

**A HITCHHIKER'S GUIDE TO ART: IMPLEMENTING
SELF-GOVERNED PERSONALLY RESPONSIBLE
DECISION-MAKING IN THE CONTEXT OF ARTIFICIAL
REPRODUCTIVE TECHNOLOGY**

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I. INTRODUCTION¹

Hitching a ride on an artificial reproductive technology vehicle² to undergo a rendition of alien or reproductive technology³ propels a couple into a place of moral dilemma they never imagined.⁴ There, they must find the “answer to the Ultimate Question of Life, the Universe, and Everything.”⁵ That is the story of Ohio residents Mr. and Mrs. Sean Savage and their family.⁶

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¹ This introduction is an adaption of the story in DOUGLAS ADAMS, *THE HITCHHIKER'S GUIDE TO THE GALAXY* (Harmony Books ed., 1979). In the novel's early chapters, the Earthling Arthur Dent watches local officials raze his house to build a highway bypass, discovers that his best friend is from another planet, and escapes with his friend just as the Earth is destroyed by hitching a ride aboard the very alien ship that is doing unto Earth as the town council had just undone to Arthur's house. Throughout the novel, the titular *Guide* helps Arthur orient himself in his vertiginous and occasionally terrifying new surroundings.

² *See id.* at 34. It might be a starship full of officious otherworldly bureaucrats or an ART clinic.

³ *See id.* at 64. Tortuously trite Vogon poetry or ovarian hyper-stimulation, take your pick.

⁴ *See id.* at 114. Magrathea, the galaxy's least-welcoming planet, might be less intimidating.

⁵ *See id.* at 172. Forty-two is the number from which all meaning can be derived; if only the answer was as simple as forty-two. *See id.* at 180.

⁶ Stephanie Smith, *Fertility Clinic to Couple: You Got the Wrong Embryos*, CNN.COM (Sept. 22, 2009), http://articles.cnn.com/2009-09-22/health/wrong.embryo.family_1_fertility-clinic-embryos-savages?_s=PM:HEALTH (“In a tragic mix-up, the Savages say the
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Sean and Carolyn Savage were pursuing artificial reproductive techniques (ART) when the clinic informed them that, due to clinic error, Carolyn was pregnant with another family's child.⁷ Shannon and Paul Morell are the genetic parents of the baby Carolyn Savage carried.⁸ There was no hitchhiking away from this dilemma. Instead, each individual⁹ and each family¹⁰ was forced to make incredibly difficult choices.¹¹ In the end, each decision was not based on any state statutory code, case law, or right to damages relating to the cruel dilemma. Rather, the Savages and the Morells made decisions from self-governance and personal responsibility that placed the life of an unborn child above their own preferences.¹²

fertility clinic where Carolyn underwent in vitro fertilization implanted another couple's embryos into Carolyn's uterus. In essence, she had become an unwitting surrogate for another family.").

⁷ *Id.*; Mike Celizic, *She Was Implanted with the Wrong Embryo: Plans to Say 'Hello, and Goodbye' when She Delivers the Baby Soon*, TODAYSHOW.COM (Sept. 21, 2009, 9:42 AM), <http://today.msnbc.msn.com/id/32950836> [hereinafter Celizic, *Hello and Goodbye*]; see also J.C. Reindl, *Happy News Turns Horrifying for Sylvania Township Couple*, TOLEDO BLADE (Sept. 22, 2009), <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20090922/NEWS16/909220358>.

⁸ Mike Celizic, *Genetic Parents of Embryo Felt 'Powerless:' Mix-Up Is a Terrible Thing that Has Happened to Two Good Families*, TODAYSHOW.COM (Sept. 23, 2009, 9:00 AM), <http://today.msnbc.msn.com/id/32980984> [hereinafter Celizic, *Genetic Parents*].

⁹ Carolyn Savage had a legal right to choose an abortion. See *Roe v. Wade*, 410 U.S. 113, 166 (1973). Sean Savage had a right to disavow the child his wife carried, because it was not his child, or he could have exercised his legal right to fight for custody of the child. See OHIO REV. CODE ANN. § 3111.03 (West 2005 & Supp. 2010). Shannon Morell had a right to sue under the contract with the clinic. See *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993). But, Shannon had no right to her genetic child as it was carried in Carolyn's womb. See *In re Baby M.*, 537 A.2d 1227, 1264 (N.J. 1988) (holding that there is no prohibition against a surrogate mother changing her mind and asserting her parental rights), *superseded by statute*, N.J. STAT. ANN. § 9:3-46. Paul Morell also could have asserted his right to his own genetic offspring, asked for judicial declaration of Carolyn Savage as his child's surrogate, and been joined in the action by his wife. See *Johnson*, 851 P.2d at 784.

¹⁰ Within each family, the marriages were handling the stress of the situation in ways none of us can ever adequately understand. See Celizic, *Genetic Parents*, *supra* note 8; Celizic, *Hello and Goodbye*, *supra* note 7; Smith, *supra* note 6.

¹¹ *Couples Make Best of Fertility Clinic's Error*, L.A. TIMES, Sept. 27, 2009, at A11 ("Paul and Shannon Morell of suburban Detroit said in a statement that they would be 'eternally grateful' to Carolyn Savage, of Sylvania, Ohio, for her decision to give birth to their child despite the clinic's mistake.").

¹² See *id.*

(continued)

These families are living paradigms of personal autonomy sacrificed for a child's best interests.¹³ This story is one example of the profound impact artificial reproduction is having on families.¹⁴ Artificial reproductive techniques have also had an incredible impact on many other families that have not incurred such devastating news from their ART experience. Those effects range from continuing disappointment to being blessed with children, with those children in turn being blessed with life and with families who love and treasure them.¹⁵

The impact that artificial reproduction has had on families is difficult to overstate. The ART process impacts individuals, creates new lives, establishes and constructs families, tests marriages,¹⁶ and sometimes causes divorce.¹⁷ Also, children who are the result of the ART process

The two couples knew nothing about each other. Shannon Morell feared that the pregnant woman would choose abortion, ending their chance to give their 2-year-old twin girls a sibling.

A few days passed before they learned that the Savages were not only willing to continue with the pregnancy but also to hand over the baby.

Id.

¹³ See *id.* (stating that the baby boy was born in Toledo and weighed five pounds, three ounces, and was eighteen inches long). "The Savages asked for privacy in the days ahead saying, 'Our family is going through a very difficult time' The Savages said in an interview with The Associated Press on Wednesday they never considered terminating the pregnancy or trying to fight for custody." *Ohio Woman Implanted with Michigan Woman's Embryo Gives Birth to Healthy Boy, Will Give Him Up*, WASHINGTONEXAMINER.COM (Sept. 26, 2009, 12:20 AM), <http://www.washingtonexaminer.com/nation/ap/61588447.html>; see also *Carolyn and Sean Savage Gave Up Their Baby Boy Without a Fight. Would You?*, CONUNDRUMLAND (Sept. 26, 2009), <http://www.whatsyourconundrum.com/parenting/Carolyn-and-sean-savage-gave-up-their-baby-boy-without-a-fight-would-you>.

¹⁴ See *Ohio Woman Implanted*, *supra* note 13 (noting that the family was going through a very difficult time).

¹⁵ See Janet I. Tu, *How Some Couples' Hopes for a Child Find New Life*, SEATTLE TIMES, Nov. 20, 2008, at A10.

¹⁶ Shirley L. Zimmerman, *Alternatives in Human Reproduction for Involuntary Childless Couples*, 31 FAM. REL. 233, 240 (1982).

¹⁷ See Anne Martin Matthews & Ralph Matthews, *Beyond the Mechanics of Infertility: Perspectives on the Social Psychology of Infertility and Involuntary Childlessness*, 35 FAM. REL. 479, 483 (1986).

would not otherwise exist, and thus, are greatly impacted.¹⁸ Lastly, ART also impacts the child's siblings, friends, future spouses, and future children. For each of these sets of people, there are personal, emotional, social, financial, and physical concerns.¹⁹ Yes, artificial reproduction has indeed impacted families.

Artificial reproduction has also impacted family law. The magnitude of the legal scenarios is nearly as vast in scope as one's imagination, even an imagination like Douglas Adams'.²⁰ Some states have a variety of regulations on ART,²¹ while others have none.²² Any experienced lawyer knows that when a client finally includes an attorney after reaching the stage of desperation in any legal matter, the law and all its incidents are not easily sorted out thereafter.²³

This article presents the three major areas of concern regarding the impact of ART on families—marriage, divorce, and children—and argues for a self-governed personally responsible decision-making paradigm that thrives in the face of minimal state regulation in every aspect of family law related to artificial reproduction. Part II considers the impact ART has had on marriage. It sets out the issues surrounding marital status and procreation generally and how ART has contributed to confusion regarding the role of procreation in society and procreation's connection to marriage.

¹⁸ See Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 43–44 (2003).

¹⁹ See Zimmerman, *supra* note 16, at 233.

²⁰ See ADAMS, *supra* note 1 (referring to his bizarre story).

²¹ See Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws that Govern that Technology*, 48 DEPAUL L. REV. 825, 825 (1999); Paula J. Manning, *Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Donation*, 5 GEO. J. GENDER & L. 677, 717 (2004); *Embryo and Gamete Disposition Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14379> (last modified July 2007).

²² See *State Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/laws_and_elections/375.htm (last visited Feb. 10, 2011) (referring to a database of state laws on this subject matter that shows at least thirty states do not have statutes or case law addressing donor insemination, surrogacy agreements, or both).

²³ I am reminded of the client who came into my law office with a mail order divorce kit, which he had been working on for two years to fill out, file, and complete his divorce. After a review of the papers during the initial consultation, I had to tell him that his efforts would require a great deal more legal work on my part to undo the errors, that the entire process would ultimately cost double what it would have cost originally, and the process would take twice as much time as it would have had he brought the matter to a lawyer at the outset.

Part III considers how ART impacts divorce; namely in the distribution of frozen embryos as marital property. Part IV then considers how ART has impacted children. The impact on children ranges from affording them life to causing a host of problems regarding their identity and future relationships. Finally, Part V discusses and analyzes the case of Carolyn and Sean Savage, first in the context of standard state statutory construction for ART and then in the context of their self-governed, rather than state regulated, decisions. Lastly, the article offers a plan of action to those building a family using ART.

What the Savages and the Morells have done is a remarkable model of self-governed personally responsible decision-making.²⁴ This article suggests that men and women desiring to be parents who choose responsible decision-making based on life affirming and family affirming choices foster the best interests of marriage, children, families, and ART itself.²⁵ It presents a guide to understanding the issues involved in self-governed personally responsible decision-making.²⁶

II. IMPACT OF ART ON MARRIAGE

Family life has become somewhat confused in American culture and the foundation of that confusion is marriage. Common wisdom has been that marriage is about love, sex, and children, but people marrying for those reasons often lack the commitment to the marriage necessary for its longevity.²⁷ Procreation has been effectively removed from marital sex,²⁸ from non-marital sex generally,²⁹ and even from pregnancy.³⁰ The effectiveness of artificial reproductive techniques has removed sex from

²⁴ See generally *Fertility Clinic's Error*, *supra* note 11, at A11.

²⁵ See *id.*

²⁶ See *id.*

²⁷ Leah Ward Sears, *Love, Yes, But Be Committed to Marriage*, AJC.COM (Feb. 10, 2010), <http://www.ajc.com/opinion/love-yes-but-be-297251.html>.

²⁸ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (recognizing the marital privacy right that encompassed contraceptive use).

²⁹ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding an individual privacy right, regardless of marital status, in the decision to use contraception).

³⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 878–79 (1992) (recognizing a woman's pre-viability right to choose abortion without undue interference from the State); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding a qualified right to privacy includes the abortion decision).

procreation.³¹ This largely unregulated fertility industry has been taken advantage of by some donors without much ethical thought³² and by some partners without thought of the future consequences.³³

At the same time, unmarried births globally appear to be skyrocketing as at least one study indicates that some teen girls actively plan to become single mothers.³⁴ Those same young mothers, who seem quite happily unmarried as parents,³⁵ expect to be married and divorced several times.³⁶

³¹ See John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 913 (1996). ART merely separates conjugal sexual relations from reproduction. *Id.* “Historically, this principally meant emphasizing the unity of sex, reproduction, and childrearing; in the modern era, it means redefining parenthood in light of the separation of these activities.” June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1011 (2003) (discussing paternity dilemmas).

³² See, e.g., Jennifer Lahl, *I'm the Only Daddy You Got! I'm the Paterfamilias!*, THE CENTER FOR BIOETHICS AND CULTURE NETWORK (Feb. 12, 2010), <http://www.cbc-network.org/2010/02/im-the-only-daddy-you-got-im-the-paterfamilias/>. In this article, a fifty-one-year-old man, making only \$29,000 a year, donated his sperm, without giving much thought to his actions, two times each week for fourteen years “to make cash for medical school and to nurture his altruistic desires to help infertile women.” *Id.* The donor now wishes to allow the 400 or so resulting children access to his genetic information. *Id.*

³³ See, e.g., *Karmasu v. Karmasu*, No. 2008 CA 00231, 2009 WL 3155062 (Ohio Ct. App. Sept. 30, 2009). Appellant husband unsuccessfully argued “that a risk of ‘accidental incest’ exists if he is not granted custody of the embryos because he ‘is a single male who openly has relationships with any woman at or above the age of eighteen.’” *Id.* at *2 (quoting portions of husband’s brief). The couple entered into a “cryopreservation agreement” with Reproductive Gynecology, Inc. in April of 2007 agreeing that in the event of marriage termination they would forgo all rights to their embryos in favor of the clinic. *Id.* at *1–2. Thereafter, they were married in June of 2007, separated in August of 2007, filed for divorce in September of 2007, and granted a divorce in September of 2008. *Id.* at *1.

³⁴ See, e.g., Julie Henry, *Modern Girls Put Children Before Marriage*, TELEGRAPH.CO.UK, <http://www.telegraph.co.uk/education/educationnews/6359900/Modern-girls-put-children-before-marriage.html> (last updated Oct. 18, 2009). “One finding suggested that some teenagers actively plan to become single mothers. Of the girls questioned who had left schools and were unemployed, almost half (45 %) expected to have a baby before they were 21.” *Id.*

³⁵ *Id.* Where less than half of UK girls surveyed thought marriage should come before parenthood. *Id.*

³⁶ *Id.* The chief researcher said the attitudes:

(continued)

In a surprising proposal to curb non-marital births, one commentator suggested the need for public admission that sex is procreative, allowing education and culture to “put the baby back into sex.”³⁷

Furthermore, women and children seem to have become commodities.³⁸ In a recent review of a surrogacy case gone awry, *A.G.R. v. S.H. & D.R.H.*,³⁹ one commentator remarked,

As bizarre as all of this is and sounds, the threat of gestational surrogacy is very real. It is an attempt to exploit women, reduce them to an inanimate object, and make children the equivalent of a commodity. Gestational surrogacy is a threat to the family and the dignity of human life. It denigrates women, their roles as mothers, and the mother-child relationship. This evil is only in its infancy and can be defeated, not only in court but also through legislation.⁴⁰

reflected those developing in society. ‘We don’t know if these girls are experiencing these things personally but they see it around them, whether it be couples who are not married or who are divorced’ ‘The findings from girls who were unemployed have real implications. Rather than early pregnancy being a mistake, it seems to be a pattern that they are expecting to follow. We need to work with youngsters to give them different horizons.’ *Id.*

³⁷ Helen Alvaré, *Admitting Sex Is Procreative: A Surprising Proposal to Curb Nonmarital Births*, A CULTURE OF LIFE FOUNDATION (2009), <http://culture-of-life.org/content/view/598/1/>.

³⁸ See, e.g., Symposium, *The Baby Market: The Future of High-Tech and Low-Tech Markets in Children*, 39 *Cumb. L. Rev.* 1 (2009); Lisa C. Ikemoto, Lecture at Georgia State University College of Law entitled *Taking Women to Market: Eggs, Embryos, and Informed Consent* (Jan. 26, 2009).

³⁹ No. FD-09-1838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf (noting that the surrogate mother of twin girls sued two men in a same-sex relationship, who were legally married under California law and who registered their domestic partnership in New Jersey, seeking judgment voiding contracts, which required consenting to a judgment of adoption and waiving significant rights after birth).

⁴⁰ *Surrogacy Threatens Family, Sanctity of Life, and the Dignity of Women as NJ Case Demonstrates*, ALLIANCE DEFENSE FUND (Jan. 11, 2010), <http://www.alliancealert.org/2010/01/11/surrogacy-threatens-family-sanctity-of-life-and-the-dignity-of-women-as-nj-case-demonstrates/>.

The threat of creating a commodity in women is even stronger in impoverished cultures where women will act as surrogates for a host of economic reasons.⁴¹

There is certainly no *direct* link between these social phenomena and the rise of ART;⁴² but nonetheless, the timing is somewhat curious. Married couples using ART allow medical technicians to build their families,⁴³ and the Vatican has suggested that such use of ART in a marital setting conflicts with religious teachings.⁴⁴ Simultaneously, unmarried same sex couples have been major beneficiaries of the ART phenomenon as well⁴⁵ but not without conflicts.⁴⁶ In his article, Professor Herbie

⁴¹ See, e.g., Jyotsna Sharma, *Right of Foreign Homosexuals to Have a Surrogate [sic] Child in India: An Analysis*, LEGAL SERVICE INDIA (Dec. 5, 2008), <http://www.legal-serviceindia.com/article/1277-Right-Of-Foreign-Homosexuals-To-Have-A-Surrogate-Child-In-India.html> (“Reasons for choosing India as a destination are also quite obvious—less paper work and also, cost of whole treatment is much lesser than other countries.”); see also *American Gays All for Indian Surrogacy*, TIMES OF INDIA (Oct. 12, 2009), <http://timesofindia.indiatimes.com/life-style/relationships/man-woman/American-gays-all-for-Indian-surrogacy/articleshow/5115901.cms>.

⁴² See 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, 114 (1997).

⁴³ See Robertson, *supra* note 31, at 911.

⁴⁴ See VATICAN’S CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGINS AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (Mar. 10, 1987), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (expressing the Vatican’s moral opposition to ART practices due to the interrupted connection between procreation and marriage and to artificial insemination by husband (AIH) when semen is collected through masturbation).

⁴⁵ See, e.g., *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539–40 (N.J. Super. Ct. App. Div. 1995) (holding that two children, who resulted from donor insemination and born to one lesbian partner, are the children of the mother’s partner as well, via step parent adoption); see also *In re Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners had standing to become adoptive parents despite family court adoption preference for married parents).

⁴⁶ See, e.g., Nathan Koppel, *Surrogacy Battles Expose Uneven Legal Landscape*, WALL ST. J., Jan. 15, 2010, A15 (discussing the conflicts between surrogate mothers and homosexual men who contract for their services to become parents). Possibly the most well known case along these lines is *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006), where a natural mother fought to keep her IVF daughter from her Vermont civil union partner. See also *Custody for Same-Sex Couple Upheld*, THE VLW BLOG (Nov. 24, 2009), <http://valawyersweekly.com/vlwblog/2009/11/24/custody-for-same-sex-couple->
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DiFonzo rightly suggested that the evolution of baby making and developing technology have made the legal questions more complicated.⁴⁷

Possibly because of the pace of the ART industry, the impact on families resulting from these points of separation and reattachment between reproduction and sexuality has not been adequately assessed. The *New York Times* noted that twenty-first century babies are begotten by “building a baby, with few ground rules.”⁴⁸ Marriage is simply not needed for procreation.⁴⁹ Indeed, frequently test tubes and Petri dishes replace romance.⁵⁰

Regardless of the issues just discussed, artificial reproduction has created great opportunities for building families and can be great for marriage.⁵¹ In fact, embryo adoption has provided married couples like Jeff and Maria Lancaster with what they have long hoped for—a family.⁵² “The family is a flexible institution by nature and will continue to accommodate changes in human reproduction”; yet, unity of the marital partners and their communication regarding reproductive issues are often

upheld/ (discussing where a male homosexual couple, who contributed sperm to artificially inseminate a Minnesota woman who agreed to be a surrogate for the men, was awarded primary custody when the surrogacy relationship broke down and the surrogate was awarded secondary custody); Caroline Overington, *Gays Seek Access to Friend's Daughter*, THE AUSTRALIAN, Oct. 15, 2009, at 1. The child “was not conceived with sperm from either of the men. But her mother was, until last year, in a same-sex relationship with another woman who does have a child conceived with one of the men’s sperm.” *Id.*; see also Mike Dennison, *Supreme Court Affirms Former Same-Sex Partner's Rights as Parent*, BILLINGS GAZETTE (Oct. 6, 2009, 2:40 PM), http://billingsgazette.com/news/state-and-regional/montana/article_5c93a844-b2b8-11de-aa51-001cc4c002e0.html (noting the parental rights accorded to ex-same sex lovers who have a “parenting interest” even though that partner had no part in the adoption or artificial reproduction of the children).

⁴⁷ J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 378–79 (2011).

⁴⁸ Stephanie Saul, *21st Century Babies: Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 12, 2009, at A1. This concept becomes very important in Part V of this article.

⁴⁹ See *supra* notes 28–30 and accompanying text.

⁵⁰ Kathleen A. Miller & Lynne Marie Kohm, *Designer Babies: Are Test Tubes and Microbes Replacing Romance?: Relevant Legal Issues and DNA*, 16 AM. J. FORENSIC MED. & PATHOLOGY 1047, 1047 (1996) (“Test tubes and microscopes may soon be gaining on candlelight and romantic music in the scientific quest for designer babies.”).

⁵¹ See Tu, *supra* note 15, at A1.

⁵² *Id.*

basic elements of such success.⁵³ In fact, ART could possibly strengthen marriages if the couples' communication is enhanced by the choices presented for family building using ART, even if those choices involve potential marital property concerns.⁵⁴

When mistakes are made, however, they can be devastating to people and difficult on marriages. In *Del Zio v. Presbyterian Hospital*,⁵⁵ the hospital supervisor interrupted a doctor's use of in vitro fertilization (IVF), thereby, destroying Mrs. Del Zio's "last chance to become pregnant."⁵⁶ In a cause of action for conversion of property, the jury found for the hospital, and in the second cause of action for intentional infliction of emotional distress, the jury awarded \$3 in damages to the husband and \$50,000 to the wife, in light of the fact that their last chance to become biological parents had been taken from them.⁵⁷ Meanwhile, unbeknownst to the sequestered jury, across the sea in the United Kingdom Louise Brown was being born, the first child of ART.⁵⁸

In another New York case, *Perry Rogers v. Fasano*,⁵⁹ a newborn conceived through IVF was a different race than either of the intended parents.⁶⁰ A clinic mistake led to the Fasano family having another couple's embryos implanted; and thus, their child was actually the genetic child of another family.⁶¹ Upon this discovery, the genetic family sued for visitation with the child, but the court denied visitation based on its finding that the genetic parents failed to take timely action regarding their parental rights after being notified of the clinical mistake.⁶²

⁵³ Lynne Marie Kohm, *Honey, I Froze the Kids: Implications for the Practitioner in Reproductive Technologies and Spousal Consent*, 46 VA. LAW. 35, 38 (1998) (discussing the marital property nature of spouse's reproductive material).

⁵⁴ *See id.* ("[I]f marriage means anything at all, doesn't it in fact mean that a person acquires some sort of 'marital property' interests in the reproductive cells of his or her spouse if they were produced and frozen during the period of marriage? The enigma is that all modern law has tended toward a view that the child-bearing decision is not a joint marital decision at all.").

⁵⁵ No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 14, 1978).

⁵⁶ *Id.* at *4.

⁵⁷ *See id.* at *11.

⁵⁸ Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 241 n.124 (1995).

⁵⁹ 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 21. This situation is eerily familiar to what the Savages are dealing with as presented herein. *See Smith, supra* note 6.

⁶² *See Perry Rogers*, 715 N.Y.S.2d at 27.

Mistakes can be damaging to marriages and can put tremendous stress on the partners.⁶³ This is important in light of the fact that social science continues to find that marriage is essential to family stability.⁶⁴ ART has clearly had a profound impact on marriage. The Savages⁶⁵ and the Morells⁶⁶ are still married, and the record has not been searched for a Del Zio or Fasano dissolution. Regardless, case law provides other examples of divorce resulting when ART goes poorly, as well as the inverse: ART going bad as a result of divorce.

III. IMPACT OF ART ON DIVORCE

As might be imagined, the intense emotional strain involved in infertility can cause divorce rates to be high among couples who struggle with infertility.⁶⁷ Courts have struggled with distributing embryos as marital property in divorce or providing for their custody, along with honoring contracts between the parties regarding ART or upholding liberty interests.⁶⁸ A line of cases highlights these dilemmas.

The first of these cases is *Davis v. Davis*,⁶⁹ where the highest court of Tennessee overturned the trial court's finding that frozen embryos are children deserving of protection, holding instead that the results of ART between Junior Davis and Mary Sue Davis were neither persons nor property "but occupy an interim category that entitles them to special respect because of their potential for human life."⁷⁰ In *Davis*, privacy in the right not to procreate prevailed where no previous agreement existed.⁷¹ The court awarded the embryos to Junior Davis, which he immediately

⁶³ See Celizic, *Hello and Goodbye*, *supra* note 7; Celizic, *Genetic Parents*, *supra* note 8.

⁶⁴ James Chapman, *Marriage Is What Matters Most to Family Stability*, THE DAILY MAIL (LONDON) (Jan. 21, 2010), available at [http://www.thefreelibrary.com/Marriage+is+what+matters+most+to+family+stability.\(News\)-a0217024565](http://www.thefreelibrary.com/Marriage+is+what+matters+most+to+family+stability.(News)-a0217024565).

⁶⁵ See Celizic, *Hello and Goodbye*, *supra* note 7.

⁶⁶ See Celizic, *Genetic Parents*, *supra* note 8.

⁶⁷ See Elizabeth Simpson, *In-Vitro Babies. All Grown Up.*, THE VIRGINIAN-PILOT, March 6, 2010, at 12 ("Parents were under added stress because of infertility issues.").

⁶⁸ See *infra* notes 70–84.

⁶⁹ 842 S.W.2d 588 (Tenn. 1992).

⁷⁰ *Id.* at 597.

⁷¹ *Id.* at 604.

discarded.⁷² When there is no written agreement, fundamental privacy rights prevail over the future of any embryos, at least in Tennessee.⁷³

In *Kass v. Kass*,⁷⁴ New York's highest court held that the ART contract between parties should be upheld.⁷⁵ Where the contract between the parties provided that the embryos be destroyed, the court ruled that there was no infringement on any fundamental right of privacy or liberty interest in the right to not procreate.⁷⁶ A written contract will be upheld if it does not violate fundamental privacy rights, at least in New York.⁷⁷

In *A.Z. v. B.Z.*,⁷⁸ the highest court in Massachusetts held that an ART contract to give custody of the parties' embryos to the wife for gestation and birth after dissolution could not be upheld because it would result in an infringement of the fundamental right of privacy and the right to not procreate.⁷⁹ A valid written contract will not be upheld if it infringes on fundamental privacy rights, at least in Massachusetts.⁸⁰

Lastly, in *In re Marriage of Dahl*,⁸¹ a more recent case from Oregon's Intermediate Court of Appeals, the court upheld a contract for embryo distribution upon divorce.⁸² Citing the three varying state court opinions in *Davis*, *Kass*, and *A.Z.*, the Oregon court held that the contractual right to dispose of frozen embryos essentially amounted to personal property subject to court disposition upon dissolution.⁸³ The result was that the embryos were distributed to the wife for destruction over the husband's strong life-affirming objections.⁸⁴ A written contract for embryo

⁷² See *7 Embryos in Custody Case Are Destroyed*, N.Y. TIMES, June 16, 1993, at A18. Junior Davis is "very glad that the ordeal that took [four and a half] years of his life is over, and he looks forward to getting on with a normal life now." *Id.*

⁷³ See *Davis*, 842 S.W.2d at 604.

⁷⁴ 696 N.E.2d 174 (N.Y. 1998).

⁷⁵ See *id.* at 182.

⁷⁶ See *id.* at 179.

⁷⁷ See *id.* at 179, 182.

⁷⁸ 725 N.E.2d 1051 (Mass. 2000).

⁷⁹ *Id.* at 1059. "[A] consent form signed by the parties on the one hand and the clinic on the others, providing that, on the parties' separation, preembryos were to be given to the wife for implantation, was unenforceable." *Id.* at 1056.

⁸⁰ *Id.* at 1059.

⁸¹ 194 P.2d 834 (Or. Ct. App. 2008).

⁸² *Id.* at 842.

⁸³ *Id.* at 840.

⁸⁴ *Id.* at 837, 842. Mr. Dahl asserted, unsuccessfully, that he did not understand the ramifications of the agreement when he signed it, arguing that if he had known that the

(continued)

destruction will be upheld even over objections to that destruction by one of the intended parents in a divorce, at least in Oregon.⁸⁵

Reproductive property distribution in divorce has changed divorce dramatically.⁸⁶ Even if the gametic stored material has not yet been used in ART, the disposition of that material can, nonetheless, be a divorce concern.⁸⁷ These cases and those like them have indeed had a strong impact on families and family law, deterring contract reliance at the least.⁸⁸ Scholars have argued that courts ought to enforce agreements between spouses regarding distribution of the embryos.⁸⁹ This notion fosters personal responsibility for contractual obligations.

State statutes can foster this notion of personal responsibility and offer some clarity in to the context of divorce decisions regarding ART material and embryos. For example, Louisiana law forbids the intentional destruction of a cryopreserved IVF embryo and declares that disputes between parties should be resolved in the "best interest" of the embryo, further requiring unwanted embryos to be made available for adoptive implantation.⁹⁰ It seems that Louisiana desired to further stabilize this sense of parental responsibility for ART embryos recently, as a new statutory code indicates:

If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The

terms of the agreement meant destruction of the embryos, he would have never agreed to such a position so opposed to his pro-life beliefs. *Id.* at 837.

⁸⁵ *See id.* at 840.

⁸⁶ *See* Mark Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos Upon Divorce*, 57 *BUFF. L. REV.* 1159, 1160 (2009).

⁸⁷ *See* Kohm, *supra* note 53, at 38. Disposition of gametic material brings a host of concerns apart from divorce. *Id.*; *see, e.g.*, Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 *DUKE J. GENDER L. & POL'Y* 379, 385 (2009) (discussing parental liability with sperm donation).

⁸⁸ *See, e.g.*, *Kass v. Kass*, 696 N.E.2d 174, 182 (N.Y. 1998); *Marriage of Dahl*, 194 P.2d at 842.

⁸⁹ *See* Strasser, *supra* note 86, at 1225; Diane K. Yang, *What's Mine Is Mine, but What's Yours Should Also Be Mine: An Analysis of State Statutes that Mandate the Implantation of Frozen Preembryos*, 10 *J.L. & POL'Y* 587, 629 (2002).

⁹⁰ *LA. REV. STAT. ANN.* § 9:129-30 (1986).

in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum.⁹¹

This type of statutory framework serves to preserve embryos through an option for a future adoption by virtue of embryo donation.⁹² It also appears to buttress personal and parental responsibility in favor of the child.⁹³ Even this brief review of the law regarding embryo disposition reveals that ART has indeed impacted divorce dramatically.

IV. IMPACT OF ART ON CHILDREN

Children of ART have completely different concerns than their natural parents, genetic parents, gestational parents, or adoptive parents. However, that does not mean the children are abnormal in any other way.⁹⁴ A recent study of IVF adults revealed that “[t]hey’re pretty much the same as people conceived the old-fashioned way.”⁹⁵ Identity exploration is among the first issues young adults of IVF may wish to investigate, not having the benefit of knowing the identity or anything else about their genetic parent(s).⁹⁶ In fact, as Professor Naomi Cahn suggested in her article, because children will be inquisitive about the donor and about any possible half-siblings, they may sense a loss of identity, and the family may experience more

⁹¹ *Id.* § 130.

⁹² *See id.*

⁹³ *See id.* §§ 126, 130.

⁹⁴ *See* Simpson, *supra* note 67, at 1. “Despite their unusual starts, the original ‘test tube babies’ have grown into perfectly normal adults.” *Id.* Studies found that adult IVF children were “‘healthy and well adjusted,’ with no unusual pattern of chronic disease.” *Id.* at 12. Most of the concerns surrounded birth risks. *Id.* “Researchers at the American Association for the Advancement of Science reported at a convention last month that some IVF babies face an increased risk of birth defects and low birth weight, which is associated with obesity, hypertension and Type 2 diabetes later in life.” *Id.* Some concerns were unexplainable concerns later in life. *Id.* “There were, however, unusually high levels of depression and binge drinking among women and more attention-deficit disorders.” *Id.*

⁹⁵ *Id.* (“Not startling news, but comforting to the growing number of parents who turn to assisted reproduction—and to the children coming behind this first generation of Petri dish babies.”).

⁹⁶ *See* John B. Shea, *The Moral Status of In Vitro Fertilization (IVF) Biology and Method*, CATHOLIC INSIGHT (Jan. 2003), http://www.catholicinsight.com/online/church/vatican/article_475.shtml (discussing how IVF violates the rights of a child to identity).

keenly the need to create a sense of unity in the midst of the child's quest for "missing parts of their identity."⁹⁷

Vast confusion over children as part of a "market" has led law schools to host conferences that deal with such concerns, such as the one hosted with the Center for Biotechnology, Law and Ethics at Cumberland School of Law at Samford University in Alabama on February 14, 2008.⁹⁸ The law is in flux, potentially changing and expanding the family institution with the needs of donor families.⁹⁹ Furthermore, the future of the child is in flux as well. When IVF results in more than one baby implanting, parents can make a choice to selectively reduce the pregnancy,¹⁰⁰ to abort,¹⁰¹ or to bring an action for wrongful birth.¹⁰²

Beyond children questioning their identity, ART can also impact a child's relationship with his parents. Complications in parental relationships abound for children of ART, particularly when children have numerous adults involved in their conception, birth, and growth. Consider the three surviving children of Michael Jackson, who are each the product

⁹⁷ Naomi Cahn, *No Secrets: Openness and Donor-Conceived "Half-Siblings,"* 39 *CAP. U. L. REV.* 313, 320 (2011). Professor Cahn notes that openness should mean "providing information about half-siblings and the opportunity to connect." *Id.* at 316.

⁹⁸ *The Baby Market,* *supra* note 38.

⁹⁹ Cahn, *supra* note 97, at 328–39 (offering this concept as part of her discussion on the meaning of families in light of ART, particularly with donor-conceived family networks).

¹⁰⁰ See A.J. Antsaklis et al., *Reduction of Multifetal Arrangements to Twins Does Not Increase Obstetric or Perinatal Risks,* 14 *HUM. REPROD.* 1338, 1338 (1999), available at <http://humrep.oxfordjournals.org/cgi/content/full/14/5/1338>. Selective pregnancy reduction is the process whereby weaker growing fetus babies are aborted to provide the best environment for the stronger of the multiple fetuses. See *id.*

¹⁰¹ See Jay Alabaster, *Japanese Woman Impregnated with Wrong Egg,* *HUFFINGTON POST.COM* (Feb. 19, 2009), http://www.huffingtonpost.com/2009/02/19/japanese-woman-impregnate_n_168178.html.

A Japanese woman was likely impregnated with the fertilized egg of another woman by accident during an in vitro procedure last year, hospital officials said Thursday. The woman, who is in her 20s, aborted the pregnancy when she was told of the potential mix-up at the government-run hospital in Kagawa prefecture, about 330 miles (530 kilometers) southwest of Tokyo. *Id.*

¹⁰² See *Lesbian Couple Loses Bid to Sue IVF Doctor Over Birth of Twins when They Wanted 1 Child,* *WELT ONLINE* (July 25, 2008), <http://www.welt.de/english-news/article/2248635/Lesbian-couple-loses-bid-to-sue-IVF-doctor-over-birth-of-twins-when-they-wanted-1-child.html>.

of ART, even though Jackson was married at the time of the birth of two of the children: (1) Michael Joseph Jackson Jr., age 12, donor sperm and donor egg, legal mother: Debbie Rowe; (2) Paris Michael Katherine Jackson, age 11, donor sperm and donor egg, legal mother: Debbie Rowe; and (3) Prince Michael Jackson II, age 7, donor sperm, mother: unidentified surrogate.¹⁰³ Children like the Jacksons have a cemented social identity but have little understanding of their own genetic identity.¹⁰⁴ The legal implications of better understanding children's capacities and participation in their own welfare are becoming increasingly relevant around the world.¹⁰⁵ The future of children like the Jacksons and other IVF babies, however, is much more secure than that of frozen embryos who may never become children.¹⁰⁶

Children are not the only ones impacted by ART. Family and non-family siblings of ART children must deal with the possibility of accidental incest that could result from the inadvertent consanguinity between ART children.¹⁰⁷ Professor Cahn examined and argued for limiting the number of offspring for an individual donor¹⁰⁸ and protecting ART children with a Donor Sibling Registry.¹⁰⁹ Protecting ART children from such accidental incest seems at least reasonable, but there is currently no legitimate way to rule out sexual intercourse between adult siblings (or

¹⁰³ See Janice Lloyd, *A Veil That's Difficult to Pierce, Jackson's Youngest Highlights Donor, Surrogate Secrecy*, USA TODAY, July 6, 2008, at 6B. Jackson's mother, Katherine, has since been awarded custody of all three children. Alan Duke, *Michael Jackson's Mom Gets Custody of the Kids*, CNNENTERTAINMENT (Aug. 3, 2009), http://articles.cnn.com/2009-08-03/entertainment/michael.jackson_1_paris-michael-katherine-jackson-debbie-rowe-michael-jackson?_s=PM:SHOWBIZ.

¹⁰⁴ See Lloyd, *supra* note 103.

¹⁰⁵ Mika Morse, *Young Citizens: A Case Study of Institutionalizing Children's Participation in Community Decision-Making*, 28 CHILD. LEGAL RTS. J. 23, 23 (2008) (discussing the same concerns in the context of the United Nations Convention on the Rights of the Child).

¹⁰⁶ See Andrea Kirk Assaf, *The Absurd Fate of Frozen Embryos*, ZENIT.ORG (Feb. 25, 2010), <http://zenit.org/rssenglish-28463>.

¹⁰⁷ Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 213 (2009) (discussing the importance of a donor sibling registry to deal with such matters).

¹⁰⁸ Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARVARD J.L. & GENDER 59, 102 (2009).

¹⁰⁹ See Cahn, *supra* note 97, at 328.

half-siblings), though, they may be unaware of their genetic familial connection.¹¹⁰

The value and worth of human life is a major conundrum.¹¹¹ The loss of a child through divorce, destruction, or clinical accident, whose birth was expected and relied upon, has not yet been explored in the ART context but could very well deserve wrongful death consideration, even as loss of society for the child and the parents. Worth of human life has been considered in the wrongful death context regarding marriage¹¹² but not yet in the context of ART. That matter would be a worthy discussion, as is the personal regulation of one's involvement in the ART process, even in the face of a mistake.

V. REGULATION OR SELF-GOVERNANCE?

The Savage's reality changes the rules completely.¹¹³ The Savages and the Morells found themselves in an unintended surrogacy agreement without the benefit of a contract, a statute, or case law.¹¹⁴ The response by these two families to this incredible mistake, however, illuminates the fact that laws fall short of the most appropriate remedy.¹¹⁵ Rather, personally responsible decision-making on the part of all four individuals seems to rise above the moral morass and the legal abyss,¹¹⁶ paving the way for the

¹¹⁰ See *id.*

¹¹¹ Katherine J. Santon, *The Worth of a Human Life*, 85 N.D. L. REV. 123, 124 (2009) (exploring the measurement of the value of human life in wrongful death causes of action, loss of consortium cases, and defining loss of society in a way that could possibly apply to expected children prohibited from being born).

¹¹² See *id.* "Loss of society damages are noneconomic damages that are awarded to compensate a wrongful death plaintiff for the loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support." *Id.* (citing *Krouse v. Graham*, 562 P.2d 1022, 1024–25 (Cal. 1922)).

¹¹³ See Celizic, *Hello and Goodbye*, *supra* note 7 ("It is supposed to [be] the happiest news a couple can get, especially a couple who have difficulty conceiving and carrying babies. The in vitro fertilization procedure had been a success: Carolyn Savage was pregnant. . . . And then came the horrible news: It wasn't her baby. The fertility clinic they had used had made an all but inconceivable mistake and had implanted another couple's embryos into Carolyn. 'They delivered the worst news of our life,' Sean Savage told TODAY'S Meredith Vieira Monday from the family's Sylvania, Ohio, home.").

¹¹⁴ See *id.*; Celizic, *Genetic Parents*, *supra* note 8.

¹¹⁵ See Celizic, *Hello and Goodbye*, *supra* note 7.

¹¹⁶ See Smith, *supra* note 6. This is most interesting though scholars continue to plead for more family law around the globe and across borders. See Ann Laquer Estin, *Families* (continued)

best interest of the child to take precedence over the personal autonomy of each of the adult parents involved.

Their case and their subsequent reactions indicate that when parents act with personal and parental responsibility, statutes and rulings are apparently unnecessary. Their actions indicate that when Carolyn and Sean Savage were advised of their rights as surrogate parents, they chose to put those rights aside in favor of the best interests of the child Carolyn was carrying by mistake.¹¹⁷ Their self-sacrificial self-governance brought about the best possible outcome for all involved in this nightmarish mistake.¹¹⁸ Family law code may not only be insufficient, but it may even be harmful to the most responsible parenting.¹¹⁹ It is both insightful and instructive to consider the wisdom of the decisions of these four adults, as compared to a purely legal decision a family court judge would make applying the law to this situation.

A. *Ohio ART and Surrogacy*

The Savages reside in Ohio.¹²⁰ There is no codification of surrogacy provisions in Ohio law, and there is no pending legislation on surrogacy or ART in Ohio.¹²¹ Although there are no citations of either state or federal cases in Ohio that refer to these statutes in the past couple of years, some potentially relevant Ohio law can be found at § 3111 of the Ohio Revised Code.¹²² For example, the paternal presumption¹²³ finds Sean Savage, by virtue of his marriage to Carolyn, as the legal father of the Morell child his wife Carolyn carries.¹²⁴ On the other hand, if Sean did not consent to the

Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States, 62 FLA. L. REV. 47, 48 (2010).

¹¹⁷ See Smith, *supra* note 6.

¹¹⁸ See Mike Celizic, *Embryo Mix-Up Baby 'Loved by Two Families,'* TODAYSHOW.COM (May 4, 2010), <http://today.msnbc.msn.com/id/36935933/> [hereinafter Celizic, *Loved by Two Families*].

¹¹⁹ See Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 398–99 (2008) (discussing concerns over a federally mandated family law approach).

¹²⁰ See Celizic, *Genetic Parents*, *supra* note 8.

¹²¹ Richard E. Dobbins, *Ohio Surrogacy Law*, SURROGACY.COM (June 2000), <http://www.surrogacy.com/legals/article/ohlaw.html>.

¹²² See OHIO REV. CODE ANN. § 3111 (West 2005 & Supp. 2010) (citing parentage laws in Ohio).

¹²³ *Id.* § 3111.03(A).

¹²⁴ *Id.* § 3111.03(A)(1).

pregnancy, he may rebut that presumption through genetic testing of the child.¹²⁵ The Savage's situation would obviously afford clear and convincing evidence that the child was not genetically related to Sean, which would lead to an assumed lack of consent to the embryo donation from another family.¹²⁶ There have been efforts to amend Ohio Revised Code § 3111.03, but to date, none have become law.¹²⁷

Ohio does have statutory law on non-spousal artificial insemination (AI) for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her own.¹²⁸ "These sections do not deal with the artificial insemination of a wife with the semen of her husband or with surrogate motherhood,"¹²⁹ and they do not consider the mistaken artificial insemination of a woman with another couples' embryo.¹³⁰ Ohio also has statutory law that requires the written consent of both the husband and the wife¹³¹ and additional law that holds that a woman who receives AI shall be treated and regarded as the natural mother of the child.¹³² That law may be applied satisfactorily in the case of an embryo donation,¹³³ but it finds Carolyn Savage as the only legal mother of the Morrell child she carries.¹³⁴ Indeed, as the gestational mother, she and her husband Sean are considered the only parents of the AI Morrel child under Ohio law.¹³⁵

¹²⁵ *Id.* § 3111.03(B).

¹²⁶ *Id.*

¹²⁷ *See, e.g.*, S.B. 189, 128th Gen. Assemb., Reg. Sess. (Ohio 2009).

¹²⁸ OHIO REV. CODE ANN. §§ 3111.89, 3111.88–3111.96 (West 2005 & Supp. 2010).

¹²⁹ *Id.* § 3111.89.

¹³⁰ *See id.* §§ 3111.88–3111.96 (demonstrating that the statutes here address only intentional, consensual insemination of a woman with the semen from a man who is not her husband for the purposes of raising the child as her own).

¹³¹ *Id.* § 3111.91.

¹³² *Id.* § 3111.97(a).

¹³³ *See generally* Michelle L. Anderson, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 CAP. U. L. REV. 589 (2006); Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529 (2008); Jonathan Penn, *A Different Kind of Life Estate: The Laws, Rights, and Liabilities Associated with Donated Embryos*, 21 REGENT U. L. REV. 207 (2008); Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1 (2008), for examples of published scholarship on embryo donation in Ohio.

¹³⁴ *See* OHIO REV. CODE ANN. §§ 3111.95, 3111.97 (West 2005 & Supp. 2010).

¹³⁵ *Id.*

Regardless of the law, from Carolyn's actions it appears she saw herself not as the legal mother but as the accidental surrogate who carried a child intended for another family because of a clinical mistake. She had no intention to abort that child,¹³⁶ though, that would have been her legal right¹³⁷ as the child's carrier.¹³⁸

One might wonder why it was in the best interest of the child for the Savages to relinquish a baby born from a desired pregnancy, because many people do not think biology determines families (adoption, for example, is a wonderful way to build a family with parents who very much want children).¹³⁹ Thus, it is easy to ask why the Savages did not keep the child Carolyn carried as their own. It is clear that Carolyn Savage had a bond with the baby to whom she gave birth, and that her family developed a bond with the baby during her pregnancy. Though not genetic, it is undeniably a flesh and blood bond. But, even though this was a wanted child and a bond was formed, in the eyes of Carolyn Savage, it was another woman's child.¹⁴⁰ So although she and her husband wanted a child of their own, they made a decision not based on their own interests or bonds, however strong and meritorious they may be, but based on what they thought would be the best interests of the child.¹⁴¹

¹³⁶ See JC Reindl, *Happy News Turns Horrifying for Sylvania Township Couple; Embryo Implanted Is Not Their Own*, TOLEDO BLADE, Sept. 22, 2009, at A1, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20090922/NEWS16/909220358>.

¹³⁷ *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that a woman has a qualified right to choose an abortion).

¹³⁸ Celizic, *Hello and Goodbye*, *supra* note 7.

¹³⁹ See C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 433-34, 441, 446-47, 468-70 (2004) (discussing the need to reexamine the Court's definition of family, examining where the Court's focused on the function rather than the form of family, and generally advocating for a broader definition of family focused on kinship rather than just biology); Roberts, *supra* note 58, at 252-53 (discussing the limits of paternal biology on legal parentage); Elizabeth A. Embrey, Note, *In Re Bonfield: Are We There Yet? The Ohio Supreme Court's Journey Establishing Adoption and Custody Laws in Ohio*, 32 CAP. U. L. REV. 207, 212 (2003) (determining parentage as a function of adoption in addition to biology); Carrie L. Wambaugh, Comment, *Biology Is Important, but Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act*, 32 AKRON L. REV. 791, 792 (1999) (discussing the effects of biology on the legal definition of family).

¹⁴⁰ See Celizic, *Hello and Goodbye*, *supra* note 7.

¹⁴¹ See *id.*

While it is important to consider Carolyn's legal rights, one must also address Sean's legal rights. Under additional Ohio law, Sean would be treated as the child's natural father if he consented to the AI.¹⁴² Thus, further complication results from the need to determine if Sean indeed consented to his wife's AI of another couple's embryo. It could be strongly asserted that his consent to his wife's AI applied only to the use of his embryos. In an ensuing analysis, Sean would have every right to disagree with his wife's intention to carry the child to term, which indeed would put stress on the Savage's marriage, if not push them to divorce. But Sean's decision to stand together with his wife and act in a manner consistent with the best interests of the child is a serious example of personal responsibility above and beyond the provisions of Ohio law.

On the other hand, Ohio law does provide that a "court, upon its own motion, may order and, upon the motion of any party to the action, shall order the child's mother, the child, the alleged father, and any other defendant in the action to submit to genetic tests."¹⁴³ While Ohio statutes do not provide for the circumstances in which the Savages find themselves nor do they encourage family stability necessarily, they do provide for judicial intervention to accomplish those objectives.¹⁴⁴ Here, the Savages are moving forward in that fashion without the assistance of statutory regulation.¹⁴⁵

Would the result be different in an application of statutory family law that does cover surrogacy arrangements? A review of state regulations regarding surrogacy, such as the code in Virginia,¹⁴⁶ is instructive here.

B. Might a More Detailed Surrogacy Law Be More Helpful?

The Virginia Code includes in-depth ART regulation and focuses on surrogacy law, which might be informative and more instructive in ART dilemmas.¹⁴⁷

Virginia law defines assisted conception as "pregnancy resulting from any intervening medical technology" and includes numerous procedures,

¹⁴² See OHIO REV. CODE ANN. § 3111.97(B) (West 2005 & Supp. 2010); see also *id.* § 3111.03 (outlining the presumptions of the father child relationship that apply to § 3111.97(B)).

¹⁴³ *Id.* § 3111.09(A)(1).

¹⁴⁴ See *id.*

¹⁴⁵ See Celizic, *Genetic Parents*, *supra* note 8.

¹⁴⁶ See generally VA. CODE ANN. §§ 20-156–20-165 (2008) (providing for legal determination of children conceived through assisted conception).

¹⁴⁷ See *id.*

which assist conception.¹⁴⁸ Because medical technology drastically alters the concept of “conception,” the Virginia Code defines the terms of one’s “parentage” through assisted reproduction.¹⁴⁹ In order to fully answer the question of parentage, however, the facts must be placed in the correct context, and Virginia, like many states, generally follows the “intended parent” rationale.¹⁵⁰ Thus, Virginia law provides for surrogacy contracts between parties using ART, and notably, Virginia sanctions surrogacy contracts that allow a surrogate and her husband to relinquish all rights and duties as a parent of the child conceived through assisted conception to allow the intended parents to become the parents of the child.¹⁵¹

Virginia law further distinguishes between surrogacy contracts that the court approved and those that the court did not approve.¹⁵² When a court approves a surrogacy contract, the process and the outcome are more secure.¹⁵³ For example, before performing the AI, the intended parents, the surrogate, and the surrogate’s husband must join in a petition to the circuit court where one of the parties resides.¹⁵⁴ Each party must sign and acknowledge the contract before the court, a copy of which must be attached to the petition, and the court will then promptly appoint a guardian ad litem to represent the interests of any resulting child and appoint counsel to represent the surrogate.¹⁵⁵ All hearings are conducted *in camera*, the records are kept confidential, and at the hearing, the court enters an approval and authorization for performance of the assisted conception for a period of twelve months.¹⁵⁶ When birth occurs through an approved surrogacy contract, the intended parents are the parents of the child unless the court vacates the order.¹⁵⁷ Virginia law also provides for termination of the surrogacy contract, allowing the court leave to terminate the agreement for cause by giving a written notice of termination to all

¹⁴⁸ *Id.* § 20-156.

¹⁴⁹ *Id.* § 20-158.

¹⁵⁰ *Id.* § 20-156. The intended parent rationale originated from *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (ruling that the parties who intended to be the child’s parents by express agreement with the surrogate were indeed the legal parents). This has come to be the rule followed in many jurisdictions. See DiFonzo & Stern, *supra* note 47, at 394–95.

¹⁵¹ VA. CODE ANN. § 20-159(A).

¹⁵² *Id.* § 20-159(B).

¹⁵³ See *id.* § 20-160.

¹⁵⁴ *Id.* § 20-160(A).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 20-160(A)–(B).

¹⁵⁷ *Id.* § 20-158(D) (providing for this remedy if the court deems it appropriate).

parties prior to the use of assisted conception.¹⁵⁸ Furthermore, within 180 days of the performance of assisted conception, a genetic parent surrogate may terminate the agreement.¹⁵⁹

A surrogacy contract in Virginia that is not approved by a family court is less predictable and less secure but is nonetheless valid if it meets the requisite criteria.¹⁶⁰ Also, birth through a surrogacy contract not approved has a different parental outcome than that of an approved surrogacy contract, as the law states that “[t]he gestational mother is the child’s mother unless the intended mother is a genetic parent, in which case the genetic mother is the [child’s] mother.”¹⁶¹ If one of the intended parents is a genetic parent, then the intended father is the child’s father.¹⁶² However, much like Ohio law, if the surrogate is married, her husband is a party to the surrogacy, and if the surrogate exercises her right to retain custody, then the surrogate and her husband are the parents.¹⁶³ Here, the Savages have the right to retain custody of the Morell child Carolyn carries; however, the Virginia Code offers some remedy to the Morells, because they might assert that they were the intended parents of the embryo Carolyn carries.¹⁶⁴

The enforceability of a surrogacy contract is an important consideration. In Virginia, if a surrogacy contract has not been subject to prior court approval, the contract is only enforceable if: (1) the surrogate, the husband of the surrogate (if any), and the intended parents are parties to the contract;¹⁶⁵ (2) the contract is in writing, signed by the parties, and

¹⁵⁸ *Id.* § 20-161(A).

¹⁵⁹ *Id.* § 20-161(B).

¹⁶⁰ *Id.* § 20-162. After getting a surrogacy contract approved pursuant to § 20-162, the intended parents are the parents of the child and the surrogate and her husband are not parents. *Id.* § 20-158(E).

¹⁶¹ *Id.* § 20-158(E)(1).

¹⁶² *Id.* § 20-158(E)(2).

¹⁶³ *Id.*; *see also* OHIO REV. CODE ANN. § 3111.95 (West 2005 & Supp. 2010) (“If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of the child . . .”). Furthermore, if none of the intended parents are genetic parents, the surrogate mother is the mother and her husband is the father if he is a party to the contract. The intended parents may obtain parental rights by adoption. VA. CODE ANN. § 20-158(E)(3).

¹⁶⁴ *See id.* § 20-158(E)(4).

¹⁶⁵ *Id.* § 20-162(A)(1) (2008 & Supp. 2010).

acknowledged before an officer of the court;¹⁶⁶ and (3) the surrogate consents to the relinquishment of her parental rights within 180 days following the birth of the child.¹⁶⁷ Furthermore, the contract must (1) not provide compensation,¹⁶⁸ (2) include a provision that the intended parents are the parents of the child only when the surrogate relinquishes her parental rights,¹⁶⁹ (3) include a statement that the parties have read and understand the contract, know their rights and responsibilities, and have entered into it knowingly and voluntarily,¹⁷⁰ and (4) include a guarantee that the intended parties will pay reasonable medical costs.¹⁷¹

Virginia law provides that in all other cases, the gestational mother is consistently the child's legal parent,¹⁷² and the gestational mother's husband is the child's father.¹⁷³ A donor is not the parent of a child conceived through assisted conception unless the donor is the husband of the gestational mother.¹⁷⁴ Virginia has no code or case law on distribution or adoption of embryos.¹⁷⁵ Though it is more detailed than most state codes on ART, it does not provide the answers that families need.

C. Parentage Laws

Issues of parentage must be resolved as this new technology is utilized. While surrogacy law may provide some parentage answers, some scholars suggest that parentage issues must be addressed much more formally with respect to other forms of ART.¹⁷⁶ Professor Naomi Cahn, for example, has

¹⁶⁶ *Id.* § 20-162(A)(2).

¹⁶⁷ *Id.* § 20-162(A)(3).

¹⁶⁸ *Id.* § 20-162(A). If compensation is provided, the contract is void and unenforceable. *Id.*

¹⁶⁹ *Id.* § 20-162(B)(1).

¹⁷⁰ *Id.* § 20-162(B)(2).

¹⁷¹ *Id.* § 20-162(B)(3).

¹⁷² *Id.* § 20-158(A)(1).

¹⁷³ *Id.* § 20-162(A)(2). This is true even in the event of an annulment obtained after assisted conception, unless the putative husband commences a divorce within two years after he discovers or should have discovered the child's birth and in which it is determined that he did not consent to the conception. *Id.*

¹⁷⁴ *Id.* § 20-158(A)(3).

¹⁷⁵ See Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 UNIV. ST. THOMAS J.L. & PUB. POL'Y 100, 109 (2007) (stating that no jurisdiction has a law regarding embryo distribution).

¹⁷⁶ See NAOMI CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 21 (2009); see also Anderson, *supra* note 133, at 615 (discussing the need for more regulation of ART).

noted in depth the lack of regulation of ART.¹⁷⁷ What has often been referred to as the “gamete industry”—a multi-billion dollar business in the United States—is operating under a relative dearth of regulation, which is of great concern chiefly because family law differs across states.¹⁷⁸ Everything from the liability of fertility clinics to the rights of donors, donor children, and hopeful couples is unregulated.¹⁷⁹ This causes Professor Cahn and others to exhort legal and policy-making communities to cease applying piecemeal laws. Rather, lawmakers ought to create laws that sustain the fertility industry, while at the same time protecting the interests of donors, recipients, and the children that result from successful transfers.¹⁸⁰

Government interference through the creation of new laws can bring new conundrums.¹⁸¹ This article strongly suggests, in contrast to being forced to follow a judicial ruling or awaiting federal intervention, that the exercise of genuine personal responsibility in self-governance may lead to the right conclusion more appropriately and allow the decision-maker to own the liberty to do so.

¹⁷⁷ CAHN, *supra* note 176, at 44.

¹⁷⁸ *See id.* at 192.

¹⁷⁹ *See id.* at 44.

¹⁸⁰ *Id.* at 235. Indeed, Professor Cahn makes a vivid argument for a uniform federal legal code by describing the case involving triplets of a gestational carrier where an Ohio couple, James Flynn and Eileen Donich, sued their gestational carrier, Pennsylvania resident Danielle Bimber, when she refused to give up her triplets. *Id.* at 104–07. The case was tried in both states, *J.F. v. D.B.*, 848 N.E.2d 873 (Ohio Ct. App. 2006), and *Flynn v. Bimber*, No. 15160-2003, 2005 WL 1349640 (Pa. Ct. Com. Pl. Jan. 7, 2005), and ultimately decided in favor of Flynn—the biological father, but not Donich, who was accorded no standing by the court. *Flynn*, 2005 WL 1349640, at *263, *268. Professor Cahn argues that a uniform federal law is needed particularly to deal with interstate conflicts. *See* CAHN, *supra* note 176, at 189.

¹⁸¹ Hilary White, “*Right of Couples to IVF Trumps Children’s Right to a Normal Family—European Court of Human Rights*,” LIFESITENEWS.COM (Apr. 7, 2010), <http://www.lifesitenews.com/ldn/2010/apr/10040704.html>. For example, Austria’s Artificial Procreation Act was codified to “protect children from some of the strange family relations suffered by many IVF children created in countries that allow gamete donation from unrelated third parties” and was “intended to protect women from exploitation.” *Id.* The European Court of Human Rights ruled the law to be discriminatory and in violation of the European Convention on Human Rights as not formulated “in a coherent manner” proffering that there were no “‘insurmountable obstacles’ to bringing such relationships into the ‘general framework of family law.’” *Id.*

D. The Savage Decision

Good-intentioned and fairly well set forth state codes are often inadequate at best when prescribed upon reality,¹⁸² particularly when compared to a self-governed personally responsible decision-making paradigm. The circumstances in which the Savages and the Morells found themselves serve to prove this point precisely.

Under Virginia law, a judge would likely rule that Carolyn and Sean Savage may keep the child as their own, as the surrogate and her husband.¹⁸³ The Morell's child would never be in the Morell family; and thus, the Morells would never have any right to meet or get to know their own genetic child. One could argue that a detailed surrogacy code like that of Virginia magnifies the injustice of the clinic mistake.¹⁸⁴

Under Ohio law, the result is less clear, but equally nightmarish, because the Savages could choose to (1) legally abort,¹⁸⁵ (2) keep the child as their own, regardless of their knowledge of his genetic core,¹⁸⁶ or (3) engage in surrogacy litigation or a custody battle with the Morells.¹⁸⁷ Neither Ohio nor Virginia law would have assisted these families in arriving at the point where their own responsible decisions have brought them today.¹⁸⁸

Carolyn and Sean Savage, by self-governance, chose self-sacrificial life for the Morell child Carolyn carried to the great detriment of their own desires.¹⁸⁹ They made a decision in favor of the child's genetic family, rather than their own family, even though they initially pursued ART to build their own family.¹⁹⁰ In the face of such disappointed hopes and

¹⁸² “The law is only a shadow of the good things that are coming—not the realities themselves.” *Hebrews* 10:1 (New International Version).

¹⁸³ See VA. CODE ANN. § 20-162 (2008 & Supp. 2010). However, this outcome is not guaranteed, as the Morells could argue that they were the intended parents of the embryo. See *id.* § 20-158(E)(4).

¹⁸⁴ See VA. CODE ANN. § 20-158 (2008) (“[Donor parent] is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.”).

¹⁸⁵ See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

¹⁸⁶ See OHIO REV. CODE ANN. § 3111.95 (West 2005 & Supp. 2010) (providing that the woman who gives birth will be the natural mother, and if the husband consented to the artificial insemination, the husband will be the natural father of the child).

¹⁸⁷ See, e.g., *J.F. v. D.B.*, 848 N.E.2d 873 (Ohio Ct. App. 2006).

¹⁸⁸ See OHIO REV. CODE ANN. § 3111.95; VA. CODE ANN. § 20-158.

¹⁸⁹ See Reindl, *supra* note 7.

¹⁹⁰ *Id.*

horrendously difficult circumstances, they made a choice not in their own favor but in favor of what was best for the child Carolyn carried because of a clinical mistake.¹⁹¹ Paul and Shannon Morell agreed to parent the child Carolyn Savage carried.¹⁹²

Self-governance with personal and parental responsibility, as evidenced by the thoughtful and sacrificial decision-making of Sean and Carolyn Savage, provides the best outcome for marriages. It also promotes the best conclusion to avert divorce. Most importantly, it protects and provides the best outcome for the ART child. So what would be the strategy toward self-governed personally responsible decision-making in ART? The Hitchhiker's Guide to an ART plan of action for any participant might look something like this:

1. When considering ART, parents view each fertilized egg that results in an embryo as a child from the point of fertilization. All embryos created are entitled to life, a discernable identity, and a future, each protected from experimentation, destruction, research, or selective pregnancy reduction. Parents understand their child's life is at stake in all their decisions.
2. Adults utilizing ART in any form view themselves as parents from the outset, particularly understanding that parental rights, obligations, and responsibilities for the best interests of the child embryo take effect upon fertilization of each embryo and continue at all times thereafter (unless consent for termination of those rights and duties is given). All fertilized eggs are afforded protection by their parents to provide for the best interests of the ART child.
3. Parents place their own personal autonomy aside to protect the ART child in every circumstance, even that of mistake, error, or wrongful pregnancy. Mothers forgo the right to abort, and fathers forgo the right to disclaim their children. Parents begin to act in the best interests of the

¹⁹¹ See Celizic, *Hello and Goodbye*, *supra* note 7.

¹⁹² See *id.*

child from the outset of their choice to utilize ART.

4. Married parents place their partner and their partner's health in carrying out the best interests of the child above their own interests.
5. Married parents place their marriage above their own personal interests. When ART mistakes or errors happen, couples stand together above all else, placing the interests of the spouse above their own.
6. Together, parents place the interests of the ART child, whatever the child's identity, above their own interests.
7. State law operates to encourage numbers one through six above as tenets of self-governance regarding personal and parental responsibility.¹⁹³ When adult participants do not govern themselves according to these standards protecting the best interests of the ART child, default rules may be implemented to reorder the process accordingly.

VI. CONCLUSION

Although the objective of the law is generally to restore what has been lost, reorganize what has been disarrayed, and make damaged parties as whole as possible,¹⁹⁴ it simply cannot accomplish those lofty objectives in the mistaken embryo insemination of Carolyn Savage.¹⁹⁵ Especially in relationships as critical as children and their family members, even the best-laid civil laws fall short. When personal and parental responsibility

¹⁹³ The notion that law should be used to shape character is not a new one. J. Budziszewski points out that laws can be used to "make men good." J. BUDZISZEWSKI, WRITTEN ON THE HEART 45 (1997). Of this notion he writes, "The arm of the law reaches only my outward deeds, but virtue is the inward disposition that gives rise to them." *Id.* Then relying on Aristotle he explains, "Having virtue is not the same as doing outward deeds; nevertheless we *acquire* virtue by doing outward deeds." *Id.*

¹⁹⁴ See generally H.L.A. HART, THE CONCEPT OF LAW (1961).

¹⁹⁵ See Celizic, *Hello and Goodbye*, *supra* note 7 (noting that after ten years of trying and finally becoming pregnant, but with the wrong embryo, the couple was forced to use a surrogate to carry a child to term once they completed this pregnancy).

rule the day, however, parents act selflessly, as the Savages have here,¹⁹⁶ providing what is best for a child regardless of the law and regardless of their own rights and privileges. Solomon's wisdom¹⁹⁷ is lived out in such circumstances when parents are willing to sacrifice their own interests for that of their child.¹⁹⁸

The use of technology in family law and family life can be an incredible and beautiful gift, as ART can be a vehicle for a life-giving blessing. Corrupted by human nature or a doctor's mistake, however, it can be the impetus to strengthen or tear apart a marriage. A divorce could be averted or could result. A child could be born or aborted. A child could be placed and raised in an intact family or fought over for custody.

ART has indeed had a tremendous impact on families¹⁹⁹ and family law.²⁰⁰ When it is utilized in an unselfish manner through personal and parental responsibility, the honor of its potential is evident. Self-government ruled the hearts and minds of Carolyn and Sean Savage, they

¹⁹⁶ This type of "virtue jurisprudence" is also often associated with Aristotle and Thomas Aquinas, and forms the root of Christian theology and is sometimes referred to as "The Unity of the Virtues." See BUDZISZEWSKI, *supra* note 193, at 31. Sean and Carolyn Savage noted that their faith informed their choices. See David Gardner, *Pregnant Mother Forced to Give Up IVF Baby After Doctors Gave Her Wrong Embryo*, DAILY MAIL ONLINE (UNITED KINGDOM), <http://www.dailymail.co.uk/news/worldnews/article-1215090/> (last updated Sept. 22, 2009). "The couple decided not to have an abortion because of their religious beliefs, and have met the other couple and arranged a handover." *Id.* "Because of her Catholic religious beliefs, Savage, a 40-year-old mother of two from Sylvania, Ohio, agreed not to abort and to give the baby back to its biological mother." Susan Donaldson James, *Embryo Mix-Up Woman Gives Birth, Faces Heartbreak Ahead*, ABCNEWS.COM (Sept. 28, 2009), <http://abcnews.go.com/Health/MindMoodNews/unintended-surrogate-mom-wrong-embryo-faces-heartbreak-birth/story?id=8675885>.

¹⁹⁷ See 1 *Kings* 3:16–28. Solomon's wise ruling, in brief: Two prostitutes lived together; each recently had a baby. *Id.* One killed her baby in the middle of the night and switched it with the other's living child. *Id.* Waking, the other knew the dead child was not hers. *Id.* The prostitutes went before the king to resolve the ensuing dispute. *Id.* He candidly recommended cutting the baby in half. *Id.* The false mother was nonplussed by this heinous suggestion, but the true mother pled desperately that her son be given over to her unscrupulous housemate, rather than be cut in two. *Id.* Solomon now knew the true mother from the false, and ordered her reunited with her son. *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ See *supra* Parts II–IV.

²⁰⁰ See *supra* Parts V.A–V.B.

made difficult decisions, and the Morells were grateful.²⁰¹ Law can be helpful, but it should choose to “tread lightly.”²⁰²

When parents together determine the priceless value of the child before fertilization, they are demonstrating parental responsibility. Combined with personal responsibility, this provides for the best interests of the child. This kind of micro-community stability values every individual above self—and is in essence, family manifested.

If a couple such as Sean and Carolyn Savage were to find that their family dreams were demolished or destroyed²⁰³ or if the child Carolyn was pregnant with was another couples’ embryo, it is likely they might want to escape to another planet. Their ART clinic made a tremendous mistake while helping them search for the “answer to the Ultimate Question of Life, the Universe, and Everything”;²⁰⁴ yet, the Savages were still able to find that the answer was in their own moral code of personal responsibility.

Carolyn and Sean Savage chose to understand ART toward self-governed personally responsible decision-making. In doing so, they placed the interests of the unborn Morell child above their own interests. Their case offers a plan of action to others who choose to build a family using ART.²⁰⁵

What the Savages and the Morells have done is a remarkable model of self-governed personally responsible decision-making. Men and women desiring to be parents who choose such responsible decision-making based on life affirming and family affirming choices foster the best interests of marriage, children, families, and ART itself.

²⁰¹ See James, *supra* note 196 (“The Morells told The Associated Press that Savage was a ‘guardian angel’ and they would be ‘eternally grateful.’”). *Id.*

²⁰² See generally Patterson, *supra* note 119 (advocating for less government intrusion in family law from the federal arena).

²⁰³ See ADAMS, *supra* note 1.

²⁰⁴ ADAMS, *supra* note 1, at 172.

²⁰⁵ See *supra* Part V.D.