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Family Law—Child Custody—A Cryopreserved in Vitro Embryo Is a "Child" for Domestic Relations Purposes. *Davis v. Davis*, 1989 WL 140495 (No. E-14496 Tenn. Cir. Ct. 1989).

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NOTES

FAMILY LAW—CHILD CUSTODY—A CRYOPRESERVED IN VITRO EMBRYO IS A “CHILD” FOR DOMESTIC RELATIONS PURPOSES. *Davis v. Davis*, 1989 WL 140495 (No. E-14496 Tenn. Cir. Ct. 1989).

Junior and Mary Davis were a married couple, aged thirty and twenty-eight respectively.¹ During their nine-year marriage the couple tried repeatedly, without success, to have children.² After her fifth ectopic pregnancy³ and upon her physician's recommendation, Mrs. Davis underwent an operation rendering her incapable of natural conception.⁴

Still desirous of having children, the couple sought out Dr. Ray King of the Fertility Center of East Tennessee to explore the possibility of having a child through the use of *in vitro* fertilization (hereinafter “IVF”).⁵ In the fall of 1985 the couple underwent IVF.⁶ After six unsuccessful attempts to produce a child using the procedure the couple withdrew from the program and attempted to adopt a child.⁷ The adoption attempt also proved unsuccessful.⁸

In the fall of 1988, having learned of the new cryopreservation technique⁹ now utilized by Dr. King, the Davises returned to the clinic

1. *Davis v. Davis*, 1989 WL 140495, at 4 (No. E-14496 Tenn. Cir. Sept. 21, 1989).

2. *Id.*

3. An ectopic pregnancy is one which occurs somewhere other than the uterine cavity. *STEDMAN'S MEDICAL DICTIONARY* 442 (24th ed. 1982) [hereinafter *STEDMAN'S*].

4. 1989 WL 140495, at 4.

5. *In vitro* fertilization is a process whereby the egg is surgically removed from a woman, placed together with sperm *in vitro*, and incubated to allow for fertilization. If fertilization occurs the resulting conceptus is allowed to mature to an acceptable level (usually two to three days) and then transferred to the uterine cavity of the woman where it hopefully will implant, resulting in a pregnancy. Vetri, *Reproductive Technologies and United States Law*, 37 INT'L & COMP. L.Q. 505 (1988). See also Brahm, *The Legal and Social Problems of In Vitro Fertilisation: Why Parliament Must Legislate*, 51 MEDICO-LEGAL J. 236 (1983).

6. 1989 WL 140495, at 5.

7. *Id.*

8. *Id.*

9. Cryopreservation is a means of freezing embryos not immediately used. In the IVF procedure the ovaries are stimulated to produce multiple eggs (up to six or eight; “superovulation”).

and re-entered the IVF program.¹⁰ In December 1988 nine ova were removed from Mrs. Davis and inseminated with Mr. Davis' sperm. All nine ova were fertilized. After the resulting zygotes¹¹ matured to the appropriate level¹² two were transferred to Mrs. Davis and the remaining seven were placed in cryogenic storage.¹³ The two transferred embryos failed to produce a pregnancy.¹⁴

The Davises tentatively planned to transfer at least one of the cryopreserved embryos to Mrs. Davis' uterus in March or April of 1989.¹⁵ However, before any disposition was made of the embryos, Mr. Davis filed for divorce. In February 1989 he filed suit in the Circuit Court of Tennessee, Blount County, seeking an order preventing Mrs. Davis from transferring the remaining embryos.¹⁶

The circuit court concluded that: (1) human embryos are not property but human beings *in vitro*;¹⁷ (2) human life begins at conception;¹⁸ (3) the common law doctrine of *parens patriae*¹⁹ controls chil-

Robertson, *Decisional Authority Over Embryos and Control of IVF Technology*, 28 JURIMETRICS J. 285 (1988). However, only a limited number of fertilized eggs can be transferred to the uterus at one time. The replacement of large numbers of embryos poses serious risks to both the mother and the offspring. Trounson, *Preservation of human eggs and embryos*, 46 FERTILITY & STERILITY 1 (1986). The freezing of excess embryos is attractive in connection with IVF for several reasons. First, pharmacologically induced superovulation increases the efficacy of the IVF procedure. Often, more fertilized eggs are produced than can be safely transferred to the uterus in a single attempt. Surplus embryos, if frozen, can be used in later attempts if the first transfer fails to cause a pregnancy. Freezing can obviate the cost and discomfort of repeated laparoscopy (the surgical process by which the eggs are removed). Second, freezing may further increase the efficacy of IVF, which results in less than one birth per four embryo transfer attempts. Pharmacologic induction of superovulation may, through hormonal effects on the uterus, reduce implantation efficacy. If so, frozen storage of the embryos could allow for embryo transfer to the uterus in a later, undisturbed cycle. Third, freezing gives the couple greater latitude in choosing the time of pregnancy. Freezing expands treatment options as well. Grobstein, Flower & Mendeloff, *Frozen Embryos: Policy Issues*, 312 NEW ENG. J. MED. 1584, at 1584-85 (1985).

10. 1989 WL 140495, at 5.

11. A zygote is "[t]he diploid cell resulting from union of a sperm and an ovum." STEDMAN'S, *supra* note 3, at 1590.

12. It is necessary to allow the fertilized egg to divide several times prior to its transfer to a uterus. Robertson, *Embryo Research*, 24 U.W. ONTARIO L. REV. 15 (1986). For a description of the stages of embryonic and fetal development, see Grobstein, *The Early Development of Human Embryos*, 10 J. MED. & PHIL. 213 (1985).

13. 1989 WL 140495, at 6.

14. *Id.*

15. *Id.* at 7.

16. *Id.*

17. *Id.* at 2.

18. *Id.*

19. *Parens patriae* refers to the role of state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979) [hereinafter BLACK'S].

dren *in vitro*;²⁰ (4) it was in the best interests of the child (or children) that they be available for implantation;²¹ and (5) it was in the child's (or children's) best interest that Mrs. Davis be permitted to bring them to term through implantation.²²

The court ruled that temporary custody of the embryos be vested in Mrs. Davis for the purpose of implantation. The court reserved judgment on the issues of support, visitation, and final custody until one or more of the embryos became the product of live birth. *Davis v. Davis*, 1989 WL 140495 (No. E-14496 Tenn. Cir. Ct. 1989).

Medical authority has traditionally recognized the existence of the unborn child from the moment of conception.²³ Legal authorities have reached differing conclusions on the matter, depending upon the context in which the question arises — tort law, criminal law or the constitutional right of privacy. Although these diverse contexts are not directly apposite to the issue in *Davis*, legal issues regarding the "personhood" of the fetus in these areas have implications for *Davis* and vice versa.

In 1884 Judge (later Supreme Court Justice) Oliver Wendell Holmes reasoned that an "unborn child [is] a part of the mother" and, therefore, cannot recover for the wrongful conduct of another.²⁴ Holmes' reasoning provided the basis of most of the decisions in tort law for the next sixty years.²⁵ The 1946 case of *Bonbrest v. Kotz*²⁶ marked the turning point in recognizing the fetus as a separate entity deserving of compensation for injuries inflicted upon it *in utero*. The court in *Bonbrest* recognized that a viable fetus is not "part" of its mother, noting that "[m]odern medicine is replete with cases of living children being taken from dead mothers."²⁷

Presently, every American jurisdiction allows a child injured *in utero* to maintain an action for the injury if the child is born alive.²⁸ However, there is disagreement as to the stage of fetal development at

20. 1989 WL 140495, at 2.

21. *Id.*

22. *Id.*

23. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS, § 55, at 367 (5th ed. 1984) [hereinafter PROSSER & KEETON].

24. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884).

25. See Note, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276 (1976-77).

26. 65 F. Supp. 138 (D.D.C. 1946).

27. *Id.* at 140.

28. PROSSER & KEETON, *supra* note 23, § 55, at 368.

which liability attaches.²⁹ Most jurisdictions require that the fetus be viable³⁰ at the time of injury before liability is imposed.³¹ In contrast, several courts have allowed recovery for injury to a nonviable fetus.³² A very few courts have gone so far as to allow recovery for injury to the fetus resulting from tortious contact with the mother prior to conception.³³

Decisions in the criminal law area concerning harm to the fetus usually turn on statutory interpretation. Most homicide statutes define crimes with reference to causing the death of another "person."³⁴ Thus, the determinative issue in criminal cases is the meaning of the word "person" as used in the statute; that is, is the unborn fetus a "person" within the meaning of the statute? In the absence of legislative direction to the contrary, most American courts have held that a fetus is not a person unless it is born alive and dies later from injuries inflicted *in utero*.³⁵

Courts typically engage in the same kind of statutory analysis in wrongful death actions.³⁶ However, a majority of courts reach a different conclusion regarding the "personhood" of a fetus in the wrongful death area, allowing a claim for wrongful death even if the fetus is

29. *Id.*

30. Viability connotes the stage of development at which a fetus is capable of living outside the womb. This is usually defined as a fetus weighing 500g and having reached 20 gestational weeks. *STEDMAN'S*, *supra* note 3, at 1556.

31. *PROSSER & KEETON*, *supra* note 23, § 55, at 368.

32. See *Andrews, The Legal Status of the Embryo*, 32 *LOY. L. REV.* 357, 377-86 (1986).

33. *E.g.*, *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (valid claim for relief when child was born jaundiced and suffering from hyperbilirubinemia because of an incompatible blood transfusion given to the mother prior to conception). *But see Albala v. City of New York*, 54 N.Y.2d 269, 445 N.Y.S.2d 108, 429 N.E.2d 786 (1981) (child has no cause of action for injuries resulting from an operation on the mother prior to conception).

34. *E.g.*, *ARK. CODE ANN. § 5-10-101* (1987) ("A person commits capital murder if . . . he . . . causes the death of any *person*" (emphasis added)); *ARK. CODE ANN. § 5-10-104* (1987) ("A person commits manslaughter if . . . he causes the death of another *person*" (emphasis added)).

35. *W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.1*, at 608-09 (2d ed. 1986) [hereinafter *LAFAVE & SCOTT*]; see also *Note, A Fetus is not a "Person" as the Term is Used in the Manslaughter Statute*, 10 *U. ARK. LITTLE ROCK L.J.* 403, 407-10 (1987-88) (authored by J. Shannon). *But see People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947) (rejecting the "born alive" rule the court held that a fetus killed during birth was a human being under the homicide statute). Subsequently, the California Supreme Court refused to extend the homicide statutes to cover the killing of a viable fetus not in the process of birth. *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (death of a thirty-four to thirty-six week old fetus delivered stillborn by caesarean section not actionable under the state homicide statutes).

36. *E.g.*, *ARK. CODE ANN. § 16-62-102* (1987) provides that a wrongful death action lies "[w]henever the death of a *person* shall be caused by a wrongful act" (emphasis added).

stillborn.³⁷ Most of these courts limit wrongful death actions to instances where the fetus could have maintained an action for its injuries had it survived.³⁸ However, several jurisdictions allow an action for lethal injuries inflicted upon a nonviable fetus.³⁹

More directly relevant to the issue in *Davis* are decisions of the United States Supreme Court in the abortion area. In *Roe v. Wade*⁴⁰ the United States Supreme Court, confronted with a state law proscribing abortion, stated in dictum that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁴¹ The Court specifically declined, however, to state at what point in fetal development life begins:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁴²

The Court added that the state does have an "important and legitimate interest in protecting the potentiality of human life,"⁴³ but that the state may not, by adopting one theory of life, "override the rights of the pregnant woman that are at stake."⁴⁴

In subsequent decisions the Court, though still not addressing the question of when life begins, reaffirmed the state's interest in making "a value judgment favoring childbirth over abortion."⁴⁵ In *Webster v. Reproductive Health Services*⁴⁶ the Court addressed the constitutionality of a state statute which, in its preamble, provided that "[t]he life of each human being begins at conception,"⁴⁷ and that "[u]nborn children

37. PROSSER & KEETON, *supra* note 23, § 55, at 370.

38. Andrews, *supra* note 32, at 388.

39. *Id.*

40. 410 U.S. 113 (1973).

41. *Id.* at 158.

42. *Id.* at 159.

43. *Id.* at 162.

44. *Id.*

45. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (state law under which Medicaid recipients were eligible for payments for medical services incident to childbirth but not for medical services incident to nontherapeutic abortions held constitutional). *See also Harris v. McRae*, 448 U.S. 297 (1980) (congressional prohibition on the use of federal funds to reimburse the cost of abortions held constitutional).

46. 109 S. Ct. 3040 (1989).

47. MO. ANN. STAT. § 1.205.1(1) (Vernon Supp. 1990).

have protectable interests in life, health, and well-being."⁴⁸ The preamble further provided that:

[T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at *every stage* of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.⁴⁹

The Court stated that its previous decisions concerning abortion meant "only that a State could not 'justify' an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins."⁵⁰ Noting that the preamble did not by its terms regulate abortion and re-emphasizing that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion,"⁵¹ the Court declined to pass on the constitutionality of the act's preamble.⁵² Presumably then, the Missouri statute is constitutionally valid to the extent that it does not interfere with a woman's right to have an abortion.

Because of the relative novelty of IVF,⁵³ in particular IVF utilizing cryopreservation,⁵⁴ there is a scarcity of law dealing with the subject. There is no case law directly on point.

The most publicized instance dealing with the disposition of frozen embryos is that involving Mario and Elsa Rios.⁵⁵ In 1981 the Rioses, a California couple, attempted a pregnancy through the use of IVF at the Queen Victoria Medical Center of Melbourne, Australia.⁵⁶ Doctors

48. *Id.* § 1.205.1(2).

49. *Id.* § 1.205.2 (emphasis added).

50. 109 S. Ct. at 3050.

51. *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

52. *Id.*

53. The first successful birth resulting from the use of IVF occurred in England in 1978. Between 1978 and 1981, two clinics in Australia were successful in achieving births using IVF. It was not until December 1981 that a child, conceived *in vitro*, was born in the United States. Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 323-24 (1986). Since 1978, an estimated 15,000 babies have been born through IVF, some 5,500 in the United States. Smothers, *Embryos in a Divorce Case: Joint Property or Offspring?*, N.Y. Times, Apr. 21, 1989, at 1, col. 6.

54. The first successful attempt at creating a pregnancy using a cryopreserved embryo in the United States was in late 1982. Trounson, *supra* note 9, at 2.

55. For a synopsis of the case see S. GREEN, J. LONG & R. MURAWSKI, MARRIAGE AND FAMILY LAW AGREEMENTS 69 (Supp. 1989) [hereinafter GREEN & LONG].

56. Note, *Genesis Retold: Legal Issues Raised By The Cryopreservation of Preimplanta-*

at the clinic removed three eggs from Mrs. Rios and fertilized them with the sperm of an anonymous donor.⁵⁷ One of the embryos was implanted and the remaining two were frozen for future use.⁵⁸ The implanted embryo failed to produce a pregnancy. Before either of the remaining embryos could be implanted, the couple was killed in an airplane crash.⁵⁹

The debate over the disposition of the two frozen embryos resulted in a report from the Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization.⁶⁰ The Committee made several recommendations concerning cryopreserved embryos, most of which the Parliament of the State of Victoria accepted and passed into legislation.⁶¹ However, the Parliament rejected the Committee's recommendation that frozen embryos be removed from storage and allowed to expire if they could not be implanted as originally planned and no other provision had been made for them.⁶² Instead, the Parliament passed legislation stating:

Where, after an embryo has been derived from an ovum produced by a woman and fertilized outside her body for the purpose of a relevant procedure to be carried out in relation to her or another woman, the embryo cannot be implanted in the body of that woman . . . the embryo shall be made available, in accordance with the consent of the persons who produced the gametes from which the embryo was derived, for use in a relevant procedure carried out in relation to another woman; or where those consents cannot be obtained because the persons are dead or cannot be found, the Minister shall direct the designated officer of the approved hospital where the embryo is stored to ensure that the embryo is made available for use in a relevant procedure carried out in relation to another woman.⁶³

Pursuant to this legislative enactment, the two embryos were im-

tion *Human Embryos*, 36 SYRACUSE L. REV. 1021, 1030 (1985).

57. *Id.* at 1030.

58. *Id.*

59. GREEN & LONG, *supra* note 55, at 69.

60. See *The Committee to Consider the Social, Ethical and Legal Issues Arising From In Vitro Fertilization: Report on the Disposition of Embryos Produced by In Vitro Fertilization* 24-33 (1984), [hereinafter WALLER COMMITTEE REPORT] (as reprinted in Note, *supra* note 56, at 1030 n.56).

61. Note, *supra* note 56, at 1032.

62. *Id.*

63. A Bill to Amend the Infertility (Medical Procedures) Act of 1984, dated 25 October 1984, 1-543-1000/25.10.1984-80813/84 (Revision No. 5)(921), at 13-14 (clause 14) (as reprinted in Note, *supra* note 57, at 1032 n.61).

planted in a patient at the Queen Victoria Medical Center on an anonymous basis.⁶⁴ However, because the process of embryo cryopreservation was in its early stages at the time the Rios embryos were frozen, it is doubtful that the embryos survived thawing and implantation.⁶⁵

Only two American courts have directly addressed the legal status of IVF embryos. In *Del Zio v. Presbyterian Hospital*⁶⁶ the court awarded damages to a married couple for the intentional destruction of their gametes⁶⁷ that had been placed together *in vitro*.⁶⁸ Mr. and Mrs. Del Zio had undergone the IVF procedure at Presbyterian Hospital, under the direction of a hospital physician. After the sperm and ova had been placed together in an incubator, the physician's supervisor⁶⁹ learned of the procedure and ordered the potential conceptus⁷⁰ destroyed.⁷¹ This was done without the knowledge of either the Del Zios or their treating physician.⁷²

The Del Zios sought damages for the destruction of the potential conceptus, asserting two theories of recovery: (1) intentional infliction of emotional distress;⁷³ and (2) tortious conversion of property.⁷⁴ The jury awarded damages in the amount of \$50,000 on the intentional infliction of emotional distress claim⁷⁵ but denied recovery on the conversion claim.⁷⁶ Although the conversion claim failed in *Del Zio*, the fact that the trial court allowed the claim to go to the jury implies that the court considered the potential conceptus⁷⁷ to be property, since only property can be converted.⁷⁸

64. GREEN & LONG, *supra* note 56, at 69.

65. Note, *supra* note 56, at 1033.

66. No. 74 Civ. 3588 (S.D.N.Y. Apr. 12, 1978).

67. A gamete is any germ cell (the ovum or spermatozoon). STEDMAN'S, *supra* note 3, at 571.

68. The sperm and ovum had been placed together *in vitro* but fertilization had not been confirmed. Powledge, *A Report from the Del Zio Trial*, HASTINGS CENTER REP. 14 (Oct. 1978).

69. IVF was unauthorized at the hospital and the Del Zios' physician had failed to obtain permission to carry out the procedure. Comment, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 317-18 (1982).

70. See *supra* note 68.

71. Palm, *Legal Implications of Artificial Conception: Making Babies Makes Law*, 1982 MED. TRIAL TECH. Q. 404, 421.

72. *Id.*

73. *Id.*

74. *Id.* at 422.

75. *Id.* at 421.

76. *Id.* at 422.

77. See *supra* note 68.

78. "Conversion: An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclu-

In *York v. Jones*⁷⁹ the court dealt with custody of a frozen embryo solely in terms of property. Dr. and Mrs. York entered the IVF program at the Jones Institute in Norfolk, Virginia in 1986. Six eggs were removed from Mrs. York and fertilized with Dr. York's sperm. Five of the embryos were transferred to Mrs. York's uterus, while the remaining embryo was placed in cryogenic storage. Prior to the freezing of the embryo the Yorks signed a Cryopreservation Agreement with the hospital which provided in pertinent part:

We may withdraw our consent and discontinue participation at any time without prejudice and we understand our pre-zygotes will be stored only as long as we are active IVF patients at the [Jones Institute] or until the end of our normal reproductive years. We have the principle responsibility to decide the disposition of our pre-zygotes. Our frozen pre-zygotes will not be released from storage for the purpose of intrauterine transfer without the written consents of us both. In the event of divorce, we understand legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand we may choose one of three fates for our pre-zygotes that remain in frozen storage. Our pre-zygotes may be: 1) donated to another infertile couple (who will remain unknown to us) 2) donated for approved research investigation 3) thawed but not allowed to undergo further development.⁸⁰

None of the five transferred embryos produced a pregnancy. After moving to Los Angeles, the Yorks sought to transfer the remaining embryo to an IVF clinic in California. Their physician, acting on behalf of the Jones Institute, refused to allow the transfer.⁸¹

The Yorks brought an action seeking the release and transfer of the embryo from the Institute. The complaint was in four counts: (1) breach of contract; (2) quasi-contract; (3) detinue;⁸² and (4) 42 U.S.C.

sion of the owner's rights. Any unauthorized act which deprives an owner of his *property* permanently or for an indefinite time." BLACK'S, *supra* note 19, at 300 (emphasis added). This was one of the arguments set forth by the defendant in the principal case. Brief for Defendant and Counter-Plaintiff at 3, *Davis v. Davis*, 1989 WL 140495 (No. E-14496 Tenn. Cir. Ct. 1989) (filed July 17, 1989).

79. 717 F. Supp. 421 (E.D. Va. 1989).

80. *Id.* at 424.

81. *Id.*

82. Detinue is a form of action demanding the return (*in specie*), along with damages for retention, of chattels from one who acquired possession in a lawful manner but retains it without right. BLACK'S, *supra* note 19, at 405.

§ 1983.⁸³ The court, in denying the defendant's motion to dismiss the first two counts, spoke strictly in property terms. The court ruled that the Cryopreservation Agreement created a bailment which implied an obligation to return the property (the conceptus) to the plaintiffs.⁸⁴ Again using a property analysis, the court found that the plaintiffs stated a cause of action in detinue.⁸⁵ The court found that the Institute was not a state actor and, consequently, dismissed the section 1983 count.⁸⁶

Various advisory committees have reached differing conclusions on the status of the embryo *in vitro*. In the United States, an Ethics Advisory Board (EAB) was formed in the mid-1970s under the direction of the Department of Health Education and Welfare.⁸⁷ The EAB issued a report⁸⁸ concluding that "the human embryo is entitled to profound respect; but this respect does not necessarily encompass the full legal and moral rights attributed to persons."⁸⁹ However, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research replaced the EAB and has taken no action on the basis of the report.

In Australia, the *Waller Committee Report*⁹⁰ concluded that the couple whose embryo was stored should not be regarded as having

83. 717 F. Supp. 421, 423.

84. The court stated that:

While the parties in this case expressed no intent to create a bailment, under Virginia law, no formal contract or actual meeting of the minds is necessary. [citation omitted]. Rather, all that is needed is the element of lawful possession however created, and duty to account for the thing as the *property* of another that created the bailment. [citation omitted]. The essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. [citation omitted].

Id. at 425 (emphasis added) (citing *Crandall v. Wird*, 206 Va. 321, 143 S.E.2d 923, 927 (1965)).

85. The court stated that:

The requisite elements of a detinue action in Virginia are as follows: (1) plaintiff must have a *property* interest in the thing sought to be recovered; (2) the right to immediate possession; (3) the property is capable of identification; (4) the property must be of some value; and (5) defendant must have had possession at some time prior to the institution of the act.

Id. at 427 (emphasis added).

86. *Id.* at 429.

87. Now the Department of Health and Human Services.

88. ETHICS ADVISORY BOARD REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER, 44 Fed. Reg. 35,033 (June 18, 1979).

89. *Id.* at 35,056.

90. WALLER COMMITTEE REPORT, *supra* note 60.

property rights to the embryo and therefore should not be allowed to sell or casually dispose of it.⁹¹ However, as previously noted, the Report recommended destruction of the embryo if: (1) the planned disposition could not be made of it; and (2) no other provisions were made for it.⁹² The Victorian Parliament rejected this recommendation.

The Warnock Commission in Great Britain issued a report⁹³ which stated:

[T]he human embryo . . . is not under the present law of the UK accorded the same status as a living child or an adult, nor do we necessarily wish it to be accorded the same status. Nevertheless we were agreed that the embryo of the human species ought to have a special status.⁹⁴

The Commission also recommended that legislation be enacted "to ensure there is no right of ownership in a human embryo."⁹⁵ The report further recommended that, upon the death of the gamete donors, the fate of the embryo(s) be determined by the storage facility.⁹⁶

The American Fertility Society has issued an *Ethical Statement on In Vitro Fertilization*⁹⁷ which stated:

It is understood that any couple entering into a program of in vitro fertilization will have discussed and signed a proper consent form covering the various steps in the procedure. It is understood that the gametes and concepti are the *property* of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines as outlined herein.⁹⁸

Thus, various advisory boards have reached somewhat discordant conclusions regarding the status of the *in vitro* embryo. However, it appears that all of the committees agree that the IVF embryo, though

91. WALLER COMMITTEE REPORT, *supra* note 60, at 27-28, *reprinted in* Note, *supra* note 56, at 1030 n.56.

92. *Id.*

93. REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, (London: Her Majesty's Stationary Office, 1984) [hereinafter WARNOCK REPORT].

94. *Id.* at 63, *reprinted in* Robertson, *Embryo Research*, 24 U.W. ONTARIO L. REV. 15, 24 (1986).

95. WARNOCK REPORT, *supra* note 93, *quoted in* S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 130 (1987).

96. S. ELIAS & G. ANNAS, *supra* note 95, at 131.

97. American Fertility Society, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY AND STERILITY 12 (1984).

98. *Id.* at 11 (emphasis added).

deserving of protection, should not be treated as a human being.

To date only one state, Louisiana, has enacted legislation dealing with the legal status of the IVF embryo.⁹⁹ The Louisiana legislation provides that the "in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with the law."¹⁰⁰ The act further provides that: (1) the in vitro embryo "is a biological human being which is not the property of the physician . . . the facility which employs him or the donors of the sperm and ovum";¹⁰¹ (2) the in vitro embryo "shall not be intentionally destroyed by any natural or other juridical person";¹⁰² and (3) that "[i]n disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be the best interest of the in vitro fertilized ovum."¹⁰³ No court, as of yet, has addressed the constitutionality of the statute.

The court in *Davis* began its analysis by stating that the intent of Mr. and Mrs. Davis was "to produce a human being to be known as their child."¹⁰⁴ This being their intent, the court found it necessary to determine whether that intent was accomplished. In the court's view this required a determination of when human life begins. The court noted that all of the expert witnesses¹⁰⁵ at the trial agreed that the seven cryopreserved embryos were human.¹⁰⁶ However, the experts disagreed as to whether the embryos were "in being." Three of the witnesses expressed the opinion that the embryos represented only the "potential for life," while one believed the embryos were actually "in being."¹⁰⁷

99. LA. REV. STAT. ANN. §§ 9:121 to 133 (West Supp. 1990).

100. *Id.* § 9:123.

101. *Id.* § 9:126.

102. *Id.* § 9:129.

103. *Id.* § 9:131.

104. 1989 WL 140495, at 8.

105. The expert witnesses at the trial were: (1) Dr. Irving Ray King, the director of the Fertility Center of East Tennessee; (2) Dr. Charles A. Shivers, the head of the Department of Zoology at the University of Tennessee (Dr. Shivers also works in the laboratory at the Fertility Center of East Tennessee); (3) Dr. Jerome Lejeune, a Professor of Fundamental Genetics and a pediatrician (Dr. Lejeune discovered the genetic cause of Down's Syndrome); and (4) Professor John A. Robertson, Professor of Law at the University of Texas and a member of the American Fertility Society's Ethics Committee. Professor Robertson has written extensively on the subject of IVF and cryopreservation. *Id.* at 42-64.

106. *Id.* at 9.

107. *Id.*

Drs. King and Shivers testified that during the first fourteen days of its existence the "pre-embryo"¹⁰⁸ is a mass of undifferentiated cells.¹⁰⁹ Dr. Shivers testified that at the time of fertilization genetic controls are "locked in forever,"¹¹⁰ but that, to his knowledge, there was no way to distinguish the cells prior to the appearance of the primitive streak.¹¹¹ Professor Robertson expressed much the same opinion, noting that "it is not clear" that a human pre-embryo is a unique individual.¹¹² Robertson also stated that the gamete donors have not procreated simply because fertilization has occurred.¹¹³ Dr. Lejeune was alone in testifying that each human being is unique upon conception and that this fact is scientifically demonstrable through the use of DNA¹¹⁴ profiling.¹¹⁵

108. A major point of contention at the trial was the denomination of the embryo in its earliest stages. The American Fertility Society uses the term "pre-embryo" to denote the conceptus prior to cell differentiation which occurs some fourteen days after fertilization. Drs. King and Shivers, as well as Professor Robertson, were in agreement that "pre-embryo" was the proper denomination for the conceptus until formation of the primitive streak. Dr. Lejeune testified that there was no such word and that an embryo was the earliest form of life. The court in accepting Dr. Lejeune's view noted that: (1) no reference to the word was made in any encyclopedia or dictionary it consulted; (2) Dr. King, in his handwritten notes concerning Mrs. Davis, repeatedly made reference to the "embryos," making no reference to the word "pre-embryo"; and (3) Professor Robertson, in a paper written specifically for the *Davis* case (see *infra* note 113), made constant reference to the "embryos." 1989 WL 140495, at 10-16.

109. *Id.* at 10.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* See also Robertson, *Resolving Disputes Over Frozen Embryos*, HASTINGS CENTER REP. 7 (Nov./Dec. 1989). This article was written especially for the *Davis* case and is mentioned in the opinion at page 15.

114. "Deoxyribonucleic acid: an essential component of all living matter and a basic material in the chromosomes of the cell nucleus: it contains the genetic code and transmits the hereditary pattern." WEBSTER'S NEW WORLD DICTIONARY SECOND CONCISE EDITION 202 (1982).

115. 1989 WL 14049, at 63. "DNA fingerprinting is based on the unique character of each individual's genetic makeup (contained in their DNA). DNA fingerprints are 'pictures' of certain regions of DNA that vary from person to person. The pattern of the print is unique, and a person can be identified by comparing his DNA fingerprint with an unknown." Note, *Evidence of DNA Fingerprinting Admitted for Identification Purposes in a Rape Trial*, 12 U. ARK. LITTLE ROCK L.J. 543, 543 n.6 (1990) (authored by C. Clayborn).

Dr. Lejeune compared the DNA code to the bar code on items at a grocery store and stated that a new device invented by Dr. Alec Jeffreys in England enabled scientists to read the DNA code of a cell in much the same way a supermarket register reads the bar code of a grocery item. Dr. Lejeune stated that by using this method:

We detect every individual is different from the next one by its own bar code. And that is no longer a demonstration by statistical reasoning. So many investigations have been made that we know now that looking at the bar code . . . the probability that you will find it identical in another person is less than one in a billion. So it's not any longer a

The court noted that the American Fertility Society (AFS) recognizes several respected views regarding the legal and moral status of the pre-embryo¹¹⁶ and that the Ethics Committee of the Society chose to adopt the view that:

[T]he preembryo deserves respect greater than accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than any other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.¹¹⁷

The *Davis* court concluded that the AFS view of the conceptus merely constituted a professional guideline and did not serve as authority for the court to use in determining the status of the embryos.¹¹⁸ However, the court noted that the AFS guidelines must be considered for their probative value.¹¹⁹

Turning to the question of cell differentiation in the embryo, the court noted the equivocality of Dr. Shivers¹²⁰ and Professor Robertson's testimony,¹²¹ and accepted the "unrebutted" testimony of Dr. Lejeune that the cells of an embryo are indeed differentiated and unique.¹²² The court then summarily dismissed the argument that the embryo may never reach its biologic potential. The court noted that the argument was statistically and speculatively true but reasoned that a newborn baby may never reach its biologic potential and "no one

theory that each one of us is unique. It's now a demonstration as simple as a bar code in a supermarket.

Testimony of Jerome Lejeune, M.D., *Davis v. Davis* (No. E-14496 Tenn. Cir. Ct. 1989), *reprinted in* Center for Law and Religious Freedom, *Custody Dispute Over Seven Human Embryos* 45 (n.p. n.d.) (Dr. Lejeune testified on Aug. 10, 1989).

116. 1989 WL 140495, at 13.

117. *Id.* (quoting *AFS Publication*, Vol. 46, No. 3, at 29S).

118. *Id.* at 14.

119. *Id.*

120. Dr. Shivers testified that "as far as we know . . . there is no way to distinguish the cells [at the zygote stage] . . ." *Id.* at 10.

121. Professor Robertson testified that it is "not clear" that a human pre-embryo is a unique individual. *Id.*

122. *Id.* at 18. The court cited *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988), *review denied*, 542 So. 2d 1332 (Fla. 1989), in support of the admissibility into evidence of DNA profiling. In *Andrews*, DNA profiling was allowed as evidence in a rape trial.

disputes the fact that a newborn baby is a human being."¹²³

Similarly, the court dismissed the argument that the embryo at this stage of development is fungible property. The court found this argument not "well founded in logic and good reason,"¹²⁴ citing Tennessee Congressman Albert Gore's response to a similar theory advanced before the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology that: "I disagree that there's just a sliding scale of continuum [sic] with property at one point along the spectrum and human beings at another. I think there's a sharp distinction between something that is property and something that is not property."¹²⁵

The court concluded that the embryos are human beings, not property, and that life begins at conception. Thus, the court reasoned Mr. and Mrs. Davis had "accomplished their original intent to produce a human being to be known as their child."¹²⁶

The court then turned its attention to what disposition was to be made of the "children." The court recognized that, while Tennessee's Wrongful Death¹²⁷ and Criminal Abortion¹²⁸ Statutes accorded no legal status to the embryo in the early stages of its development, the Tennessee Legislature had yet to address the status of the embryo in the IVF context.¹²⁹ The court further recognized that the United States Supreme Court in *Webster*¹³⁰ had "left the door open for a state to establish its compelling interest in even potential life by legislation declaring its public policy."¹³¹

Noting the lack of legislative guidance in the area, the court cited *Smith v. Gore*,¹³² a wrongful pregnancy case, in which the Tennessee Supreme Court observed that the state places great value on human life and that no public policy prevents the continuing development of the common law. Having determined that the frozen embryos were "human beings," the court extended the doctrine of *parens patriae*¹³³

123. 1989 WL 140495, at 19.

124. *Id.*

125. *Id.* at 20-21.

126. *Id.* at 21.

127. TENN. CODE ANN. § 20-5-106(b) (1980).

128. TENN. CODE ANN. § 39-15-201(c) (1989).

129. 1989 WL 140495, at 21-22.

130. 109 S. Ct. 3040.

131. 1989 WL 140495, at 22.

132. 728 S.W.2d 738 (Tenn. 1987).

133. See *supra* note 19.

to them. The court reasoned that *parens patriae* controls children *in vitro* just as it does "children of a marriage at live birth in domestic relations cases."¹³⁴

The doctrine of *parens patriae* is concerned with the child's interests, not with the interests of those who claim an interest in the child.¹³⁵ Noting that to allow the embryos to remain frozen for more than two years would be tantamount to their destruction, and further noting that Mr. Davis was strongly opposed to the anonymous donation of the embryos, the court concluded it was in the best interests of the children *in vitro* that they be made available for implantation in Mrs. Davis.¹³⁶

The significance of the *Davis* decision is potentially tremendous. With infertility among married couples in the United States estimated to be around fifteen percent,¹³⁷ it is certain that IVF will become more prevalent. It is equally certain that, as a result of the growth of IVF, disputes such as the *Davises'* will become more frequent.¹³⁸

Davis may hold particular significance for Arkansas. With the passage of Amendment 68 to the Arkansas Constitution in 1988, the people of Arkansas declared that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."¹³⁹ If *Davis* is upheld as constitutional, the Arkansas courts may feel obliged to reach the same result if faced with a similar situation.

The *Davis* court's determination that *in vitro* embryos are "human beings" clearly cuts against the great weight of authority.¹⁴⁰ However, it should be borne in mind that cases dealing with the conceptus have heretofore done so in vastly different contexts.

The constitutionality of the *Davis* decision remains to be decided. If *Roe* and its progeny are viewed as protecting the right of a woman to be free from unwanted gestational and child rearing burdens, the deci-

134. 1989 WL 140495, at 23-24.

135. *Id.* at 24.

136. *Id.* at 25.

137. Vetri, *supra* note 5, at 505.

138. Lori Andrews, a legal expert on reproductive technologies (see *supra*, note 32), stated in April, 1989: "I just left a conference on cryopreservation where two doctors from other states stood up to say that they had cases very similar to the Tennessee case where there is a divorce." Smothers, *supra* note 53, at 8, col. 5.

139. ARK. CONST. amend. 68, § 2.

140. *E.g.*, 410 U.S. 113. "In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162.

sion is probably on firm constitutional footing. No such right is impinged upon by protecting the embryo *in vitro* from destruction against the wishes of one of the gamete donors. However, if *Roe* is viewed as protecting the right not to procreate,¹⁴¹ the constitutionality of the *Davis* decision is questionable. The former interpretation of *Roe* is particularly persuasive in view of the fact that the Supreme Court has held that a state may not constitutionally require a married woman to obtain spousal consent prior to an abortion.¹⁴² Presumably, if the interest protected by *Roe* is the right of procreative choice, the husband would have rights similar to the wife's regarding the decision.¹⁴³

Assuming the constitutionality of the *Davis* decision, the court's conclusion nevertheless raises the possibility of seemingly anomalous results in the area of prenatal life. By granting the embryo the status of a "human being," the court accords the embryo the full protection of the law. The right of a mother who carries a fetus *in utero* to have an abortion is, at least through the first trimester, absolute. Therefore, under the reasoning of *Davis*, an *in vitro* embryo, with less potential for life than a three-month-old fetus, is afforded far greater protection under the law.

However, the differing results may be justified when the interests involved in each case are considered. The fetus *in utero* imposes substantial burdens on the mother. The rights, if any, of the fetus and the "State's important and legitimate interest in potential life"¹⁴⁴ must therefore be balanced against the pregnant woman's interest in avoiding gestational burdens. In this context, the Supreme Court has ruled that a pregnant woman's interest will prevail.¹⁴⁵

The rights at issue in the IVF context are vastly different. The only interest that the gamete donor opposing implantation could claim

141. *Contra* Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986). "If no gestational or rearing obligations are imposed, the Court may find that there is no fundamental right to prevent unknown lineal descendants." *Id.* at 980.

142. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

143. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10 (2d ed. 1988).

Recognition of a true right to decide whether one's body shall be the source of another life would also be problematic on equal protection grounds, since such a right cannot be recognized in a man without empowering him to compel the abortion of any fetus conceived with his sperm—something forbidden under the Court's current doctrine.

Id. at 1359. For a discussion of *Roe* as it applies to IVF embryos, see Note, *Frozen Embryos: The Constitution on Ice*, 19 LOY. L.A.L. REV. 267, at 270-81 (1985).

144. 410 U.S. at 163.

145. 410 U.S. 113.

is the interest in avoiding a genetic link. When this interest is weighed against the state's interest in protecting "potential life," concluding that the scales should tip in favor of the latter is quite reasonable.¹⁴⁶ As one commentator stated:

But what of the day when even the youngest fetus can safely be removed to another woman's womb or to some artificial incubator by a procedure no more threatening to the pregnant woman's well-being than that used to accomplish an abortion? In that instance, the woman's right to terminate her pregnancy and the fetus' right to life may be vindicated simultaneously. But the woman would no longer have complete control over her reproductive destiny, since her body would be the source of a new life she may not have wished to come into being. In order to vindicate *that* right, may a pregnant woman insist not only that the unwanted fetus be removed from her body, but also that it be killed? Apart from the problematic character of any claim in behalf of such a right, its recognition and enforcement would be indistinguishable from licensing infanticide.¹⁴⁷

The rationale of the *Davis* court in reaching this result is nonetheless troubling. As previously noted, the conclusion that the human embryo is a "child" is opposed by the weight of legal authority.¹⁴⁸ The result in *Davis* could easily have been reached by making a determination that the embryos represented "potential life" and, as such, deserved state protection.¹⁴⁹

The decision in *Davis* raises additional questions in domestic relations law. For instance, does the unwilling gamete donor have support obligations toward any embryos successfully brought to term? Presumably, in the absence of contrary legislation, the unwilling donor would

146. See Robertson, *supra* note 141. "[The Supreme Court] might also prevent discard when the two gamete providers disagree about disposition. As long as the unwilling partner is not forced into gestational or rearing burdens, the partner wishing to procreate might be given priority over the partner wishing to avoid biological offspring." *Id.* at 980-81.

147. L. TRIBE, *supra* note 143, at 1359.

148. See *supra* notes 30-52.

149. *E.g.*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), wherein the court concluded that it was unnecessary to denote the conceptus a "person" to allow recovery for prenatal torts. Noting that the process which ultimately results in a person begins at conception, the court stated that "[i]f in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being." 31 N.J. at 363, 157 A.2d at 503. See also Annas, *The Ethics of Embryo Research: Not as Easy as it Sounds*, 14 L. MED. & HEALTH CARE 138 (1986), wherein the author states: "Embryos have no more 'right to life' than do fish, horses, or pigs. But that does not mean that we cannot legally protect embryos because of what they represent to us." *Id.* at 139 (emphasis in original).

have support obligations.¹⁵⁰

Another area in which the *Davis* decision may pose legal problems is inheritance law. As advances in cryopreservation technology extend the time that an embryo can be stored, the likelihood that one, or both, of the biological parents will die prior to the birth of an IVF embryo increases. The possibility of an IVF embryo being born years, or even decades, after the death of its parents presents enormous practical difficulties in the administration of the gamete donors' estates.¹⁵¹

The *Davis* decision also raises the question of what happens when *both* of the gamete donors desire to have the embryo destroyed. Presumably, a woman would not waive her right to abort a fetus after implantation.¹⁵² Thus, the state's interest in protecting the conceptus could be thwarted by the woman implanting the embryo and, if a pregnancy resulted, aborting the fetus.

Similarly, a divorce situation in which both parties desire to have the embryo brought to term would present problems under *Davis*. If the male donor has remarried and the new wife's chances of having a baby through the use of IVF are greater than the female donor's, who would receive the embryo? Presumably, if the state is primarily concerned with protecting the interests of the embryo, it should be implanted in the person with the greater chance of bringing it to term. Thus, a female donor willing to implant the embryo would be denied the opportunity.

These issues cannot presently be resolved. IVF presents extremely complex legal and moral issues which must be addressed by either state legislatures or the courts. Although the desirability of legislative intervention at this early stage in the development of IVF is questionable, even more troubling is the prospect of necessarily ad hoc judicial decisions concerning the rights and obligations of IVF participants.

At present, couples contemplating IVF, as well as the clinics ad-

150. See *Pamela P. v. Frank S.*, 110 Misc. 2d 978, 443 N.Y.S.2d 343 (N.Y. Fam. Ct. 1981) (fact that the unmarried mother of a child had intentionally deceived the father into believing that she was using contraception does not relieve the father of child support obligations if the mother is financially unable to provide the child with a standard of living equal to that of the father). See also *Robertson*, *supra* note 113, at 8.

151. See *Andrews*, *supra* note 32, at 392-94.

152. *E.g.*, *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987) (clause in surrogate parenting contract prohibiting abortion except as allowed by the male promisor held violative of the female surrogate's constitutional right to an abortion and, thus, void and unenforceable).

ministering it, are unsure of the "rules of the game."¹⁵³ Consequently, couples and clinics alike are forced to resort to the courts both to enforce their rights and to determine what those rights are.

The unknown status of the IVF embryo is an example of "[l]aw, marching with medicine but in the rear and limping a little."¹⁵⁴ It is a situation in desperate need of very cautious, very deliberate, legislative action.

David P. Martin

Editor's Note

After this note was accepted for publication, Davis was reversed by the Court of Appeals of Tennessee. Davis v. Davis, 59 U.S.L.W. 2205, 1990 WL 130807 (No. 180 Tenn. App. Sept. 13, 1990). Ignoring the trial court's findings of fact and reversing the trial court's findings of law, the appellate court held that the Davises share an equal interest in the embryos. Id., 59 U.S.L.W. at 2206. Pursuant to Tennessee Code of Appellate Procedure Rule 11, Mrs. Davis filed an Application for Permission to Appeal with the Tennessee Supreme Court. A ruling on the application is expected before December 1990.

153. Most clinics require the gamete donors to sign an agreement regarding the disposition of embryos upon dissolution of the marriage, death of one of the partners, etc. *E.g.*, University Hospital [of Arkansas] In Vitro Fertilization Program Human Embryo Cryopreservation Program: Control and Disposition of Embryo(s) Statement (available from The University Hospital of Arkansas, Little Rock, Ark.). However, the enforceability of these agreements is untested and unknown.

154. Kirby, *Medical Technology and New Frontiers of Family Law*, 14 L. MED. & HEALTH CARE 113 (1987) (quoting Mount Isa Mines Ltd. v. Pusey, 125 C.L.R. 383 (1970)).