

Cryopreserved Pre-Embryos: An Exordium to the Person or Property Discourse in Indian Legal Context

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Abstract

Scientific advancements in reproductive technology allow couples to combat problems with conception through various alternatives in assisted reproduction. However, with the advancement of science and technology, particularly in assisted reproductive technologies (ART) and the infertility business, several specific questions are posed, largely overshadowed by legal and ethical dilemmas. From the Indian legal context, this paper attempts to address the recent legal question of whether a cryopreserved pre-embryo is to be considered a person or a property. Exploring the status of a cryopreserved pre-embryo, the paper delves into a debate of whether the cryopreserved pre-embryo is to be treated as a person, thereby applying family law principles; or as property by applying property law jurisprudence while determining the pre-embryo ownership, particularly in a situation where the partners involved in the creation of the pre-embryo intend to dissolve their marriage. The present research does not attempt to resolve the controversies; instead, it analyzes the extent of legal recognition given to a pre-life form across various legislations in India. By perusing different judicial approaches, such as the right to life position, the property approach, and the special respect position that have been elucidated in several foreign judgements dealing with this issue, an effort has been made to highlight the legal dilemmas in this area. In conclusion, the paper suggests strict regulations to prohibit the commercialization of embryos because of public welfare concerns stemming from cryopreservation, and advances the argument in favour of the special respect position of cryopreserved embryo acknowledging the personhood analysis.

Keywords: *Assisted Reproductive Technology (ART), Indian Legislative Framework, Judicial Approach*

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I. Introduction

The term “property” connotes the idea of interest over something or everything recognized and protected by law.³This definition appears to be insufficient in these modern times with the progress of highly advanced technology posing a myriad of legal questions to the existing legal frameworks, including property jurisprudence, which lacks the ambit to address such unforeseen matters.⁴ While addressing the danger of a legal system failing to address such legal questions, Justice Michael Kirby observed: *"It is for our society to decide whether there is an alternative or whether the dilemmas posed by modern science and technology, particularly in the field of bioethics, are just too painful, technical, complicated, sensitive and controversial for our institutions of government."*⁵ Among the various developments that we have seen, the infant of assisted reproductive technology, more particularly the "infertility business"⁶ has in the last few decades, raised numerous disquiets having both medico-legal and ethical dimensions.⁷ In this present research, the authors focus on the relatively modern technology of cryogenic preservation of embryos mainly because the focus of the technology lies in creating new life. By its very nature, the issue of cryopreserved embryos represents numerous moral and ethical implications

³This recognized and protected interest is known as right. Therefore, proprietary right means the legally recognized and protected interest over anything and everything (movable or immovable, tangible or intangible), over which a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'right, so to carry out his wishes. See, Thomas Erskine Holland, THE ELEMENTS OF JURISPRUDENCE 70 (The Lawbook Exchange, Ltd., New Jersey, 2006).

⁴ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 691-732 (1938).

⁵Keenan, *Science and the Law - Lessons from the Experience of Legislating for the New Reproductive Technology*, 59 AUSTRALIAN L.J. 488, 489 (Aug. 1985).

⁶ The global [In Vitro Fertilization \(IVF\) Market](https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20(GLOBE%20NEWSWIRE),in%20males%20thann%20female%20partners) size is prophesized to reach USD 36.39 billion by 2026, with a CAGR 10.1% by 2026, (last visited on June 17, 2020), [https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20\(GLOBE%20NEWSWIRE\),in%20males%20thann%20female%20partners](https://www.globenewswire.com/news-release/2020/02/20/1987683/0/en/In-Vitro-Fertilization-Market-will-Reach-USD-36-39-Billion-by-2026-Increasing-Cases-of-Infertility-Among-Men-to-Positively-Influence-Growth-says-Fortune-Business-Insights.html#:~:text=20%2C%202020%20(GLOBE%20NEWSWIRE),in%20males%20thann%20female%20partners).

⁷ Sufiya Ahmed, *Embryo Freezing and Donation: Ethical-Legal Issues*, 137 Summer Issue, ILI LAW REVIEW (2018).

embroiled in great controversy.⁸ The focus of this paper is not on critiquing the technology but analyzing a unique legal problem that has arisen in contemporary times with the use of in-vitro fertilization (IVF)⁹, one of the more widely known types of assisted reproductive technology (ART). Recently, courts face the question of what should become of a cryopreserved embryo when the couple who initiated the process decides to dissolve their marriage.¹⁰ In 2018, the Court in Ontario, Canada, while dealing with a case related to a cryopreserved embryo, recognized the embryo as property. The Court also asked the wife who wished to retain the cryopreserved embryos to **reimburse** her ex-husband with his share of the **cost incurred for the embryo's cryogenic preservation**.¹¹ Various other cases addressing the issue of ownership of cryopreserved embryos have shown that this is an issue that falls in the intersection of property law, family law, contract law, and principles of equity. Because of significant development in property jurisprudence, the authors attempt to answer whether a cryopreserved embryo should be considered a person or property.¹²

II. The Science of an Embryo¹³

The question of whether an embryo is a property or a person invites an understanding of the science behind the creation of a cryopreserved embryo

⁸ *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998), the Court dealt with the mind-numbing ethical and legal questions related to reproductive science.

⁹ Many scholars describe the IVF procedure as a "miracle of modern science". For example, see Andrea Michelle Siegel, Comment, *Legal Resolution to the Frozen Embryo Dilemma*, 4 OHIO N.U. J. PHARMACY & L. 43 (1994).

¹⁰ See, e.g., *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

¹¹ NATIONAL POST, *Judge allows Ontario woman to use frozen embryo despite ex-husband's objection in 'acrimonious' divorce*, (last visited on June 18, 2020), <https://nationalpost.com/news/canada/judge-allows-ontario-woman-to-use-frozen-embryo-despite-ex-husbands-objection-in-acrimonious-divorce>.

¹² About the legal status of a prelife form, see John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990)

¹³ Analysis of the individual steps of the IVF procedure can be found in Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 HIGH TECH. L.J. 257, 265 (1990).

through an IVF procedure.¹⁴ Although both moral and legal questions persist, the fertility experts have successfully created human embryos outside of the human body through IVF techniques, contributing to the worldwide growth of the "infertility business."¹⁵ The IVF process is initiated by first stimulating a woman's ovaries so that the ovaries release multiple eggs beyond the usual one egg per month produced naturally, thereby increasing the chances of successful fertilization later on. This is done by injecting follicle-stimulating hormones into the woman's ovaries, thereby stimulating the ovarian follicles to produce more eggs. These eggs are removed via a surgical process such as laparoscopy or by ultrasound-directed needle aspiration. The extracted eggs are then placed in a petri dish, where the sperm cell collected from the male partner is inseminated into the egg for fertilization.¹⁶ After a span of a few days, these fertilized eggs reach a particular stage of development, though still unicellular (also known as pre-embryo), and at this stage, which is also known as the morula stage, the eggs are frozen in liquid nitrogen for preservation and storage. This process is known as cryopreservation, and these frozen fertilized eggs are called cryopreserved pre-embryos. The fertilized egg is known as a pre-embryo at this stage as it lacks any form of cellular differentiation.¹⁷

In the course of a normal, natural pregnancy, this pre-embryo would multiply to become multi-cellular and subsequently implant itself on the uterine walls. At this point, it becomes an embryo, and after another eight weeks of development, it becomes a foetus. A foetus is of two types; viable and non-viable. A viable foetus can potentially live outside the mother's womb, albeit with artificial aid,

¹⁴ In-vitro fertilization (IVF), also known as gestational surrogacy or "Host Uterus," is a procedure that creates an embryo in a laboratory environment for subsequent transfer to a gestational surrogate for carriage. CHRISTINE L. KERIAN, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113 (1997).

¹⁵ For a comprehensive understanding on the issues related to this- SHIRLEY DARBY HOWELL, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DePaul J. Health Care L. 407-440 (2013).

¹⁶ JANETTE M. PUSKAR, *Prenatal Adoption: The Vatican's Proposal to the In Vitro Fertilization Disposition Dilemma*, 14 N.Y.L. SCH. J. HUM. RTS. 757-763 (1998).

¹⁷ HAUT, MARK C., *Divorce and the Disposition of Frozen Embryos*, 28(2) Hofstra Law Review (1999).

whereas a non-viable foetus cannot survive even with aid.¹⁸ Though colloquially, a successfully fertilized egg is referred to as an embryo, the authors in this paper specifically discuss the pre-embryo stage at which the fertilized egg is frozen.¹⁹ The basic understanding of these various distinctions is essential to analyse better the extent to which existing legal frameworks deal with pre-life entities.

III. Recognition of Pre-Life and Existing Legislative Framework

The legal implication to these different stages of development of a pre-life entity, more specifically, the creation of a cryopreserved embryo through an IVF procedure, has remained a contentious issue in legal literature.²⁰ The question about the status of an “unborn child” has been debated since the time of Aristotle²¹; however, the clarification on this now has become a necessity.²² In 1986, the State of Louisiana passed a statute that recognized embryos as being

¹⁸ Michelle F. Sublet, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38(4) Clev. St. L. Rev. 585-616 (1990).

¹⁹ For a comprehensive analysis about the stages of embryonic development, see Clifford Grobstein, “The Early Development of Human Embryos” 10(3) *J. MED. & PHIL.* 213-236 (1985).

²⁰ There are numerous critical and scholarly works dealing with the debate of embryos’ legal status as to property or persons. For example, see Patricia A. Martin & Martin L. Lagod, *The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights, and Research Policy*, 5 *HIGH TECH. L.J.* 257 (1990); David A. Rameden, Note, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward*, 62 *UMKC L. REV.* 377 (1993); Lori B. Andrews, *The Legal Status of the Embryo*, 32 *LOY. L. REV.* 357 (1986); Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 *U.C. DAVIS L. REV.* 193 (1997).

²¹ Recently during the bail hearing at the Delhi high court for Jamia Millia Islamia student Safoora Zargar, presiding judge Rajiv Shakhdher had asked for the legal regime on the rights of an unborn child. For a discussion on Indian domestic law recognises the personhood of an unborn child, [THE WIRE STAFF](#), “In Considering Bail for a Pregnant Woman, the Personhood of Her Fetus Has to Be a Factor”, (last visited on September 20, 2020), <https://thewire.in/law/in-considering-bail-for-a-pregnant-woman-the-personhood-of-her-fetus-has-to-be-a-factor> .

²² US NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH, “Determining the status of non-transferred embryos in Ireland: a conspectus of case law and implications for clinical IVF practice”, (last visited on July 7, 2020) , <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2714322/>.

"persons".²³ Contrary to that, the Indian legislative framework lacks such distinct clarity. In the Indian context, one might observe that across various areas of law, numerous references are made concerning an unborn child, though there is no definition for the term.²⁴ A few examples are taken for discussion within the scope of this paper from the Transfer of Property Act, the Indian Penal Code, the law of Torts, and the Medical Termination of Pregnancy Act.

A. Transfer of Property Act

Section 13 of the Transfer of Property Act deals with the transfer of property for the benefit of an unborn child. While the Act does not define the term "unborn child", it is commonly understood under this Act that an unborn child not only refers to a foetus in a woman's womb, but can also refer to a non-existent person who may eventually be conceived and given birth to in the future.²⁵ Section 5 of

²³ Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50(3) AJCL 633-646 (2002).

²⁴ The "rights of unborn child", as defined in Black's Law Dictionary makes it clear that the rights of an unborn child are recognised differently in various different legal contexts. For *e.g.* in *Jabbar And Ors. vs State*, 1966 CriLJ 1363, Justice M. H. Beg while upholding the conviction of the appellant under Section 304A of the Indian Penal Code, dealt with the meaning of the child in mother's womb held:

"As he then was an unborn child can be regarded as a living entity with a life of its own. The word "person" is defined in the Shorter Oxford English Dictionary in two ways: firstly, it is defined as "an individual human being" or "a man, woman, or child"; and, secondly, as "the living body of a human being". I do not think that it can be denied that an unborn child in advanced stages of pregnancy has a being or life of its own and that it has a body. It may be that its life and body are not independent of the mother's existence so that the unborn child cannot be said to have a separate exist-once. The word "person" has not been defined in such a way as to involve a separate existence or the living creature spoken of as "a person". As there is no such technical definition, I prefer to adopt the ordinary meaning of the term "person" as including a "child" whether born or unborn. Even if the child is unborn and within the womb of the mother, it is capable of being spoken of as a "person" if its body is developed sufficiently to make it possible to call it a "child". The post mortem report shows that the child had developed sufficiently to have an identity of its own as a child? That would, in my opinion, be enough to satisfy the definition of the term "person" as used in Section 304a, I.P.C."

²⁵ In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth". *Quoted in State of Andhra Pradesh v. Malladi Rama Subbaiah*, Civil Revision Petition Appeal No. 1578 Of 7976.

the Act lays down that the transfer of property can only happen between one or more living persons, wherein the term "living person" has been said to include a company, association or body of individuals etc. By a joint reading of the sections along with the adoption of the harmonious construction of the two provisions, it becomes evident that a property may not be transferred directly to an unborn child. Section 13 necessitates the transfer of a prior interest to another party until the unborn child takes worldly birth. This legal arrangement to transfer property for the interest of the unborn person clearly indicates the intention not to recognise the unborn children as legal person having rights and duties in itself. However, they can be conferred with successive interest, only through a living person. According to Salmond, "*There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is nonetheless a real and present ownership.*"²⁶ The Supreme Court in *Raj Bajrang Bahadur Singh v. Bakhtraj Kuer*²⁷, reaffirmed this position and observed that "*It is quite true that no interest could be created in favor of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest.*"²⁸ Section 14 further provides that the unborn person, in whose favor the interest is created, must have come into existence on or before the expiry of the life or lives of the person in whose favor the prior interest is created as required under Section 13. Therefore, Section 13 works in tandem with Section 5 in that a transfer can only validly take place between living persons. If it is the case of a non-living entity like an unborn child, a living person will have to hold prior interest until such a child is born for such transfer to be valid. From the viewpoint of property law, we see that a pre-life entity is not given the same recognition as a living person. Thus, an embryo does not share the same legal personality as a living individual for the purpose of property law.

²⁶ P. J. FITZGERALD, SALMOND ON JURISPRUDENCE, 354-355(2nd ed., Sweet & Maxwell, 1966).

²⁷ AIR 1953 SC 7.

²⁸ *Ibid.*

B. Indian Penal Code

This differential treatment in the value given to a living individual as opposed to a pre-life form also exists in the Indian Penal Code. Section 312 of the IPC lays down punishment for voluntarily causing a miscarriage, other than for the purpose of saving the life of the mother.²⁹ Under this provision, depending on the extent of the foetus' development, the punishment prescribed ranges from a fine to an imprisonment of three years or even up to seven years, if the woman is quick with the child. The phrase "quick with the child" refers to a foetus in the 15th to 20th week of its development (varying from woman to woman), wherein the mother is able to feel the motion of the foetus in her womb.³⁰ Now, to compare this with Section 299 of the IPC, which deals with culpable homicide amounting to murder, the punishment prescribed for it under Section 302 is a sentence of life imprisonment or death and is also liable to a fine. When comparing Sections 299 and 312, it is evident that there is a common thread of voluntary death being caused in both instances. However, the vast difference in punishments meted out can be reasonably attributed to the lives involved. In the former case, it is the death of any living individual that incurs liability, while in the latter, a miscarriage involves causing the death of a pre-life form. Even in that, a distinction has been made between a miscarriage caused to a woman and a woman who is quick with a child, that is, a woman carrying a more developed foetus. Therefore, it is interesting to note that there is no bar on the age of the deceased victim under Section 299, and punishment under Section 302 is equally applicable to all deaths caused to a living person. While, under Section 312, firstly, a lower punishment is meted out for the same consequence, that is death caused intentionally, and secondly, a differential punishment has been provided in accordance to what the law perceives to be a higher or lesser form of life, even between pre-life forms. It is, therefore, reasonable to observe that in the eyes of the Indian Penal Code, there is a hierarchy in the value attached to the different stages of life.³¹ There are no variations in the punishments given for any

²⁹ K.D. Gaur, *Abortion And The Law In India*, 28(3) JILI 348-363 (1986).

³⁰ Sidhanth Mor and Mahima Chowdhary, *Comparative Analysis of Right to Privacy of Woman v. Right to live of the Unborn Child*, (last visited on August 8, 2020), <https://www.latestlaws.com/articles/comparative-analysis-of-right-to-privacy-of-woman-v-right-to-live-of-the-unborn-child/>.

³¹ *Prakash v. Arun Kumar Saini*, (2010) 167 DLT 311.

intentional death caused to a living person, and the age of the victim does not in any way mitigate or aggravate the punishment given. However, in the case of intentional miscarriages, which are also a crime involving the causing of intentional death, a substantially different stance is adopted. Pre-life forms are given lesser value than a living person, and even within pre-life forms, a highvalue is assigned to the life of a foetus that is more developed.³² From this, it can be concluded that the legal status of an embryo is definitely not equivalent to that of a living person, though, it could be considered as being acknowledged as a form of life.³³

C. Law of Torts

In the olden times, with the lack of advanced technology, it was nearly impossible to determine whether a foetus was living or had died due to the perpetrator's misconduct. This largely contributed to the fact that pre-natal tortious injuries could not be recognized as a civil wrong. However, with the progress of innovative technology, it has become possible to point out the cause of death of a foetus with almost utmost certainty. Consequently, cases of wrongful death, wrongful birth etc. are areas in which tort law has been newly emerging. Courts have been faced with several issues that had been unusual so far. For example, the right of action by an unborn against his mother for her failure to provide a healthy womb – such as when the mother does not abstain from activities such as alcohol and drug consumption during her pregnancy, thereby causing grave detriment to the welfare of the growing child; and the right of action against the mother for an attempt to self-abort, resulting in a disability of the child.

D. Medical Termination of Pregnancy Act

Abortions are legally allowed up till twenty weeks of pregnancy under the Medical Termination of Pregnancy Act. Moreover, certain conditions need to be

³² In *Oriental Insurance Co. Ltd. v. Santhilal Patal*, (2007) 4 ALD 855, the Court while dealing with the question whether a child in the womb of the mother can be called as a person, held that "it is pertinent to discuss different stages of birth of a child in the womb of a mother". In the opinion of the Court an unborn child aged five months onwards in the mother's womb till its birth can be treated as equal to a child in existence, and the unborn child of a woman in her seventh month of pregnancy shall be regarded as life.

³³ *Ibid.*

fulfilled for a legal abortion to take place. Of the four conditions, three of them are focused on the consequences to the mother's health and the personal choice of the mother, while one condition alone allows for abortion in case of the foetus having any severe abnormality.³⁴ It may therefore be reasonably deduced that in the case of an abortion, the embryo's right to life is placed only second to the concerns of the living person, that is, the mother bearing the child. We see that the mother's choice and health are given greater importance.³⁵ Similar to the previous observations, we once again see that a greater value is attached to the life of the existing living individual as opposed to a pre-life form. It may be observed that under this law too, "a doctor can lawfully, by statute do to a foetus what he cannot lawfully do to a person who has been born."³⁶ A reference to the abovementioned legislation helps one to arrive at the conclusion that the present legal framework certainly does not place a pre-life form such as an embryo at an equal pedestal to that of a living person. What may be derived is that there are traces of recognition of a pre-life form as a form of life or rather an animate object,³⁷ though that is all the status that is given. Hence, an embryo is certainly not treated as equivalent to a living person in the eyes of the law MTP legislative framework as well.

IV. Commodification³⁸ of Embryos

³⁴ Saurabhk9431, *A Critical Analysis on the Abortion Laws in India*, (last visited on August 16, 2020), <https://blog.ipleaders.in/critiquing-indias-abortion-laws/>.

³⁵ While dealing with the women's right to abortion it has been observed that, the Court's obligation is not to mandate a moral code regarding abortion, but to examine the constitutional issue regarding whether a state can regulate a woman's decision to have an abortion. See, *Planned Parenthood v. Casey*, 505 U.S. 833, 850-51 (1992).

³⁶ *McKay v. Essex Area Health Authority* [1982] 2 AER 771 at 781.

³⁷ Some authors concluded that embryos are not legal subjects sui iuris as well as they are not legal objects. The embryos are the product of biological process and the bio-ethical nature of parent-child relationship makes the embryos the 'legal subjectivity' of their parents. For e.g. Robbie Robinson, *The Legal Nature of the Embryo: Legal Subject or Legal Object*, 21 *Potchefstroom Elec. L.J.* 26 (2018).

³⁸ The term 'commodification' means to turn something into a commodity. From economic point of view, the concept describes the assignment of economic value to a thing which previously has not been assessed in economic terms., Hitesh Bhasin, "What is Commodification – Its advantages and disadvantages", (last visited on July 22, 2020), <http://www.marketing91.com/commodification-advantages-and-disadvantages/>.

A critical analysis of legal and political trends in recent years shows that the commodification of eggs and embryos is gaining the status of a principal question to be decided in contemporary embryo-disposition suits and "infertility business" in almost every jurisdiction in some forms or other.³⁹ Apart from the differential treatment of pre-embryos and foetuses under the law as discussed above, wherein pre-life forms are not seen as an equal counterpart of a living individual, there are some laws that surely perpetuate this attitude. In other words, we may seek and refer to the instances wherein embryos are allowed to be dealt with in the manner of a commodity rather than a child or a person. For instance, it is a fact that the donation and sale of eggs from willing women is entirely legal.⁴⁰ If we took the stance of an egg/embryo of being a person in itself, the sale and commodification of an egg/embryo in this manner would undoubtedly amount to slavery, which is illegal. Such transactions are justified only due to the unsaid legal stance that a pre-life form is not a person.⁴¹ Moreover, most IVF procedures are governed by a contract, willingly entered into by the parties, which lays down terms regarding what is to be done with an embryo in case of dissolution of a marriage. The Courts have placed contractual obligations as the first point on the hierarchy of considerations while determining to whom the embryos should be handed over to, in the disputes concerning the ownership of embryos.⁴²

In the English case of *Kass v Kass*⁴³, the Kass couple had undergone an IVF procedure in 1993, before which the couple had signed several consent agreements, making their own informed choices. In these agreements which they signed, it was stated that neither Mr Kass nor Mrs Kass will have a claim

³⁹ Browne, Colleen M. and Hynes, Brian J., *Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, *The Note*, 17(1) J. Legis. 97 (1991).

⁴⁰ US NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTE OF HEALTH, "Indian egg donors' characteristics, motivations and feelings towards the recipient and resultant child", (last visited on May 18, 2020) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5341288/>.

⁴¹ Robbie Robinson, *The Legal Nature of the Embryo: Legal Subject or Legal Object*, 21 *Potchefstroom Elec. L.J.* 1 (2018).

⁴² Donna M. Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?* 48 *Cath. U. L. Rev.* 989 (1999).

⁴³ *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

over the pre-embryos, and they were to be disposed of in case of death or other unforeseen circumstances. Divorce was not mentioned as one of the grounds. Sixteen eggs were retrieved from MsKass, out of which nine of them were fertilised and cryopreserved as pre-embryos. Soon after, the couple ended up filing for an uncontested divorce. However, during the divorce process, Mrs Kass instituted a matrimonial suit claiming custody over the pre-embryos. This case went through multiple levels of appeal but what was held by the Court of Appeals finally was that the issue of disposition was to be dealt with as if it were a contract case.⁴⁴ The Court expressly observed that, although in this case, the agreement did not deal with how the pre-embryos should be handled in a situation of divorce, if the same had been stated, the Court would have gone by the terms of the contract.⁴⁵ Similarly, in the case of *Litowitz v Litowitz*⁴⁶, the Court of Appeal strictly held that the terms of a contractual agreement would determine the outcome of disposition.⁴⁷ Hence, in the situation where a divorced couple contends for the ownership of an embryo, courts have taken to interpreting and relying on the contract that was signed at the time of consenting to the IVF procedure and have abided by the same. In the circumstance where this is an uncertainty, then the courts have proceeded to looking at other considerations. This is certainly not the case of an actual child custody matter where the reasoning of *parens patriae* is adopted. In such cases, the best interests of the child are analyzed using family law principles to determine who deserves the custody of the child. Due diligence and caution goes into ensuring that the child is placed in good hands.⁴⁸ This is not so in the case of embryos belonging to divorced couples. This very fact that the ownership of embryo can

⁴⁴The Court reasoned that;

“The first inquiry should be directed at whether the parties have made an expression of mutual intent which governs the disposition of the pre-zygotes under the circumstances in which the parties find themselves.”

⁴⁵Following the approach in *Kass v. Kass*, in the case of *Cahill v. Cahill*, 757 So 2d 465 (Ala Civ App 2000), the court refused to release the embryos for implantation to the wife stating the expressed intent of the parties on disposition of embryos.

⁴⁶*Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002)

⁴⁷Jessica Wilen Berg, "Owning Persons: The Application of Property Theory to Embryos and Fetuses" 173 *Faculty Publications* (2005), (last visited on May 18, 2020), https://scholarlycommons.law.case.edu/faculty_publications/173.

⁴⁸ In *Davis v. Davis*, the trial court concluded that the preembryos were "human beings" and therefore relied on a "best interest of the child" analysis.

be decided based on contractual terms rather than on the basis of family law principles and without looking into issues of welfare further perpetuates the notion that an embryo is not a person but rather, a property of sorts. The same principle was upheld in another embryo battle of *Davis v Davis*⁴⁹. In the *Davis* case, the couple decided to dissolve the marriage after the IVF process, and while the wife wanted to implant the embryos, the husband was vehemently against the same.⁵⁰ Of the many issues involved, the relevant observation here is the fact that the Tennessee Supreme Court had recognized that "*embryos are neither people nor property, but occupy an interim category that entitles them to special respect because of their potential for human life.*"⁵¹ This observation by the Court substantiates the authors' view that a pre-life form is given a status of what may potentially be termed as a quasi-property.

A. Embryo as Property: *SH v DH*

A landmark judgement that perhaps tilted the scale entirely in favour of recognizing an embryo as a property is a decision made by a judge in the Ontario Supreme Court. In the case of *SH v DH*⁵², Justice Robert Del Frate had to deal with a dispute wherein he had to determine the fate of an embryo that the couple had bought from a fertility center. The key difference to note from the previously mentioned cases is the fact that the embryos, in this case had no biological connection to the couple who had bought it. The cost of the donated eggs and sperm was approximately USD\$11,500. While doing so, the couple signed a contract in the Georgian fertility center where they bought the eggs, agreeing that in the event of a separation of the two, the legal ownership of the preserved embryo would be upon the court to determine and that the same

⁴⁹ 842 S.W.2d 588 (Tenn. 1992). A detailed discussion establishing Guidelines for resolving disputes over frozen embryos can be found in Dan Fabricant, *International Law Revisited: Davis v. Davis and the Need for Coherent Policy on the Status of the Embryo*, 6 CONN. J. INT'L L. 173-207 (1990).

⁵⁰ *Davis v. Davis*, 842 S.W.2d 588, 601 (The Court emphasized that "procreational autonomy is composed of two rights of equal significance-the right to procreate and the right to avoid procreation").

⁵¹ ANNA STOLLEY PERSKY, "*Contentious battles between couples over frozen embryos raise legal and ethical dilemmas*", (last visited on August 6, 2020), https://www.abajournal.com/magazine/article/contentious_battles_between_couples_over_frozen_embryos_raise_legal_and_eth?icn=most_read%3E.

⁵² 2018 ONSC 4506

would be considered as a property. Once again, the couple signed a contract in the fertility center in Ontario (where the purchased embryos were delivered from Georgia to be implanted in the wife), which stated that in the event of a separation, the patient (*i.e.* the wife) would be the one to make the decision. Hence, there was a direct conflict in the two contracts signed. The judge took to interpreting the same harmoniously and read it as the wife being able to make a decision that would be facilitated by the Court. Additionally, he also held that since USD\$11,500 was spent on the four embryos, making each embryo worth USD\$2,875, he ordered the wife to pay compensation to the husband for the embryos she was keeping.⁵³ In this case, not only do we see that the embryo is being treated as a commodity in that, a numerical value is being attached to its worth, something that is not done to human life, but an outright stance is also being taken to consider an embryo as a property. Moreover, Justice Robert Del Frate himself had mentioned in the judgement that given the infancy of cases of this nature, until an intervention is made in the form of legislative changes to the current law, it is necessary for the court to decide disputes like the one in hand based upon the agreements that have been signed and entered into by the parties and interpret their intentions from such agreements. Additionally, as highlighted previously, one of the reasons for the Court interpreting the dispute in this manner was due to the fact that there was no biological connection of the embryos to the parties. Once again, through this line of reasoning, we see a differential value of life being attached to an embryo that lacks biological connection to the parties, and this would be in violation of principles of equality.

V. The Different Judicial Approaches

Every society has its own social and moral regulations regarding the use and control of gametes and embryos, which is primarily based upon the individual choice of reproduction⁵⁴ and responsible parenthood.⁵⁵ However, if there are

⁵³Financial Post Staff & Laurie H. Pawlitz, “*Battle over embryo highlights family law's new fertility frontier*”, (last visited on May 14, 2020), <https://business.financialpost.com/personal-finance/battle-over-embryo-highlights-family-laws-new-fertility-frontier>.

⁵⁴Emphasising individual's choice to reproduce and safeguarding the privacy of an individual in doing so the Court in *Jack B. Anglin Co. Inc. v. Tipps*, 842 SW 2d 266 at 600 (Tex 1992), observed;

several options among which the people can choose due to the scientific advancement in IVF, then advance directives in the form of legal standards are necessary to limit the individual's right to dispose of their genetic materials, including gametes and embryos. Moral restrictions were always there as procreation, marriage, sexuality, and family were considered to be private affairs,⁵⁶ and it was largely accepted that the parental project stops with the death of one of the partners and that post-mortem use of genetic materials is not morally justifiable.⁵⁷ However, in view of the continuing disposition of genetic material and advancement in IVF, different courts have been holding different views when it faced with legal disputes. These outcomes can be broadly divided into three approaches: the right to life, the property approach, and the "special respect" position. The present research, essentially engages with the property approach while superficially addressing the other two.

A. Right to Life

Under this position of right to life, it is advocated that life starts at the point of conception and hence, embryos are placed on an equal pedestal to human beings; and therefore, embryos must be legally protected from the moment fertilization occurs.⁵⁸ The destruction of a pre-embryo is seen as destroying a human being.⁵⁹ Here, we see the Courts giving minimal importance to a

“For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance the right to procreate and the right to avoid procreation.”

⁵⁵ Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703 (1999).

⁵⁶ In many occasions the Court has recognized the individual right to determine, free from unjustified governmental interference, whether to bear or beget a child. For *e.g.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

⁵⁷ Guido Pennings, *What are the ownership rights for gametes and embryos: Advance directives and the disposition of cryopreserved gametes and embryos*, 15(5) Human Reproduction 979-986 (2000).

⁵⁸ Browne, Colleen M. and Hynes, Brian J., *Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law*, *The Note*, 17(1) J. Legis. 118 (1991).

⁵⁹ For more analytical presentation with the help of judicial observation, see Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28(2) Hofstra Law Review: 497-499 (1999).

husband's right to refrain from procreation and higher weightage to a mother's desire to bear the child. This was the position taken in the *Davis* case.⁶⁰

B. Property Approach

A polar opposite to the right to life position is the property approach. Previously in a plethora of cases, the court was governed by the "no property rules" for human biomaterials⁶¹; there are sufficient reasons to consider or treat human biomaterials capable of being a legitimate object of property in the eye of law.⁶² It is important to note that the objective of this approach is not to label a pre-embryo as property but to identify whether there are property interests that may be legally recognizable, calling for the application of property law principles while determining disposition.⁶³ In the *Davis*⁶⁴ case, it was argued that the frozen embryos were property jointly owned by the parties; they did not constitute life, but instead had the potential for life.⁶⁵ This approach centers on the parties' rights, emphasizing on the intentions of the parties as opposed to characterizing the embryo as property. In the situation where embryos are considered as property, there is a shift in perspective and the legal framework which governs the ownership of pre-embryos is one that focuses on factors such as control, contract, and protection of creators' rights.⁶⁶ Under this position, neither party is allowed to implant the embryo, if another party does not consent to it. Here, the contractual obligations agreed by the two parties are given greater importance than the right to life of the pre-embryo. A pre-embryo is

⁶⁰ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 691-732 (1938).

⁶¹ For a review of the debate, see Phillippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195 (1996).

⁶² For details see, Muireann Quigley, *Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials*, 77(5) Mod. L. Rev. 677-702 (SEPTEMBER, 2014).

⁶³ W. N. Hohfeld describes property as legal interest that exists only between persons in respect of things. W. N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23(1) Yale L.J. 22 (Nov., 1913).

⁶⁴ *Davis v. Davis*, No.E-14496 (Blount Co. Tenn. Cir. Ct. Equity Div. Sept. 21, 1989) (WESTLAW, 140495).

⁶⁵ Transcript of Proceedings, *Davis*, Vol. II at 153.

⁶⁶ Jessica Wilen Berg, "Owning Persons: The Application of Property Theory to Embryos and Fetuses" 173 *Faculty Publications* (2005), (last visited on May 18, 2020), https://scholarlycommons.law.case.edu/faculty_publications/173.

treated as an asset over which the couple, being an equal contributor of gametes, holds joint ownership and therefore has an equal say over its disposition.⁶⁷ More simply expressed, it is treated as somewhat like a matrimonial asset. This appears to be a sound approach to follow, especially in the case of the absence of a contract dictating the same. An instance in which this stance was taken, as previously discussed, is in the case decided by the Supreme Court of Tennessee, wherein the judge observed that embryos neither squarely fit into the category of people nor that of property. Instead, he observed that it was best suited in an interim category for which the pre-embryo was entitled to some form of special respect, keeping in mind the viability of human life to arise from the same.⁶⁸ Under this approach, the most relevant and most potent property interest that exists is that of ownership.⁶⁹

Fundamentally, like all other biotechnological innovations that create or alter life, the science of IVF is also faced with much ethical backlash for its intervention in the procreation of life. Taking a property approach further dehumanizes and devalues the life potential that the pre-embryo holds. Moreover, from the perspective of family law principles, this dehumanization of a pre-embryo goes against the most fundamental of welfare principles that guide the decisions made in family law disputes. A property approach is definitely a cold approach in the sense that it does not consider the latter part of life of the pre-embryo.⁷⁰ The whole idea of treating biomaterials, such as embryos, as property based upon the notion of “separability”, which emphasizes that there is a difference between “us” and “our bodies”; and there is some sort of separation from the person who is the source of those materials.⁷¹ However, many

⁶⁷ Contrary to this, some scholar also argued that women have a greater interest in gaining the right to implant their frozen embryos because sperm are "cheap" and plentiful. For example see, Ruth Colker, “Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not” 47 *HASTINGS L.J.* 1063 (1996).

⁶⁸ *Ibid* at 178.

⁶⁹ *Ibid* at 209-210.

⁷⁰ However, scholars have attempted to clarify that the notion of property does not signify that the embryos can be treated as property in all respects, but rather it merely grants decision-making authority regarding the disposition of the fertilized egg. See, e.g. John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 454-455 (1990).

⁷¹ JE Penner, *The Idea of Property in Law* 111(OUP 1997).

commentators argue that a separability criterion is not sufficient enough to draw a distinction between the whole body and its separated parts for the proprietary purpose; and penetration of such separability notion will result in the wrongful commodification of the body by allocating them to the third parties for various purposes.⁷² Given that the very reason such disputes arise is because of one parent's desire to implant the pre-embryo and bring up the child in the near future, the lack of consideration of these essential factors makes one skeptical of the property approach. This seems like an immediate solution to the dispute at hand in ignorance of the implications that will foreseeably arise in the future.

C. Special Respect Position

This view has earned support from a couple of benches. In the *Davis*' case, the appellate court disagreed with the trial court's classification of the cryopreserved embryos as persons or children. On appeal to the Tennessee Supreme Court, the court affirmed that "[P]re-embryos are not, strictly speaking, either "persons" or "property," but occupy an *interim category* that entitles them to *special respect* because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos, within the scope of policy set by law."⁷³ Unlike the right to life position and the property approach, this approach focuses on striking a balance between the competing interests of both sides wherein it recognizes that the granting of the right to procreate to one individual results in depriving another of the right to avoid procreation. The way in which this conflict can be overcome is by striking a balance between these two interests or by identifying a hierarchy in the interests and giving them preferences accordingly. The supporters of this approach hold that when a couple decides to undergo an IVF procedure, it is done with the objective of creating and implanting a pre-embryo, at a later time. Given this, there is a bilateral exchange of promises between the

⁷² Muireann Quigley, *Property in Human Biomaterials—Separating Persons and Things?*, 32(4) *Oxf. J. Leg. Stud.* 659-683 (Winter 2012).

⁷³ *Davis v. Davis*, 842 S.W.2d 589 (Tenn. 1992); For details see, Igor A. Brusil, "Fifty Shades of Gray Area: Are Cryopreserved Embryos Property" 30 *Prob. & Prop.* 58-63 (2016).

couple and hence, a party's right to procreation should prevail over that of abstention.⁷⁴

VI. Arriving at a Middle Ground

From the detailed analysis of the implications of the various approaches that courts have been taking, it is evident that the issue is not black and white, that can be single-handedly resolved entirely by the adoption of any one of the abovementioned approaches. However, what the authors do feel would be the soundest most approach out of the existing approaches would be adopting a middle-ground approach such as the special position approach; though the same may be accompanied by various legal obstacles due to the shortcomings of the current legislative framework. Additionally, the authors feel that since courts have recognized pre-embryos are being a form of quasi-property, there is a need to consider more human considerations such as the future welfare of the pre-embryo while determining cases of disposition.⁷⁵ Since the matter is not merely a question of who gains ownership of the pre-embryo but rather a matter of who will nurture this child, employing certain family law principles would be quite reasonable and prudent while arriving at a decision in this regard. In terms of striking a balance between the right to procreate and the right to avoid procreation, it is beyond doubt a highly emotional matter for both parties. So long as one party is for and the other against, it is a stressful deal for the opposing parent to ignore the existence of his/her biological child. Hence, such decisions cannot be unilaterally decided on and given in the hands of one party, in detriment to the other. From this point of view, it may be claimed that contractual obligations are the most straightforward cut way of dealing with disposition⁷⁶, but that again is based on the premise of treating a pre-embryo as a

⁷⁴ Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86(7) U. Pa. L. Rev. 718 (1938).

⁷⁵ Considering the vast difference between the couples who use alternative reproduction to further their procreative decisions, as well as the physicians who aid them, and individuals who harm an embryo in violation of the progenitors' wishes. Because of the fundamental importance of procreative decisions, the author argued for recognition of legal status of the embryos. See generally, Lori B. Andrews, *The Legal Status of the Embryo*, 32 Loy. L. Rev. 357-409 (1986).

⁷⁶ In *Johnson v. Calvert*, 851 P.2d 776, 782-84 (Cal. 1993), the Court held that an intent-based or contractual analysis should be used to establish parentage in the context of surrogacy arrangements.

property, rather than a living being. The authors believe that perhaps the arena of property law is also not sufficiently suited to deal with an issue such as this, which involves emotional intricacies. Inevitably, the notion of the commodification of a pre-embryo occurs in pursuance of this approach, which the authors believe is unethical to human life. Therefore, the creation and adoption of an approach that recognizes pre-embryos as animate objects/quasi property and involves humane reasoning in the form of welfare principles will impact the future of the unborn child. In this approach, contracts that have been entered into by parties should not be interpreted as the conclusive determinant as to who gets the pre-embryos, but as a reflection of the parties' intentions that have to be jointly considered with other abovementioned factors.

VII. Summing Up

In the context of embryo-disposition, the rights and obligations of the parties must be fixed and regulated by the State.⁷⁷ Considering its living nature, adequate disclosures relating to preservation, implantation, or destruction of the embryos must be made to the regulatory bodies or enforcing agencies constituted under the law, including the financial and legal responsibilities of any resulting child.⁷⁸ The above discussion concerning the legal status of an unborn child and an embryo at the different stages of development within the existing legal framework in India establishes that a sub-person status is given to pre-life forms. The laws in place perpetuate the commodification of eggs and embryos, and therefore are more likely to be considered a property than a person. As scientific advancements continue to be made in creating a frozen embryo by way of an IVF procedure, it is time for the State to accord a balanced and reasonable legal status to frozen embryos addressing widespread legal issues such as abandonment, divorce, negligent destruction affecting frozen

⁷⁷ While initiating any such legislative mechanism the government should take for proactive role to ongoing advances in biotechnology, promote public debate, canvassing informed opinion to have a detailed legislation in such politically sensitive area. See, Alison Burton, "Women, the Unborn, the Common Law and the State" 5 S. Cross U. L. Rev. 188 (2001).

⁷⁸ Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 Am. U. L. Rev. 515 (2018).

embryos.⁷⁹ In the absence of such legal status and comprehensive legislation the courts will continue to be forced to confront the issues of personal injury, property, contract and probate, and application of family law at a time when embryo donation has already become the new normal in our modern life, and it will create more ambiguity rather than resolving the issues relating to a cryopreserved embryo.⁸⁰ It is not only the cryopreserved embryo that results in a child; the law must address the liabilities and responsibilities of medical and technical professionals by the specific legal norms and principles.⁸¹ This research highlights the contemporary legal issue unique to the assisted reproductive technology wherein couples deciding to dissolve their marriage post entering into the IVF procedure, contend for custody of the cryopreserved pre-embryos at the time of separation. The most significant controversy in this issue has been the debate on whether a pre-embryo is to be considered as a person or a property.⁸² Many commentators argue for strict regulations to prohibit the commercialization of embryos because of public welfare concerns stemming from cryopreservation. They also argue for prohibiting the sale of embryos or gametes for implantation, and require that the donation of embryos for implantation be anonymous to prevent genetic manipulation through selective reproduction for preserving the dignity of the human being.⁸³ Therefore, the jurisprudential determination based on family values and human rights, whether it can be recognized as property or person, has become much more relevant in order to preserve our social health, safety and well-being.

⁷⁹Legal status of the embryo is particularly significant, especially to the divorcing couple in a marriage dissolution proceeding. For details See, Natalie K. Young, "Frozen Embryos: New Technology Meets Family Law" 21 Golden Gate U. L. Rev. (1991).

⁸⁰ See generally, Charles P. Jr. Kindregan & Maureen McBrien, "Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos" 49 Vill. L. Rev. 169 (2004).

⁸¹ Sufiya Ahmed, *Embryo Freezing and Donation: Ethical-Legal Issues*, Summer Issue, ILLI LAW REVIEW 134 (2018).

⁸² For an interesting analysis of changing dynamics in relation to property jurisprudence, see generally Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325-367 (1980).

⁸³ See generally, Tamara L. Davis, *Protecting the Cryopreserved Embryo*, 57 Tenn. L. Rev. 507-537 (1990).