

# Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?

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## I. INTRODUCTION

In 1992 the Tennessee Supreme Court<sup>1</sup> considered who should receive a divorcing couple's frozen embryos<sup>2</sup> held in an in vitro fertilization ("IVF") program.<sup>3</sup> The court determined that the parties had competing constitutional rights both to procreate and to avoid procreation.<sup>4</sup> In the absence of a prior agreement regarding what was to be done when one party no longer wished to participate,<sup>5</sup> the parties' interests were to be balanced.<sup>6</sup> The court declared that the party wishing to avoid procreation should normally prevail, assuming the other party could achieve parenthood in a reasonable way which did not utilize the embryos in question.<sup>7</sup> Another attempt at IVF as well as adoption were considered other reasonable means of achieving parenthood.<sup>8</sup>

A factually similar case arose in New York in *Kass v. Kass*.<sup>9</sup> Again, the dispute concerned which participant would receive frozen embryos when one of them no longer wished to participate in the IVF program. A two-justice plurality of the appellate division believed that the couple's prior agreement controlled the embryo's disposition.<sup>10</sup> Three justices felt the prior agreement was not controlling, but disagreed as to how the parties' interests were to be balanced.<sup>11</sup> One justice felt that when there was no prior agreement, the objecting party should be able to veto a former spouse's implantation of the embryos "except in

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1. *See* *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

2. There is some confusion as to the proper term to be given to these tissues. *See id.* at 592-94. One expert at the trial testified that "preembryo" was the term to be used until 14 days after fertilization. *Id.* For the sake of simplicity, I will refer to the tissues as embryos.

3. For a description of IVF, *see infra* Part II.A.

4. *See Davis*, 842 S.W.2d at 600.

5. The court believed prior agreements between the parties should be presumed valid and enforced. *See id.* at 597.

6. *See id.* at 603.

7. *See id.*

8. *See id.*

9. No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

10. *See Kass*, 663 N.Y.S.2d at 586-87 (plurality opinion). The plurality's opinion was affirmed by a unanimous opinion of the court of appeals, who held that the couples' prior agreement controlled. *See Kass*, 696 N.E.2d at 182.

11. *See Kass*, 663 N.Y.S.2d at 591, 594.

the most exceptional circumstances."<sup>12</sup> The party wishing to become a parent to the disputed embryos must make a prima facie showing of no other possible means of achieving parenthood, including showing that adoption is not a feasible or satisfactory option.<sup>13</sup> Two dissenting justices felt the parties' interests needed to be carefully balanced, with special emphasis on whether the ex-wife had reasonable alternatives to achieve motherhood.<sup>14</sup> As part of its analysis, the dissent also asked whether there was a reasonable opportunity to adopt.<sup>15</sup>

The courts in *Davis* and *Kass* both appeared to consider adoption as a reasonable alternative to biological parenthood.<sup>16</sup> If the mother who wanted control of the embryos was not awarded them and could not achieve parenthood by another attempt at the IVF process, she could simply adopt. Despite the courts' appraisal of adoption as a possible alternative to biological parenthood, "[a]doption is not identical with producing one's own child. It is raising and integrating another's biological child into one's own family. Not to recognize this reality is to romanticize adoption . . . ."<sup>17</sup> To automatically consider adoption a reasonable alternative to genetic offspring amounts to granting an automatic veto to the objecting party by always providing an alternative means to become a parent, even if genetic parenthood is no longer a possibility.<sup>18</sup> In light of the special concerns and difficulties relevant to adoption,<sup>19</sup> it should not be forced upon the parent wishing to implant the embryos as an equal alternative to child birth if no other genetic options are available.

This Note will briefly describe the IVF process. Next, it will examine the *Davis v. Davis* decision and the *Kass v. Kass* appellate division decision.<sup>20</sup> Analyzing

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12. *Id.* at 592 (Friedmann, J., concurring).

13. *See id.* at 593.

14. *See id.* at 594, 600 (Miller, J., dissenting, joined by Altman, J.).

15. *See id.* at 600.

16. The *Davis* court noted that the Davises had attempted adoption previously and that Mary Sue Davis had at one time at least considered foregoing genetic parenthood. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

17. ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY* 203 (1993) (quoting Sanford N. Katz, *Introduction* to JOHN TRISELIOTIS, *IN SEARCH OF ORIGINS: THE EXPERIENCE OF ADOPTED PEOPLE* at xi (Beacon Press 1975) (1973)).

18. The *Davis* court expressly rejected such a veto power to the objecting spouse. *Davis*, 842 S.W.2d at 604. However, by including adoption as an alternative the court may have done just what it said it was not going to do.

19. *See infra* Part III.B for a discussion of adoption.

20. Two unpublished lower court opinions also decided for the party resisting implantation of frozen embryos. A Michigan court decided that a divorcing couple's frozen embryos may not be implanted into the woman. The judge concluded that the embryos were not children and the man had a right to avoid procreation. *See Karl Leif Bates, Dad Wins Embryos Court Fight*, *DETROIT NEWS*, June 25, 1998, at C1.

A Massachusetts probate court declined to award custody to a woman desiring to implant embryos despite consent forms giving control of the embryos to the wife in the event of a divorce. The court found that the consent agreements did not control because of a change in circumstances, and the husband's interest in avoiding parenthood outweighed the wife's interest in becoming pregnant. The court believed, as the *Davis* court did, that the party wishing to avoid procreation should normally prevail as long as the other party had a reasonable possibility of achieving parenthood through other means. *See The Week's Opinions*, MASS.

the balancing test developed in these two decisions, this Note will then explore the relevance of adoption to the reasonable alternatives analysis. Discussing the difficulties in obtaining an adoption and adoption's effects on the adoptive parent and child, this Note concludes that adoption should play little, if any, role in the reasonable alternatives analysis.

## II. BACKGROUND

### A. *In Vitro Fertilization*

Roughly fifteen percent of all couples of reproductive age have difficulty conceiving children.<sup>21</sup> IVF provides infertile couples a means by which they can conceive their own children.<sup>22</sup> IVF relies on stimulation of the ovaries to produce multiple eggs, which are fertilized outside of the woman's body in a petri dish.<sup>23</sup> Usually several eggs are retrieved from the woman, as the chance of pregnancy is small if only one egg is transferred.<sup>24</sup> The fertilized eggs are then transferred back to the uterus, impregnating the woman.<sup>25</sup>

While ninety percent of removed eggs are successfully fertilized, only three or four embryos can be safely placed in the uterus.<sup>26</sup> Untransferred embryos may be stored for later use through cryopreservation.<sup>27</sup> Cryopreservation consists of

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LAW. WEEKLY, Oct. 7, 1996, at 4 (containing an excerpt from *AZ v. BZ* (Lawyers Weekly No. 15-008-96)); David Yas, *Estranged Wife Denied Use of Frozen Embryos: Ruling Made Despite Couple's Agreement*, MASS. LAW. WEEKLY, Oct. 7, 1996, at 1.

21. See *Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regulation, Bus. Opportunities, and Energy of the House Comm. on Small Bus.*, 101st Cong. 60 (1989) [hereinafter *Hearing*] (report of the American Fertility Society). Ten million out of 67 million reproductively active couples are infertile. See Dominick Vetri, *Reproductive Technologies and United States Law*, 37 INT'L & COMP. L.Q. 505, 505 (1988). Infertility is defined as an inability to conceive after 12 months of intercourse using no contraception. See *Hearing, supra*, at 61.

22. See Jennifer Marigliano Dehmel, Note, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes Over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1380 (1995).

23. See John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 440 (1990).

24. See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 948 (1986). Retrieval of 10 or more eggs from the woman is not uncommon. See John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 407 (1990) [hereinafter Robertson, *Prior Agreements*].

25. See Robertson, *supra* note 23, at 439.

26. See Robertson, *Prior Agreements, supra* note 24, at 407 n.3. Implanting more eggs into the uterus would place risk on the offspring and on the mother through multifetal pregnancy. See *id.*

27. See Jennifer L. Carow, Note, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 529 (1994). Without cryopreservation, all eggs must be implanted immediately or

freezing embryos in liquid nitrogen at subzero temperatures.<sup>28</sup> This allows all eggs to be fertilized and preserved for transfer to the uterus in later cycles, relieving the woman of further egg retrievals,<sup>29</sup> which can be expensive. Each attempt at ovum retrieval and implantation costs between \$8000 and \$10,000.<sup>30</sup> Since estimates put the success rate for IVF anywhere between nine<sup>31</sup> and thirty-six percent,<sup>32</sup> a live birth can cost tens of thousands of dollars.

The storage of unused embryos causes a time lapse between fertilization and implantation which can allow legal conflicts to arise.<sup>33</sup> This time lapse allows biological donors to change their preferences regarding implantation and marital status.<sup>34</sup> Both *Davis v. Davis* and *Kass v. Kass* examined the disposition of frozen embryos after the parties' preferences had changed.

## B. The Case Law

### 1. Davis v. Davis

Mary Sue and Junior Davis married in 1980 after meeting in Germany where both were serving in the Army.<sup>35</sup> Shortly after their marriage, Mary Sue became pregnant but suffered a painful tubal pregnancy,<sup>36</sup> which forced the surgical removal of her right fallopian tube.<sup>37</sup> Four other tubal pregnancies followed.<sup>38</sup> After the fifth tubal pregnancy, Mary Sue chose to have her left fallopian tube ligated, eliminating any chance for her to conceive naturally.<sup>39</sup> The Davises

they will expire. See Marcia Joy Wurmbbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1083 (1986).

28. See Wurmbbrand, *supra* note 27, at 1083.

29. See Robertson, *Prior Agreements*, *supra* note 24, at 408. For one woman's description of the IVF process, see GENE COREA, *THE MOTHER MACHINE* 174-75 (1985) (describing repeated tests, programmed sex life, surgical procedures, a miscarriage, and menopause at the age of 31 due to the "medical and surgical mayhem" on the ovaries).

30. See Bette Harrison, *Special Delivery: A Baby*, ATLANTA J., Dec. 21, 1997, at 6D. Medication costs, which run between \$2500 to \$3000 per cycle, are extra. See Abigail Trafford, *Medicine's Money Back Warranty*, WASH. POST, Aug. 5, 1997, at Health 6.

31. See *Hearing*, *supra* note 21, at 2.

32. See Harrison, *supra* note 30, at 6D (profiling a clinic with higher than average success rates).

33. See Samuel A. Gunsburg, Note, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM L. REV. 2205, 2211 (1997).

34. See *id.*

35. See *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992).

36. Tubal pregnancy, also called ectopic pregnancy, is "a pregnancy that develops outside the uterus." THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 389 (Charles B. Clayman ed., 1989) [hereinafter ENCYCLOPEDIA]. The pregnancy can occur in the cervix, uterine tube, ovary, or the abdominal or pelvic cavity. See THE MERCK MANUAL 1868 (Robert Berkow ed., 16th ed. 1992). In a tubal pregnancy, the fetus must be removed, as it can be fatal if untreated. See ENCYCLOPEDIA, *supra*, at 389.

37. See *Davis*, 842 S.W.2d at 591.

38. See *id.*

39. See *id.*

attempted to adopt, but after one failed attempt it became "prohibitively expensive."<sup>40</sup> The Davises next went through six attempts at IVF in 1985 at a cost of \$35,000, but a pregnancy never occurred.<sup>41</sup>

In 1988, the Davises attempted IVF at a clinic that could offer them cryogenic preservation.<sup>42</sup> At the time of egg retrieval, the Davises did not consider the implications of extra stored embryos and therefore had no agreement as to their disposition.<sup>43</sup> Before a successful pregnancy occurred, Junior Davis filed for divorce.<sup>44</sup> The divorce proceedings were complicated only by the embryo disposition.<sup>45</sup>

In the ensuing dispute, the trial court found that human life began at the moment of conception and declared that the embryos were children in vitro.<sup>46</sup> It then invoked the doctrine of *parens patriae*<sup>47</sup> and held that it was in the best interests of the "children" to be born.<sup>48</sup> Since Mary Sue desired implantation, the trial court awarded her the embryos.<sup>49</sup>

At the time of appeal, the preferences of the parties had changed. Mary Sue had remarried and now wished to donate the embryos to another childless couple rather than implant them into herself.<sup>50</sup> The court of appeals rejected the "life begins at conception" view endorsed by the trial court,<sup>51</sup> pointing out that as embryos develop they are given more respect, but even after viability they are not given all the rights a legal person would have.<sup>52</sup> The court also recognized Junior's right not to beget a child where no pregnancy had occurred,<sup>53</sup> citing the

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40. *Id.* The birth mother changed her mind about putting the child up for adoption at the last minute. *See id.* See also *infra* Part III.B.I for a description of the adoption process and its cost.

41. *See Davis*, 842 S.W.2d at 591. To produce ova, the IVF attempts entailed a month of injections to shut down Mary Sue's pituitary gland and eight days of intramuscular injections to stimulate her ovaries, all despite her fear of needles. *See id.*

42. *See id.* at 592; see also *supra* text accompanying notes 27-30 (describing cryogenic preservation).

43. *See Davis*, 842 S.W.2d at 592.

44. *See id.* Junior testified that he knew their marriage "was not very stable" but he had hoped a child would improve it. *Id.*

45. *See id.*

46. *See Davis v. Davis*, No. E-14496, 1989 WL 140495, at \*9 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

47. *Parens patriae* is a concept used by courts "when acting on behalf of the state to protect and control the property and custody of minors and incompetent persons." BARRON'S LAW DICTIONARY 360 (4th ed. 1996).

48. *Davis*, 1989 WL 140495, at \*11.

49. *See id.*

50. *See Davis v. Davis*, No. 180, 1990 WL 130807, at \*1 n.1 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

51. *Davis*, 1989 WL 140495, at \*1.

52. *See Davis*, 1990 WL 130807, at \*2 (noting that after viability, abortion can be performed to save the life of the mother, and, furthermore, the state's wrongful death, murder, and assault statutes differentiated between abortion and other acts harming a fetus).

53. *See id.*

United States Supreme Court's recognition of the right to procreate,<sup>54</sup> and the right to prevent procreation.<sup>55</sup> The court felt that allowing Mary Sue to implant the embryos against Junior's will would be impermissible state action.<sup>56</sup> The court then held that the parties shared an interest in the fertilized ova with an equal voice over their disposition.<sup>57</sup> By giving each party an equal voice, a deadlock resulted.

The Tennessee Supreme Court agreed with the appellate court that the embryos were not persons in the whole sense,<sup>58</sup> citing *Roe v. Wade*.<sup>59</sup> The court did not, however, agree that the embryos were a mere property interest, as the appellate court had held.<sup>60</sup> Instead, embryos occupied an interim category that deserved greater respect than ordinary human tissue but not the full respect given to actual persons.<sup>61</sup> Relying on a report of The American Fertility Society, the court felt that embryos were due greater respect because of their potential for human life, even if they may never recognize their biologic potential.<sup>62</sup> The court concluded that Mary Sue and Junior Davis both had an ownership interest in the embryos entitling them to decisionmaking authority as to the embryos' disposition.<sup>63</sup>

Prior agreements between parties in a dispute over embryos should be presumed valid and enforced, the court believed.<sup>64</sup> In the instant case, however, no prior agreement between the parties existed. The court rejected an implied

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54. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (recognizing the right to procreate as one of a citizen's basic civil rights).

55. "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to use contraception).

56. See *Davis*, 1990 WL 130807, at \*2.

57. See *id.* at \*3. The court used *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) as part of the basis for its decision that both parties shared an interest in the embryos, which assumed that frozen embryos were the joint property of the couple when the couple who created the embryos wished to have them transferred to another facility. The *York* court held that the agreement between the couple and the facility created a bailment relationship, obligating the facility to return the embryos to the couple once the purpose of the bailment had terminated. *Id.* at 424-25.

58. See *Davis v. Davis*, 842 S.W.2d 588, 595 (Tenn. 1992).

59. 410 U.S. 113 (1973) (refusing to hold that fetuses possess independent rights).

60. See *Davis*, 842 S.W.2d at 596. See Robert J. Muller, Note, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763 (1993), for an argument that the court should not have abandoned the property law approach so quickly.

61. See *Davis*, 842 S.W.2d at 596. See generally Dehmel, *supra* note 22, at 1382-85 (summarizing the various legal views proposed to govern the status of frozen embryos).

62. See *Davis*, 842 S.W.2d at 596.

63. See *id.* at 597.

64. See *id.* Because the embryos had not been implanted in Mary Sue, these agreements were distinguishable from agreements concerning abortion, which are unenforceable because of a woman's rights to privacy and autonomy. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 68-75 (1976). For a discussion of prior agreements and their enforceability, see Robertson, *Prior Agreements*, *supra* note 24, at 414-18, suggesting prior agreements should be enforced to maximize reproductive freedom, provide certainty, and minimize disputes.

contract theory because there was no evidence the parties considered any disposition of the embryos other than by Mary Sue's pregnancy.<sup>65</sup> The supreme court also rejected the joint custody decision of the appellate court because it gave what amounted to a veto to Junior.<sup>66</sup> Theorizing that a veto power equally applied to both parties would probably be a constitutional resolution to the dispute, the court nevertheless concluded it was not the best route to take.<sup>67</sup>

The Tennessee Supreme Court framed the essential dispute as whether the parties would become parents. The answer to that question turned on the parties' constitutional right to privacy.<sup>68</sup> The court believed that the right to procreate was a vital part of an individual's right to privacy under both Tennessee and federal law.<sup>69</sup> "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>70</sup> Acknowledging that the U.S. Supreme Court had never dealt with procreational autonomy in an IVF context, the court nevertheless felt "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."<sup>71</sup> Since none of the concerns regarding a woman's bodily integrity were applicable in an IVF proceeding, the court regarded Mary Sue and Junior as equivalent gamete

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65. See *Davis*, 842 S.W.2d at 598; see also Dehmel, *supra* note 22, at 1398-1401 (opining that an estoppel theory of implied contract in embryo disputes is misplaced because of changes in circumstances not considered at the time of initial consent). But see Alise R. Panitch, Note, *The Davis Dilemma: How to Prevent Battles over Frozen Embryos*, 41 CASE W. RES. L. REV. 543, 573-76 (1991) (recommending that a spouse who initially consents to IVF should have no power to interrupt the process later based on an estoppel theory); Mario J. Trespalacios, Comment, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 830 (1992) (suggesting that the court in *Davis* should have fashioned the terms of the contract to meet the possibilities, taking into account the parties' knowledge of the others' desires).

66. See *Davis*, 842 S.W.2d at 598.

67. See *id.*

68. See *id.*

69. See *id.* at 599-600 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down the sterilization of criminals and describing the right to procreate as "one of the basic civil rights of man")).

70. *Id.* at 600 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (emphasis omitted). The court also noted that the right to procreational autonomy was recognized in the reproductive freedom cases. See *id.* at 601; see also *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

71. *Davis*, 842 S.W.2d at 601; see also Gunsburg, *supra* note 33, at 2215 (agreeing with the *Davis* court's constitutional conclusions, but feeling the court did not provide sound reasoning). But see Robertson, *supra* note 23, at 500 (finding it unlikely the U.S. Supreme Court would extend fundamental rights to include avoiding unknown biological offspring); Muller, *supra* note 60, at 785-86 (arguing that the U.S. Supreme Court would not likely find avoiding genetic parenthood a fundamental right); Leanne E. Murray, Note, *Davis v. Davis: The Embryonic Stages of Procreational Privacy*, 14 PACE L. REV. 567, 592 (1994) (believing it likely the U.S. Supreme Court would find that the state's interest in potential life outweighs the gamete donor's interest in avoiding genetic parenthood).

providers.<sup>72</sup> The decisional authority rested in the gamete providers alone.<sup>73</sup> Because there was no agreement between the donors, the court resolved the competing constitutional interests of the parties by balancing their interests, “consider[ing] the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.”<sup>74</sup>

Junior Davis’s interest was the avoidance of unwanted parenthood and the psychological and financial consequences that flowed from it.<sup>75</sup> Mary Sue’s interest was the donation of the embryos to another couple.<sup>76</sup> This provided a key distinction for the court. While refusal to permit donation would make her IVF efforts futile,<sup>77</sup> Mary Sue’s interest in donation was not as great as Junior’s interest in wanting to avoid parenthood.<sup>78</sup> The court felt donation would in fact rob Junior twice.<sup>79</sup> He would lose his procreational autonomy and have no relation with his offspring. Had Mary Sue wished to implant the embryos herself, it would have been a closer case, “but only if she could not achieve parenthood by *any other reasonable means*.”<sup>80</sup> The court considered another attempt at IVF a reasonable opportunity, despite the trauma and discomfort it entailed.<sup>81</sup> Significantly, the court also considered adoption as an alternative to achieving parenthood.<sup>82</sup> Since Mary Sue and Junior had considered adoption earlier, there was at least one prior time when she was willing to forego genetic parenthood.<sup>83</sup>

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72. See *Davis*, 842 S.W.2d at 601. *But cf.* *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-71 (1976) (denying men the ability to control abortions because a woman bears the child and is more intimately affected by the pregnancy). The *Davis* court noted that women suffer more severe trauma both physically and mentally through the IVF process but gave it no special consideration. See *Davis*, 842 S.W.2d at 601.

73. See *Davis*, 842 S.W.2d at 602. The state had no compelling interest until the end of the first trimester; any other interest was slight and outweighed by the donor’s interest in parenthood. See *id.*

74. *Id.* at 603.

75. See *id.* *But see* Panitch, *supra* note 65, at 576 (discounting the psychological burden of genetic parenthood and suggesting financial responsibility could easily be eliminated). Junior did not want his biological child to grow up without a father. As a boy he had severe problems caused by the separation of his parents and the nervous breakdown of his mother. See *Davis*, 842 S.W.2d at 603-04.

76. See *Davis*, 842 S.W.2d at 604.

77. The court thus ignored the “sweat equity” theory, which theorizes that because IVF places a greater physical burden on the woman than the man, the female who has relied to her detriment should be given the greater decision making authority. Dehmel, *supra* note 22, at 1399.

78. See *Davis*, 842 S.W.2d at 604.

79. See *id.*

80. *Id.* (emphasis added). *But see* Murray, *supra* note 71, at 594-95 (pointing out that women have historically been able to force genetic parenthood on men simply by giving birth to a jointly conceived child even when the man did not intend to conceive a child).

81. See *Davis*, 842 S.W.2d at 604; see also *infra* Part III.A (describing the possibility of another IVF attempt).

82. See *Davis*, 842 S.W.2d at 604. See also *infra* Part III.B for an analysis of adoption as a reasonable alternative.

83. See *Davis*, 842 S.W.2d at 604.



In sum, the Tennessee Supreme Court's final holding first looked to the preferences of the parties. If there was a dispute, the prior agreement should control. If there was no prior agreement, then the interests of the parties should be weighed. The party wishing to avoid procreation should normally prevail, assuming the other party has a reasonable means of achieving parenthood without using the embryos in question. If there are no alternatives, then the interest of the party wishing to use the embryos should be considered.<sup>84</sup> If the party desiring the embryos merely intended to donate them to another couple, the objecting party should prevail.<sup>85</sup> However, the court expressly stated the ruling was not meant to create an automatic veto.<sup>86</sup>

Thus, the court gave great weight to the objecting party, as reasonable alternatives will almost certainly exist. Even if the woman was completely unable to produce a child through IVF,<sup>87</sup> counting adoption as a reasonable alternative would certainly eliminate most objections based on no other reasonable means to achieve parenthood. Adoption is almost always possible.<sup>88</sup> The *Davis* court mentioned adoption specifically in the context of the Davises' prior attempts to adopt. The court's opinion was unclear as to whether it would consider adoption a reasonable alternative if the Davises had not attempted adoption previously.<sup>89</sup>

Furthermore, since Mary Sue was not attempting to use the embryos herself, the court had no occasion to consider whether adoption could be used as a reasonable alternative to genetic offspring if Mary Sue had no other means to achieve

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84. For a critical analysis of the *Davis* "exception" when there are no alternatives to achieve parenthood, see Carow, *supra* note 27, at 567-68, suggesting that the exception undermines the balancing test by giving one factor too much weight and favors women over men as they are the only ones who could use the embryos themselves. See also Dehmel, *supra* note 22, at 1403 (describing the exception as an illusion because reasonable alternatives should be interpreted broadly to include genetic and non-biological alternatives, such as adoption). But see Panitch, *supra* note 65, at 574-78 (favoring an implantation rule based on an estoppel argument, also discounting the psychological effects on the objector, opining that the woman's effort during the IVF process, as well as the cost of alternative means of parenthood, is undervalued as women suffer both psychological and physical problems); Trespalacios, *supra* note 65, at 822-24 (arguing the *Davis* decision is gender biased and discounts the woman's countervailing interests).

85. See *Davis*, 842 S.W.2d at 604.

86. See *id.* But see Trespalacios, *supra* note 65, at 824 (claiming the court's equal balancing of interests gives the objecting party an automatic veto).

87. A woman may have a hard time finding a program willing to use donor sperm and IVF with an unmarried woman. See Robertson, *supra* note 23, at 481 n.109. Most clinics presently restrict the use of IVF to married couples. See *Hearing*, *supra* note 21, at 71. A woman could also lose the capacity to produce eggs, or be unable to safely undergo ovarian stimulation and retrieval. See COREA, *supra* note 29, at 174-75 (describing a woman reaching menopause at age 31); Robertson, *supra* note 23, at 481 n.109. The risk of genetically defective eggs increases if the woman were much older than she were when the initial embryos were produced. See *id.* In addition, the woman may be able to afford to have the embryos thawed and implanted, but not have the \$8000 needed to undergo another full IVF cycle. See *id.*

88. The level of difficulty in adopting a child depends on the race, health, and age of the desired child. See *infra* Part III.B.I.

89. See Dehmel, *supra* note 22, at 1403 (recommending that reasonable alternatives include non-biological alternatives in future disputes).

biological parenthood. As a result, the role of adoption in the reasonable alternatives analysis was unclear in *Davis* because of the specific facts of the case. However, a case fitting the *Davis* exception, where the woman wished to implant the embryos in herself, arose in New York just a few years later. Again adoption would show up in the reasonable alternatives analysis.

## 2. *Kass v. Kass*

Maureen and Steven Kass made ten unsuccessful attempts to conceive a child through IVF from 1990 through 1993 at a cost of over \$75,000.<sup>90</sup> Unlike the Davises, the Kassess signed informed consent agreements which covered the disposition of the embryos should certain events occur.<sup>91</sup> One section of the consent form stated that in the event of divorce the legal ownership of the embryos would be determined by a court if the parties could not agree.<sup>92</sup> Another section of the consent form directed the embryos to be donated to the IVF program for research should the parties no longer wish to continue with the program and disagreed as to their disposition.<sup>93</sup> After further unsuccessful attempts to achieve parenthood, the Kassess agreed to dissolve their marriage.<sup>94</sup> In the divorce agreement, the parties agreed to dispose of the embryos as the previously signed consent form directed.<sup>95</sup> Maureen Kass, however, later notified the IVF program that she would seek sole custody of the fertilized eggs to be implanted in herself.<sup>96</sup> Steven Kass objected to any further attempts to achieve pregnancy and wanted the embryos donated to the IVF program for research.<sup>97</sup>

In deciding the issue, the trial court noted and approved of the *Davis* court's recognition of a right to procreate and avoid procreation.<sup>98</sup> However, it viewed the issue in a different way: Was there a difference between in vivo and in vitro fertilization?<sup>99</sup> Noting that the husband had no right over an in vivo fertilization,<sup>100</sup> the court concluded there is no difference between an in vivo and an in vitro fertilization, remarking that "it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish."<sup>101</sup> The court believed that biological life began at conception.<sup>102</sup> "To

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90. See *Kass v. Kass*, 663 N.Y.S.2d 581, 583 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

91. See *id.* at 583-84.

92. See *id.* at 584.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.* at 585. Maureen Kass's sister had initially agreed to act as a surrogate, but later changed her mind. See *id.* at 584.

97. See *id.* at 585.

98. See *Kass v. Kass*, No. 19658/93, 1995 WL 110368, at \*2 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

99. See *id.*

100. See *id.* (citing *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (denying men a voice in abortion decisions) and *Roe v. Wade*, 410 U.S. 113 (1973)).

101. *Id.* at \*3.

102. See *id.*

deny a husband rights while an embryo develops in the womb and grant a right to destroy [an embryo] while it is in a hospital freezer is to favor situs over substance."<sup>103</sup> The court felt that the husband's right to avoid procreation was waived by his participation in an IVF program.<sup>104</sup> The trial court's ruling rested on its refusal to recognize a right to avoid procreation after the initial act of procreation had taken place, contrary to what the *Davis* court had allowed.<sup>105</sup> The court further concluded that the consent forms signed by the parties were not dispositive because the forms expressly left it up to a court to determine what would happen in the event of divorce.<sup>106</sup> Based on the court's conclusions, Maureen Kass was granted the exclusive right to determine the fate of the embryos.<sup>107</sup>

The appellate division split as to the proper resolution of the case, but all five justices agreed that the trial court had erred in equating IVF with an in vivo conception.<sup>108</sup> "A woman's established right to exercise virtually exclusive control over her own body is not implicated in the IVF scenario until such time as implantation actually occurs . . . ."<sup>109</sup> A two-justice plurality felt that the informed consent document signed by the Kasses was the prior agreement desired by the court in *Davis*. Since the consent form provided that the embryos were to go to the IVF facility in the event the parties could not come to an agreement as to their disposition, that language was controlling.<sup>110</sup> The plurality felt the provision containing the divorce contingency was only to insulate the IVF program from liability in the event of a divorce dispute.<sup>111</sup> Furthermore, the plurality felt Maureen Kass had not provided enough proof to establish any right to custody, therefore the balancing test employed in *Davis* would not be triggered even had there been no prior agreement.<sup>112</sup>

The concurrence did not agree that the informed consent document should be the sole authority on the disposition of the embryos as it did not provide "real insight into the intentions of these divorced parties."<sup>113</sup> Since the consent form could be susceptible to conflicting interpretations, it could not be relied upon to

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103. *Id.*

104. *See id.* This is in effect the implied contract or estoppel theory. *See* Dehmel, *supra* note 22, at 1398-1401; Panitch, *supra* note 65, at 574-75; Trespalacios, *supra* note 65, at 829-30.

105. *See Kass*, 1995 WL 110368, at \*3-4.

106. *See id.* at \*4. The court felt the provision concerning what would happen in the event the parties could not agree to the embryos' disposition was inapplicable in a divorce proceeding, as a different provision explicitly governed what would happen in the event of divorce. *See id.*

107. *See id.* Steven's rights were to be protected by a directive that Maureen implant the embryos within a medically reasonable time. *See id.* at \*5. The court did not consider his possible financial obligations, determining it would more properly be considered when and if a pregnancy occurred. *See id.*

108. *See Kass v. Kass*, 663 N.Y.S.2d 581, 585 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

109. *Id.* at 586.

110. *See id.* at 588 (plurality opinion).

111. *See id.* at 589.

112. *See id.* at 590.

113. *Id.* at 591 (Friedmann, J., concurring).

resolve the dispute.<sup>114</sup> The concurrence also did not favor the strict balancing of interest preferred by the *Davis* court and the *Kass* dissenters,<sup>115</sup> opting instead for a veto power given to the objecting party absent “the most exceptional circumstances.”<sup>116</sup> Emphasizing that once lost, the right to not procreate cannot be regained, the concurrence could imagine few, if any, situations where the party wishing reproduction should prevail.<sup>117</sup> The concurrence felt there should not even be a hearing to balance the interests unless the woman desiring implantation could show she had lost the ability to ovulate or some other disabling circumstance.<sup>118</sup> “Mere discomfort, expense, or other potentially surmountable difficulties should not suffice to defeat the defendant’s fundamental right to avoid biological fatherhood in a case of this sort.”<sup>119</sup>

As inere preference for genetic parenthood should not override the other spouse’s right not to procreate, adoption was to be considered among “other reasonable alternatives.”<sup>120</sup> Maureen Kass had made no showing that the embryos in question represented her last chance at motherhood, and had not addressed adoption at all.<sup>121</sup> In the concurrence’s view, being an unmarried woman in her late thirties was not enough of a hindrance to grant her possession of the embryos. Because Maureen Kass had not shown she had no other reasonable means to achieve parenthood, the concurrence agreed with the plurality that the embryos should be given to the IVF program for research purposes.<sup>122</sup>

The dissent agreed with the concurrence that the consent forms in no way reflected an intent to donate the embryos to research in the event of divorce.<sup>123</sup>

114. *See id.* at 592.

115. The concurrence felt the strict balancing test could violate the Supreme Court’s decision in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), by allowing one person to interfere with another person’s decision not to have offspring before the point of viability. *See Kass*, 663 N.Y.S.2d at 592 (Friedmann, J., concurring). *But see* Kristine E. Luongo, Comment, *The Big Chill: Davis v. Davis and the Protection of “Potential Life”?*, 29 NEW ENG. L. REV. 1011, 1038 n.283 (1995) (emphasizing that the *Danforth* decision was based on the man not being able to control the woman’s choice, since she is more affected by the pregnancy); Murray, *supra* note 71, at 571-72 (pointing out the Court has summarily dismissed the man’s rights in past cases because of the woman’s overriding rights).

116. *Kass*, 663 N.Y.S.2d at 592 (Friedmann, J., concurring). One commentator has coined this the “double consent” rule, since it requires consent before participation in the IVF program and again before implantation. *See Panitch*, *supra* note 65, at 572. The *Davis* court expressly rejected such a veto power. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

117. *See Kass*, 663 N.Y.S.2d at 592 (Friedmann, J., concurring). The fact that a biological parent had an unwaivable duty to support the child financially was also a factor. *See id.* at 593.

118. *See id.*

119. *Id.*; *see also* Robertson, *Prior Agreements*, *supra* note 24, at 419 (arguing that a party who made an agreement not to use the embryos in the event of divorce should not be able to impose unwanted parenthood on another merely “because she has changed her mind and wishes to use these embryos rather than go to the trouble of creating new ones”). *But see* Panitch, *supra* note 65, at 576-77 (suggesting that Robertson undervalues the woman’s psychological and physical effort in the IVF process).

120. *Kass*, 663 N.Y.S.2d at 593 (Friedmann, J. concurring).

121. *See id.*

122. *See id.* at 593-94.

123. *See id.* at 594 (Miller, J., dissenting).

However, a more strict balancing of the interests was favored. Because there was not enough evidence in the record to balance the equities, the dissent would have remanded the case to balance the parties' conflicting interests.<sup>124</sup> Noting that Maureen Kass had as much right to procreate as Steven Kass did not to procreate, the dissent also believed the right to procreate could be just as irrevocably lost as the right not to procreate.<sup>125</sup> Therefore, both of the parties' competing interests must be taken into account.<sup>126</sup> The dissenting justices believed that a court should consider whether the woman could achieve pregnancy through IVF, taking into account her age, physical, emotional, and financial condition.<sup>127</sup> Moreover, whether adoption was a reasonable opportunity should also be considered.<sup>128</sup>

Weighed against the woman's right to procreate was the man's interest in avoiding unwanted fatherhood, both psychologically and financially.<sup>129</sup> Circumstances could exist that would lessen the impact of the man's interest. A woman may be wealthy enough to support her child on her own.<sup>130</sup> Moreover, psychological concerns are not always dispositive, as numerous men father children with no thought or concern for their offspring.<sup>131</sup> The motivation behind the objections needed to be scrutinized carefully, the dissent felt, so as not to cause the party wishing implantation to exhaust every alternative when the opposing party's only motive is to harass.<sup>132</sup> The dissent also mentioned that the *Davis* court had expressly rejected granting a veto but had awarded a presumption to the party resisting implantation.<sup>133</sup> The *Kass* dissent was not even willing to go that far, favoring that each case be decided on its individual facts.<sup>134</sup>

In sum, three of the five justices felt the interests of the parties needed to be balanced as the court had done in *Davis*. Two justices felt the interests needed to be balanced strictly, with each party starting in the same position and their individual situations deciding the issue. One concurring justice believed the objecting party should have what amounted to a veto, unless there were absolutely no other means of achieving parenthood. Since Mrs. Kass had not satisfied the concurrence's proposed burden, the embryos should be dispensed of as the consent form indicated. Because the plurality felt the prior agreement controlled, three justices agreed that the embryos should be disposed of according to the consent agreement.

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124. *See id.* The dissent felt the plurality and concurrence had created a new evidentiary standard by making Maureen Kass show she had no other means to achieve parenthood before a hearing was ever held. *See id.* at 602.

125. *See id.* at 599.

126. *See id.*

127. *See id.* at 600. A woman may no longer be able to produce eggs, *see supra* note 87, or she may not be able to afford the \$8000 cost, *see supra* text accompanying note 30.

128. *See Kass*, 663 N.Y.S.2d at 600 (Miller, J., dissenting). *See infra* Part III for a discussion of whether adoption should be considered a reasonable alternative.

129. *See Kass*, 663 N.Y.S.2d at 600 (Miller, J., dissenting).

130. *See id.*

131. *See id.* at 601.

132. *See id.*

133. *See id.* at 602.

134. *See id.*

The court of appeals, in a unanimous opinion, agreed with the plurality holding of the appellate division and ruled that the consent form signed by the Kasses governed the disposition of the embryos.<sup>135</sup> Under the agreement, the embryos could not be used by either party without both parties consent. Since Steven Kass would not consent to the use of the embryos, neither party could claim custody.<sup>136</sup> Furthermore, the addendum to the consent form provided that in the event of death or unforeseen circumstances the embryos were to be donated to research. The court concluded that divorce constituted an unforeseen circumstance, thus the embryos were to be donated for research.<sup>137</sup> Because the court of appeals found that the consent form governed the embryos' disposition, the court did not discuss whose interests should prevail in the absence of an unambiguous declaration of intent. Therefore, the appellate division's opinion remains as the highest New York court to deal with the issue of balancing interests in frozen embryo disputes.<sup>138</sup>

### III. ANALYSIS

The *Davis* and *Kass* decisions placed emphasis on whether there were reasonable alternatives to achieve parenthood by other means for the party desiring the embryos. Both courts mentioned adoption as a possible alternative to biological offspring.<sup>139</sup> This raises the question whether adoption should be considered an alternative to genetic parenthood, both when the party desiring the embryos has other opportunities to conceive through IVF, and when the party has no chance at genetic parenthood. If it is not impracticable for the party desiring the embryos to achieve parenthood through another attempt at IVF, the embryos should not be used. However, if achieving parenthood through IVF is unlikely because of age, marital status, or loss of reproductive capacity, the parties' interests need to be carefully balanced to determine what should be done with the embryos. In balancing the parties' interests in this circumstance, adoption should not be a factor.

#### A. The IVF Possibility

If the party wishing to use the embryos herself has a right to procreate as strong as the right of the party protesting against the use of the embryos, a factor that can break the tie must exist. The court in *Davis* and a majority of the justices in *Kass* broke this tie by asking whether the party desiring implantation had reasonable alternatives to achieve parenthood. One way to achieve parenthood without using the disputed embryos would be to go through the IVF process all over again, if biologically possible. In the majority of cases, the woman will be able to

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135. See *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

136. See *id.* at 180.

137. See *id.* at 181.

138. For the balance of this Note unless otherwise specified, any reference to the *Kass* court's opinion will refer to the opinion of the appellate division.

139. See *Kass v. Kass*, 663 N.Y.S.2d 581, 593, 600 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

reproduce with a new partner through IVF.<sup>140</sup> One expert has opined that it is not unreasonable to ask the woman to undergo the moderate physical burdens of IVF again in order to avoid an irreversible loss to the party who wants to avoid having genetic offspring.<sup>141</sup> However, this would cost the party at least another \$8000 to \$10,000, as well as more fertility drug therapy and possible surgery.<sup>142</sup> Furthermore, since most clinics restrict IVF to married couples, the ex-wife would likely have to remarry before she could begin the process again.<sup>143</sup> Nevertheless, if the IVF process is not an impracticability, the party opposing implantation seems to have the better argument and the embryos should not be used.

Regardless of the outcome in balancing the above factors, the problem is obviously exacerbated if the woman has no further reproductive opportunity.<sup>144</sup> It could reasonably be argued that the party with no alternative opportunity to reproduce should win, because the joy and significance of parenthood to that person will be much greater than the discomfort of unwanted biological offspring.<sup>145</sup> The force of this argument is lessened, however, if adoption is added to the reasonable alternatives analysis, as the courts in *Davis* and *Kass* appeared to do.

If adoption is considered a reasonable alternative to achieving parenthood, then it will not matter whether the party desiring implantation cannot conceive through another attempt at IVF. The party can become a parent through adoption. Both the *Davis* and *Kass* courts may have fallen prey to the common belief that "[w]ith the placement of the child in the adoptive family . . . the various parties of the adoption triangle simply go on their way to live 'happily ever after.'"<sup>146</sup> Despite the courts' possible beliefs, the process of adoption and the nature of adoptive relationships show that adoption should not automatically be discussed as a reasonable alternative to achieving parenthood genetically. Treating adoption as a reasonable alternative proceeds on two mistaken assumptions. First, the assumption that children are easily obtained through adoption, and second the notion that the relationship between an adoptive parent and an adoptive child is the same as one between a biological parent and child. This Note will next explore the validity of these two questionable assumptions.

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140. See Robertson, *supra* note 23, at 480.

141. See *id.* Panitch, *supra* note 65, at 576, argues Robertson overlooks several important considerations, namely that the objecting spouse may not have to support the child financially, there may not be any psychological burden on the objecting spouse, and the physical and emotional costs on the spouse favoring implantation are undervalued.

142. See Panitch, *supra* note 65, at 576. If a woman in her mid-thirties could go through IVF again but chose to adopt, the lengthy adoption process could foreclose another attempt at IVF if the adoption did not succeed. See Vetri, *supra* note 21, at 506.

143. See *Hearing*, *supra* note 21, at 71.

144. See *supra* note 87.

145. See Robertson, *supra* note 23, at 481.

146. David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in *THE PSYCHOLOGY OF ADOPTION* 3, 4 (David M. Brodzinsky & Marshall D. Schechter eds., 1990).

## B. Adoption

### 1. Obtaining a Child Through Adoption

Healthy adoptive children are not easy to obtain. Adopting a healthy infant can cost anywhere from \$10,000 to \$30,000 and international adoptions can cost twice that much.<sup>147</sup> Furthermore, postponed child bearing, changed participation of women in the labor force, and increased infertility have led to an increase of people seeking to adopt.<sup>148</sup> Birth control, abortion, and societal acceptance of single motherhood has correspondingly led to a sharp decrease in the number of healthy babies available for adoption.<sup>149</sup> Far more people want to adopt Caucasian babies than there are babies available,<sup>150</sup> as fewer white mothers are giving up their babies.<sup>151</sup> In the late 1980's, an estimated one million couples were chasing 30,000 white infants available in America each year.<sup>152</sup> The wait for adopting a white infant can be from two to five years.<sup>153</sup> Adoption of children of other races is not a viable alternative, as agencies discourage white couples from adopting black babies, and vice versa.<sup>154</sup> Due to these factors, most children available for adoption are older or have disabilities.<sup>155</sup>

Additionally, being a single person, as many recently divorced people fighting over embryos will be, decreases one's chance of becoming an adoptive parent.<sup>156</sup> For infant adoptions, many adoption agencies will only consider couples married

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147. See Lois Gilman & Susan Freivalds, *How to Realize the Joy of Adopting a Child*, MONEY, Nov. 1997, at 160, 160. New tax credits and some employer adoption programs can decrease these expenses. See *id.* at 162.

148. See Marianne Berry, *Risks and Benefits of Open Adoption*, FUTURE OF CHILDREN, Spring 1993, at 125, 125. The federal government collects no comprehensive national statistics on adoption. See Kathy S. Stolley, *Statistics on Adoption in the United States*, FUTURE OF CHILDREN, Spring 1993, at 26, 26. Consequently, the estimated number of adoptions occurring each year varies widely. Total adoptions in 1990 were estimated at 118,529. See *id.* at 29.

149. See Berry, *supra* note 148, at 125.

150. See NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK, ADOPTION—WHERE DO I START? 1 (1991).

151. In 1973, an estimated 19% of white mothers gave up their babies. See Stolley, *supra* note 148, at 32. From 1982 through 1988, only an estimated 3% did so. See *id.*

152. See Cynthia Crossen, *Hard Choices: In Today's Adoptions, the Biological Parents are Calling the Shots*, WALL ST. J., Sept. 14, 1989, at A1. For all adoptions, the number of women seeking to adopt surpasses the annual number of unrelated adoptions (adoptions by those not related to each other) by over three to one. See Stolley, *supra* note 148, at 37.

153. See NATIONAL COMM. FOR ADOPTION, *supra* note 150, at 3.

154. See Crossen, *supra* note 152, at A1; see also NATIONAL COMM. FOR ADOPTION, *supra* note 150, at 1 (noting most adoption agencies prefer to place children with parents of the same ethnic background).

155. See NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK—SINGLE PARENT ADOPTION: WHAT YOU NEED TO KNOW 2 (1991).

156. Being single also virtually eliminates one's chance of becoming a parent via IVF. See *supra* note 87.



for one to three years who are between the ages twenty-five and forty.<sup>157</sup> One survey found that ninety-nine percent of women were married at the time of adopting a child.<sup>158</sup> More recent estimates suggest only five percent of adoptions are by single parents.<sup>159</sup> Some adoption agencies still do not accept applications from single parents, and the agencies who do are likely to put single parents in line behind married couples.<sup>160</sup> Single men face an even tougher obstacle, as their motives and sexual preference will be closely scrutinized.<sup>161</sup>

Even if the age and marriage requirements are satisfied, more challenges lie ahead. The lack of infants available for adoption has shifted the balance of power to the birth parents.<sup>162</sup> This has resulted in an increasing number of "open adoptions." An open adoption is one which does away "with as much confidentiality as [it] can."<sup>163</sup> Typically, this involves the birth parents picking the adoptive parents from biographies.<sup>164</sup> Many interviews may have to be conducted before a child can be placed with an adoptive couple, and the birth mother can change her mind at any time.<sup>165</sup> Birth mothers or parents can select by whatever

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157. See NATIONAL COMM. FOR ADOPTION, *supra* note 150, at 2. The chances of a single person adopting are increased when adopting a special needs child (one with a disability), or an older child. See *id.*

158. See Stolley, *supra* note 148, at 37 (citing a 1982 survey).

159. See NATIONAL COMM. FOR ADOPTION, *supra* note 155, at 1.

160. See *id.* at 3. Since many of the women in IVF disputes have delayed parenthood, the chances of them being close to the 40-year age limit are also increased.

161. See *id.*

162. See Crossen, *supra* note 152, at A1.

163. Kenneth W. Watson, *The Case for Open Adoption*, PUB. WELFARE, Fall 1988, at 24, 24. Sorosky defines open adoption as "an adoption in which the birth parent meets the adoptive parents, relinquishes all legal, moral, and nurturing rights to the child, but retains the right to continuing contact and knowledge of the child's whereabouts and welfare." ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 207 (1978). Roughly half of all adoptions conducted through agencies each year are open adoptions. See Gilman & Freivalds, *supra* note 147, at 164.

164. See Gilman & Freivalds, *supra* note 147, at 164. There is usually an evaluation done by the adoption agency even before the stage where the birth mother picks from adoptive couples. This study evaluates the prospective adoptive family by examining the physical and emotional environment in which the child will be placed, taking into account the couple's income, assets, the stability of their marriage, and their health. Physical exams may even be required. See NATIONAL COMM. FOR ADOPTION, *supra* note 150, at 3; see also STANLEY B. MICHELMAN & MEG SCHNEIDER, *THE PRIVATE ADOPTION HANDBOOK* 16-28 (1988) (describing the pre-approval process). Obviously, adoptive couples can feel uncomfortable in being assessed for suitability, as it goes against the norms of parenthood to have one's motives probed and domestic management evaluated before having a child. See Rob Clayton & Mary Clayton, *An Alternative Family*, in *ADOPTION* 100, 104 (Philip Bean ed., 1984). Indeed, the home study process has been described as "going through the ringers of a washing machine." SOROSKY ET AL., *supra* note 163, at 75.

165. See James Lardner, 'Open' Adoption and Closed Minds, WASH. POST, Dec. 31, 1989, at C3. It is estimated that half of the independent adoptions (adoptions through private sources, such as an attorney, and not through an agency) attempted each year fall through, usually because the birth mother decides to keep her child. See Gilman & Freivalds, *supra* note 147, at 171. Almost one-third of all adoptions are handled independently. See Stolley, *supra* note 148, at 31.

criteria they choose, and the prospective parent's physical appearances can be determinative.<sup>166</sup> Temperament and personality tests are not unheard of either.<sup>167</sup> Once the couple is chosen, the birth parents and adoptive parents meet and get to know each other, usually before the child's birth.<sup>168</sup> This can result in intimate and long-term contact with the biological parents of the child.<sup>169</sup> The openness and beauty pageant character of the adoption process may be unsettling to adoptive parents, but it may be their only way to get a baby.<sup>170</sup> In open adoptions, "the interests of the adoptive parents come last."<sup>171</sup>

A single white woman's adoption of a healthy white infant could be considerably more difficult than another attempt at IVF. If the woman could complete another IVF cycle she would likely find that a much easier option than trying to adopt a healthy child. If she could not attempt IVF again, a court would be imposing considerable expense and delay on a woman by forcing her to adopt a child to achieve parenthood. The difficulty of becoming an adoptive parent is overlooked by the *Davis* and *Kass* courts. Adopting a healthy infant is not as easy as heading down to the nearest adoption agency and selecting a child. Inconvenience alone may not convince a court that adoption is not an alternative to genetic parenthood. However, additional factors unique to adoptive relationships require that adoption not be considered a reasonable alternative to biological parenthood, depriving a woman of the embryos and her last chance to become a genetic parent.

## 2. The Adoptive Parent-Child Relationship

Adoption has been recognized as "the legal equivalent of biological parenthood" by the United States Supreme Court.<sup>172</sup> Legal adoption perpetuates the fiction that adoption creates children and families just as birth does.<sup>173</sup> However, adoption is not the equivalent of producing one's own child, it is bringing another's child into one's own family.<sup>174</sup> "Adoption should be seen as a service for children who need families they wouldn't otherwise have, not as a

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166. See Crossen, *supra* note 152, at A1.

167. See *id.*

168. See Lardner, *supra* note 165, at C3. The adoptive parents may even be invited to attend the delivery. See *id.*

169. See Crossen, *supra* note 152, at A1.

170. See *id.* Some studies have shown that despite the initial uneasiness about the open adoption process, adoptive parents were generally satisfied with the outcome. See Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1018 & nn.106-07 (1995). For a discussion of the risks and benefits of open adoption, see generally Berry, *supra* note 148.

171. Lardner, *supra* note 165, at C3.

172. *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 n.51 (1997) (noting that families not based on blood ties can contain many of the characteristics of a natural family, but holding that the state may remove foster children from foster homes when due process procedures are met).

173. See Appell, *supra* note 170, at 1000-01.

174. See HARALAMBIE, *supra* note 17, at 203.

solution to infertility or an alternative to abortion."<sup>175</sup> Adoption has profound effects that continue throughout the lives of the biological parents,<sup>176</sup> the adoptive parents, and the adopted child.<sup>177</sup> It is a stressful experience to many children and parents, and the coping measures used to deal with the stress are not always successful.<sup>178</sup> These stresses and their effects show that adoption should not be considered an alternative to genetic parenthood and should not be a factor in resolving frozen embryo disputes.

#### a. The Adoptive Parents

Discovering their inability to achieve parenthood does not come easy to a couple.<sup>179</sup> It can leave them feeling ashamed and guilty.<sup>180</sup> They blame both themselves and each other.<sup>181</sup> The couple grieves for the loss of reproductive function and the loss of biological children.<sup>182</sup> If a party to an embryo dispute was forced to adopt in order to become a parent, this grief for the loss of genetic children would certainly be intensified because they were so close to biological parenthood.

A child that is conceived by the parent has positive advantages.<sup>183</sup> The offspring will be the child of the parent. The woman will have the emotional satisfaction of childbearing, or the man the experience of seeing his child brought to term.<sup>184</sup> For women, pregnancy creates a bond between the mother and the child because the mother becomes aware of the child before birth.<sup>185</sup> This awareness creates a sense of responsibility in the mother.<sup>186</sup> The act of carrying a child brings about a union between mother and child like no other.<sup>187</sup> Pregnancy changes a woman, bringing about changes in her thoughts and emotions.<sup>188</sup> The carrying of the child transforms the woman into a mother.<sup>189</sup> "[I]t is a rare woman who does not

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175. Mark Hansen, *Fears of the Heart*, A.B.A. J., Nov. 1994, at 58, 61 (quoting Ken Watson, Assistant Director of the Chicago Child Care Society and Member of the Board of Directors of the American Adoption Congress). One commentator states, "Adoption is not a cure for childlessness: [but] it may provide the childless couple with a substitute for their own child." Peter M. Bromley, *Aided Conception: The Alternative to Adoption*, in ADOPTION 174, 174 (Philip Bean ed., 1984).

176. See SOROSKY ET AL., *supra* note 163, at 47-72, for a discussion of the effects on the biological parents.

177. This triad has been referred to as the adoption triangle. *See id.* at 220.

178. *See* Brodzinsky, *supra* note 146, at 4.

179. *See* SOROSKY ET AL., *supra* note 163, at 74.

180. *See id.* *See* Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 929-32 (1991), for a description of the traditional social stigma associated with infertility.

181. *See* SOROSKY ET AL., *supra* note 163, at 74.

182. *See id.*

183. *See* Bromley, *supra* note 175, at 174.

184. *See id.*

185. *See* VANGIE BERGUM, A CHILD ON HER MIND 21 (1997).

186. *See id.*

187. *See id.* at 34.

188. *See id.* at 144.

189. *See id.* at 37.

experience some fundamental alteration of her core during pregnancy."<sup>190</sup> Furthermore, birth mothers contribute more than half of their children's genetic material, even if they never see their children again.<sup>191</sup> Thus, genetic parents, and mothers in particular, have unique bonds with their children that non-genetic parents will never have.

Adoptive parents, on the other hand, may not develop a full sense of parental identity.<sup>192</sup> They suffer a lack of preparation for parenthood by not going through a pregnancy.<sup>193</sup> Preparation for adoptive parenthood, rather than the gradual progression towards parenthood during a pregnancy, tends to be abrupt.<sup>194</sup> In adoption there is no certainty of the child's arrival.<sup>195</sup> Even after the child has arrived in the adoptive parent's home, there is no guarantee the child will not be taken from them.<sup>196</sup> Birth parents can later change their minds, and court disputes have centered on whether biological parents can remove their children from adoptive households.<sup>197</sup> One court has stated in a ruling upholding the breakup of an adoptive family, "If there is a tragedy in this case . . . then that tragedy is the wrongful breakup of a natural family and the keeping of a child by strangers without rights."<sup>198</sup>

Creation of families based on psychological instead of blood ties contains inherent identity problems that the law can never eliminate.<sup>199</sup> The lack of a biological tie makes it difficult for the adoptive parents to believe the child is theirs.<sup>200</sup> The adoptive mother's susceptibility to shameful feelings because of her infertility can lead to a greater likelihood of problems developing between an adoptive mother and child than between a birth mother and child.<sup>201</sup> Adoption can also diminish the likelihood of the adoptive parent becoming a psychological

190. KATHRYN ALLEN RABUZZI, *MOTHER WITH CHILD* 54 (1994).

191. See ANN DALLY, *MOTHERS* 26 (Cox & Wyman 1976).

192. See SOROSKY ET AL., *supra* note 163, at 75. This lack of parental identity can often be traced back to the home study. See *id.* See *supra* note 164, for a discussion of the home study process.

193. See H. DAVID KIRK, *ADOPTIVE KINSHIP: A MODERN INSTITUTION IN NEED OF REFORM* 33 (1982).

194. See *id.*

195. See *id.* at 32.

196. The adoptive parents must await finalization, which is based on "their continued fitness as adoptive parents." Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really "Strangers Without Rights"?*, 1995 ANN. SURV. AM. L. 166, 170.

197. See *In re John Doe*, 638 N.E.2d 181 (Ill. 1994) (denying a rehearing on a ruling revoking a final decree of adoption); *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (ordering an adopted child to be returned to the biological parents); Welt, *supra* note 196 (suggesting the adoptive parents' constitutional rights should be given weight in disputes between the adoptive and biological parents). Cases such as these provoke the fears of adoptive parents that their babies will be taken away. See KATHLEEN SILBER & PHYLIS SPEEDLIN, *DEAR BIRTHMOTHER: THANK YOU FOR OUR BABY* 3 (1983) (quoting one adoptive mother as saying, "[t]he birthparents were now villainous kidnapers who would one day reappear to claim their own").

198. *In re John Doe*, 638 N.E.2d at 190. See generally Welt, *supra* note 196, for a description of the issues involved in disputes between biological and adoptive parents.

199. See Carl Schoenberg, *On Adoption and Identity*, 53 CHILD WELFARE 549, 549 (1974).

200. See SOROSKY ET AL., *supra* note 163, at 76.

201. See *id.* at 98.

parent<sup>202</sup> because the trial period before the adoption is finalized may cause the parents to hesitate in making a commitment to the child.<sup>203</sup>

The effects on the adoptive parents alone counsel against including adoption as a reasonable alternative to achieving parenthood in an embryo dispute. Feelings of shame and guilt due to infertility should be worked out prior to adoption.<sup>204</sup> Women not able to conceive have reported periodic anger in situations reminding them of their infertility.<sup>205</sup> Adoption agencies often spend time with adoptive parents on the issue of loss because the agencies are convinced that if the loss of a fantasized biological child remains unresolved, the parents will have more difficulty parenting the real adopted child.<sup>206</sup> These problems would be magnified by a would-be parent who was so close to having his or her own biological child but was denied the chance to do so by a former spouse. To deny that parent access to the embryos because of the chance at adoption ignores the problems adoptive parents face, especially adoptive parents who have fertility problems. If the party desiring a child is forced to adopt in order to become a parent, that party's relationship with his adopted child will not be the equivalent of a relationship with a genetic child.

#### b. The Adopted Child

Adoptees are forever members of two families, the one that gave them life and their adoptive parents.<sup>207</sup> Adopted children continually struggle with questions related to their birth families and their adoption.<sup>208</sup> Many have feelings of embarrassment and not belonging during childhood.<sup>209</sup> One expert does not believe that children ever bond completely with their adoptive parents, positing that bonding is a unique act between the child and the child's biological parents,

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202. "Psychological parent" is defined as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973).

203. *See id.* at 22.

204. *See* SOROSKY ET AL., *supra* note 163, at 74.

205. *See id.*

206. *See* Watson, *supra* note 163, at 27.

207. *See id.* at 24.

208. *See* Appell, *supra* note 170, at 1016. Studies have also shown that adoptees have higher incidences of psychological problems. At one time, it was estimated that 13% of psychiatric patients in the United States were adoptees. *See* SOROSKY ET AL., *supra* note 163, at 96; Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 J. CLIN. CHILD PSYCHOL. 447, 447-54 (1993) (citing studies showing that adoptees had a significantly higher level of maladjustment, but pointing out accuracy could be limited by including all adoptees in the study, regardless of the child's age at the time of adoption). *But cf.* David M. Brodzinsky, *Long-term Outcomes in Adoption*, *FUTURE OF CHILDREN*, Spring 1993, at 153, 157 (indicating that while adoptees are more vulnerable to emotional, behavioral, and academic problems than their nonadopted peers, they are well within the normal range of behavior).

209. *See* SOROSKY ET AL., *supra* note 163, at 89-103. "Many adopted children feel that they were given away because there was something wrong with them from the beginning." Annette Baran & Rueben Pannor, *Perspectives on Open Adoption*, *FUTURE OF CHILDREN*, Spring 1993, at 119, 120.

usually the mother.<sup>210</sup> Adoptees are prone to fantasizing about their "real parents,"<sup>211</sup> and there may be conflicts in identification with the adoptive parents because the birth parents remain as a possible identification model.<sup>212</sup>

Adopted children must at some point in their life deal with the loss of their birth parents and the reason they were adopted.<sup>213</sup> Virtually all adoption experts advise that adoptive parents tell their child about the adoption, preferably before the age five.<sup>214</sup> Following the initial revelation, experts recommend relaxed discussions occurring over a number of years.<sup>215</sup> As they grow older, adoptees have an urgent need to learn more about their genealogical background.<sup>216</sup> Any interest shown by the adoptee in their biological parents is sometimes seen by the adoptive parents as an indication of their personal failure as parents or simply ingratitude.<sup>217</sup> Understandably, adoptive parents may have difficulty answering their child's questions regarding her birth parents and why she was given up for adoption.<sup>218</sup>

These differences between adoptive and biological relationships "undermine the mythic foundation of contemporary adoption as a simple substitution of the adoptive family for the birth family."<sup>219</sup> Adoptive children are troubled by issues inherent in the adoption process. Adoptive parents must inevitably discuss these issues with their children, and often have to deal with their adopted child seeking out her birth parents.<sup>220</sup> Denying access to frozen embryos on the grounds that the party can adopt a child disregards not only the effect of adoption on the adoptive parents, it ignores how adoptive parents must interact and communicate with their adopted child. Parties in a frozen embryo dispute may have never even considered adoption or may have considered it and concluded it was not in their best interests. Rather than hold adoption up as a per se alternative to biological parenthood, perhaps courts should require parties to show that adoption was not an alternative for them. This raises questions as to what a party would have to show to refute adoption as a reasonable alternative. Maybe a negative personal experience with adoption would be required. Possibly a "Brandeis brief" study

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210. See Watson, *supra* note 163, at 27. Another commentator maintains that the adoptive family "cannot provide the adoptee with the physical, genetic, or ethnic connection that the adoptee shares uniquely with the birth family." Appell, *supra* note 170, at 999.

211. Arthur D. Sorosky et al., *Identity Conflicts in Adoptees*, 45 AM. J. ORTHOPSYCHIATRY 18, 20 (1975).

212. See SOROSKY ET AL., *supra* note 163, at 99; see also Sorosky et al., *supra* note 211, at 18 (explaining that adoptees are more vulnerable to the development of identity problems in late adolescence and young adulthood). "The process of developing an individual identity is more complicated for adoptees because they live with the knowledge that an essential part of their personal history remains on the other side of the adoption barrier." Baran & Pannor, *supra* note 209, at 120.

213. See Watson, *supra* note 163, at 27-28.

214. See SOROSKY ET AL., *supra* note 163, at 88.

215. See *id.* at 89.

216. See Sorosky et al., *supra* note 211, at 19.

217. See *id.* at 24.

218. See Baran & Pannor, *supra* note 209, at 120.

219. Appell, *supra* note 170, at 999.

220. This phenomenon has led to an increased demand for openness in the adoption process. See *id.* at 1009. See *supra* text accompanying notes 162-70 for a description of open adoption.

on adoption and its effects on all participants would convince a court that adoption is not a reasonable alternative.

However, based on the unique characteristics inherent in adoptive and biological relationships, no showing should have to be made by a party requesting frozen embryos that adoption is not an alternative to parenthood. For a party desiring to become a biological parent, adoption simply is not a substitute.<sup>221</sup>

Adoptive parents must deal with complex, sensitive issues that genetic parents never have to face. In addition, biological parenthood creates ties and feelings to a child that adoption may never simulate. If a party chooses to adopt rather than use the embryos that is her prerogative. But to deny a last chance at genetic parenthood because one could adopt is both unreasonable and unjust.

The *Davis* court's mentioning of adoption as an alternative was reasonable in light of the Davises' prior attempts to adopt, as well as the fact Mary Sue was not going to use the embryos herself. However, the use of adoption by the *Kass* court is more questionable. The concurrence and dissent in *Kass* appeared to consider adoption as an assumed alternative that had to be rebutted. The concurrence stated bluntly, "adoption should be considered as among the 'other reasonable alternatives' to pre-zygote implantation. . . . Only following a prima facie showing by the plaintiff that she lacks all other means of achieving genetic parenthood *and* that adoption is not a feasible or satisfactory option for her should [a] hearing . . . be held."<sup>222</sup> This position essentially raises the question asked above: What does one have to show to prove adoption is not a satisfactory option? The *Kass* dissent, slightly less emphatically asked, "Is adoption a reasonable possibility?"<sup>223</sup> Despite the difficulties in procuring a child through adoption,<sup>224</sup> it is always a reasonable possibility.

As long as courts presume that adoption is a reasonable alternative to achieve parenthood, parties will be denied embryos and a chance at genetic parenthood. The question, then, is what a court will do when the party has no other means to achieve parenthood genetically. If the party can attempt IVF again safely, another attempt should be required. But because of the inherent difficulties with adoption, it should not be considered a reasonable alternative to genetic parenthood that has to be rebutted, possibly depriving one of their opportunity to procreate because an ex-spouse objects. Including adoption in the analysis in effect gives a veto to the opposing ex-spouse—a powerful and vicious tool.

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221. Economic evidence from *Davis* and *Kass* supports this conclusion. The cost of an adoption can range from \$10,000 to \$30,000 for a healthy infant, not including the value of the time spent waiting to receive the child. See Gilman & Freivalds, *supra* note 147, at 160. The Davises spent \$35,000 in their attempts to conceive naturally. See *Davis v. Davis*, 842 S.W.2d 558, 591 (Tenn. 1992). The Kasses spent over \$75,000. See *Kass v. Kass*, 663 N.Y.S.2d 581, 585 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998). The Kasses were willing to spend roughly three times more money to have their own child than they would spend to adopt another's child. Since both the Davises and the Kasses spent more to attempt IVF than they likely would have spent to adopt, it can be inferred that many couples are willing to pay a much greater cost to have their own child.

222. *Kass*, 663 N.Y.S.2d at 593 (Friedmann, J., concurring) (emphasis added) (citation omitted).

223. *Id.* at 600 (Miller, J., dissenting).

224. See *supra* Part III.B.1.

## IV. CONCLUSION

“Adoption is not a cure for childlessness.”<sup>225</sup> Special consideration should be given to a party who desires an embryo that they helped to create; forcing that party to refute adoption as an alternative to achieving parenthood ignores the realities of adoption. The party seeking the embryos presumably has as much right to procreate as the other party has not to procreate. If there are other possible genetic opportunities, they should have to be pursued. However, if the right to procreate by other means has vanished, the party fighting for the embryos should not have to prove adoption is not a reasonable alternative, as the *Davis* and *Kass* courts would appear to require. Adoption is simply not the equivalent of biological parenthood. Therefore, courts involved in frozen embryo disputes should not treat adoption as such. In determining who should receive custody of the embryos, the parties’ interests should be balanced, but adoption should not be a factor.

Nothing in this Note is meant to suggest that adoption cannot be a wonderful experience for both the adoptive parent and child. There is no doubt that adoption is an essential child welfare service.<sup>226</sup> Adoption should not, however, be considered a reasonable alternative to natural parenthood denying a person one last chance to procreate.

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225. Bromley, *supra* note 175, at 174.

226. *See Appell, supra* note 170, at 998.