A "Frozen Exception" for the Frozen Embryo: The *Davis* "Reasonable Alternatives Exception"

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INTRODUCTION

> In the sixth month, the angel Gabriel was sent from God to a town of Galilee called Nazareth, to a virgin betrothed to a man named Joseph . . . and the virgin's name was Mary. . . . Then the angel said to her, ". . . Behold, you will conceive in your womb and bear a son . . . ." But Mary said to the angel, "How can this be, since I have no relations with a man?" And the angel said to her in reply, "The Holy Spirit will come upon you and the power of the Most High will overshadow you."[1]

Unable to rely on divine intervention in order to conceive a child, many infertile couples[2] today seek help from technological advances such as in vitro fertilization ("IVF") and cryopreservation of embryos, also known as "frozen embryos,"[3] in order to become parents.[4] Studies estimate that fifteen percent of all reproductively active couples experience some difficulty conceiving children.[5] Furthermore, research indicates that ten million out of sixty-seven million reproductively active couples are infertile.[6] Just as technological advances have been made in order to accommodate reproductively active couples who experience difficulty conceiving children, so too has the legal system had to advance in order to deal with the legal issues accompanying these alternatives to natural conception.[7] Two of the most noteworthy strides made by the legal system to address the legal issues accompanying IVF and cryopreservation include the Tennessee Supreme Court case, *Davis v. Davis*,[8] and the

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1. *Luke* 1:26-:27, :30-:31, :34-:35.

2. Couples are "infertile" if they do not conceive a child after one year of unprotected intercourse. 1 ROBERT K. AUSMAN & DEAN E. SNYDER, MEDICAL LIBRARY § 1.32, at 175 (Lawyers ed. 1988).

3. Jennifer M. Dehmel, Comment, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1377 n.4 (1995) ("The term 'frozen embryos' . . . is the term of art denoting cryogenically-preserved preembryos.").

4. *See id.* at 1380.

5. 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, 526 (1994).

6. *Id.* (citing Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 510 n.22 (1990)).

7. *See* Dehmel, *supra* note 3, at 1377-78.

8. 842 S.W.2d 588 (Tenn. 1992).

New York Court of Appeals case, *Kass v. Kass*.[9]

Davis started as a divorce action[10] and eventually culminated in a battle for custody over seven frozen embryos that were being stored at a Knoxville, Tennessee fertility clinic.[11] The trial court awarded custody of the frozen embryos to Mary Sue Davis, the mother.[12] The court of appeals reversed and held that Mary Sue Davis and Junior Davis, the father, should have "joint control of the fertilized ova and [an] equal voice over their disposition."[13] On appeal, the Tennessee Supreme Court recognized that because there was no agreement regarding the disposition of the frozen embryos, under this grant of "joint control" they would continue to be stored and eventually would no longer be viable for implantation, resulting in a victory by way of a veto power for Junior Davis.[14] In an effort to erase any victory by way of such a veto power,[15] the Tennessee Supreme Court held that "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[16] Balancing these rights, the court held:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered.[17]

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9. 696 N.E.2d 174 (N.Y. 1998). The author acknowledges two other cases that address the legal issues accompanying IVF and cryopreservation. *See* A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 751 A.2d 613 (N.J. Super. Ct. App. Div. 2000). *A.Z. v. B.Z.* involved a situation in which the document signed by the parties in effect gave one party complete control over the frozen embryos in the event of a contingency. *A.Z.*, 725 N.E.2d at 1054. *J.B. v. M.B.* involved a situation in which the document signed by the parties provided that ownership of the cryopreserved embryos would be relinquished to the IVF program upon the occurrence of a contingent event. *J.B.*, 751 A.2d at 616. Both of these cases are distinguishable from *Davis* because in *Davis*, no prior agreements existed between the parties to the dispute. *Davis*, 842 S.W.2d at 598. Likewise, *A.Z.* is distinguishable from *Kass* because in *Kass*, the documents signed by the parties provided that the frozen pre-zygotes were to be donated to the IVF program for biological research and study. *Kass*, 696 N.E.2d at 176-77. *A.Z.* and *J.B.* specifically addressed the enforceability of contracts to procreate. *See A.Z.*, 725 N.E.2d at 1058; *J.B.*, 751 A.2d at 619. These two cases do not mention nor do they criticize the reasonable alternatives exception in any manner so as to bring them within the scope of this Note.

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

11. *Id.*

12. Davis v. Davis, No. E-14496, 1989 WL 140495, at *11 (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).

13. Davis v. Davis, No. 180, 1990 WL 130807, at *3 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

14. *Davis*, 842 S.W.2d at 598. Experts at trial testified that the frozen embryos would be viable for implantation for approximately two years. *Id.*

15. *See id.* The Tennessee Supreme Court concluded that recognition of a veto power was "not the best route to take, under all the circumstances [of the case]." *Id.*

16. *Id.* at 601.

17. *Id.* at 604. Notice that in its holding the Tennessee Supreme Court uses the term

This language created what judges and legal scholars alike recognize as the reasonable alternatives exception.

The next effort made by a state court to address the legal issues surrounding IVF and cryopreservation was the New York Court of Appeals case, *Kass*.[18] In *Kass*, Maureen Kass sought sole "custody" of five frozen pre-zygotes[19] that were produced as a result of her and her ex-husband's participation in an IVF program.[20] Maureen and Steven Kass signed various documents throughout the course of their marriage, their participation in the IVF program, and their impending divorce that outlined an agreed method for disposition of the frozen pre-zygotes in the event the couple no longer wished to use them for implantation.[21] The New York Supreme Court, Nassau County, granted Maureen Kass custody of the pre-zygotes.[22] On appeal, the Supreme Court, Appellate Division, unanimously agreed that any document showing a clear intent that is created by the parties regarding the disposition of the pre-zygotes in the event of the occurrence of a contingency should control a custody dispute.[23] However, the appellate division was divided on the issue of whether the documents in question were sufficiently clear so as to provide evidence of the parties' intent as to the manner of disposition of the frozen embryos.[24] Although all three of the appellate division opinions referred to *Davis*, only Justice Miller, in his dissenting

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"preembryo." *Id.* "Preembryo" is a term for a zygote or a fertilized egg that has not been implanted in utero. *See* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 952 n.45 (1986). In the context of IVF and cryopreservation, courts use a variety of terms in addition to "preembryo" to denote a fertilized egg that has not been implanted in a uterus. The terms "pre-zygote" and "frozen embryo" are among these additional terms. This Note will use the term of choice for the particular case being analyzed in the Note text. In the alternative, this Note will use the term "frozen embryo" to denote this particular stage of development.

18. Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

19. *See supra* note 17.

20. *Kass*, 696 N.E.2d at 174.

21. *Id.* at 176-77. The first set of documents, which were signed by the Kasses prior to their participation in the IVF program, stated that in the event the parties no longer wished to use the pre-zygotes for implantation and could not reach an agreement regarding the disposition of the pre-zygotes, the pre-zygotes would be donated to the program for biological study and investigative purposes. *Id.* The second document was an "uncontested divorce" agreement, which was signed by the parties shortly before their divorce proceedings began, stating that the parties still desired to have their pre-zygotes donated to the IVF program. *Id.* at 177.

22. Kass v. Kass, No. 19658/93, 1995 WL 110368, at *5 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

23. Kass v. Kass, 663 N.Y.S.2d 581, 590 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

24. *Compare id.* at 583 (plurality opinion) (stating that the intent of the parties—that the IVF program retain control over the pre-zygotes for research purposes—is clearly expressed in the provisions of the informed consent document and the uncontested divorce agreement), *with id.* at 591 (Freidmann, J., concurring) (disagreeing with the plurality's proposition that the terms of the informed consent document are sufficiently unambiguous to manifest an intent regarding the disposition of the pre-zygotes), *and id.* at 594 (Miller, J., dissenting) (stating that the informed consent document failed to reflect an unambignous statement of intent as to disposition of the pre-zygotes).

opinion, mentioned that the *Davis* court made a "seemingly contradictory statement"[25] to the proposition it earlier set forth: "[P]rocreational autonomy is composed of two rights of equal significance."[26] The inconsistent statement to which the dissenting opinion referred[27] is the reasonable alternatives exception.[28]

This Note explores what the dissenting opinion in *Kass* hinted at but minimally expounded upon—that is, the reasonable alternatives exception, as it is currently written, really amounts to no exception at all. Part I of the Note will describe the IVF and cryopreservation procedures. Part II of the Note will discuss in more detail *Davis* and *Kass*. Part III of the Note will provide an analysis of the reasonable alternatives exception and argue that the reasonable alternatives exception, as it is currently written, is problematic. Given the unwillingness of the courts to apply the exception in *Davis* and *Kass*, it is apparent that the exception will rarely, if ever, be used. In addition, the assumptions upon which the reasonable alternatives exception operates are questionable. Therefore, the reasonable alternatives exception, as it is currently written, serves no purpose in the resolution of frozen embryo custody disputes. The Note will conclude that because of the problematic nature of the reasonable alternatives exception and its lack of any function in the resolution of frozen embryo custody disputes, the exception must be abandoned or rewritten. Abandoning or, in the alternative, rewriting the reasonable alternatives exception will purge our judicial system of an exception that deceptively purports to balance the right to procreate with the right to avoid procreation.

I. IVF AND CRYOPRESERVATION

IVF is a widely used[29] and socially accepted[30] technological alternative to natural conception. The need for IVF cannot be understated in light of the fact that approximately fifteen percent of all reproductively active couples have difficulty in naturally conceiving children.[31] From 1978, the first year in which IVF technology became available, to 1998,[32] more than 35,000 babies in the United States have been born using the IVF process.[33]

The IVF process uses hormones to stimulate a woman's ovaries to produce many

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25. *Id.* at 602 (Miller, J., dissenting).

26. *Id.* (quoting Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992)).

27. *Id.*

28. *See supra* text accompanying note 17.

29. Esther M. Schonfeld, Note, *"To Be or Not to Be a Parent?" The Search for a Solution to Custody Disputes over Frozen Embryos*, 15 TOURO L. REV. 305, 308 (1998).

30. Carow, *supra* note 5, at 526 (citing Kathryn V. Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1643-75 (1984)).

31. *Id.* (citing Tamara L. Davis, Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 510 n.22 (1990)).

32. *See* Alise R. Panitch, Note, *The* Davis *Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 545 (1991) (citing Robertson, *supra* note 17, at 942-43).

33. Schonfeld, *supra* note 29, at 309 (citing ARTHUR CAPLAN, DUE CONSIDERATION: CONTROVERSY IN THE AGE OF MEDICAL MIRACLES (1998)).

eggs.[34] Once the eggs mature, they are removed through a surgical procedure called laparoscopy.[35] Upon removal, the mature eggs are placed in a petri dish containing "'a fluid similar to that found in the fallopian tube,'"[36] where they are combined with sperm and fertilized.[37] The fertilized eggs are allowed to develop in the petri dish environment for approximately forty-eight to seventy-two hours, wherein they "grow into a two-, four-, six-, or eight-celled entity."[38] At this stage, three or four of the preembryos are transferred back into the woman's uterus.[39] Any surplus preembryos that are not implanted can be stored through a freezing process known as cryopreservation.[40] During cryopreservation, the surplus preembryos are "frozen in nitrogen and stored at sub-zero temperatures."[41] Hence, this is where the popular term "frozen embryo" originates. Cryopreservation is beneficial in that implantation can be postponed until the most optimal time and the couple, particularly the woman, is somewhat spared from the pain, discomfort, time, and expense that multiple laparoscopy procedures would entail.[42] However, with the benefits of IVF and cryopreservation come a whole host of legal disputes concerning frozen embryos when contingencies arise that the couple had not planned for in advance of their utilizing these technologies.

II. CASE LAW CONCERNING IVF AND CRYOPRESERVATION

The cases described herein represent the most strenuous attempts by state courts to date to formulate solutions to the legal dilemmas posed by IVF and cryopreservation technology.[43] An understanding of the facts of these cases as well as the various rulings of the courts involved is imperative to embrace the arguments posited in Part III and the Couclusion regarding why the reasonable alternatives exception must be abandoned or, in the alternative, rewritten.

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34. Carow, *supra* note 5, at 527 (citing Robertson, *supra* note 17, at 948).

35. *Id.*

36. Panitch, *supra* note 32, at 547 (quoting Richard P. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 326 (1986) (citation omitted)).

37. Carow, *supra* note 5, at 527-28 (citing Kathryn V. Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1666 (1984)).

38. *Id.* at 528 (citing Robertson, *supra* note 17, at 968).

39. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 407 n.3 (1990). Three or four of the preembryos is the maximum number that can be implanted in utero without compromising the safety of the mother and any potential offspring. *Id.*

40. Carow, *supra* note 5, at 529.

41. Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).

42. Schonfeld, *supra* note 29, at 310-11 (citing Marcia J. Wurmbrand, Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1084 (1986)).

43. *See supra* note 9.

A. Davis v. Davis

Mary Sue Davis and Junior Davis married on April 26, 1980.[44] Soon after their marriage, Mary Sue suffered a tubal pregnancy that resulted in the removal of her right fallopian tube.[45] Mary Sue suffered a total of five tubal pregnancies during the course of the marriage and eventually decided to have her left fallopian tube ligated.[46] Without the proper functioning of either fallopian tube, the couple had no chance to conceive a child naturally.[47] The Davises turned to adoption as a means to start their family, but the birth mother ultimately opted not to put her child up for adoption.[48] The Davises made other attempts to adopt a child, but those attempts failed because they proved to be "prohibitively expensive."[49] Thus, after having exhausted all nontechnological remedies, the couple turned to a Knoxville fertility clinic and IVF for help.[50]

The Davises began participating in the IVF program in 1985.[51] The couple underwent the IVF process a total of six times, at a cost of $35,000, with no success of pregnancy.[52] In 1988, the Davises opted to cryopreserve the surplus preembryos that were not transferred back into Mary Sue's uterus.[53] Initially, the couple was elated at the prospects for the cryopreservation process, for at the time, the Davises were happily married and did not anticipate the occurrence of any unforeseen contingencies that would necessitate the storage of the frozen embryos beyond a few months.[54] However, Mary Sue never became pregnant, and before any of the surplus preembryos could be transferred, Junior Davis filed for divorce.[55]

The disposition of the frozen embryos became the ultimate focus of the divorce proceedings.[56] Mary Sue initially requested that the court grant her custody over the frozen embryos because she desired to use them in a postdivorce attempt to become a parent.[57] Junior Davis preferred to leave the preembryos in their frozen state because he had doubts about becoming a parent outside of marriage.[58] The Circuit Court of Tennessee awarded custody of the seven frozen embryos to Mary Sue Davis,[59] holding that the frozen embryos were "human life" from the moment of

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44. *Davis*, 842 S.W.2d at 591.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *See id.*
51. *Id.*
52. *Id.*
53. *Id.* at 592.
54. *Id.*
55. *Id.*
56. *See id.* at 589.
57. *Id.*
58. *Id.*
59. Davis v. Davis, No. E-14496, 1989 WL 140495, at *11 (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).

conception[60] and that Mary Sue Davis should "be permitted the opportunity to bring these children to term through implantation."[61] The trial court's decision was reversed by the court of appeals based on its finding that Junior Davis had a "constitutionally protected right not to beget a child where no pregnancy [had] taken place."[62] Further, the court of appeals held that Mary Sue Davis and Junior Davis "share[d] an interest in the seven fertilized ova"[63] and directed that the parties be vested "with joint control . . . and with equal voice over their disposition."[64]

By the time the case reached the Tennessee Supreme Court on appeal, the parties' positions with respect to the frozen embryos had changed.[65] Both parties remarried and Mary Sue no longer wanted to implant the frozen embryos in her own uterus; rather, she wanted to donate them to other couples that experienced difficulty naturally conceiving children.[66] Despite its overall approval of the legal analysis employed by the court of appeals, the Tennessee Supreme Court granted review because "the decision of the Court of Appeals [did] not give adequate guidance to the trial court in the event the parties cannot agree."[67] The Tennessee Supreme Court, therefore, embarked on formulating a new rule in the absence of any statutory guidance from the state.[68]

The Tennessee Supreme Court first addressed whether preembryos should be considered "persons" or "property" under the law.[69] The court referred to Tennessee's wrongful death statute[70] and other state legislative enactments concerning abortion,[71] assault,[72] and murder[73] in order to dismiss the notion that preembryos are "persons" under state law.[74] The court then referred to the U.S. Supreme Court's decisions in *Roe v. Wade*[75] and *Webster v. Reproductive Health Services*[76] in order to dismiss the

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60. *Id.* at *9.

61. *Id.* at *11.

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

63. *Id.* at *3 (citing TENN. CODE ANN. §§ 39-15-208, 68-30-101 to -402 (1996 & 1997), and York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989)).

64. *Id.*

65. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).

66. *See id.*

67. *Id.*

68. *See id.* at 590-91.

69. *See id.* at 594.

70. TENN. CODE ANN. § 20-5-106 (Supp. 1999).

71. TENN. CODE ANN. § 39-15-201 (1997). This provision adopts the trimester approach to abortion articulated by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). *Davis*, 842 S.W.2d at 595 (quoting Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Ct. App. Sept. 13, 1990)).

72. TENN. CODE ANN. § 39-13-107 (providing that assault of a viable fetus is a crime, but having an abortion is not).

73. *Id.* § 39-13-214 (providing that homicide of a viable fetus is a crime, but having an abortion is not).

74. *Davis*, 842 S.W.2d at 594-95 (quoting Davis v. Davis, No. 180, 1990 WL 130807, at *2 (Tenn. Ct. App. Sept. 13, 1990)).

75. 410 U.S. 113 (1973).

76. 492 U.S. 490 (1989).

notion that preembryos are recognized as "persons" under federal law.[77]

Though satisfied that the trial court *got it wrong*, the Tennessee Supreme Court was not entirely convinced that the court of appeals had *got it right* and expressed a fear that the court of appeals "may have swung too far in the opposite direction."[78] The Tennessee Supreme Court questioned the court of appeals's reliance on legislative enactments such as the Uniform Anatomical Gift Act[79] and case law such as *York v. Jones*[80] by which the court of appeals implied that preembryos are in the nature of a "property interest."[81] Instead, the Tennessee Supreme Court referred to the ethical standards established by the American Fertility Society[82] to conclude that preembryos are not "either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[83] Thus, while the Tennessee Supreme Court did not view Mary Sue's or Junior's interests as "a true property interest," it did recognize that the two parties had "an interest in the nature of ownership" to decide the fate of the preembryos.[84]

The Tennessee Supreme Court then addressed the issue of contract enforceability in the context of IVF and cryopreservation procedures.[85] With respect to this issue, the Tennessee Supreme Court stated that "an agreement regarding [the] disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the

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77. *Davis*, 842 S.W.2d at 595.

78. *Id.*

79. TENN. CODE ANN. § 68-30-101 to -103 (1996). The provisions in the Uniform Anatomical Gift Act determine who controls disposition of organs and tissue that do not have potential to develop into human life. *Davis*, 842 S.W.2d at 596.

80. 717 F. Supp. 421 (E.D. Va. 1989). In *York*, the court held that a cryopreservation agreement between a couple and a fertility clinic created a bailment relationship, obligating the clinic to return one remaining frozen embryo to the couple for later implantation at a different fertility clinic. *Id.*

81. *See Davis*, 842 S.W.2d at 595-96.

82. The ethical standards established by the American Fertility Society posit three views regarding preembryo status. *Id.* at 596 (quoting Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 J. AM. FERTILITY SOC'Y No. 6, June 1990, at 34S-35S). The first is "that the preembryo [is] a human subject after fertilization, which requires that it be accorded the rights of a person." *Id.* As such, this view requires implantation of the preembryo and forbids any action before implantation that would harm the preembryo. *Id.* The second is "that the preembryo has a status no different from any other human tissue." *Id.* As such, "[w]ith the consent of those who have decision-making authority over the preembryo, no limits should be imposed on actions taken with preembryos." *Id.* The third and most widely held view is "that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons." *Id.* In light of the above views, the Ethics Committee of the American Fertility Society "conclude[d] that special respect is necessary to protect the welfare of potential offspring . . . [and] creates obligations not to hurt or injure the offspring who might be born after transfer [by research or intervention with a preembryo]." *Id.*

83. *Id.* at 597.

84. *Id.*

85. *See id.* at 597-98.

progenitors."[86] However, no agreement was ever contemplated or signed by the Davises;[87] therefore, the court's statements concerning the issue of contract enforceability were inapplicable to the case.[88]

It was precisely because no agreement existed between the parties in *Davis* that the Tennessee Supreme Court fonnd the court of appeals's grant of "joint custody" over the frozen embryos to be problematic. The absence of any agreement between the parties and the court of appeals's failure to articulate a solution in the event that the parties never reached an agreement regarding what to do with the frozen embryos meant that the party opposing the use of the frozen embryos would have a veto power because the frozen embryos would continue to be stored and eventually would no longer be viable for implantation.[89] In an effort to erase any victory by way of such a veto power,[90] the Tennessee Supreme Court held that "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[91] Balancing what the court claimed to recognize as equal rights,[92] it awarded custody of the preembryos to Junior Davis holding:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than [the] use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve preguancy should be considered.[93]

Judges and legal scholars came to recognize the above language as the reasonable alternatives exception. The Tennessee Supreme Court, however, made only a minimal effort to define what reasonable alternatives exist for individuals who, unlike Mary Sue Davis, desire to use preembryos for themselves, stating:

> The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means. We recognize the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing.
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> Further, we note that if Mary Sue Davis were unable to undergo another

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86. *Id.* at 597.

87. *Id.* at 598.

88. *See id.* The Tennessee Supreme Court explicitly refused to apply the principles of implied contract or reliance doctrine in favor of Mary Sue Davis on the grounds that the record did not reflect that the parties ever considered the possibility of contingent events or that Junior Davis ever contemplated becoming a parent outside of his marriage to her. *Id.*

89. *Id.* Experts testified at trial that cryopreserved preembryos would be viable for implantation for approximately two years. *Id.*

90. *See id.* The Tennessee Supreme Court stated that the recognition of a veto power was "not the best route to take, under all the circumstances" to resolve the frozen embryo custody dispute. *Id.*

91. *Id.* at 601.

92. *See id.*

93. *Id.* at 604.

> round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption.[94]

The Tennessee Supreme Court's dialogue alone, as described in the preceding paragraphs, demonstrates the reasonable alternatives exception's lack of purpose in the resolution of frozen embryo custody disputes. The language is indicative of the fact that all reproductive alternatives count as reasonable alternatives, regardless of the pain, trauma, and expense suffered by a party prior to a frozen embryo custody dispute. This invites the obvious question: why have such an exception when the conditions necessary to invoke it will never exist? The exception's lack of purpose did not go unnoticed by courts that subsequently addressed custody disputes in the frozen embryo context.[95]

B. Kass v. Kass

Maureen and Steven Kass were married on July 4, 1988.[96] After experiencing difficulty conceiving a child through sexual intercourse, the couple joined an IVF program sponsored by a Long Island hospital.[97] Prior to and throughout their participation in the IVF program, the couple executed informed consent documents.[98] These informed consent documents contained provisions stating, among other things, that the pre-zygotes[99] would not be released without the written consent of both participants and that, in the event the couple no longer wished to use the pre-zygotes to achieve pregnancy or was unable to reach a decision regarding their disposition, the pre-zygotes would be donated to the IVF program for biological research and investigation.[100] The Kasses underwent the IVF procedure ten times, at a total cost of approximately $75,000.[101] Unfortunately, a pregnancy never resulted[102] and the couple decided to dissolve the marriage, leaving five pre-zygotes in storage under the care of the IVF program.[103]

Almost immediately after their decision to dissolve the marriage, the parties executed an uncontested divorce document in which they reiterated their desires to donate the pre-zygotes for biological research and study.[104] Less than a month after

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94. *Id.*

95. *See, e.g.*, Kass v. Kass, 663 N.Y.S.2d 581, 592 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998) (Friedmann, J., concurring) ("[T]here can be few situations, if any, where the burden upon the party forced to forfeit using particular pre-zygotes to acquire offspring will outweigh the burden upon the party who wishes to avoid reproduction but is compelled by court order to become a parent.").

96. *Id.* at 583.

97. *Id.*

98. *Id.*

99. *See supra* note 17.

100. *Kass*, 663 N.Y.S.2d at 583-84.

101. *Id.* at 583.

102. Maureen Kass's sister acted as the couple's surrogate for the tenth unsuccessful IVF procedure. *Id.* at 584. Subsequently, Maureen's sister changed her mind and refused to participate in any additional IVF attempts. *Id.* at 583-84.

103. *Id.* at 584.

104. *Id.*

executing the uncontested divorce document, Maureen Kass changed her mind and filed a matrimonial action in which she sought custody of the pre-zygotes for the purpose of undergoing an additional IVF attempt.[105] Steven Kass opposed giving Maureen Kass custody of the pre-zygotes and sought to have them donated to the IVF program, as provided in the informed consent documents signed by both parties.[106]

The New York Supreme Court, Nassau County, awarded Maureen Kass possession of the five pre-zygotes.[107] The court stated that a male's reproductive rights terminate at the moment of ejaculation because reproductive rights in the IVF context are not accorded different treatment than reproductive rights in the abortion context.[108] The court also stated that the informed consent documents and the uncontested divorce agreement were not dispositive with respect to the custody dispute.[109]

Shortly after the trial court's ruling an appeal ensued. The New York Supreme Court, Appellate Division, began its analysis by criticizing the trial court's application of a woman's right to personal autonomy and the exercise of control over the fate of her nonviable fetus to the IVF procedure.[110] The court adopted *Davis*'s conclusion "that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and be enforced as between the progenitors."[111] Thus, the plurality held that the contracts previously signed by Maureen and Steven Kass were valid and binding.[112] A substantial portion of the plurality opinion was devoted to contractual law issues outside the scope of *Davis* and irrelevant to the subject of this Note. However, the reasonable alternatives exception, the focus of this Note, was discussed in the appellate division's concurring and dissenting opinions.

In his concurring opinion, Justice Friedmann agreed with the result reached by the plurality but disagreed with the route it took to get there. Specifically, the concurring justices thought that the informed consent documents and the uncontested divorce agreement were too ambiguous to manifest the true intentions of the parties involved.[113] The concurring justices also believed that this case was much closer to *Davis* than did the justices comprising the plurality.[114] However, the concurring justices disagreed with the balancing approach articulated by the Tennessee Supreme Court in *Davis*.[115] Instead, they favored a veto power approach whereby in the event that the parties disagree over the disposition of frozen embryos and no prior agreement exists between the parties, the objecting party would be able to automatically veto a former spouse's proposal for implantation, save in the most

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105. *Id.* at 584-85.

106. *Id.* at 585.

107. Kass v. Kass, 1995 WL 110368, at *5 (N.Y. Sup. Ct. Jan. 18, 1995), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

108. *Id.* at *2-3.

109. *Id.* at *4-5.

110. *Kass*, 663 N.Y.S.2d at 585-86 (plurality opinion).

111. *Id.* at 587 (quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)).

112. *Id.*

113. *Id.* at 591-92 (Friedman, J., concurring).

114. *See id.* at 592.

115. *Id.*

exceptional of circumstances.[116] The concurring justices favored this approach because it was clear that there would be few situations, if any, under the balancing approach, "where the burden upon the party forced to forfeit using particular pre-zygotes to acquire offspring [would] outweigh the burden upon the party who wishes to avoid reproduction but is compelled by court order to become a parent."[117] Reinforcing this idea, the concurring justices held:

> [T]he party seeking to implant the pre-zygotes . . . should be required to establish as a threshold matter that she cannot undergo IVF with a new partner or a sperm donor because, for example, she has lost her ability to ovulate or has some other major medical contraindication to egg retrieval. 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. In addition, adoption should be regarded as among "other reasonable alternatives" to pre-zygote implantation. The wife's mere preference for genetic parenthood should not override her former spouse's prerogative to elect not to procreate in circumstances such as these. 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 the hearing recommended by the dissent be held.[118]

Thus, because Maureen Kass could not establish such a threshold, the concurring justices agreed with the plurality's result—awarding custody of the frozen embryos to Steven Kass.[119]

In his dissenting opinion, Justice Miller agreed with the concurring justices that the informed consent documents were too ambiguous to manifest the true intentions of the parties.[120] However, Justice Miller disagreed with the concurring opinion's holding that an objecting party in a frozen embryo dispute should have an automatic veto power over a party wishing to use the pre-zygotes in a postmarital attempt to become preguant.[121] Justice Miller favored the use of a balancing test and further judicial proceedings involving a fact-sensitive analysis in order to better supplement the judicial record with the specifics of the parties' circumstances so that the court might reach a more equitable solution.[122] In addition, Justice Miller supported a resolution that looked to whether alternative, reasonable opportunities existed whereby the party wishing to implant the frozen embryos could achieve parenthood.[123] For example, Justice Miller wanted to ask whether there were additional unfertilized eggs that had already been removed by laparoscopy that could be fertilized by the sperm of someone other than the ex-husband.[124]

Another area of inquiry for Justice Miller concerned the effect that the woman's "age, physical, emotional, and financial condition" would have on the possibility of

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116. *Id.*
117. *Id.*
118. *Id.* at 593 (citations omitted).
119. *See id.* at 593-94.
120. *Id.* at 594 (Miller, J., dissenting).
121. *See id.*
122. *Id.*
123. *Id.* at 600.
124. *Id.*

her undergoing additional IVF procedures with the ex-spouse or a different partner.[125] A final area of inquiry dealt with whether adoption was a reasonable possibility.[126] Justice Miller suggested weighing the aforementioned factors against the burdens attendant on the party wishing to avoid parenthood.[127] Justice Miller stated that these burdens may include various financial obligations that a parent has to a child, as well as the potential moral, psychological, and emotional impact that a party could suffer as a result of unwanted parenthood.[128] Thus, instead of automatically granting a veto to the objecting party when the party wishing to use the pre-zygotes cannot satisfy evidentiary thresholds and presumptions, the dissent sought to resolve pre-zygote custody disputes on a case-by-case basis, paying special attention to the circumstances of each party.[129]

The decision of the New York Supreme Court, Appellate Division, was appealed by Maureen Kass. Without addressing any of the language in the concurring and dissenting opinions concerning whether a veto power or balancing test approach should be used to resolve pre-zygote custody disputes in the event that no agreement exists between the parties, the New York Court of Appeals focused on the fact that the parties executed agreements and that those agreements should control the dispute.[130] Thus, the dissenting and concurring opinions of the New York Supreme Court, Appellate Division, remain the highest court opinions that analyze the aspect of the *Davis* decision pertinent to the subject of this Note, the reasonable alternatives exception.

III. ANALYSIS OF THE REASONABLE ALTERNATIVES EXCEPTION

The Tennessee Supreme Court created an exception to its holding that "[o]rdinarily, the party wishing to avoid procreation should prevail" when no prior agreements regarding the disposition of preembryos exist and there is a custody dispute.[131] This exception, commonly known as the reasonable alternatives exception, states that "[i]f no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered."[132] This exception is problematic. The failure of courts to apply the reasonable alternatives exception to Mary Sue Davis and Maureen Kass indicates that there are few, if any, circumstances in which the exception will be applied,[133] thereby making its existence futile. In

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 600-01.
129. *See id.* at 601-02.
130. *See* Kass v. Kass, 696 N.E.2d 174, 180-82 (N.Y. 1998).
131. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992).
132. *Id.*
133. Justice Friedmann in his concurring opinion in *Kass* acknowledged as much when he discussed balancing the right to procreate and the right to avoid procreation:

> [I]t is clear to me that there can be few situations, if any, where the burden upon the party forced to forfeit using particular pre-zygotes to acquire offspring will outweigh the burden upon the party who wishes to avoid reproduction but is compelled by court order to become a parent.

addition, as Justice Miller alluded to in *Kass*,[134] the exception rests on the questionable assumption that additional IVF attempts and adoption are "reasonable" alternatives for all want-to-be parents.[135] In light of the fact that the exception will rarely, if ever, be applied and that the assumptions upon which the exception is founded may not be plausible, the reasonable alternatives exception serves absolutely no purpose in the resolution of frozen embryo custody disputes. The reasonable alternatives exception, therefore, either needs to be struck from any judicial opinion that addresses frozen embryo custody disputes or, in the alternative, the exception needs to be rewritten in a manner that requires courts to take account of the pain, trauma, and expense already suffered by the parties prior to the custody dispute.[136] Only by rewriting the exception so that it accounts for past circumstances will courts ever truly balance the right to procreate with the right to avoid procreation.

A. The Reasonable Alternatives Exception as It Was Applied to Mary Sue Davis and Maureen Kass

An examination of the reasonable alternatives exception as it was applied to Mary Sue Davis and Maureen Kass invites the question of whether there are any situations under which the courts would find that Mary Sue Davis, Maureen Kass, or other individuals similarly situated had no reasonable alternatives of achieving parenthood other than through the use of the frozen embryos. Looking at the courts' treatment of these women suggests a negative response to this question. For instance, Maureen Kass had been exposed in utero to Diethylstilbistrol ("DES") and, as a result, could not conceive a child through sexual relations.[137] Maureen and her spouse underwent ten unsuccessful IVF attempts at an estimated cost of $75,000.[138] In addition, after ten unsuccessful IVF attempts, the surrogate mother for the tenth IVF attempt, Maureen's sister, decided that she no longer wished to be part of the IVF program.[139]

The failure to achieve "balance" by utilizing the reasonable alternatives exception in frozen embryo custody disputes is better illustrated by Mary Sue Davis's situation. In the course of her marriage, Mary Sue had both of her fallopian tubes ligated as a result of suffering five painful, tubal pregnancies.[140] Unable to conceive a child

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Kass, 663 N.Y.S.2d at 592 (Friedmann, J., concurring).

134. Justice Miller wanted to probe the issues of whether adoption was a reasonable possibility for the party wishing to use the pre-zygotes and whether the party's physical, emotional, and financial condition would affect future attempts at IVF. *Id.* at 600 (Miller, J., dissenting). His willingness to probe these issues gives rise to the inference that Justice Miller may not have thought that adoption is always a reasonable alternative and that a party's physical, emotional, and financial condition could affect future IVF attempts.

135. *See generally* David L. Theyssen, Note, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711 (1999).

136. This suggestion is, in effect, a variation on Justice Miller's proposal in *Kass* that a court should consider many diverse factors when balancing the right to procreate and the right to avoid procreation. *Kass*, 663 N.Y.S.2d at 600-01 (Miller, J., dissenting).

137. *Id.* at 583.

138. *Id.*

139. *Id.* at 583-84.

140. Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992).

naturally, she and her husband went through the adoption process only to have the birth mother change her mind at the last minute.[141] Additional attempts to adopt a child proved to be "prohibitively expensive."[142] During each of her six attempts at IVF, Mary Sue went through a month of injections necessary to shut down the glands in her body responsible for menstruation and several days of intermuscular injections in order to stimulate her ovaries to produce eggs.[143] Also, Mary Sue was anesthetized a total of five times in order to remove the eggs via the laparoscopy procedure.[144] In addition, forty-eight to seventy-two hours after each laparoscopy procedure, she had to return to the clinic for implantation.[145] Mary Sue and her spouse underwent these procedures at a cost of $35,000.[146] The Tennessee Supreme Court claimed that it "[was] not unmindful of the . . . trauma (including both emotional stress and physical discomfort) to which women are subjected in the IVF process,"[147] yet the court considered another attempt at IVF with a different partner and adoption to qualify as reasonable alternatives to achieve parenthood that would preclude Mary Sue Davis or an individual similarly situated from using the preembryos.[148] Another attempt at IVF and adoption were deemed reasonable alternatives by the concurring justices in *Kass* as well.[149]

The Tennessee Supreme Court and the New York Court of Appeals's lack of sympathy for the specific medical, physical, emotional, psychological, and financial conditions that Mary Sue Davis and Maureen Kass experienced suggests that it is entirely probable that no situation exists in which a court will find that a party does not have reasonable alternatives available to him or her to achieve parenthood.[150] Moreover, in dismissing these women's claims that the use of the frozen embryos in question was the only possible method to achieve parenthood, the courts never once mentioned what exactly it would take to satisfy the exception—that is, if Mary Sue's six attempts at IVF were not enough to preclude IVF as a reasonable alternative in her case, would more failed attempts have made a difference? Or are these courts suggesting that if either Mary Sue Davis or Maureen Kass had allocated more than $35,000 or $75,000, respectively, to the IVF procedure that it would have made a difference in the outcome? The answer to these inquiries is "no." The reason for this is that the reasonable alternatives exception amounts to no exception at all regardless of the circumstances.

One criticism of this analysis is that the Tennessee Supreme Court in *Davis* only intended to account for reasonable alternatives available to a party in the future when it articulated the exception.[151] Thus, it should not matter how many unsuccessful IVF

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 591-92.
146. *Id.* at 591.
147. *Id.* at 601.
148. *Id.* at 604.
149. Kass v. Kass, 663 N.Y.S.2d 581, 593 (N.Y. App. Div. 1997) (Friedmann, J., concurring), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).
150. *See supra* note 133.
151. Such a reading from *Davis* is legitimized in the following language from the opinion:

attempts were made in the past or how much money was expended by a party prior to a custody dispute, for as long as a party has a future possibility of reproducing via any method deemed reasonable by a court, the party is not entitled to custody of the frozen embryos.[152] The reasonable alternatives exception's exclusive focus on future reproductive possibilities is precisely what makes it inadequate for balancing reproductive rights in the frozen embryo context. That is, what a "reasonable alternative" is cannot be determined without taking into consideration all of the pain, trauma, and expense suffered by a party prior to a frozen embryo custody dispute. Factors such as these must be incorporated into the reasonable alternatives exception in order to achieve a true balance of the right to procreate and the right to avoid procreation.[153]

B. Is Another IVF Attempt or Adoption a Reasonable Alternative?

The reasonable alternatives exception rests on the implausible assumptions that additional attempts at IVF and adoption are always reasonable alternatives to achieve parenthood.[154] Is the court just to look at Mary Sue Davis after she has lost both fallopian tubes as a result of five tubal pregnancies, undergone six unsuccessful attempts at IVF, and spent $35,000 and tell her that another attempt at IVF is reasonable? The answer to this question is "no" for several reasons. First, the reasonable alternatives exception makes it seem as if undergoing the IVF procedure is just a walk in the park when clearly this is not the case.[155] Second, the reasonable alternatives exception assumes that following a contingent event, such as a death or divorce, a woman is going to be wealthy enough to spend at least another $8,000 to $10,000 to undergo IVF again.[156] Such an expectation is highly unreasonable if the contingent event is a divorce in light of the fact that women are, on average, economically poorer than men following divorce.[157] Finally, since most IVF programs restrict participation to married couples,[158] the ex-wife will not only have to marry

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> We recognize the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing.

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

152. *See id.*

153. *See supra* note 136.

154. *See generally* Theyssen, *supra* note 135.

155. The New York Supreme Court, Appellate Division, in *Kass*, acknowledged that IVF is "physically painful, emotionally draining, and financially burdensome." Kass v. Kass, 663 N.Y.S.2d 581, 595 (N.Y. App. Div. 1997) (Miller, J., dissenting), *aff'd*, 696 N.E.2d 174 (N.Y. 1998). Likewise, the Tennessee Supreme Court, in *Davis*, recognized the trauma and discomfort that accompanies IVF. *Davis*, 842 S.W.2d at 604.

156. Theyssen, *supra* note 135, at 725.

157. Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1063 (1996).

158. Theyssen, *supra* note 135, at 725 (citing *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. 71 (1989)).

again, but the reasonable alternatives exception assumes that she is going to marry someone who will want to spend the money and time necessary for participation in an IVF program.

The reasonable alternatives exception also rests on what might be another faulty assumption—that adoption is a reasonable alternative to achieve parenthood. Indeed, the fact that Mary Sue and Junior Davis had tried to adopt a child makes this assumption seem plausible.[159] However, in articulating the reasonable alternatives exception, courts have made it seem as if adoption is a fool-proof way to become a parent when obviously this is not the case.[160] At least one author has opined that adoption is not a reasonable alternative, because children are not always easily obtained by adoption and the relationship between an adoptive parent and an adoptive child is not the same as the relationship between a biological parent and child.[161] Thus, in light of existing skepticism in the legal field concerning the assumptions upon which the reasonable alternatives exception relies, the exception's purpose in resolving frozen embryo disputes becomes all the more questionable.

C. What Is the Solution?

Because the reasonable alternatives exception will rarely, if ever, be applied and the assumptions upon which the exception relies are not plausible in all cases, it is difficult to imagine any good reason for continuing to discuss the possibility of invoking the reasonable alternatives exception when there is a dispute as to which party gets custody of frozen embryos produced by IVF. The reasonable alternatives exception amounts to no exception at all, no matter what the circumstances. For this reason, the reasonable alternatives exception is indeed a "frozen exception" in that until it is abandoned or, in the alternative, rewritten to require that a court consider the pain, trauma, expense, and other circumstances suffered by a party prior to a frozen embryo custody dispute, the exception will continue to be of absolutely no use in the resolution of frozen embryo disputes and will only act to refute the courts' assertions that they are balancing the right to procreate and the right to avoid procreation.

Justice Miller's dissenting opinion in *Kass*[162] provides a template for additional factors that could be incorporated into the reasonable alternatives exception if the exception is to have any purpose in the resolution of frozen embryo custody disputes. For instance, the exception could be written to state that after a certain number of unsuccessful attempts at IVF, it is no longer a reasonable alternative to achieve parenthood. To couch the exception in this way would demonstrate that the courts do recognize the trauma and discomfort involved in the IVF procedure.[163] More

159. The *Davis* court relied on the fact that Mary Sue and Junior Davis pursued adoption to conclude that adoption would be a reasonable alternative for Mary Sue to achieve parenthood. *Davis*, 842 S.W.2d at 604.

160. For example, Mary Sue and Junior Davis were "victimized" by the adoption process when a birth mother withdrew from the adoption arrangement. *Id.* at 591.

161. Theyssen, *supra* note 135, at 725.

162. Kass v. Kass, 663 N.Y.S.2d 581, 600 (N.Y. App. Div. 1997) (Miller, J., dissenting), *aff'd*, 696 N.E.2d 174 (N.Y. 1998).

163. *Contra Davis*, 842 S.W.2d at 604. The Tennessee Supreme Court devotes only two

specifically, the exception could state that courts are going to look at a person's "age, physical, emotional, and financial condition"[164] in making the determination as to whether an additional attempt at IVF is a reasonable means of achieving parenthood. In addition, the exception could state that previous, unsuccessful attempts to adopt a child will weigh into the decision of whether adoption is a reasonable alternative to achieving parenthood.[165] Such an incorporation into the reasonable alternatives exception would demonstrate that the courts are aware that adoption is not always a fool-proof way to become a parent. Finally, the exception could include some statement that the courts will scrutinize the opposing party's reasons for objecting to the use of the frozen embryos.[166] At least in the case of divorce, the objection to the use of the frozen embryos may be predicated on malice or some other frivolous reason.[167] The inclusion of such a factor would make the exception less favorable to the right to avoid procreation. It is not enough if these factors are unspoken yet taken into cousideration when the courts attempt to resolve frozen embryo disputes. In order to make this an "exception with teeth," these factors need to be articulated so that individuals can understand the sincerity with which the courts approach the balancing of the right to procreate and the right to avoid procreation.

CONCLUSION

Chief Judge Kaye in the New York Court of Appeals's decision in *Kass* stated: "As science races ahead, it leaves in its trail mind-numbing ethical and legal questions. The law, whether statutory or decisional, has been evolving more slowly and cautiously."[168] The truth in this statement cannot be understated in light of the legal developments concerning IVF and cryopreservation. The continued inclusion of the reasonable alternatives exception in judicial opinions addressing frozen embryo disputes is arguably one of the causes for the slow development of the law in this area. This is due to the fact that the reasonable alternatives exception as it is currently written will rarely, if ever, be applied, and that the assumptions on which the exception is built may not always be plausible; therefore, the exception serves absolutely no purpose in the resolution of frozen embryo custody disputes. If the law is expected to keep in pace with the progress of science, particularly in the area of IVF and cryopreservation, the reasonable alternatives exception must be abandoned or rewritten so that the exception, which is arguably a "frozen exception," can be transformed into a test that truly balances the right to procreate and the right to avoid procreation.

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sentences to the trauma and suffering that additional attempts at IVF would entail. *See id.*

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

165. *Cf. id.*

166. *See id.* This is a factor that was directly articulated by Justice Miller in *Kass*. *See id.*

167. *See id.* at 600-01.

168. Kass v. Kass, 696 N.E.2d 174, 178 (N.Y. 1998) (citations omitted).