

**A COMPARATIVE ANALYSIS OF THE LEGAL STATUS OF
CRYOPRESERVED EMBRYOS, RESULTING FROM *IN
VITRO* FERTILISATION, FOR THE PURPOSES OF
CUSTODY ISSUES DURING DIVORCE PROCEEDINGS.**

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requirements for the degree Masters in Medical Law (LLMMED)
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DECLARATION

I, the above student, hereby declare that the submission
contained herein is my own original work and that all my
sources have been properly acknowledged.

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ABSTRACT

The process of cryopreservation of embryos is a relatively new concept in the field of *in vitro* fertilisation (IVF) treatment. South African law is silent on the manner in which these cryopreserved embryos should be disposed of; in instances of divorce.

During the course of this paper, comparisons will be made between South Africa and countries that have already dealt with custody disputes of these cryopreserved embryos during divorce. The United States of America (USA); United Kingdom (UK) and Australia are countries that have already dealt with these issues in their courts. The analogies made between these countries and South Africa will illustrate the deficiencies in South African law. The USA, UK and Australia will also be compared with each other to demonstrate which country has the most accurate approach in dealing with these matters. To this end, cases that have been dealt with in each of the countries' jurisdictions will be examined and critiqued.

The validity of surrogacy agreements, both under the common law and under the Children's Act 38 of 2005 (The Children's Act), will also be discussed. The purpose of this discussion is to comment on the similarities between surrogacy agreements, and embryo disposition agreements, and argue that laws similar (to those regulating surrogacy agreements) should be promulgated to govern and regulate embryo disposition agreements.

The submission that I will make in conclusion is that in the event of not enacting legislation to specifically govern embryo disposition agreements, the legislature should amend the Children's Act to include the regulation of embryo disposition agreements. The amendment of the Children's Act is the most practical approach to remedy the *lacuna*.

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1. Introductions

1.1. Overview of the topic

This paper will begin by explaining and dealing with definitions and basic principles related to the content that will serve as the focal point throughout this discussion.

The South African perspective on the issue of conferring legal status upon cryopreserved embryos,¹ will be analysed. In this chapter the tools that will be discussed to determine and depict the degree of protection afforded to cryopreserved embryos under South African law are: the Constitution;² the Human Tissue Act;³ National Health Act;⁴ its Regulations;⁵ and a number of cases.

This research paper will focus on foreign jurisdictions that have already dealt with the issue of affording legal status to cryopreserved embryos for the purpose of determining custody during divorce proceedings. The jurisdictions that will be dealt with in this regard are the United States of America (USA), the United Kingdom (UK) and Australia. These jurisdictions will be compared to each other to determine which of these countries has taken the most appropriate approach in dealing with the disposition of cryopreserved embryos. After deciding which jurisdiction has the most appropriate approach, an analysis and comparison will be made to remedy the *lacunae*⁶ that exist in South Africa.

The next segment of the discussion will focus on surrogacy agreements and their validity in terms of the law. Surrogacy agreements⁷ will be compared to embryo disposition

¹ National Health Act 61 of 2003, Regulations relating to Artificial Fertilisation of Persons in GN 869 in GG 26595 of 23rd July 2004 - describes freezing or cryopreservation as – ‘freezing or cryopreserving genetic material including ova, sperm, embryos or ovarian tissue by an authorized institution’ - section 1.

² Constitution of the Republic of South Africa, 1996 (1996 Constitution).

³ The Human Tissue Act 64 of 1983.

⁴ The National Health Act 61 of 2003.

⁵ The Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁶ ‘A *lacuna* is an empty space in the law with no regulations applicable or an absent part in a law. It denotes an instance where there is no controlling law,’ available at:

<http://www.translegal.com/legal-latin/lacuna>, accessed 24th November 2014.

⁷ The Children’s Act (note 14 above) Section 293 – the surrogacy agreement must be entered into, in writing, between the commissioning person/parents, within the Republic of South Africa, and must be confirmed by the High Court.

agreements. Embryo disposition agreements are agreements that exist between the donating couple and the institution in which the embryos will be cryogenically frozen and stored.⁸ These agreements regulate how embryos are to be disposed of in the instance of divorce.⁹ The rationale for making the comparison between embryo disposition agreements and surrogacy agreements is to illustrate the similarities between these two types of agreements. The issue of whether or not embryo disposition agreements are *contra bonos mores*¹⁰ and whether or not they should be given preference over the interests of the parties will be discussed.¹¹ It will be submitted that since surrogacy agreements are accepted and recognised by the South African legal system (having legislation that governs it), then the same acceptance and recognition should be extended to embryo disposition agreements.

In the absence of legislation to govern this *lacuna* in South Africa regarding the legal status of cryopreserved embryos,

the submissions made will include that:

- (a) Similar to the United Kingdom¹² and Australia,¹³ South Africa set up a committee to make recommendations to the Legislature to draft legislation that will govern embryo disposition agreements; alternatively
- (b) the Children's Act¹⁴ should be amended to regulate embryo disposition agreements, similar to how surrogacy agreements¹⁵ are presently governed.

⁸ JA Robertson 'Prior Agreements for Disposition of Frozen Embryos' *Ohio State LJ* (1990) 51 407, 410 – embryo disposition agreements are agreements that are entered into and exist between the couple and the program/institution for disposition and set out exactly how these cryopreserved embryos that are kept in a storage facility at the program/institution treatment facility, will be disposed in the instance of an arising dispute. These agreements are said to be legally binding.

⁹ *Ibid.*

¹⁰ 'Against good morals, available at:

http://leagl-dictionary.thefreedictionary.com/_/dict.aspx?rd=1&word=contra=bonos=mores, accessed 21st May 2014.

¹¹ This depends on the facts of the case and refers to the instance where the court (or other institution; or person) must deliberate and give weight to considerations of both parties to the dispute. After doing this the court must make a decision about who they believe is in the best position to have the benefit (in question) accrued to them.

¹² Report of the Warnock Committee *Inquiry into Human Fertilisation and Embryology* 1984.

¹³ New South Wales Law Reform Commission Report 58 *Artificial Conception: In Vitro Fertilization* 1988.

¹⁴ The Children's Act 38 of 2005.

¹⁵ *Ibid* Section 292.

1.2. Background to the topic

There are many couples in South Africa, as well as internationally, who struggle to conceive a child naturally. This may be due to either the male or female being infertile, or either the male or female having a genetic disease or disability that they may pass on to a child should the child be conceived naturally. The prospective parent or parents may be a same sex couple who would like to become parents without resorting to adoption.¹⁶

It is for these reasons that numerous advancements have been made in the field of reproductive technology and embryology to provide people and in particular, couples, with the opportunity to become parents where natural conception is not an option. The most common of these artificial fertilisation procedures,¹⁷ is *in vitro* fertilisation (IVF).¹⁸

1.3. The IVF Procedure

The process of IVF involves extracting the oocyte¹⁹ and then merging it with the sperm²⁰ outside the human body.²¹

¹⁶ *J and Another v Director-General, Department of Home Affairs* 2003 (5) SA 605 (D).

¹⁷ The Children's Act (note 14 above) defines artificial fertilisation as 'the introduction of means, other than natural means, of a male gamete, into the internal reproductive organs of a female person for the purpose of human reproduction, including:

(a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female; or

(b) the placing of the product of a union of a male and female gametes which have been brought together outside the human body, in the womb of a female person' - Section 1.

The Regulations relating to Artificial Fertilisation of Persons (note 1 above) - defines artificial fertilisation as the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction and includes artificial insemination, *in vitro* fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection, Regulation 1.

¹⁷ Human Embryo Cryopreservation, available at:

<http://www.ivf.com?cryo.html>, accessed 23rd March 2014.

¹⁹ Regulations relating to Artificial Fertilisation of Persons (note 1 above) - the female gamete.

²⁰ *Ibid* - the male gamete.

²¹ The Children's Act (note 14 above).

The mature oocytes²² (which will be harvested) are surgically retrieved through one of two ways.²³ The first, most popular method, is retrieval of the oocytes through ultrasound-guided transvaginal aspiration. The process involves a vaginal ultrasound where a probe is inserted into the vaginal cavity²⁴ that sends an ultrasound image to a monitor which guides the physician to the ovary containing the oocytes.²⁵ A hollow needle is then directed through the vaginal wall into the ovary and the oocytes are removed via aspiration (suction).²⁶

The second method of egg retrieval is through laparoscopic surgery. This process involves a form of surgery that is slightly more invasive using a laparoscope or camera placed through a small incision in the abdominal wall (usually through the umbilicus). This allows the surgeon to view and scan the internal organs.²⁷

Upon retrieval, the oocytes are fertilised with sperm in a petri dish²⁸ to create an embryo.²⁹ Some of the embryos are implanted into the uterus for procreation, while the others are cryogenically preserved³⁰ for future implantation.³¹ The IVF laboratory usually fertilises more eggs than can be implanted safely on an attempt to prevent the intrusive process of egg retrieval from being repeated.³²

²² About the *In Vitro* Fertilisation (IVF) Process, available at:

<http://www.nyufertilitycenter.org/ivf/process>, accessed 4th December 2014.

²³ LS Langley and J.W Blackston 'Sperm, Egg, and a Petri Dish: Unveiling the underlying property issues surrounding Cryopreserved Embryos' *The J of Legal Medicine* (2006) 27 167, 174.

²⁴ *In Vitro* Fertilisation (IVF) Process (note 22 above).

²⁵ Langley and Blackston (note 23 above) 173.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ A 'petri dish' is a shallow circular flat-bottomed dish, often with a fitting cover, used in laboratories, especially for producing cultures of microorganisms, available at:

<http://www.thefreedictionary.com/petri+dish>, accessed 24th November 2014.

²⁹ Human Embryo Cryopreservation (note 17 above).

³⁰ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

³¹ Human Embryo Cryopreservation (note 17 above).

³² Langley & Blackston (note 23 above) 174.

1.4. Cryopreservation

Embryo cryopreservation has become standard practice in IVF programs because of the ability of the process to enhance both the safety and efficiency of the IVF procedure. The embryos that have not been implanted are frozen in liquid nitrogen, allowing the embryos to be safely preserved in a suspended biological state.³³ Once frozen, the embryos are stored in special containers³⁴ until they are ready for implantation³⁵ for the purpose of procreation.³⁶

1.5. Conclusion

Controversy arises when couples who have engaged in IVF treatment initiate divorce proceedings, and the custody and disposition of the cryopreserved embryos are in dispute.³⁷ The reason for the dispute is because each parent seeks control over the cryopreserved embryos³⁸ that are kept in storage facilities at fertility clinics, with one parent wanting to dispose of these embryos and avoid forced parenthood and the other parent wanting to have them implanted as at a later stage.³⁹ This concept of forced parenthood will be discussed later and in more detail.

The next chapter will discuss the South African perspective and what has been done regarding the legal status of a cryopreserved embryo, and the approach adopted when dealing with such situations.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Human Embryo Cryopreservation (note 17 above).

³⁷ H Forster 'The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposition in Britain and the lack of Law in the United States' *Washington University LQ* (1998) 76 759, 769; A. M Johnson, Jr 'The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements' *Southwestern LR* (2013) 43 191,197.

³⁸ *Kass v Kass* (1998) 696 NE 2d 174 NY.

³⁹ *Ibid* 178.

2. The South African Perspective on the status of Cryopreserved Embryos

The definitions and basic principles that are used throughout this paper have already been discussed in the previous chapter.

This chapter will deal with the approach that South Africa has adopted regarding the legal status of cryopreserved embryos. The Constitution,⁴⁰ Human Tissue Act,⁴¹ National Health Act⁴² and its Regulations,⁴³ and case law will be discussed.

2.1. The difference between an embryo and a foetus

In medicine there is a difference between an embryo and a foetus, depending on their developmental stage after conception.⁴⁴ The difference is that conceptions are referred to as embryos from the day after conception, until the eighth week of the pregnancy. From the eighth week until the before the birth, it is referred to as a foetus.⁴⁵ This definition does not sit in law.⁴⁶

2.2. South Africa's position regarding the granting of conferring a legal status on embryos

2.2.1. The Constitution

The Constitution⁴⁷ provides an array of rights that are available to people in South Africa. There are no provisions in the Constitution⁴⁸ which refer specifically to fetuses or embryos.⁴⁹ Sections 12(2) (a) and 27 (1) (a), however, refer to reproductive rights.⁵⁰

⁴⁰ 1996 Constitution (note 2 above).

⁴¹ The Human Tissue Act (note 3 above).

⁴² The National Health Act (note 4 above).

⁴³ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁴⁴ <http://www.invitra.com/difference-between-a-zygote-an-embryo-and-a-fetus/>, accessed 20 July 2014.

⁴⁵ *Ibid.*

⁴⁶ *S v Collop* 1979 (4) SA 381 (C).

⁴⁷ 1996 Constitution (note 2 above).

⁴⁸ *Ibid.*

Section 12(2) (a)⁵¹ states that ‘everyone has the right to bodily and psychological integrity, including the right to make decisions concerning reproduction’.

Section 27(1) (a)⁵² states that ‘everyone has the right of access to health care services including reproductive health care’.

It can be adduced that these rights set out in the Constitution,⁵³ are rights that may be invoked by a woman when choosing whether or not to terminate her pregnancy, or to take contraceptives as it is *her* body.

It is submitted that fetuses and embryos are mentioned, indirectly, as they are linked to reproduction. Unfortunately, our Constitution,⁵⁴ unlike the German Constitution⁵⁵ does not make provision for or recognise the legal status of embryos or fetuses. This was reaffirmed by the *Christian Lawyers* case.⁵⁶ In this case the court confirmed that there are no provisions in the Constitution that afford protection to a foetus unless such a foetus is born alive.⁵⁷ The court stated, further, that the drafters of the Constitution would have expressly stated that they wished to afford protection and a status to the foetus if this was their intention.⁵⁸

The German Constitution Court states that embryos should be considered ‘human life’ and not just ‘potential human life’ and as such, are entitled to the rights under the German

⁴⁹ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T), 1121.

⁵⁰ *Ibid.*

⁵¹ 1996 Constitution (note 2 above).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ 1996 Constitution (note 2 above).

⁵⁵ The Basic Law for the Federal Republic of Germany (The German Constitution) states that ‘every person shall have the right to life and physical integrity’ - Article 2 (2).

⁵⁶ *Christian Lawyers Association of SA and Others v Minister of Health and Others* (note 49 above).

⁵⁷ *Ibid* 1121.

⁵⁸ *Ibid* 1122.

Constitution,⁵⁹ as the embryo is recognised as being independent of its mother.⁶⁰ However, the application of Article 2 (2)⁶¹ has still not been dealt with by the German courts.⁶²

2.2.2. Legislation

Legislation in South Africa is equally silent on the matter of cryopreserved embryos and the status which they are given. South African legislation makes no provision for the status of either cryopreserved embryos or foetuses.

Prior to the Human Tissues Act,⁶³ there was no legislation regulating artificial fertilisation in South Africa.⁶⁴ On 1 March 2012 the Human Tissues Act⁶⁵ was repealed and replaced by Chapter 8 of the National Health Act.⁶⁶ Regulations⁶⁷ regarding artificial fertilisation in terms of the National Health Act were promulgated on 2 March 2012.⁶⁸

The Human Tissue Act⁶⁹ did not include a definition for embryos or foetuses but included a definition for gametes. A gamete, according to the definitions section of the Human Tissue Act,⁷⁰ means ‘either of the two generative cells that are essential for human reproduction’.⁷¹

The National Health Act,⁷² unlike the Human Tissue Act⁷³ defines the embryo as ‘a human offspring in the first eight weeks from conception’.⁷⁴ The National Health Act⁷⁵ mentions

⁵⁹ M Coester ‘The Protection of the Embryo under German Family Law’ *J of Child Law* (1993) 5(2) 88, 89.

⁶⁰ *Ibid* 92.

⁶¹ The German Constitution (note 49 above).

⁶² Coester (note 59 above) 92.

⁶³ The Human Tissue Act (note 3 above) – before it was repealed by the Chapter 8 of the National Health Act, the Human Tissue Act was the only legislation governing medico-legal issues in South Africa.

⁶⁴ DJ McQuoid-Mason *Medical Professions and Practice LAWSA* 17 (2) 2 ed (2008) 63.

⁶⁵ The Human Tissue Act (note 3 above).

⁶⁶ The National Health Act (note 4 above) Chapter 8.

⁶⁷ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁶⁸ *Ibid*.

⁶⁹ The Human Tissue Act (note 3 above).

⁷⁰ *Ibid* Section 1.

⁷¹ The Human Tissue Act (note 3 above) Section 1.

⁷² *Ibid*.

⁷³ *Ibid*.

embryos in relation to cryopreservation, but does so in the context of research⁷⁶ and human cloning will not form part of the discussion during this paper.⁷⁷

The Regulations⁷⁸ refer to ownership of the embryos before and after artificial fertilisation (not specifically to cryopreserved embryos) as set out below:

- (a) Regulation 18 (1)⁷⁹ states that before artificial fertilisation ownership of the embryo vests in the institution in which the IVF treatments is to be carried out.
- (b) Regulation 18 (2)⁸⁰ states that after artificial fertilisation ownership of the embryo vests in the recipient.⁸¹

The vesting of ownership may not cause concern when the recipient is also the female gamete donor. However, concerns arise when the male donor, shares a genetic link with the embryo, and the recipient, does not share a genetic link to the embryo, yet she still retains ownership of the embryo after artificial fertilisation, by virtue of the fact that only a female can be a recipient. The Regulations⁸² do not provide for shared or joint control of the embryo after fertilisation. The Constitutionality of this may be challenged in terms of the equality clause⁸³ on the ground of sexual discrimination.⁸⁴

⁷⁴ The National Health Act (note 4 above).

⁷⁵ *Ibid.*

⁷⁶ *Ibid* Section 57.

⁷⁷ *Ibid.*

⁷⁸ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁷⁹ *Ibid* Regulation 18 (1).

⁸⁰ *Ibid* Regulation 18 (2).

⁸¹ Regulations relating to Artificial Fertilisation of Persons (note 1 above) - define a recipient as 'a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction' - Regulation 1.

⁸² Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁸³ 1996 Constitution (note 2 above) Section 9 (3).

⁸⁴ *Ibid* - discrimination on the bases of sex is a listed ground in Section 9 (3) and is presumed to be automatically unfair.

It is submitted that the argument raised, by the father who shares a genetic link with the child, would be that the recipient is always a female, and even if she is not genetically linked to the embryo, she still holds complete rights over the embryo after fertilisation. The father would argue that the recipient has more control over *his* child, simply because as a woman she is genetically designed to carry the child.

For the purpose of this discussion the focus will be on who holds rights over the cryopreserved embryos and their status *before* they are used in the IVF treatment process, while they are still in storage at the fertility institution.

The Regulations⁸⁵ define freezing or cryopreservation⁸⁶ and is the only source of law to recognise and define cryopreservation. However, the Regulations⁸⁷ do not provide for who makes the decision not to transfer the embryos nor do they make any express provisions for the status of cryopreserved embryos.

2.2.3. The Common Law

The law in South Africa makes no distinction between an embryo and a foetus. The common law, in the case of *Collop*,⁸⁸ states that there is essentially ‘no difference between an embryo and a foetus’.⁸⁹ Therefore, it can be argued that all the rights that are afforded to the foetus, should be also afforded be afforded to the cryopreserved embryo. However, it is argued that legal personality begins at birth provided that the birth is complete and the child is born alive.⁹⁰ Since, natural persons obtain all their rights upon birth, it seems South Africa does not afford any rights to cryopreserved embryos.

⁸⁵ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁸⁶ *Ibid* - freezing or cryopreservation means ‘freezing or cryopreserving genetic material including ova, sperm, embryos, ovarian tissue or stem cells by an authorised institution,’ Regulation 1.

⁸⁷ *Ibid*.

⁸⁸ *S v Collop* (note 46 above).

⁸⁹ *Ibid* 383.

⁹⁰ DSP Cronje & J Heaton *The South African Law of Persons* 2 ed (2003) 7.

The *Christian Lawyers*⁹¹ case (discussed above) is another case that supports the approach adopted by our Constitution⁹² which is that no provision is made for the recognition or legal status of embryos or fetuses, unless such a foetus is born alive.⁹³

The term ownership is used in the Regulations⁹⁴ to refer to embryos. In terms of the law of property, ownership can be defined as ‘the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership entitles the owner to do with his or her things as he or she deems fit, subject to the limitations imposed by public and private law.’⁹⁵ The use of the term ownership implies that an embryo is viewed merely as a thing over which a person may have complete control. The wording of Regulation 18⁹⁶ suggests that South Africa may view embryos as property. Ownership of the embryos prior to fertilisation vests in the institution where the embryos are held, but the Regulations⁹⁷ fail to make express statements or provisions to this effect.

2.3. Conclusion

A popular South African author, Jordaan,⁹⁸ states that pre-embryos (cryopreserved embryos) should not be afforded any legal protection by the law. I disagree with this author’s view. This is not the approach this paper will take, as the discussion advocates for the recognition of a legal status to be conferred upon them.

It is submitted that South African law is analogous with Jordaan’s⁹⁹ view on cryopreserved embryos, as it fails to afford any legal status to them. This is a growing concern especially

⁹¹ *Christian Lawyers Association of SA and Others v Minister of Health and Others* (note 49 above).

⁹² 1996 Constitution (note 2 above).

⁹³ *Ibid* 1121.

⁹⁴ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁹⁵ PJ Badenhorst & JM Pienaar & H Mostert *Silberg and Schoeman’s The Law of Property* 5 ed (2006) 91.

⁹⁶ *Ibid*.

⁹⁷ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁹⁸ DW Jordaan ‘The Legal Status of the Human Pre-Embryo in the Context of the Genetic Revolution’ *SALJ* (2005) 122 237, 249.

⁹⁹ *Ibid*.

with IVF treatment becoming increasingly prevalent. There has not yet been any South African precedent which deals specifically with the legal status afforded to cryopreserved embryos in instances of divorce proceedings. Therefore, there is a need for the establishment and implementation of definitive framework in this regard.

Unlike South Africa, the United States of America,¹⁰⁰ the United Kingdom¹⁰¹ and Australia¹⁰² have made advancements regarding this area of law. These jurisdictions have deliberated on issues regarding the legal status of embryos and who asserts rights over them during custody matters when divorce proceedings have been instituted. Some countries have even set up committees¹⁰³ to draft legislation to this effect. In the next chapter, these will be discussed in greater detail.

¹⁰⁰ *Davis v Davis* (1992) 842 SW 2d 588 Tenn: Supreme Court.

¹⁰¹ The Warnock Committee Report (note 12 above).

¹⁰² *Re Estate of the Late K and Re the Administration and Probate Act 1935: Ex Parte the Public Trustee* (1996) TASSC 24.

¹⁰³ The Warnock Committee (note 12 above); New South Wales Commission (note 13 above).

3. The Approach taken by the International Community and Foreign Jurisdictions regarding the status of cryopreserved embryos

The previous chapter mentioned South African law regarding the legal status of cryopreserved embryos. South Africa has not yet dealt with a case relating to the legal status of cryopreserved embryos, and has not drafted legislation regulating this issue. There is a *lacuna* in South African law and this chapter will focus on the approaches taken by other countries to determine which country has the most appropriate approach in dealing with the legal status of cryopreserved embryos. In particular the discussion will deal with which party these embryos should be awarded to in the instance of divorce proceedings being instituted between the creators of the cryopreserved embryo.

As stated earlier, the United States of America (USA), the United Kingdom (UK) and Australia have made advancements regarding this area of law. Each of these jurisdictions has decided cases regarding the legal status of embryos. The UK and Australia have dealt with the issue to the extent of setting up committees¹⁰⁴ whose recommendations have been used to draft legislation. The USA does not have legislation to govern this issue, and rely strongly on common law. The USA, through its common law, has used the law of contract, to recognise embryo disposition agreements, to regulate the status of cryopreserved embryos.

In general, embryos are viewed in 3 different ways:¹⁰⁵

- (a) personal property;
- (b) human beings; or
- (c) neither persons nor property (special category).

The latter occupy a *sui generis*¹⁰⁶ category and are entitled to special respect as they are viewed as potential human life.¹⁰⁷

¹⁰⁴ *Ibid.*

¹⁰⁵ KE Diamond 'Cryogenics, Frozen Embryos and the Need For New Means of Regulation: Why the U.S. is Frozen in its Current Approach,' *New York Int LR* (1998) 11 77, 83.

¹⁰⁶ *Sui generis* means 'of its own kind.' It is used to describe a form of legal protection that exists outside typical legal protection and is something that is unique or different,' available at: <http://www.nolo.com/dictionary/sui-generis-term.html>, accessed 29th October 2014.

¹⁰⁷ Langley & Blackston (note 23 above) 168.

International Law will be discussed briefly before examining the views of each of the three jurisdictions on the legal status of cryopreserved embryos.

3.1 The impact of international law on the cryopreserved embryo

3.1.1 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights¹⁰⁸ (ICCPR) together with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) is commonly referred to as the international Bill of Rights.¹⁰⁹ The ICCPR¹¹⁰ which is a treaty that sets out basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial, and; minority rights¹¹¹ was adopted by the U.N. General Assembly in 1966 and came into force in 1976.¹¹² The ICCPR¹¹³ obliges states that sign it to take executive, judicial, and legislative measures to ratify it, in order to protect the rights as set out in this instrument.¹¹⁴ The first paragraph of Article 6 of the ICCPR¹¹⁵ states that ‘every human being has the inherent right to life’. It is submitted that the wording of this Article¹¹⁶ does not define ‘human being’. It is argued by some authors that the protection of the right to life should be afforded not only to the born but to the unborn as

¹⁰⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, 999 171 available at:

<http://www.refworld.org/docid/3ae6b3aa0.html>, accessed 31st October 2014.

¹⁰⁹ American Civil Liberties Union (ACLU), available at:

<https://aclu.org/human-rights/faq-covenant-civil-political-rights-iccpr>, accessed 2nd September 2014.

¹¹⁰ UN General Assembly (note 100 above.)

¹¹¹ American Civil Liberties Union (note 101 above).

¹¹² <http://legal.un.org/avl/iccpr/iccpr.html>, accessed 24th August 2014.

¹¹³ *Ibid.*

¹¹⁴ International Convention on Civil and Political Rights, available at:

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, accessed 4th December 2014.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* Article 6.

well.¹¹⁷ This would mean that the protection under Article 6¹¹⁸ would be extended to embryos from the moment of conception. When deciding to elaborate on the ICCPR,¹¹⁹ some states (Belgium, Brazil, El Salvador, Mexico and Morocco) proposed to re-structure Article 6¹²⁰ to include protection of foetuses and embryos from the moment of conception. This view was rejected by the majority of states as there was no conclusive evidence to prove when conception occurs.¹²¹

Another argument for why the extension of the application should not be acceptable is that laws regulating abortion would have been affected. One cannot abort the embryo due to the fact that is covered by the right to life,¹²² as the mother who terminates her pregnancy would be charged with murder. Ultimately, Petersen¹²³ concludes that there are no compelling legal arguments that are made to afford any protection to an embryo, especially protection of the right to life.¹²⁴

¹¹⁷ N Petersen ‘The Legal Statutes of the Human Embryo in vitro: General Human Rights Instruments’ (2005) 65 447 ,449 available at:

<http://www.zaoerv.de>, accessed on 19th October 2014.

¹¹⁸ The International Covenant on Civil and Political Rights (note 93 above).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² Langley & Blackston (note 23 above) 83.

¹²³ Petersen (note 117 above) 453.

¹²⁴ *Ibid* 464.

3.2. The United States of America (USA)

3.2.1. Legislation

The advances made in medical technology have surpassed legislation. This is why there is an urgent need for legislation to govern the advancements in medical technology so that the disputes that arise can be adequately dealt with by the judiciary.¹²⁵

Various states in the USA have passed legislation dealing with embryos, abortion and human cloning with very few states dealing specifically with the disposition of cryopreserved embryos on dissolution of marriage.¹²⁶

In 2004 California passed legislation relating to the disposition of embryos remaining in a fertility clinic to the effect that an advance directive needs to be effected by the parties regarding how these embryos should be disposed of in the event of death or divorce by either one or both parties.¹²⁷ The legislation¹²⁸ requires written informed consent from the parties if they want to donate the remaining embryos once they have completed their fertility treatment.¹²⁹

Colorado has passed legislation¹³⁰ dealing with conception posthumously as well as after a divorce. The legislation¹³¹ states that if death or divorce should take place *before* implantation of the cryopreserved embryo, then the former spouse or deceased spouse is not the parent of the child born from the implantation *unless* written consent is produced to prove the contrary by the former or deceased spouse.¹³² The statute makes no reference to the legal status of the embryos or how they are to be disposed of the embryos upon divorce.¹³³ The legislation is defective, in that it allows for one genetic parent to bear and produce the child

¹²⁵ *JB v MB* (2001) 783 A 2d 707 NJ.

¹²⁶ Langley & Blackston (note 23 above) 193.

¹²⁷ *Ibid* 194.

¹²⁸ West California's Health & Safety Code 2004 at section 125315.

¹²⁹ Langley & Blackston (note 23 above) 194.

¹³⁰ West Colorado's Revised Statute Annotated 1999.

¹³¹ *Ibid*.

¹³² *Ibid* Section 19-04-106.

¹³³ *Ibid*.

without the consent of the other genetic parent. This goes against the *boni mores* of society,¹³⁴ as it forces a person into parenthood, which is appropriately guarded against and protected.¹³⁵ Similar legislation has been passed in Delaware,¹³⁶ but it is even narrower as it fails to make provision for implantation posthumously.¹³⁷

Florida has passed legislation¹³⁸ that is similar to the legislation in California, relating to the disposition of embryos in the instance of either death or divorce.¹³⁹ The statute fails to elucidate whether a contract in terms of the statute is enforceable between the parties themselves, or between the parties and the medical practitioner administering the IVF treatment.¹⁴⁰

Although Louisiana has a civil law system,¹⁴¹ it is the only state to enact legislation¹⁴² which confers legal status on and grants rights to, cryopreserved embryos in the IVF process.¹⁴³ It is submitted that the drafters of the legislation granted this status to embryos on the basis that to protect the embryo is to protect human life.¹⁴⁴ Since these embryos enjoy all the protection and rights afforded to human beings, they are referred to as judicial person,¹⁴⁵ and

¹³⁴ E Waldman 'The Parent Trap: Uncovering the Myth of "Coerced Parenthood" In Frozen Embryo Disputes' (2004) 53 *American Univ LR* 1021, 1035.

¹³⁵ *AZ v BZ* (2000) NE 2d Mass 725.

¹³⁶ Delaware Code Annotated Title 13.

¹³⁷ Langley & Blackston (note 23 above) 196.

¹³⁸ West Florida Statutes Annotated (1997).

¹³⁹ Langley & Blackston (note 23 above) 196.

¹⁴⁰ HS Shapo 'Frozen Preembryos and the Right to Change One's Mind,' *Duke J of Comparative and Int Law* (2002) 12 75, 83.

¹⁴¹ A civil law system refers to 'the body of laws governing disputes between individuals, as opposed to those governing offenses that are public and relate to the government. The Civil law system differs from that common law system because; it allows appellate courts to hear matters on appeal and review that not only deal with a point of law, but also a point of fact,' available at:

<http://legal-dictionary.thefreedictionary.com/civil+law>, accessed 28th November 2014.

¹⁴² Louisiana Revised Statutes Annotated (2000).

¹⁴³ *Ibid* Sections 9:121 - 9:129.

¹⁴⁴ Langley & Blackston (note 23 above) 196.

¹⁴⁵ In terms of the Louisiana Revised Statutes Annotated, 'judicial persons' are defined as 'of or relating to judicial proceedings or to the administration of the law.'

are not the property of the IVF clinic, the ‘parents’ or the doctor who administers the IVF treatment.¹⁴⁶

It is submitted that there are many states that have enacted legislation dealing with the disposition of cryopreserved embryos, the wording of the statutes make reference to research and other aspects regarding cryopreserved embryos and are not clear enough for the courts to apply them without difficulty.¹⁴⁷ It is submitted the legislation in California and Louisiana are very useful, but since the USA is a federal state, the legislation only applies to the state that enacted them.

3.2.2. The Common Law

There are mainly two approaches that courts use when presented with disputes relating to the custody of cryopreserved embryos in the instance of divorce:¹⁴⁸

- (a) The Contractual Approach;¹⁴⁹ and
- (b) The Balancing Approach.¹⁵⁰

The cases discussed below will illustrate how these approaches are applied by the courts. The most important case that has been dealt with in relation to the disposition of cryopreserved embryos in divorce proceedings is the case of *Davis v Davis*.¹⁵¹ It is the first

¹⁴⁶ Louisiana Revised Statutes Annotated 9:126.

¹⁴⁷ Langley & Blackston (note 23 above) 198.

¹⁴⁸ *Szarfranski v Dunston* (2013) 933 NE 2d 502, 506.

¹⁴⁹ Langley & Blackston (note 23 above) 198 – under this approach, where there is an existence of a contract (agreement) entered into by the parties regarding the disposition of cryopreserved embryos, the courts will enforce the provided that such a contract is clear, unambiguous and not *contra bonos mores*.

¹⁵⁰ *Szarfranski v Dunston* (note 148 above) – under this approach the courts will balance the interests of the parties. This approach is used when there is an absence of a contract (agreement) between the parties regarding the disposition of the cryopreserved embryos in the instance of divorce. The balancing approach is also used where there is an agreement but the agreement is unclear or ambiguous; or where the agreement is *contra bonos mores* and cannot be enforced by the courts.

¹⁵¹ *Davis v Davis* (note 100 above).

American case to have dealt with the issue and was heard by the Tennessee Supreme Court.¹⁵²

Mr and Mrs Davis were married and expecting their first child when, unfortunately, Mrs Davis suffered an extremely painful tubal pregnancy,¹⁵³ as a result of which she had surgery to remove her right fallopian tube.¹⁵⁴ During the course of the marriage, Mrs Davis suffered four more tubal pregnancies. After the fifth tubal pregnancy, Mrs Davis chose to have her left fallopian tube ligated. This procedure left Mrs Davis without being able to conceive naturally.¹⁵⁵ Mr and Mrs Davis decided to try IVF treatment after failed attempts at adoption. The rigorous and regular harvesting process caused extreme discomfort to Mrs Davis with no results. The institution recommended to Mr and Mrs Davis the option of cryogenically freezing the embryos for implantation at a later stage, which they accepted. The Davis' had undergone six attempts at IVF treatment but the pregnancy they had hoped for never materialised. This caused a huge strain on their marriage financially and emotionally¹⁵⁶ and Mr Davis filed for divorce.¹⁵⁷ The couple agreed on all the terms of the dissolution of the marriage, except which one of them would get custody of the seven embryos that were still being kept in storage at the clinic.¹⁵⁸ The trial court awarded custody to Mrs Davis¹⁵⁹ and ordered that she was to be given the opportunity to implant these embryos and become a parent.

The appeal court reverse this decision and stated that Mr Davis had a 'constitutionally protected right not to produce a child where no pregnancy has taken place' and stated that 'there is no compelling state interest to justify making the order to implant the embryo

¹⁵² *Ibid* 589.

¹⁵³ A tubal pregnancy is a condition where the fertilised egg attaches itself and grows in an area other than the, usual, uterus. Statistics prove that this occurs once in every fifty pregnancies. These pregnancies pose a major health risk and are can be very painful. The survival rate of babies born through tubal pregnancies is very low available at:

<http://www.webmd.com/baby/guide/pregnancy-ectopic-pregnancy>, accessed 4th December 2014.

¹⁵⁴ *Davis v Davis* (note 100 above) 589.

¹⁵⁵ *Ibid* 591.

¹⁵⁶ *Ibid* 591.

¹⁵⁷ *Davis v Davis* (note 100 above) 592.

¹⁵⁸ *Ibid* 589.

¹⁵⁹ *Ibid*.

against the wishes of either party.’¹⁶⁰ Essentially, it is the parent who wishes not to become a parent whose interests outweigh those of the other parent.

There are two factors that guided the court to coming to its decision:¹⁶¹

- (a) The existence of a written agreement, between the clinic where the embryos were being held in storage and Mr and Mrs Davis, stating how the embryos are to be with disposed of in the instance of a divorce; and
- (b) That there was no statute or case law to rely on or refer to as a precedent since this was the first case to deal with this particular issue.¹⁶²

Mrs Davis wished to obtain custody of the embryos as she wished to implant them and become a parent.¹⁶³ Some of the arguments raised were that since Mr and Mrs Davis created the embryos, they had made an ‘irrevocable commitment to reproduction’¹⁶⁴ and intended to become parents. An opposing argument was that Mr Davis requested for the cryopreserved embryos to be kept in storage at the facility until he decided whether or not he wanted to become a parent outside the bounds of marriage.¹⁶⁵

The appeal court concluded that the interests of both parties had to be weighed in order to come to a decision that was fair and reasonable.¹⁶⁶

In deciding who to award custody of the cryopreserved embryos to, the court had to consider the fundamental question: Do the cryopreserve embryos occupy the status of a person or property?¹⁶⁷

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid* 590.

¹⁶² JS Vinciguerra ‘Showing “special respect” – permitting the gestation of preembryos’ *Alb LJ Sci & Tech* (1999) 9 399, 410.

¹⁶³ *Ibid* 598.

¹⁶⁴ *Ibid* 591.

¹⁶⁵ *Ibid* 589.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Davis v Davis* (note 100 above) 594.

The issue dealt with two completely opposing positions:¹⁶⁸

- (a) The position, which was adopted by the trial court, was to consider that after fertilisation, the cryopreserved embryo should acquire the rights that are afforded to a person.
- (b) The other position was that the cryopreserved embryos are nothing more than property and have the same status as any other human tissue, and therefore are, not deserving of the right or legal status of a person.

The appeal court considered these two positions and then introduced a third, intermediate position which holds that the cryopreserved embryo deserves respect greater than that accorded to human tissue, but not the respect accorded to actual persons.¹⁶⁹ The court concluded that it deserved special respect as it is a potential human life.¹⁷⁰

Cases of this nature are very intricate and cannot be decided by the courts using a general formula. Each case should be judged on their surrounding facts and circumstances. Embryo disposition agreements can be used to settle these disputes.¹⁷¹ In making this submission, there should be clear, unambiguous and definitive legislation that governs the contents of these embryo disposition agreements.¹⁷²

This is the first, but not the only case that has dealt with this issue before. The USA is the only country to have dealt with so many cases involving cryogenically frozen embryos and their disposition in the instance of divorce.¹⁷³

There are more cases that have dealt with embryo disposition agreements. In some of these cases the embryo disposition agreements have been enforced against the wish of one or both parties, and in other cases the agreement has not been given effect to, despite compelling arguments raised by one or both parties stating why the agreement should be enforced.¹⁷⁴

¹⁶⁸ Langley & Blackston (note 23 above) 178.

¹⁶⁹ *Davis v Davis* (note 100 above) 597.

¹⁷⁰ Vinciguerra (note 162 above) 413.

¹⁷¹ Robertson (note 8 above) 409.

¹⁷² Langley & Blackston (note 23 above) 198.

¹⁷³ *Kass v Kass* (note 38 above); *AZ v BZ* (note 135 above); *In re marriage Witten* (2003) 672 NW 2d 768 Iowa; *Szarfranski v Dunston* (note 148 above); *JB v MB* (note 125 above).

¹⁷⁴ *JB v MB* (note 125 above).

The reason is due to vagueness and ambiguity in the contract or because the enforcement of the agreement would amount to a violation of public policy.¹⁷⁵

In such instances, the court will decide these cases by applying the balancing approach (discussed above):¹⁷⁶

- (a) Where there is an absence of an embryo disposition agreement
- (b) Where there is evidence of ambiguity in the contract; or
- (c) Where enforcement would be *contra bonos mores*.

The cases discussed deal with the application of this approach.

In the case of *Kass v Kass*,¹⁷⁷ the couple had been trying to conceive a child naturally but were unsuccessful. They then opted for IVF treatment. The institution required Mr and Mrs Kass to sign an embryo disposition agreement setting out how to dispose the embryos. The couple signed an agreement, dealing with the disposition of the embryos¹⁷⁸ in a property settlement agreement.¹⁷⁹ The IVF procedure was unsuccessful and within three weeks of signing the forms at the IVF institution, the couple instituted divorce proceedings. The divorce papers made provision for disposition of the embryos if Mr and Mrs Kass did not want to continue with the IVF treatment. The agreement stated that the embryos would be donated to research and that neither party would lay individual claims against them.¹⁸⁰ However, Mrs Kass later changed her mind and decided to keep the embryos to implant them in the future¹⁸¹ as she was one of the genetic parents and it was her only opportunity to become a mother. Mr Kass objected to this, as refused to be forced into parenthood, and did not want to father a child with Mrs Kass after their divorce.¹⁸²

The trial court did not accept the embryo disposition agreement and awarded the embryos to Mrs Kass, against the arguments raised by Mr Kass.¹⁸³

¹⁷⁵ SB Apel 'Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent' *Family LQ* (2005) 39(3) 663, 665.

¹⁷⁶ Langley & Blackston (note 23 above) 196; *Szafrański v Dunston* (note 129 above).

¹⁷⁷ *Kass v Kass* (note 38 above).

¹⁷⁸ Langley & Blackston (note 23 above) 197.

¹⁷⁹ *Ibid* 599.

¹⁸⁰ *Ibid* 561.

¹⁸¹ *Ibid* 566.

¹⁸² *Ibid*.

¹⁸³ *Kass v Kass* (note 38 above) 561.

The Appeal Court,¹⁸⁴ however, overturned the decision of the trial court, stating that where there is a contract that has been signed, it must be presumed that that contract is valid and must be given effect to.¹⁸⁵ The court granted an order in favour of Mr Kass, giving effect to the agreement.¹⁸⁶

In the case of *AZ v BZ*¹⁸⁷ the couple had, after many failed attempts at natural conception, decided to enrol for IVF treatment. The facility that they had chosen made them sign an agreement regarding the disposition of embryos in the event of divorce.¹⁸⁸ The agreement stated that no implantation of embryos would take place unless the consent of both parties was obtained.¹⁸⁹ The agreement was signed by the husband and later signed by the wife, after adding a term to the agreement stating that the embryos would be given to the wife for implantation¹⁹⁰ if the marriage dissolved.¹⁹¹ The wife became pregnant and the couple had twin daughters¹⁹² as a result of the IVF treatment the wife then decided to have embryos implanted without obtaining the consent of her husband.¹⁹³ The couple decided to get divorced and during these proceedings, the husband sought an interdict preventing his wife from implanting any more embryos, whereas the wife sought to enforce the agreement which stated that she was entitled to the embryos for future implantation upon divorce.¹⁹⁴

Both the trial and appeal courts disregarded the contract, stating that the wording of the contract was ambiguous, with the appeal court stating that there was no binding agreement and resolved the matter by balancing the interests of the parties.¹⁹⁵ It is against the *boni mores* of society to force a party to become a parent against their will.¹⁹⁶

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* 178.

¹⁸⁶ *Ibid* 183.

¹⁸⁷ *AZ v BZ* (note 135 above).

¹⁸⁸ M Strasser 'You Take The Embryos But I Get The House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce' available at:

http://works.bepress.com/mark_strasser/12/, accessed 15th March 2014.

¹⁸⁹ *AZ v BZ* (note 135 above) 1052.

¹⁹⁰ Strasser (note 188 above).

¹⁹¹ *AZ v BZ* (note 135 above) 1051.

¹⁹² *Ibid* 1153.

¹⁹³ *Ibid* 1154.

¹⁹⁴ *Ibid* 1155.

¹⁹⁵ Langley & Blackston (note 23 above) 196.

In the case of *Roman v Roman*¹⁹⁷ the couple were married but had trouble conceiving a child naturally.¹⁹⁸ They sought the advice of a specialised doctor¹⁹⁹ who recommended that they try IVF treatment.²⁰⁰ The facility where the IVF treatment would take place required the couple to enter into an agreement regarding the disposition of the embryos if the IVF treatment was terminated.²⁰¹ The couple entered into an embryo disposition agreement with the institution which stated that the embryos would be discarded in the instance of divorce.²⁰² Unfortunately the couple was unsuccessful at the IVF procedure and the husband filed for divorce.²⁰³ The husband requested the trial court to uphold the agreement and discard the embryos. The court, instead awarded the embryos to the wife so that she had the opportunity to implant the embryos and have her own biological child.²⁰⁴ The appeal court agreed with the husband, and stated that the trial court had violated the embryo disposition agreement between the parties²⁰⁵ and reversed the decision of the trial court.²⁰⁶

The reasons provided by the court were that:²⁰⁷

- (a) The agreement was clear and unambiguous, therefore, was valid and enforceable; and
- (b) At the time of signing the agreement, both parties were aware of the consequences of the agreement;

The appeal court stated that there was no reason why the agreement should not have been enforced.

¹⁹⁶ Apel (note 175 above)665.

¹⁹⁷ *Roman v Roman* (2006) 193 SW3d 40.

¹⁹⁸ *Ibid* 42.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*.

²⁰¹ Sara C Gaugier *The Veto Approach: Disposal Strategies for Disputed Frozen Embryos* (unpublished LLM Thesis, Michigan State University, 2010) 4.

²⁰² Strasser (note 188 above).

²⁰³ *Ibid* 43.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid* 44.

²⁰⁶ *Ibid* 55.

²⁰⁷ *Ibid* 52.

In the previous cases it was always the woman advocating for the embryos to be given to her so that she could have them implanted at a later date²⁰⁸ and essentially, forcing the man into parenthood.²⁰⁹

The case of *J.B v M.B*²¹⁰ is different from the earlier cases, because in this case, the husband wished to become a parent, while the wife did not. After marriage, the couple realised that the wife had a condition that prevented her from conceiving naturally and decided to try IVF treatment.²¹¹ The fertility clinic required the couple to sign an embryo disposition agreement which stated that upon the dissolution of their marriage, the embryos would be released to the IVF programme at the institution.²¹² The procedure was successful and a year later, the wife gave birth to a child. During the same year the couple decided to get divorced. The wife expressed her wish to abandon the embryos, while the husband wanted to donate the embryos to an infertile couple.²¹³

The trial court concluded that the interest of the wife in not wanting to become a parent outweighed the interest of the husband who wanted to donate the embryos.²¹⁴

The appeal court concluded that there was no valid contract and decided the matter by balancing the interests of the parties. The husband contended that his right to procreate had been infringed because his wife wished to have the embryos discarded. The appeal court stated that his right to procreate had not been infringed. This was because the husband was not infertile, so the fact that his wife wanted to destroy the embryos did not mean that he would never be a father.²¹⁵ The appeal court, reiterated the reason for rejecting the contract, by stating that they would not force someone into parenthood, and it is the party not wanting to become a parent, is the party whose interests will prevail.²¹⁶

²⁰⁸ Embryo Adoption: defusing the Legal Landmine 12, available at: <http://www.embryolaw.org/essays/PRN26061.pdf>, accessed 5th December 2014.

²⁰⁹ Apel (note 175 above)665.

²¹⁰ *JB v MB* (note 125 above).

²¹¹ *JB v MB* (note 125 above) 709.

²¹² Embryo Adoption: defusing the Legal Landmine (note 200 above) 15.

²¹³ *Ibid*

²¹⁴*Ibid* 711.

²¹⁵ *Ibid* 717.

²¹⁶ *Davis v Davis* (note 100 above) 604; *JB v MB* (note 125 above) 717; *AZ v BZ* (note 135 above) 1158.

None of the cases discussed conclude that cryopreserved embryos deserve the same respect as human beings. The approach that is adopted by the courts is the ‘special respect’ doctrine,²¹⁷ which means that cryopreserved embryos are ‘potential human beings’ and as such occupy a special category in law that is worthy of protection.

The courts do not have legal jurisprudence to rely on when hearing cases that involve custody disputes over cryopreserved embryos during divorces,²¹⁸ but the courts have clarified that where an embryo disposition agreement exists, it must be enforced. The exception to the enforcement of the embryo disposition agreements is when such an agreement appears to be unambiguous and vague.²¹⁹ The courts have also stated that in the absence of such an agreement the interests of the parties must be balanced.²²⁰

The next jurisdiction that will be discussed is the United Kingdom whose approach on the status of cryopreserved embryos is vastly different from the approach taken by the USA.

²¹⁷ Langley & Blackston (note 23 above) 192.

²¹⁸ *Ibid* 193.

²¹⁹ *Ibid*.

²²⁰ *Kass v Kass* (note 38 above).

3.3. The United Kingdom (UK)

3.3.1. The Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Committee) of 1985

In July 1982,²²¹ a 16 member Warnock Committee²²² was established under the Chairmanship of Mary Warnock.²²³²²⁴ The Warnock Committee²²⁵ was mandated with the task of making recommendations on the social, ethical and legal implications²²⁶ of recent embryology and research and development regarding infertility treatment²²⁷ as well as other potential developments in the field.²²⁸ These recommendations²²⁹ formed the framework for legislation and regulations that would govern the laws of infertility and embryology.²³⁰

The Warnock Committee²³¹ submitted a report on the current law in the country and stated that there was no conclusive legal status conferred upon cryopreserved embryos, the law does not grant the embryo the ‘same status as a child or an adult, and the law does not treat the human embryo as having a right to life’.²³²

The Warnock Committee stated in their report²³³ that no live human embryo created during IVF, ‘whether frozen or unfrozen, may be kept alive, if not transferred to a woman, after fourteen days from the date of fertilisation, nor may they be used as a research subject within

²²¹ ‘The Warnock Committee’ (1984) 289 *British Medical Journal*, 239 available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1442316/?page=1>, accessed 4th September 2014.

²²² The Warnock Committee (note 13 above).

²²³ ML Lupton ‘The Legal Status of The Embryo.’ *Acta Juridica* (1988) 197, 201.

²²⁴ Surrogate Motherhood: Ethical and Legal Issues 5, available at: <https://repository.library.georgetown.edu/bitstream/handle/10822/556906/sn6.pdf?sequence=1>, accessed 5th December 2014.

²²⁵ The Warnock Committee (note 13 above).

²²⁶ How legislation on fertility treatment developed, available at: <https://www.hfea.gov.co.uk/1319.html>, accessed 5th December 2014.

²²⁷ Diamond (note 105 above) 88.

²²⁸ TL Davis ‘Protecting the Cryopreserved Embryo’ *Tennessee Law Review* (1989) 57 508, 520.

²²⁹ The Warnock Committee (note 13 above).

²³⁰ Diamond (note 105 above) 88; Warnock Committee Report (note 12 above) 1.3.

²³¹ The Warnock Committee (note 12 above).

²³² *Ibid* 11.16.

²³³ The Warnock Committee (note 12 above).

the fourteen day time period'.²³⁴ The reason the Warnock Committee²³⁵ presented was that before fourteen days there would be no individual development that would have occurred.²³⁶ 'This fourteen day period does not include any time during which the embryo may have been frozen'.²³⁷ Even though the issue of granting extra protection to cryopreserved embryos (created through IVF) before the implantation was considered, the position in law is still unclear.²³⁸

The Warnock Committee²³⁹ concluded their report by stating that they adopted the 'actual mode of existence' theory, which granted embryos a status analogous with property.²⁴⁰

The Warnock Committee²⁴¹ agreed that they would draft legislation based on a utilitarian approach to benefit the general population, but at the same time not outrage too many people.²⁴²

3.3.2. Legislation

Acting upon the Recommendations of the Warnock Committee,²⁴³ the Human Fertilisation and Embryology Act (the British Act)²⁴⁴ was passed. The British Act²⁴⁵ defines and regulates legal aspects resulting from artificial fertilisation including the storage and use of gametes and embryos, embryo testing and sex selection, parenthood, surrogacy and consent.²⁴⁶ The British Act,²⁴⁷ further, establishes the Human Authorisation and Embryology

²³⁴ *Ibid* 11.22.

²³⁵ The Warnock Committee (note 12 above).

²³⁶ *Davis* (note 228 above) 520.

²³⁷ The Warnock Committee (note 12 above) 11.22.

²³⁸ *Davis* (note 228 above) 522.

²³⁹ The Warnock Committee (note 12 above).

²⁴⁰ *Diamond* (note 105 above) 89.

²⁴¹ The Warnock Committee (note 12 above).

²⁴² *Ibid* 88.

²⁴³ The Warnock Committee (note 12 above).

²⁴⁴ 2008. This is Amendment to the Human Fertilisation and Embryology Act 1990.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid* Section 1.

²⁴⁷ *Ibid*.

Authority (HAE Authority)²⁴⁸ whose function, *inter alia*,²⁴⁹ is to ensure compliance with the provisions of the British Act.²⁵⁰ The British Act²⁵¹ only describes embryos in the context within which embryos are used but does not define or confer a status upon them.²⁵²

The British Act²⁵³ does not provide for ownership of the embryo but provides that, when conducting IVF procedures, the consent of both gamete donors²⁵⁴ is necessary for the creation of embryos, the use of embryos in treatment, and the storage of embryos.²⁵⁵

The British Act²⁵⁶ fails to clearly define embryos and grant them a status in terms of the law. It is obvious that in the debate about whether embryos should be granted the status of personhood, or be regarded purely as property when determining to which party custody should be granted in the instance of divorce.²⁵⁷ The UK has clearly regarded cryopreserved embryos purely as property. This is contrary to the approach set out in the American case of *Davis*,²⁵⁸ where cryopreserved embryos were granted the status of ‘pseudo-humans’ as they occupy an intermediately phase between personhood and property.

It is submitted that the approach taken in the *Davis*²⁵⁹ case is the most appropriate approach to have regarding cryopreserved embryos.²⁶⁰

²⁴⁸ The British Act (note 244 above) Section 7.

²⁴⁹ *Inter alia* is a Latin phrase for ‘among other things.’ ‘The phrase is often found in legal pleadings and writings to specify one example out of many possibilities’, available at:

http://legal-dictionary.thefreedictionary.com/_/dict.aspx?rd=1&word=Inter+alia, accessed 29th November 2014.

²⁵⁰ The British Act (note 244 above) Section 6.

²⁵¹ The British Act (note 244 above).

²⁵² *Diamond* (note 105 above) 89.

²⁵³ The British Act (note 244 above).

²⁵⁴ The British Act (note 244 above) schedule 3.

²⁵⁵ M Swanepoel *Embryonic Stem Cell Research and Cloning: A Proposed Legislative Framework in the Context of Legal Status and Personhood* (Unpublished LLM dissertation, University of Pretoria, 2006).

²⁵⁶ The British Act (note 244 above).

²⁵⁷ KP Gunnison ‘Poaching the Eggs: Courts and the Custody Battles over Frozen Embryos’ *J of L and Family Studies* (2006) 8 275, 279.

²⁵⁸ *Davis v Davis* (note 100 above) 589.

²⁵⁹ *Davis v Davis* (note 100 above).

²⁶⁰ *Diamond* (note 105 above) 86; Texas Courts Deal With Frozen Embryos Following Divorce (B Patsner) available at:

This view was further emphasised when the HAE Authority Chairperson,²⁶¹ stated that embryos ‘are not “little babies” in the freezer.’²⁶²

3.3.3. The Common Law

In the case of *Evans v Amicus Healthcare Ltd*,²⁶³ Ms Evans discovered that she had ovarian cancer and, before she began her treatment for the cancer, she was offered the chance to remove her ovaries for the purpose of IVF treatment before the cancer affected them. She agreed to this. Embryos were created using her ovaries and the sperm of her fiancé, Mr Johnson. Unfortunately, the relationship ended before any of the embryos were implanted into Ms Evans. Mr Johnson wanted the embryos to be destroyed since he no longer wished to have a child with Ms Evans. Ms Evans, however, did not want this and applied to court for an order allowing her to have the embryos implanted. The court, in rejecting her application, stated that it was a violation of the requirements for consent in terms of the British Act²⁶⁴ (consent of both gamete donors are required for the implantation of the embryo). The case was dismissed.²⁶⁵

It is submitted that in the *Evans*²⁶⁶ case, the decision of the court was beneficial to Mr Johnson as it enforced his rights in terms of the British Act²⁶⁷ and did not force him to become a parent, contrary to the wishes of Ms Evans. This is an example of good advocacy, interpretation and application of the British Act²⁶⁸.

[http://www.law.uh.edu/healthlaw/perspectives/2008/\(BP\)%20embryos.pdf](http://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20embryos.pdf), accessed 17th February 2014.

²⁶¹ Ruth Deech – Chairperson of the Human Fertilisation Authority established by the British Act.

²⁶² Davis (note 226 above) 522.

²⁶³ *Evans v Amicus Healthcare Ltd and Other* [2003] 2161 EWHC (Fam).

²⁶⁴ The British Act (note 244 above) schedule 3.

²⁶⁵ M Sawnepoel ‘The statutory regulation of cryopreserved embryos in South Africa and England’ (2008) *De Jure* 126.

²⁶⁶ *Evans v Amicus Healthcare Ltd and Other* (note 263 above).

²⁶⁷ The British Act (note 244 above).

²⁶⁸ *Ibid.*

The next case will depict the flaws in the British Act²⁶⁹ and its application and interpretation by the courts. Even though the next case does not deal with the status of the embryos in relation to divorce, it will nevertheless be discussed as an illustration of the possible consequences of the British Act²⁷⁰ which may arise when dealing with custody issues during divorce.

In the matter of *Ex Parte Blood*,²⁷¹ Mr Blood had been in a coma when, (upon Mrs Blood's instructions), two sperm samples were taken from him by means of electro-ejaculation without his prior consent or knowledge.²⁷² Mr Blood then died and Mrs Blood then wished to have the cryopreserved sperm transported to Belgium so that she could have the sperm inseminated. There were many difficulties experienced in resolving this case as there were no precedents to follow and the only thing the court could rely on was the British Act,²⁷³ which was in conflict with the European Community Treaty.^{274,275} Instead of deliberating on the matter, the court referred the case to the HAE Authority for to authorise the exportation of the sperm.²⁷⁶

The appeal court stated that the trial court incorrectly interpreted the function of the HAE Authority by assuming that the HAE Authority had discretion to make restrictions regarding the exportation of the sperm to Belgium.²⁷⁷ The appeal court stated that such restrictions should be justified based on 'public interest',²⁷⁸ and were unsatisfied with evidence of public interest being served (in restricting Mrs Blood from exporting the sperm to Belgium).²⁷⁹ The appeal court referred the matter back to the HAE Authority to be reviewed.²⁸⁰ After review,

²⁶⁹ The British Act (note 244 above).

²⁷⁰ *Ibid.*

²⁷¹ *R v Human Fertilisation and Embryology Authority, Ex Parte Blood* (1997) 2 All ER 687.

²⁷² Diamond (note 105 above) 90.

²⁷³ The British Act (note 244 above).

²⁷⁴ *Ex Parte Blood* (note 271 above) 806.

²⁷⁵ It is a binding agreement between EU member countries (here it would be the UK and Belgium) and how to regulate the relationship between the EU member countries.

²⁷⁶ S McLean 'Consent and the law: review of the current provisions in the Human Fertilisation and Embryology Act 1990 for the UK Health Ministers' *Human Reproduction Update* 3 (1997) 593, 594.

²⁷⁷ *Ibid* 594.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ McLean (note 276 above) 594.

the HAE Authority withdrew its objection to Mrs Blood's application to export the sperm of the late Mr Blood.²⁸¹

The judiciary cannot be blamed for this error, because it is the consequence of poorly drafted legislation.²⁸²

The legislation drafted by the UK, based on the recommendations of the Warnock Committee,²⁸³ may not have been very effective regarding its content, but the entire process, concluding with the enactment of the British Act,²⁸⁴ was highly commendable.

In the case of *Evans*²⁸⁵ the court decided in favour of the party not wanting to become a parent. This court, unlike in *Ex Parte Blood*²⁸⁶ case, correctly interpreted the provisions of the British Act.²⁸⁷

As previously mentioned, the USA and UK have completely different views on how cryopreserved embryos should be treated and what status or rights they deserve.²⁸⁸ The UK views them purely as property,²⁸⁹ whereas the USA views them as pseudo-humans.²⁹⁰

²⁸¹ *Ibid.*

²⁸² Diamond (note 105 above) 90.

²⁸³ The Warnock Committee (note 12 above).

²⁸⁴ The British Act (note 244 above).

²⁸⁵ *Evans v Amicus Healthcare Ltd and Other* (note 263 above).

²⁸⁶ *Ex Parte Blood* (note 271) above.

²⁸⁷ The British Act (note 244 above) Schedule 3.

²⁸⁸ Diamond (note 105 above) 90.

²⁸⁹ When viewed as pure property, the person with whom they lie is entitled to keep the frozen embryos.

²⁹⁰ In viewing the embryos as pseudo-humans they fall within a category that is worthy of special protection in the eyes of the law. Texas Courts Deal with Frozen Embryos Following Divorce (note 252 above).

3.4. Australia

Unlike the differences between the UK and the USA, the UK and Australia share similar views in their approach regarding the legal status of cryopreserved embryos. The discussion here will focus on the similarities between the UK and Australia. Australia, like the UK, is more conservative in dealing with the development of law and social considerations in relation to ethical and legal issues surrounding cryopreserved embryos.²⁹¹ Australia has largely followed the UK in its reasoning and approach on how to deal with cryopreserved embryos. Like the UK, Australia also called for the establishment of an inquiry committee, whose recommendations they would use to draft legislation.²⁹²

3.4.1. New South Wales Law Reform Commission Report 58 of 1988 - Artificial Conception: *In Vitro* Fertilisation

The New South Wales Commission²⁹³ which was established in 1988, parallel to the Warnock Committee²⁹⁴ in their objectives, substance, and recommendations was set up because, like the UK, Australia had no conclusive guidelines or legislation to follow when dealing with issues regarding cryopreserved embryos.²⁹⁵

The recommendations made by the New South Wales Commission²⁹⁶ state that ‘embryos may only be stored for 10 years after which they may not be kept alive’.²⁹⁷ The Recommendations also state that where either partner²⁹⁸ dies, the ‘surviving partner retains the power of use, dealing and disposition’.²⁹⁹ In the event that both partners die, ‘such power vests in the fertility clinic or storage facility’.³⁰⁰

²⁹¹ Davis (note 226 above) 518.

²⁹² New South Wales Commission (note 13 above).

²⁹³ *Ibid.*

²⁹⁴ The Warnock Committee (note 12 above).

²⁹⁵ Diamond (note 105 above) 91.

²⁹⁶ New South Wales Commission (note 13 above).

²⁹⁷ *Ibid* Recommendation 22.

²⁹⁸ Partners – two people who are in a relationship; a couple.

²⁹⁹ Diamond (note 105 above) 91.

³⁰⁰ *Ibid.*

Recommendation 2³⁰¹ states that ‘no embryo should be allowed to develop *in vitro*, beyond the point at which implantation would normally occur and should therefore not be kept alive longer than 14 days,³⁰² (excluding any period in storage) and cannot be disposed of unless the couple for whom the ovum was fertilised agree to the disposition’.³⁰³

Analogous to the Warnock Committee³⁰⁴ in the UK, the Recommendations made by the New South Wales Commission³⁰⁵ formed the basis for enacted legislation and regulations that govern cryopreserved embryos in Australia.

3.4.2. Legislation

In 1995 the Infertility Treatment Act³⁰⁶ was passed, based predominantly on the recommendations made by the New South Wales Commission.³⁰⁷

The Infertility Treatment Act³⁰⁸ fails to define cryopreservation or cryopreserved embryos. The Infertility Treatment Act³⁰⁹ also fails to include embryo in its definitions,³¹⁰ but defines gametes.³¹¹ Section 9³¹² sets out the requirements for consent,³¹³ as well as for the withdrawal of consent.³¹⁴

³⁰¹ The New South Wales Commission (note 13 above) Recommendation 2.

³⁰² *Ibid* Recommendation 15.

³⁰³ *Ibid* Recommendation 2.

³⁰⁴ The Warnock Committee (note 12 above).

³⁰⁵ The New South Wales Commission (note 13 above).

³⁰⁶ Infertility Treatment Act 63 of 1995.

³⁰⁷ The New South Wales Commission (note 13 above).

³⁰⁸ Infertility Treatment Act (note 306 above).

³⁰⁹ *Ibid*.

³¹⁰ *Ibid* Section 3.

³¹¹ *Ibid* Section 3 (oocyte or sperm).

³¹² *Ibid* Section 9.

³¹³ *Ibid* - consent must be in writing, must be informed consent that is given, the withdrawal of consent must be done prior to the procedure.

³¹⁴ Infertility Treatment Act 1995 – Australasian Legal Information Institute, available at:

http://www.austlii.edu.au/au/legal/vic/hist_act/ita1995264.pdf, accessed 5th December 2014.

Section 37 – ‘withdrawal must be lodged:

(a) at the place where consent was obtained, at the place where the consent was lodged; or

The Infertility Treatment Act³¹⁵ is very similar to the British Act.³¹⁶ Both the Acts³¹⁷ have the same time period for when an embryo should be kept 'alive' before they are discarded, and they both have internal regulatory bodies to ensure the smooth running of the Act.³¹⁸

3.4.3. The Common Law

There have not been any cases that have dealt particularly with the issue of cryogenically frozen embryos in relation to custody during divorce; however, there is one case that dealt with embryos and inheritance rights.³¹⁹

The Supreme Court of Tasmania in the case of *Estate of the Late K*³²⁰ decided that there was an urgent need for a precedent to be set that the court could follow when considering the issue of cryopreserved embryos. The court applied the Recommendations made by New South Wales Commission³²¹ and concluded that since the child was born of a cryopreserved embryo, (a product of his father's semen and mother's ovum), which was implanted in the mother's womb after the death of his father, he should not be denied the right to claim an inheritance from his father's estate in terms of the law.³²²

(b) at the place where the sperm, oocyte or embryo to which the consent relates is kept or stored or where it is to be used; or

(c) in accordance with the regulations'.

³¹⁵ The Infertility Treatment Act (note 306 above).

³¹⁶ The British Act (note 244 above).

³¹⁷ The British Act (note 244 above); The Infertility Treatment Act (note 306 above).

³¹⁸ The Infertility Treatment Act (note 306 above) Section 121 (provides for the establishment of the Infertility Treatment Authority).

³¹⁹ Diamond (note 105 above) 92.

³²⁰ *Re Estate of the Late K* (note 102 above) - This case dealt with an inheritance claim in respect of a child who had been posthumously conceived and born from a cryopreserved embryo. The claim was lodge against the estate of the father of the child.

³²¹ The New South Wales Commission (note 13 above).

³²² *Re Estate of the Late K* (note 102 above) 29

These recommendations by the New South Wales Commission³²³ and subsequent enacted legislation, the Infertility Treatment Act,³²⁴ are very similar to the Warnock Committee's Recommendations³²⁵ and the British Act.³²⁶

Since Australia has adopted the approach taken by the United Kingdom, as is evident from the wording of the Recommendations made by the New South Wales Commission,³²⁷ Australia has also considered embryos to be property and failed to grant them legal status or afford them any significant protection in terms of the law.

The enacted legislation³²⁸ does not contribute anything to the current discussion. The Infertility Treatment Act³²⁹ fails to define embryos, and offers no significance to the discussion on which party receives custody of cryopreserved embryos in a divorce.

3.5. Conclusion

Legislators in all of the jurisdictions we have discussed have failed to confer legal status on cryopreserved embryos. The state of California made the most significant advancement on how embryos should be dealt upon the dissolution of marriage, but that the USA, (unlike the UK and South Africa which are unitary states) is a federal state and laws that bind California will not be binding on any other state in the US, rendering this piece of legislation futile, unless other states enact similar legislation.

It is clear from the discussion of American case law, that the common law in the USA is far more developed than statutory law. The USA adequately deals with situations involving custody of cryopreserved embryos in divorces by applying its well-developed common law.

It is submitted that in terms of the approach applied by the courts by the three jurisdictions discussed in this chapter, the USA has the most appropriate approach, in suggesting the use

³²³ New South Wales Commission (note 13 above).

³²⁴ The Infertility Treatment Act (note 306 above).

³²⁵ The Warnock Committee (note 12 above).

³²⁶ The British Act (note 244 above).

³²⁷ New South Wales Commission (note 13 above).

³²⁸ The Infertility Treatment Act (note 306 above).

³²⁹ *Ibid.*

of embryo disposition agreements, which are regulated by the common law, firmly based on the law of contract.³³⁰

The discussion in the next chapter will focus on surrogacy agreements in South Africa, the requirements for establishing the agreement, the effectiveness of the agreement, the prohibitions relating to the agreements and how the agreements can be compared to embryo disposition agreements.³³¹ The chapter will also deal with a discussion on the absence of an embryo disposition agreement and its effect on forced parenthood.³³²

³³⁰ Gunnison (note 257 above) 277.

³³¹ Robertson (note 8 above).

³³² Apel (note 175 above)665.

4. Surrogacy Agreements and their similarity to Embryo Disposition Agreements

In the previous chapter we looked at cases and legislation in the international perspective as well as the US, the UK, and Australia, and examined the cases and legislation that regulate cryopreserved embryos in those jurisdictions. Many of the American cases³³³ and the case of *Evans*³³⁴ in the UK considered and referred to embryo disposition agreements³³⁵ and their need to be enforced.³³⁶

In this chapter we will consider surrogacy agreements³³⁷ and their relationship with embryo disposition agreements as well as the issue of, whether these embryo disposition agreements are *contra bonos mores*.

The relevance of this discussion is to illustrate an alternative solution to the problem that South Africa is currently faced with. The problem is the failure of the South African government to create legislation that affords legal status or protection to cryopreserved embryos. The alternative being that, since the Children's Act³³⁸ governs surrogacy agreements, a comparison will be drawn between surrogacy agreements and embryo disposition agreements, in order to portray their similarities. We will also discuss the position of surrogacy agreements in other jurisdictions, for the purposes of comparison to the South African model. Finally, we will look at the concept of embryo disposition agreements and their effect on forced parenthood.³³⁹

As mentioned above, the acceptance of embryo disposition agreements in South Africa needs to be discussed. However, since the comparison is being made between embryo disposition

³³³ *Kass v Kass* (note 38 above); *A.Z v B.Z* (note 135 above); *In re marriage Witten* (note 165 above); *JB v MB* (note 125 above); *Szarfranski v Dunston* (note 148 above).

³³⁴ *Evans v Amicus Healthcare Ltd and Other* (note 263 above).

³³⁵ *Apel* (note 175 above) 665.

³³⁶ *Litowitz v Litowitz* (2002) 48 P 3d Wash 261, 262

³³⁷ The Children's Act (note 14 above).

³³⁸ *Ibid.*

³³⁹ *Apel* (note 175 above) 665.

agreements and surrogacy agreements, it must be first established whether or not surrogacy agreements are *contra bonos mores*.

4.1. Surrogacy Agreements

The relationship of surrogacy and the terms and conditions thereof are all based on a compulsory surrogacy agreement,³⁴⁰ (which ‘reduces the risk of a breach of the surrogate motherhood arrangement and consequent litigation’).³⁴¹ Surrogacy involves the surrogate mother³⁴² who carries the child and the commissioning person/parents, one or both of whom share a genetic link to the child.

The process involves the surrogate mother carrying the child who, upon birth, will be handed over to the commissioning person/parents to be raised as their own child.³⁴³ In terms of the law in South Africa, surrogacy agreements are governed by the Childrens Act³⁴⁴ and are defined in terms of Section 1 of the Children’s Act.³⁴⁵ Prior to the commencement of the Childrens Act,³⁴⁶ surrogacy agreements were regulated by the common law.

Internationally, the Australian approach, which states that surrogacy should be, altogether, discouraged both legally and morally³⁴⁷ is different from the approach taken in the UK and the USA³⁴⁸ which encourage and regulate surrogacy.³⁴⁹

³⁴⁰ The Children’s Act (note 14 above) Section 293 – the surrogacy agreement must be entered into, in writing, between the commissioning person/parents, within the Republic of South Africa, and must be confirmed by the High Court.

³⁴¹ FM Mahlobogwane ‘Surrogate Motherhood Arrangements in South Africa: Changing Societal Norms’ *Speculum Juris* (2013) 2 45, 50.

³⁴² The Children’s Act (see note 14 above) section 1 – The surrogate mother may or may not be genetically related to the child depending on whether the surrogacy is partial or full. Partial surrogacy is when the surrogate mother is also the genetic mother, which is when her gamete is the one that is fertilised. Full surrogacy is when the surrogate mother merely uses her body to carry the child to term. She has no genetic relation to the child.

³⁴³ Mahlobogwane (note 341 above) 45.

³⁴⁴ The Children’s Act (note 14 above).

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ J Millbank ‘The New Surrogacy Parentage Laws in Australia: Cautious Regulation or ‘25 Brickwalls?’’ *Melbourne University LR* (2011) 43 1, 7.

4.1.1. Surrogacy Agreements in terms of the Common Law

Although surrogacy was never explicitly prohibited, the common law approach to surrogacy was to assess whether the issues arising out of surrogacy agreements were *contra bonos mores*.³⁵⁰

South Africa's common law has recognised the establishment of surrogacy and considers it to be a legal procedure.³⁵¹ In terms of the common law, surrogacy agreements are established in terms of written contracts which are regulated by basic contractual principles and requirements such as the 'rights and duties of the parties, enforceability, breach and remedies for such breach'.³⁵² These agreements are only 'valid and enforceable if they are not considered to be *contra bonos mores*'. It does not simply mean that because the requirements and principles of the law of contract have been satisfied, an agreement is not *contra bonos mores*, as the content of the contract may be *contra bonos mores*.³⁵³

What needs to be determined is how the law can prevent these contracts from being *contra bonos mores* and afford protection to the parties in terms of the common law. What happens if the surrogate mother decides to change her mind at the last minute and not hand over the baby to the commissioning parents even if they are both genetically related to the baby?³⁵⁴

The only available case to illustrate the position of the common law is the case of *Conradie v Rossouw*.³⁵⁵ This case dealt with a breach of contract regarding an option to purchase a farm.³⁵⁶ The court stated that where two or more people possessing capacity and consensus to enter into a valid agreement in terms of the law, a valid and enforceable contract arises between the parties.³⁵⁷ If one of the parties commits a breach, the other party will have remedies for breach in terms of the law of contract available to them.³⁵⁸

³⁴⁸ <http://www.bbc.com/news/world-28679020>, accessed 17th March 2015.

³⁴⁹ *Ibid* 9

³⁵⁰ ML Lupton 'The Effect of the Baby M Case on Commercial Surrogacy' *TSAR* 1991 224, 229.

³⁵¹ Mahlobogwane (note 341 above) 46.

³⁵² *Ibid* 50.

³⁵³ *Ibid* 51.

³⁵⁴ L Mills 'Certainty about Surrogacy' *Stellenbosch LR* 3 (2010) 429, 430.

³⁵⁵ *Conradie v Rossouw* 1919 AD 279.

³⁵⁶ *Ibid* 280.

³⁵⁷ *Ibid* 320.

However, where the surrogate mother refuses to hand over the child, an award for damages would not suffice as there can be no monetary value placed on a child, and the consequential loss of the commissioning parents.³⁵⁹

It is clear that one cannot force a woman to become pregnant, as doing this would be *contra bonos mores*. It is submitted that altruistic surrogacy was allowed but commercial surrogacy was regarded as *contra bonos mores*.³⁶⁰

4.1.2. Surrogacy Agreements as regulated by Chapter 19 of the Children’s Act 98 of 2005

Previously, surrogacy agreements were regulated in terms of the common law, which was the subject of many controversies and inconsistencies. Now, surrogacy agreements³⁶¹ are regulated in terms of Chapter 19 of the Children’s Act.³⁶²

Chapter 19³⁶³ regulates everything that deals with surrogacy agreements, which includes but is not limited to surrogate motherhood agreements,³⁶⁴ ‘confirmation by the court’,³⁶⁵ ‘artificial fertilisation of a surrogate mother’³⁶⁶ and conduct that is prohibited in relation to these agreements.

In terms of section 292,³⁶⁷ the agreement:

- (a) ‘must be in writing;
- (b) signed by all the parties;
- (c) entered into within the Republic of South Africa (RSA);

³⁵⁸ *Ibid* 324.

³⁵⁹ M.L Lupton ‘The right to be born: Surrogacy and the legal control of human fertility’ *De Jure* (1988) 55.

³⁶⁰ Mills (note 354 above) 429.

³⁶¹ Mahlobogwane (note 341 above) 45.

³⁶² The Children’s Act (note 14 above) Chapter 16.

³⁶³ The Children’s Act (note 14 above).

³⁶⁴ *Ibid* Section 292.

³⁶⁵ *Ibid* Section 295.

³⁶⁶ *Ibid* Section 296.

³⁶⁷ *Ibid* Section 292.

- (d) at least one of the commissioning parents are domiciled in the RSA;
- (e) the surrogate mother must be domiciled in the RSA at the time when the agreement is entered into; and
- (f) the agreement must be confirmed by the High Court in a jurisdiction where the commissioning person or parents are domiciled, in order for the agreement to be valid; effective and enforceable’.

Section 295³⁶⁸ deals with the confirmation of these agreements by the High Court. However, in order for the court to confirm the surrogacy agreement, the court must be satisfied that parties have the requisite capacity. This confirmation must take place before the surrogate mother is artificially fertilised. The artificial fertilisation ‘must be before the lapse of eighteen months from the date of the confirmation of the agreement by the Court’.³⁶⁹ The agreement,³⁷⁰ in addition to all the requirements referred to in the Children’s Act,³⁷¹ must also make provision for conditions that will affect the child’s general care and well-being. The agreement must provide for situations where one of the parties dies before the birth of the child. The agreement should also deal with custody of the child, if the commissioning parents get divorced before the birth of the child.³⁷²

An important matter that the Children’s Act³⁷³ does not provide for is that the child is the child of the commissioning parents from the instance of birth and must be handed over by the surrogate mother to the commissioning parents as soon as reasonably possible.³⁷⁴

The Children’s Act³⁷⁵ is a very structured and comprehensive piece of legislation. It covers all possible areas governing children. This includes their relations with other countries.³⁷⁶ The Children’s Act³⁷⁷ sets out exactly what is required by law regarding surrogacy

³⁶⁸ *Ibid* Section 295.

³⁶⁹ *Ibid* Section 296.

³⁷⁰ *Ibid* Section 292.

³⁷¹ The Children’s Act (note 14 above).

³⁷² Mills (note 354 above) 435.

³⁷³ The Childrens Act (note 9 above).

³⁷⁴ *Ibid* Section 297.

³⁷⁵ The Children’s Act (note 14 above).

³⁷⁶ *Ibid* Chapter 16 (inter-country adoption) and Chapter 17 (child abduction)

³⁷⁷ The Children’s Act (note 14 above).

agreements, in clear and unambiguous language. The Children's Act³⁷⁸ also sets out what conduct is prohibited. In the event of a dispute regarding surrogacy agreements, it is submitted that the courts will not have difficulty in solving the matter, as long as the agreement has satisfied all the requirements set out in the Children's Act.³⁷⁹

Similar to the common law, the Children's Act³⁸⁰ also prohibits commercial surrogacy agreements.³⁸¹ This position is also adopted by the Australia.³⁸² while some states in the USA have legalised commercial surrogacy.³⁸³ Australia, however, does not have a list of requirements³⁸⁴ that need to be fulfilled like those set out in the Children's Act.³⁸⁵

After discussing the requirements for a valid surrogacy agreement, the discussion will now shift to embryo disposition agreements to illustrate their similarity to surrogacy agreements.

4.2. Embryo Disposition Agreements

It is stated that in the absence of embryo disposition agreements, the interests of the parties should be balanced to determine which parties' interest is more worthy of protection.³⁸⁶ Essentially, the rights and interest in competition with each other are 'the right to procreate versus the right not to procreate'.³⁸⁷ The purpose of the embryo disposition agreements are to avoid conflict³⁸⁸ as once a party enters into a legitimate contract, such a contract should be valid and enforceable.³⁸⁹ Sometimes weighing the interests of the party may create the

³⁷⁸ *Ibid* Section 303.

³⁷⁹ The Children's Act (note 14 above).

³⁸⁰ The Children's Act (note 14 above).

³⁸¹ *Ibid* Section 301.

³⁸² http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm, accessed 17th March 2015.

³⁸³ BBC News report (note 348 above).

³⁸⁴ Millbank (note 347 above) 22,23.

³⁸⁵ The Children's Act (note 14 above).

³⁸⁶ SD Petersen 'Dealing With Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations' *Univ of California LR* (2003) 50 1065, 1070.

³⁸⁷ Waldman (note 134 above) 1035.

³⁸⁸ Robertson (note 8 above) 411.

³⁸⁹ Langley & Blackston (note 23 above) 188.

opportunity for error, but where there is a contractual agreement in place, the parties must be bound by it where the agreement is unambiguous.³⁹⁰ Embryo disposition agreements are extremely popular in the USA, since there are many cases (discussed in detail above) that suggest the use of these agreements.

There are various cases that have dealt with the issue of embryo disposition agreements. The essence of these cases have all been discussed in the preceding chapter.

In this chapter the discussion will focus on the reasoning of the courts when deciding whether or not the embryo disposition agreement should be enforceable or not.

In the *JB v MB*³⁹¹ case, the court found that the agreement entered into between the couple³⁹² was ambiguous and unenforceable based purely on the wording,³⁹³ as the wording suggested that the embryos, in the event of divorce, will be surrendered to the IVF programme at the clinic unless the court makes an order to the contrary.³⁹⁴ The court found that even if there was a valid agreement in place, the parties were allowed to change their minds regarding 'disposition of the embryos until the time of disposition'.

It is submitted that the court's decision in this case is correct even though it undermines the basic principles and enforceability of the law of contract.³⁹⁵ In the context of South Africa, it goes against the principles of *pacta sunt servanda*.³⁹⁶ It is acceptable to defy the principles of *pacta sunt servanda* if a contract is vague or ambiguous.

The appeal court in the American case of *Kass v Kass*³⁹⁷ confirmed an earlier statement that where the agreement is found to be binding, enforceable and unambiguous in its wording, such an agreement must be enforced irrespective of the interests of the parties at the time of the dispute. This ruling is in support of one of the requirements for a valid contract, which is

³⁹⁰ Waldman (note 134 above) 1035.

³⁹¹ *JB v MB* (note 125 above).

³⁹² *Ibid* 710.

³⁹³ Langley & Blackston (note 23 above) 184.

³⁹⁴ *JB v MB* (note 125 above) 710.

³⁹⁵ Langley & Blackston (note 23 above) 188.

³⁹⁶ *Pacta Sunt Servanda* is a contractual principle which states that contracts agreed upon and signed by parties, requires that all parties to fulfil his obligation in terms of the contract available at:

http://www.umac.mo/fl/ibl/doc/Abstract_yu%20jiafeng.pdf, accessed 27th October 2014.

³⁹⁷ *Kass v Kass* (note 38 above).

intention of the parties to the contract. The intention that courts need to focus on is ‘not the intention of the parties at the time of the dispute but the intention of the parties at the time of completion of the contract’.³⁹⁸

The American case of *Davis v Davis*³⁹⁹ emphasised the need for embryo disposition agreements to be entered into before commencing IVF treatment, instead of leaving the matter to the courts to balance the rights of the individuals. This is of particular interest as there was no embryo disposition agreement in the *Davis* case.⁴⁰⁰

In the American case of *Roman v Roman*⁴⁰¹ the appeal court overturned the decision of the trial court stating that the agreement was valid and enforceable between the parties and that there was no reason why the agreement should not have been enforced.⁴⁰²

The courts in the USA rely on the principles of the law of contract, instead of the law of property to deal with the concerning with the custody of cryopreserved embryos during divorce.⁴⁰³

The salient point that needs to be made is that these agreements are legally binding and are accepted in the aforementioned cases.⁴⁰⁴

4.3. Forced Parenthood

Usually, people who conceive a child naturally⁴⁰⁵ are considered to be the parents of such a child. However, assisted reproductive technology (ART) now creates more complexities in the simple phenomenon of parenthood.⁴⁰⁶ As explained earlier, many couples go through

³⁹⁸ LF Van Huyssteen & S Williem & J van der Merwe & CJ Maxwell *Contract Law in South Africa* (2010) 81.

³⁹⁹ *Davis v Davis* (note 100) above.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Roman v Roman* (note 197 above)

⁴⁰² *Ibid.*

⁴⁰³ Diamond (note 105 above) 182.

⁴⁰⁴ Robertson (note 8 above) 410.

⁴⁰⁵ Using the mother’s ova and the father’s sperm.

⁴⁰⁶ Apel (note 175 above) 672.

IVF treatment in order to bear a child.⁴⁰⁷ Of these couples, some elect to cryogenically freeze the embryos that will be implanted into the woman at a later stage, in storage facilities at IVF treatment centres.⁴⁰⁸ In certain instances, the relationship between the couple disintegrates and they decide to get divorced. The decision of who the embryos should be awarded to during divorce lies with the court. Forced parenthood then arises, in terms of which one of the parties' wishes to have the embryos given to them, either to implant at a later stage⁴⁰⁹ and become a parent or donate these embryos to an infertile couple, against the wishes of the party not wanting to become a parent.⁴¹⁰ There are very few cases that have dealt with this issue, mainly because there is no legislation that governs the legal status of cryopreserved embryos.⁴¹¹ What usually occurs, in the absence of an embryo disposition agreement, is that the court is tasked with weighing the interests of the parties and making an order in favour of the party electing not to become a parent.⁴¹² Case law in support of this point are *A.Z v B.Z*⁴¹³ and *Davis v Davis*.⁴¹⁴

In the American case of *A.Z v B.Z*⁴¹⁵ the trial and appeal courts stated that the agreement which existed between the parties, due to its wording, was ambiguous and unenforceable.⁴¹⁶ The agreement stated that in the event of the dissolution of the marriage, the embryos would be awarded to the wife for future implantation. The court held, *inter alia*, that the wife had signed the agreement after the husband had signed the document and that the husband had not seen the clause.⁴¹⁷ The court, further, stated that even if the agreement had been unambiguous, it would still refuse to render it enforceable⁴¹⁸ as it would be *contra boni mores* to enforce an agreement that forces someone to become a parent against their will.⁴¹⁹

⁴⁰⁷ Human Embryo Cryopreservation (note 17 above).

⁴⁰⁸ Apel (note 175 above) 664.

⁴⁰⁹ *Kass v Kass* (note 38 above) 178.

⁴¹⁰ *JB v MB* (note 125 above) 710.

⁴¹¹ Apel (note 175 above) 665.

⁴¹² *Davis v Davis* (note 100 above) 604.

⁴¹³ *AZ v BZ* (note 135 above).

⁴¹⁴ *Davis v Davis* (note 100 above).

⁴¹⁵ *AZ v BZ* (note 135 above).

⁴¹⁶ *Ibid* 1055.

⁴¹⁷ *AZ v BZ* (note 135 above) 1054.

⁴¹⁸ Apel (note 175 above) 665.

⁴¹⁹ *AZ v BZ* (note 135 above) 1059.

In the American case of *JB v MB*⁴²⁰ it was the wife who wished to have the cryopreserved embryos destroyed and the father who 'wished to have them donated to an infertile couple'⁴²¹. The court stated that even though there was a valid agreement which dealt with how the cryopreserved embryos would be disposed of in the event of divorce, the court refused to enforce the agreement and stated that to force a party into parenthood is *contra bonos mores*.⁴²²

In the UK, the case of *Evans*,⁴²³ although the case does not deal with forced parenthood, the judgment makes reference to the fact that forced parenthood is *contra bonos mores*.

The burden of parenthood does not cease at sharing a genetic link with someone whom they wished not to share family ties with,⁴²⁴ but there are also social, financial and resource constraints on the party that becomes a parent against their will.⁴²⁵

It is submitted that irrespective of the theory used, none of these courts have granted orders allowing 'embryos to be awarded to a party seeking to implant them against the will of a party seeking to destroy the embryos or donate them to research'.⁴²⁶ The theme that flows from all the cases discussed, illustrates that irrespective of whether there is an embryo disposition agreement or not, the interest of the party avoiding procreation and parenthood will always prevail.⁴²⁷

4.4. Conclusion

Surrogacy agreements have always been regulated in terms of South African law. Previously, surrogacy agreements were regulated under the common law, and were subject to

⁴²⁰ *JB v MB* (note 125 above).

⁴²¹ Langley & Blackston (note 23 above) 187.

⁴²² *Ibid.*

⁴²³ *Evans v Amicus Healthcare Ltd and Other* (note 263 above).

⁴²⁴ Waldman (note 134 above) 1038.

⁴²⁵ *Ibid* 1028.

⁴²⁶ Langley & Blackston (note 23 above) 192.

⁴²⁷ Apel (note 175 above)665.

the law of contract. Currently, surrogacy agreements are regulated in terms of Chapter 19 of the Children's Act.⁴²⁸

Under the common law, the only problem with surrogacy agreements was that rules regarding their interpretation were not precise enough and rendered too much of flexibility. This is remedied under the Children's Act.⁴²⁹

This flexibility and would have allowed for commercialising of surrogacy which is prohibited under South African law⁴³⁰, neither is it allowed in Australia or the UK.⁴³¹ However, in some states in the USA surrogacy is permitted and legal.⁴³²

It is submitted that the South African position in terms of the Children's Act⁴³³ is the most appropriate approach taken, when compared to Australia and the UK. The reason for this is because surrogacy agreements in South Africa have requirements that need to be met before they are approved by the High Court,⁴³⁴ and if these requirements are not fulfilled, the agreement is not approved and the surrogacy arrangement is not permitted.

There has been unanimous agreement through all of the cases that have been discussed, that there is a need for embryo disposition agreements,⁴³⁵ their need to be implemented and enforced.⁴³⁶

It is evident that the basis for embryo disposition agreements is legal and is similar to surrogacy agreements in its content, structure and requirements.

It is submitted that if the law is able to regulate surrogacy agreements through the promulgation of legislation, then the same consideration should be afforded to embryo disposition agreements. If South Africa is not willing to draft legislation that confers legal

⁴²⁸ The Children's Act (note 14 above).

⁴²⁹ *Ibid.*

⁴³⁰ The Children's Act (note 14 above).

⁴³¹ Millbank (note 347 above).

⁴³² BBC News report (note 348 above).

⁴³³ The Children's Act (note 14 above).

⁴³⁴ The Children's Act (note 14 above).

⁴³⁵ *Apel* (note 175 above)665.

⁴³⁶ *Litowitz v Litowitz* (note 336 above), 262.

status on cryopreserved embryos to determine custody in the instance of divorce, then at least legislation to regulate embryo disposition agreements should be enacted.

This is to prevent the judiciary from having to deal with unnecessary disputes, involving unambiguous or vague agreements, in which they have to weigh the interests of the parties to resolve the matter.

It must also be noted that contracts of this nature are *sui generis* and of an intricate nature. They deserve special recognition, regulation and protection in our law. Yet, as important as these legal requirements are, the interests of the parties must always take preference over an embryo disposition agreement where the wording of the agreement would force one party to become a parent against their wishes.

It is submitted that until legislation is passed regarding the regulation of embryo disposition agreements, there will remain uncertainty regarding their interpretation⁴³⁷ and the approach as set out in the *Davis*⁴³⁸ case must be used, where courts balance the interests of the parties to resolve the dispute.⁴³⁹

⁴³⁷ Robertson (note 8 above) 411.

⁴³⁸ *Davis v Davis* (note 100 above).

⁴³⁹ EA Waldman 'Disputing over Embryos: of Contracts and Consents' *Arizona State LJ* (2000) 32 897, 909.

5. Conclusion and Recommendations

5.1. Conclusion

Internationally and nationally, ART is becoming increasingly prominent in society, with IVF being the most popular form of ART.⁴⁴⁰

The process of IVF includes cryogenically freezing some of the embryos and storing them in storage facilities available at fertility clinics to be used for future implantation.⁴⁴¹

Unfortunately, many marriages dissolve as a result of the strain caused by fertility treatment. The question of who the cryopreserved embryos are awarded to, during divorce proceedings, inevitably arises.

The following conclusions are submitted based on the discussions in this paper:

- (a) There is South African legislation that deals with the recognition of artificial fertilisation,⁴⁴² the procedure of artificial fertilisation, and which institutions may be used for such procedures.⁴⁴³

- (b) The Regulations to the National Health Act⁴⁴⁴ state that ownership of embryos vests in the institution where the IVF treatments will be performed.⁴⁴⁵ South African legislation⁴⁴⁶ then places the embryos in the care of an establishment that has no genetic link or interest in the embryo.

The wording of Regulation 18⁴⁴⁷ suggests that South Africa views embryos as property. This is because ownership of the embryos, prior to fertilisation, vests in the institution in

⁴⁴⁰ Human Embryo Cryopreservation (note 17 above).

⁴⁴¹ Langley & Blackston (note 23 above) 186.

⁴⁴² The Children's Act (note 14 above)

⁴⁴³ The National Health Act (note 4 above) Chapter 8; Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁴⁴⁴ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁴⁴⁵ *Ibid* Regulation 18 (1).

⁴⁴⁶ The Children's Act (note 14 above).

⁴⁴⁷ *Ibid*.

which it is being held⁴⁴⁸ and as property, they should not be afforded legal status or protection by the law.⁴⁴⁹ However, the Regulations⁴⁵⁰ fail to make express provisions that categorise embryos as property. The Regulations⁴⁵¹ also fail to make provisions on how to deal with competing interests of the parties who both wish to gain custody over the cryopreserved embryos to which they are genetically linked.

- (c) The exact nature of the embryo is still unclear, but it is clear that it is not afforded the same rights and protection as a person under South African law.⁴⁵²

South Africa has not heard a case involving a dispute of custody over cryopreserved embryos during divorce, and yet, our law fails to afford any legal status, to cryopreserved embryos. This is problematic, and legislation needs to be drafted to this to remedy the deficiency.

The reason that I have selected these particular foreign jurisdictions (USA, UK and Australia) to be discussed throughout this paper is that these jurisdictions have heard cases regarding the custody of cryopreserved embryos during divorce. The cases discussed have contributed to remedying the *lacuna* in South African law.

- (d) The UK and Australia have drafted legislation to try and remedy the situation and have stated that there needs to be control over cryopreserved embryos.⁴⁵³

The legislation drafted by the UK and Australia are futile to the debate involving the legal status of cryopreserved embryos upon divorce. This is particularly true for the Infertility Treatment Act⁴⁵⁴ as this legislation fails to even define cryopreservation or embryos. The Human Fertilisation and Embryology Act⁴⁵⁵ fails to deal with cryopreserved embryos during divorce, but mentions cryopreserved embryos in relation to research.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Jordaan (note 98 above) 249.

⁴⁵⁰ Regulations relating to Artificial Fertilisation of Persons (note 1 above).

⁴⁵¹ *Ibid.*

⁴⁵² A Dhali & J Moodley & D.J McQuoid-Mason & C Rodeck 'Ethical and legal controversies in cloning for biomedical research- A South African Perspective' *SA Medical J* (2004) 94 906, 907.

⁴⁵³ Diamond (note 105 above) 353.

⁴⁵⁴ The Infertility Treatment Act (note 306 above).

⁴⁵⁵ The British Act (note 244 above).

- (e) The courts in the USA, UK and Australia, have all heard cases dealing with which party is awarded custody of the cryopreserved embryos upon the dissolution of their marriage, unlike the courts in South Africa. The UK and Australia have even set up committees⁴⁵⁶ to make recommendations which they have used to draft their legislation.⁴⁵⁷
- (f) The approach adopted by the USA has proved to be the most successful of the three foreign jurisdictions we have discussed throughout this paper. Unlike the UK and Australia, the USA did not set up committees to specifically deal with custody of cryopreserved embryos during divorce. Instead the USA has developed rules through their common law. The most important of these cases being the case of *Davis v Davis*.⁴⁵⁸

Since the USA has no legislation dealing with this issue, the principles of contract law are incorporated and applied through their common law.⁴⁵⁹

The *Davis*⁴⁶⁰ case stated that there is a need for embryo disposition agreements to be entered into by a couple prior to commencement of fertility treatment. The court also stated that in the absence of such an agreement, the court must balance the interests of the parties and grant an order in favour of the party wishing not to become a parent, as forced parenthood is *contra bonos mores*.⁴⁶¹ Where the embryo disposition agreement is unambiguous there will be no need to balance the interests of the parties.⁴⁶²

⁴⁵⁶ The Warnock Committee (note 12 above); New South Wales Commission (note 13 above).

⁴⁵⁷ The British Act (note 244 above); The Infertility Treatment Act (note 306 above).

⁴⁵⁸ *Davis v Davis* (note 100 above).

⁴⁵⁹ Langley & Blackston (note 23 above) 178.

⁴⁶⁰ *Davis v Davis* (note 100 above).

⁴⁶¹ Langley & Blackston (note 23 above) 186.

⁴⁶² *Ibid* 178.

- (g) The approach set out in the *Davis*⁴⁶³ case is the most appropriate approach for South Africa to follow. This is because prior to the Children's Act,⁴⁶⁴ surrogacy agreements were regulated by the common law which relied on the law of contract for its rules.⁴⁶⁵
- (h) Embryo disposition agreements are very similar to surrogacy agreements, and deserve similar protection under the law.

5.2. Recommendations

There is an urgent need for the drafting of legislation to regulate the legal status of cryopreserved embryos, particularly considering the prevalence of IVF treatment in the country.

The following recommendations are submitted based on the discussion:

- (a) Since there is no legal status is afforded to cryopreserved embryos in South Africa, the approach taken by the UK and Australia (to set up Committees⁴⁶⁶ that made recommendations for legislation regarding the legal status of cryopreserved embryos) should be adopted in South Africa.

The South African Law Reform Commission⁴⁶⁷ should be mandated with the duty of investigating and making recommendations⁴⁶⁸ to form the basis upon which legislation is drafted.⁴⁶⁹

⁴⁶³ *Davis v Davis* (note 100 above).

⁴⁶⁴ The Children's Act (note 14 above).

⁴⁶⁵ Langley & Blackston (note 23 above) 186.

⁴⁶⁶ The Warnock Committee (note 12 above); New South Wales Commission (note 13 above).

⁴⁶⁷ The South African Law Reform Commission is an independent advisory body that was established by the South African Law Reform Commission Act 19 of 1973, as amended, Section 2 (2), available at:

<http://www.issafrika.org/uploads/SWEATISSUBJUN07.PDF>, accessed 5th December 2014.

⁴⁶⁸ 'The objectives of the Commission are to do research with reference to all branches of the law in order to make recommendations to the Government for the development, improvement, modernisation or reform of the law. The Commission investigates matters appearing on a programme provided by the Minister of Justice and Constitutional Development'. Reports and other documents published by the Commission are made available on the Commission's website for general information, available at:

- (b) Alternatively, South Africa should develop the common law, similar to the USA, to assist the courts if they have to deal with cases regarding the custody of cryopreserved embryos during divorce.
- (c) Lastly, since embryo disposition agreements are so similar to surrogacy agreements, and the requirements for surrogacy agreements have been included in the Children's Act⁴⁷⁰, the legislator should amend the Children's Act⁴⁷¹ to include requirements (similar to the requirements that govern surrogacy agreements)⁴⁷² to regulate embryo disposition agreements in South Africa.

It is submitted that amending the Children's Act⁴⁷³ is the easiest way to remedy the *lacuna* in our legal system.

<http://www.justice.gov.za/salrc/>, accessed 27th November 2014.

⁴⁶⁹ The South African Law Reform Commission Act 19 of 1973, as amended, Section 5.

⁴⁷⁰ The Children's Act (note 14 above).

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

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