

THE STATUS OF CRYO PRESERVED EMBRYOS IN DIVORCE PROCEEDINGS

—ANANDHAPADMANABHAN VIJAYAKUMAR* AND
ATHIRA PALANGAT**

The use of Assisted Reproductive Technologies (ART) is on the rise in India with a huge number of couples adopting IVF techniques in conceiving children. ART has revolutionized traditional notions of family into a scope and scale that the current law is incapable of handling as it stands now. Among the most far reaching consequences within various folds of personal law, divorce remains one of the most crucial areas where ART techniques—specifically cryo-preservation of frozen embryo—is likely to create far reaching consequences. The question of what embryos are is being battled out all over the world with strong arguments regarding its status as person, property or an intermediate of the two. Critical and academic discussions are virtually absent in India as of now on the status of frozen embryo and on its disposition in the event of a divorce between parties. This paper seeks to analyze the status of frozen embryo by evaluating already existing approaches in USA and analyzing them in the Indian legal context to break down and build on the prevailing uncertainty over the matter.

I. INTRODUCTION

“The parents construct the child biologically, while the child constructs the parents socially.”—Law Commission of India¹—

Statistics show that at least 15 percent of the world’s population is infertile and has no hope of naturally bearing a child.²

* Final Year Student at the National University of Advanced Legal Studies, Kochi, India.

** Associate at IC Universal, Chennai, India and an expert in Corporate Governance and Investment Law.

¹ 228th Law Commission Report, “Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to a Surrogacy”, 8 (2009), available at <<http://lawcommissionofindia.nic.in/reports/report228.pdf>>, accessed 10-11-2017.

² “Mother or Nothing: The Agony of Infertility”, 88(12), Bulletin of the World Health Organization, (2010), <http://www.who.int/reproductivehealth/publications/infertility/bulletin_88_12/en/>, accessed 10-11-2017.

The data collected by the National Institutes of Health, Rockville, USA suggest that out of 7,600 cases of women analyzed across the country in 2002 between the age of 15 and 44,³ close to 1 in 6 couples in the United States don't get pregnant despite a year of trying.⁴ In India too, fertility is decreasing at a rapid rate.⁵

In such a scenario, Assisted Reproductive Technologies ('ART') are likely to gain traction as an alternative to couples for conceiving children. Moreover, ART enables couples to make planned parenthood decisions, thus enabling couples to focus on their priorities like career, education etc.

Assisted Reproductive Technologies involves a number of therapies that manipulate the egg and/or the sperm for conception in order to establish a sustainable pregnancy. All these stem from the basic In Vitro Fertilization ('IVF') process. As for frozen embryo transfers, after a series of initial setbacks in 1980s' due to the challenges of freezing and thawing procedures and low survival rates of embryos, it steadily improved to capture a significant proportion of IVF cycles performed. In 2003, it accounted for 21,981 of the 1,12,872 IVF cycles (17.8%) performed in the US, with an overall live birth rate of 27.0% per embryo transfer procedure.⁶

The first IVF baby was born in England on 25th July, 1978 named Louise Brown.⁷ India followed suit and had its first successful IVF baby Kanupriya alias Durga in Kolkata on Oct. 3, 1978.⁸ Since then, India has become the hub for IVF and surrogacy owing to unprecedented and unregulated growth of IVF/Infertility/Assisted Reproduction Technology clinics and hospitals that offer easy availability of surrogate mother, gamete donors and high end treatments at low cost (nearly one-quarter of the cost in developed nations) making India until recently, a favored destination for reproductive medical tourism or better known as fertility tourism.⁹

However, scientific advancement has brought not just a new facet of social issues but also legal issues. The development of ART like that of IVF

³ Geneva Pittman, "Almost One in Six Couples Face Infertility: Study", Thomson Reuters, (12-1-2013), <<https://www.reuters.com/article/us-couples-infertility/almost-one-in-six-couples-face-infertility-study-idUSBRE9oA13Y2o130111>>, accessed 10-11-2017.

⁴ *Ibid.*

⁵ Ministry of Health and Family Welfare, Government of India, National Health Profile 2018, available at <<https://cdn.downtoearth.org.in/pdf/NHP-2018.pdf>>, accessed 5-1-2019.

⁶ Jeff Wang, Mark V. Sauer, "In Vitro Fertilization (IVF): A Review of 3 Decades of Clinical Innovation and Technological Advancement", 2(4), *Therapeutics and Clinical Risk Management*, 355, 357, (2006), <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1936357/#>>, accessed 11-21-2017.

⁷ *Ibid.*

⁸ Aditya Bharadwaj, "The Indian IVF Saga: A Contested History", 2, *Reproductive Biomedicine & Society Online*, 54, 59, (2016), <[http://www.rbmsociety.com/article/S2405-6618\(16\)30012-0/fulltext](http://www.rbmsociety.com/article/S2405-6618(16)30012-0/fulltext)>, accessed 10-11-2017.

⁹ *Ibid.*

and cryo preservation as a mainstream family planning alternative has also served to complicate the procedures of divorce in courts, sometimes striking at the very foundations of the traditional notions on the institution of family. ART in divorce proceedings has once again widened the existing jurisprudential gaps in family law in resolving conflicting questions on the constitutional, statutory, and common law rights of partners such as whether one partner's right to reproduce and the frozen embryo's right to life outweigh the other partner's reproductive and privacy rights.

The paper shall look into the aspect of frozen embryos and how the same has been discussed in cases of divorce by the courts in the United States of America ('USA') as well as India. The paper shall also throw light on the statutory and jurisprudential growth in this area of law. Therefore, the paper is divided into two major parts; Firstly, focusing on the stance taken in the international arena, mainly the precedential judgments decided by the American courts and; secondly, the emerging jurisprudence of frozen embryos and its status in India.

II. INTERNATIONAL SCENARIO

In the international context, several countries have over the past three decades adopted laws pertaining to regulation, production, storage and research of embryos. Few relevant ones include the Warnock report on the need to regulate Embryology and Human Fertilization ('Warnock report') in 1984,¹⁰ and the European Parliament and the Council of European Union Directive 2004/23/EC¹¹ ('EC technical directives') that laid down standards of quality and safety for human tissues and cells intended for human applications, to ensure a high level of protection of human health. These guidelines extended to all aspects of production, storage and research of frozen embryos. In 2008, based on the Warnock report and the EU technical directives, amendments to the Human Fertilization and Embryology Act, 1990 was passed by United Kingdom ('UK') which lays down crucial guidelines and regulations on embryo research and for the licensing and monitoring of fertility clinics.¹²

In Australia, the regulatory space is dominated by Research Involving Human Embryos Act 2002 and the National Health and Medical Research

¹⁰ Jacqueline A. Priest, The Report of the Warnock Committee on Human Fertilisation and Embryology, 48(1), *The Modern Law Review*, 73, 85 (1985), <<https://embryo.asu.edu/pages/report-committee-inquiry-human-fertilisation-and-embryology-1984-mary-warnock-and-committee>>, accessed 10-11-2017.

¹¹ Art. 1, Directive 2004/23/EC of the European Parliament and of the Council of 31 March, 2004 O.J. (L 102/48), (European Union).

¹² Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, (United Kingdom).

Council ('NHMRC') which issued ethical guidelines on the use of assisted reproductive technology in clinical practice and research in 2017.¹³

However, none these documents have conclusively addressed the legal status of frozen embryos in family law, which continues to be decided by the courts on case to case basis in divorce proceedings, criminal cases and liability suits.

III. POSITION TAKEN BY USA

The courts of USA continue to decide cases on the status of frozen embryo without the foundation of any Legislation. Courts of various states within USA have taken divergent and sometimes mutually conflicting positions on the issue, which has greatly complicated the overall process of divorce in America where a claim of frozen embryo is involved. What can be readily observed in the initial cases like *Davis v. Davis*¹⁴ ('*Davis*') is the head on jurisprudential conflict of in deciding the legal status of embryo. The court did not succeed in permanently resolving on critical issues in divorce proceeding like personal entitlement, inheritance, maintenance and other constitutional questions such as whether one partner's right to reproduce and the frozen embryo's right to life outweigh the other partner's reproductive and privacy rights.¹⁵ However, the courts should be credited with evolving a balanced approach to the issue in the absence of legislative enactments to reconcile the disputes that arise therein.

Before pursuing the discussion further, it is impertinent to state the three approaches adopted by American courts in evaluating the status of frozen embryos. The stance taken has been amongst one of the following:

- (i) Conferring full personhood on the embryo,
- (ii) Considering embryos as tissues and therefore property or
- (iii) Not human life fully but something more than just mere property.¹⁶

¹³ National Health and Medical Research Council, Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research, <https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc_-_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf>, accessed 10-11-2017.

¹⁴ 842 SW 2d 588 (Tenn 1992).

¹⁵ Melinda Troeger, "The Legal Status of Frozen Pre-Embryos When a Dispute Arises During Divorce", 18 , Journal of the American Academy of Matrimonial Lawyers, 563, 580, (2004), <<http://aaml.org/sites/default/files/legal%20status%20of%20frozen-article.pdf>>, accessed 10-11-2017.

¹⁶ Michelle F. Sublett, "Frozen Embryos: What are They and How Should the Law Treat Them", 38, Cleveland State Law Review; 586, 615 (1990), <<http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1847&context=clevstlrev>>, accessed 11-21-2017.

The court had previously held in *York v. Jones*¹⁷ that the Frozen embryos were essentially property and the creators, who were the intended parents, owned the embryo and could control disposition. The relationship between the clinic and Parents was seen as a bailor-bailee relationship by virtue of which an action of detinue could lie in the instance of wrongful interference. This however was adjudicated without reaching questions of which parent had greater proprietary interest in an embryo, which makes *Davis* case the first one to adjudicate on the status of frozen embryo and its interplay with the rights of the parents.¹⁸

All three approaches were considered in divorce cases involving the rights of couple over the embryos in *Davis*. Therefore, it is helpful to analyze the various aspects of this case to get an understanding of the diverse issues involved. The parties in this case had undertaken a frozen embryo program before getting divorced. However, there was no written agreement between the parties regarding assignment of ownership of the frozen embryos in the event of divorce. The conflict regarding the ownership of the frozen embryos reached the Tennessee Supreme Court where the matter was set to be adjudged. The wife wished the embryos to be donated to a childless couple. The husband, on the other hand, wanted the embryos to be destroyed and wished to be relieved of any future responsibility or conviction of parenthood from those embryos. Thus, the court was to choose between the wife's desire to donate the pre-embryos and the husband's desire not to have the embryos develop into children.

The trial court had awarded the embryos to the wife for implantation on the grounds that embryos were essentially children, thus recognizing the right to life of the embryo over the right to privacy of the husband in relation to the choice of parenthood. Here, the trial court recognized full personality of frozen embryo and conferred it with the rights that a child shall have. However, conferring the frozen embryo with personhood was not done taking into consideration the consequences that would follow from its legal status.

The husband objected saying that if the embryo were implanted he would approach the court for the custody of children from the couple who had implanted them. This creates a challenge as conferring complete personhood to the embryo and considering them as children would establish an effective parent child relationship between the progenitors and the embryo, making it hard to deny parenthood of the progenitors at any later stage if implantation was done without consent of both parties and thus making the question of custody of children another endless loop under the eyes of law. Thus, conferring the right to be born on the embryo under the assumption of personhood would not only backfire but also deny justice to the couple who implants the

¹⁷ 717 F Supp 421 (ED Va 1989).

¹⁸ *Davis v. Davis*, 842 SW 2d 588 (Tenn 1992).

embryo other than its progenitors as the dispute over parenthood will never be resolved.

Another complication arising out of the decision of the trial court is with regards to how conferring full personhood on the embryo will make it a criminal offence to destroy them under any circumstances once it is created. Since there are more than a million embryos in USA which are cryo-preserved by private clinics, it would not just be an illogical measure, but would also make an easy way for people to take advantage of the clinics by not paying for the maintenance of the embryos. In this context, the clinics will be forced to keep the embryos preserved under all circumstances and will be disdained from employing any measure to deny the couple undertaking the implantation in case of default of payment since the right involved is that of the embryo's right to be born as a person.

Conferring of personality to embryo in its radical sense of life took a defining blow in *Miller v. American Infertility Group*¹⁹ where the Appellate Court of Illinois rejected the claim of wrongful death regarding destroyed embryos. Furthermore, embryos, if taken as persons, will be automatically conferred with added rights to property, inheritance, succession and maintenance from the progenitors as per the personal law code of the respective legal jurisdiction. In Indian context, this would translate to vesting coparcenary rights on the embryo if either of the couple implants them. The rights of embryo towards the property of the progenitors is most likely to be a thorn in the divorce proceedings as couples may claim the embryos for implantation to get a greater share of property and maintenance.

The Supreme Court of Tennessee however revoked this order and enunciated that pre-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. In evaluating the facts of the case, the court observed that progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.

The crucial question which the trial court had ignored was whether one person's right to reproduce outweighed another person's right to not to reproduce. The Supreme Court interpreted the decisions in *Skinner v. State of Oklahoma*²⁰ and *Eisenstadt v. Baird*²¹ in which the courts previously ruled in favour of an individual's choice to reproduce and safeguarding the privacy of an individual in doing so. In the instant case, the court held that, by parallel

¹⁹ 897 NE 2d 837 (Ill App Ct 2008).

²⁰ 1942 SCC OnLine US SC 125 : 86 L Ed 1655 : 316 US 535 (1942).

²¹ 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 405 US 438 (1992).

logic, the right to privacy also protects the right of an individual to choose not to have children.

*“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.”*²²

As from the facts of *Davis*, the husband's right not to have children was given more importance than the wife's right to donate the frozen embryos. The court while observing that the emotional burden of Mrs. Davis was substantial also said that if she was allowed to donate the embryos, Mr. Davis will be subjected to a lifetime dilemma of parenthood or knowledge of parenthood over which he had no control of. This would necessarily be imposing parenthood on him when he clearly wished not to. The court also took note of the previous testimony of Mr. Davis where he said that he would fight for the custody of his child or children that would be born out of the donation of embryos. This would effectively rob him of his parenthood twice and the relationship with his children would be prohibited. The court in this respect incorporated various ranges of privacy rights of the progenitors into the jurisprudence of pre-embryos.

It is however necessary to notice that court relied measurably on the fact that Mrs. Davis did not seek to implant the embryo on her, which may have brought the conflicts in the questions of law and its outcomes much closer. While acknowledging the emotional anguish and discomfort involved in attempting further IVF procedures, court noted that as long as Mrs. Davis can conceive children by attempting again through IVF or otherwise, the right of Mr. Davis to not reproduce will prevail over the right to reproduce of Mrs. Davis.

Thus, it can be concluded from the analysis that the American position of special status to embryo was not based on any biological characteristics particular to the embryos itself, but rather a balancing of legitimate interests between the parties. It is pertinent to note that that the parties in *Davis* had not entered into any agreement on the disposition of embryos in case of divorce or any other contingencies. Thus, there was no previous “expressed intent” between the parties on disposing the embryos in case of contingencies like divorce while entering the IVF procedures in the form of Embryonic Disposition Agreement or Informed Consent Agreement (‘Agreement’). This made it necessary for the court to balance the interests of the parties.

²² *Jack B. Anglin Co. Inc. v. Tipps*, 842 SW 2d 266 at 600 (Tex 1992).

The first case wherein the court employed a strict contractual approach to the disposition of frozen embryos was that of *Kass v. Kass*²³ (*Kass*) which was decided five years after *Davis* in 1997. Contractarian approach represents one of the most prevalent approaches towards deciding cases on frozen embryo disposition even today. No approach suits better for a de-facto classification of frozen embryo as property than the contractual approach, as the intent of parties can be enforced in ways that are similar to that of dealing with property. Considering the embryos as property severs all legal connection that the embryo has with its progenitor to whom the custody of the embryo has not been awarded to and avoid any possibility of any legal claim of parenthood by the excluded parent.

In the case of *Kass*, the husband and wife had undertaken the IVF procedures only after entering into an Agreement. The Agreement entered into by the parties specifically stated the steps for disposition of the embryos unlike in the previous case which treated divorce as a contingency. The Agreement lay down, in unambiguous terms, the intention of parties to dispose the embryos for research studies under the IVF Program. This clearly indicated that in case of divorce, no parties shall claim the pre-zygotes. However, the wife filed a claim for the frozen embryos which was contested against by the husband.

In light of the *Davis* analysis, the court in *Kass* 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.”*²⁴

Thus, one can infer that the court limited the context to the parties' intent to divorce. In *Kass*, the court after looking into the lack of expressed intent of parties in *Davis* held that the balancing of interest adopted by *Davis* may be appropriate when parties are in conflict, but when there is an agreement governing the contingencies, such balancing is not necessary. The parties to the case decided in allowing the clinics to utilize them for medical studies and to not release them unless on an order of a court of competent jurisdiction.

The court observed that IVF procedures and having children is a very personal matter which should not be intervened upon by a third party. The agreements entered between the parties clearly state an expressed intent throughout the Agreement using words of shared understanding “we,” “us” and “our” that permeate the pages. The overriding choice of these parties could not be plainer:

²³ 91 NY 2d 554 (1998).

²⁴ *Ibid.*

*"We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF program and applicable law."*²⁵

This joint intent applies even in unforeseen circumstances. Commenting that divorce was also one among such unforeseeable circumstance, the intention of the parties originally stated would apply.

Court further held that the passing reference in the consent form for determination of legal ownership by the court was not intended to permit implantation against the wishes of either party. Noting the same, the court therefore refused to permit implantation.

The Contractarian approach in *Kass* was later adopted in succeeding cases where a joint intention was expressed by the parties contemplating divorce in relation to the frozen embryos. In the case of *Cahill v. Cahill*,²⁶ the couple similarly entered into an Agreement that on a contemplated divorce, the frozen embryos to be donated to the University of Michigan for Biological Studies. The court refused to release the embryos for implantation to the wife stating the expressed intent of the parties on disposition of embryos.

When the couple did not envisage the divorce but intended to not allow its development after five years of creating the embryos, the court upheld the intent of the parties understood from the reading of agreement in whole. The court rejected the rights-based argument for the 'best interest of the embryos' and emphasized the intent theory. Similar arguments for balancing interests of the parties were rejected in later cases of *Randy M. Roman v. Augusta N. Roman*²⁷ and *Marriage of Dahl and Angle, In re*²⁸ where Agreements had expressed joint intent of the parties in the fate of embryos in case of contingencies.

While inspecting the status of embryos, one cannot overlook the attempt made by American courts in defining frozen embryo as a property and confining the progenitor's interest in the frozen embryo merely as a proprietary interest. It is very important to note that intent theory secures the best possible approach in legitimizing a property-oriented status to frozen embryos.

Conferring the embryo with the status of property will enable the court to decide cases based on contract law principles and relieve the court and the legal system of the necessity to decide cases premised on rights-based arguments which had been controversial throughout the debate. The courts can rely

²⁵ *Ibid.*

²⁶ 757 So 2d 465 (Ala Civ App 2000).

²⁷ 193 SW 3d 40 (Tex Ct App 2006).

²⁸ 194 P 3d 834 (Or Ct App 2008).

on the Agreements entered by the parties before starting the IVF procedures to decide the question of entitlement.

This position was however rejected by the court in cases where the courts accepted arguments tilting in favor of an intermediate status of frozen embryos and thereby applying the balancing of interest approach to the determination of cases.

In *AZ v. BZ*²⁹ and later in *Marriage of Witten, In re*,³⁰ the court marked a change of policy in relation to contractual approach and the proprietary jurisprudence that guided frozen embryo disposition and held that

“principles of contract law are inconsistent with the reasoning behind entering into the embryonic disposition agreements in the first place as they interfere with an individual’s ability to reach personal decisions related to their personal reproduction. The agreement cannot be enforceable even if initial agreement was unambiguous in its intent. A rather human analysis of the nature of “informed consent given by the parties has to be made in assessing whether an agreement is enforceable or not”.

Any Agreement between the parties however may always not be always enforceable in the absence of sufficient flexibility in it for modification. The Court observed that allowing the parties to change their mind was necessary to enhance their freedom in a family relationship and to prevent any family relation being forced on them without their will. Thus, the court ruled that the alleged contract with the fertility clinic would not control, and if one of the parties wished to avoid procreation after the divorce, that person’s choice would control by presumptive default.

Any interest that the parties have in the pre-embryos could not therefore be deemed to be of a truly proprietary interest and the laws of property and contract applied only in as much as the policy set by law allowed them to do so. However, the agreement between the parties however was still given prevalence in as much as other considerations of law were met with.

In *JB v. MB*,³¹ the court observed that primary importance has to be given to the contract between the parties, subject to any later change in mind by either of the parties. Striking a harmonious cord with *AZ v. BZ* case, the court decided that in case of differences, the party choosing to not become a biological parent will ordinarily prevail.

²⁹ 725 NE 2d 1051 (Mass 2000).

³⁰ 672 NW 2d 768 (Iowa 2003).

³¹ 783 A 2d 707 (NJ 2001).

The full scope of balancing of interest in relation with the intermediate status of frozen embryos came in 2012 when in *Reber v. Reiss*,³² the Supreme Court of Pennsylvania granted the release of frozen embryo to the wife who was able to prove that the impugned embryos was the last and only chance that she had in conceiving children of her own. This was made convincing due to her diagnosis of cancer which made her unfit to conceive children normally. The court held that the wife's inability to achieve biological parenthood without the use of the embryos was a unique factor that outweighed the husband's desire to avoid procreation.

IV. POSITION IN INDIA

India does not have a very developed jurisprudence or even a well-defined legislation regarding frozen embryos, let alone, the answer to what to do with them after divorce. Though the present laws are not very adept with handling such scenarios, one can consider the jurisprudence laid down in abortion and surrogacy to bring in some clarity in the issue of frozen embryos as to what the legal status of an embryo is. The status of frozen embryo is a crucial in Indian family law landscape as the IVF procedures is on the rise in India. However, many factors including a lack of legislations have left judiciary with very little work in this area.

The lack of precedents in India on the legal status of embryo also makes the job of the judiciary precarious and uncertain. The position of law on the legal status of embryo could be better understood by drawing parallels from the jurisprudence of abortion, surrogacy, child custody and inheritance in the Indian legal system. Even though one can argue there is a difference in both the scenarios and that it would be ghastly unfair to compare, the thing to keep in mind is how the jurisprudence of a similar state of life is being compared. Due to lack of any material or opinion as such in Indian legal scenario, such a call has been made in this paper.

For the determination of the Status of Frozen embryos in Divorce proceedings, parallels have to be drawn from the following prevailing conditions: (A) Child custody in Divorce proceedings; B) Implications of Surrogacy laws in analyzing the status of Embryo; (C) Unborn child in various cross sections of personal laws; (D) Existing legal viability of contractarian approach; (E) A case for balancing of interest under a viable fundamental rights framework.

A. Child Custody in Divorce Proceedings

Custody of a child is governed under the personal laws of the child along with Guardians and Wards Act 1890. For Hindus, Buddhists, Jains

³² 42 A 3d 1131 (Pa Super Ct 2012).

and Sikhs, Guardians and Wards Act is read along with Hindu Minority and Guardianship Act, 1956 to decide on the custody of the child.³³ For Muslims and Parsis, custody of child is governed solely by Guardians and Wards Act 1890 and for Christians, Guardians and Wards Act needs to be read along with Indian Divorce Act 1869. In all cases, infants are always left with the mother as the 19th century law presumes women to be in better position to give the emotional, moral and physical support needed to raise the child. For Muslims, the statute confers custody of a boy upto 7 years and for girl upto puberty.³⁴ For Hindus, the child custody rests with women till the child turns 5. However, the court has time and again affirmed that welfare of the minors and not the rights of the parties are the paramount consideration in deciding custody over the child.³⁵

It is a moot question whether Guardians and Wards Act, can be applied to embryonic disposition. A person is said to achieve majority on completion of eighteen years of age. However, under Section 4 of the Guardians and Wards Act, minors are defined as a person who is to be deemed not to have attained his majority under the provisions of Indian Majority Act 1875.³⁶

Provisions of Guardians and Wards Act can be applied to the embryos if an embryo is considered to be a child, effectively bringing it under the ambit of Guardians and Wards Act. Doing so would effectively end our debate.

However, it is quite tempting to imagine (if not to urge the advocates who are reading this paper to profitably initiate) that conferring personality to embryos will be challenged in courts as it involves substantial questions of law including crucial questions on interpretation of fundamental rights. Such a challenge under the jurisdiction of the Supreme Court akin to the issues that the American courts faced in balancing fundamental rights claims of parties would be equally applicable and maintainable. For example, the need to balance the reproductive privacy of male progenitors that we earlier saw in cases like *Davis v. Davis*.

B. Implications of Surrogacy Laws in Analyzing the Status of Embryo

A nameless wise monk once said that to know what it is, one should know for sure what it isn't.³⁷ Hence, when we explore the proposition that embryos could be truly property and a purely contractarian approach will

³³ S. 3, Hindu Minority and Guardianship Act, 1956.

³⁴ Mulla, *Principles of Mahomedan Law*, 295 (19th edn., 1990).

³⁵ *Ruchi Majoo v. Sanjeev Majoo*, (2011) 6 SCC 479; *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.

³⁶ S. 4(i), Guardians and Wards Act, 1890.

³⁷ Anandhapadmanabhan Vijayakumar, *Tao of Revolution*, Hitler's Long Meditation, <<https://taoofrevolution.blogspot.com/2018/01/hitlers-long-meditation.html>>, accessed 5/1/2019.

find consonance in Indian legal scenario, we will have to look into laws which surely suggests otherwise. And that would be the surrogacy laws. While India does not have a comprehensive legislation that regulates surrogacy, the enforceability of surrogacy contracts was upheld in *Manji Yamada v. Union of India*,³⁸ where the Supreme Court held that commercial surrogacy is legal in India. In both the National Guidelines for Accreditation, Supervision and Regulation of ART clinics, evolved in 2005 by the Indian Council of Medical Research ('ICMR'), and the Assisted Reproductive Technology (Regulation) Bill, 2014, the surrogate mother is not considered to be the legal mother.

However, just as we have seen in USA, the existence of an enforceable contract does not mean that the embryo itself is akin to property. Infact, some would argue that the very comparison of surrogacy contracts as laid down by *Baby Manji case* has little influence in the determination of the status of embryos as surrogacy agreement makes way for immediate implantation of the embryo and in almost no circumstance places the contention on the disposition of an embryo in itself as it is made only for a period of 60 days during which it is either implanted or discarded. Since there is no element of storage in a surrogacy agreement, frozen embryos can be said to derive no influence from surrogacy laws as neither its status or its disposition is in question. Further, in USA in the *Baby M case*³⁹ where the legality of surrogacy contracts was upheld, the reasoning of this case wouldn't make any contribution in the determination of status of frozen embryos. This argument seems to be relevant and render the debate unnecessary until we consider the prospective changes in law in surrogacy.

The Lok Sabha in 2018 passed the Surrogacy (Regulation) Bill,⁴⁰ which if passed in Rajya Sabha would in effect outlaw commercial surrogacy. The bill defines embryo under section 2(i) as a developing or developed organism after fertilization till the end of fifty-six days and effectively excludes cryopreservation from its ambit. In doing so, the bill clearly does not envisage any meaningful regulation of cryopreserved embryos. But the status of an embryo could be regardless inferred seeing whether it treats embryos as property. Section 35 prevents selling of embryos for the purposes of surrogacy or undertaking any sex selection in any form for surrogacy.⁴¹

Another crucial provision in the bill is the blanket prohibition under Section 4(iii)(b)(III) of the bill against the surrogate mother providing her own gametes for implantation. While the ban on commercial surrogacy could be interpreted as an effort to prevent its misuse, the ban on traditional surrogacy (surrogate mother providing her own gametes) even by an altruistic relative

³⁸ (2008) 13 SCC 518.

³⁹ *Baby M, In re*, 217 NJ Super 313 (1987).

⁴⁰ The Surrogacy (Regulation) Bill, 2018 (pending).

⁴¹ S. 35, Surrogacy (Regulation) Bill, 2018 (pending).

does not fit within the above narrative. It impliedly would have a lot to do with the refusal of lawmaker to treat the embryos solely as property.

C. Understanding Status of Frozen Embryos from the Position of an Unborn Child Within Cross Sections of Various Personal Laws

In India, the status of embryo akin to property could be inferred again by drawing parallels from cases involving unborn child in Indian Penal Code, 1860; Transfer of Property Act, 1882 and Indian Succession Act, 1925.

Under the Transfer of Property Act, 1882, it is impossible to confer an estate or a grant of interest, limited by time or otherwise, to an unborn person for life on an unborn person under Section 13.⁴² Further, 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 13.⁴³

Thus, to transfer a property for the benefit of a person unborn on the date of the transfer, it is imperative that property must vest in some person between the date of the transfer and the coming into existence of the unborn person since property cannot be transferred directly in favor of an unborn person. This shows that frozen embryos will not have legal rights on matters of succession.

On looking at Sections 113 and 114 of the Indian Succession Act, 1925 one may realize that they are almost identical to Sections 13 and 14 of Transfer of Property Act, 1882 respectively. The main difference between the provisions under the Indian Succession Act, 1925 and the provisions under Transfer of Property Act, 1882 is that the former deals with bequests which take effect only on the death of the testator while the latter relate to transfer of property *inter vivos*. Section 13 of Transfer of Property Act, 1882 controls Section 113 of Indian Succession Act, 1925 and both are to be read together, as opined by the Supreme Court in *Raj Bajrang Bahadur Singh v. Bakhtraj Kuer*.⁴⁴

It was further observed by the Court 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

⁴² S. 13, Transfer of Property Act, 1882.

⁴³ S. 14, Transfer of Property Act, 1882.

⁴⁴ AIR 1953 SC 7.

at the time of the testator's death and is invalid as to the rest." The above provision clarify that the unborn children does not have legal personality in India so as to be conferred with rights and duties in itself, but can be conferred with successive interest, only through a living person.

However, one crucial question is likely to put an enormous test on the above said principles. The question being whether the transfer or succession of the estates and rights can be held valid if at the time of the testator's death, the unborn child was in a frozen embryonic state and assuming that soon after, the embryo was implanted on the womb of mother. Comparing it with the position of US, it is likely that such a transfer or succession of rights or estates may still hold valid due to the intermediate status of frozen embryo as partly life and partly property and the balancing of interest approach that they have taken. In India, the case could be radically different due to the clear language of the statute which puts a blanket prohibition on all unborn children which does not differentiate frozen embryos in its broad scope.

However, the possibility of a favourable presumption of legal personality of frozen embryo cannot be completely ruled off in the light of persuasive facts and circumstances. For example, in case where a testator confers the estates or rights expressly on a frozen embryo, the court will have to consider whether the frozen embryo that was implanted after the death of the testator would fall under the blanket prohibition as laid down by *Raj Bajrang Bahadur Singh* case.

Unborn child vested with rights and duties is considered to be a person as long as it has reached biological maturity within mother's womb. Sections 312 and 316 of the Indian Penal Code make it an offence to cause miscarriage of an unborn child. These sections are pertinent to understanding the constitutional right to life of an embryo in the Indian context. However, voluntarily causing miscarriage is an offence under two circumstances. One, when a woman is 'with child' which means that as soon as the gestation period begins and secondly, when she is 'quick with child' which means the period when the movements of the fetus have been felt.

In *Prakash v. Arun Kumar Saini*⁴⁵ on 5 February 2010, the court observed that to decide whether a child in the womb of the mother can be called as a person or not, it is pertinent to discuss different stages of birth of a child in the womb of a mother.

Technically the term 'developing ovum' is used for the first seven to ten days after conception i.e. until implantation occurs. It is called an 'embryo' from one week to the end of the second month and later it is called 'fetus'. It becomes an infant only when it is completely born. The life may be considered

⁴⁵ 2010 SCC OnLine Del 478 : (2010) 167 DLT 311.

to have entered either immediately on the date of conception in the form of a small cell which gets multiplied later or when a mother can feel the movement of child physically, i.e. when the fetus is twenty weeks or five months old and the cell changes its structures and texture to become different parts of the body such as eyes, legs, bones, blood, head etc.. Thus, when the child makes movements touching the internal walls of the womb, the actual life is considered to take its physical form by some. Therefore, there may be controversy as regards the exact date of life entering the fetus but there cannot be any controversy as regards the life of the unborn child of a woman in her seventh month of pregnancy.⁴⁶

Though it is pertinent to note that the above stated cases and statutes pertain to succession, transfer of property, criminal and tort jurisprudence of damages respectively, the ratio in each case rests heavily on the very status of the embryos. Thus, we can effortlessly conclude that frozen embryo in a cryo-preserved state will not have the status of person by itself in India at the moment. This may be put to severe debate when such questions of law arise in cases like the ones we have earlier pointed above.

D. Existing Legal Viability of Contractarian Approaches

A contractual approach by far is legally enforceable in India. It is necessary to note that donation of sperms and ovum to ART laboratories and all aspects of ART is guided in India under an already existing contractarian approach.

ART lacks a binding legal definition in India due to the lack of any statute delving into it. Indian Council for Medical Research (ICMR) has come out with its National Guidelines for Accreditation, Supervision & Regulation of ART Clinics (Guidelines) in India which has come out with comprehensive measures to regulate the ART procedures in India. However, it remains non-binding on ART clinics in the absence of any statutes that backs the Guidelines.

However, in *Anitha Jayadevan v. Ministry of Health & Family Welfare*⁴⁷ decided on 22 April 2009, it was held that the guidelines are yet to be translated to an Act. In *Normann Witzled v. Jyotshana Mandal* on 18 November 2011,⁴⁸ the Delhi District Court led by Shri Inderjeet Singh, Additional District Judge observed and upheld the validity of ICMR guidelines insofar as the written contract if in consonance with the Guidelines. While this does not cast an obligation on the Couples to conform to the ICMR guidelines, a voluntary adoption of the guidelines at the time of disposition agreements can

⁴⁶ *Oriental Insurance Co. Ltd. v. Santhilal Patal*, 2007 SCC OnLine AP 199 : (2007) 4 ALD 855.

⁴⁷ 2009 SCC OnLine CIC 4937.

⁴⁸ Commercial Suit No. 143 of 2011, decided on 18-11-2011 (DDC).

very well bind them, similar to *Kass* where the first instance of mutual consent was held to be binding.

Section 2(c) of the Assisted Reproductive Technology (Regulation) Bill 2014 defines “assisted reproductive technology” as “all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or the oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract of a woman;” and it is to be read with its grammatical variations and cognate expressions.⁴⁹ Section 2(c) continues to remain the most comprehensive definition of ART in Indian regulatory context.

In *Normann Witzled v. Jyotshana Mandaf*⁵⁰ on 18 November 2011, the Court observed the validity of ICMR guidelines insofar as the written contract if in consonance with the Guidelines. The court also held that “a child born through ART shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both the spouses. Therefore, the child shall have a legal right to parental support, inheritance, and all other privileges of a child born to a couple through sexual intercourse.”

It is clear by now that not even claims of parentage over donated genetic materials are likely to be entertained at a later point of time and a contractual approach seems the most appropriate in case of such donations. In FORM – F under the rule 15.1 on Consent for Artificial Insemination or Intrauterine Insemination with Donor Semen of the draft Assisted Reproductive Technologies (Regulation) Rules – 2010 (Regulation) it is clearly mentioned that the child as a result of IVF procedures will be considered their legal heirs. The contractarian approach in this case will more or less hold validity in a court of law.

The Regulation however fails to provide any clear answers with respect to the ownership of frozen embryos in case of divorce. Form G under rule 15.1 of the Regulation provides binding option in case of death. By now, we can conclude that except the disposition of embryos in a divorce proceeding, all regulated aspects of IVF are dealt under a strict contractarian approach, under various ART guidelines in India.

E. A case for balancing of interest under a viable fundamental rights framework

However, similar to the position in US, the contractarian approach will prevail only as long as the reproductive autonomy of the involved parties will be taken into consideration. Reproductive rights fall under the broad

⁴⁹ S. 2(c), Assisted Reproductive Technology (Regulation) Bill, 2014.

⁵⁰ Commercial Suit No. 143 of 2011, decided on 18-11-2011 (DDC); S. 4, Guardians and Wards Act, 1890.

construction of personal liberty under Article 21 of the Constitution of India, 1950 and therefore cannot be ignored while deciding the cases on disposition of frozen embryos. Therefore, any progenitor wishing to prevent his/her embryo being implanted after divorce may have a fundamental right to choose not to have children, similar to *Davis*. This careful tightrope is reflected in the 2018 bill which seeks to prohibit even traditional surrogacy to prevent unforeseen crisis that could very well be associated with the conflict of interest involving questions of fundamental right.

In *Bhupinder Kumar v. Angrej Singh*⁵¹ on 28 August 2009, the court observed that reproductive choices are also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. This position has achieved even more relevance due to the landmark judgment on Privacy, *K.S. Puttaswamy v. Union of India* which laid down that Privacy is a fundamental right under Article 21 of the Indian Constitution.⁵² Further, It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.

Though the instant judgment (*Bhupinder Kumar*) speaks about the right of women not to procreate, it is only natural that such right will be extended to men if brought into question. Apart from applying to divorced couples, this may even apply in a wide interpretation of Article 21 to even sperm or ovum donors who wish their gametic materials to be destroyed or withdrawn in the backdrop of the new Puttaswamy Judgment.

The most pertinent question in such a case is whether balancing of interest approach or a contractarian approach will prevail. However, as we have seen, ART procedures lack binding guidelines in India and reproductive rights at present is within the ambit of fundamental Rights under Article 21. This would mean that the progenitors who are not willing to have children may have higher bargaining power in a court of Law in India. It can be assumed that implementation of any embryonic disposition agreement at present will require careful balancing of interest to avoid claims of unconstitutionality in post ART scenario.

V. CONCLUSION

First and foremost is the necessity for Binding ART regulations which should as far as possible provide innovative methods of dispute resolution for

⁵¹ (2009) 8 SCC 766.

⁵² (2017) 10 SCC 1.

the purpose of Frozen Embryo disposition rather than engage in a rights based approach of either progenitors to decide on disposition which would bring conflicts rooted in the constitutional rights of the Parties which will make it harder for the Court to resolve once and for all the issues surrounding Frozen embryo disposition in the aftermath of divorce.

While there is little clarity about the approaches that the courts will take under varying circumstances and compelling arguments like in the American courts, Indian courts have a difficult job in trying to reconcile various aspects of disposition. While there is nothing we can do to predict the outcomes of such disputes, some inference could be made from the existing scheme of law. For evaluating the other aspects regarding the status of frozen embryo, one will have to inspect the fundamental rights of the progenitors involved in the debate and analyze whether a balancing of interest approach or a contractual approach would hold water. As Indian legal system has different notions of family values and fundamental rights, it would not be optimum to reach a conclusion based on parallels drawn from the American jurisprudence on the subject matter.

However, the instant issue will have wide ramification in the Contemporary jurisprudence of Family law as well as very foundation on the future of ART. As the application of ART increases dramatically, resolving the dispute is of widest possible relevance.