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Common law contract theory has long been in place encouraging parties and others involved to carefully analyze a situation and the relevant agreements before executing a written contract.1 As technology and societal relationships advance, courts are increasingly faced with the dilemma of couples who have artificially created pre-embryos, but subsequently disagree on the use and control of those pre-embryos.2 In Szafranski v. Dunston,3 the Appellate Court of Illinois, First District, Second Division

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1 See Laura Dietz et al., 17A Am. Jur. 2d Contracts § 243 (2013); 5 Williston on Contracts § 12:3 (4th ed. 2013) (noting parties should have freedom to contract and contracts voluntarily entered into should be upheld). Courts differ on the extent that public policy should interfere with this freedom to contract in later disputes. Id. Although some courts prefer not to involve themselves with parties' freedom to contract, others find they have a duty to not enforce a contract that goes directly and drastically against public policy. Dietz, supra.

2 See Carl H. Coleman, Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes, 84 MINN. L. REV. 55 (1999); John A. Robertson, Precommitment Strategies for Disposition of Frozen Embryos, 50 EMORY L.J. 989, 993 (2001). The first pregnancy in the world resulting from implanting embryos occurred in Australia in 1983. Coleman, supra at 55. From that time forward, freezing and cryopreserving embryos and in vitro fertilization have become increasingly common because the technology allows couples to store embryos for a later time. Id. at 55, 59-60. In vitro fertilization has become a well-established procedure, such that it is seen as a treatment for fertility problems and is used with egg donation and surrogacy. Robertson, supra at 991. As in vitro fertilization and cryopreservation increases in popularity and the divorce rate remains approximately fifty percent, there are increasingly more disputes over pre-embryos. Susan B. Apel, Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent, 39 FAM. L.Q. 663, 664 (2005). Contracting prior to the creation of pre-embryos allows for a simple and generally reasonable resolution of the handling of the embryos if the couple is unable to agree for one reason or another. Robertson, supra at 993. Courts are split on the analyses to apply in situations of dispute and what to hold regarding the disposition of pre-embryos both when there is and when there is not a previous contract. Id. at 993-94.

(hereinafter the “court”), was faced with a dispute between a couple who created pre-embryos and subsequently ended the relationship, with one party wishing to permanently enjoin the other from using the pre-embryos. The court analyzed three approaches applied by other states, the “contractual approach”, the “contemporaneous mutual consent approach”, and the “balancing approach”, and ultimately held the contractual approach to be the proper test regarding the disposition of pre-embryos.

In March 2010, Karla Dunston (hereinafter “Dunston”) was diagnosed with non-Hodgkin’s lymphoma and was told the recommended chemotherapy treatment for her cancer would likely result in infertility. Dunston asked her significant other at the time, Jacob Szafranski (hereinafter “Szafranski”), to provide his sperm to create pre-embryos with her eggs so that she could have the option to have a child of her own in the future, and Szafranski agreed. On March 25, 2010, Dunston and Szafranski visited Northwestern Medical Faculty Foundation’s Division of Reproductive Endocrinology and Infertility (hereinafter “NMFF”) to discuss donating their eggs and sperm for the creation of pre-embryos. At the appointment Dunston and Szafranski signed an “Informed Consent for Assisted Reproduction” document, which detailed the risks of in vitro fertilization and stated that the pre-embryos could not be used without the consent of both partners. The informed consent form further detailed that if the couple were

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4 Id. at 504-05.
5 Id. at 514. Courts have applied the contractual approach, the contemporaneous mutual consent approach, and the balancing approach. Reber v. Reiss, 42 A.3d. 1131, 1134 (Pa. Super Ct. 2012). The contractual approach in particular results in upholding a prior agreement between the parties regarding the disposition of the embryos as long as the agreement does not violate public policy. In re Marriage of Witten, 672 N.W.2d 768, 774 (Iowa 2003). The contemporaneous mutual consent approach on the other hand, provides that the pre-embryos should not be used until both parties agree on the use. Id. at 778. The final position, the balancing approach, involves enforcing prior agreements to an extent, but also considering the interests of each of the parties. Szafranski, 993 N.E.2d at 514.
6 Id. at 503.
7 Id.
8 Id.
9 Id. at 503-04. A disclaimer within the informed consent document detailed:

The law regarding [in vitro fertilization], embryo cryopreservation, subsequent embryo thaw and use, and parent-child status of any resulting child(ren) is, or may be unsettled in the state in which either the patient, spouse, partner, or any current or future donor lives . . . . [Parties] should consider consulting with a lawyer who is experienced in the areas of reproductive law and embryo cryopreservation as well as the disposition of embryos, including any questions or concerns about the present or future status of your embryos, your individual or joint access to them, your individual or joint parental status as to
to dissolve or divorce, NMFF would utilize the embryos in accordance with a court decree or settlement agreement by the parties.\textsuperscript{10}

On the same day of the appointment, Dunston and Szafranski discussed the creation of pre-embryos with an attorney, who recommended that the couple sign either a co-parent agreement or a sperm donor agreement.\textsuperscript{11} Four days later, Dunston sent the attorney an e-mail stating that she and Szafranski wished to execute a co-parent agreement with an explicitly stated purpose demonstrating their intent to create the pre-embryos and their intent to attempt at least one in vitro fertilization cycle.\textsuperscript{12} The agreement was never signed, but the couple nevertheless went forward with the donation procedure in April 2010 and agreed to fertilize all eight of Dunston’s retrieved eggs to increase the chances of conception.\textsuperscript{13} The following day Dunston began chemotherapy treatment.\textsuperscript{14} One month later, in May 2010, Szafranski sent a text message to Dunston informing her that their relationship was over.\textsuperscript{15}

In August 2011, Szafranski filed a pro se complaint asking the circuit court to


\textsuperscript{11} See 1 Mass. Continuing Legal Educ., Inc Representing Nontraditional Families § 1.3.4 (a)-(b)(2006). Sperm donor agreements, on the other hand, can sometimes allow for co-parenting between the couple, but more often provide for the donor to have no relationship or involvement with the resulting child. See id. at § 1.3.2(a).

\textsuperscript{12} Under the terms of the agreement, Szafranski was to donate his sperm samples for the creation of the pre-embryos and the couple was to attempt at least one transfer of pre-embryos and \textit{in vitro} fertilization. \textit{Id.} The agreement stated that Szafranski “agrees to undertake all legal, custodial and other obligations to the Child [created from the pre-embryos], regardless of any change of circumstance between the Parties.” \textit{Id.} In addition, it detailed that any eggs preserved following in vitro fertilization would be in Dunston’s sole control and that if the parties were to later separate, Dunston would retain control of the use of the pre-embryos. \textit{Id.} Finally, the agreement provided that Szafranski recognized that Dunston would likely be unable to create healthy embryos following her scheduled chemotherapy treatments, and that he specifically agreed that Dunston should thus have an opportunity to use any embryos created prior to chemotherapy to later allow her to have a child. \textit{Id.}

\textsuperscript{13} Following fertilization, three of Dunston’s eggs were viable for later implementation in the uterus. \textit{Szafranski}, 993 N.E.2d at 504.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}
enjoin Dunston from using the pre-embryos to conceive a child against his will.16 Dunston answered seeking declaratory judgment granting her control over the pre-embryos and sole custody of any children resulting from the pre-embryos.17 She alleged a breach of contract and requested specific performance by Szafranksi of their agreement, seeking relief under the theory of promissory estoppel.18 Persuaded by Dunston’s claims of contract theory, promissory estoppel, and the need for balancing the interests of both parties, the district court entered an order awarding Dunston full custody and control of the pre-embryos, stipulating that she may use them in an attempt to create children.19 Szafranski appealed, and in a matter of first impression, the Appellate Court of Illinois, First District, found the contractual approach, honoring the parties’ interests as expressed in prior agreements, to be the proper test, but also found where a dispute does not involve an executed agreement, the court should balance the parties’ interests.20 Thus, the court reversed the district court’s grant of Dunston’s motion for summary judgment, and remanded the case to apply the contractual approach to all of the facts, whether determined initially or newly presented on remand.21

16 Id. at 504-05.
17 Id. at 505.
18 Id. Dunston alleged that although Szafranski did not sign the co-parenting agreement, he performed his primary obligation under the agreement, namely, donating his sperm for the creation of pre-embryos with her eggs. Szafranski, 993 N.E.2d at 504. She also alleged she reasonably relied on his representation based on his actions leading up to their creation of the pre-embryos and because her chemotherapy treatments had already begun, she was now unable to fertilize her eggs by any other sperm donor. Id. Dunston alleged even if the court determined that the parties were not bound by the co-parenting agreement or that she was estopped from using the created pre-embryos, that the court should balance the parties’ interests and find that her interest in having her own biological children and her inability to do so without the pre-embryos outweighed Szafranski’s interest in not having a child. Id. On the other hand, Szafranski alleged he had the right not to be a parent under both the Illinois and US constitutions. Id. Szafranski specifically claimed the pre-embryos were not inside of Dunston’s body, so unlike in an abortion context, he and Dunston were in equal positions and thus consent from both the man and the woman was required for use of pre-embryos. Id. at 505. He further argued that the right of privacy under Illinois law was broader than under federal law, and under federal law he thus had the constitutional right to privacy in deciding if he wanted to be a parent. Id. He also requested Dunston’s motion for summary judgment be denied based on the remaining issue of whether the co-parenting agreement or any contract existed. Szafranski, 993 N.E.2d at 505.
19 Id. at 505-06. See supra note 18 and accompanying text (detailing the claims by Szafranski and the counterclaims by Dunston).
20 Szafranski, 993 N.E.2d at 514-15.
21 Id. at 517-18. See supra notes 19-20 and accompanying text (discussing the district court’s holding and the court’s reversal in light of the contractual approach).
The issue of resolving disagreements over the disposition of pre-embryos was a matter of first impression in Illinois. To date, only eight states, New York, Oregon, Tennessee, Texas, Washington, Iowa, New Jersey, and Pennsylvania, have adopted positions involving the control or use of pre-embryos. Disputes over embryos arise in a variety of circumstances, and courts that have previously addressed these issues have focused on the terms of the contract, if any, as well as the interests of the parties, and public policy. Overall, five states have applied the contractual approach. Only one

22 Safranski, 993 N.E.2d. at 503. The review of a lower court's grant of summary judgment is de novo. Lazenby v. Mark's Const., Inc., 923 N.E.2d 735, 742 (Ill. 2010) (citing Illinois State Chamber of Commerce v. Filan, 837 N.E.2d 922, 928 (Ill. 2005)). A grant of summary judgment is appropriate where there is no issue of material fact in light of the pleadings and evidence provided when viewed most favorably to the nonmoving party. Lazenby, 923 N.E.2d at 742. A motion for summary judgment may be granted where it is shown that there is "no genuine dispute as to any material fact." FED. R. Civ. P. § 56(a).

23 See Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) (detailing state court decisions from the eight jurisdictions that have adopted provisions regarding the control or use of pre-embryos); Dahl v. Angle, 194 P.3d 834, 840 (Or. 2008); Roman v. Roman, 193 S.W. 3d 40, 50 (Tex. App. 2006); In re Marriage of Witten, 672 N.W. 2d 768, 780-81 (Iowa 2003); Litowitz v. Litowitz, 48 P.3d 261, 269 (Wash. 2002); J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); Davis v. Davis, 842 S.W. 2d 588, 597 (Tenn. 1992). Compare Kass, 696 N.E.2d at 180 (holding the inherent uncertainties associated with use of pre-embryos requires honoring parties' intentions within contracts) with Witten, 672 N.W. 2d at 783 (adopting the contemporaneous mutual consent approach based on the sensitive and private matters of pre-embryos) and Davis, 842 S.W.2d at 604 (finding the right to procreate and to avoid procreation require balancing the parties' interests). See also supra note 2 and accompanying text (discussing the process for the creation of pre-embryos). Although in vitro fertilization has been practiced for more than twenty years, there has been little legislative action concerning the enforceability of contracts regarding the control of pre-embryos. Elizabeth A. Trainor, Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or other Circumstances, 87 A.L.R.5th 253, 2b (2001). Only Florida, New Hampshire, and Louisiana have enacted legislation regarding contracts for the control of pre-embryos, and there is no federal law on the subject. Id.

24 See supra note 23 and accompanying text (summarizing positions held by different states in disputes regarding control or use of pre-embryos).

25 See Kass, 696 N.E.2d at 180 (enforcing prior agreements avoids litigation in personal matters and still provides the liberty to contract); Davis, 842 S.W.2d at 597 (finding the prior agreement binding where there is no mutual agreement to modify the terms); In re Marriage of Dahl, 194 P.3d 834, 840-41 (Or. Ct. App. 2008) (enforcing advance agreements is consistent with statutory and case law over prenuptial agreements); In re Marriage of Litowitz, 48 P.3d 261, 268 (Wash. 2002) (holding the right of a donee to pre-embryos is based solely upon contract). Courts have held that where an agreement regarding the disposition of pre-embryos contains contingencies for death, separation, or related future events that may affect the couple, the agreement should be presumed valid and therefore should be enforced. Davis, 842 S.W.2d at 597.
state adopted the contemporaneous mutual consent approach. Finally, three states have adopted the balancing approach.

Courts following the contractual approach enforce contracts between the parties so long as the contract does not violate public policy. The public policy issues involved in disputes over the use of pre-embryos are the parties’ right to contract, the right to procreation, the right to individual identity in regards to parental status, important familial values, and the strength of genetic ties. The contractual approach thereby encourages parties to execute well-contemplated agreements prior to acting, which will best serve public policy and the interests of the parties to in vitro fertilization or creation of pre-embryos. States have also supported the contractual approach by

26 Witten, 672 N.W. 2d at 778 (finding the sensitive and private matters of pre-embryos necessitates adopting the contemporaneous mutual consent approach).
27 See e.g. J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001); Reber, 42 A.3d at 1135; Davis, 842 S.W. 2d at 603 (holding parties’ interests must be balanced in disputes over the rights involving procreation).
28 See Witten, 672 N.W.2d at 776. Public policy does not have a precise definition, but is particular to the contract between the parties and the circumstances involved. Liggett v. Shriver, 164 N.W. 611, 612-13 (Iowa 1917). Courts should “look to the Constitution, statutes, and judicial decisions of the state, to determine its public policy and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy.” Id. The primary public policy issue surrounding pre-embryos include a person’s right to choose to reproduce and be a parent. See, e.g., Witten, 672 N.W.2d at 781; Roman v. Roman, 193 S.W. 3d 40, 49 (Tex. App. 2006). In analyzing disputes over pre-embryos, courts have struggled with whether a prior agreement that binds one party who has since changed his/her mind about the use of the pre-embryos violates such public policy. See supra note 25 (noting different court holdings where couples had an executed prior agreement).
29 See Witten, 672 N.W. at 776; Coleman, supra note 2, at 88-89; supra note 24 and accompanying text (discussing the significance of public policy issues in disputes over pre-embryos).
30 See Kass, 969 N.E.2d at 180; Roman, 193 S.W.3d at 50. Encouraging parties to contract prior to any action decreases the likelihood of costly litigation and minimizes confusion between the parties over later uses and control of the pre-embryos. Id. Such agreements also provide parties with maximized freedom to contract, allowing them to agree to their specific intents. Id. Courts criticizing the contractual approach have noted that decisions regarding the use of pre-embryos are so fundamentally personal that “individuals are entitled to make decisions consistent with their contemporaneous wishes, values and beliefs.” Witten, 672 N.W.2d at 777. See Coleman, supra note 2, at 88-89. Further, it is very difficult for such agreements to predict each party’s intent following life-altering events and to bind parties to these agreements in light of such difficulty ignores fundamental familial, reproduction, and genetic ties values. See Witten, 672 N.W. 2d at 777; Coleman, supra note 2, at 88-89. Moreover, in light of unpredicted or not contemplated changes of circumstance, providing the right to control and use pre-embryos to one party can force the other party into becoming a parent despite his or her desire to avoid parenthood, which has been viewed as contrary to public policy. A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000).
enacting statutes and passing bills that direct couples to enter into such prior agreements.\footnote{31}

Iowa has been the only state to adopt the contemporaneous mutual consent approach, which prohibits use of the embryos, whether destroying, donating to research, or donating to another party, without the consent of both of the parties.\footnote{32} This approach does not treat advance instructions as a binding agreement between the parties, and if either party's wishes regarding the disposition of the embryos changes, that current intention of the parties prevails over the prior consent.\footnote{33} The contemporaneous mutual consent does not ignore that parties are free to contract prior to the creation of pre-embryos, but in light of the important personal interests at stake regarding pre-embryos, the parties' current values cannot be ignored, nor can the court interject itself as the decision maker.\footnote{34}

\footnotetext[31]{See, e.g., FLA. STAT. ANN. 742.17 (West 1998); S.B. 1120, 222d Leg. (N.Y. 1999). See also supra note 24 and accompanying text (discussing courts' analysis of contracts in light of public policy).}

\footnotetext[32]{See Witten, 672 N.W.2d at 778. See also supra note 26. Where the parties cannot agree on the use or disposition of the pre-embryos, the embryos should be kept frozen. Witten, 672 N.W.2d at 778. This maintains the status quo and allows for later use of the embryos by the parties should they change their minds and come to an agreement about the disposition of the embryos. Id.}

\footnotetext[33]{Witten, 672 N.W.2d at 778.}

\footnotetext[34]{See id. at 777, 783; Coleman, supra note 2, at 88-89 (describing how decisions about becoming a parent and use of pre-embryos is reserved for individuals); Christina C. Lawrence, **Procreative Liberty and the Preembryo Problem: Developing a Medical and Legal Framework to Settle the Disposition of Frozen Embryos**, 52 CASE W. RES. L. REV. 721, 729 (2002) (explaining procreative liberty is maximized allowing individuals to govern disputes over pre-embryos vs. courts). The contemporaneous mutual consent approach has been criticized, however, for putting the male in an unequal and powerful position. See Mark P. Strasser, *You Take the Embryos But I get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 BUFF. L. REV. 1159, 1210 (2009). The contemporaneous mutual consent approach requires the party who opposes destruction of the pre-embryos to bear the cost of preserving the pre-embryos until a later agreement between the parties may occur. Id. This can force the female to continually pay the costs to preserve the pre-embryos simply because the spiteful male wants to get back at her, or vice versa. Id. Such an issue can also arise if one of the parties decides he/she no longer wants to have a child in general or because of questioning parenting abilities. Id. Advocates of the contemporaneous mutual consent approach have compared contracts over pre-embryos to surrogacy contracts, which several states statutorily void for violation of public policy. See Coleman, supra note 2, at 93-94; see, e.g., N.Y. Dom. Rel. Law § 122 (McKinney 1992) (codifying surrogacy contracts as contrary to public policy and therefore unenforceable); but see UTAH CODE ANN. § 76-7-204 (1998) (finding that surrogacy contracts are not automatically void because of the rights of the couple wishing to receive the child). Surrogacy contracts have been held valid so long as the surrogate mother is provided the right to assert her parental rights if she later changes her mind after signing the agreement. In re Baby M, 537 A.2d 1227, 1264 (N.J. 1988); see also Matter of Adoption of a Child by D.M.H., 641 A.2d 235, 239-40 (N.J. 1994) (supporting holding
The third approach, the balancing approach, has been followed in three states. The balancing approach upholds contracts between the parties, at least to some extent, and also balances the parties' interests where there is no agreement. Courts have long resolved disputes over conflicts of interest in light of contractual agreements. This duty requires courts to analyze the parties' relation to one another, the significance of their interests, and the burdens that may be placed on each of them by potential resolutions. Despite the three approaches having some overlap in light of public policy and the personal nature involved with the disposition of pre-embryos, courts have not come to a single consensus or even a significant majority consensus of how to remedy such disagreements.

Acknowledging that this dispute was a matter of first impression, the court in Szafranski v. Dunston analyzed the approaches adopted by the other states and examined the criticisms of each approach. The court noted that under the facts of this case, of In re Baby M). The balancing approach has been criticized, however, for permitting courts to make the decision on behalf of the parties in such a personal and emotional aspect of life. Witten, 672 N.W.2d at 779. See infra note 38 and accompanying text (discussing courts' analyses based on the balancing approach).

See supra note 35 (detailing three states' application of the balancing approach). The balancing approach has been criticized, however, for permitting courts to make the decision on behalf of the parties in such a personal and emotional aspect of life. Witten, 672 N.W.2d at 779. See infra note 38 and accompanying text (discussing courts' analyses based on the balancing approach).

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See supra note 37 and accompanying text (detailing three states' application of the balancing approach). The balancing approach has been criticized, however, for permitting courts to make the decision on behalf of the parties in such a personal and emotional aspect of life. Witten, 672 N.W.2d at 779.
Szafranski’s position favored application of the contemporaneous mutual consent approach, and Dunston’s position supported the application of either the contractual approach or the balancing approach. Subsequently, the court determined that the best approach to resolve disputes over control of pre-embryos was the contractual approach, finding that prior agreements concerning pre-embryos should be presumed valid and binding. Through the contractual approach, the parties, rather than the courts, will make decisions regarding the ultimate use and control of pre-embryos and familial planning decisions, thus incentivizing parties to discuss their desires and concerns prior to any medical action. The court noted the possibility of individuals later changing their minds could be properly addressed in advance agreements and courts should not permit “one party’s indecisiveness to plague a process, fraught with emotions and lifelong repercussions, with uncertainty at another’s expense.” The court, however, also found Davis v. Davis persuasive. The court in Davis held that that where the parties did not execute an advance agreement regarding the control or use of the pre-embryos, a court should balance the each party’s interests in the use of the pre-embryos.

506. The court reviewed the grant of summary judgment de novo. Id.

41 See supra note 23 (discussing states’ applications of the three approaches). The court noted if it were to accept the contemporaneous mutual approach, Szafranski would prevail because forcing him to consent to parenting a child would violate public policy. Szafranski, 993 N.E.2d at 514. On the other hand, if the court were to adopt the contractual approach or the balancing approach, the signed informed consent agreement and contemplated co-parenting agreement would weigh in Dunston’s favor, and in the alternative, if the court found that no agreement existed between the parties, Dunston would still be able to argue that her infertility following chemotherapy would be a compelling interest outweighing any interest of Szafranski’s. Id.

42 See supra note 23 and accompanying text (detailing courts’ holdings on the three approaches); supra notes 30, 36, 36 and accompanying text (discussing criticisms of the three approaches); infra note 54 and accompanying text (noting the fundamentals of contract theory). Kass v. Kass, 696 N.E. 2d 174, 180 (N.Y. 1998). The court noted that the contractual approach most appropriately honors “the parties’ own mutually expressed intent as set forth in their prior agreements.” Szafranski, 993 N.E.2d at 514.

43 Szafranski, 993 N.E. 2d at 515. The court noted that the American Medical Association had promoted its recommendation that parties execute advance agreements “for deciding the disposition of frozen pre-embryos in the event of divorce or other changes in circumstances.” Id. (citing AMERICAN MEDICAL ASSOCIATION, Code of Medical Ethics, Op. 2.141 (1994)).

44 Id.

45 Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992). In Davis the husband sought divorce from his wife, who was then awarded custody of the pre-embryos the two had created. Id.

46 Id. at 589, 604. Weighing each party’s interests constitutes the balancing approach, but to not weigh each party’s interest where there is no advance agreement might give one party the power to block the other from parentage or the capability to bribe the other with payment to permit the use of the pre-embryos. See Szafranski, 993 N.E.2d at 515. Under the balancing approach, the party that desires to avoid parenting or procreation normally should prevail, especially where the other party has another reasonable possibility of becoming a parent not through the use of the
In reviewing the facts of the case under the contractual and balancing approaches, the court held for Dunston, thereby reversing the grant of summary judgment. Szafranski argued that contracting to create pre-embryos is equivalent or analogous to contracting to engage in sexual intercourse, however, the court found this argument unpersuasive, as a contract to create and use pre-embryos did not violate any clear public policy. The court further noted in disputes over pre-embryos, the parties are not in equal positions and therefore the consent of both parties to the use of the pre-embryos is not required. The court also pointed out that Szafranski failed to explain why the state right to privacy would prohibit the court from applying the contractual approach or the balancing approach. The court found, however, that while each party presented its case to the Circuit Court, neither party presented evidence specific to each of the particular approaches because they did not know which approach would ultimately be applied. Therefore, the court vacated the Circuit Court’s entry of summary judgment in favor of Dunston, and remanded the dispute, ordering the court to apply the contractual approach to the facts already presented, as well as any additional

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Szafranski, 993 N.E.2d at 517. See also supra notes 19, 20 (providing district court holdings and reversal by the Appellate Court of Illinois, First District).

Id. at 515; supra note 29. The court noted the Illinois legislature directly supported its holding, because the legislature had permitted and encouraged contracts in surrogacy situations and had set forth the requirements to be followed when such contracts are used. Szafranski, 993 N.E.2d at 515. See also 750 ILL. COMP. STAT. ANN. 47/25 (2010) (West 2013) (stating a surrogacy contract is presumed enforceable). A written surrogacy contract is considered valid and enforceable if executed prior to the start of any medical procedures, each party is represented by counsel, the compensation is placed in escrow, and two adult witness its signing. Id.

Szafranski 993 N.E.2d at 516; supra note 23. Szafranski argued that forcing him to be a parent was unconstitutional and that his right to unilaterally forbid Dunston from using the pre-embryos is equivalent to a woman’s unilateral right to terminate a pregnancy. Szafranski, 993 N.E. 2d at 516. The court noted, however that with the termination of pregnancy, only one view can prevail. Id. “[T]he woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance [will] weigh[] in her favor.” Id.

Szafranski 993 N.E.2d at 516-17. Szafranski also argued that the Illinois right to privacy was broader than the federal right to privacy, and because of technological advances of IVF and pre-embryos, even greater privacy should be afforded, and thus consent by both parties for the use of the pre-embryos is required. Id. The court however found that this argument did not explain “why the Illinois right to privacy would preclude this court from honoring a contract governing the disposition of pre-embryos or in the absence of a contract balancing the interests of the parties in the event of a dispute over their use.” Id. at 517.

As the parties had not presented evidence in specifically regarding to the contractual approach, the court was unable to respond to their arguments over whether the informed consent or unsigned co-parenting agreements were advance agreements enforceable under the contractual approach. Id. at 517-18.
facts the parties might present on remand.\textsuperscript{52}

The court’s holding in favor of the contractual approach is inappropriate because individuals’ rights to pre-embryos involve procreative liberty; rights so fundamental and personal to the individual that they cannot be judicially decided.\textsuperscript{53} Courts generally treat prior contracts and the commitments within as legally binding, unless evidence of fraud, duress, or mental incapacity exists under the circumstances.\textsuperscript{54} The law, however, has acknowledged that certain inalienable rights are so significant that prior commitments related to these rights are not enforceable if an individual later changes his or her mind.\textsuperscript{55} Inalienable rights typically involve deeply personal decisions...  

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52 Id. at 518.  
53 See Coleman, supra note 2, at 56-57. Coleman argues:

\begin{itemize}
  \item [C]ontracts for the disposition of frozen embryos undermine important society values about families, reproduction, and the strength of genetic ties. While advance agreements can play an important role when couples are unavailable to make disposition decision, such agreements should not be applied if either partner objects to the application of the agreement . . . .
\end{itemize}

\textit{Id.} at 57. Binding a couple to a prior agreement respects the decisions of the parties at the time the agreement was executed, but if either party has a change of mind regarding the decision, which is to be expected given the deeply personal issues at stake, enforcing the prior agreement can be profoundly disrespectful to the party’s current state of mind and persona. \textit{Id.} at 91.  
54 See id. at 92; Restatement (Second) of Contracts § 164 (1981) (providing that contracts entered into based on fraud are voidable). While contract theory does not support voiding contracts based on all changes of heart, under certain circumstances, contracts based on fraud, duress, or mental incapacity may be voidable. Coleman, supra note 2, at 92. Where no such fraud, duress, or mental incapacity is present, courts uphold contracts as legally binding, thereby overriding any present changes of feelings. \textit{Id.} at 94.  
55 Coleman, supra note 2, at 92. Alienating a right involves a present promise to waive a future right. \textit{Id.} at 94. Examples of such rights involve the promise to marry, promise never to seek divorce, whether or not to have children during the course of a marriage, a promise to have an abortion, or a promise to give an unborn child up for adoption. \textit{Id.} at 93. In addition, most states also find agreements in which women promise to create a child and give it up after birth, also known as surrogacy, as void and unenforceable if the woman carrying the child changes her mind. \textit{Id.} at 93-94. See, e.g., N.Y. Dom. Rel. Law § 122 (McKinney 1999) (declaring surrogate parenting contracts as void and unenforceable); Coleman, supra note 2,
that are central to an individual's identity, and therefore generally are constitutionally protected.\textsuperscript{56} Holding such fundamental rights as inalienable shows that courts acknowledge that a person's identity changes over time, and that it is unfair and unconstitutional to force an individual to endure the consequences of certain prior decisions, which are now inconsistent with their current desires.\textsuperscript{57}

Societal values have long supported familial relationships, genetic ties, and the concept that family commitments and relationships should be generally free of legal compulsion.\textsuperscript{58} Imposing parenthood on an individual can force an unwanted change of circumstance upon that individual for the remainder of his or her lifetime.\textsuperscript{59} Similarly, requiring the destruction of pre-embryos can have an extremely impactful, and often permanent, change in identity, particularly where the individual cannot create any further pre-embryos of his or her own.\textsuperscript{60} Therefore, the deeply personal decisions inherently connected to the disposition of pre-embryos require an analysis not of contract law, but of family law.\textsuperscript{61}
Further, given the highly personal rights at stake, it is very difficult for couples to properly execute prior agreements regarding the disposition of pre-embryos. It is not easy for a couple to predict future events and their state of mind following drastic changes, particularly where personal, family values are at stake. The highly personal nature of reproductive decisions makes it less likely for a person to be able to predict rationally, without emotion, thereby making related decisions even more complicated, and likely to be erroneous, unlike in the ordinary contract contexts. Furthermore, couples whose only reproductive option is through pre-embryos may feel additional pressures knowing that they will be bound by prior agreements, as opposed to if they were simply choosing to reproduce through pre-embryos as one of many options.

the argument that binding the parties to prior agreements still provides the parties with procreative liberty in the form of freedom to contract is flawed in that this liberty is liberty of the couple, not of the two individuals separately, which is the right conferred by the Constitution. A court faced with a pre-embryo dispute should not enforce a prior disposition agreement in an attempt to maximize the couple's right to privacy because the couple as a unit no longer has a right to privacy.

Couples may not be certain about their parenting abilities, nor what they may want to do in the future if there are additional pre-embryos that may be utilized. There are also many other emotional and psychological factors that may prevent individuals from executing an advance agreement, such as worry that the other party will prevent his/her use of the pre-embryos simply out of spite or may feign that he/she will consent at a later time but may not be genuine. In traditional contract contexts, parties are presumed to have the capabilities to make predictions of impactful future events and thus the parties to the contract must live with any consequences that do occur later, whether or not their predictions are correct, unless they can demonstrate that the circumstances were so unforeseen that had they been predictable, the parties would have contracted differently. Allowing individuals to change their minds given a significant change in circumstances ensures that the resulting decision regarding the disposition of the pre-embryos will be in accordance with the individuals' constitutional rights.

Coercion is an even bigger factor when the couple
In conclusion, while the contractual approach on its face appears to be a logical approach that will compel parties to think about and discuss the disposition of pre-embryos prior to creating them, the contemporaneous mutual consent approach is more appropriate. Parties will still be bound to advance agreements, but courts will weigh legitimate changes of mind by the parties in light of the fundamental rights involved. Inalienable rights include the right to procreate, which is so fundamental and personal that it cannot be ignored or decided on behalf of individuals by courts.

Coleman, supra note 2, at 104. See also supra note 23 (discussing the contractual approach, contemporaneous mutual consent approach, and balancing approach); supra note 30 (detailing criticisms of the contractual approach).

Coleman, supra note 2, at 104. See also supra notes 55-57 (discussing rights and alienation of rights).

Coleman, supra note 2, at 104. See also supra notes 55-57 (noting the weight of inalienable rights is so great that a violation of them is unconstitutional).
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