertility Preservation*, *supra* note 84; *Importance of the Egg*, *supra* note 84.

86. *Fertility Preservation*, *supra* note 84; *see also Importance of the Egg*, *supra* note 84.

87. *See Fertility Preservation*, *supra* note 84.

88. *Why Freeze Eggs? Freezing Eggs for Healthy Pregnancies Later in Life: Slow Down the Biological Clock*, EXTEND FERTILITY, <http://www.extendfertility.com/why/> (last visited Jan. 2, 2014) [hereinafter *Freezing Eggs for Healthy Pregnancies*].

89. *See supra* Part I.B.

90. *See supra* Part I.B.

91. *See supra* Part I.B.

92. *See supra* notes 67-88 and accompanying text.

93. *See Fertility Preservation*, *supra* note 84.

94. *See* Steven Reiss, *Multifaceted Nature of Intrinsic Motivation: The Theory of 16 Basic Desires*, 8 REV. GEN. PSYCHOL. 179, 186-87 (2004).

95. *See Fertility Preservation*, *supra* note 84.

96. *See* KINDREGAN & MCBRIEN, *supra* note 67, at 82-83.

97. *Id.* at 82.

98. *See infra* Part II.

Property rights include the “unrestricted right to [the object’s] use, enjoyment and disposition.”⁹⁹ A court’s view of the status of reproductive material significantly impacts its decisions on cases involving transmission of the right to access and use the material.¹⁰⁰ *Moore v. Regents of the University of California*¹⁰¹ and *Davis v. Davis*¹⁰² demonstrate the development of the current, although uncertain, view on the legal status of reproductive material.¹⁰³

i. The Moore Case

John Moore was diagnosed with hairy-cell leukemia.¹⁰⁴ Moore’s doctor drew several blood samples and other bodily substances, and removed his spleen.¹⁰⁵ The doctor used the samples for research and developed a cell line that was commercialized.¹⁰⁶ Moore sued the doctor for conversion.¹⁰⁷ Conversion requires the individual bringing suit to have a proprietary interest in the subject material.¹⁰⁸

The Supreme Court of California held that Moore did not have a property right sufficient to support a conversion claim nor should such a right be extended.¹⁰⁹ The court reasoned that property rights did not cover the body or bodily substances.¹¹⁰ The court considered the existing law and a number of public policy issues in making its decision.¹¹¹ The case supports the general principle that body parts are not property.¹¹² However, *Moore* did not address cells with the potential to create human life,¹¹³ which hold a unique position within the law.¹¹⁴

99. Erik B. Seeney, Note, *Moore 10 Years Later – Still Trying to Fill the Gap: Creating a Personal Property Right in Genetic Material*, 32 NEW ENG. L. REV. 1131, 1146 (1998).

100. See *infra* Part II.

101. 793 P.2d 479, 479 (Cal. 1990).

102. 842 S.W.2d 588, 589 (Tenn. 1992).

103. See *infra* Part II.A.

104. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d at 479.

105. *Id.* at 481.

106. *Id.*

107. *Id.* at 487.

108. *Id.*

109. *Moore*, 793 P.2d at 488.

110. *Id.* at 489.

111. *Id.* at 488-90.

112. KINDREGAN & MCBRIEN, *supra* note 67, at 83. See generally *Moore*, 793 P.2d at 487, 489.

113. See generally *Moore*, 793 P.2d 479.

114. See *infra* notes 118-122 and accompanying text.

ii. The Davis Case

During marriage, Junior Lewis Davis and Mary Sue Davis froze a number of their embryos.¹¹⁵ Upon a decision to divorce, they disagreed over possession or “custody” of the embryos.¹¹⁶ The court considered whether the embryos were “persons” or “property.”¹¹⁷ The court concluded that the embryos were neither persons nor property, but an interim category.¹¹⁸ The court stated that the embryos deserved “special respect because of their potential for human life.”¹¹⁹ The court held that the couple did not have a true property interest in the embryos, but instead possessed “an interest in the nature of ownership” regarding the disposition of the embryos.¹²⁰

This case represents the proposition that genetic materials with reproductive capabilities deserve special treatment different than the treatment of other body parts.¹²¹ The materials’ potential for human life played a large role in the decision of the court.¹²² However, due to the limited case law, there is no established precedent.¹²³

B. Cases Addressing Disposition of Reproductive Material and Applicability of Clinic Contracts

There are few cases that deal with the exact topic of this article.¹²⁴ However, a number of courts have addressed the disposition of embryos in light of fertility clinic contracts.¹²⁵ The diverse ways in which courts interpret fertility clinic contracts in disputes over the disposition of reproductive material demonstrates the need for uniformity.¹²⁶ A person should be able to enter into a contract with a reasonable expectation of how a court will interpret that contract should challenges arise.¹²⁷ However, no

115. *Davis v. Davis*, 842 S.W.2d at 589. Embryos involve the genetic material of two individuals. *See infra* notes 355-357 and accompanying text. For this reason, the relevancy of the *Davis* case to this article is limited.

116. *Davis*, 842 S.W.2d at 589.

117. *Id.* at 594 (citing *Hamby v. McDaniel* 559 S.W.2d 774 (Tenn. 1977)).

118. *Id.* at 597.

119. *Id.*

120. *Id.*

121. *Compare Moore*, 793 P.2d 479, with *Davis*, 842 S.W.2d 588. *See also* Seeney, *supra* note 99, at 1168-69.

122. *See generally Davis*, 842 S.W.2d at 596. *See also* Seeney, *supra* note 99, at 1168-69. Similarly, frozen sperm or eggs, with the intervention of artificial reproduction technology, possess the same potential for human life.

123. KINDREGAN & MCBRIEN, *supra* note 67, at 83.

124. These disputes arise in regard to divorce actions. *See infra* notes 131, 134, 137.

125. *See infra* Part II.B.

126. *See infra* Part II.B.

127. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

such certainty currently exists, because courts treat similar clinic contracts differently.¹²⁸ The following is a brief sampling of approaches courts have used in interpreting clinic contracts.¹²⁹

i. The Contractual Approach

One approach presumes the validity of the contract between the depositor and the clinic.¹³⁰ A number of states have adopted the contractual approach.¹³¹ The approach honors the contract unless the circumstances surrounding the contract, the acts of the parties after signing the contract, and the reasonableness of the proffered interpretations warrant a conflicting interpretation.¹³²

ii. The Balancing Test

The balancing test involves the court weighing the various interests of the parties.¹³³ Courts typically side with the party wishing to avoid procreation in order to avoid forcing someone to become a parent.¹³⁴ This approach gives the depositor the freedom to change his or her mind about the disposition of his or her reproductive material, regardless of the clinic contract provisions.¹³⁵

iii. Public Policy Perspective

Under this approach, courts place the greatest weight on public policy considerations when determining a dispute concerning disposition of reproductive material.¹³⁶ A Massachusetts decision provides a clear example of this approach.¹³⁷ In a divorce action, the court denied the decedent's wife access to embryos despite the fact that the fertility clinic contract gave her the authority to determine disposition.¹³⁸ The court identified problems with the contract and its execution.¹³⁹ However, the

128. *See infra* Part II.B.

129. *See infra* notes 130-141 and accompanying text.

130. KINDREGAN & MCBRIEN, *supra* note 67, at 354.

131. *See In re Marriage of Litowitz*, 48 P.3d 261 (Wash. 2002), *cert. denied*, 537 U.S. 1191 (2003); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (pointing out that “[e]xplicit agreements avoid costly litigation in business transactions.”).

132. *See Litowitz*, 48 P.3d at 268. *See Kass*, 696 N.E.2d at 180-81 (quoting *Atwater & Co. v. Panama R.R. Co.*, 159 N.E. 418, 419 (1927)).

133. *Litowitz*, 48 P.3d at 265 (quoting *Davis*, 842 S.W.2d at 604).

134. *See, e.g., J.B. v. M.B.*, 783 A.2d 707, 716-17 (N.J. 2001) (quoting *Davis*, 842 S.W.2d at 604); *see also* KINDREGAN & MCBRIEN, *supra* note 67, at 355.

135. KINDREGAN & MCBRIEN, *supra* note 67, at 355. *See J.B.*, 783 A.2d at 719.

136. *See* KINDREGAN & MCBRIEN, *supra* note 67, at 355.

137. *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1058-59 (Mass. 2000).

138. *Id.* at 1059.

139. *Id.* at 1056-57.

court held that it would not enforce the contract for public policy reasons, even if it had been executed properly.¹⁴⁰ The court concluded that forced procreation and judicial involvement in intimate marital relations were against public policy.¹⁴¹

Individuals attempting to anticipate how a court will interpret a fertility clinic contract face uncertainty, as evidenced by the approaches discussed above.¹⁴² Each approach represents a distinct method that can produce widely differing results from extremely similar facts.¹⁴³

C. Cases Dealing With Disposition of Reproductive Material From a Single Donor

One appellate court decision in Louisiana centered around the topic of this paper.¹⁴⁴ A California case, with its complexity and number of appeals, demonstrates the uncertainty that courts face in addressing this issue.¹⁴⁵ Since cryopreservation is still relatively new, only these few cases have come before the courts.¹⁴⁶ However, if growth continues in the field of cryopreservation, it is reasonable to anticipate more cases addressing this issue. The particular facts of these two cases reveal why clarity and uniformity are important for the ease and consistency of future dispositions of reproductive material.¹⁴⁷

i. A Louisiana Case

Barry S. Hall's doctor diagnosed him cancer.¹⁴⁸ Before undergoing treatment, Hall deposited his sperm, because chemotherapy could harm his fertility.¹⁴⁹ Hall "executed an Act of Donation" that "purported to convey his interest in" the frozen sperm to his girlfriend, Christine C. St. John.¹⁵⁰ After Hall's death, his family asked the court to order the samples destroyed.¹⁵¹ St. John sought to have the samples released to her, so she could conceive a child.¹⁵² The trial court granted a preliminary injunction preventing the release of the sperm until the court could examine the Act of

140. *Id.* at 1057-58.

141. *Id.* at 1057-58.

142. *See supra* Part II.B.i-iii.

143. *See supra* Part II.B.i-iii.

144. *See infra* Part II.C.i.

145. *See infra* Part II.C.ii.

146. *See infra* Part II.C.i-ii.

147. *See infra* Part II.C.

148. *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348, 1349 (La. App. 1994).

149. *Id.*

150. *Id.* at 1350.

151. *Id.*

152. *See id.* at 1349.

Donation.¹⁵³ The appellate court upheld the trial court's decision to grant the preliminary injunction.¹⁵⁴ There were no further proceedings.¹⁵⁵

If the court had reached the merits of the case, it would have faced uncertainty.¹⁵⁶ Without a uniform document that controlled the disposition of the sperm, the court would be forced to examine the Act of Donation, a number of affidavits, and multiple depositions in order to piece together Hall's intentions.¹⁵⁷

ii. A California Case

William E. Kane committed suicide.¹⁵⁸ He left behind a long-term girlfriend, two college-aged children from a previous marriage, and fifteen vials of his frozen sperm at California Cryobank, Inc.¹⁵⁹ The storage agreement with the sperm bank stated that upon Kane's death, the executor of his estate would decide whether to continue storage of the specimens or to release them.¹⁶⁰ The contract between Kane and the clinic did not specify in more detail what was to be done with the sperm.¹⁶¹

Kane's will, executed shortly before his death, stated that the stored sperm should go to his girlfriend, Deborah Hecht.¹⁶² The will further stated that Kane intended for Hecht to be able to use the sperm to become pregnant, if she so desired.¹⁶³ After Kane's death, Hecht entered multiple settlement agreements with Kane's surviving children, but disagreements remained regarding treatment of the frozen sperm.¹⁶⁴ The settlement agreement gave Hecht twenty percent of the estate, but did not specifically mention the sperm.¹⁶⁵ The surviving children sought destruction of the sperm.¹⁶⁶ The children argued that it would "prevent the birth of children who [would] never know their father . . . and would 'prevent additional emotional, psychological and financial stress on'" the surviving family members.¹⁶⁷ The trial court ordered the sperm destroyed, but stayed the

153. *Hall*, 647 So. 2d at 1350.

154. *Id.* at 1351.

155. *See generally id.* (no appeal filed).

156. *See supra* Part II.C.i.

157. *See Hall*, 647 So. 2d at 1350-51.

158. *Hecht*, 20 Cal. Rptr. 2d at 276.

159. *Id.*

160. *Id.*

161. *See id.*

162. *Id.*

163. *Hecht*, 20 Cal. Rptr. 2d at 276-77.

164. *Id.* at 277-79.

165. *See id.* at 277-79.

166. *Id.* at 279.

167. *Id.*

order for sixty days to allow Hecht's appeal.¹⁶⁸ The trial judge indicated a need for appellate court guidance on the issue.¹⁶⁹ The judge expressed his concerns, stating, "'science has run ahead of common law.'"¹⁷⁰

On appeal, the court vacated the trial court's order, denied the motion for destruction of the sperm, and remanded the case for further proceedings.¹⁷¹ The appellate court acknowledged the uncertainty of the law and lack of statutory guidance on the issue.¹⁷² The appellate court ultimately held that Kane had a property right in his frozen sperm; therefore, the sperm was part of his estate.¹⁷³ The appellate court specified that the holding did not address whether the will or contract were valid and enforceable ways to dispose of the property.¹⁷⁴ The Supreme Court of California denied a petition for review.¹⁷⁵

On remand, the probate judge determined that Hecht was entitled to at least twenty percent of the sperm in accordance with the property settlement.¹⁷⁶ The court ordered three of the fifteen vials distributed immediately to Hecht.¹⁷⁷ Upon appeal, the court upheld the order of the probate court, and ordered the sperm bank to distribute the three vials to Hecht.¹⁷⁸

The litigation continued regarding the remaining twelve vials of semen.¹⁷⁹ The probate court denied Hecht's petition for the twelve vials based upon the settlement agreement.¹⁸⁰ The appellate court held that sperm was unique material, which was not subject to the property settlement.¹⁸¹ The appellate court reasoned that Kane's clear intent was for Hecht to have the sperm and his intent must control.¹⁸² The appellate court considered the right to procreate a fundamental right; therefore, no one, not even Hecht, could contract or sell that right away through a settlement decision.¹⁸³

168. *Hecht*, 20 Cal. Rptr. 2d at 279-80; Los Angeles Daily News, *Dead Man's Sperm Ordered Destroyed but Stay Issued So Man's Lover Can Appeal*, THE BALTIMORE SUN (Dec. 10, 1992), http://articles.baltimoresun.com/1992-12-10/news/1992345222_1_hecht-sperm-kane [hereinafter *Dead Man's Sperm*].

169. *See Dead Man's Sperm*, *supra* note 168.

170. *Id.*

171. *Hecht*, 20 Cal. Rptr. 2d at 291.

172. *See id.* at 281-82.

173. *Id.* at 283.

174. *Id.*

175. *Hecht v. Superior Court*, 1993 Cal. LEXIS 4768, 1 (1993).

176. *Kane v. Superior Court*, 44 Cal. Rptr. 2d 578, 580 (Cal. Ct. App. 1995).

177. *Id.*

178. *See id.* at 580, 584.

179. *See generally Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996).

180. *Id.* at 225.

181. *Id.* at 226-27.

182. *Id.* at 226.

183. *Id.* at 226-27.

The last appellate decision seems to offer a promising clarity on this issue; however, the Supreme Court of California ordered that the decision not be published.¹⁸⁴ As a result, the case is “not generally citable as precedent.”¹⁸⁵ No other American jurisdiction has reported a case that addresses this issue.¹⁸⁶

iii. A French Case

Examining how other countries handle issues may prove helpful when American precedent is lacking. Unfortunately, there is not an abundance of established foreign law addressing this issue either.¹⁸⁷ The first case to address this issue reveals the need for guidance and certainty.¹⁸⁸

The relevant case took place in France in 1984.¹⁸⁹ A French man deposited his sperm with a government run sperm research and conservation center after he was diagnosed with cancer.¹⁹⁰ The court was exceedingly concerned with the deceased’s intent for the sperm; unfortunately, he left no clear instructions regarding disposition.¹⁹¹ The evidence established that the deceased intended for his widow to use the sperm to become pregnant after he died, so the court ordered the sperm distributed to her.¹⁹² The court did not have a conclusive way to determine the intent of the depositor, and had to examine an array of evidence in order to discern the wishes of a dead man.¹⁹³

D. Summary

The above examination of existing law makes it clear that certainty is needed so depositors know how to leave clear evidence regarding their intentions for their reproductive material.¹⁹⁴ The current state of the law leaves a court with a variety of evidence (fertility clinic contracts, wills, acts of donation, and testimony) with which to discern the intent of the deceased depositor.¹⁹⁵ The lack of a single method of interpretation and reliable

184. See *Hecht v. Superior Court*, 1997 Cal. LEXIS 131, 1 (1997).

185. *Opinions*, CALIFORNIA COURTS, <http://www.courts.ca.gov/opinions.htm> (last visited Jan. 2, 2014).

186. See *Hecht*, 20 Cal. Rptr. 2d at 287; see also JULIA J. TATE, *ARTIFICIAL INSEMINATION AND LEGAL REALITY* 21 (1992).

187. See *infra* Part II.C.iii.

188. See *infra* Part II.C.iii.

189. DAAR, *supra* note 29, at 552; TATE, *supra* note 186, at 21.

190. DAAR, *supra* note 29, at 552.

191. *Id.*

192. *Id.*; TATE, *supra* note 186, at 21.

193. See DAAR, *supra* note 29, at 552.

194. See *supra* Part II.

195. See *supra* Part II.C.

documentation to serve as conclusive evidence of the depositor's intent results in unpredictable and unreliable outcomes.¹⁹⁶

Further, the unique position of sperm and eggs to create life demands a specialized solution which allows the depositor to control his or her right to procreate.¹⁹⁷ Reproductive cells are not the same as other body parts, and depositors have an interest in the disposition of the cells.¹⁹⁸ The current state of the law does not accommodate the extraordinary status and value of frozen sperm and eggs.¹⁹⁹

A death clause document, if both uniform and accepted as dispositive by courts, would provide the much-needed certainty. Contracts with differing provisions and language currently risk a variety of interpretations from courts.²⁰⁰ Similarly, if more than one document addresses the issue, courts are required to weigh the evidence to determine which document controls.²⁰¹ If a single uniform death clause document were adopted, a depositor can be sure that the court will interpret his or her document in a manner consistent with its previous interpretation of similar documents. He or she will have the comfort of knowing that a court will order the disposal of his or her reproductive cells as he or she instructed.

IV. THE LAW SHOULD REQUIRE A UNIFORM DEATH CLAUSE DOCUMENT

A. *Contracts Already in Use*

The way current contracts address depositor death differs widely.²⁰² Some fertility clinics have specific documents that address the ultimate disposition of the semen, while others include only a brief mention in the fine print.²⁰³ This inconsistency demonstrates the need for clarity and uniformity. An analysis of contracts that fertility clinics and sperm banks use reveals that institutions apply a plethora of methods to handle donor death.²⁰⁴ The following is a sampling from different banks and clinics across the country.

196. *See supra* Part II.A-B.

197. *See supra* notes 115-123, 181-184 and accompanying text.

198. *Compare Moore*, 793 P.2d 479, with *Davis*, 842 S.W.2d 588.

199. *See supra* Part II.

200. *See supra* Part II.B.

201. *See supra* Part II.C.i.

202. *See infra* Part III.A.i-iii.

203. *Compare Ultimate Disposition of Semen Specimens*, SPERM BANK OF CALIFORNIA, <http://www.spermbankcalifornia.com/media/Ultimate-Disposition-of-Semen-Specimens1.pdf> (last visited Jan. 2, 2014) [hereinafter SPERM BANK OF CALIFORNIA], with *Semen Banking Enrollment Form*, CRYOCHOICE, <http://www.cryochoice.com/CryoChoice-info.pdf> (last visited Jan. 2, 2014) [hereinafter CRYOCHOICE].

204. *See infra* Part III.A.i-iii.

i. Least Detailed and Definite Provisions

Some sperm banks do not require depositors to leave their homes.²⁰⁵ The bank sends individuals a collection kit, overnight shipping materials, and an enrollment form.²⁰⁶ The bank then addresses the issue of donor death in a clause in the small print amid all the other legalese.²⁰⁷ The small print renders the provision easily lost in the sea of writing, and the legalese is difficult for the average person to understand. As depositing sperm is not something that traditionally involves lawyers,²⁰⁸ the lack of easy to understand language renders such provisions incoherent to the most common consumer of this service.²⁰⁹ A “Client Service Agreement” (“CryoChoice Agreement”) is attached to CryoChoice’s enrollment form.²¹⁰ The only clause addressing donor death is a provision in the CryoChoice Agreement that states:

3.3 Death of Client. CryoChoice’s right to terminate this Agreement for breach of any provision, including non-payment, continues even after Client’s death. Client agrees to make whatever arrangements You deem necessary so that Your estate, heirs, successors, beneficiaries or anyone else who may have an interest in Your semen will take the appropriate action to notify CryoChoice of Your death and to request an assignment of this contract pursuant to Section 7.²¹¹

Section 7 simply indicates that the Client cannot assign the CryoChoice Agreement to anyone without the notice and written consent of CryoChoice.²¹²

This Agreement relieves CryoChoice of any obligation in case of depositor’s death.²¹³ CryoChoice does not even know whom the depositor intends to inherit the sperm.²¹⁴ Instead, the entire responsibility is placed at the feet of the depositor.²¹⁵ If he dies and no one makes storage payments,

205. CRYOCHOICE, *supra* note 203.

206. *Id.*

207. *Id.*

208. Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC’Y 25, 110 (2009).

209. Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer “Products”*, 26 OHIO ST. J. ON DISP. RESOL. 119, 135 (2011).

210. CRYOCHOICE, *supra* note 203.

211. *Id.* at § 3.3.

212. *Id.* at § 7.

213. *See id.*

214. *See id.* at §§ 3.3, 7.

215. *See* CRYOCHOICE, *supra* note 203, at §§ 3.3, 7.

the CryoChoice Agreement is terminated.²¹⁶ Should termination take place, any stored semen becomes the “property of CryoChoice, and CryoChoice [has] the unfettered right to destroy the semen without further notice”²¹⁷ Although such provisions may be acceptable when dealing with storage agreements regarding traditional property,²¹⁸ the unique nature of reproductive material places a greater burden on banks and clinics to take steps to honor a depositor’s wishes in such circumstances.²¹⁹

No guidance on the processes involved in the assignment after the depositor’s death is provided.²²⁰ The CryoChoice Agreement simply states that a deceased person’s estate would need to contact CryoChoice in order to arrange an assignment.²²¹ The absence of specific provisions leaves a depositor without the knowledge to instruct his future beneficiaries.²²² The bank does not indicate what arrangements would be acceptable.²²³ Is proof needed of depositor’s death? Does the person seeking to have the contract assigned to him or her need to demonstrate depositor permission to the assignment? Can anyone contact CryoChoice, claim the depositor died, and have the contract assigned? Such undetailed death clauses leave these questions unanswered, and are undesirable because they risk confusion and mistake.²²⁴

ii. Moderately Detailed and Definite Provisions

Cryogenic Laboratories, Inc. has a slightly more detailed death clause in its required “Semen Analysis, Freeze & Storage Agreement” (“Cryogenic Agreement.”)²²⁵ Cryogenic has a form Cryogenic Agreement and maintains one on file for each customer.²²⁶ The Cryogenic Agreement indicates that, unless the depositor executes a written and notarized statement granting ownership to another for the purposes of procreation, the Cryogenic Agreement will terminate at depositor’s death, and Cryogenic shall own the sperm.²²⁷ If Cryogenic becomes the owner of the sperm, the corporation has

216. *Id.* at § 3.3.

217. *Id.* at § 3.2.

218. See Jeffery Douglas Jones, *Property Rights, Property Wrongs, and Chattel Dispossession Under Self-Storage Leases*, 78 TENN. L. REV. 1015, 1027-29 (2011).

219. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 954 (1997).

220. See CRYOCHOICE, *supra* note 203, at § 3.3.

221. *Id.*

222. See *id.*

223. *Id.*

224. See *supra* Part III.A.

225. *Semen Analysis, Freeze & Storage Agreement*, CRYOGENIC LAB., INC., at § 8(b), <http://www.cryolab.com/documents/DIS.10ahICLISemenAnalysisFreezeandStorageAgreementWEB.pdf> (last visited Jan. 2, 2014) [hereinafter CRYOGENIC].

226. See *id.*

227. *Id.* at §§ 8(b), 13.

the right to destroy the sperm or use it for scientific or research purposes.²²⁸ The depositor's estate must notify Cryogenic in writing of the depositor's death within sixty days of the first storage invoice issued after death and send a certified copy of the death certificate.²²⁹ The new owner must execute a written and notarized statement indicating ownership of the remaining semen if he or she desires continued storage.²³⁰

The depositor does have the option on the Cryogenic Agreement to select from limited choices regarding his wishes for disposition after death, subject to the above requirements.²³¹ The Cryogenic Agreement gives the depositor the option to choose one of the following:

() I understand that my specimen(s) can be used for the purpose of procreation by my surviving spouse, identified surviving intimate partner, or parent(s)/legal guardian(s) if a minor, if all of the conditions of 8b are met. I further understand that I must take additional legal steps during my life to establish the paternity of the child. I understand that regulatory agencies may make these samples unable to be used for the purpose of procreation.

() Upon my death, I elect to have all of my stored specimens destroyed, regardless of the desires of any surviving spouse, identified intimate partner, or parent(s)/legal guardian(s) if a minor.²³²

The option gives the depositor the ability to use only the Cryogenic Agreement to control the disposition of his semen after his death.²³³ However, the Cryogenic Agreement does not suggest how to handle a conflict between the Cryogenic Agreement and a notarized statement.²³⁴ The option of a notarized statement clearly indicates that the Cryogenic Agreement allows the depositor to provide separately for Cryogenic to transfer his semen after death.²³⁵ However, the Cryogenic Agreement also allows the instruction of destruction of the semen after death.²³⁶ The Cryogenic Agreement encourages the use of a separate legal document without instructions addressing the potential conflict when the depositor

228. *Id.* at § 13.

229. *Id.* at § 8(b).

230. CRYOGENIC, *supra* note 225, at § 8(b).

231. *See id.*

232. *Id.*

233. *See id.*

234. *See id.*

235. CRYOGENIC, *supra* note 225, at § 8(b).

236. *Id.*

selects the destruction after death option.²³⁷ An inconsistency between the two instructions could result in, at the worst, a disposition directly contrary to the depositor's wishes or, at the best, litigation.²³⁸

Xytex Tissue Storage, Inc's ("XTS") "Semen/Testicular Tissue Storage Agreement"

("XTS Agreement") reflects the unreliable state of the law.²³⁹ Although the XTS Agreement limits the effective documents to the XTS Agreement, the XTS Agreement specifically provides that XTS is not legally bound to follow the depositor's wishes.²⁴⁰ The XTS Agreement allows the depositor to choose one of two options.²⁴¹ The first option allows a depositor to have his samples destroyed at death.²⁴² The second option allows a depositor to have his samples released to the administrator or executor of his estate.²⁴³ However, despite these provisions that allow the depositor to indicate his wishes, XTS states that it is not legally bound to follow the selected option due to the "unsettled" nature of the law regarding disposition after depositor's death.²⁴⁴ The XTS Agreement calls the options "preferences" and releases any claim that parties may have if XTS fails to comply with the depositor's wishes.²⁴⁵ The contract does not create a binding requirement on XTS to enforce the death clause.²⁴⁶

237. *See id.*

238. *See id.*

239. *See Semen/Testicular Tissue Storage Agreement*, XYTEX TISSUE STORAGE, INC., at § 7, <http://www.dreamababy.com/downloads/XYTEX%20Semen%20Testicular%20Tissue%20Storage%20Agreement%20For%20Client%20Depositor.pdf> (last visited Dec. 28, 2012) [hereinafter XTS].

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *See XTS*, *supra* note 239, at § 7.

I understand that, if I select choice (b), XTS may nonetheless decline to deliver the Samples to my estate without express instructions in my will or court order, as is the present standard in the industry. As mentioned above, the law in Georgia is unsettled concerning the disposition of stored semen/testicular tissue after the death of the donor. Accordingly, XTS strongly recommends that I consult with an attorney regarding the disposition of the Samples upon my death if I do not want them to be destroyed.

Id.

245. *Id.*

246. *See id.* Some clinics use a more compulsory death clause. *See Consent Form for Cryopreservation and Storage of Human Semen*, FERTILITY STORAGE, INC., http://mifertility.com/x_clude/pdfdocs/Consent_cryo_and_storage_sperm.pdf (last visited Jan. 2, 2014). Fertility Storage's clause states: "In the event of my death or disability, I hereby acknowledge and agree that ownership and control as to the use or disposition of my stored semen specimen(s) will be held by . . ." *Id.* The consent form then allows the depositor to indicate whether the semen is to be disposed, thawed, and used for IUI or IVF with a named partner, or some other disposition. *Id.* Despite the form's lack of lengthy provisions, the agreement couches the provisions in terms of a binding agreement. *Id.* However, the form lacks any type of indication of proper procedure for transfer. *See id.* That can leave a depositor unsure of what, if any, steps are necessary to effectuate his wishes. *See id.*

iii. Most Detailed and Definite Provisions

One of the most comprehensive death clauses is a document that is not just a single clause among many in a storage agreement.²⁴⁷ The Fertility Center of California (“FCC”) has a mandatory individual document dedicated to the issue of disposition of semen after death.²⁴⁸ The first two options allow the depositor to indicate whether he wants someone to inherit the semen or he wants the semen destroyed.²⁴⁹ If the depositor identifies an individual, he must include the person’s name, driver’s license number, telephone number, and relationship to the depositor.²⁵⁰ The new owner must make payments for continued storage and assume responsibility for decisions regarding the semen.²⁵¹ Proof of death of the depositor by a death certificate is necessary to transfer ownership.²⁵² Further, depositors are allowed to indicate an alternative disposition in case of the beneficiary’s death.²⁵³ This type of death clause does not require the depositor to prepare a separate document for disposition of the sperm.²⁵⁴ However, there is no indication of how to resolve a potential conflict between the clinic document and a will.²⁵⁵

B. Laws Already In Place

The federal government already regulates reproductive technology.²⁵⁶ The extent of the regulations is limited considering the aspects the federal government could monitor.²⁵⁷ In fact, the United States of America’s lack of regulation of ART is unusual among developed countries.²⁵⁸ As is demonstrated below, it would be both appropriate and reasonable for the federal government to require a death clause document between a depositor of reproductive material and the clinic or laboratory providing the storage.²⁵⁹ The federal government already regulates some aspects of reproductive technology.²⁶⁰ Current regulations concern required testing on

247. See SPERM BANK OF CALIFORNIA, *supra* note 203.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. SPERM BANK OF CALIFORNIA, *supra* note 203.

253. *Id.*

254. *See id.*

255. *Id.*

256. *See infra* notes 261-263 and accompanying text.

257. *See infra* note 261 and accompanying text.

258. Michelle N. Meyer, *States’ Regulation of Assisted Reproductive Technologies: What Does the U.S. Constitution Allow?*, THE ROCKEFELLER INST. at 2 (2009), http://www.rockinst.org/pdf/health_care/2009-07-States_Regulation_ART.pdf.

259. *See infra* Part III.C.iii.

260. *See infra* Part III.B.

deposited reproductive cells.²⁶¹ The Food and Drug Administration (“FDA”) enacted these regulations.²⁶² The authority comes from Congress’s mandate to the FDA to promulgate regulations to control communicable diseases.²⁶³ As the death clause document would not control communicable diseases, it is unlikely that authority for a regulation requiring such documentation can be found through that specific code provision.²⁶⁴ An examination of existing federal statutes does not reveal authorization for a regulation that would require a death clause document when depositing reproductive material.²⁶⁵ Therefore, a new enabling statute is required to provide for promulgation of regulations.

C. Proposed Federal Legislation

i. Authority

The term “right to privacy” describes the fundamental rights individuals have in family and home.²⁶⁶ The right to procreate is one such right.²⁶⁷ The Supreme Court of the United States held that “Marriage and procreation are fundamental to the very existence and survival of the race.”²⁶⁸ The Court has found that the decision to have children or not “is at the very heart of this cluster of constitutionally protected choices.”²⁶⁹ Further, the Court has held that protection of the right to procreate must extend to all, whether married or unmarried.²⁷⁰

The depositor’s fundamental right to procreate is “at the very heart of” whether an individual can control the disposition of frozen reproductive

261. 21 C.F.R. §§ 1271.85, 1271.90 (2013). If an individual donates reproductive cells, the cells must be tested for human immunodeficiency virus, type 1 and type 2; hepatitis B virus; hepatitis C virus; *treponema pallidum*; and unless retrieved in such a way to prevent contamination from the genitourinary tract, tests must also be performed for *Chlamydia trachomatis* and *neisseria gonorrhoea*. *Id.* § 1271.85(c). An exception from the testing exists for reproductive cells donated for use by a sexually intimate partner. *Id.* § 1271.90(a)(2). Further, if a person originally donated the reproductive cells for use by a sexually intimate partner but the intended recipient changes, the testing does not need to be conducted if “[a]dditional donations are unavailable, for example, due to the infertility or health of a donor . . . and [a]ppropriate measures are taken to screen and test the donor(s) before transfer to the recipient.” *Id.* § 1271.90(a)(3)(i)-(ii).

262. *See generally* 21 C.F.R. §§ 1271.85, 1271.90.

263. 42 U.S.C. § 264(a) (Supp. II 2008); *see also* Human Cells, Tissues, and Cellular and Tissue-Based Products; Establishment Registration and Listing, 66 Fed. Reg. 5,447 (Jan. 19, 2001) (codified at 21 C.F.R. pts. 207, 807, and 1271).

264. *See* 42 U.S.C. § 264.

265. *See supra* notes 261-262 and accompanying text.

266. Ronald B. Standler, *Fundamental Rights Under Privacy in the USA* 2 (1998), <http://www.rbs2.com/priv2.pdf>.

267. *Id.* at 4-7.

268. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

269. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (the phrase “this cluster” referred to the cluster of privacy rights).

270. *See generally* *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

material after death.²⁷¹ The Supreme Court of the United States should give this right the same protection after death as it has during an individual's life.²⁷² The individual has the right to control whether he or she procreates.²⁷³ Now that the ability to procreate can survive the individual, the protections need to accommodate that right in light of new technology.²⁷⁴ The only way to protect this right is to document the depositor's wishes conclusively and uniformly and requires courts to honor those wishes.

The United States of America is far behind other countries in regards to regulation of ART and cryopreservation.²⁷⁵ Regulation would not violate the United States Constitution.²⁷⁶ Instead, regulations would protect one of the most fundamental human rights.²⁷⁷

ii. ABA Model Act Governing Assisted Reproductive Technology

In 2008, the American Bar Association ("ABA") adopted a model act addressing ART ("the Act").²⁷⁸ The Act provides a flexible framework for the legislative bodies of states and territories to consider when addressing issues related to assisted reproductive technologies.²⁷⁹ Research reveals that no states have adopted the Act, and state laws remain unclear on many of the topics covered by the Act.²⁸⁰

The Act is a "model act" instead of a "uniform code" or "uniform act."²⁸¹ This means that the Act assists legislatures in considering issues and offering possible solutions, instead of setting out solutions that are adopted directly.²⁸² The scope of the issues covered in the Act also differs from the uniform code provisions that address this topic.²⁸³ Although

271. See *infra* Part III.C.i.

272. See *supra* notes 268-270 and accompanying text.

273. See *supra* notes 268-270 and accompanying text.

274. See *supra* notes 268-270 and accompanying text.

275. Meyer, *supra* note 258, at 2.

276. *Id.* at 2-3.

277. See *supra* notes 267-276 and accompanying text.

278. ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY § 101 (2008) [hereinafter MODEL ACT], available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>; CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE - SUPPLEMENT 1 (2009) [hereinafter KINDREGAN & MCBRIEN, SUPPLEMENT].

279. MODEL ACT § 101; Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J. (Mar. 1, 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate/.

280. Hansen, *supra* note 279.

281. KINDREGAN & MCBRIEN, *supra* note 67, at 374.

282. *Id.*

283. *Id.* at 374-75; see generally UNIFORM PARENTAGE ACT 8 (2000); UNIFORM PROBATE CODE (2010).

amended to include some provisions regarding ART, the Uniform Parentage Act is limited to parentage issues, and the Uniform Probate Code is limited to succession issues.²⁸⁴ However, the ABA Model Act provides a much broader scope to assist legislatures in “provid[ing] overall governance in the field” of ART.²⁸⁵

The Act largely focuses on issues pertaining to embryos.²⁸⁶ The only discussion involving an individual donor is directed at anonymous donors.²⁸⁷ Depositors who have their reproductive material frozen for personal use are not covered by any of the provisions.²⁸⁸ For this reason, the Act is deficient and fails to address a considerable concern.²⁸⁹

Despite the inadequacies, the Act still can provide helpful guidance. The Act requires all parties to the assisted reproduction to provide informed consent to the procedures and the use of their reproductive material.²⁹⁰ The informed consent must include a number of provisions.²⁹¹ One of the requirements is “[a] statement of the need for intended parents to agree in advance who shall acquire the right to possession and control of the embryos or gametes in the event of marriage dissolution, death of one or both of them, or subsequent disagreement over disposition”²⁹² This clearly acknowledges the importance of considering disposition of the reproductive material after the depositor’s death.²⁹³

However, the Act stops short of requiring that the agreement be in writing or in a specific format.²⁹⁴ The language of the Act only requires the document to indicate the need for such considerations.²⁹⁵ The Act acknowledges the importance of the issue, but does not require an affirmative response.²⁹⁶

iii. Substance of the Law and Regulation

A law is needed that requires the execution of a death clause document. In order to have nationwide effect, a federal law should be enacted that

284. See UNIFORM PARENTAGE ACT; UNIFORM PROBATE CODE; KINDREGAN & MCBRIEN, *supra* note 67, at 374-75.

285. See KINDREGAN & MCBRIEN, *supra* note 67, at 374.

286. See MODEL ACT art. 2-6.

287. See *id.* §§ 204, 801-02, 1002.

288. See *generally id.* § 102(9).

289. See *supra* notes 286-288 and accompanying text.

290. MODEL ACT § 201(1).

291. *Id.* § 201(2).

292. *Id.* § 201(2)(j).

293. See *id.*

294. See *id.* (pointing out that § 201(2)(j) speaks to the disposition of embryos *or* gametes subject to § 501. Section 501 speaks to embryo disposition agreements needing to be entered into a record explicitly but is silent as to gamete disposition agreements).

295. See MODEL ACT § 201(2)(j).

296. See *id.*

instructs the FDA to regulate ART and cryopreservation.²⁹⁷ The law should instruct the FDA to enact the regulations necessary to protect the fundamental rights of individuals involved. The law should acknowledge the unique status of reproductive cells given their potential for human life. The law should also specifically indicate that the depositor's expressed wishes in regards to the disposition of the reproductive material after death will control.

With such authority granted to the FDA, regulations should follow requiring a death clause document for the storage of all reproductive material in any licensed fertility clinic, sperm bank, or egg bank. The FDA should also promulgate the requirements for the document and the necessary procedures for its execution. Details of the sample document and proper execution are discussed below.

V. SAMPLE DEATH CLAUSE DOCUMENT AND EXECUTION PROCEDURE

A. Document

The death clause should be a separate document rather than a clause on a consent form.²⁹⁸ It should be part of the paperwork that every depositor must fill out before deposit. This will ensure that decisions concerning disposition upon death do not get overlooked among other clauses and provisions.²⁹⁹ The goal is to provide for the proper and certain disposition of an individual's reproductive material after his or her death.

First and foremost, identifying information should be at the top of the document in order to match a deceased individual with his or her deposited material readily.³⁰⁰ Name, address, phone number, and social security number could serve this function, as well as any identifying information specific to the bank or clinic. This will ensure that the identifying information on a death certificate will be conclusively matched with the correct depositor.

Next, the following clause should appear on the document:

In the event of my death:

() I authorize _____ with address

297. See *supra* Part III.B.

298. See SPERM BANK OF CALIFORNIA, *supra* note 203.

299. See CRYOCHOICE, *supra* note 203; see also Ponte, *supra* note 209, at 135.

300. See SPERM BANK OF CALIFORNIA, *supra* note 203.

_____ and telephone number _____
 _____ and social security number -
 _____, who is my _____
 (relationship), to be the owner of all my stored semen or eggs at
 (name of clinic or bank). This individual will be responsible for
 payment of storage fees if he/she chooses to continue storage.
 He/She will be responsible to make all decisions regarding the use
 and/or disposal of my stored samples. Such responsibility DOES /
 DOES NOT (circle one) include the ability to use my stored
 samples to procreate after my death.

OR

() I authorize and instruct (name of clinic or bank) to
 destroy all of my reproductive material in its possession.

OR

() I authorize and instruct (name of clinic or bank) to use all of my
 reproductive material for research to further fertility and
 cryopreservation technology.

OR

() I authorize and instruct (name of clinic or bank) to donate all of
 my reproductive material for the use by other individuals seeking to
 have children through artificial means.³⁰¹

I retain the right to revoke the above option and to indicate a
 different option, which can be done only through proper execution
 of the Amendment document.

The depositor must select one of these options, as well as an alternate
 disposition if the depositor identifies an individual to assume ownership. A
 second section should begin, "In the event of my death and the death of the
 person named in the option above," followed by the aforementioned clause.
 This will ensure that the executor of the depositor's estate will still know the
 depositor's wishes in case the depositor and the original intended recipient
 die simultaneously or closely in time.

The document should include directions on how to accomplish post-
 death transfer of ownership. Clarifying the proper procedures will allow the
 depositor to instruct the desired recipient and ensure protections are in place

301. The drafters used the Sperm Bank of California's form as a guide. *See id.*

to prevent premature or wrongful transfers.³⁰² The individual to assume ownership of the material must provide a certified death certificate as proof of the depositor's death. Also, the document should require the designee to produce proof of identification in the form of photo identification and a social security card. Requiring such proof will protect the clinic or bank against those who attempt to fraudulently gain control of the material.³⁰³

The document should also indicate a time frame in which the executor of the depositor's estate should contact the bank after depositor's death. This will prevent the storage facility from retaining reproductive material out of fear that someone may later claim ownership. With consideration to grief and the number of other affairs that loved ones need to address, a time period of ninety days is reasonable. This will prevent the bank from being forced to sustain too great a loss from lack of storage payment if no one came forward to claim ownership. The deceased person's designee would not need to make any decisions regarding use or destruction of the stored material within those ninety days, as the new owner would only need to continue storage payments while deciding the ultimate disposition.

The document should also include an explanation of the requirements the designee must fulfill.³⁰⁴ If the designee desires continued storage, he or she must execute an agreement, assume any outstanding storage fee balance, and agree to continue payment. Also, the document should include all practical information such as the phone number and address of the clinic or bank. Such explanations and directions will help ensure that a designee would not fail to assert ownership over the reproductive material out of ignorance or mistake.

The document should provide that such instructions are valid until and unless the depositor executes and files an amended death clause document with the bank prior to death. The death clause document should not permit any other method of amendment. The amending document would be essentially the same in substance; however, the document would be entitled "Amendment." A clause in the beginning would state:

I hereby revoke the Death Clause Document executed on _____ (insert date of original document or amendment) and authorize this document as an expression of my current wishes.

302. See *supra* Part III.A.i-iii.

303. See Vincent Gnoffo, *Notary Law and Practice for the 21st Century: Suggested Modifications for the Model Notary Act*, 30 J. MARSHALL L. REV. 1063, 1073 (1997); see also Annotation, *Liability for Loss of Contents of Safe-Deposit Box*, 133 A.L.R. 279 (1941); Safe Deposit Boxes, ST. CLOUD FEDERAL CREDIT UNION, <https://stcloudfcu.coop/safe-deposit-boxes/> (last visited Jan. 2, 2014).

304. Cryogenic's agreement does this well. See *CRYOGENIC*, *supra* note 225.

The document should provide that the depositor may make such amendments as frequently as he or she wishes. This will accommodate any changes in the depositor's life that alter his or her desires. This flexibility will ensure that, at the time of death, the documents accurately reflect the depositor's most recent wishes.³⁰⁵

B. Procedure to Execute Death Clause Document

Proper execution is as important as what the document actually contains. Requiring specific execution procedures will ensure that the document reflects the true wishes of the depositor. The procedures discussed below should apply to both the original death clause and any subsequent amendments.

First and foremost, the depositor must sign the document in the presence of a notary public. The statement of the notary must attest that the document was complete at the time of signing and the individual signing the document is the person named in the document.³⁰⁶ Completeness requires that all the blanks in the relevant portions are filled out, and all options are clearly checked or circled.³⁰⁷ Any blanks that are not filled out or any room left in blanks should have lines drawn through the remaining space to prevent insertion of further writing.³⁰⁸ All of these provisions will protect against forgery.

Further, the signature and notarization must take place outside the presence of the depositor's spouse, intimate partner, or other interested person.³⁰⁹ Since procreation can be an intimate topic, this requirement is extremely important. Whether an individual authorizes a spouse or intimate partner to use his or her reproductive material after his or her death could be an area of contention for a couple. If the depositor is outside the presence of an interested party at signing, he or she will feel more comfortable making the document reflect his or her own wishes instead of those of the spouse or partner.³¹⁰

305. *Cf.* Knolle v. Hunt, 551 S.W.2d 755, 764 (Tex. Civ. App. 1977) (discussing the role of amendments and codicils for wills); *see also* Senger v. Senger's Ex'rs, 27 S.E.2d 195, 197 (1943).

306. Michael L. Closen & G. Grant Dixon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D.L. REV. 873, 883-85 (1992).

307. Relevant portions means that if the individual wishes to have his or her reproductive material destroyed or donated after his or her death or the death of the original designee that the blanks pertaining to a designee under that portion do not need to be filled in.

308. *Cf.* Sean W. Duffy, *Fighting Check Forgery in the New Economy: Is Computer-Generated Check Fraud Covered Under the Financial Institution Bond?*, 6 FIDELITY L.J. 1, 6 (2000) (discussing the prevention of check fraud by filling in blank areas of checks).

309. *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 427-28 (2009).

310. *See id.*

VI. THE PROBATE COURT SHOULD HONOR A PROPER DEATH CLAUSE AS A WILL SUBSTITUTE

A. The Functions of the Formalities of a Will

Statutes in every state prescribe strict formalities that an individual must observe in order to dispose of his or her property effectively after death.³¹¹ Such formalities are present for specific purposes, and if these purposes are fulfilled, the disposition can be effective despite the absence of the formalities.³¹² Therefore, because the proposed death clause document meets all of the functions of the formalities of a will, the court should treat it as a will substitute.³¹³

i. Evidentiary Function

The first function of testamentary formalities is evidentiary in nature.³¹⁴ “The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent”³¹⁵ The deceased individual can no longer testify to his or her wishes.³¹⁶ The requirement for the testator’s signature on the will provides evidence of the genuine nature of the will, and requiring the signature at the end prevents others from making additions.³¹⁷ The writing and attestation requirements also serve this function.³¹⁸

The above-described sample death clause document and procedure satisfy this function. First, the depositor must sign the document.³¹⁹ The further requirement to fill any remaining blank space is much like requiring a testator to sign at the bottom of a will.³²⁰ Finally, a notary public attests to the death clause document through his or her signature.³²¹ Thus, the proposed death clause document satisfies the evidentiary function.

311. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975); Glover, *supra* note 309, at 424-25.

312. Leigh A. Shipp, Comment, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723, 724-26 (2005).

313. See Langbein, *supra* note 311, at 490-97.

314. Glover, *supra* note 309, at 426-27.

315. Langbein, *supra* note 311, at 492.

316. Glover, *supra* note 309, at 426-27.

317. Langbein, *supra* note 311, at 493.

318. Glover, *supra* note 309, at 427.

319. See *supra* Part IV.

320. See *supra* Part IV.B.

321. See *supra* Part IV.B.

ii. Channeling Function

The second function of testamentary formalities is the channeling function.³²² The purpose of the channeling function is to require all wills to appear similar, so courts can easily recognize the document and give it validation.³²³ A death clause document's proper format is described above.³²⁴ If all fertility clinics and banks use the proposed format, then courts would be able to recognize the document and its purpose easily. Following the death clause document set forth in this article fulfills the necessary channeling function.³²⁵

iii. Cautionary Function

The third function of testamentary formalities is the cautionary, or ritual, function.³²⁶ The requirement of a certain amount of formal ceremony imparts on the individual the importance and seriousness of his or her act.³²⁷ The goal is to ensure that the individual is not “acting in a casual or haphazard fashion.”³²⁸ The requirements that the will be in writing, be signed, and be witnessed fulfill this function.³²⁹

In the case of cryopreservation of reproductive cells, the very procedure is cautionary. As discussed above, an individual often uses cryopreservation because his or her ability to parent a child is in jeopardy.³³⁰ Further, neither the procedure nor the storage fees are cheap.³³¹ Such a decision is not made on a whim. In addition, the requirement that the agreement be in writing, that the depositor sign the agreement, and that it be notarized³³² parallel the will formalities.³³³ Therefore, the death clause document described above fulfills the cautionary function.³³⁴

322. Glover, *supra* note 309, at 428; Langbein, *supra* note 311, at 493.

323. Glover, *supra* note 309, at 428; Langbein, *supra* note 311, at 494.

324. *See supra* Part IV.A.

325. *See supra* Part IV.B.

326. Glover, *supra* note 309, at 426 (calling it the ritual function); Langbein, *supra* note 311, at 494 (calling it the cautionary function).

327. Langbein, *supra* note 311, at 494-95.

328. Glover, *supra* note 309, at 426 (citing Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941)).

329. Langbein, *supra* note 311, at 495.

330. *See supra* Part I.B.

331. *See supra* Part I.A.

332. *See supra* Part IV.

333. Langbein, *supra* note 311, at 490.

334. *See supra* Part IV.A.

iv. Protective Function

The fourth function of testamentary formalities is the protective function.³³⁵ These formalities ensure that the testator is making the decisions of his or her free will and prevent another from substituting his or her intentions for the testator's.³³⁶ The attestation process and the requirement that witnesses be disinterested parties largely fulfill this function.³³⁷ The writing requirement also serves the protective function, since it prevents individuals from presenting oral testimony of the deceased person's wishes.³³⁸

Admittedly, this may be the most difficult function for a death clause document to fulfill, particularly if the deceased person has a spouse or partner involved in the process. In order to ensure that this function is met, the depositor must sign the death clause in the presence of a notary, outside the presence of a spouse, intimate partner, or other interested party.³³⁹ This allows the depositor to be free from any coercion, both intentional and unintentional, while executing the clause.³⁴⁰

As detailed above, all of the functions of the formalities of a will are met by the usage of the sample death clause document suggested in this article.³⁴¹ Therefore, the document should be viewed as a will substitute and probate courts should not interfere with its enforcement.

B. A Death Clause Document is Similar to Other Will Substitutes

The solution proffered by this article is no different from a number of other contractual based dispositions of property after death.³⁴² The following is an examination of the death clause documents similarities to pay-on-death ("POD") accounts, life insurance policies, and joint tenancies.

All of the above-mentioned methods avoid probate,³⁴³ which is the goal of the death clause document. Similarly to the POD accounts, life insurance, and joint tenancies, the death clause document allows a person to

335. Glover, *supra* note 309, at 427-28; Langbein, *supra* note 311, at 496.

336. Langbein, *supra* note 311, at 496.

337. Glover, *supra* note 309, at 427-28.

338. *Id.* at 428.

339. *See supra* Part IV.B.

340. *See supra* Part IV.B.

341. *See supra* Part IV.A.

342. *See infra* Part V.B.

343. *See* Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 821, 863 (2007); F.D.I.C. Consumer News, *Estate Planning: Protecting Your 'Family Fortune' Through FDIC-Insured Bank Accounts*, F.D.I.C. (2004), <http://www.fdic.gov/consumers/consumer/news/cnwin0304/cvrstry.html>; Mary Randolph, *How Joint Owners Can Transfer Survivorship Property After Death*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/joint-owners-survivorship-32441.html> (last visited Jan. 2, 2014) [hereinafter Randolph, *Joint Owners*].

indicate whom he or she desires to be the beneficiary.³⁴⁴ Much like POD accounts and life insurance policies, the depositor has full rights to use or dispose of the stored material, and can change beneficiaries at any time during life.³⁴⁵ Only life insurance offers the flexibility, like the death clause document, to choose an alternate designee.³⁴⁶ The use of a certified death certificate and identification as the means for the designee to gain control of the deposited material is the same identification procedure required for POD accounts, life insurance policies, and joint tenancies.³⁴⁷

There are substantial similarities between will substitutes currently in effect and the solution offered by this article.³⁴⁸ The proposed method would not require a radical change in estate law or in the way courts currently handle such dispositions.

C. Policy Considerations

Policy considerations also support the presented solution.³⁴⁹ “Judicial economy” is “[e]fficiency in the operation of the courts and the judicial system; esp[ecially], the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary’s time and resources.”³⁵⁰ Treating a death clause document as a will substitute limits arguments concerning disposition to allegations that the document was improperly executed.³⁵¹ This decreases the judicial burden from hearing all cases addressing disposition of reproductive material after depositor’s death.

Furthermore, courts value the intent of the deceased individual when determining the appropriate disposition of his or her property.³⁵² If a document demonstrates the clear intent of the deceased individual, the court will have conclusive evidence of the deceased person’s wishes.³⁵³ Allowing

344. See F.D.I.C. Consumer News, *supra* note 343; Randolph, *Joint Owners*, *supra* note 343; Mike Smith & Celia Ray Hayhoe, *Life Insurance: Payout Options*, VA. TECH. AGRICULTURE & EXTENSION COMM’NS (2005), http://pubs.ext.vt.edu/354/354-148/354-148_pdf.pdf.

345. See Gagliardi, *supra* note 375, at 863; Smith & Hayhoe, *supra* note 344.

346. See Kathryn R. Bennett, Note, *Spencer v. Floyd: Distribution of Life Insurance Proceeds When the Primary Beneficiary is Disqualified*, 45 ARK. L. REV. 213, 214-29 (1992).

347. See F.D.I.C. Consumer News, *supra* note 343; Randolph, *Joint Owners*, *supra* note 343; Smith & Hayhoe, *supra* note 344; Mary Randolph, *How Beneficiaries Can Claim Life Insurance and Social Security Benefits*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/beneficiaries-claim-life-insurance-32433.html> (last visited Jan. 2, 2014) [hereinafter Randolph].

348. See *supra* Part V.B.

349. See *infra* Part V.C.

350. BLACK’S LAW DICTIONARY 923 (9th ed. 2009). Judicial economy is a factor for courts when considering what types of cases to hear. See generally *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 436 (2007) (judicial economy is a reasonable element to consider when deciding a dismissal); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (the court took judicial economy into consideration when reaching the holding).

351. See *supra* Parts IV.B, V.A-B.

352. See *supra* Part II.C.

353. See *supra* Part III.C.

the depositor to indicate what he or she desires upon his or her death would serve judicial economy.

VII. CONCLUSION

The above proposal is not the only possible solution to such an important problem. Other options like wills or trusts may present similar solutions; however, the adoption of a uniform death clause document with set procedures offers a promising resolution. Either a will or trust would require the depositor to take action beyond the boundaries of the actual clinic or bank to provide for the disposition of his or her reproductive material.³⁵⁴ Requiring a death clause document before successfully depositing one's reproductive cells would ensure that every individual who stores sperm or eggs will execute such a document.

Further, although not fully developed within this article, the solution presented in this article could provide a foundation for solving the similar issue regarding embryos. Scientific scholars have disagreed on how to define a human embryo in light of technological advancements; however, the definition consistently focuses on a point after development begins.³⁵⁵ For the purposes of artificial insemination, an embryo is created once the male and female reproductive cells have physically combined.³⁵⁶ Therefore, an embryo's creation involves two individuals' rights.³⁵⁷ Although Part II discussed precedent that addressed embryos,³⁵⁸ further discussion is beyond the scope of this article and warrants its own in-depth examination.³⁵⁹

354. See generally Langbein, *supra* note 311, at 490.

355. See J. K. Findlay et al., *Human Embryo: A Biological Definition*, 22 HUMAN REPRODUCTION 905, 905 (2007), available at <http://humrep.oxfordjournals.org/content/22/4/905.full.pdf>; National Health and Medical Research Council, 'Human Embryo' – A Biological Definition, AUSTRALIAN GOVERNMENT 3 (2005), available at http://www.nhmrc.gov.au/_files_nhmrc/file/research/embryos/reports/humanembryo.pdf [hereinafter *Human Embryo*].

356. See J. K. Findlay et al., *supra* note 355, at 905; *Human Embryo*, *supra* note 355, at 3.

357. See J. K. Findlay et al., *supra* note 355, at 905; *Human Embryo*, *supra* note 355, at 3.

358. See *supra* Part III.

359. Aspects of the solution proposed in this article could translate to embryos. However, since an embryo necessarily implicates the rights of two people, the solution must be more complex. The questions implicated are extensive and require a unique solution. Questions of death do not have the same answers as for single donor cells. If one spouse dies and indicates in a death clause document that he or she wishes the embryos destroyed, is that binding regardless of the surviving spouse's wishes? Unlike other forms of property, an embryo cannot be split down the middle and divided in a divorce. Awarding custody of an embryo in a divorce situation necessarily involves giving the reproductive material of one person to the other. How should a court consider the impact of one depositor no longer wanting to become a parent? Should a contract regarding dispositions of the embryos be binding when circumstances have changed dramatically since execution? Does it violate a person's fundamental right to procreate to force him or her to become a parent by awarding the embryo to the other spouse? The solution in this article focuses on the ultimate authority an individual has in his or her right to procreate. The death clause document values the ability to respond to change in circumstances during the life of the depositor. The interplay of these concepts is much more complex when two individuals' reproductive

This author is concerned with the fact that individuals in this country are dying with reproductive material frozen in clinics and labs with no guarantee that his or her wishes regarding disposition of the samples will be respected.³⁶⁰ Requiring a depositor to indicate his or her wishes before the samples are deposited is a simple solution that grants peace of mind to the individual. It also ensures that loved ones left behind are able to make use of the stored sperm or eggs, if that is what the depositor intended. Such personal and intimate situations deserve the utmost care and respect, and adopting a mandatory and uniform death clause document is one manner to protect individuals' fundamental right to procreate.

rights are involved. The solution proposed in this article simply is not adequate to take into consideration those challenges. A unique solution must be crafted to address death of depositor and divorce situations regarding embryos.

360. *See supra* Part III.