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"Alimony for Your Eggs": Fertility Compensation in Divorce Proceedings

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"Alimony for Your Eggs": Fertility Compensation in Divorce Proceedings

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I. INTRODUCTION

With one granted every thirty-six seconds,[1] it is not uncommon for an indignant spouse to utter the words, "I want a divorce!" What *is* unexpected, however, is the exclamation, "I want alimony for my eggs!" Such is the case of Mr. and Mrs. X, an anonymous couple in New Jersey making

1. *32 Shocking Divorce Statistics*, MCKINLEY IRVIN (Oct. 30, 2012, 12:00 AM), http://www.mckinleyirvin.com/blog/divorce/32-shocking-divorce-statistics/.

headlines for the unprecedented legal claims in their pending divorce.[2] As recounted in Sarah Elizabeth Richards's *New York Times* op-ed *Alimony for Your Eggs*, the thirty-eight-year-old Mrs. X seeks $20,000 from her soon-to-be-former husband to finance egg-freezing procedures, medication costs, and egg storage.[3] The request is borne from the fact that, despite several failed attempts at in vitro fertilization, Mrs. X has yet to fulfill her maternal desires.[4] Thus, at an age when fertility is both delicate and in decline,[5] Mrs. X requests compensation from her estranged husband to finance what is likely her last opportunity to have children of her own.[6]

This claim for fertility compensation is a question of first impression in the United States.[7] While Mrs. X's attorney seeks to settle the case out of court,[8] it is only a matter of time before the next woman requests alimony to recompense for her years of bygone fertility.[9] It thus behooves the legal community to contemplate the implications of "alimony for your eggs."[10] For despite the questionable policy implications of compensating women for long-lost parenthood,[11] the history[12] and the policies informing divorce and alimony jurisprudence suggest that a viable legal argument can be made for fertility compensation.[13] In fact, according to case law explicating marital standards of living,[14] reimbursement alimony,[15] and embryonic disposition,[16]

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2. Sarah Elizabeth Richards, *Alimony for Your Eggs*, N.Y. TIMES, Sept. 7, 2013, at A23, *available at* http://www.nytimes.com/2013/09/07/opinion/alimony-for-your-eggs.html?_r=0. Because the couple is anonymous, they will hereinafter be referred to as "Mr. and Mrs. X."

3. *Id.*

4. *Id.*

5. *See infra* note 185.

6. *See* Richards, *supra* note 2.

7. *Id.*

8. *Id.*

9. *See* Sarah Elizabeth Richards, *Science of Egg Freezing Means Fertility Has a Value in Divorce*, DALL. MORNING NEWS (Sept. 9, 2013, 10:12 PM), http://www.dallasnews.com/opinion/latest-columns/20130909-science-of-egg-freezing-means-fertility-has-a-value-in-divorce.ece.

10. This is particularly true given the rise of Assisted Reproductive Technology (ART). *See infra* Part III.C. Not only are there a host of legal inquiries inherent to this question, *see infra* Part IV, but social policy also demands a careful analysis. *See infra* Part V.

11. *See infra* Part V.

12. *See infra* Part II.

13. *See infra* Parts II, III, and IV.

14. *See infra* Part IV.A.

15. *See infra* Part IV.B.

16. *See infra* Part IV.C.

Mrs. X has a strong legal argument to get alimony for her eggs.[17] Perhaps, then, the more significant question is *should* she?[18]

This Comment explores the history and reasoning behind divorce in the United States,[19] examines contemporary alimony jurisprudence,[20] and assesses the viability of fertility compensation in divorce proceedings,[21] arguing that there is, in fact, a legal basis for awarding such reparation upon divorce.[22] Part II surveys divorce at common law[23] and details the impact of the Uniform Marriage and Divorce Act (UMDA) and its introduction of no-fault divorce.[24] Part III discusses alimony under New Jersey state law,[25] with particular emphasis on reimbursement alimony after the *Reiss* trilogy,[26] the *Crews* marital standard of living,[27] and the impact of Assisted Reproductive Technology (ART) on divorce jurisprudence.[28] Part IV evaluates the viability of Mrs. X's claim for alimony for her eggs under the *Crews*, *Reiss*, and ART frameworks, contending that there is a strong legal basis for awarding her fertility compensation. Part V focuses on the social policy implications of recognizing fertility compensation as a legitimate form of alimony. Part VI concludes.

II. A HISTORY OF DIVORCE IN THE UNITED STATES

A. *Divorce at Common Law*

While marriage and divorce can be traced to the early Greeks,[29] the

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17. *See infra* Part IV.
18. *See infra* Part V.
19. *See infra* Part II.
20. *See infra* Part III.
21. *See infra* Part IV.
22. *See infra* Part IV.
23. *See infra* Part II.A.
24. *See infra* Part II.B.
25. *See infra* Part III.A.
26. *See infra* Part III.A.2.
27. *See infra* Part III.B.
28. *See infra* Part III.C.
29. Under Athenian law, marital dissolution simply required filing notice with a magistrate, allowing Greek spouses to divorce with ease. Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?*, 38 FAM. L.Q. 3, 4 (2004). This contrasts with dissolution requirements in ancient Rome, where divorce did not transpire during the civilization's first 500 years. *Id.*

foundational concept of marital fault first emerged as a corollary of Christian thought.[30] In early England, ecclesiastical courts were the only bodies vested with the ability to grant legal separations, yet they were limited to granting divorce *a mensa et thoro*, from bed and board.[31] Divorce *a vinculo matrimonii*, from the banns of matrimony,[32] was strictly prohibited because these courts were governed by canon law—such divorce could only be granted by an Act of Parliament.[33] This structure was carried to the American colonies and continued to govern divorce proceedings in the United States until the mid-nineteenth century when the Divorce Act of 1857 stripped ecclesiastical courts of their jurisdiction and established absolute divorce by judicial decree.[34]

---

30. *Id.* Marital fault was the main principle of common law marriage until the advent of no-fault divorce. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1498–99 (2000). Marital fault mandated that "[a] spouse was entitled to a divorce if, and only if, the other spouse had committed an offense against the marriage." *Id.* at 1498. Modernly, marital fault is only relevant to alimony determinations in two specific instances: (1) those in which the fault has impacted the couple's economic lifestyle, and (2) egregious violations of societal norms that warrant severance of economic bonds. 20 NEW JERSEY PRACTICE, SKILLS AND METHODS § 14:10 (3d ed. 2014) [hereinafter SKILLS AND METHODS].

31. Lyle & Levy, *supra* note 29, at 4. A divorce *a mensa et thoro* is largely similar to a modern-day legal separation, but required the wife to demonstrate that her husband was at fault. David H. Kelsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1, 2 (1988).

32. "Banns of matrimony" is defined as "[p]ublic notice of an intended marriage . . . given to ensure that objections to the marriage would be voiced before the wedding." BLACK'S LAW DICTIONARY 168 (9th ed. 2009).

33. Lyle & Levy, *supra* note 29, at 4. By virtue of their power to grant divorce, ecclesiastical courts also determined alimony. *Id.* at 5. English law mandated that

> a husband was obligated to support his wife so long as they cohabitated or were separated by reason of his misconduct. Because only very serious misconduct on the part of the husband warranted alimony in the first place, when it was awarded, it was generally in excess of bare sustenance. On the other hand, if the divorce a mensa et thoro (legal separation) was granted because of the wife's misconduct, no alimony was awarded. . . . In the absolute divorces granted by Parliament, it became a practice that divorces would not be granted unless financial provision was made for the wife.

Id. Early America, in contrast, did not require an act of Parliament to grant divorce *a vinculo matrimonii*, but rather required special acts of the legislature, and later, legislative statutes, to grant divorce from the banns of matrimony. *Id.* at 4–5. Jurisdiction over divorce proceedings was later shifted to chancery courts, which could also award alimony as an incident to divorce. *Id.* at 5–6; *see* Barrere v. Barrere, 4 Johns. Ch. 187, 198 (N.Y. Ch. 1819) (ordering in a domestic violence case "that the [wife] and [husband] be separated from bed and board forever" and "that the [husband] pay to the [wife] 200 dollars a year, to be computed from the date of this decree, in half yearly payments, to be applied towards the support and maintenance of the [wife]").

34. Lyle & Levy, *supra* note 29, at 4.

American courts, as in English courts,[35] awarded alimony in response to strict property laws under which women were prohibited from holding title apart from their husbands.[36] Furthermore, "[c]ourts and legislatures . . . viewed alimony as proper because women remained dependent and society expected husbands to support their wives. It was believed that the 'innocent' wife gained 'the apparent right to perpetual support as if the marriage had remained intact.'"[37] In essence, the "fault rules" governing divorce gave the "innocent" spouse significant leverage in that she could choose to cooperate via acceptance of a consent decree so long as her financial demands were met.[38] This theory continued to underlie alimony awards until the mid-twentieth century, at which time no-fault divorce began to seep into family law jurisprudence.[39]

B. *The Uniform Marriage and Divorce Act and the Advent of No-Fault Divorce*

Despite its traditional wide acceptance, notions of marital fault were disposed of by the Uniform Marriage and Divorce Act in response to "virtual unanimity as to the urgent need for basic reform."[40] The UMDA was notably not adopted in its entirety by every state.[41] However, it laid the foundation for alimony determinations throughout the country.[42] Specifically, section 308 of the UMDA provides that the following are relevant factors in determining appropriate alimony payments:

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35. *See supra* note 33.

36. Lyle & Levy, *supra* note 29, at 6.

37. Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 5–6 (1989). Notably, these courts also extended their awards to wives whose misconduct provided the grounds for divorce. Lyle & Levy, *supra* note 29, at 6.

38. *See* Lyle & Levy, *supra* note 29, at 6–7.

39. Ellman, *supra* note 37, at 6. Despite the advent of no-fault divorce, "alimony's form has remained the same while its function has changed." *Id.* at 5. That being said, alimony and property claims could theoretically yield different results with this shift in rationale. *Id.* at 12.

40. UNIF. MARRIAGE & DIVORCE ACT Prefatory Note (amended 1973), 9A Part I U.L.A. 160 (1998). The Act formally rejected fault and economic dependency as relevant factors in determining alimony. *Id.* § 308. It also provided that alimony was only appropriate when a spouse "is unable to support himself through appropriate employment." *Id.* § 308(a)(2).

41. Lyle & Levy, *supra* note 29, at 8. For examples of state-to-state variations of the UMDA, see *infra* note 66 and accompanying text.

42. While cases throughout the nation rely on similarly constructed statutory rules, actual alimony awards, as well as the theory behind them, often vary. Ellman, *supra* note 37, at 4.

> (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;
>
> (4) the duration of the marriage;
>
> (5) the age and the physical and emotional condition of the spouse seeking maintenance; and
>
> (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.[43]

In emphasizing that fault is not determinative in divorce proceedings, the UMDA triggered the shift away from permanent alimony and toward temporary alimony.[44] This was, in large part, due to the increasing employability of women, whom the drafters "were determined to recognize."[45] In fact, the official comment to section 308 of the UMDA strongly suggests that employment is determinative in achieving the requisite "self-support" status for terminating alimony payments.[46] Thus, "[b]y emphasizing employability and failing to refer to the actual marital standard-of-living as a factor in determining eligibility for support, the

43. UNIF. MARRIAGE & DIVORCE ACT § 308(b).

44. Lyle & Levy, *supra* note 29, at 8, 10 ("The influence of the UMDA has resulted in an approach to alimony that in many cases relegates a spouse who has sacrificed his or her own earning capacity to help build up the earning capacity of the other spouse and to tend to the personal side of the marriage to a mere subsistence level post-divorce standard of living, especially in comparison with the standard of living enjoyed by the other spouse. The longer the marriage, the more potent the damage to the dependent spouse.").

45. Laura W. Morgan, *Current Trends in Alimony Law: Where Are We Now?*, 34-WTR FAM. ADVOC. 8, 9 (2012).

46. UNIF. MARRIAGE & DIVORCE ACT § 308 cmt.

drafters of the UMDA appeared to reject the common law rule that the measure of support is the marital standard-of-living."[47] Instead, the UMDA adopted the term "maintenance" to distinguish traditional alimony from a more temporary form of alimony.[48]

The practical effect of the UMDA is threefold. First, divorce can now be grounded in incompatibility—fault is no longer relevant.[49] Second, the UMDA removed the residency requirements for divorcing couples.[50] Finally, the UMDA provided for equal distribution of marital assets.[51] These changes aimed to foster greater economic equality amongst men and women, but critics remain skeptical, chastising the UMDA for too hastily attempting to have legislation reflect progressive social movements.[52] For while the UMDA was adopted in 1979 in response to society's belief that women were soon to achieve economic equality with men,[53] to this day such economic equality fails to exist.[54] Moreover, the UMDA's no-fault divorce contributes to women's decreased bargaining power in alimony negotiations.[55] Prior to the UMDA, "[t]he fault rules gave great bargaining leverage to the spouse who felt no urgency to end the marriage."[56] This was most often the wife.[57]

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47. Morgan, *supra* note 45, at 9.

48. *Id.*

49. Phyllis D. Coontz, *Alimony Awards and the Search for Equity in the No-Fault Divorce Era*, 18 JUST. SYS. J. 103, 103 (1995).

50. *Id.*

51. *Id.*

52. *See* Lyle & Levy, *supra* note 29, at 10.

53. *Id.*

54. According to the National Committee on Pay Equity, in 2012, women earned 76.5 cents to every dollar earned by men. NAT'L COMM. ON PAY EQUITY, http://www.pay-equity.org/ (last updated Nov. 30, 2014). Furthermore, "[s]ince the Equal Pay Act was signed in 1963, the wage gap has been closing at a very slow rate. In 1963, women who worked full-time, year-round made 59 cents on average for every dollar earned by men. In 2010, women earned 77 cents to men's dollar." *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMM. ON PAY EQUITY, http://www.pay-equity.org/info-time.html (last updated Sept. 2014).

55. Ellman, *supra* note 37, at 7. Ellman remarks that "[n]o-fault reform created a sea-change in this legal environment. Although motivated in large part by a desire to end the charade of perjured testimony and falsified residency that permeated consent divorces under the fault system, its effects went considerably further." *Id.* Another significant unanticipated effect of no-fault divorce lies in the moral implications of failing to assign fault in divorce. *See* Karen Turnage Boyd, *The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce*, 12 CARDOZO J.L. & GENDER 609, 614–15 (2006). No-fault schemes effectively condone extramarital affairs and the failure to fulfill marital vows and obligations, both of which weaken partnership foundations and family units. *Id.* at 615.

56. Ellman, *supra* note 37, at 7 ("Knowing the difficulty of obtaining a divorce in a truly

Yet, when the UMDA recognized unilateral divorce, it "allow[ed] men easy exit from marriage without provision for ensuring a sufficient financial obligation to their former wives."[58] Thus, critics look to the UMDA and its elimination of marital fault as detrimental to obtaining the equality necessary to legitimize and validate alimony determinations.[59]

III. A CONTEMPORARY UNDERSTANDING OF DIVORCE AND ALIMONY

A. *Alimony Under New Jersey State Law*

In the midst of policy disagreements between proponents and critics of the UMDA's no-fault divorce, the state of New Jersey has emerged as the preeminent national leader in divorce and alimony jurisprudence.[60] A model of progressivism since the 1970s, the New Jersey Supreme Court has established itself as a progressive bench, namely in cases involving housing policy, capital punishment, surrogacy contracts, and sex offender laws.[61] More specifically, the New Jersey alimony and maintenance statute[62] serves as a model for family law throughout the United States. Accordingly, New Jersey's case law provides strong guidance in understanding the implications of receiving fertility compensation in divorce.[63]

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contested proceeding in which her fault would have to be shown, the innocent spouse might offer to cooperate with a 'consent' decree if certain financial demands were met."). For example, an older man who abandoned his long-time wife for a younger woman could not obtain a divorce without his older wife's consent. *Id.* If she did not agree, he would have to buy his freedom from her, a situation that bestows upon her great bargaining power. *Id.*

57. *See id.*

58. *Id.* at 8. Under contemporary no-fault divorce, "[t]he wife seeking alimony, property division, or child support has no leverage to demand such compensation as the price of her husband's 'freedom,' but must rely instead on the substantive law governing these issues." *Id.* at 7.

59. *Id.* at 8.

60. Gerald J. Russello, *The New Jersey Supreme Court: New Directions?*, 16 ST. JOHN'S J. LEGAL COMMENT. 655, 658, 667–68 (2002).

61. *Id.* at 660–61. "Since World War II 'the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning for itself a national reputation for activism and liberal reformism.'" *Id.* at 658 (quoting G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 184 (1988)); *see* Kevin M. Mulcahy, Comment, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 865–79 (2000).

62. *See* N.J. STAT. ANN. § 2A:34-23(b)–(d) (West 2000).

63. *See generally* Mulcahy, *supra* note 61 (analyzing why the New Jersey Supreme Court is the most active and progressive state supreme court).

Under New Jersey state law, alimony is a personal right—not a property right—that terminates upon the payor's death.[64] While some states refer to alimony as "spousal support" or "maintenance," each recognizes several different types, including permanent, periodic, rehabilitative, and reimbursement.[65] Factors taken into consideration to determine the type and size of the alimony award include:

> (1) The actual need and ability of the parties to pay;
>
> (2) The duration of the marriage;
>
> (3) The parties' age and physical and emotional health;
>
> (4) The standard of living established in the marriage and the likelihood that each party can maintain a reasonably comparable standard of living;
>
> (5) The parties' earning capacities, educational levels, vocational skills, and employability;
>
> (6) The length of absence from the job market and custodial responsibilities for children of the party seeking maintenance;
>
> (7) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisition of capital assets and income;
>
> (8) The financial and non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;
>
> (9) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of

64. SKILLS AND METHODS, *supra* note 30, § 14:10.
65. Lyle & Levy, *supra* note 29, at 7.

current income, to the extent this consideration is reasonable, just and fair; and

(10) Any other factors which the court may deem relevant.[66]

Every court in a petition for alimony must take into account these factors in

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66. § 2A:34-23(b). It is worth noting that several states take different statutory approaches to alimony determinations:

> In Alaska, the alimony award must fairly allocate the economic effect of divorce. In Arkansas, alimony should be reasonable based on the circumstances of the parties.
>
> Connecticut courts may order either of the parties to pay alimony to the other, after considering [a variety of factors similar to those contemplated in New Jersey].
>
> The District of Columbia allows the court to require either party to pay alimony to the other party if it seems ‘just and proper,’ after considering all relevant factors for a fair and equitable award. In Florida, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. . . .
>
> In Illinois, the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the court deems just after consideration of all relevant factors, but without regard to marital misconduct. In Kansas, the court may award to either party an allowance for future support denominated as maintenance in an amount the court finds to be fair, just, and equitable under all of the circumstances. . . .
>
> In several states, alimony is ordered only if the assets awarded to a dependent spouse are insufficient for the support of that spouse. Typically these states[, which include Colorado,] also require the court to place major emphasis on whether the dependent spouse has the ability to support himself or herself through employment. . . .
>
> . . . .
>
> A few states have extremely restrictive statutory approaches to alimony. For example in Indiana, where a spouse is physically or mentally incapacitated so that his or her ability to support himself or herself is materially affected, a court may order support for the period of incapacity. . . .
>
> In North Carolina, the court is barred from awarding alimony if the needy spouse committed illicit sexual behavior before separation. On the other hand, if the supporting spouse committed illicit sexual behavior before the separation, . . . the court may exercise discretion in determining whether to award alimony.
>
> Texas is among the most restrictive. Unless the supporting spouse is found to have committed domestic violence in the two years before the complaint is filed or while the divorce is pending, the parties must have been married ten years or longer for maintenance to be awardable. . . .
>
> In Virginia, no permanent maintenance and support may be required to be paid by a spouse if there exists in such a spouse’s favor a ground of divorce, unless the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based on the respective degrees of fault in the marriage and the relative economic circumstances of the parties. . . .
>
> Maryland clearly prefers limited-term alimony and expressly provides that it cannot be modified.

Lyle & Levy, *supra* note 29, at 13–16 (footnotes omitted). However, most are simply variations of the UMDA or the New Jersey Revised Statutes, or both. *See id.*

computing awards.[67] Furthermore, "[i]f the court determines that an award of permanent alimony is not warranted, the court shall make specific findings on the evidence setting out the reasons therefor."[68]

1. Permanent, *Pendente Lite*, and Rehabilitative Alimony

Permanent alimony, the most common and enduring form of alimony, is of statutory origin[69] and reflects "the important policy of recognizing that marriage is an adaptive economic and social partnership."[70] It is grounded in the husband's common law obligation to provide for his wife and is thus a right that arises out of the marriage and endures post-divorce.[71] In contemporary alimony jurisprudence, however, obligations of permanent alimony may attach to either spouse.[72] It is permanent in the sense that the obligation to pay cannot be removed; rather, "when parties enter into a marriage, each spouse is thereafter viewed as owing a duty of support to the other."[73]

Alimony may also be granted *pendente lite*[74] subject to conditions including, but not limited to, those imposed by periodic, rehabilitative, and reimbursement arrangements.[75] Like permanent alimony, the court has full discretion in awarding the sum and duration of a *pendente lite* award.[76] Its purpose, however, is to provide a means of support during the course of a divorce proceeding.[77] *Pendente lite* alimony is therefore temporary and is

67. *See* Lyle & Levy, *supra* note 29, at 13–16.

68. Cox v. Cox, 762 A.2d 1040, 1047 (N.J. Super. Ct. App. Div. 2000) (emphasis omitted).

69. *See* § 2A:34-23(b).

70. *Cox*, 762 A.2d at 1048 ("[M]arriage is a joint enterprise whose vitality, success and endurance is dependent upon the conjunction of multiple components, only one of which is financial.").

71. 11 SUSAN REACH WINTERS & THOMAS D. BALDWIN, NEW JERSEY PRACTICE, FAMILY LAW AND PRACTICE § 30.4 (3d ed. 2013).

72. *Id.*

73. *Id.*

74. "During the proceeding or litigation; in a manner contingent on the outcome of litigation." BLACK'S LAW DICTIONARY 1248 (9th ed. 2009).

75. Lyle & Levy, *supra* note 29, at 7.

76. WINTERS & BALDWIN, *supra* note 71, § 30.4.

77. *Id.* § 30.3 ("The objective of pendente lite alimony is to secure for the payee the 'financial means whereby to live and to retain counsel until the court shall have opportunity to hear and determine the controversy . . . .'" (quoting Monica v. Monica, 96 A.2d 87, 88 (N.J. Super. Ct. App. Div. 1953))).

more grounded in necessity than its permanent counterpart.[78]

In addition to permanent and *pendente lite* awards, courts may also grant rehabilitative alimony, a temporary form of compensation that terminates when the dependent spouse reaches a state of self-support.[79] "Rehabilitative alimony can be modified based upon either changed circumstances or upon the nonoccurrence of circumstances that the court found would occur at the time of the award."[80] Its aim is to provide for the supported spouse's rehabilitation, but not at the risk of overcompensation.[81] Such rehabilitation manifests itself as establishing the capacity for self-support, "either through the redevelopment of previous skills or provision of the training necessary to develop potential supportive skills."[82] Accordingly, rehabilitative alimony is generally not awarded if the marriage did not affect either spouse's ability to self-support.[83] This form of spousal support was a direct result of the UMDA's introduction of no-fault divorce.[84]

2. Reimbursement Alimony and the *Reiss* Trilogy

In contrast to rehabilitative alimony, reimbursement alimony is awarded "under circumstances in which one party supported the other through an

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78. *Id.* Because it is grounded in necessity, applicants for *pendente lite* alimony must prove a prima facie case to be granted relief. *Id.*; *see* Wheeler v. Wheeler, 137 A.2d 84, 88 (N.J. Super. Ct. App. Div. 1957) (finding that *pendente lite* alimony should not be awarded to cover counsel fees).

79. WINTERS & BALDWIN, *supra* note 71, § 30.5.

80. SKILLS AND METHODS, *supra* note 30, § 14:10; *see also* Lyle & Levy, *supra* note 29, at 7 ("Rehabilitative alimony [is] a finite sum to be paid in one installment or periodically, terminable upon the remarriage or continued cohabitation of the supported spouse, the death of either spouse . . . or the occurrence of a specific event to occur in the future, or modifiable based upon unforeseen events frustrating the good faith efforts of the supported spouse to become self-supporting or the ability of the supporting spouse to pay the rehabilitative alimony.").

81. Lyle & Levy, *supra* note 29, at 7.

82. Victoria M. Ho & Stephanie A. Sussman, *Appellate Court Trends in Rehabilitative Alimony: 10 Years Later*, FLA. B.J., Oct. 2008, at 64 (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980)).

83. *Id.* at 66 ("When arguing for or against rehabilitative alimony, you will be more effective if you focus on whether the marriage impacted the employability of the spouse rather than emphasizing the length of the marriage."); *see* Landow v. Landow, 824 So. 2d 278, 279 (Fla. Dist. Ct. App. 2002) (declining to award rehabilitative alimony because the wife's business did not suffer as a result of her marriage).

84. After the UMDA's publication, "some states specifically amended their laws to authorize rehabilitative alimony; in other states, the courts interpreted existing statutes to permit rehabilitative alimony." Lyle & Levy, *supra* note 29, at 11.

advanced education, anticipating participation in the fruits of the earning capacity generated by that education."[85] It may be awarded either in a lump sum or periodically and terminates upon remarriage, continued cohabitation of the supported spouse, or upon the death of either spouse.[86] Reimbursement alimony is not terminable or modifiable as a result of future altered circumstances.[87] This form of alimony addresses the "resulting inequity" in marriages that end after the dependent spouse supports the payor spouse "while the latter obtained a professional degree or license, while anticipating that future benefits derived from such degree or license would be enjoyed by both of them."[88]

This concept of reimbursement alimony was first introduced by the Supreme Court of New Jersey in *Mahoney v. Mahoney*,[89] in which Mrs. Mahoney financed her husband's professional business degree with the expectation that they would both enjoy the material benefits from his Master in Business Administration.[90] The court admitted that it did "not support reimbursement between former spouses in alimony proceedings as a general principle" but recognized the unfairness in denying the supporting spouse "the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it."[91] Most notably, reimbursement extends not simply toward investments in education but also to other financial contributions provided during that

85. N.J. STAT. ANN. § 2A:34-23(e) (West 2000).

86. Lyle & Levy, *supra* note 29, at 7–8.

87. § 2A:34-23(e).

88. WINTERS & BALDWIN, *supra* note 71, § 30.10 ("Reimbursement alimony recognizes that the dependent spouse has likely made personal financial sacrifices, which result in a reduced or lowered standard of living, and that by foregoing gainful employment, the payor spouse has reduced the level of support the dependent spouse might have received, and the standard of living that the parties otherwise would have enjoyed."). *See generally* William M. Howard, Annotation, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, 3 A.L.R. 6TH 447 (2005) (discussing whether professional degrees or licenses have distributive value in marriage dissolution proceedings).

89. 453 A.2d 527 (N.J. 1982).

90. *Id.* at 529; *see also* Hill v. Hill, 453 A.2d 537, 538–39 (N.J. 1982) (awarding rehabilitative alimony where the wife financially supported her husband's pursuit of a dental degree while simultaneously failing to pursue her own education); Lynn v. Lynn, 453 A.2d 539, 542 n.2 (N.J. 1982) (holding that reimbursement alimony does not involve consideration of the economic value of a professional degree, license, or advanced professional certification).

91. *Mahoney*, 453 A.2d at 533–34.

time of training.[92]

Despite wide acceptance as a method of compensation in divorce proceedings, questions arise as to whether "alimony" is the appropriate designation for this form of reimbursement.[93] In the *Reiss* trilogy, Mrs. Reiss served as the household's sole wage earner while her husband spent five years pursuing a medical degree.[94] The Superior Court of New Jersey determined that "[t]he only valuable asset accumulated during the marriage through the joint efforts of the parties [wa]s the husband's increased earning capacity" and that "[i]t would be unfair and inequitable to hold this asset free of the claim by his wife."[95] Mrs. Reiss was accordingly awarded $46,706.50 in reimbursement alimony to be paid in monthly installments of $1,500.[96]

Later that same year, the *Reiss II* court revisited their decision to more clearly define the nature and character of reimbursement alimony in light of Mrs. Reiss's remarriage.[97] Because she remarried less than two months after the divorce, Mr. Reiss sought cessation of his monthly payments under a traditional theory of alimony.[98] The former Mrs. Reiss argued that her award was not alimony per se because it served more so to reimburse her financial contributions to her former husband's professional endeavors.[99] In clarifying

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92. WINTERS & BALDWIN, *supra* note 71, § 30.10 (noting that contribution to household expenses may also be included in reimbursement alimony).

93. *Id.*; *see* Reiss v. Reiss (*Reiss III*), 500 A.2d 24, 27 (N.J. Super. Ct. App. Div. 1985); Reiss v. Reiss (*Reiss II*), 490 A.2d 378, 379 (N.J. Super. Ct. Ch. Div. 1984); Reiss v. Reiss (*Reiss I*), 478 A.2d 441, 444 (N.J. Super. Ct. Ch. Div. 1984). Unlike other forms of alimony, reimbursement alimony "is available regardless of whether the supporting spouse can work, is economically self-sufficient or is unable to work." Joan Freedman Meyer, Recent Case, Mahoney v. Mahoney, *91 N.J. 488, 453 A.2d 527 (1982)*, 14 RUTGERS L.J. 1011, 1019 (1983).

94. *Reiss I*, 478 A.2d at 443.

95. *Id.* at 444.

96. *Id.* at 446.

97. *Reiss II*, 490 A.2d at 378 ("Is [reimbursement alimony] alimony or a marital asset that was equitably distributed or, perhaps, neither? The resolution has significant implications.").

98. *Id.* at 379. According to statute, permanent alimony payments terminate upon remarriage of a former spouse. SKILLS AND METHODS, *supra* note 30, § 14:10; *see* Malkin v. Malkin, 79 A.2d 863, 865 (N.J. Super. Ct. App. Div. 1951) (holding that wife's remarriage terminated husband's alimony obligations, but not his duties of child support). *But see* MARK S. GURALNICK, GURALNICK'S NEW JERSEY FAMILY LAW ANNOTATED, pt. A, ch. 3.II.B (2013) (clarifying that cohabitation of a former spouse may not terminate alimony payments unless the economic relationship between the former spouse and his or her new cohabitant suggests otherwise); Ehrenworth v. Ehrenworth, 454 A.2d 895, 898–99 (N.J. Super. Ct. App. Div. 1982) (permitting husband and wife to agree that alimony obligations could survive remarriage despite "the strong public policy against enforcing support orders on behalf of remarried former wives").

99. *Reiss II*, 490 A.2d at 379.

the scope of reimbursement alimony, the *Reiss II* court stated:

> It is not clear how the phrase "reimbursement alimony" arose, but some believe it is a contradiction of terms and, indeed, a misnomer. Alimony is future "sustenance or support" for a divorced person payable by a former spouse, and its award generally involves a determination of the future needs of the recipient and the future ability of the former spouse to pay. The past is relevant only to determine the standard of living to which the recipient became accustomed during coverture. On the other hand, "reimbursement" involves a determination of what was paid in the past. It has nothing to do with the future needs of the recipient or the future income of the payer. It is remarkably similar to the return of a financial advance or investment. Thus, the determination of alimony essentially looks to the future, while reimbursement looks to the past.[100]

The court ultimately held that reimbursement alimony should be governed by a flexible standard that takes into account the personal and financial circumstances of the parties involved.[101] Accordingly, reimbursement alimony should neither be classified as alimony nor as a marital asset.[102] Rather, reimbursement should be independently classified as compensation for "unredressed suffering" endured by the spouse in the course of marriage.[103]

The *Reiss III* court ultimately upheld the trial court on appeal.[104] The New Jersey statutes were thus amended to reflect the *Reiss* trilogy, providing that remarriage would only terminate permanent and limited duration alimony.[105] Accordingly, reimbursement compensation is no longer

100. *Id.* (citation omitted).

101. *Id.* at 380–81. The only part of the trial court's decision that the *Reiss III* court overturned was its determination that Mrs. Reiss be reimbursed for the cost of her post-graduate education. *Reiss III*, 500 A.2d 24, 27 (N.J. Super. Ct. App. Div. 1985).

102. *See Reiss II*, 490 A.2d at 380–81 ("[S]ince neither the wife's earnings nor assets were considered in granting the award . . . any substantial change in either[, such as remarriage,] should not be a basis for a reduction or termination of the award.").

103. *Id.* at 380.

104. *Reiss III*, 500 A.2d at 27.

105. N.J. STAT. ANN. § 2A:34-25 (West 2000).

contingent upon the payee's marital status.[106]

B. A Working Standard for Alimony Obligations: Changed Circumstances and Maintaining the Marital Lifestyle Post-Divorce

All forms of alimony are subject to post-judgment modification so long as there is a demonstrable change in circumstances.[107] The degree to which these circumstances warrant modification depends on whether continued enforcement of the agreement is unconscionable.[108] This standard of unconscionability was explored in the seminal case *Lepis v. Lepis* in which Mr. and Mrs. Lepis disagreed over what constitutes "changed circumstances" sufficient to justify alimony modification.[109] In light of nation-wide inconsistencies, the New Jersey Supreme Court in *Lepis* set forth three criteria to evaluate requests for post-judgment modification: (1) consideration of the dependent spouse's needs, (2) the dependent spouse's ability to provide for his or her own needs, and (3) the supporting spouse's ability to maintain the marital lifestyle for the dependent spouse.[110] The

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106. *Id.*

107. *Id.* § 2A:34-23 ("Pending any matrimonial action . . . brought in this State or elsewhere, or after judgment of divorce . . . or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders . . . ."). Even permanent alimony is subject to modification. Cynthia L. Greene, *Alimony is Not Forever: Self-Sufficiency and Permanent Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 9, 14 (1988).

108. Lepis v. Lepis, 416 A.2d 45, 49 (N.J. 1980) (citing Schiff v. Schiff, 283 A.2d 131, 139 (N.J. Super. Ct. App. Div. 1971)). This standard of unconscionability applies equally to consensual modification agreements and judicial decrees for modification. Smith v. Smith, 371 A.2d 1, 6 (N.J. 1977).

109. *Lepis*, 416 A.2d at 50, 57 (affirming the appellate division's decision to remand the case for further inquiry into Mrs. Lepis's ability to maintain her lifestyle and the lifestyle of her children).

110. *Id.* at 52. The *Lepis* court also acknowledged seven circumstances meriting a post-judgment modification:

> (1) an increase in the cost of living;
> (2) increase or decrease in the supporting spouse's income;
> (3) illness, disability or infirmity arising after the original judgment;
> (4) the dependent spouse's loss of a house or apartment;
> (5) the dependent spouse's cohabitation with another;
> (6) subsequent employment by the dependent spouse; and
> (7) changes in federal income tax law.

Id. at 51 (footnote omitted) (citations omitted). *Compare* Reese v. Weis, 66 A.3d 157, 175 (N.J. Super. Ct. App. Div. 2013) (evaluating the dependent spouse's benefits derived from ten-year

driving policy behind such modification is one of equity—if a change in circumstances makes an alimony payment inequitable to *either* spouse,[111] the balance achieved by the initial agreement is lost.[112] In these circumstances, post-judgment modification is necessary to remedy the unconscionable effect of changed circumstances.[113]

While the *Lepis* court introduced a tripartite framework for evaluating post-judgment modification, the New Jersey Supreme Court in *Crews v. Crews*[114] further clarified the standard for initial alimony determinations and modification hearings.[115] In the contentious case marked by a series of adjournments to investigate Mr. Crews's closely held corporation, the trial court awarded Mrs. Crews $513,000 in non-business assets and $91,490 in business assets.[116] The trial court did not contemplate the marital standard of living in determining Mrs. Crews's alimony.[117] Instead, the trial court made a broad assessment that "she could meet her expenses" with the award.[118]

Three years later, the former Mrs. Crews petitioned for a post-judgment

cohabitant in terminating alimony obligations), *and* Donnelly v. Donnelly, 963 A.2d 855, 863–64 (N.J. Super. Ct. App. Div. 2009) (recognizing that "fixing and altering a support obligation . . . requires not only an examination of the parties' earnings but also how they have expended their income and utilized their assets"), *with* Storey v. Storey, 862 A.2d 551, 559–60 (N.J. Super. Ct. App. Div. 2004) (holding that husband's reduced earnings was not a significant change in circumstances and therefore did not warrant post-judgment modification to his alimony payments). These circumstances need not be foreseen at the time of divorce to warrant modification. *Lepis*, 416 A.2d at 51.

111. While alimony jurisprudence undeniably favors the dependent spouse, the supporting spouse may also seek modification under sufficiently egregious circumstances. *See, e.g.*, Beck v. Beck, 570 A.2d 1273 (N.J. Super. Ct. App. Div. 1990).

112. *See* Greene, *supra* note 107, at 22–23 ("The recent trend toward the application of a self-sufficiency standard to awards of permanent alimony is merely an extension of the reasoning and policy behind the development of the rehabilitative purpose of alimony.").

113. *Lepis*, 416 A.2d at 49; *see, e.g.*, *Donnelly*, 963 A.2d at 863 ("The trial court must consider—in both fixing and altering a support obligation—what is equitable and fair in *all* the circumstances.").

114. 751 A.2d 524 (N.J. 2000).

115. The New Jersey Supreme Court in *Crews* reviewed the appellate division's denial of Barbara Crews's motion to modify her rehabilitative alimony award and to convert her increased award to permanent alimony. *Id.* at 526.

116. *Id.* at 527.

117. *Id.* at 528. Notably, the case information statement did contain a detailed breakdown of the expenses necessary to maintain the marital standard of living, including a vacation home, sailboat, yacht club membership, annual vacations, as well as dining and entertainment expenses. *Id.* However, the trial court considered only the monthly expenses for Mrs. Crews and her two children—not the marital standard of living. *Id.*

118. *Id.*

modification given the significant debt she had accrued in maintaining the marital standard of living.[119] The Supreme Court of New Jersey remanded the case for more specific findings, holding that the marital standard of living should not simply be *a* consideration in making alimony determinations but should be *the* consideration in formulating awards.[120] The marital standard of living[121] has thus become the benchmark for both initial awards and post-judgment modifications.[122] It is to this standard that compensation in divorce proceedings must be measured.[123]

C. Divorce and Embryonic Disposition

Historically, alimony has been a numbers game—a battle of who-gets-what-and-how-much.[124] Yet as a concept reflecting the "ever-changing . . . concerns of public policy," alimony must adapt to the dynamics of a society in transition.[125] One such transition is the scientific advent of in vitro fertilization (IVF) and cryopreservation.[126] Together, these technologies not

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119. *Id.* at 530.

120. *Id.* at 532.

121. According to the Supreme Court of New Jersey, the marital standard of living is defined as "a lifestyle 'reasonably comparable' to the marital standard of living." *Id.*

122. *See* Michele Ann Higgins, Crews v. Crews: *Never Underestimate the Difference a Lifestyle Can Make*, 23 WOMEN'S RTS. L. REP. 101, 102 (2001) ("This determination of the marital standard of living will be required for divorce decrees 'in all cases,' including those that are uncontested [and for modifications]." (footnote omitted)).

Notably, post-judgment modification is still subject to the longstanding changed-circumstances analysis set forth in *Lepis*. *Crews*, 751 A.2d at 534. For that analysis, the party petitioning for modification must first demonstrate a prima facie showing of changed circumstances before subsequently considering the respondent's financial status and ability to pay, which accordingly relates to the marital standard of living. *Id.* at 533–34 ("When modification is sought, the level of need of the dependent spouse must be reviewed in relation to the standard of living enjoyed by the couple while married. If that need is met by the current alimony award and there are no other changed circumstances, support should not be increased merely because the supporting spouse has improved financial resources.").

123. *See* Higgins, *supra* note 122, at 102; *see also* Boardman v. Boardman, 714 A.2d 981 (N.J. Super. Ct. App. Div. 1998).

124. *See generally* Morgan, *supra* note 45, at 9–10 (explaining that the expanding use of factors encourages courts to base awards on facts rather than on assumptions).

125. *See id.* at 8.

126. *See* Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 378 (2013).

In vitro fertilization is a method of reproductive science that allows infertile couples to have biological children. Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for*

only transformed the landscape of reproductive science but also have permanently impacted the nature and policy of divorce in the United States.[127] No longer are trial courts simply haunted by monetary queries; now they seek to answer questions rooted in a quagmire of scientific discovery, social policy, and compensatory jurisprudence.[128]

As a consequence of these laboratory procedures, nearly half of a million cryogenically preserved embryos are stored in fertility clinics throughout the United States.[129] Embryos can remain viably frozen for up to thirteen years, a time period during which a couple may disagree about their embryonic disposition.[130] The law has struggled to remain contemporary in governing such a disposition, with most states failing to adopt statutes expressly addressing the controversial topic.[131] Accordingly, case law has

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Consumer-Oriented Regulation of the In Vitro Fertilization Industry, 18 J. LEGAL MED. 265, 274 (1997). The complex process is best and most simply summarized as a two- to three-day procedure that combines and incubates mature male and female gametes. *Id*.; Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process*, 33 FLA. ST. U. L. REV. 395, 399 (2005). The resulting embryo is then transferred into the woman, and pregnancy commences as if the couple had naturally conceived. Upchurch, *supra*, at 399.

127. *See* Forman, *supra* note 126; Susan L. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599 (2005).

128. *See supra* note 126 and accompanying text.

129. Forman, *supra* note 126, at 378; *see also* Upchurch, *supra* note 126, at 399. Cryogenic preservation is defined as a procedure that uses extraordinarily low temperatures to preserve embryos so that they may remain viable once unfrozen. *See* Upchurch, *supra* note 126, at 399–400.

130. *Fertility: Embryo Freezing (Cryopreservation)*, GENETICS & IVF INSTITUTE, http://www.givf.com/fertility/embryofreezing.shtml (last updated 2013); *see also* Upchurch, *supra* note 126, at 399 & n.16, 400.

131. *See* Forman, *supra* note 126, at 381. Of the statutes that have been enacted, only "[s]ome of these statutes deal explicitly with embryo disposition; others address parental status when embryos are used after divorce." *Id*. A brief overview of relevant statutes reveals the following:

> [Massachusetts] provides that the physician present the patient with the options of storing, donating to another person or to research or destroying any unused embryos "as appropriate." It does not address any specific contingencies, such as divorce, and Massachusetts will not compel procreation in the absence of contemporaneous consent. New Jersey and Connecticut also have statutes dealing with stem cell research that require physicians treating fertility patients to present patients with the options of storing or donating excess embryos to another or to research, but they do not address contingencies such as divorce. New Jersey, too, has adopted the rule of contemporaneous consent by case law.
>
> Likewise, pending legislation in New York requiring embryo disposition advance directives has arisen from the desire to engage in stem cell research. New York is currently [as of 2012] considering several bills. . . .
>
> . . . .

been integral to developing a body of law governing embryonic disposition in divorce proceedings.[132]

Courts have primarily taken two approaches to evaluating alimony awards in the context of cryogenic preservation[133]: a balancing approach developed by the Tennessee Supreme Court in the seminal case *Davis v. Davis*,[134] and the contemporaneous consent approach adopted by the New Jersey Supreme Court in *J.B. v. M.B.*[135] Employing these approaches has allowed courts to gain a more sophisticated understanding of embryonic formation and development.[136] Such understanding is crucial to balancing

> . . . [North Dakota's] provision reads as follows: "The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child." . . .
>
> . . . [Florida] requires that a couple and physician "enter into a written agreement" that addresses disposition of gametes and embryos in the event of death, divorce or any other unforeseen circumstance. The Florida statute also sets forth default rules governing disposition of gametes in the absence of a written agreement, with decision-making authority for embryos resting jointly with the couple.

Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. LAW. 57, 91–95 (2011) (footnotes omitted). Additionally, on September 23, 2012, California adopted the Model Act Governing Assisted Reproductive Technology, *see id.* at 95–99, which amended the Family Code's regulation of surrogacy agreements. A.B. 1217, 2011–2012 Leg., Reg. Sess. (Cal. 2011). The bill requires all parents and surrogates to be independently represented by counsel, sets forth specific requirements for gestation carrier agreements, and governs execution of said agreements. *Id.*

132. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); *In re* Marriage of Dahl, 194 P.3d 834 (Or. Ct. App. 2008); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

133. Forman, *supra* note 131, at 61–66. Courts have also adopted a contractual approach advanced by the New York Court of Appeals in *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998). *Id.* However, this contractual approach is widely known as a flawed alternative to the balancing and contemporaneous consent approaches. Upchurch, *supra* note 126, at 397–98. Applying the contractual rights model can be complex, but it ultimately attempts to resolve disputes "according to the intention of the parties as evidenced in any express agreements between them." *Id.* In order to employ the contract approach, a prior agreement must exist. Forman, *supra* note 131, at 62. The *Davis* court was not presented with a prior contract, nor was the existence of a prior contract relevant to the case at hand. *See Davis*, 842 S.W.2d at 590. Accordingly, for purposes of this Comment, the contractual approach and its companion cases, *Kass* and *Litowitz*, will not be discussed at length. *See Kass*, 696 N.E.2d 174; *Litowitz*, 48 P.3d. 261.

134. 842 S.W.2d at 604.

135. 783 A.2d at 720.

136. Crockin, *supra* note 127, at 605 ("Following the seminal 1992 Tennessee Supreme Court decision, *Davis v. Davis*, . . . courts have demonstrated a sophisticated understanding of the subtleties of embryonic development and a willingness to grapple with the sensitive issues involved

the social, political, and moral policies implicated in this melding of legal and scientific disciplines.[137]

As the first case to contemplate embryonic disposition in divorce proceedings, the Tennessee Supreme Court's *Davis* decision broke new ground in family law jurisprudence.[138] In *Davis*, the formerly married Junior and Mary Sue Davis sought the court's guidance regarding the disposition of their cryogenically preserved embryos.[139] The trial court originally granted Mary Sue full "custody" of the embryos for post-divorce conception.[140] However, on appeal, Junior Davis's "constitutionally protected right not to beget a child" earned him "joint control . . . and [an] equal voice over their disposition."[141] The Supreme Court of Tennessee granted review on this issue of first impression to give more adequate guidance in understanding the role of ART in modern case law.[142]

The *Davis* opinion traces the development of reproductive technology and, accordingly, addresses the personal versus property debate.[143] Yet despite the court's determination that an embryo is property deserving "special respect,"[144] the Tennessee court more significantly[145] held that "the

in their disposition, . . . [and] [a]lthough the decisions are not wholly consistent in their language or their fact-specific outcomes, they have produced some consensus about both the nature of these IVF embryos and who should control their fates.").

137. *See* Forman, *supra* note 126, at 400.

138. Forman, *supra* note 131, at 61.

139. *Davis*, 842 S.W.2d at 589 ("The case began as a divorce action, filed by the appellee, Junior Lewis Davis, against his then wife, appellant Mary Sue Davis. The parties were able to agree upon all terms of dissolution, except one: who was to have 'custody' of the seven 'frozen embryos' stored in a Knoxville fertility clinic that had attempted to assist the Davises in achieving a much-wanted pregnancy during a happier period in their relationship.").

140. *Id.*

141. *Id.* (first alteration in original). The Court of Appeals further determined that "there is no compelling state interest to justify [ ] ordering implantation against the will of either party." *Id.* (ateration in original).

142. *Id.* at 590 ("We granted review, not because we disagree with the basic legal analysis utilized by the intermediate court, but because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies, and because the decision of the Court of Appeals does not give adequate guidance to the trial court in the event the parties cannot agree.").

143. *Id.* at 593–97. The personal versus property debate solicits the following question: Should pre-embryos be legally defined as persons or property? *Id.* at 594.

144. *Id.* at 596–97 (defining the special respect status as a hybrid characterization that does not bestow "true property interest[s]" unto the genetic parents but alternatively provides "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"); *see also* Upchurch, *supra*

right of procreation is a vital part of an individual’s right to privacy.”[146] In the context of divorce, this right prohibits the government from compelling a person to parentage by granting sole disposition authority to one party.[147] This right of procreational autonomy markedly changes the landscape of family law jurisprudence; for when an individual exercises his right *not* to procreate, the rights and privileges accorded to this constitutional guarantee trump even a former spouse’s plea for parentage.[148]

This right of procreational autonomy determined the outcome in *Davis v. Davis*.[149] While Mary Sue Davis eventually changed her mind about post-divorce implantation, wanting instead to donate the embryos to a childless couple, her difference in position did not affect the Tennessee Supreme

note 126, at 403–04. The “property deserving special respect” characterization is the most accepted legal definition of a frozen embryo set forth by a state court. Upchurch, *supra* note 126, at 403–04. Other courts have suggested that embryos should either be characterized strictly as property or, in contrast, as persons imbued with full constitutional rights. *Id.* at 400–03; *see also id.* at 400–01 (citing York v. Jones, 717 F. Supp. 421, 424–27 (E.D. Va. 1989), as a foundational case in identifying frozen embryos as property); *id.* at 401–02 (citing section 9:123 of the Louisiana Revised Statutes as legislation identifying frozen embryos as persons deserving a “best interest of the child” analysis in divorce and disposition proceedings); *id.* at 400–01 (explaining the ramifications of characterizing a frozen embryo as “property”).

145. As the Supreme Court of Tennessee commented:

> Although an understanding of the legal status of preembryos is necessary in order to determine the enforceability of agreements about their disposition, asking whether or not they constitute “property” is not an altogether helpful question. . . . Thus, the essential dispute here is not where or how or how long to store the preembryos, but whether the parties will become parents. The Court of Appeals held in effect that they will become parents if they both agree to become parents.

Davis, 842 S.W.2d. at 598.

146. *Id.* at 600. The court grounded this right to procreational autonomy in the constitutional right to privacy. *Id.* at 598–99 (“The right of privacy inherent in the constitutional concept of liberty has been further identified ‘as against the [power of] government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.’” (alteration in original) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))); *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (declaring that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights”).

147. *See supra* note 146; *see also Davis*, 842 S.W.2d at 602 (“[T]he state’s interest in potential human life is insufficient to justify an infringement on the gamete-providers’ procreational autonomy.”).

148. *See Davis*, 842 S.W.2d at 601 (recognizing that procreational autonomy includes the right to procreate *and* the right to avoid procreation, which necessarily protects both “the joys of parenthood” and “the relative anguish of a lifetime of unwanted parenthood”).

149. *Id.* at 604–05.

Court's decision to affirm the Tennessee Court of Appeals.[150] In doing so, the court advanced a hierarchy unique to issues of embryonic disposition and cryogenic preservation.[151] The *Davis* hierarchy honors the following criteria, listed in order of descending importance: (1) the present wishes of the genetic contributors, (2) a prior disposition agreement, and (3) the relative interest of the parties in the use or disposition of the embryos.[152] Accordingly, because there was no prior agreement,[153] the court weighed the burden of Junior Davis's unwanted parenthood with Mary Sue Davis's interest in donating the embryos to an infertile couple.[154] Junior's upbringing as a child of divorce and brother to five siblings ultimately outweighed Mary Sue's interest in donating the embryos.[155] Had Mary Sue maintained her original position of wanting to use the embryos for post-divorce implantation, the court's analysis would have focused more so on evidence of her willingness to forego genetic parenthood.[156] In weighing these interests, the *Davis* court pioneered the balancing approach now commonly employed in cases of embryonic disposition.[157]

Yet the *Davis* method is not the only way to evaluate alimony awards in the context of cryogenic preservation.[158] In *J.B. v. M.B.*, the Supreme Court of New Jersey adopted a contemporaneous consent approach in lieu of balancing J.B. and M.B.'s respective rights to procreate.[159] This approach

150. *Id.* at 590, 604.

151. *Id.* at 603–04.

152. *Id.* at 604; *see also* Forman, *supra* note 131, at 61–62 (noting that the balancing of interests is only performed when no prior agreement exists).

153. *Davis*, 842 S.W.2d at 604.

154. *Id.* at 603–04.

155. *Id.*

156. *Id.*

157. *See id.*

158. *See* J.B. v. M.B., 783 A.2d 707, 717 (N.J. 2001); Upchurch, *supra* note 126, at 396–98.

159. 783 A.2d at 717. Both parties, however, argued in the context of a *Davis* analysis. *Id.* at 712. M.B. asserted that the lower court's decision to destroy the embryos (1) violated his constitutional right to procreate, (2) hindered his ability to care for the companionship of his daughter, (3) disregarded his religious convictions regarding cryogenic preservation, and (4) violated his procedural due process rights by refusing to hear evidence about their prior disposition agreement. *Id.* In response, J.B. argued that a decision to the contrary would violate her right *not* to procreate. *Id.* J.B. also advanced a public policy argument, citing New Jersey's "long recognized [policy] that individuals should not be bound by agreements requiring them to enter into family relationships or [that] seek to regulate personal intimate decisions relating to parenthood and family life." *Id.*

The Supreme Court of New Jersey agreed with the Tennessee Supreme Court in that

was adopted in light of the couple's pre-existing cryopreservation agreement, reproduced below:

> I, J.B. (patient), and M.B. (partner) agree that all control, direction, and ownership of our tissues will be relinquished to the IVF Program under the following circumstances:
>
> 1. A dissolution of our marriage by court order, unless the court specifies who takes control and direction of the tissues, or
>
> 2. In the event of death of both of the above named individuals, or unless provisions are made in a Will, or
>
> 3. When the patient is no longer capable of sustaining a normal pregnancy, however, the couple has the right to keep embryos maintained for up to two years before making a decision [regarding a] "host womb" or
>
> 4. At any time by our/my election which shall be in writing, or
>
> 5. When a patient fails to pay periodic embryo maintenance payment.[160]

Under this agreement, the fertility clinic was to exercise control over the pre-embryos unless the court or the parties themselves made explicit determinations to the contrary.[161] While M.B. did, in fact, assert that he and his wife had contracted for alternate disposition, J.B. contested the existence of any such agreement.[162] The New Jersey Supreme Court accordingly held that in the absence of a mutual contemporaneous agreement, disposition

"[o]rdinarily, the party wishing to avoid procreation should prevail." *Id.* at 716 (alteration in original). However, the fact that M.B. already had children negated the relevancy of a *Davis* analysis because his right to fatherhood had already been claimed. *Id.* at 716–17.

160. *Id.* at 713.

161. *Id.* at 714; *see also* Forman, *supra* note 131, at 64 ("J.B. and M.B. had signed a consent form that provided that they would relinquish the embryos to the clinic's IVF Program in the event of a marital dissolution, unless a court ordered otherwise. . . . [However,] the consent form 'did not manifest a clear intent by J.B. and M.B. regarding disposition of the preembryos' in the event of divorce and . . . they 'never entered into a separate binding contract providing for the disposition of the cryopreserved preembryos.'" (citing *J.B.*, 783 A.2d at 713–14)).

162. *J.B.*, 783 A.2d at 714.

would favor the party objecting to parenthood.[163] It is this absence of mutual contemporaneous agreement—this "change of heart"—that informs the contemporaneous consent approach.[164]

The advent of both the contemporaneous consent approach and the *Davis* balancing test has revolutionized divorce litigation over matters of fertility and embryonic disposition.[165] Yet despite the emergence of these tests, courts are reluctant to directly address the issues implicated by ART.[166] It is this reluctance that has opened the floodgates for creative divorce litigation unique to ART, and it is from here that we can begin to examine the viability of Mrs. X's claims for fertility compensation.

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163. *Id.* Otherwise, "[e]nforcement of a contract that would allow the implantation of preembryos at some future date in a case where one party has reconsidered his or her earlier acquiescence . . . will [result in that party] hav[ing] been forced to become a biological parent against his or her will." *Id.* at 718. This concept relates back to similar policies as those informing the *Davis* court's balancing approach. *See supra* notes 149–157.

164. Forman, *supra* note 126, at 385 (discussing that the contemporaneous consent approach cases "presume that cryopreservation contracts should be enforceable, but only to a point: they will not enforce embryo disposition agreements between the progenitors when one party has changed his or her mind").

In an earlier case, *A.Z. v. B.Z.*, the Massachusetts Supreme Court also refused to use embryos over a party's later objection, stating that "forced procreation is not an area amenable to judicial enforcement." 725 N.E.2d 1051, 1058 (Mass. 2000); *see also* Forman, *supra* note 126, at 386 ("From the perspective of the *A.Z.* court, allowing a change of mind, rather than enforcing a previous agreement, enhanced the individual's freedom of choice in family matters. This view is consistent with the court's general reluctance to become involved in 'intimate questions inherent in the marriage relationship.'"). This holding laid the foundation for the *J.B.* court's inauguration of the contemporaneous consent approach. *See J.B.*, 783 A.2d at 717; *see also In re* Marriage of Witten, 672 N.W.2d 768, 782–83 (Iowa 2003) ("[A]bsent a change of heart by one of the partners, an agreement governing disposition of embryos does not violate public policy. Only when one person makes known the agreement no longer reflects his or her current values or wishes is public policy implicated. Upon this occurrence, allowing either party to withdraw his or her agreement to a disposition that person no longer accepts acknowledges the public policy concerns inherent in enforcing prior decisions of a fundamentally personal nature." (emphasis omitted)).

165. *See* Mark P. 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 (2009); *see also* Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006) (rejecting the contemporaneous consent approach but embracing the *Davis* balancing test in determining custody of Randy and Augusta Roman's frozen embryos); *In re* Marriage of Dahl, 194 P.3d 834, 839 (Or. Ct. App. 2008) (mirroring the *Davis* court in attempting to balance the meaning of a "just and proper" division of the couples' frozen embryos).

166. Strasser, *supra* note 165, at 1224.

IV. UNDERSTANDING THE NEW JERSEY CASE: *WILL* MRS. X GET ALIMONY FOR HER EGGS?

After surveying the national landscape of alimony jurisprudence,[167] the question becomes whether Mrs. X *will* get alimony for her eggs. As a thirty-eight-year-old woman seeking divorce from a man with whom she shared the expectation of starting a family,[168] Mrs. X represents a situation that is not unfamiliar to many women throughout the United States.[169] Yet despite the increasing prevalence of infertility and childlessness among women in their late childbearing years,[170] this case is an issue of first impression for the courts.[171] Thus, they are likely to assess Mrs. X's claim for fertility compensation under a variety of theories, some of which provide viable legal footing for a favorable decision.[172]

A. *Compensation Under a* Crews *Analysis: The Marital Standard of Living*

As the benchmark for initial awards and post-judgment modification, the "marital standard of living" is the standard to which courts measure alimony determinations.[173] For Mrs. X, this determination requires a thorough analysis of her pre-divorce standard of living alongside the

167. *See supra* Parts II and III.

168. Richards, *supra* note 2.

169. *See, e.g.*, Vicki Larson, *Are Childless Couples Headed Toward Divorce?*, HUFFINGTON POST (Aug. 1, 2011, 11:25 AM), http://www.huffingtonpost.com/vicki-larson/are-childfree-couples-doo_b_913051.html (citing infertility as a common factor in divorce); Gretchen Livingston & D'Vera Cohn, *Childlessness Up Among All Women; Down Among Women with Advanced Degrees*, PEW RES. CTR. (June 25, 2010), http://www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/ (stating that 18% of women between the ages of forty and forty-four are childless).

170. *See* Livingston & Cohn, *supra* note 169.

171. Patricia Annino, *Is It Reasonable to Expect Alimony for Your Eggs?*, PATRICIA ANNINO (Oct. 22, 2013), http://www.patriciaannino.com/is-it-reasonable-to-expect-alimony-for-your-eggs/. Note that Mrs. X's attorney first seeks to settle the case out of court. Richards, *supra* note 2. However, if the parties cannot agree to settlement, the case will most likely be seen through litigation. *See id.*

172. *See infra* notes 173–237 and accompanying text.

173. *See supra* note 122 and accompanying text; *see also* Higgins, *supra* note 122, at 101 ("In order to effectuate fair and adequate alimony a thorough assessment of the marital standard of living must be determined."). Since the *Crews* decision, courts are required to determine the marital standard of living in all cases—even those that are uncontested. Crews v. Crews, 751 A.2d 524, 532 (N.J. 2000).

additional factors enumerated under New Jersey law.[174] While little is known about Mr. and Mrs. X's general financial situation, the key to receiving compensation for egg-freezing procedures, medication, and egg storage fees is the couple's previous failed attempts at in vitro fertilization.[175]

In *Crews v. Crews*, the New Jersey Supreme Court explicitly stated that alimony must be determined on "whether [a dependent] spouse can maintain a lifestyle that is reasonably comparable to the standard of living enjoyed during the marriage."[176] Little case law exists as to whether health and medical costs are factored into the marital lifestyle assessment.[177] That being said, marital standard of living is determined on a case-by-case basis throughout the United States,[178] and it is this ambiguous nature that creates leeway for Mrs. X to receive compensation for her fertility procedures.[179]

For example, under California law, the "needs of each party" significantly influence standard of living determinations.[180] These needs are in turn discerned by investigating each couple's savings, investments, and "marital investment strategies."[181] As a significant financial undertaking, in

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174. *See supra* Part III.A; Denise Lanuto, Comment, *Is* Crews v. Crews *Destined to Be the Next Circle Chevrolet?*, 32 SETON HALL L. REV. 837, 848–49 (2003).

175. *See* Richards, *supra* note 2.

176. *Crews*, 751 A.2d at 527; *see also* Lanuto, *supra* note 174, at 849.

177. Of the New Jersey case law that does exist on the subject, most judges do not account for medical expenses in computing the marital standard of living. *See, e.g.*, Glass v. Glass, 841 A.2d 451, 455 (N.J. Super. Ct. App. Div. 2004) ("Under no circumstances shall the Husband be responsible for the uncovered medical expenses for the Wife.").

178. *See, e.g.*, B.E. WITKIN ET AL., 11 WITKIN, SUMMARY OF CALIFORNIA LAW § 224, at 297 (10th ed. 2005) ("[T]he Legislature intended the marital standard of living to be what case law has described it to be, that is, reasonable needs commensurate with the parties' general station in life. . . . It is a general description, not intended to specifically spell out or narrowly define a mathematical standard. If the Legislature had intended something more specific, it could have prescribed a more specific measurement, such as the marital standard of living as measured by the gross annual family income. The Legislature has wisely chosen not to do so. . . . [T]hat figure is of little value to the judge hearing a motion for modification many years later. It appears . . . that the Legislature intended 'marital standard of living' to be a general description of the station in life the parties had achieved by the date of separation." (alterations in original)).

179. *Cf.* Goldman v. Mautner, No. FM-07-1478-03, 2012 WL 1288749, at *7–8 (N.J. Super. Ct. App. Div. 2012) (designating 75% of the medical expenses as former husband's responsibility); Wolkoff v. Wolkoff, No. FM-0010-85, 2008 WL 3539939, at *8 (N.J. Super. Ct. App. Div. 2008) (recognizing that preexisting medical conditions warrant post-judgment modification of alimony awards).

180. Rebecca Brengle, *Evidence of Marital History for Determining Alimony Award*, 20 J. CONTEMP. LEGAL ISSUES 243, 245 (2011).

181. *Id.* at 245 n.12; *see also In re* Marriage of Drapeau, 114 Cal. Rptr. 2d 6, 13–14 (Ct. App.

vitro fertilization could certainly fall within the ambit of a marital investment strategy.[182] This is particularly true given the growing costs of child-rearing in the United States, which has ballooned to almost $250,000 per child—a figure that excludes the cost of college tuition.[183] For many couples, it is a marital investment strategy to delay parenthood and save money to more adequately finance their lifestyles and development.[184] The cost of this strategy, unfortunately, is often decreased fertility.[185] Regardless, such fertility is the byproduct of a marital choice—the choice to invest in their financial wellbeing so as to better support future offspring.[186] This marital investment strategy reflects the marital standard of living, which, as established in *Crews*, is the benchmark for alimony awards in the state of New Jersey.[187] Accordingly, given her past attempts at in vitro fertilization,

2001) (holding that the lower court should have taken into account the couple's longtime investment strategies in computing alimony payments); *In re* Marriage of Cheriton, 111 Cal. Rptr. 2d 755, 768 (Ct. App. 2001) (determining that wife deserved to receive a portion of the couple's marital investments).

182. According to The American Society for Reproductive Medicine, the average cost of an IVF cycle in the United States is $12,400. *Q06: Is In Vitro Fertilization Expensive?*, AM. SOC'Y FOR REPROD. MED. (2014), http://www.reproductivefacts.org/detail.aspx?id=3023. When some couples face the prospect of undergoing up to six cycles to achieve a single pregnancy, the financial burden placed upon a couple can significantly impact their investment strategies and marital standard of living. *See* Patti Neighmond, *Study: Sixth Time May Be Charm for In Vitro*, NAT'L PUB. RADIO (Jan. 21, 2009, 1:00 PM), http://www.npr.org/templates/story/story.php?storyId=99654924.

183. Melanie Hicken, *Average Cost to Raise a Kid: $241,080*, CNN MONEY (Aug. 14, 2013, 7:28 PM), http://money.cnn.com/2013/08/14/pf/cost-children/. This figure is up almost 3% since 2011. *Id*. As for college tuition, this can increase parents' expenses by upwards of $60,000 per year per child, depending on the institution. Kim Clark, *How Much Does College Actually Cost?*, CERTIFICATIONPOINT (Nov. 18, 2013, 11:14 PM), http://www.certificationpoint.org/blog/index.php?entry=entry131118-231404.

184. *See, e.g.*, Allison Linn, *Dreams Delayed or Denied, Young Adults Put Off Parenthood*, TODAY (July 10, 2013, 4:17 AM), http://www.today.com/money/dreams-delayed-or-denied-young-adults-put-parenthood-6C10528964. Since the recession of 2007, U.S. birth rates have fallen for women ages twenty to twenty-nine. *Id*. This drop in birth rates is directly proportional to couples' financial security and confidence in their economic futures. *Id*.

185. With many women waiting until their late-twenties to early-thirties to have children, *see supra* note 184, the risk of infertility greatly increases: 6% between the ages of twenty and twenty-four, 9% between the ages of twenty-five and twenty-nine, 15% between the ages of thirty and thirty-four, 30% between the ages of thirty-five and thirty-nine, and 64% between the ages of forty and forty-four. *Aging and Infertility in Women*, 86 AM. SOC'Y FOR REPROD. MED. 248, 248 (2006), *available at* http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Committee_Opinions/aging_and_infertility_in_women(1).pdf.

186. *See generally supra* notes 184–85 and accompanying text.

187. *See supra* notes 115–23 and accompanying text.

Mrs. X has a viable opportunity to receive compensation for her continued fertility treatments under a *Crews* marital standard of living analysis.

B. Compensation as Reimbursement Alimony

As discussed in Part III.A.2, reimbursement alimony is grounded in the concept of a "mutually anticipated benefit."[188] While most courts have limited this benefit to those instances in which one spouse has supported the other in pursuing higher education,[189] the parallels between the mutually anticipated financial benefit of higher education and the mutually anticipated financial benefit of postponing parenthood suggest that Mrs. X might, in fact, deserve compensation for her sacrifices.[190] This is primarily because her sacrifice of early parenthood was made for the mutually anticipated benefit of financial security.[191]

There are two avenues by which Mrs. X could receive fertility compensation under the guise of reimbursement alimony.[192] Both are dependent on the judiciary's interpretation of assets, sacrifice, and investment.[193] First, courts identify increased earning capacity as a valuable asset.[194] As a valuable asset, the income derived from increased marital earning capacity can be characterized as a mutual benefit.[195] Alimony

188. Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982); *see also supra* notes 85–92 and accompanying text.

189. *See, e.g.*, *Mahoney*, 453 A.2d at 534; Hill v. Hill, 453 A.2d 537, 538–39 (N.J. 1982) (awarding rehabilitative alimony where the wife financially supported her husband's pursuit of a dental degree while simultaneously failing to pursue her own education); Lynn v. Lynn, 453 A.2d 539, 542 n.2 (N.J. 1982) (holding that reimbursement alimony does not involve consideration of the economic value of a professional degree, license, or advanced professional certification).

190. *See supra* notes 180–87 and accompanying text.

191. Very little is known about Mrs. X aside from the fact that she is a thirty-eight-year-old woman who is divorcing her husband and seeking $20,000 to freeze her eggs and cover associated storage and medical expenses. Richards, *supra* note 2. However, she and her husband did pursue IVF treatments prior to the divorce, *see supra* notes 180–89, and given her age, a logical inference can be made that she and her husband chose to set familial priorities aside to achieve financial stability.

192. *See infra* notes 194–208 and accompanying text.

193. *See infra* notes 194–208 and accompanying text.

194. *Reiss I*, 478 A.2d 441, 444 (N.J. Super. Ct. Ch. Div. 1984); *see also Mahoney*, 453 A.2d at 535–36 (holding that there should be "an equitable distribution of the assets to reflect the parties' different circumstances" in alimony determinations).

195. According to Black's Law Dictionary, "mutual" is defined as "directed by each toward the other." BLACK'S LAW DICTIONARY 1115 (9th ed. 2009). In the context of alimony jurisprudence,

jurisprudence suggests that sacrifices made in order to achieve such a mutual benefit must be accounted for in an alimony award.[196] While these sacrifices are generally characterized as "personal *financial* sacrifices,"[197] the novelty of ART jurisprudence warrants reconsideration of such a narrow construal.[198] This is particularly the case because "there is 'no nationally recognized law on [the] subject' [of ART]."[199] Here, Mrs. X sacrificed her peak years of fertility[200] to invest in the mutually anticipated benefit of financial security—all with the promise of eventual parenthood in her late thirties.[201] Accordingly, Mrs. X may deserve compensation for this sacrifice under a reimbursement theory of alimony.[202]

Second, the *New Jersey Family Law and Practice Guide* suggests that reimbursement extends not simply toward investments in education but also to other financial contributions provided during the marriage.[203] In the *Reiss* trilogy, this language was interpreted as a command to compensate the disadvantaged spouse for "unredressed suffering" endured during the course of the marriage.[204] As previously established, Mrs. X was likely persuaded

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the *Reiss I* court commented that it would be "unfair and inequitable" to keep the mutual benefit of Mr. Reiss's increased earning capacity from Mrs. Reiss, stating that "the benefits of his spouse's support in obtaining a professional degree[were] with the understanding that future benefits w[ould] accrue and inure to both." *Reiss I*, 478 A.2d at 444 (quoting *Mahoney*, 453 A.2d at 533).

196. WINTERS & BALDWIN, *supra* note 71, § 30.10 ("Reimbursement alimony recognizes that the dependent spouse has likely made personal financial sacrifices, which result in a reduced or lowered standard of living, and that by foregoing gainful employment, the payor spouse has reduced the level of support the dependent spouse might have received, and the standard of living that the parties otherwise would have enjoyed.").

197. *Id.* (emphasis added).

198. *See supra* notes 124–32 and accompanying text.

199. Andrea Messmer, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science*, 3 J. HEALTH & BIOMEDICAL L. 203, 204 (2007) (quoting CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE xi (2006)). Messmer recognizes that attorneys practicing family law must be particularly attune to ART issues, especially in divorce. *Id.*

200. *See supra* note 185.

201. *See* Richards, *supra* note 2.

202. Legal experts, such as Kevin Noble Maillard at Syracuse University, "speculate that a woman's missed opportunities to have a baby during a marriage could be viewed as a form of 'sacrifice' for which she should be compensated." *Id.* In this sense, he compares this sacrifice to that of "a woman who put her husband through law school [who] could expect to be compensated if he divorced her just before he reaped the financial rewards of the degree." *Id.*

203. WINTERS & BALDWIN, *supra* note 71, § 30.10 (noting that contribution to household expenses may also be included in reimbursement alimony).

204. *Reiss II*, 490 A.2d 378, 380 (N.J. Super. Ct. Ch. Div. 1984).

to forgo her peak fecundity in lieu of financial stability.[205] This decision not only constituted a financial contribution to the marriage, but it was also apt to trigger significant personal suffering.[206] Given the physical and psychological trauma associated with infertility, IVF, and unrequited motherhood, not even an alimony award could fully redress her distress.[207]

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205. *See supra* text accompanying notes 200–01 (analyzing Mrs. X's decision to forgo parenthood for financial security); *supra* notes 182–85 and accompanying text (noting the financial burdens facing young couples desiring parenthood); *see also supra* note 191 (noting that very little is known about Mrs. X's actual financial decisions).

206. *Q1. What Impact Does Infertility Have on Psychological Well Being?*, AM. SOC'Y FOR REPROD. MED. (2014), http://www.asrm.org/awards/detail.aspx?id=3458 (validating feelings of anxiety, depression, and isolation as common psychological effects of infertility).

207. According to doctoral research on the counseling psychology of infertility, women undergo significant psychological trauma in response to infertility. Jo Perkins, *The Psychological Impact of Infertility*, THERAPY TODAY, http://www.therapytoday.net/article/show/1230/ (last visited Oct. 29, 2014). Perkins emphasizes the following:

> The female experience can be both complex and painful. It is generally characterised [sic] by periods of intense feelings of isolation—from her partner, her social circle and society. As more than one female client has reflected, it can feel as if they are "on the outside looking in on the rest of the world". [sic] Females can feel unsupported and misunderstood throughout the experience, which adds to their despair and isolation. Pregnancy and motherhood is inextricably wrapped up in perceptions of femininity, and infertility can evoke a pervasive sense of failure as a woman, a person, and, in cases of unexplained and femalefactor [sic] infertility, she can feel that her body has failed her. All of which can have a devastating effect on selfesteem [sic]. For those females who desire a child, this desire can increase as the possibility of having one reduces and for some it can become overwhelming, which creates a sense of urgency about finding a "solution" to the problem. The result of this can be that treatment is pursued without pausing to consider the impact of this route on them, their body, their partner and their relationship. Treatment can be an unpredictable, long drawn-out rollercoaster of hoping, waiting and disappointment, which may or may not result in the birth of a child, and which can take a serious toll on females in a number of ways. Ultimately the experience for females can be one of grief.

Id.; *see also* Byers, *supra* note 126, at 270–71 ("Difficulty in conceiving a child is a deeply emotional experience. . . . For some, it is similar to the amputation of a limb or the diagnosis of a chronic illness. . . . It is almost as if [they are] emotionally trapped . . . ." (internal quotation marks omitted)).

In addition to the psychological trauma that Mrs. X likely suffered as a result of her infertility, the IVF process itself—which, here, is a product of the couple's decision to delay parenthood—elevates the suffering she had to endure as a consequence of her marital investment. *See* Byers, *supra* note 126, at 277. Despite popular belief, the IVF process is far from innocuous. *Id.* In fact, "this goal [of achieving pregnancy] must be weighed against the threat of endangering the woman's health." *Id.* This is primarily because

> [m]aking a test-tube baby is a test of human endurance—especially for the would be mother. To start the process of in vitro fertilization (IVF) she must submit to a two-week regimen of daily drug injections. They prepare her ovaries and cause perhaps half a dozen eggs to mature simultaneously, but the shots can also produce pain, bloating, and

Thus, under this concept of "unredressed suffering," Mrs. X could receive some compensation for the distress endured in her marital pursuance of financial security.[208]

C. *Compensation Informed by Embryonic Disposition*

While all of the case law concerning ART focuses on disposition and custodial agreements, the policies underlying the *Davis* balancing approach and the *J.B.* contemporaneous consent approach can inform courts' decisions regarding fertility compensation.[209] In *Davis*, the right to procreational autonomy determined the outcome of the Tennessee Supreme Court decision.[210] Yet, unlike the parties in *Davis*, Mrs. X does not seek to use her husband's genetic material to compel parentage.[211] Consequently, the absence of a party's desire *not* to procreate leaves the court free to explore other aspects of the *Davis* hierarchy in reaching an alimony determination.[212] Most importantly, it begs the following question: how much weight does Mrs. X's desire *to* procreate carry in awarding alimony?[213] Moreover, is a claim of purloined fertility sufficient to compel compensation?[214]

> sharp mood swings. Every day she undergoes tedious blood tests and ultrasound examinations: the doctors need to monitor the ovaries closely and remove the eggs at just the right time so they can be fertilized in the lab and then returned to the womb.

Id.

208. In addition to the *Reiss* court's use of "unredressed suffering" to compensate Mrs. Reiss, *Reiss II*, 490 A.2d at 380, the *Mahoney* court also looked to "[t]he unredressed sacrifices . . . [and] unfairness attendant upon the defeat of the supporting spouse's shared expectation of future advantages" to justify a remedial award. Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982). Here, the unfairness inherent to the physical and psychological pain of IVF on women such as Mrs. X can also be used to justify reimbursement alimony. *See supra* notes 206–07.

209. *See supra* Part III.C.

210. *See supra* note 149 and accompanying text.

211. Richards, *supra* note 2 ("[A]warding money to freeze future unfertilized eggs is different [than awarding custody of fertilized embryos], because the genetic material belongs solely to the woman."); *cf.* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992).

212. When a party exercises his or her right not to procreate, *Davis* dictates that the rights and privileges accorded to that constitutional guarantee trump even a former spouse's desire for parentage. *See supra* note 148 and accompanying text. The present wishes of the genetic contributors outweigh any other agreement or interest that the parties may have or possess. *See supra* note 152 and accompanying text.

213. *See* Richards, *supra* note 2 (noting that one of life's "greatest biological injustices" is "that men but not women can typically start a family well into middle age and beyond" and suggesting that this should inform a court's alimony determination).

214. Richards identifies the slippery slope that a claim of stolen fertility might expose: "[I]f a

The *Davis* court unequivocally held that "the right of procreation is a vital part of an individual's right to privacy."[215] Since that 1992 declaration, which was based on the Supreme Court's decision in *Skinner v. Oklahoma*,[216] the Court has continued to affirm the right to procreate.[217] The depth and breadth of this right is subject to varied interpretation,[218] with some scholars suggesting that it deserves "presumptive priority in all conflicts" and that it protects both natural and artificial procreation.[219] Under this line of reasoning, Mrs. X deserves fertility compensation to preserve her right to procreate—particularly if this right was obstructed in the same way by her husband.[220]

Nestling Mrs. X's right to procreate under the *Davis* hierarchy, however, does not necessarily comport with the New Jersey Supreme Court's contemporaneous consent approach to ART.[221] In fact, its decision to affirm the rights of the objecting party in *J.B. v. M.B.* paralleled the Tennessee Supreme Court's decision to honor the right *not* to procreate over the right *to* procreate.[222] These cases suggest that, "[f]or all practical purposes, . . . [such

woman is to receive money to save her declining fertility, what's to stop her from claiming to need breast implants or a face-lift because she used up her youth in the marriage?" *Id.*

215. *Davis*, 842 S.W.2d at 600.

216. 316 U.S. 535, 541 (1942) (holding that the right to procreate is "one of the basic civil rights of man"). The *Davis* court also cited the Supreme Court's decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which recognized the fundamental right to marital privacy; *Roe v. Wade*, 410 U.S. 113 (1973), which determined that the fundamental right to personal privacy includes the right to terminate a pregnancy; and *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), which held that the family is "the institution by which we inculcate and pass down many of our most cherished values, morals and cultural." *Davis*, 842 S.W.2d at 601.

217. Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 11–12 (2007).

218. Some scholars believe that *Skinner* established a fundamental right to procreate, whereas others "view Skinner as merely an equal protection case." *Id.* at 13–14.

219. *Id.* at 12.

220. John Robertson argues that the right to procreate is of central importance to individual "meaning, dignity, and identity," directly linking procreation to self-worth, validation, and happiness. *Id.* at 46 (citing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 16 (1994)). Mrs. X's happiness was stolen by her husband when he wasted, so to speak, the most fertile years of her life. *See* Richards, *supra* note 2.

221. *See supra* notes 159–66 and accompanying text; J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

222. *Compare* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (honoring the right *not* to procreate), *with J.B.*, 783 A.2d at 714 (honoring J.B.'s desire to destroy the cryopreserved embryos upon divorce). *See also* Amanda J. Smith, J.B. v. M.B.*: New Evidence that Contracts Need to Be Reevaluated as the Method of Choice for Resolving Frozen Embryo Disputes*, 81 N.C. L. REV. 878, 887 (2003).

disputes] will never result in the enforcement of a contract that provides for the exercise of one partner's positive right to reproduce against the objection of the other partner."[223]

Yet even though the contemporaneous consent approach appears inapplicable to Mrs. X because it assumes that each spouse will be a genetic contributor to the child,[224] the nuances of the New Jersey Supreme Court's opinion make *J.B. v. M.B.* surprisingly relevant to the present case.[225] The court does not contend that the right *not* to procreate is more vital than the right *to* procreate.[226] Instead, it emphasizes the significance of weighing the parties' competing interests of reproductive freedom, ultimately criticizing other courts' repeated failures to thoroughly contemplate the implications of their decisions.[227] After all, there are a plethora of interests to be weighed in ART cases:

> An individual's positive right to reproduce affects several other people's lives, potentially including those of the other genetic parent, the surrogate parent, the nurturing or custodial parent, and the relatives of the individual exercising his positive right. If the positive right to reproduce is absolute, an individual may have the right to be provided with every available means by which he or she can potentially reproduce. This could feasibly include the rights to government funding for expensive reproductive services and free access to surrogate mothers. On the other hand, the exercise of an individual's negative right to reproduce also has drastic consequences, in that it may infringe upon other individuals' rights to bodily integrity, their own positive rights to reproductive

223. Smith, *supra* note 222, at 893; *see also* A.Z. v. B.Z., 725 N.E.2d 1051, 1057–58 (Mass. 2000); *J.B.*, 783 A.2d at 719–20.

224. *J.B.*, 783 A.2d at 718 ("Enforcement of a contract that would allow the implantation of preembryos at some future date in a case where one party has reconsidered his or her earlier acquiescence . . . will [result in that party] hav[ing] been forced to become a biological parent against his or her will.").

225. *See infra* notes 226–36.

226. *See J.B.*, 783 A.2d at 719; *see also* Smith, *supra* note 222, at 893 ("This Recent Development does not contend that the positive right to reproduce is the better right.").

227. *See* Smith, *supra* note 222, at 893; *J.B.*, 783 A.2d at 718 (criticizing the Court of Appeals of New York for blindly enforcing disposition contracts, as was the case in *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998)).

freedom, and even their rights to be born.[228]

In the present case, depending on the New Jersey court's view of an individual's right to reproduce, Mrs. X's positive right to reproduce may implicate this very "right to be provided with every available means by which he or she can potentially reproduce."[229]

Under the Court's exhortation to weigh the competing interests of reproductive freedom, it becomes evident that Mrs. X belongs to a vulnerable reproductive class—a class for whom the majority anticipates the need to enforce the positive right to reproduce.[230] First, she is clearly infertile, and thus her bodily integrity is severely compromised.[231] Second, the fiscal[232] and physical burdens[233] of pursuing future IVF treatments place Mrs. X at a decidedly more vulnerable position when endured post-divorce than when endured during the course of her marriage.[234] This burden is only augmented by the reality that women have a much smaller window of fertility than their male counterparts.[235] Finally, the financial burden asked of her spouse—$20,000 to cover egg-freezing procedures, medication, and storage costs[236]—pales in comparison to the aforementioned burdens that

228. Smith, *supra* note 222, at 893–95 (footnotes omitted).

229. *Id.* at 894.

230. This class is composed of infertile women whose "bodily integrity is severely compromised." *Id.* at 898. Mrs. X's failed attempts at IVF qualify her as a member of this class. *See* Richards, *supra* note 2.

231. *See* Richards, *supra* note 2 (noting that Mrs. X underwent a series of IVF treatments prior to divorce). This concept of compromised bodily integrity comes into play when assessing the procreative value of fertile individuals in comparison to the procreative value of infertile individuals. Smith, *supra* note 222, at 897–98. For "[i]f the wife were the fertile partner in the relationship and remains fertile at the time the custody decision [or alimony determination] is made, she can [still] resort to natural means for procreation . . . ." *Id.* at 897.

232. *See supra* note 182.

233. *See supra* note 207.

234. This is due to the fact that the partnership inherent to marriage provides a strong foundation of emotional support during IVF treatment. *See Preparing for IVF: Emotional Considerations*, AM. SOC'Y FOR REPROD. MED. (2014), http://www.asrm.org/detail.aspx?id=1902. Given that "[p]atients have rated the stress of undergoing IVF as more stressful than or almost as stressful as any other major life event, such as the death of a family member or separation or divorce," having someone to share in the experience helps alleviate the emotional trauma associated with infertility treatment. *Id.*

235. *See* Manny Alvarez, *Does Father's Age Increase Child's Autism Risk?*, FOX NEWS (Aug. 12, 2013), http://www.foxnews.com/health/2013/08/06/do-men-have-age-limit-for-having-children/ (stating that male fertility begins to decline after age 50, but that, even so, many septuagenarians have fathered children).

236. Richards, *supra* note 2.

infertility places on Mrs. X. Thus, while the reasoning articulated in embryonic disposition case law does not directly apply to Mrs. X's demand for fertility compensation, the policy underlying these decisions gives credence to the notion that she should receive some sort of compensation.[237]

V. THE IMPACT OF THE NEW JERSEY CASE: *SHOULD* MRS. X GET ALIMONY FOR HER EGGS?

Although an issue of first impression,[238] the question of fertility compensation in divorce proceedings is not without legal guidance.[239] Yet despite the fact that arguments can be made in favor of awarding Mrs. X the $20,000 that she seeks to finance her egg-freezing, medication, and storage costs,[240] policy considerations call into question the prudence of granting such an award.[241] Current trends in alimony law recognize that "[a]limony is and may always be, a concept in flux, ever-changing to meet the concerns of public policy," and it is because of alimony's fickle nature that policy has come to play an important role in alimony determinations.[242]

One of the most important policy considerations implicated by fertility compensation is its impact on gender relations.[243] For while alimony has technically been gender-neutral since 1979,[244] conflating alimony with fertility—a concept governed by gender—has the potential to unravel years of social progress.[245] Many men feel manipulated by a system steeped in the

237. *See supra* Parts IV.A–C.

238. Richards, *supra* note 2.

239. Namely, the guidance is gleaned from the *Crews* standard, *see* Part IV.A, the principles underlying reimbursement alimony, *see* Part IV.B, and cases involving embryonic disposition, *see* Part IV.C.

240. *See supra* Part IV.

241. *See infra* notes 243–59 and accompanying text.

242. Morgan, *supra* note 45, at 8.

243. *See infra* notes 244–59 and accompanying text.

244. Orr v. Orr, 440 U.S. 268, 270–71 (1979) (striking down a law that allowed only women to receive alimony).

245. Despite the judiciary's attempt to neutralize divorce, *see* Part II.B., the majority of alimony recipients in the United States continue to be women. *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 24 (2003). *But cf.* Patricia Reaney, *Alimony: Women Increasingly Paying Alimony to Their Ex Husbands*, HUFFINGTON POST (May 10, 2012, 11:27 AM), http://www.huffingtonpost.com/2012/05/10/alimony-women-increasingly_n_1506394.html (observing that more than half of divorce lawyers throughout the United States have seen an increase in the number of women *paying* alimony and child support to their ex-husbands in the past three years).

tradition of favoring their ex-wives.[246] Thus, when faced with the reality that female fertility is, in fact, more time sensitive and physically traumatic than their own infertility,[247] the opportunity for men to receive unbiased consideration in divorce proceedings dramatically decreases.[248] This is not to say that women intentionally target men.[249] Rather, "men suffer because of the same gender role stereotypes that hurt and restrict women": women

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246. This sense of manipulation and discrimination was articulated in the Supreme Court's seminal *Orr* decision, which struck down an Alabama statute that barred men from receiving alimony awards:

> But in this case, even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would "not adequately justify the salient features of" Alabama's statutory scheme. Under the statute, individualized hearings at which the parties' relative financial circumstances are considered already occur. There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy. Similarly, since individualized hearings can determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands. Progress toward fulfilling such a purpose would not be hampered, and it would cost the State nothing more, if it were to treat men and women equally by making alimony burdens independent of sex. "Thus, the gender-based distinction is gratuitous; without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids," and the effort to help those women would not in any way be compromised.
>
> Moreover, use of a gender classification actually produces perverse results in this case. As compared to a gender-neutral law placing alimony obligations on the spouse able to pay, the present Alabama statutes give an advantage only to the financially secure wife whose husband is in need. Although such a wife might have to pay alimony under a gender-neutral statute, the present statutes exempt her from that obligation. Thus, "[t]he [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands." They are precisely those who are not "needy spouses" and who are "least likely to have been victims of . . . discrimination," by the institution of marriage. A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.

Orr, 440 U.S. at 281–83 (alterations in original) (footnote omitted) (citations omitted).

247. *See supra* note 207.

248. Even when fertility is not a consideration in alimony awards, men still suffer from sexism in family law courts. *See* Noah Berlatsky, *When Men Experience Sexism*, ATLANTIC (May 29, 2013, 3:15 PM), http://www.theatlantic.com/sexes/archive/2013/05/when-men-experience-sexism/276355/ (asserting that permanent alimony and disproportionate custody determinations, among other phenomena, are influenced by "an antiquated perpetuation of retrograde gender roles" that disproportionately harm men).

249. *Id.*

are expected to be passive and domestic, and men are characterized as active, aggressive, and vocational.[250] Introducing fertility compensation as a viable form of alimony could very well serve to perpetuate these stereotypes.[251]

Even though awarding fertility compensation will likely strain gender relations, compensating women for their stolen fecundity will, more importantly, impact contemporary marriage. American society is already burdened with the fifth-highest divorce rate in the world, recording 3.4 divorces for every 1,000 people.[252] Moreover, marriages in the United States last a mere 8.8 years on average[253]—a number that has, surprisingly enough, leveled off in the past decade.[254] Some attribute these startling statistics to a sociological phenomenon identified as "emerging adulthood," a time during which young adults exhibit an absence of commitment to longstanding societal institutions such as marriage.[255] Others, however, give credence to the notion that perhaps the financial incentives of divorce outweigh the relational benefits of marriage.[256] Under this theory, fertility compensation

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250. *Id.*

251. *See Orr*, 440 U.S. at 283 ("[C]lassifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."); *cf. id.* at 282 ("Progress toward fulfilling such a purpose [of remedying past discrimination] would not be hampered[] . . . if it were to treat men and women equally by making alimony burdens independent of sex.").

252. Ashley Reich, *Highest Divorce Rates in the World*, HUFFINGTON POST (Dec. 21, 2010, 11:38 AM), http://www.huffingtonpost.com/2010/12/21/highest-divorce-rates-in-_n_798550.html.

253. *Sabrina Thompson's 'Marriage Is . . .' Project Counters Negative Relationship Images, Makes Us Cry (VIDEO)*, HUFFINGTON POST (Sept. 17, 2013, 2:52 PM), http://www.huffingtonpost.com/2013/09/17/sabrina-thompson-marriage-is-project_n_3942190.html.

254. Hope Yen, *Census: Divorces Decline in United States*, HUFFINGTON POST (May 18, 2011, 12:51 PM), http://www.huffingtonpost.com/2011/05/18/census-divorces-decline-i_n_863639.html.

255. Jim Eckman, *The Ongoing Decline of Marriage in America*, ISSUES IN PERSPECTIVE (Jan. 7, 2012), http://graceuniversity.edu/iip/2012/01/12-01-07-2/.

256. *See* D'Vera Cohn, *Love and Marriage*, PEW RES. CTR. (Feb. 13, 2013), http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/; *see also, e.g.*, Dan Schulman, *Women Marry for Money*, PSYCHOL. TODAY (Mar. 1, 2003), http://www.psychologytoday.com/articles/200305/women-marry-money ("[W]omen living with men of lesser economic means and lower levels of education were less likely to anticipate marrying their current partner."); Elizabeth Ford & Daniela Drake, *Smart Girls Marry Money*, FORBES (Aug. 18, 2010, 4:10 PM), http://www.forbes.com/2010/08/18/love-marriage-money-forbes-woman-net-worth-economic-security.html ("We don't think 'gold-digging' should be frowned upon. . . . [After all,] [m]arrrying for money isn't new. In fact, throughout history spousal arrangements have rarely taken any other form. . . . So even if your husband leaves you for someone younger or you get sick of hanging out with your old man, with a few bucks in your pocket, you can live well . . . ."); Jessica Wakeman, *Why Marrying for Money*

would only serve to encourage flippant matrimony.[257] For not only does modern technology permit women to have biological children later in life,[258] receiving alimony for bygone fertility increases financial incentives to marry—and subsequently divorce—for money.[259]

VI. CONCLUSION

The New Jersey court presented with Mrs. X's case will be confronted with a plethora of weighty considerations.[260] From the public policy concerns surrounding fertility compensation,[261] to the legal quandaries inherent to recognizing a new type of alimony,[262] this issue of first impression is rife with implications for family law jurisprudence. Yet even if Mrs. X's case settles out of court as her attorney hopes,[263] recent advances in ART are bound to intersect with divorce law and alimony jurisprudence in the near future.[264] For if not Mrs. X, another woman will undoubtedly bring a similar claim before the court, asking once again the question of "alimony for your eggs."[265]

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Isn't a Bad Idea, CNN.COM (Jul. 6, 2009, 1:01 PM), http://www.cnn.com/2009/LIVING/personal/07/06/tf.marrying.for.money/index.html?eref=ib_us ("[M]arrying a man with money can be a better idea than marrying someone who is broke. . . . Couples' finances are intertwined with one another . . . . That's why a man who makes a decent amount of money and is responsible with it will always, always be more attractive to most women."); Robert Frank, *Marry for Love . . . of Money*, WALL ST. J. (Dec. 14, 2007, 12:01 AM), http://online.wsj.com/news/articles/SB119760031991928727 ("[P]rice-tag partnerships and checkbook breakups are increasingly making headlines . . . even among the workaday (or wannabe) wealthy, marrying for money has become a popular pursuit.").

257. *See infra* notes 258–59 and accompanying text.

258. *See supra* notes 125–32 and accompanying text.

259. The concept of divorcing for money is becoming increasingly prevalent in modern society. *See* Rachel Rothwell, *Is it Wrong to Profit from Divorce Litigation?*, L. SOC'Y GAZETTE (May 28, 2012), http://www.lawgazette.co.uk/65820.article (exposing the practice of divorce litigation funding and the solicitors who use such funding as an investment opportunity).

260. *See supra* Parts IV and V.

261. *See supra* Part V.

262. *See supra* Parts III and IV.

263. Richards, *supra* note 2.

264. *See supra* Part III.C.

265. *See* Richards, *supra* note 2.

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