

**PARPALAIX C. CECOS: PROTECTING INTENT  
IN REPRODUCTIVE TECHNOLOGY**

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I. INTRODUCTION

As new reproductive technology emerges, potential parents have both more legal options as well as more legal difficulties when it comes to their procreative rights. Imagine if Solomon actually were able to split a baby in two through the latest in cloning technology.<sup>1</sup> Would the disputing women simply take one baby each or would they both be considered the mothers of both the children? Even more relevant to current technology is the question involving embryos. If Solomon had to resolve a dispute between a man and a woman over embryos created with their genetic material, would he still be so willing to split the "child"? While courts have not been forced to deal with all of these questions yet, a few recent cases have laid the groundwork for future courts to unravel the answers to many of reproductive technology's difficult dilemmas.

The first major question that forced courts to view embryos and reproductive cells in a new light was that of sperm ownership. In 1984, in *Parpalaix c. Centre d'etude et de Conservation du Sperme*,<sup>2</sup> a French court faced the question of who owned the sperm of a man who had donated his reproductive cells to a sperm bank and subsequently passed away. The court was asked to decide if "wandering sperm"<sup>3</sup> could be viewed as property or if society should think about sperm as having

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1. See 1 Kings 4:16. Two women came before King Solomon requesting that he resolve a dispute. Each woman claimed to be the mother of a certain baby. Solomon suggested that they split the baby in half, so each mother could take home a piece. Solomon discovered who the true mother was because she claimed that she would rather give the child to the other woman than see it harmed. See *id.*

2. T.G.I. Creteil, Aug. 1, 1984, Gaz. du Pal. 1984, 2, pan. jurisp., 560.

3. E. Donald Schapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 229 (1986).

potential for life.<sup>4</sup> Instead of viewing sperm as ordinary property that could be alienated at will, the *Parpalaix* court chose to decide the use of sperm based on the intent of the donor.<sup>5</sup> This standard for reproductive material provides a foundation for determining future cases as technology advances and reproductive options continue to grow.

This Note will examine the court's decision to use donor intent in the *Parpalaix* case and show how that standard was applied and modified as the basis for resolving disputes involving embryos.<sup>6</sup> This Note argues that the *Parpalaix* intent model is a difficult standard to apply in embryo disputes, but it is one that cannot be ignored in solving any reproductive question.

## II. *PARPALAIX C. CECOS*: THE FIRST SPERM CASE

### A. Case Facts

In 1981, Alain Parpalaix began receiving chemotherapy as treatment for testicular cancer.<sup>7</sup> Warned by his doctors that the treatments could render him sterile, and at their suggestion, he deposited sperm in the Centre d'étude et de Conservation du Sperme ("CECOS"), a research center and sperm bank.<sup>8</sup> The contract with CECOS had no provision for the use of the sperm in the event of Alain's death.<sup>9</sup>

At the time of the sperm deposit, Alain had been living with his girlfriend, Corinne.<sup>10</sup> The cancer went through a period of remission before taking a turn for the worse in 1983.<sup>11</sup> In December 1983, Corinne and Alain were married; two days later, Alain died on Christmas Day.<sup>12</sup>

Following Alain's death, Corinne requested his sperm from CECOS for the purpose of insemination.<sup>13</sup> CECOS refused, claiming that no law mandated the return of the sperm, and requested that Corinne turn the case over to the Ministry of Health for a legal ruling on the matter.<sup>14</sup> When the Ministry chose to postpone a ruling on the issue, the *Parpalaix*

4. See *id.* at 561.

5. See *id.* at 560.

6. See *infra* Parts IV.B-C.

7. See *Parpalaix* at 560.

8. See *id.*

9. See Schapiro & Sonnenblick, *supra* note 3, 229-30.

10. See *id.* at 230.

11. See E.J. Dionne Jr., *A French Widow Sues Over Sperm*, N.Y. TIMES, July 2, 1984, at A7.

12. See *id.*

13. See *Parpalaix* at 561.

14. Dionne, *supra* note 11, at A7.

family, both Alain's parents and Corinne, went to court suing for possession of the sperm.<sup>15</sup>

### *B. The Argument on Both Sides*

Lawyers for the Parpalaix family argued that sperm is an divisible part of the body and should be treated as a movable object, subject to the property laws governing movable objects.<sup>16</sup> Thus, as Alain's heirs, the family could inherit the sperm and request possession of it under the contract that Alain signed with CECOS.<sup>17</sup> In addition, the family lawyers appealed to the court on a moral argument: "Let her give life to this child, the fruit of a love that she goes on expressing with quiet determination. It is her most sacred right."<sup>18</sup>

The defendants, CECOS, responded to the family's statements in a number of ways. First, CECOS claimed that sperm should be considered as different from other organs since sperm has the special potential to create life.<sup>19</sup> Sperm must be viewed as an indivisible part of the body and not a separate movable object. As such, the center's only legal obligation was to the donor himself and standard rules of property did not govern.<sup>20</sup> Thus, CECOS did not violate the contract by refusing to hand over the sperm to Alain's widow.<sup>21</sup> Next, CECOS argued that sperm banks have a specific purpose: their aim is "therapeutic," and when Alain deposited sperm it was for the purpose of allaying his fears about possible sterility, not necessarily to have children.<sup>22</sup> Since insemination and birth are not part of the therapeutic aim of the sperm bank, the contract did not cover giving the sperm over to Corinne.<sup>23</sup> The final argument of CECOS was that since Alain left no instructions for the use of his sperm after his death, his intent was unclear. In the absence of express intent, the sperm should not be turned over to Corinne for use in insemination.<sup>24</sup>

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15. *See id.*

16. *See Parpalaix* at 561. The court refers to the French Civil Code, Article 1939, which states that if a person dies after making a deposit of material goods, the deposited goods are transferred only to the heirs. *See* C. CIV. [CODE CIVIL] art. 1939 (Fr.).

17. *See Parpalaix* at 561.

18. *Woman Must Wait to Know if She Can Have Dead Husband's Baby*, REUTERS N. EUR. SERV., June 28, 1984.

19. *See Parpalaix* at 561.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

### C. The Court's Decision

The court began its discussion by pointing out that French law in 1984 was not yet equipped to deal with posthumous conception.<sup>25</sup> According to the French Civil Code, a child is deemed illegitimate if born more than 300 days after the death of its father<sup>26</sup> and any child not alive at the time of death of its father is denied inheritance rights.<sup>27</sup> The court did not answer these questions; rather it used the problem to ask the question, "Do we need to revise our traditional notions of conceptions under these conditions?"<sup>28</sup>

The court rejected the Parpalaix family's argument and found the Civil Code completely inapplicable in the case of sperm.<sup>29</sup> Sperm must fall under all parts of the Civil Code or not at all; since sperm did not fall under the commerce clause, it could not be dictated by the inheritance clause either.<sup>30</sup> The commerce section of the Civil Code was inapplicable, given that sperm cannot be considered divisible from the body of the donor in order to protect the integrity of the human body.<sup>31</sup> Thus, the court claimed that sperm is not movable, inheritable property.

Additionally, the court dismissed the sperm bank's arguments as well. Sperm is "the genetic expression" of a person's fundamental right to create life or to refrain from bearing children.<sup>32</sup> As such, a person's intent to bear children must dictate the use of the sperm, not, as CECOS chose to argue, that upon his death a man's sperm must be destroyed.<sup>33</sup> The court narrowed its role to a fact finding mission: to uncover Alain's "unequivocal" intent for the posthumous use of his sperm.<sup>34</sup>

The court used several factors to determine Alain's intent. According to the Tribunal, the fact that there was no prior written contract outlining the posthumous use of the sperm did not necessarily indicate that Alain never intended for Corinne to use the sperm.<sup>35</sup> Thus,

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25. *See id.*

26. *See id.*; C. CIV. art. 340 (Fr.). However, in *Mme. X. c. Proc. R.p.*, T.P.I. Angers, 1994, the court declared that a child born by in vitro fertilization more than 300 days after the death of its father will still have the presumption that the husband of the child's mother is the father of the child.

27. *See Parpalaix* at 561; C. CIV. art. 725 (Fr.).

28. *Parpalaix* at 561.

29. *See id.*

30. *See id.*

31. *See id.*

32. *Id.*

33. *See id.* at 560.

34. *See id.* at 561.

35. *See id.*

the court turned to other factors to uncover Alain's intent. First, the court determined that Alain's parents were the best people to determine the intent of their child when it came to procreation, since Corinne had been his wife for only 2 days and since she was directly involved in the possible implantation.<sup>36</sup> Since Alain's parents supported Corinne's decision to be inseminated, the court inferred that Alain would support that decision as well.<sup>37</sup> Second, the court determined that Alain and Corinne got married right before he died in order to make it easier for her to obtain the sperm and bear his child posthumously.<sup>38</sup> Lastly, the court used the fact that since Alain had no way of knowing CECOS's policy with regard to deceased donor sperm, the absence of his written consent is not evidence that he did not consent to a posthumous child.<sup>39</sup>

The Tribunal ordered CECOS to turn the sperm over to Corinne and her doctor for insemination or destruction, the only two options placed before the court by Corinne.<sup>40</sup> Unfortunately, Corinne never conceived with the amount of sperm available. Thus, the Tribunal never had to face the question of inheritance rights of Alain's unborn child.<sup>41</sup>

### III. APPLICATION IN AMERICAN COURTS

The dilemma of determining sperm ownership was placed before American courts subsequent to the *Parpalaix* decision. In *Hall v. Fertility Institute of New Orleans*,<sup>42</sup> the Louisiana Court of Appeal concluded that sperm is not traditional property. In a situation parallel to that of Alain Parpalaix, a deceased man willed his sperm to his lover.<sup>43</sup> The court stressed that the consequences of using sperm are so enormous that transfer must not be taken lightly.<sup>44</sup> "[T]he possible development of human beings is such a serious consequence that the irreparable nature of the risk at issue is clear."<sup>45</sup> Thus, the consequences of transfer must comport with the donor's intent.<sup>46</sup>

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36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.* at 560.

41. *See Schapiro & Sonnenblick, supra* note 3, at 233.

42. 647 So.2d 1348 (La. Ct. App. 1994).

43. *See id.* at 1350.

44. *See id.* at 1351.

45. *Id.*

46. *See id.*

Utilizing this same approach, the court in *Hecht v. Superior Court of Los Angeles County*<sup>47</sup> found that frozen sperm can only be utilized according to the intent of the donor. In this case too, a sperm donor died after depositing his sperm in a storage facility, and his fiancée claimed ownership rights to the sperm.<sup>48</sup> The California court held that the donor had a limited property interest in his sperm by stating that "the decedent had an interest in his sperm which falls within the broad definition of property in Probate Code Section 62, as 'anything that may be the subject of ownership and includes both real and personal property and any interest therein.'"<sup>49</sup> The court, however, declined to apply the general law regarding gifts of personal property to the deposited sperm.<sup>50</sup> While the court used more traditional property language to describe the sperm than did the French tribunal, it cited *Parpalaix* as precedent for its decision and reasoning.<sup>51</sup>

#### IV. WHY INTENT IS IMPORTANT

In the wake of the *Parpalaix* decision, the emphasis on intent in American case law about reproductive cells is no surprise. The focus on intent is the obvious choice when viewed alongside the alternative of sperm as property. If sperm were considered standard property and alienable at will, then in the instance where a man died intestate, his reproductive material would pass to a family member that could choose a course of action that the decedent never intended.<sup>52</sup> He could then be responsible for an unwanted child.<sup>53</sup> As the court in *Parpalaix* noted, the decision to procreate is a fundamental right. The sperm donor's basic right to decide whether or not to procreate would thus be violated if his intent was not followed. The special nature of reproductive material forces courts to find an intermediate status for sperm — somewhere

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47. 20 Cal. Rptr. 2d 275 (Ct. App. 1993). Interestingly, the *Hecht* court omitted the final opinion from the record. This may be evidence that the court worried about the consequences of its opinion in the uncharted territory of sperm ownership and the difficulties of classifying sperm in terms of property, despite the court's application of the Probate Code.

48. See *id.* at 275.

49. See *id.* at 281.

50. See *id.* at 283.

51. See *id.* at 287 (citing CAL. PROB. CODE § 62 (West 1997)).

52. Here, I am assuming that the donor is also the owner of the sperm after donation; however, the donor can give up ownership rights in his sperm (e.g., through anonymous sperm donation).

53. For a discussion of the psychological effects, if any, of a posthumous birth on the child, see Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995).

between a piece of inheritable property and an actual life. By applying the unequivocal intent rule, courts show that they respect this status.

### A. Defining Intent

If intent will be used as the future standard for courts to determine the use of reproductive material, then the intent itself must be carefully defined. But the question remains: Intent to what? From the discussion of the *Parpalaix* holding,<sup>54</sup> the court effectively narrowed the possibilities of the sperm's use to two results: destruction of the sperm or implantation in Corinne, the intended recipient.<sup>55</sup> The holding did not consider any other alternative, e.g., donating the sperm to research or placing it in a pool of anonymous donors. The *Parpalaix* Tribunal seemed to be searching for Alain's specific intent to give the sperm to Corinne for the purpose of her insemination. If the court deemed that Alain had intended to simply give the sperm to Corinne for her to decide its use, then she would have more than the options of destruction or personal implantation. Besides donating the cells to research or to a pool of anonymous sperm, Corinne would be able to implant the sperm in a surrogate if she were sterile or did not want to give birth herself. The question is left open of whether the court would expand Alain's intent to give the sperm to Corinne for insemination to include implantation in a surrogate. If the sperm were deemed standard property, the cells could be inherited and the beneficiaries would be able to use the sperm in this fashion. The court did not go this far because it tied the use of the sperm to the fundamental right to procreate.<sup>56</sup> Though no court has yet faced the issue of using sperm for implantation in a surrogate, it can be interpolated from the *Parpalaix* decision that the fundamental right to procreate is not only the ability to decide whether or not to have children, but also to decide with whom you are willing to have them. This would include choosing a genetic mother as well as a birth mother. Corinne would thus be restricted to inseminating herself, even if she would otherwise choose to use a surrogate. The issue of defining the donor's specific intent will become a much bigger problem if courts use intent to determine the use of embryos.<sup>57</sup>

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54. See *supra* Part II.C.

55. See *Parpalaix c. CECOS, T.G.I. Creteil, Aug. 1, 1984, Gaz. du Pal. 1984, 2, pan. jurisp., 560.*

56. See *id.*

57. See *infra* Part IV.C.

### B. French Courts Extend the Notion of Intent to Embryos

The analysis of sperm ownership naturally has consequences on an even tougher issue — that of embryo ownership. In 1993, CECOS once again emerged as a defendant in *Mme. O. c. CECOS*.<sup>58</sup> A wife's eggs were fertilized with sperm from her husband and the embryos were stored at CECOS.<sup>59</sup> The agreement between the couple and the depository included fertilization and implantation. The husband died prior to implantation and CECOS refused to fulfill the implantation portion of the contract without his direct consent.<sup>60</sup> The High Court at Rennes, France, ruled that a fertilized embryo is "not a legal entity with respect to the parents,"<sup>61</sup> the persons who have provided the reproductive materials.<sup>62</sup> In other words, the embryos are not joint property of the couple; if they were, the wife would be able to unilaterally dictate their use. In absence of proof that the deceased husband provided the wife with unilateral consent power, the court ruled that the embryos could not be used for insemination.<sup>63</sup>

Later this decision was challenged in the Court of Appeals at Toulouse. The facts of *Mme. P. c. La Grave Hôpital*<sup>64</sup> are very similar to the *Mme. O.* case, however, here the agreement had a specific provision that both the husband and wife needed to consent to the implantation.<sup>65</sup> After the husband's death, the wife brought suit claiming that the document should be ignored in light of the fact that life begins at conception.<sup>66</sup> Thus, according to her, an embryo is a conceived life and should be implanted in line with that public policy. The court held that there was nothing in French law that made frozen embryos the possessors of rights, and ordered the embryos destroyed.<sup>67</sup>

These two cases highlight the logical extension of the *Parpalatx* court's ruling. The fundamental right to procreate includes the ability not to conceive. Absent clear proof that one party intended to use the embryos for insemination, courts are unwilling to force someone to

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58. T.G.I. Rennes, June 30, 1993, J.C.P. 1994, II, 22250, 169.

59. *See id.* at 169.

60. *See id.*

61. *Id.*

62. EUR. CURRENT L., July 1994, at 140.

63. *See id.*

64. CA Toulouse, Aug. 18, 1994, J.C.P. 1995, II, 224072, 301.

65. Gerard Valles, *Une Decision du Tribunal de Grande Instance de Toulouse Des Embryons Congeles ne Seront ni Implantés ni Detruits*, LE MONDE, Oct. 9, 1992, Section Société.

66. *See Mme. P.* at 301.

67. *See id.* at 302.

become a parent with all the responsibilities attached. However, these cases also highlight the problems of applying the unequivocal intent standard of sperm to embryos. First, like the *Parpalaix* Tribunal, a court takes into account only the deceased's intent and therefore ignores the difference between sperm and embryo. The latter is actually the "property" of two people. In *Mme. O.*, the court denied her the use of not only her husband's genetic material but her own as well.<sup>68</sup> The fact that these embryos were half her genetic material should mean that her intent to procreate should not be ignored. Second, the court extended a presumption of the *Parpalaix* case that is not easily applied to embryos. In *Parpalaix*, the court rightly presumed that sperm donation itself is not enough to find an intent to procreate — a man who faces the possibility of sterility may want to donate as "fertility insurance," thus postponing the decision until later.<sup>69</sup> Allowing donation to be evidence of desire to procreate would force a man facing sterility to decide immediately whether he will eventually have children or not. In the embryo cases however, the presumption is not dispositive. Creating an embryo is not insurance against sterility. The only purpose of fertilizing an egg with sperm is for implantation and eventual birth. It should be easier for a court to find intent to procreate with fertilized cells than it does with sperm donation. Yet in both the *Mme. O.* and *Mme. P.* cases, the French courts did not find unequivocal intent as in *Parpalaix*; rather, the courts focused more on unequivocal consent through contract or implication. This is not to say that the courts reached the wrong conclusions based on the specific facts before them. Yet, it is important to recognize that the standard of unequivocal intent, as well as the factors used to uncover the intent of the deceased party, may differ greatly when applied to embryos, where two people's intents must be considered.

### C. *Whose Intent Matters?*

While the French cases illustrate how intent was applied when one party was deceased, the harder question arises when both parties are still living and are in disagreement about the fate of the embryos. The first major case involving a dispute over the custody of frozen embryos was in 1992, in *Davis v. Davis*.<sup>70</sup> A woman sued her ex-husband for custody of frozen embryos created and stored during their marriage.<sup>71</sup> Like the

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68. See *Mme. O* c. CECOS, T.G.I. Rennes, June 30, 1993, J.C.P. 1994, II, 22250, 169.

69. See Schapiro & Sonnenblick *supra* note 3, at 235.

70. 842 S.W.2d 588 (Tenn. 1992).

71. See *id.* at 589.

court in *Mme. O.*, the Supreme Court of Tennessee also recognized that an embryo cannot be considered a "person" that has the right to be born.<sup>72</sup> Nonetheless, embryos should not be treated as standard property given their special nature as potential life.<sup>73</sup> Describing the status of frozen embryos, the court wrote:

[They] occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest . . . in the preembryos in this case is not a true property interest. However, [the biological parents] do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.<sup>74</sup>

The ruling in *Davis* suggests that an interest in reproductive cells is a limited property right, subject to the decision-making authority of the owner.

This intent-based approach is similar to the *Parpalax* decision. The court in *Davis* ruled that:

[D]ecision-making authority regarding preembryos should reside with the persons who have provided the gametes. . . . As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject. A person's liberty to procreate or avoid procreation is

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72. See *id.* at 594-97. The court determined that an embryo is not a "person" from Tennessee's treatment of unborn children. A woman's right to abort her unborn fetus diminishes as the fetus reaches viability, even though her right does not disappear completely. The woman has considerable leeway to decide to abort in the first trimester, less in the second, and when the fetus becomes viable, the woman's rights are almost non-existent. See *Roe v. Wade*, 410 U.S. 113, 115 (1973). Thus, the court concluded that the fetus has fewer rights the farther away it is from viability. A pre-zygote is the furthest away from viability, since before implantation, it has less of a chance to reach its biological potential than a zygote. Therefore, a pre-zygote cannot be considered a life since an implanted zygote is not legally a life.

73. See *Davis*, 842 S.W.2d at 597.

74. *Id.*

directly involved in most decisions involving pre-embryos.<sup>75</sup>

The *Davis* court's intent theory stems from the same reasoning as the *Parpalaix* holding. The fundamental right of choice in procreation can only be protected if the court follows the manifested intent of the donors.

Therefore, the court ruled that the intent of the parties must be the main factor in determining the fate of the cells.<sup>76</sup> However, the court does not use the term "intent", rather it chose the term "consent" in recognition of the impossibility of satisfying the intent of two donors. Consent, rather than intent, is a standard that applies the ex ante intent of the parties. For example, a court applying the consent standard looks to what the parties had agreed upon when the embryos were created rather than what they think now. So if the parties consented to destroy the embryos in the event of a divorce, that agreement is binding after the divorce, even if one party then changes his or her mind. In *Davis*, the court found no prior written unequivocal agreement, and rejected other evidence of unequivocal consent, recognizing that "life is not static and human emotions run particularly high when a married couple is attempting to overcome fertility problems."<sup>77</sup>

Absent proof of a prior agreement showing unequivocal consent, the court employed a balancing test and weighed the right of one party to procreate against the right of the other party not to procreate. Each is an equal right with respect to the other, according to the *Davis* court: "the right of procreational autonomy is composed of two rights of equal significance — the right to procreate and the right to avoid procreation. . . . The equivalence of and inherent tension between these two interests are nowhere more evident than in the context of in vitro fertilization."<sup>78</sup> In this case, the Tennessee court found the husband's right not to become a parent as more significant than the wife's right to become a parent.<sup>79</sup> The court acknowledged that this balancing test must

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75. *Id.* (quoting the Ethics Committee of the American Fertility Society).

76. *See id.*

77. *Id.*

78. *Id.* at 601.

79. *See id.* at 604. In her first claim, Mary Sue Davis wanted the embryos for insemination. However, as the suit progressed, she amended her claim, requesting that the embryos be given to a childless couple, while Junior Davis wanted them to remain in their frozen state in order to keep his future options open. In balancing Mary Sue's rights against those of Junior Davis, the court stated that the question would be "closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means." *Id.* at 604. Thus the fact that she wished to donate the pre-embryos added little weight to her interests, given that Mary

be applied to each and every specific circumstance, but they also implied that the person declining to parent should generally prevail.<sup>80</sup>

The Supreme Court of New York, Appellate Division, agreed with *Davis*. In *Kass v. Kass*,<sup>81</sup> Maureen Kass sued her ex-husband for custody of fertilized embryos stored in a depository before their divorce.<sup>82</sup> However during their marriage, they not only fertilized her eggs with his sperm, but they even attempted a few unsuccessful inseminations.<sup>83</sup> After their divorce, Maureen wanted to continue implantation with the remaining embryos.<sup>84</sup> Maureen and Steven had signed an informed consent agreement with the fertility clinic that stated that without both parties' consent, the embryos must be donated to research.<sup>85</sup> The agreement recognized their joint rights and obligations and that any decision must be mutual; "[s]ince the parties now in fact no longer agree with regard to this matter, they are no longer able to render the single, joint decision regarding the disposition of the pre-zygotes which the informed consent document contemplated."<sup>86</sup> Thus the court held that the agreement was binding, and the *Davis* balancing test could not be invoked.<sup>87</sup> The court could have found that the agreement was not binding because of the intervening attempts at conception. *Kass* differs from *Davis* in that insemination was attempted prior to the dispute. Had any of those attempts been successful, Steven Kass would be the lawful father. However, the court did not even discuss the possibility that early insemination attempts establish his consent to procreate; it allowed him to change his mind up until successful implantation.

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Sue never even attempted to show that parenthood by adoption or the use of another man's sperm would be impossible.

80. *See id.*

81. 235 A.D.2d 150 (N.Y. App. Div. 1997).

82. *See id.* at 150.

83. *See id.* at 151.

84. *See id.* at 153.

85. *See id.* at 151.

86. *Id.* at 158.

87. *See id.* at 162. Even if the consent agreement were deemed invalid or unequivocal as to state of the parties' prior intent, Maureen would still be denied authority over the embryos in the balancing test. The court claimed that the lack of proof that other parenting options were impossible would tip the *Davis* test in Steven's favor. *See id.* Either way, Maureen would have lost.

## V. THE GENDER BIAS OF INTENT

### A. Switching of Traditional Roles

In line with the reasoning in *Parpalaix*, both the *Davis* and the *Kass* courts held that, absent evidence of consent, a person's reproductive material must not be used for procreation. However in a pending case in New Jersey, a man is suing his wife for custody of embryos created during their marriage.<sup>88</sup> The man wants possession of the embryos to inseminate a surrogate, while the woman does not want to become a parent. The ex-husband is claiming that she in fact did consent to be a parent — the creation of the embryos implied consent to have a baby. He claims that she is no longer allowed to rescind that consent once the baby is "conceived" in a laboratory. The court must rule on the question of where that consent lies.

The New Jersey court has two options: (1) it could accept the notion that consent is located in the party's willingness to fertilize her eggs; or (2) it could follow the example of the *Davis* and *Kass* courts and look to the contract that was signed at the creation of the embryos. Without prior agreement to vest authority of the gametes solely in the husband, it is doubtful that the New Jersey court will award him custody. In order to find that consent is located in the donation, the court would have to reason that, unlike sperm donation, fertilization of embryos has only one purpose, i.e., procreation. The problem with this argument is that since there is a time delay between the donation of the reproductive material and the implantation of the pre-zygotes, there is opportunity for one party to change his or her mind about the process. In a case like *Mme. O.*, where the husband is dead, courts should have an easier time locating consent in the donation, since the deceased's last intent should dictate the use of his material. However, given the fact that in a divorce, the ex-spouse is still alive to protest, courts should give more weight to a person's need to change his or her mind about procreation up until the moment of implantation.<sup>89</sup> Events such as death or divorce do impact these decisions and a person should not be held to consent from a previous circumstance. Additionally, the precedent in *Kass* makes it difficult to argue that a person cannot change his or her mind up until the

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88. See Michael Booth, *Fate of Frozen Embryos Brings N.J. Action to Bioethics Fore*, N.J. L.J., Mar. 9, 1998, at 1.

89. Abortion is considered solely the woman's choice, given the fact that she has a "right to exercise virtually exclusive control over her own body." *Id.* at 155. Once implantation is successful, then the authority ceases to be vested in both donors of genetic material.

implantation is successful. Since there is no explicit, contractual arrangement for the embryos in the event of a divorce, the New Jersey court will have to apply a *Davis*-like balancing test.

The most significant challenge the New Jersey court will face is whether or not the *Davis* decision carries the same weight, given that the gender roles evident in the previous cases are switched. The unique situation in New Jersey is that the man wishes to procreate while the woman is on the defense. The *Davis* court attempted to create a gender neutral rule — since both the man and the woman are equal providers of the gametes, their intent should be considered equally.<sup>90</sup> However, two problems arise with this gender neutral rule. The man and woman may provide the cells for the gametes equally, but they have different intents. A man has the intent to procreate, while the woman has the intent not only to procreate but also to bear the child.<sup>91</sup> If a man were awarded custody of the embryos and used a surrogate to have the child, his ex-wife's original intent would be violated. If she were awarded authority over the embryos and used them herself for insemination, then her ex-husband's previous intent will be fulfilled. When the *Parpalaix* court held that the right to procreate or refrain from procreation was a matter of bodily integrity, it left open the issue of what that right entailed. However, where such a fundamental right is implicated, courts should assume that the right entails not only the decision to procreate but also the circumstances of the birth — who donates the genetic material as well as who bears the child. Any balancing test has more potential to violate the woman's original intent where the man is the party who wishes to procreate. Gender neutrality in the balancing of interests can only be achieved if the courts protect both the choice to procreate as well as the circumstances of procreation.

## VI. FUTURE QUESTIONS

The problem of competing intentions will only grow more difficult as technology advances. The next issue courts will conceivably face is that of a situation where neither person is genetically linked to the reproductive material, yet they have decision making authority over the cells. It is an established principle that when a woman uses anonymous donor sperm for insemination, her husband will be considered the lawful

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90. See *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992).

91. They may have planned from the start of the donation process to use a specific surrogate for the birth. In that situation, only that specific surrogate can fulfill both parties' intents.

father of the child, despite the fact that he is not the genetic parent.<sup>92</sup> His role in consenting to the insemination establishes his parenthood. However, a situation could arise where a couple decides to fertilize the wife's eggs with the sperm of an anonymous donor. If a child were born from these embryos, the mother's husband would be the child's legal father. But if they divorce subsequent to insemination, is authority over the embryos vested solely in the woman, since only her reproductive cells are involved? When does his "fatherhood" begin?

The same question arises when neither party has any of his or her own cells in the embryos. In *In Re Buzzanca*,<sup>93</sup> a woman sued her ex-husband for child support and won.<sup>94</sup> He tried to argue that since their daughter was conceived using donated anonymous reproductive material and was born through a surrogate mother, neither he nor his ex-wife were the lawful parents.<sup>95</sup> The court held that the parents of a child are the two people who consented to her birth, not the surrogate who carried the baby nor the anonymous biological parents who donated the genetic material.<sup>96</sup> Would the same logic apply if a man and woman were fighting over, not an actual child, but embryos created during their marriage to which neither were genetically related? Imagine the scenario where people choose to use donated eggs and sperm to create embryos and then subsequently one party disclaims responsibility.<sup>97</sup> Will the outcome be the same in those situations even though neither is a donor to the gametes? Does consent to create the gametes make the parties equally responsible as if they had donated the reproductive material? And if not, is the fate of the gametes necessarily destruction?

Consent will be the key factor to answer these questions. If policy arguments claim that a man's consent establishes him as the legal father of a child when his wife used anonymous donor sperm, then both he and his wife should be the legal decision-makers over embryos which both consented to create. If neither of the parties are the genetic donors of the cells, yet they consented to the fertilization, each should have equal say in determining the fate of the embryos. The *Davis* court's idea that each party has equal say in the matter solely because they are equally gamete providers<sup>98</sup> will necessarily have to be expanded and modified to include equal providers of consent to fertilization.

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92. See Shapiro & Sonnenblick, *supra* note 3.

93. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

94. See *id.* at 280.

95. See *id.* at 282-84.

96. See *id.* at 287-91.

97. This will be a significant decision for gay and lesbian couples.

98. See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

Another problem implicated by the *Davis* court consent theory is the case of an embryo fertilized with the sperm of an anonymous donor. If a child were born from these embryos, the mother's husband would be the child's legal father.<sup>99</sup> But if the mother and her husband divorce subsequent to insemination, is authority over the pre-zygotes vested solely in the woman, since only her reproductive cells are involved? When does the husband's "fatherhood" begin?

## VII. CONCLUSION

Undoubtedly, the Tribunal de Grande Instance knew that the *Parpalaix* decision could not be the end of the discussion of ownership of reproductive material. However, their carefully crafted opinion stated the foundation for the discussion: the fact that decisional authority is located in the gamete providers.<sup>100</sup> When two people with opposing viewpoints possess authority in gametes, then the issue is much more difficult. The possibility of resolving these embryo disputes using a standardized model was dismissed by the *Davis* court. The court rejected solutions that allowed the woman's choice to prevail in every case, that demanded the destruction of embryos across the board without mutual consent, or that in some way created an easy answer.<sup>101</sup> Implied in this analysis is the notion that the intent of the parties cannot be ignored, as difficult as uncovering that intent may be. This is the message of *Parpalaix* — that a bright line test should not be used in these cases — reproductive rights are too sacred and the integrity of the human body too personal to ignore the donor's wishes. As reproductive technology advances, future courts will face even more difficult decisions, but ultimately the key factors for each solution will rest in some form or other in the intent or consent of the parties involved.

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99. See Shapiro & Sonnenblick, *supra* note 3.

100. See *Parpalaix* c. CECOS, T.G.I. Creteil, Aug. 1, 1984, Gaz. du Pal. 1984, 2, pan. jurispr., 560.

101. See *Davis*, 842 S.W.2d at 591 ("Adoption of any one of them would establish a bright line test that would dispose of disputes like the one we have before us in a clear and predictable manner. As appealing as that possibility might seem . . . there can be no easy answer.").