

**FROZEN EMBRYO DISPOSITION AFTER DEATH AND *DOBBS*: APPLYING
TESTAMENTARY GUARDIANSHIP FOR EMBRYOS IN “PERSONHOOD” STATES.**

I. INTRODUCTION

Globally, one of the most pervasive health issues affecting people of reproductive age is infertility.¹ Statistics reveal that worldwide, nearly 48 million couples suffer from the inability to conceive.² In the United States alone, the failure to induce pregnancy after “12 months or more of regular unprotected sexual intercourse” affects about 19% of heterosexual women between the ages of 15 and 49.³ Yet, women are not the sole contributors to a heterosexual couple’s infertility, as is often considered the case.⁴ Heterosexual men may contribute to infertility through several factors: hormonal disorders, genetic diseases, or disruption of testicular or ejaculatory function.⁵ For men and women alike, “environmental and lifestyle factors” also play a part in one’s fertility.⁶ Simply being a smoker, drinking alcohol excessively, being obese, or having “exposure to environmental pollutants” may impact an individual’s fertility.⁷

Nevertheless, the inception of assistive reproductive technology (ART) in 1978 has led to the conception and delivery of over nine million children worldwide.⁸ Excluding natural procreation by heterosexual intercourse, ART is generally any scientific means of inducing pregnancy, such as “1. intrauterine or vaginal insemination; 2. donation of gametes; 3. donation of embryos; 4. in vitro fertilization and transfer of embryos; and 5. intracytoplasmic sperm injection.”⁹ The process of cryogenic preservation (cryopreservation) is then utilized for the conservation of a couple’s genetic material if the embryos are to be used at a later date for either implantation, donation, or research.¹⁰

As of June 2022, an estimated “more than [one] million” frozen embryos are currently stored in cryogenic preservation (cryopreservation) banks across the United States.¹¹ Across the country, each state varies in its classification of a couple’s combined genetic material: it is either an embryo simply “entitle[d]...to special respect,” property, or a person.¹² From this nationwide division on the legal status of a cryogenically preserved embryo emerges another, far more nuanced, concern: how estate law defines the status of frozen embryos for the appointment of guardianship of a minor child in a biological parent’s will.¹³

This paper will assert that to safeguard cryogenically preserved embryos created through ART after the death of both biological parents, a mechanism must exist in “personhood” states, in which frozen embryos are each “accorded the rights of a person” by the courts, that permits parents to select a guardian for their frozen and fertilized embryo(s).¹⁴ This paper will propose that because cryogenically preserved embryos are legally regarded as “persons” in Louisiana and New Mexico, these fertilized embryos are comparable to minor children for the purpose of testamentary guardianship.¹⁵

In states where frozen embryos are regarded as marital property,¹⁶ or “property acquired or accumulated during the marriage,”¹⁷ of a special character,¹⁸ this mechanism is likely unnecessary, as parents may specify the “donation, sale, bequest, or distribution” of their genetic material in a will to be executed upon their deaths.¹⁹ Essentially, where fertilized embryos are deemed marital property of a special character,²⁰ upon the death of both parents, these cryogenically preserved embryos may be distributed through probate in a manner parallel to the equitable distribution of marital property in divorce proceedings.²¹

In “personhood states,” where “the legal rights of people [are extended] to a fetus or embryo before viability,”²² this proposed mechanism should mimic several states’ application of testamentary guardianship, in which a parent may appoint, nominate, or designate a guardian for their minor child within their last will and testament.²³ Generally, “a guardian is a court-appointed decision-maker” responsible for a minor child’s “physical well-being”²⁴; a guardian normally exists to safeguard minor children unable to “car[e] for themselves, provid[e] for shelter, food, clothing, medical care, or other necessities of life.”²⁵ These minor children are “typically referred to as the ‘ward,’” and guardians are usually responsible for all common parental duties, save financially supporting the ward.²⁶ The testamentary designation of a guardian includes appointment by a parent of an individual who then becomes a guardian “only upon the death of the parent.”²⁷ Typically, a testamentary guardian is “designated by will” by both parents or the sole surviving parent.²⁸

The New Mexico and Louisiana state legislatures should create a guardianship statute to enable guardianship of fertilized embryos in New Mexico and Louisiana in the same way these states grant biological parents the power to appoint guardians for their minor children via testamentary guardianship.

II. ASSISTED REPRODUCTIVE TECHNOLOGY

According to 42 U.S.C.A. § 263a-7, ART refers to any treatment or procedure involving human embryos, such as “in vitro fertilization, gamete intrafallopian transfer, and zygote intrafallopian transfer,” that aids in causing pregnancy.²⁹ Specifically, some of these laboratory procedures involve the surgical removal of “eggs from a woman’s ovaries” to be combined with a man’s sperm, to be later reinserted into the woman’s uterus for implantation of the fertilized embryo or donated to another woman for pregnancy purposes or surrogacy.³⁰

A. In Vitro Fertilization

Globally, ART has contributed to the birth of “more than 5 million children.”³¹ In the United States, recent statistics indicate that about 2.1% of infants born in 2019 were conceived via various ART methods.³² Yet, the most common method is in vitro fertilization (IVF).³³ IVF refers to the “formation of a human embryo outside the human body.”³⁴ During the IVF process, a fertilized embryo, or a combination of a woman’s egg and a man’s sperm, is transferred “into the uterine cavity” to induce pregnancy.³⁵ Specifically, a “ripe egg” is removed from a woman’s body and combined with a man’s sperm in “a petri dish,” via a “laparoscopy or aspiration.”³⁶ Following this process of fertilization, the embryo is then implanted into the woman’s body to induce pregnancy.³⁷

Though the most common method of ART, IVF presents its own difficulties for hopeful women and couples alike. While individuals who seek IVF treatment typically share a dream of starting a family, IVF can be incredibly cost-prohibitive to those struggling with fertility. Generally, one can expect to pay nearly \$25,000 in the United States for IVF, creating a significant economic burden on many optimistic prospective parents.³⁸ In Louisiana, where IVF costs are not covered by insurance,³⁹ just one cycle of IVF ranges from “\$7,000 to [\$20,000].”⁴⁰ Although Louisiana covers any “diagnosis and treatment of a correctable medical condition” despite the fact that it may lead to infertility, § 22:1036(2)(b) of the Louisiana Revised Statutes states that this provision is not to be mistaken as “[requiring] coverage of...(b) in vitro fertilization or any other assisted reproductive technique.”⁴¹ “At least two cycles of IVF” are often needed to result in a successful pregnancy.⁴² Similarly, New Mexico does not mandate insurance for infertility treatments like IVF,⁴³ and a single cycle of IVF ranges from “[\$10,000] and [\$15,000]”⁴⁴ For a majority of individuals undergoing IVF, fertility loans are one way to ensure their hopes for

pregnancy are brought to fruition.⁴⁵ Notably, fertility lenders are only available if offered by one's provider, and these types of financing typically "have higher interest rates."⁴⁶ Moreover, in states without mandated fertility insurance, people struggling with infertility may rely on credit union loans, online personal loans, and even credit cards to finance their wish for pregnancy, illustrating the immense financial hindrance of ART.

Aside from financial barriers to IVF treatment, the emotional burdens faced by those undergoing IVF are substantial.⁴⁷ Though Louisiana and New Mexico adhere to the Family and Medical Leave Act (FMLA), wherein employers with over 25 employees are mandated to "provide unpaid leave for up to six weeks for 'normal pregnancies,' and up to 4 months for more 'seriously disabling' pregnancies,"⁴⁸ for IVF to qualify under the FMLA, "the treatment the employee receives [must be] for a serious medical condition."⁴⁹ Moreover, women must also prove that they are receiving care from a "health care provider who certifies that the [ART] treatment is medically necessary," who then must complete a "Medical Certificate" indicating the woman's condition is "serious."⁵⁰ If a woman is unable to secure protected leave for her IVF treatment, she may be plagued with overwhelming feelings of deceit, as it may feel entirely self-evident that her condition is "serious," as required by federal law.⁵¹

Whether financial pressures lead to marital conflict and multiple jobs or feelings of disappointment and anxiety stem from back-to-back failed IVF cycles, those who proceed with IVF are embarking on an emotional rollercoaster with the expectation that they will one day have a child.⁵² For example, of those who experience infertility, women in particular often struggle with "violence, divorce, social stigma, emotional stress, depression, anxiety, and low self-esteem."⁵³ In the event that both biological parents suddenly pass after the successful fertilization of embryos,

it is likely that parents who endured significant financial and emotional strain to get this far would also have a plan for those embryos in the future.

B. Cryogenic Preservation

Commonly referred to as “embryo freezing,” cryopreservation entails the use of “extremely low temperatures to preserve biological material” in specialized facilities, such as “a lab, or commercial reproductive medicine centers.”⁵⁴ This frozen biological material is then thawed at a later time for purposes of inducing pregnancy or research.⁵⁵ Since only a select number of fertilized embryos may be implanted in a woman’s uterus at a given time, the cryopreservation of remaining fertilized embryos may lessen “the need for further ovarian stimulation and egg retrieval,” which is a highly invasive procedure.⁵⁶ Couples struggling with infertility typically resort to this method of “fertility preservation” following IVF, as it provides a way to safeguard their additional genetic material while certain embryos are implanted for pregnancy.⁵⁷ However, considerations may arise regarding the continued ability to safeguard excess fertilized embryos after parental death.⁵⁸

III. THE LEGAL STATUS OF THE FERTILIZED EMBRYO

Though ART is widely used and revered for its advanced fertility capabilities, several legal and ethical concerns have emerged as a result of these remarkable scientific technologies.⁵⁹ The most fundamental of them all is how to classify fertilized embryos created through IVF.⁶⁰ Though there are two prevailing classifications for embryos adopted by many states, others have opted to instead regard embryos as “occupy[ing] an interim category that entitles them to special respect,” due to the “failings of each label.”⁶¹ Still, a majority of states across the nation fall into one of two categories: those that classify embryos as property, and those that classify embryos as persons.

A. An Embryo as Property

In states that consider this biological material as property of “a special character,”⁶² genetic donors have inherent property rights vested in their embryos, which “are manifested in decisional authority over the” frozen embryos.⁶³ For example, biological parents may “lay their claim,” or assert their right or title, to cryopreserved genetic material as part of their right to the product of their labor.⁶⁴ Therefore, if a frozen embryo is deemed property, it “can be owned.”⁶⁵ Under property law, an individual may “convey [the embryo] through donative transfer (a gift made with donative intent),⁶⁶ or sale regulated by basic gift, contract, and code principles.”⁶⁷ A conveyance refers to a “transfer and assignment of any property right or interest from [one] to another,” which is “most often accomplished through... a deed,”⁶⁸ whereas a gift is a “voluntary transfer of a benefit without the need for any compensation.”⁶⁹ Because property law in these states typically allows for the transfer of ownership of the embryos in divorce proceedings,⁷⁰ fewer disputes over ownership may arise. As is typical in the estate planning process, testators may “coordinate the distribution of [their] assets after death” in a will.⁷¹ Consistent with the embryo-as-property theory, it is possible that if deemed “property,” this genetic material may be “sold, bequeathed, donated, dealt with in a manner consistent with an agreement executed by the parties, or dealt with in a manner consistent with a judicial property award.”⁷² A bequest, or “a gift of personal property,” is plausible where frozen embryos are classified as such, and bequeathing one’s pre-embryos to another may be useful, as “bequests can be subject to various conditions,” such as parental death.⁷³ Therefore, in states that classify embryos as property in marital dissolution proceedings, biological parents may also list their cryogenically preserved embryos as assets to be specifically distributed upon their death.⁷⁴

B. An Embryo as a Person

Alternatively, certain states have enacted legislation recognizing cryogenically preserved embryos as persons.⁷⁵ Coined “personhood legislation,” these states acknowledge the creation of life upon the fertilization of an embryo.⁷⁶ Courts with “personhood” legislation recognize the rights of a fertilized embryo as akin to that of a person, meaning the embryo is granted the same, or similar, rights as a person.⁷⁷ Though the 1973 landmark decision in *Roe v. Wade* “foreclose[d] any rights of the fertilized ovum,” the overturning of this case by *Dobbs v. Jackson Women’s Health Org.* has encouraged debate over the creation of rights in fertilized embryos.⁷⁸ Whereas *Roe v. Wade* refused the notion that a “fetus possesses independent rights under law,” the Supreme Court of the United States’ decision in *Dobbs v. Jackson Women’s Health Org.* provides that the fetus “exists in a liminal state, capable of being construed as a person or as a non-person” on a state-by-state basis.⁷⁹ Though the majority in *Dobbs* refrained from proposing that “the fetus itself is a constitutionally protected ‘person,’”⁸⁰ its silence on the pressing issue seemingly provides the states with the sole decisional authority to determine the legal status of fetuses. If fetuses are deemed persons, it is inevitable that conflicts may result relating to the “adoption or custody” of frozen embryos, similar to common disputes over a minor “child’s best interests.”⁸¹ For example, disagreements over the appointment of “proper... ‘guardians’” in the case of parental death may emerge.⁸² As it is possible that this type of dispute might arise after *Dobbs*’ apparently intentional silence on fetal personhood, biological parents in “personhood” states should be afforded a mechanism analogous to testamentary guardianship for minor children that would apply to cryopreserved embryos.

IV. THE LEGAL STATUS OF THE FERTILIZED EMBRYO IN “PERSONHOOD” STATES: LOUISIANA AND NEW MEXICO

While a fertilized embryo in cryopreservation has not yet been “accorded full human status” by the courts, both Louisiana and New Mexico have legislation indicating an embryo’s personhood status.⁸³

In Louisiana, a “human embryo”⁸⁴ has “the status of a juridical person,” or “an entity to which the law attributes personality,” whereas a natural person is a “human being.”⁸⁵ Although a juridical person is separate and apart from a natural person in Louisiana, the state’s definition provides fertilized embryos with “the right to sue, raise[s] custody issues [that are poorly or not addressed at all], and pose a number of inconsistencies within the [Louisiana] Civil Code.”⁸⁶ Though Louisiana’s Civil Code does not grant a frozen embryo “full human status,” the state legislature vests some degree of personhood in these fertilized embryos.⁸⁷ Namely, Article 26 of Louisiana’s Civil Code defines “an unborn child...as a natural person for whatever relates to its interests from the moment of conception.”⁸⁸ Comment (b) of this provision provides that “‘an ‘unborn child’ may be a person even if it is in a test tube.”⁸⁹ While a cryopreserved embryo is accorded juridical personhood,⁹⁰ a “‘test tube’ baby” is accorded natural personhood,⁹¹ indicating the conflicting nature of Louisiana’s legal approach to frozen embryos. With four fertility clinics bearing the option of cryopreservation across the state, Louisiana law safeguards the fertilized embryo from intentional destruction by another person,⁹² or from potential disposal.

Similarly, New Mexico’s 1985 Maternal, Fetal and Infant Experimentation Act recognizes fertilized embryos as living beings, or “living fertilized... embryo[s]” to be implanted within a woman’s uterus.⁹³ Notably, the “unborn” are considered humans for clinical research in the Act.⁹⁴

Yet, fertilized embryos in New Mexico are not granted the status of a juridical person; instead, they are treated as persons, mandating their implantation into a woman's uterus.⁹⁵ In New Mexico, two fertility clinics provide embryo cryopreservation services across the entire state.⁹⁶ Since both New Mexico and Louisiana consider fertilized embryos as persons, they should provide biological parents with the ability to safeguard excess cryogenically preserved embryos in the event of their unexpected death, as they naturally would with a minor child through testamentary guardianship.⁹⁷ While there is no reason provided by either state legislature for the absence of embryonic testamentary guardianship as of June 2023, it is possible that legislators are still in the process of proposing methods to safeguard frozen embryos in the wake of *Dobbs*.

V. THE LEGISLATIVE HISTORY OF TESTAMENTARY GUARDIANSHIP

Generally, a "will or testament" is a document that indicates an individual's preference for the disposition of their assets and property "owned at death."⁹⁸ Within a last will or deed, parents have the power to appoint a testamentary guardian for their minor child.⁹⁹ A minor child is typically defined as an unemancipated person not yet eighteen years old, or an adult subject to a court-issued custody order.¹⁰⁰ § 5-202 of the Uniform Probate Code encourages the parental appointment of a guardian for minor children; specifically, it authorizes parents to designate guardians within a will or "other signed writing" that will take effect upon the parent's death.¹⁰¹ However, under "the early common law," parents did not have this right.¹⁰²

Because this right did not always exist, it is crucial that parents now take advantage of their right to safeguard their minor children; otherwise, in the event of parental death, the courts will likely have discretion in naming a guardian for the minor child, regardless of whether the court-appointed guardian contradicts the parents' wishes.¹⁰³ For example, "failing to select a guardian

for your child could mean chaos” after parental death, wherein a minor child may be placed in foster care or the court may substitute its judgment regarding the “child’s best interests.”¹⁰⁴ When considering who to appoint as a testamentary guardian for their minor child, parents should consider the following: “religious preference..., physical ability..., emotional stability..., location..., financial responsibility..., teamwork [with a fiduciary]...,” and backup guardians so as to ensure the child’s well-being after parental death.¹⁰⁵

Presently, this power of appointment is limited in some states; certain state statutes call for adherence to the testator’s wishes, while others require court confirmation of a testator’s chosen guardian.¹⁰⁶ States that adhere to a testator’s designation of a guardian are commonly known as “parent-appointed” guardian states, whereas states requiring court confirmation or appointment are called “court-appointed” guardian states.¹⁰⁷

“Court-appointed” states generally appoint guardians “in the best interest of the child,” despite recognizing a parental nomination of a guardian.¹⁰⁸ Moreover, the court may evaluate a guardian’s “blood relationship” to the child, their “willingness and ability to serve,” and their religious beliefs to determine whether that nominated guardian would serve the child’s best interests if appointed.¹⁰⁹

“Parent-appointed” states may then be distinguished as follows: those who “automatically” grant guardianship as prescribed by will; those who require nominees “to take action for appointment”; and those that limit appointment to “the best interest of the child and the child’s right to choose.”¹¹⁰ In these states, a parent may “change or revoke” their appointment prior to court confirmation, however, the guardianship appointment “generally becomes effective upon” parental death.¹¹¹ A parent’s ability to alter guardianship appointment before confirmation is the

crux of “parent-appointed” states, wherein “the court should not disregard [such an] appointment without good cause.”¹¹²

A. Testamentary Guardianship in New Mexico

In § 45-5-202 of New Mexico’s Uniform Probate Code, New Mexico permits the parental appointment of a guardian of a minor child.¹¹³ A child is either “an unemancipated individual” under the age of eighteen years, or “an adult son or daughter...subject of a court order concerning custodial responsibility.”¹¹⁴ Where a parent, either by will or other signed writing “attested by at least two witnesses,” appoints a guardian for a minor child, that appointment will become effective when both parents are deceased, “the guardian’s acceptance” is filed with the court, and “notice is given to the minor and to the person caring for [them] or the closest adult relative.”¹¹⁵ However, New Mexico legislation does not require both parents to agree on the designated guardian; instead, the later deceased parent “has priority” to effectuate the appointment of a guardian for their minor children.¹¹⁶ Once an individual is appointed as guardian of a minor child, they will remain a guardian until their appointment is terminated.¹¹⁷ Pursuant to § 45-5-210, testamentary guardianship in New Mexico terminates if the guardian dies, resigns, or is removed by the court, or “upon the minor’s death, adoption, emancipation, marriage or attainment of majority.”¹¹⁸ In New Mexico, the attainment of majority occurs at age eighteen.¹¹⁹

New Mexico courts have limited power in appointing guardians for minor children. For example, where “all parental rights of custody have been terminated or suspended,” the court may appoint a guardian for a minor child.¹²⁰ While a guardian appointed by a parent has precedence over a court-appointed guardian, if a New Mexico court finds the parent-appointed guardian has not accepted their appointment “within thirty days after notice of the guardianship proceeding,”

the court may then appoint another guardian.¹²¹ Additionally, a minor child aged fourteen years or more may object, at any time, in writing to “a parental appointment of a guardian” by filing the objection “in the court in which the will is probated.”¹²² Nonetheless, the court may proceed with the appointment if it is in “the best interests of the minor,” in accordance with § 45-5-206 of New Mexico’s Uniform Probate Code.¹²³

B. Testamentary Guardianship in Louisiana

Louisiana has four different types of “tutorship,” or guardianship, available for minor children: “(1) tutorship by nature, (2) tutorship by will, (3) tutorship by effect of law, and (4) dative tutorship.”¹²⁴ Minor children are those “under the age of eighteen years,” as well as students “under the age of twenty-three years.”¹²⁵ Tutorship by nature for a minor child refers to the surviving parent following the death of the other parent.¹²⁶ Tutorship by will, as defined by Article 257 of the Louisiana Civil Code, exclusively grants the right to appoint a tutor to the biological parent of the minor child.¹²⁷ Typically, tutorship by will is “given by testament,” but the surviving parent may also provide a declaration “executed before a notary and two witnesses” to appoint a guardian.¹²⁸ Tutorship by the effect of law, or legal tutorship, refers to when the court alone appoints a tutor, “without the advice of a family meeting.”¹²⁹ Dative tutorship occurs when an orphaned minor child has no tutor by way of their parent’s failure to designate one, the absence of close relatives to be appointed by the court, or the tutor is legally excused; the dative tutor is one selected by and “with the advice of a family meeting.”¹³⁰

For each type of tutorship, the court must itself confirm or appoint a guardian, who “must qualify for office as required by law.”¹³¹ In Louisiana, a nominated “tutor,” or guardian, may be appointed if in the best interest of the minor child upon the tutor’s “furnishing security and taking

an oath.”¹³² In cases where deceased parents failed to precautionarily appoint a tutor, Louisiana courts are required to appoint close relatives before other candidates to protect the minor child’s best interests.¹³³

According to Article 29 of the Louisiana Civil Code, a minor child has not yet reached majority, or eighteen years of age.¹³⁴ Until then, a tutor “acts for, and represents” the minor child’s interests “in all matters.”¹³⁵ Once a “tutorship” is created, the guardian has “no authority, no rights, no duties except those...conferred and imposed by the law.”¹³⁶

C. Testamentary Guardianship in “Parent-Appointed” New Mexico and Louisiana

Both New Mexico and Louisiana may be classified as “parent-appointed” states, with certain limitations.¹³⁷ In these states, “parents are empowered” to designate who they wish to raise their minor children in the event of their death.¹³⁸ However, both states provide courts with the authority to make the final determination of whether a nominated guardian is in the “minor’s best interest” or if other considerations exist that justify “overriding the parent’s selection.”¹³⁹

Despite the elusive nature of the standard, the best interest of the child is considered by the court before confirmation of a guardianship appointment.¹⁴⁰ In the United States, the best interest of the child doctrine has been applied to numerous decisions involving children, such as “custody of the child, the nature of visitation rights, and the nature of child support payments.”¹⁴¹ Nevertheless, each state considers different factors to determine whether a decision is made in the child’s best interests.¹⁴² Still, the overwhelming majority of states agree that “the child’s ultimate safety and well-being [is of] paramount concern” in decision-making.¹⁴³ Regarding guardianship appointments in New Mexico and Louisiana, an examination of each state’s best interest standard

for minor children is likely valuable for providing an understanding of how courts in “personhood” states will evaluate the best interests of fertilized embryos.

With respect to child custody, § 40-4-9 of West’s New Mexico Statutes Annotated provides several factors for the best interests determination: “(1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school and community; and (5) the mental and physical health of all individuals involved.”¹⁴⁴ Though these factors refer to child custody, they provide insight into New Mexico’s approach to the best interest of the child doctrine.¹⁴⁵ Similarly, Louisiana lists fourteen factors considered in child custody decisions under the best interest of the child standard.¹⁴⁶ Notably, these factors address the child’s overall emotional and physical health, stability of their home environment, and the capacity of a party to provide for them.¹⁴⁷

While guardianship of a minor child is distinct from child custody, both New Mexico and Louisiana consider the best interest of the child doctrine in these determinations.¹⁴⁸ Although these states are “parent-appointed states,” the courts may occasionally provide the ultimate decision regarding the appointment of a guardian.¹⁴⁹ Therefore, biological parents should thoroughly consider their respective state’s best interest of the child factors when appointing a guardian by will for their fertilized embryos, in the same way they should in the testamentary appointment of a guardian for their minor child. If parents demonstrate careful contemplation in selecting a guardian for their frozen embryos, a state court may be less likely to follow the “court-appointed” approach for guardianship and overrule their wishes.

VI. TESTAMENTARY GUARDIANSHIP OF FERTILIZED EMBRYOS IN CRYOPRESERVATION BY WILL

Despite the current ambiguity surrounding the legality of the disposition of fertilized embryos created through IVF after *Dobbs v. Jackson Women's Health Org.*,¹⁵⁰ this paper proposes the enactment of testamentary guardianship legislation in New Mexico and Louisiana for fertilized embryos in cryopreservation. Namely, both New Mexico and Louisiana regard fertilized embryos as legal persons;¹⁵¹ thus, to safeguard one's excess embryos which remain in cryopreservation, testamentary guardianship should be a means available to biological parents.

Consider the following simulated anecdote:

Mr. and Mrs. Smith have been married for seven years. Both Mr. and Mrs. Smith are now in their late thirties and have tried and failed to conceive naturally for four years. Thus, the couple participated in three rounds of IVF at their local fertility clinic, Albuquerque Fertility, in New Mexico. Because the Smiths' insurance plan did not cover assisted reproductive technologies, the couple spent a total of \$23,745 on the first two rounds of IVF, which both ended up unsuccessful.¹⁵² Still, the couple decided to try again, with Mr. Smith taking on a second job to pay for the third round of IVF, bringing their total fertility expenses to \$31,365.¹⁵³ Upon the most recent implantation of two fertilized embryos, Mrs. Smith successfully became pregnant. Nine months later, the Smiths delivered a healthy child, Baby Smith. Shortly after the birth of Baby Smith, Albuquerque Fertility contacted the Smiths regarding four additional cryopreserved embryos in storage. The couple opted to continue storing the embryos in hopes of having more children in the near future. Three and a half years later, Mr. and Mrs. Smith visit their attorney, Mrs. Jones, to devise their

last will and testament after the sudden passing of Mrs. Smith's own mother from a car accident. While discussing the disposition of certain assets, Mrs. Jones asks about any remaining fertilized embryos the couple may have stored at Albuquerque Fertility. The Smiths have paid for the continuous cryopreservation of four fertilized embryos for the past three and a half years - nearly \$12,000, excluding the cost of three IVF cycles.¹⁵⁴ In sum, the couple has paid nearly \$43,000 toward fertility treatments and continuous storage of their genetic material -- some \$12,000 per year in additional costs. The family of three regularly opted out of vacations in order to afford their payments to their fertility clinic. After conversing with their attorney, the Smiths expressed concern about the disposition of their remaining frozen genetic material after their death. Should the couple unexpectedly die before Mr. Smith's mother, Joan, the couple fears that she will seek custody of the remaining four embryos with the intent to implant and deliver another child via surrogate. Of course, this is contrary to the Smiths' wishes, as Joan's personal beliefs and values contradict those of the Smiths. Though the couple wishes to have additional children, they would only do so if their children are raised in accordance with their parenting beliefs and values. As such, the Smiths intend to leave all decision-making power regarding the four embryos to Mrs. Smith's best friend, Mrs. Johnson, if they were to both die unexpectedly. Because Mrs. Johnson has no relation to the Smiths, it is conceivable that Joan, Mr. Smith's mother, may prevail in obtaining their four remaining fertilized embryos in cryopreservation. Moreover, Joan may be likely to succeed in her plan to implant the embryos via surrogate, as embryos are considered living beings to be implanted for pregnancy in New Mexico. Thus, the Smiths are faced with the predicament of how to safeguard their remaining frozen embryos following their death."

While having to protect your genetic material from your mother-in-law may appear absurd in some respects, it is all too common - much like the astonishing prices for IVF.¹⁵⁵ In divorce proceedings, child custody battles are routine.¹⁵⁶ But these battles often extend beyond divorcing individuals arguing over property distribution; close relatives may disagree on who will bear the legal responsibility of the child following unexpected parental death where neither parent specified a designated guardian to be appointed in writing.¹⁵⁷ In these situations, the court may appoint a close relative as guardian for the child in the absence of a will appointing a guardian.¹⁵⁸ When the court selects a guardian, there is the risk that the individual selected is one who the deceased parents would not have appointed themselves, despite the consideration of the child's best interests. Whether this decision not to appoint is due to disagreements on how to raise children or other conflicts such as age, infirmity, prior tutorships, or excuse by reason of office or function,¹⁵⁹ it is likely fair to presume that the appointment of such an individual would be contrary to the deceased parents' wishes.

While cryopreserved fertilized embryos are not yet minor children in the legal sense, both the Louisiana and New Mexico legislatures have recognized them as persons.¹⁶⁰ In Louisiana and New Mexico, a minor child is legally recognized as one who has not yet reached eighteen years of age.¹⁶¹ This paper contends that fertilized embryos in cryopreservation banks be legally regarded as minor children for the purpose of appointing testamentary guardianship following parental death.

In the simulated anecdote above, Mr. and Mrs. Smith were concerned that Mr. Smith's mother, Joan, would obtain guardianship over their excess frozen embryos with the intent to conceive, deliver, and raise another child by implanting the embryos into an unknown surrogate.

As this is contrary to the couple's wishes, they seek a mechanism to safeguard their four frozen embryos from Joan, Mr. Smith's mother. In states that classify cryopreserved embryos as property, the Smiths would have the option to instruct the disposition of any excess frozen embryos in the case of death or divorce. However, because the Smiths live in New Mexico, their embryos are "living being[s]" that may not be destroyed.¹⁶² Herein lies the Smiths' dilemma: in personhood states, how can parents safeguard their excess frozen embryos that are considered "persons" after their death?¹⁶³

This paper contends that fertilized embryos in cryopreservation should be considered minor children for testamentary guardianship appointments. Since this biological material already has the status of a "person" in New Mexico and Louisiana, classifying them as minor children is certainly not inconceivable.¹⁶⁴ These "persons" are not yet emancipated, nor have they reached eighteen years of age.¹⁶⁵ If Louisiana and New Mexico state legislatures accept this classification, parents may then designate guardians to be appointed for their embryos upon their death.

VII. DISPOSITION AFTER DEATH AND *DOBBS*: WHAT HAPPENS TO FERTILIZED EMBRYOS NOW?

Following the Supreme Court of the United States' decision on June 24, 2022, to overturn *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, effectively ruling that there is no right to abortion conferred by the United States Constitution, there is growing concern regarding other substantive due process rights.¹⁶⁶ While the majority opinion in *Dobbs* attempts to dissuade such concern, Justice Clarence Thomas' concurrence entirely contradicts this stance: "...in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."¹⁶⁷ Because ART methods such as IVF

“often requires eliminating excess embryos,” *Dobbs*’ decision to enable states to once more determine abortion rights for their citizens presents serious implications for ART.¹⁶⁸ For example, IVF typically involves the implantation of several fertilized embryos to induce pregnancy.¹⁶⁹ In cases where more than one fertilized embryo is implanted, “selective reduction” is advised.¹⁷⁰ Selective reduction is “essentially an abortion -- removing one of the embryos in utero” to protect the implanted embryos’ “chance of resulting in a healthy pregnancy and delivery.”¹⁷¹

In anti-abortion states, there is a high likelihood that fetal personhood will soon be recognized if it is not already.¹⁷² As of May 2023, there is little clarity on whether anti-abortion state legislatures will impose restrictions on IVF or other ART processes as they have with abortion.¹⁷³ Nonetheless, hopeful couples across the United States have expressed their fear of the personhood status of fertilized embryos in the wake of *Dobbs* and the consequences of disposing of such genetic material.¹⁷⁴ Generally, there is increased concern over the legal repercussions that a couple may face for discarding their excess fertilized embryos.¹⁷⁵

VIII. CONCLUSION

After the decision in *Dobbs v. Jackson Women’s Health Org.*, there must be a mechanism available to prospective parents who wish to protect any excess fertilized embryos in cryogenic preservation after their death. With the growing uncertainty of how *Dobbs* will affect assisted reproductive technologies and fertility clinics across the United States,¹⁷⁶ biological contributors and hopeful parents should be able to safeguard their stored genetic material as other parents can safeguard their minor children through testamentary guardianship in the event of parental death. Several methods of assisted reproductive technology may be negatively impacted as a result of *Dobbs*, such as “the discardment of embryos...that are not implanted in a patient; preimplantation

genetic testing to determine the genetic health makeup of the embryo; and fetal reduction in cases of multiple pregnancies.”¹⁷⁷ As a result of the many ways in which *Dobbs* may now influence IVF, biological parents should be provided the ability to protect their fertilized embryos after their death via testamentary guardianship.

Specifically, in New Mexico and Louisiana, where parents are permitted to appoint guardians for minor children via will,¹⁷⁸ parents with frozen embryos in storage should be able to similarly appoint guardians for those embryos. As these two states are “parent-appointed” states, if testamentary guardianship appointments were permitted for cryopreserved embryos, it is probable that a deceased parent’s plan for their embryos would be respected, as it relates to guardianship appointment. Because fertilized embryos are considered “persons” in both New Mexico and Louisiana and both require the implantation of “unborn” embryos, it is entirely plausible that the state legislatures enact laws providing a testamentary appointment for embryos analogous to that for minor children.¹⁷⁹ Since these states recognize fertilized embryos as “persons,” enacting legislation for these “persons” is effectively the same as enacting legislation for minor children.¹⁸⁰ Therefore, testamentary guardianship must be made available to biological parents who wish to safeguard their excess embryos in cryopreservation banks in the event of their unexpected death.

¹ World Health Organization, *Infertility*, WORLD HEALTH ORGANIZATION (last visited June 29, 2023), https://www.who.int/health-topics/infertility#tab=tab_1.

² *Id.* Data also indicates that worldwide, “186 million individuals” struggle with infertility.

³ *Id.*; see also Centers for Disease Control and Prevention, *Infertility*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 1, 2022) <https://www.cdc.gov/reproductivehealth/infertility/index.htm>.

⁴ Centers for Disease Control and Prevention, *supra* note 3; see also World Health Organization, *supra* note 1 (“In the female reproductive system, infertility may be caused by a range of abnormalities of the ovaries, uterus, fallopian tubes, and the endocrine system, among others.”). Women in heterosexual couples struggling with infertility are often assumed to be the infertile partner. While this is a possibility, such an assumption is incorrect, as men may also contribute to a couple’s infertility.

⁵ See Centers for Disease Control and Prevention, *supra* note 3; see also World Health Organization, *supra* note 1 (“In the male reproductive system, infertility is most commonly caused by problems in the ejection of semen..., absence or low levels of sperm, or abnormal shape (morphology) and movement (motility) of the sperm.”).

⁶ See World Health Organization, *supra* note 1.

⁷ *Id.*; see also World Health Organization, *Air Pollution*, WORLD HEALTH ORGANIZATION (last visited June 29, 2023), https://www.who.int/health-topics/air-pollution#tab=tab_1. (“Pollutants of major public health concern include particulate matter, carbon monoxide, ozone, nitrogen dioxide, and sulfur dioxide.”).

⁸ Anne-Kristen Kuhnt & Jasmin Passet-Wittig, *Families formed through assisted reproductive technology: Causes, experiences, and consequences in an international context*, 14 REPROD. BIOMED. & SOC’Y ONLINE 289, 290 (2022); see also ROBERT E. OLIPHANT & NANCY VER STEEGH, *supra* note 8. The authors identify Louise Brown, who was born in 1978 in Oldham, England, as the first test tube baby.

⁹ N.Y. FAM. CT. ACT. LAW § 581-102 (McKinney 2022); see generally Mayo Clinic, *Intrauterine Insemination (IUI)*, MAYO CLINIC (last visited June 29, 2023) <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722#:~:text=Overview,more%20eggs%20to%20be%20fertilized>. Intrauterine or vaginal insemination is one form of ART wherein “sperm that have been washed and concentrated are placed directly in [the] uterus around the time [one’s] ovary releases one or more eggs to be fertilized.”; see also ReproductiveFacts.org, *Gamete and Embryo Donation: Deciding Whether to Tell*, THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE (Jan. 1, 2014) https://www.reproductivefacts.org/news-and-publications/fact-sheets-and-infographics/gamete-and-embryo-donation-deciding-whether-to-tell/?_t_id=53aVx_eiOgWvTMIEfuDGtw%3d%3d&_t_uuid=7_rHOYaySYGjxXtavJZCHA&_t_q=gamete&_t_tags=siteid%3adb69d13f-2074-446c-b7f0-d15628807d0c%2clanguage%3aen%2candquerymatch&_t_hit.id=ASRM_Models_Pages_ContentPage/_4f8614a1-2138-47ab-9d50-e0af3dd94c0f_en&_t_hit.pos=2. Donation of gametes or embryos involves “giving sperm, eggs, both, or embryos to another person/couple so that [they] may have a child.”; see generally Planned Parenthood, *What is IVF?*, PLANNED PARENTHOOD (last visited June 29, 2023) <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf>. In vitro fertilization and transfer of embryos refers to “a combination of medicines and surgical procedures to help sperm fertilize an egg, and help the fertilized egg implant in your uterus.”; see University of California San Francisco Health, *FAQ*:

Intracytoplasmic Sperm Injection, UNIVERSITY OF CALIFORNIA SAN FRANCISCO HEALTH (last visited June 29, 2023) <https://www.ucsfhealth.org/education/faq-intracytoplasmic-sperm-injection>. “Intracytoplasmic sperm injection, or ICSI, involves injecting a single live sperm directly into the center of a human egg.”

¹⁰ Deborah Kay Walther, “Ownership” of the Fertilized Ovum In Vitro, 26 FAM. L. Q. 235, 236 (1992); see also Mindy Christianson, M.D., *Freezing Embryos*, HOPKINS MEDICINE (last visited June 29, 2023) <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos#:~:text=Frozen%20embryos%20are%20stored%20and,10%20years%20and%20even%20longer> (describing vitrification, or the freezing of embryos, as replacing water within the embryos with a protectant fluid to be flash-frozen with liquid nitrogen for protective purposes.).

¹¹ See Beth Kowitt, “If you can move them, move them’: Fertility experts say the end of Roe raises huge questions about the fate of frozen embryos in red states, FORTUNE (June 24, 2022, 4:31 PM) <https://fortune.com/2022/06/24/roe-v-wade-abortion-ivf-embryos-red-states>; see also Gerard Letterie, *In re: the disposition of frozen embryos: 2022*, 117 STERILITY AND FERTILITY, 477, 479 (Mar. 2022) (“Estimates place the number of frozen embryos at greater than 1.5 million.”); see also Elaine S. Povich, *Abortion Bans May Add to Uncertainty Over Embryo Donation*, THE PEW CHARITABLE TRUSTS (June 10, 2022) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/10/abortion-bans-may-add-to-uncertainty-over-embryo-donation> (“About 400,000 embryos...have been frozen since the 1970s and stored in the United States, according to a 2003 RAND Corporation study.”). Statistics on the number of frozen embryos in the United States are largely estimate-based, as there appears to be no current uniform method to collecting this data. Though most figures are estimates, among scholars, it is believed that there are more than one million embryos in cryopreservation in the United States today.

¹² Hannah C. Catchings, *A “Modern Family” Issue: Recategorizing Embryos in the 21st Century*, 80 LA. L. REV. 1521, 1535 (2020).

¹³ Katherine R. Guzman, *Article: Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 198 (1997). Compare 42 U.S.C.A. § 1397j (West 2010) (defining guardianship as “the process by which a State court determines that an adult individual lacks capacity to make decisions about self-care or property, and appoints another individual or entity known as guardian...as a surrogate decisionmaker.”), with UNIF. PROB. CODE § 5-201 (UNIF. LAW COMM’N amended 2019) (defining guardianship “of a minor by parental appointment or upon appointment by the court” that “continues until terminated.”).

¹⁴ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (citing the J. of Am. Fertility Soc’y, Volume 53, number 6, June 1990 at 34S-35S).

¹⁵ See LA. CIV. CODE ANN. art. 24 (2022); N.M. STAT. ANN. § 24-9A-1(D) (2022).

¹⁶ See Catchings, *supra* note 12, at 1523 (“Several states, including Missouri, Washington, Oregon, and California [and New York] classify embryos as property.”); see also *Finkelstein v. Finkelstein*, 79 N.Y.S.3d 17 (N.Y. App. Div. 2018) (establishing that frozen embryos must be disposed of in accordance with written agreements created by parties to a divorce proceeding). In divorce proceedings, remaining embryos in cryopreservation are to be disposed of as indicated by both parties in a contractual agreement completed and signed before the IVF process begins. This is known as the “contractual” approach to the disposition of cryopreserved embryos in divorce cases.

¹⁷ *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994).

¹⁸ See *In re Marriage of Rooks*, 429 P.3d 579, 591 (Colo. 2018) (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992): “We conclude that pre-embryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect...”); see also *McQueen v. Gadberry*, 507 S.W.D.3d 127, 149 (Mo. Ct. App. 2016); see also *Davis*, 842 S.W.2d at 594 (“...the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.”).

¹⁹ *Guzman*, *supra* note 13, at 206.

²⁰ See *Comstock v. Comstock*, 771 S.E.2d 602, 610 (N.C. App. 2015) (“Marital property includes ‘all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties’”).

²¹ See *Washington v. Washington*, 770 N.W.2d 908, 913 (Mich. Ct. App. 2009) (“The goal behind dividing marital property is to reach an equitable distribution in light of all the circumstances”).

²² Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM) <https://time.com/6191886/fetal-personhood-laws-roe-abortion/>.

²³ See, e.g., ALA. CODE § 26-2A-71(a) (2022); ALASKA STAT. ANN. § 13.26.121 (West 2022); ARIZ. REV. STAT. ANN. § 14-5202 (2022); ARK. CODE ANN. § 28065-222(a)(1)(A-C) (West 2022); CAL. PROB. CODE § 1500(a) (West 2022); COLO. REV. STAT. ANN. § 15-14-202(1) (West 2022); CONN. GEN. STAT. ANN. § 45a-596 (West 2022); DEL. CODE ANN. tit. 12, § 3902(b) (West 2021-2022); D.C. CODE ANN. § 21-102 (West 2022); GA. CODE ANN. § 29-2-4(a) (West 2022); HAW. REV. STAT. ANN. § 560:5-202(a) (West 2022); IDAHO CODE ANN. § 15-5-202 (West 2022); 755 ILL. COMP. STAT. ANN. 5/11.5(a-1) (West 2022); KY. REV. STAT. ANN. § 387.040 (West 2022); ME. REV. STAT. ANN. tit. 18-C, § 5-202(1) (2022); MASS. GEN. LAWS ANN. ch. 190B, § 5-202(a) (West 2022); MICH. COMP. LAWS ANN. § 700.5202(1) (West 2022); MINN. STAT. ANN. § 524.5-202(a) (West 2022); MO. ANN. STAT. § 475.045(3) (West 2022); MONT. CODE ANN. § 72-5-211(1) (West 2021); NEB. REV. STAT. ANN. § 30-2606 (West 2022); N.H. REV. STAT. ANN. § 463:5(I) (2022); N.J. STAT. ANN. § 3B:12-13 (West 2022); N.Y. DOM. REL. LAW § 81 (McKinney 2022); N.C. GEN. STAT. ANN. § 35A-1225(a) (West 2022); N.D. CENT. CODE ANN. § 30.1-27-02 (West 2021); OHIO REV. CODE ANN. § 1337.28(A) (West 2021-2022); OKLA. STAT. ANN. tit. 30, § 2-102(A) (West 2022); 20 PA. STAT. AND CONS. STAT. § 2519(a) (West 2022); 33 R.I. GEN. LAWS ANN. § 33-15.1-7 (West 2022); S.D. CODIFIED LAWS § 29A-5-202 (2022); TENN. CODE ANN. § 34-2-103(2) (West 2022); TEX. EST. CODE ANN. § 1104.053(a) (West 2021); UTAH CODE ANN. § 75-5-202.5(1) (West 2022); VT. STAT. ANN. tit. 14, § 2656 (West 2022); VA. CODE ANN. § 64.2-1701(A) (West 2022); WASH. REV. CODE ANN. § 11.130.215(2)(a) (West 2022); W. VA. CODE ANN. § 44-10-1 (West 2022); WIS. STAT. ANN. § 54.15(6) (West 2022); WYO. STAT. ANN. § 3-2-107(c)(vi) (West 2022).

²⁴ Peter Mosany, II, *Comment: A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. L. 253, 255 (2002).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 256.

²⁸ *Id.*

²⁹ 42 U.S.C.A. § 263a-7 (1992).

³⁰ Centers for Disease Control and Prevention, *What Is ART*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 8, 2019) <https://www.cdc.gov/art/whatis.html>.; Yale Medicine, *Surrogacy*, YALE MEDICINE (last visited Nov. 14, 2022) <https://www.yalemedicine.org/conditions/gestational-surrogacy#:~:text=couple%20or%20individual-,Surrogate%20mothers%20are%20impregnated%20through%20the%20use%20of%20in%20vitro,father%20or%20a%20sperm%20donor> (stating surrogacy is “a process in which a woman carries and delivers a child for a couple or individual” following “the use of in vitro fertilization.”).

³¹ See World Health Organization, *supra* note 1.

³² Centers for Disease Control and Prevention, *State-Specific ART Surveillance*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Dec. 27, 2021) <https://www.cdc.gov/art/state-specific-surveillance/index.html>.

³³ *Id.*

³⁴ N.Y. FAM. CT. ACT. LAW § 581-102 (McKinney 2022).

³⁵ *Id.*

³⁶ See ROBERT E. OLIPHANT & NANCY VER STEEGH, *supra* note 8.

³⁷ *Id.*

³⁸ Alex K. Wu et al., *Time Costs of Fertility Care: The Hidden Hardship of Building a Family*, 99 FERTILITY AND STERILITY 2025 (Mar. 1, 2013) [https://www.fertstert.org/article/S0015-0282\(13\)00250-1/fulltext](https://www.fertstert.org/article/S0015-0282(13)00250-1/fulltext).

³⁹ The Fertility Institute of New Orleans, *IVF Costs, Fertility Pricing & Insurance*, THE FERTILITY INSTITUTE OF NEW ORLEANS (last visited June 29, 2023) <https://fertilityinstitute.com/patients/ivf-costs-insurance/#:~:text=Louisiana%20is%20not%20one%20of,insurance%20provider%20before%20beginning%20treatment> (“Louisiana is not one of the 15 states where laws mandate insurance coverage of assisted reproductive technologies such as IVF. This means that a person’s insurance plan will dictate fertility coverage...”).

⁴⁰ Cinnamon Cornell, *Special Report: A look inside the financial and emotional stress of IVF*, KPLC NEWS (Feb. 18, 2020) <https://www.kplctv.com/2020/02/19/special-report-look-inside-financial-emotional-stress-ivf/>.

⁴¹ LA. STAT. ANN. § 22:1036(b) (2023).

⁴² See Cornell, *supra* note 40.

⁴⁵ Emily Starbuck Crone, *IVF: How to pay for an expensive and emotional process*, USA TODAY (April 27, 2017, 7:06 AM) <https://www.usatoday.com/story/money/personalfinance/2017/04/27/ivf-how-pay-expensive-and-emotional-process/100961654/>.

⁴⁶ *Id.*

⁴⁷ See generally A Eugster & A.J.J.M. Vingerhoets, *Psychological aspects of in vitro fertilization: a review*, 48 SOC. SCI. AND MED. 575 (Mar. 1999) <https://www.sciencedirect.com/science/article/abs/pii/S0277953698003864?via%3Dihub>.

⁴⁸ Louisiana Pregnancy Risk Assessment Monitoring System, *Maternity Leave in Louisiana*, LOUISIANA PREGNANCY RISK ASSESSMENT MONITORING SYSTEM (Oct. 2015) <https://ldh.la.gov/assets/oph/Center-PHCH/Center->

PH/maternal/LouisianaPRAMS/PRAMS_Maternity_Leave_Fact_Sheet.pdf; *see also* Taxation & Revenue New Mexico, *Family Medical Leave Act (FMLA): What you need to know*, TAXATION & REVENUE NEW MEXICO (last visited Mar. 27, 2023) https://www.tax.newmexico.gov/wp-content/uploads/2020/11/What_You_Need_to_Know_About_FMLA.pdf.

⁴⁹ MRA, *Can FMLA Be Taken for Infertility?*, MRA (last visited June 29, 2023)

<https://www.mranet.org/resource/can-fmla-be-taken-infertility>.

⁵⁰ *Id.*

⁵¹ *See generally* Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

⁵² *See generally* A Eugster & A.J.J.M. Vingerhoets, *supra* note 47.

⁵³ World Health Organization, *supra* note 1.

⁵⁴ National Cancer Institute, *Definition of Embryo Cryopreservation*, NATIONAL CANCER INSTITUTE (last visited June 29, 2023) <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/embryo-cryopreservation>; *see* Catchings, *supra* note 12, at 1528; *see also* Christianson, M.D., *supra* note 10.

⁵⁵ *See* National Cancer Institute, *supra* note 54; *see also* Catchings, *supra* note 12, at 1528.

⁵⁶ J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001).

⁵⁷ *See* Catchings, *supra* note 12, at 1529; *see also* National Cancer Institute, *supra* note 54.

⁵⁸ Stouffer Legal: Estate Planning and Elder Law, *Frozen Embryos in Probate*, STUFFER LEGAL: ESTATE PLANNING AND ELDER LAW (July 28, 2021)

<https://www.stoufferlegal.com/blog/frozen-embryos-in-probate> (“With...the inevitability of dying, what to do with all of these embryos will require legal guidance.”).

⁵⁹ Davis, 842 S.W.2d at 594. Namely, the legal status of a frozen fertilized embryo created through in vitro fertilization is one of the largest ethical concerns to arise from the advanced assisted reproductive technologies.

⁶⁰ *Id.*

⁶¹ *Id.* at 597; *see also* Guzman, *supra* note 13, at 207.

⁶² *See* McQueen, 507 S.W.D.3d at 149.

⁶³ Jennifer Marigliano Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?*, 27 CONN. L. REV. 1377, 1384 (1995).

⁶⁴ *See* Guzman, *supra* note 13, at 198; *see also* Pierson v. Post, 3 Cai. R. 175 (N.Y. Gen. Term, 1805); *see also* Ghen v. Rich, 8 F. 159 (Mass. Dist. Ct. 1881). *Lay claim to*, CollinsDictionary.com, <https://www.collinsdictionary.com/us/dictionary/english/lay-claim-to> (last visited June 29, 2023).

⁶⁵ Guzman, *supra* note 13, at 206; *see also* *Ownership*, Legal Information Institute, <https://www.law.cornell.edu/wex/ownership#:~:text=Ownership%20is%20the%20legal%20right,such%20as%20intellectual%20property%20rights> (last visited June 29, 2023). Generally, “ownership is the legal right to use, possess, and give away” something. In Louisiana, ownership refers to “the right to possess, enjoy the use of, and to dispose of property.” *See* Muckelroy v. Muckelroy, 498 P.2d 1357 (N.M. 1972). Similarly, in New Mexico, ownership includes “every interest a person may have in a thing...including the right to enjoy, use, freely possess and transfer that interest.”

⁶⁶ *Donative intent*, Legal Information Institute, https://www.law.cornell.edu/wex/donative_intent (last visited June 29, 2023).

⁶⁷ *See* Guzman, *supra* note 206.

-
- ⁶⁸ *Conveyance*, Legal Information Institute, <https://www.law.cornell.edu/wex/conveyance#:~:text=A%20conveyance%20is%20the%20transfer,creates%20a%20lien%20on%20property> (last visited June 29, 2023).
- ⁶⁹ *Gift*, Legal Information Institute, <https://www.law.cornell.edu/wex/gift> (last visited June 29, 2023).
- ⁷⁰ *See generally In re Marriage of Dahl and Angle*, 194 P.3d 834, 839 (Or. Ct. App. 2008) (stating “the contractual right to possess or dispose of the frozen embryos is personal property...subject to a ‘just and proper’ division” under the applicable law).
- ⁷¹ Fidelity, *What is a will?*, FIDELITY, <https://www.fidelity.com/life-events/estate-planning/will> (last visited June 29, 2023).
- ⁷² Marisa G. Zizzi, *The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting a Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos*, 21 WIDENER L.J. 391, 397 (2012).
- ⁷³ *Bequest*, Legal Information Institute, <https://www.law.cornell.edu/wex/bequest> (last visited June 29, 2023).
- ⁷⁴ Guzman, *supra* note 13, at 206.
- ⁷⁵ Davis, 842 S.W.2d at 597 (citing the J. of Am. Fertility Soc’y, Volume 53, number 6, June 1990 at 34S-35S).
- ⁷⁶ LA. STAT. ANN. § 9:121 (2022).
- ⁷⁷ Davis, 842 S.W.2d at 597 (citing the J. of Am. Fertility Soc’y, Volume 53, number 6, June 1990 at 34S-35S).
- ⁷⁸ *Roe v. Wade*, 410 U.S. 113, 159 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228 (2022) (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer”).
- ⁷⁹ M. Cathleen Kaveny, *Dobbs and Fetal Personhood*, RELIGION AND POLITICS (July 19, 2022) <https://religionandpolitics.org/2022/07/19/dobbs-and-fetal-personhood/>.
- ⁸⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2331 n.7 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).
- ⁸¹ Guzman, *supra* note 13, at 205.
- ⁸² *Id.*
- ⁸³ Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 323 (2006).
- ⁸⁴ LA. STAT. ANN. § 9:121 (2022).
- ⁸⁵ LA. CIV. CODE ANN. art. 24 (2022).
- ⁸⁶ *See Catchings*, *supra* note 12, at 1525; *see also Katz*, *supra* note 83, at 323; LA. STAT. ANN. § 9:124 (2000). Cryopreserved embryos in Louisiana are permitted “to sue or be sued” within a medical facility.
- ⁸⁷ *See Katz*, *supra* note 83, at 323.
- ⁸⁸ LA. CIV. CODE ANN. art. 26 (2022).
- ⁸⁹ LA. CIV. CODE ANN. art. 26 cmt. (b) (2022).
- ⁹⁰ LA. CIV. CODE ANN. art. 24 (2022).
- ⁹¹ Art. 26 cmt. (b).

-
- ⁹² Centers for Disease Control and Prevention, *Assisted Reproductive Technology (ART) Data*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last visited June 29, 2023) https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&SubTopic=&State=LA&Zip=&Distance=50; LA. STAT. ANN. § 9:129 (2000).
- ⁹³ N.M. STAT. ANN. § 24-9A-1(D) (2022).
- ⁹⁴ *Id.*
- ⁹⁵ *Id.*
- ⁹⁶ Centers for Disease Control and Prevention, *supra* note 92.
- ⁹⁷ Brett R. Turner, § 5:10. *Property -- Interests which ordinarily do not constitute property*, 1 EQUIT. DISTRIB. OF PROP. (4th ed. Feb. 2023) (“The effect of the overruling [of *Roe*] on frozen embryo law remains uncertain. Some states are likely to now insist that frozen embryos are children, so that medical centers must retain them, cannot destroy them, and perhaps even must attempt to implant them.”).
- ⁹⁸ Lawrence H. Averill Jr. & Terri Lynn Helge, BLACK LETTER OUTLINE ON WILLS, TRUSTS, AND FUTURE INTERESTS 235 (West Acad. Pub. eds., 4th ed. 2013); Jean Gordon Carter & Elizabeth K. Arias, *What is a Will and Why Do I Need One?*, THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (last visited June 29, 2023) <https://www.actec.org/estate-planning/what-is-a-will-and-why-do-i-need-one/>.
- ⁹⁹ L.S. Tellier, Annotation, *Function, power, and discretion of court where there is testamentary appointment of guardian of minor*, 67 A.L.R.2d 803 § 3 (1959).
- ¹⁰⁰ *See, e.g.*, N.D. CENT. CODE § 14-09.3-01(3)(a-b) (2022); COLO. REV. STAT. § 14-13.7-102(3)(a-b) (2022); ALASKA STAT. § 13.26.066(j)(6) (2022); WIS. STAT. ANN. § 324.02(2)(a-b) (2021-2022); N.J. REV. STAT. § 43:10-18.1; N.C. GEN. STAT. § 35A-1370(9) (2022).
- ¹⁰¹ UNIF. PROB. CODE § 5-202(a) (amended 2019), 5 pt. 2 U.L.A. (1969).
- ¹⁰² L.S. Tellier, *supra* note 99 (“Under the early common law a man could not control or affect the guardianship of his children by will.”); *See Copp v. Copp*, 20 N.H. 284, 285-86 (N.H. 1850) (“The common law made various provisions for the tuition and protection of infants, and the care of their estates, but did not recognize the right of a parent to make any testamentary disposition of the guardianship of his children.”).
- ¹⁰³ Alyssa A. Dirusso & S. Kristen Peters, *Parental Testamentary Appointments of Guardians for Children*, 25 QUINNIPIAC PROB. L.J. 369, 372 (2012).
- ¹⁰⁴ Claire Zulkey, *Have You Named a Legal Guardian for Your Kids?*, The New York Times (Apr. 17, 2020, 6:28 PM) <https://www.nytimes.com/article/legal-guardian.html>.
- ¹⁰⁵ *Id.*
- ¹⁰⁶ L.S. Tellier, *supra* note 99.
- ¹⁰⁷ Dirusso & Peters, *supra* note 103 at 371-72.
- ¹⁰⁸ *Id.* at 372.
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Id.* at 370-71.
- ¹¹¹ UNIF. PROBATE CODE § 5-202(a) (2010); UNIF. PROBATE CODE § 5-202(c) (2010).
- ¹¹² § 5-202(a) (2010); *see also* UNIF. PROBATE CODE § 5-202 cmt. (2010).
- ¹²⁴ Succession of Wetmore, 422 So. 2d 726, 728 (La. Ct. App. 1982).
- ¹²⁵ LA. STAT. ANN. § 11:1301(5) (2022).
- ¹²⁶ *In re Tutorship of Watts*, 681 So. 2d 74, 76 (La. Ct. App.1996); LA. CIV. CODE ANN. art. 250 (2022).

¹²⁷ LA. CIV. CODE ANN. art. 257 (2022).

¹²⁸ *Id.*

¹²⁹ *In re Labarre*, 5 Rob. 268, 269 (La. 1843); *see* LA. CIV. CODE ANN. art. 263 (2022).

¹³⁰ *See In re Mossy*, 3 Rob. 390, 393 (La. 1843); *Labarre*, 5 Rob. at 269; LA. CIV. CODE ANN. art. 270 (2022).

¹³¹ *Wetmore*, 422 So. 2d at 728.

¹³² LA. CIV. CODE ANN. art. 4062 (2022).

¹³³ LA. CIV. CODE ANN. art. 263 (2022).

¹³⁴ LA. CIV. CODE ANN. art. 29 (2022).

¹³⁵ *Bordelon v. Capers*, 189 So. 615, 618 (La. Ct. App. 1939)(citing *Parker v. Ohio Oil Company*, 186 So. 604, 607 (1939)).

¹³⁶ *Id.*

¹³⁷ *Dirusso & Peters*, *supra* note 103, at 378.

¹³⁸ *Id.* at 369.

¹³⁹ *Id.* at 378.

¹⁴⁰ *Adoption of Michelle T.*, 117 Cal. Rptr. 856, 858 (Cal. Ct. App. 1975) (“The ‘best interest of the child’ is an elusive guideline that belies rigid definition. Its purpose is to maximize a child’s opportunity to develop into a stable, well-adjusted adult.”).

¹⁴¹ *Best interests of the child*, Legal Information Institute, https://www.law.cornell.edu/wex/best_interests_of_the_child (last visited June 29, 2023).

¹⁴² *Id.*

¹⁴³ Child Welfare Information Gateway, *Determining the best interests of the child*, U.S. DEP’T OF HEALTH AND HUM. SERV., ADMIN. FOR CHILD. AND FAM., CHILDREN’S BUREAU (2020) https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

¹⁴⁵ *Id.*

¹⁴⁶ *See* LA. CIV. CODE ANN. art. 134 (2022) (“(1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration. (2) The love, affection, and other emotional ties between each party and the child. (3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child. (4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. (5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment. (6) The permanence, as a family unit, of the existing or proposed custodial home or homes. (7) The moral fitness of each party, insofar as it affects the welfare of the child. (8) The history of substance abuse, violence, or criminal activity of any party. (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody. (10) The home, school, and community history of the child. (11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. (12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party. (13) The distance between the respective residences of the parties. (14) The responsibility for the care and rearing of the child previously exercised by each party.”).

¹⁴⁷ *Id.*

¹⁴⁸ N.M. STAT. ANN. § 40-4-9 (2022); LA. CIV. CODE ANN. art. 134 (2022).

¹⁴⁹ Dirusso & Peters, *supra* note 103 at 378.

¹⁵⁰ Dobbs, 142 S.Ct. 2228 (2022).

¹⁵¹ See LA. CIV. CODE ANN. art. 24 (2022); N.M. STAT. ANN. § 24-9A-1(D) (2022); see generally Letterie, *supra* note 11 (“Although the practice of ART seems at first glance to be at a distance from the abortion debate, the companion issues of conferring personhood to an embryo and defining when life begins could ensnare the status of frozen embryos and who gets to decide their disposition.”).

¹⁵² The University of New Mexico Health, *Considering IVF? Try These Lower-cost Infertility Treatments First*, THE UNIVERSITY OF NEW MEXICO HEALTH (Nov. 12, 2020) <https://unmhealth.org/stories/2020/11/low-cost-infertility-treatments.html>. (“The process [of IVF] takes about four weeks and can cost between \$10,000 and \$15,000.”); see also Gina Kolata, ‘Sobering’ Study Shows Challenges of Egg Freezing, THE NEW YORK TIMES (Sept. 23, 2022) <https://www.nytimes.com/2022/09/23/health/egg-freezing-age-pregnancy.html> (“Before choosing to freeze their eggs, women also must be prepared for substantial costs. Each egg retrieval cycle can cost \$10,000... It costs another \$5,000 to \$7,000 to thaw and fertilize the eggs, grow embryos in the lab for a few days, then transfer them to the woman’s uterus. Many women...have the embryos tested for chromosomal anomalies. That costs another \$3,000. And storage of frozen eggs can cost up to \$1,000 per year.”).

¹⁵³ See The University of New Mexico Health, *supra* note 152.

¹⁵⁴ Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Mar. 7, 2023, 11:47 AM) <https://www.forbes.com/health/family/how-much-does-ivf-cost/> (discussing costs of embryo cryopreservation and embryo storage).

¹⁵⁵ Evie Jeang, *Fighting Over Custody of Frozen Embryos*, FAMILY LAWYER MAGAZINE (Dec. 17, 2019) <https://familylawyermagazine.com/articles/fighting-over-custody-of-frozen-embryos/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Labarre, 5 Rob. at 269; LA. CIV. CODE ANN. art. 263 (2022).

¹⁵⁹ See LA. CIV. CODE ANN. art. 296 (2022); LA. CIV. CODE ANN. art. 297 (2022); LA. CIV. CODE ANN. art. 298 (2022); LA. CIV. CODE ANN. art. 292 (2022).

¹⁶⁰ LA. STAT. ANN. § 9:124 (2022). N.M. STAT. ANN. § 24-9A-1(D) (2022).

¹⁶¹ LA. CIV. CODE ANN. art. 29 (2022). N.M. STAT. ANN. § 10-12B-2 (2022).

¹⁶² N.M. STAT. ANN. § 24-9A-1(D) (2022).

¹⁶³ *Kass v. Kass*, 696 N.E.2d 174, at 176 (N.Y. 1998) (asserting that frozen embryos may be stored “indefinitely in liquid nitrogen for later use.”).

¹⁶⁴ LA. STAT. ANN. § 9:124 (2022); see also N.M. STAT. ANN. § 24-9A-1(D) (2022).

¹⁶⁵ LA. CIV. CODE ANN. art. 29 (2022); see also N.M. STAT. ANN. § 10-12B-2 (2022).

¹⁶⁶ NYU Law News, *A Q&A with Melissa Murray on the Dobbs decision’s impact on assisted reproductive technology*, NYU LAW (Sept. 27, 2022) <https://www.law.nyu.edu/news/-melissa-murray-supreme-court-IVF-dobbs>.

¹⁶⁷ Dobbs, 142 S.Ct. at 2300 (Thomas, J., concurring); see also NYU Law News, *supra* note 166.

¹⁶⁸ NYU Law News, *supra* note 166; see also The Washington Post, *Roe is gone. How will state abortion restrictions affect IVF and more?*, THE WASHINGTON POST, (June 25, 2022, 6:00 AM) <https://www.washingtonpost.com/politics/2022/06/25/dobbs-roe-ivf-infertility-embryos-egg-donation/>. (“In addition to ending abortion access for many, the *Dobbs* ruling may have far-

reaching impacts on building families with its impact going beyond its most obvious implications....particularly, infertility care.”).

¹⁶⁹ See NYU Law News, *supra* note 166.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² I. Glenn Cohen et al., *What the Supreme Court’s abortion reversal means for in vitro fertilization*, BOSTON GLOBE (June 30, 2022, 3:15 AM)

<https://www.bostonglobe.com/2022/06/30/opinion/what-supreme-courts-abortion-reversal-means-vitro-fertilization/>.

¹⁷³ See generally Judith Darr, *The Impact of Dobbs on Assisted Reproductive Technologies: Does it Matter Where Life Begins?*, HARVARD LAW (May 9, 2023)

<https://blog.petrieflom.law.harvard.edu/2023/05/09/the-impact-of-dobbs-on-assisted-reproductive-technologies-does-it-matter-where-life-begins/>.

¹⁷⁴ Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.*, N.Y.

TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html?smid=nytcore-ios-share> (“Will doctors still be allowed to conduct genetic testing on embryos for chromosomal anomalies or diseases like Tay-Sachs, Huntington’s and sickle cell, to help determine which to implant? Will patients...be precluded from discarding unneeded embryos, and instead urged to donate them for adoption or compelled to store them in perpetuity? If embryos don’t survive being thawed for implantation, could clinics face criminal penalties? In short many fear that regulations on unwanted pregnancies could, unintentionally or not, also control people who long for pregnancy.”); see also NYU Law News, *supra* note 166.

¹⁷⁵ See Hoffman, *supra* note 174 (“Since the ruling [of *Dobbs v. Jackson Women’s Health Org.*] fertility clinics have been pounded with frantic calls from patients asking if they should or even legally could, transfer frozen embryos to states with guaranteed abortion rights.”).

¹⁷⁶ See generally Letterie, *supra* note 11, at 478 (“We may transition from a black-and-white national framework that assures the full panoply of reproductive options for all into a grayscale patchwork of varying laws at local levels. These possibilities bring added pressure to resolve two additional clinical trends: the expanding numbers of frozen embryos and much needed safe guards for their short-and long-term storage. These issues should not be confused with the debates focused on the timing and legality of ending (or, in some cases, preventing) a pregnancy but rather the impact that these changes could have on the management of frozen embryos, options open to our patients, and implications regarding liabilities they could pose.”).

¹⁷⁷ Abigail Tracy, “*This is the whole point of the movement*”: *Doctors fear IVF will be the next target in GOP’s abortion crusade*, VANITY FAIR (Sept. 28, 2022)

<https://www.vanityfair.com/news/2022/09/doctors-ivf-abortion-bans>.

¹⁷⁸ See N.M. STAT. ANN. § 45-5-202 (West 2022); Wetmore, 422 So. 2d at 728.

¹⁷⁹ LA. CIV. CODE ANN. art. 26 (2022); N.M. STAT. ANN. § 24-9A-1(D) (2022); see also La. Stat. Ann. § 130 (2022).

¹⁸⁰ LA. CIV. CODE ANN. art. 26 (2022); N.M. STAT. ANN. § 24-9A-1(D) (2022).