

2008 EMBRYO LAW ESSAY COMPETITION

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I. INTRODUCTION

This essay contemplates a very complicated subject referred to as “third party reproduction,” which is a reference to “the use of *eggs*, *sperm*, or *embryos* that have been donated by a third person (donor) to enable an infertile individual or couple (intended recipient) to become parents.”¹ The donor may be known or anonymous to the recipient, but for purposes of this essay, the donor is anonymous.² Third party reproduction is a very complex process and raises a number of concerns, including ethical, legal, and social issues.³ For example, when a couple no longer wishes to utilize embryos which were created for themselves, that couple may wish to donate or give up the embryos for adoption, which transfers the remaining embryos to another infertile couple who wishes to become pregnant.⁴ Additionally, parentage issues can arise when individuals give birth to children to whom they have no, or only partial biological ties—i.e. their own sperm or egg combined with a donated sperm or egg—or when a surrogate is used to carry the child for a couple.

A form of Assisted Reproductive Technology (“ART”) referred to as In Vitro Fertilization (“IVF”) has produced nearly 500,000 frozen embryos now in storage in the United

¹ American Society for Reproductive Medicine, *Third Party Reproduction (Sperm, Egg, and Embryo Donation and Surrogacy), A Guide for Patients* (2006), <http://www.asrm.org/Patients/patientbooklets/thirdparty.pdf>.

² *See id.*

³ *See id.*

⁴ *See id.*

States.⁵ Even though “embryo donation” and “embryo adoption” are terms often used interchangeably, there are differences between the two programs.⁶ While embryo adoption offers more protection to the families involved by use of home studies and other more traditional adoption procedures, embryo donation is less formal with little or no contact between the families.⁷ The situation this essay addresses is an embryo donation scenario. First, the essay will describe the complicated fact situation which contains a number of issues for which current case law does not provide clear guidance. Part III will discuss Egg Donor Agreements as relating to embryo donation and will contemplate appropriate remedies for situations when these agreements are breached. Parts IV and V will analyze the rights and liabilities of the various parties involved, including the anonymous egg donor, the donors of the embryo, the recipients of the embryo, and the fertility clinics involved in the ART. Lastly, the essay will discuss important policy issues, which must be considered when dealing with such a delicate and sensitive issue as human reproduction.

⁵ Nightlight Christian Adoptions, *What is Embryo Donation and Adoption?*,
<http://www.embryoadoption.org/about/index.cfm>.

⁶ *See id.* *See also* Public Awareness on Embryo Adoption and/or Donation, 71 Fed. Reg. 30410-01 (May 26, 2006) (announcing availability of funds from the Office of Public Health and Science, the Office of the Secretary, and the Department of Health and Human Services to support “increasing public awareness of embryo donation and/or adoption”).

⁷ *See* Nightlight Christian Adoptions, *What is Embryo Donation and Adoption?*,
<http://www.embryoadoption.org/about/index.cfm>.

II. FACTS

Mr. and Mrs. Jones (“Joneses”) received five donated frozen embryos from Mrs. Jones’s cousin, Mr. Peterson and his wife (“Petersons”). The two couples signed a written agreement to facilitate this transfer without exchange of money. Mrs. Jones was implanted with three viable embryos and is now six months pregnant due to a successful IVF treatment done by a licensed fertility clinic. The Petersons created the embryos with Mr. Peterson’s sperm and an anonymously donated egg when they signed an egg donor agreement three and a half years ago. A now defunct egg donation facility arranged the agreement, and the Petersons never had contact with the egg donor. The Petersons both signed the egg donor agreement, but never noticed two of the clauses until Mrs. Jones was six months into her pregnancy with the donated embryo. The agreement gave the Petersons ownership of the ova and resulting embryos as joint tenants with rights of survivorship⁸ and gave them “complete control and authority over the disposition of the ova and resulting embryos.” However, an additional clause limited the Petersons’ disposition in that they were not to “donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos” to anyone else unless they were working with a surrogate for purposes of conception.

As a result of this situation, several issues arise. First, one must evaluate the egg donor agreement and determine whether it is a valid contract, and if so, what remedies exist if the Petersons breached the contract. Second, one must evaluate the rights and liabilities of each party, most importantly to determine which party has parental rights regarding the child Mrs. Jones is carrying. Lastly, this situation raises very important public policy concerns that cannot

⁸ BLACK’S LAW DICTIONARY 625 (3rd pocket ed. 2006) (defining joint tenancy with a right of survivorship as “[a] joint tenant’s right to succeed to the whole estate upon the death of the other joint tenant”).

be ignored. What can and should be done with frozen embryos when parties no longer need or want them, and the parental rights of couples receiving donated embryos are the two main concerns on which this essay will focus.

III. Interpretation of Egg Donor Agreements

a. Relating to Embryo Donation

Very few, if any, courts have considered the precise situation in which the Petersons and Joneses find themselves. However, many courts do provide instructions on contract interpretation. In *Roman v. Roman*, a Texas court presumes parties intend every clause in the contract to have an effect and absent any vagueness or uncertainty, it will interpret the contract as a matter of law.⁹ For a contract to be valid and binding five elements must be met: (1) there must be an offer; (2) the terms of that offer must be accepted in strict compliance; (3) a “meeting of the minds” must occur; (4) each party must consent to the contract’s terms; (5) the contract must be executed and delivered with an intent it will be binding and mutual.¹⁰ This court, which considered an agreement between progenitors whom happened to be husband and wife, stated these agreements should be enforced unless public policy has been violated in some way.¹¹ The court went on to find embryo agreements do not violate the public policy of Texas and ordered enforcement of the parties’ original agreement in that the fertility clinic was to discard the embryos.¹²

⁹ *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 50 – 55.

In *Litowitz v. Litowitz* the Supreme Court of Washington considered an egg donor agreement very similar to the agreement the Petersons signed.¹³ Like the Petersons, this agreement forbade the intended parents from allowing any other party to utilize the donated eggs absent the donor's express written permission.¹⁴ While the court found egg donor contracts must be adhered to, it did not find the contract binding in this case because it referred only to the use of the eggs, and not any subsequent embryos created with those eggs.¹⁵ Because the eggs no longer existed as eggs, but had changed form and become embryos, the court stated the egg donor contract could not control the disposition of the embryos.¹⁶

Because there is an “emerging majority view that written embryo agreements between embryo donors and fertility clinics to which all parties have consented are valid and enforceable,” one may logically conclude agreements involving the egg donor and intended parents such as the Petersons will also be enforceable.¹⁷ However, one must not make a blanket statement and claim all contracts in ART situations will be enforceable. As one commentator noted, “[t]raditional contract notions obviously cannot be applied to mistake cases.”¹⁸ This

¹³ See *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (ordering a husband and wife to abide by their original contract in the disposition of frozen embryos even though the wife had changed her mind).

¹⁴ See *id.* at 263.

¹⁵ *Id.* at 269.

¹⁶ *Id.*

¹⁷ See *Roman*, 193 S.W.3d at 48.

¹⁸ Leslie Bender, “*To Err is Human*” *ART Mix-Ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 460 (2006).

author considered situations in which ART clinics accidentally implanted the wrong frozen embryo resulting in a woman giving birth to a child that is not her own biological child.¹⁹ The solution proposed by this author is, absent any other contractual agreement to provide for such mistakes, the woman that carries the child and gives birth should have the first choice as to whether she will keep that child as her own or give it to the biological parents.²⁰

Unfortunately, there does not appear to be one clear answer to solve the Peterson and Jones dilemma in regards to contract interpretation. More than likely, the contract the Petersons made with the now-defunct egg donation facility is enforceable.²¹ However the facts do not divulge important information necessary to determine if a valid contract was made to begin with. If all the elements were not present, then likely there will be no contract and therefore no breach. If there was a contract, perhaps the “traditional contract notions” should not be applied, as there was an obvious mistake made in donating the embryos against the donor and donation facility’s wishes.²² Because it is impossible to determine whether a valid contract was formed give these facts, the second view, disallowing the traditional contract notions, could be one suitable option in this situation. Adopting this view would allow the Joneses to keep the child. However, even

¹⁹ *Id.*

²⁰ *Id.* at 506.

²¹ The facts do not indicate whether the egg donor agreement is between the Petersons and the clinic, or the Petersons and the egg donor. Therefore, this essay will analyze the potential conflicts between the Petersons and both the clinic and egg donor.

²² *See id.*

if these facts support a valid breach of contract action, there seems to be very few remedies available to the anonymous egg donor or the out-of-business facility that arranged the donation.²³

If the agreement the Petersons signed regarding the egg donation is valid, then the Petersons did not have the right to make the agreement with the Joneses, as the egg donor agreement specifically prohibited them from donating the embryos.²⁴ This situation is unlike that found in *Litowitz*, because the Peterson's egg donor agreement did not limit donation of only the eggs, but included embryos as well; therefore the Petersons never had the right to donate the embryos.²⁵ Because the embryo donation agreement is invalid, the Joneses will have no contract remedy and no way to enforce the agreement.²⁶

²³ See UNIF. PARENTAGE ACT § 702 cmt., 7 U.L.A. 1 (2002) (“The new UPA does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction. Issues such as ownership and disposition of embryos, regulation of the medical procedures, insurance coverage, etc., are left to other statutes or to the common law. Only the issue of parentage falls within the purview of this Act.”).

²⁴ See *Griffin v. Smith*, 101 F.2d 348, 349 (7th Cir. 1938) (stating a contract is void when two parties go through the act of making a contract, but some missing essential element renders the contract invalid as if it were never made).

²⁵ See *Litowitz*, 48 P.3d at 269.

²⁶ See *Griffin*, 101 F.2d at 349 (“A void contract . . . is ineffective for all purposes, and the court may find itself unable to grant relief to either party.”).

b. Remedies

The Second Restatement of Contracts describes three judicial remedies that may apply when a party breaches his contract.²⁷ One remedy includes expectation damages, which places a party in the position he would have been in had there been no breach of contract.²⁸ Expectation damages should not be awarded to the Petersons' anonymous egg donor or the clinic because there has been no change in position due to this breach.²⁹ The eggs have been donated, the agreement facilitated, and presumably the parties have already received the "benefit of the bargain."³⁰ Another remedy awarded in breaches of contract are reliance damages, which reimburse a party for the losses caused by his reliance on the contract, and attempt to place a party "in as good a position as he would have been in had the contract not been made."³¹ Neither the Petersons' anonymous donor nor the clinic should receive reliance damages either, because one may presume each has already been reimbursed for the egg donation and facilitation of the agreement.

Lastly, a party may receive restitution damages, which restores to the wronged party any benefit conferred onto the breaching party.³² Again, it is difficult to see how the Petersons'

²⁷ RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

²⁸ *Id.*

²⁹ Because the clinic that facilitated the egg donor agreement is out of business, it obviously cannot receive any kind of remedy because it no longer exists as an entity. However, for sake of analysis this portion of the essay will treat the facility as if it were still in existence.

³⁰ *See id.*

³¹ *Id.*

³² *Id.*

donor or clinic could receive restitution damages because the breach by the Petersons did not confer any benefit onto them, at least not monetarily. Therefore, even though the Petersons did unwittingly breach the contract, it appears there are no remedies available to the anonymous egg donor or clinic. One must also keep in mind damages for emotional distress are usually not available for breaches of contract.³³ In fact, emotional distress damages are excluded “unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”³⁴ The breach by the Petersons clearly caused neither the anonymous egg donor nor the clinic no bodily harm, and it is very difficult to see how emotional distress would be a likely result particular to this breach. Therefore, damages will probably not be recovered on this theory either.

IV. Rights

a. The Recipients of the Embryos (Jones)

Mr. and Mrs. Jones may have trouble establishing they are the legal parents of the child Mrs. Jones is carrying given the current situation. Because the donation agreement is probably invalid, the Petersons still own the embryos. Therefore, Mrs. Jones might be viewed as a surrogate carrying the Petersons’ child. Even if that is true, that does not mean Mr. and Mrs. Jones have no claim to the child, it simply means they will not be the parents automatically upon

³³ RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

³⁴ *Id.* See *Frisina v. Women and Infants Hosp. of R.I.*, No. CIV. A. 95-4037, 2002 WL 1288784 at *1, 10 (R.I. Super. May 30 2002) (unpublished opinion) (disallowing a cause of action for negligent infliction of emotional distress against a fertility clinic that caused the loss and destruction of frozen embryos).

the child's birth, even though both parties probably had that intention.³⁵ Although there few, if any, cases which deal exactly with this situation, many cases provide guidance as to how a court may handle the Jones and Peterson dilemma.

The gestational carrier in the case *In re C.K.G., C.A.G. & C.L.G.* ("*In re C.K.G.*") faced a slightly analogous situation as Mr. and Mrs. Jones face.³⁶ In this case, the woman was implanted with embryos created from her boyfriend's sperm and an anonymous donor's eggs.³⁷ The couple intended to raise the children together, but when their relationship fell apart the man claimed the woman had no standing as a parent and sought sole and exclusive custody.³⁸ The court examined genetics, intent, and gestation factors and found all three important to consider for establishing legal maternity.³⁹ This court issued a very narrowly-tailored ruling and found the woman was the legal mother based on the facts of this case, but was careful to note the legislature would be better suited to create a general rule for such situations.⁴⁰

³⁵ The facts do not divulge the terms of the embryo donation agreement, however embryo donation and adoption programs exist to allow embryos to be transferred to a recipient couple so that they may experience childbirth become that child's parents. Nightlight Christian Adoptions, *What is Embryo Donation and Adoption?*, <http://www.embryooption.org/about/index.cfm>.

³⁶ *In re C.K.G., C.A.G. & C.L.G.*, 173 S.W.3d 714 (Tenn. 2005).

³⁷ *Id.* at 716.

³⁸ *Id.*

³⁹ *Id.* at 727 – 29.

⁴⁰ *Id.* at 730 –31.

Johnson v. Calvert also gives guidance in determining whom shall receive “natural” or “legal” status as the mother of a child born by ART.⁴¹ In this case, the Calverts used their own sperm and eggs to create embryos which were implanted in Johnson, whom had agreed to serve as a surrogate.⁴² Johnson filed an action to be declared the mother of the child, despite having no genetic connection to the child and having signed an agreement relinquishing all parental rights in favor of the Calverts.⁴³ The court stated, “in a true ‘egg donation’ situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.”⁴⁴ However, this case was not a donation situation as the Calverts never intended to donate genetic material but always intended to procreate a child genetically and raise it as their own.⁴⁵

Johnson’s description of a “true egg donation situation” applies directly to Mr. and Mrs. Jones. Mrs. Jones is gestating and will give birth to a child formed with the egg of another woman. Presumably, the Joneses intend to raise the child as their own. If the Joneses lived in California, there would be no question the child would be theirs. More than likely other jurisdictions would also hold this to be true.⁴⁶ In applying the *In re C.K.G.* holding to the

⁴¹ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (en banc).

⁴² *Id.* at 778.

⁴³ *Id.*

⁴⁴ *Id.* at 782.

⁴⁵ *Id.* at 787.

⁴⁶ *See e.g.*, *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002) (discussing *Johnson* in a positive light and applying it to an similar situation involving issues between a surrogate and intended

Joneses' situation, a court could find the Joneses satisfied two out of three important elements in establishing maternity—gestation and intent.⁴⁷ However, because the donation agreement likely establishes intent—and that agreement is probably void—the Joneses are left with gestation as the only prong of the *In re C.K.G.* test they satisfy.⁴⁸ Reading the holdings of *In re C.K.G.* and *Johnson* together, this will probably not be enough to establish the parentage in favor of the Joneses.

b. The Donors of the Embryos (Petersons)

The Petersons had the right to enter the contract with the anonymous donor and the clinic facilitating the agreement, and they theoretically had the right to include any term in the contract they desired.⁴⁹ The contract would then be enforceable as long as it did not violate public policy.⁵⁰ The Petersons did utilize this right to enter the contract, but evidentially made no attempt to include terms which would allow them to transfer the embryos as they desired. They also did not take advantage of another right, (or perhaps 'duty' would be a more appropriate term), which was to read the contract they signed. "Absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it had different terms."⁵¹ So, while the Petersons did have the right to sign the contract, they

parents); *In re Doe*, 793 N.Y.S.2d 878 (Surr. Ct. 2005) (applying *Johnson* to determine twins born by a surrogate eligible to take under the biological father's trust).

⁴⁷ See *In re C.K.G.* at 730.

⁴⁸ See *id.*

⁴⁹ See *In re Marriage of Witten III*, 672 N.W.2d 768, 776 (Iowa 2003).

⁵⁰ *Id.*

⁵¹ *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005).

must be held to its terms because there are no facts to indicate fraud, misrepresentation, or deceit played a part in forming the contract. However, given the fact the facility which arranged this contract is out of business, maybe a deeper look into the facts surrounding that time period could indicate fraudulent behavior. As it stands with the current facts, there was no fraud and the contract does not appear to violate public policy.

The Petersons did have the right to place their embryos with another family, but only so long as the contract with their donor did not specify the embryos were for their use only.⁵² The court in *In re Witten III* allowed couples to change their minds regarding disposition of embryos, but only when the dispute between the couple and the contract governing the disposition of embryos lies with an ART facility.⁵³ In the Petersons' situation, the "dispute" is not between Mr. and Mrs. Peterson, but rather with the anonymous donor or the clinic. Therefore, the limited holding in *In re Witten III* would not apply directly to the Petersons and they could not change their mind regarding the egg donor agreement they signed. However, perhaps a good argument could be made for the Petersons, because their right to determine what happens to their embryos is a very important right with huge ramifications.⁵⁴ Maybe a court examining the Petersons and

⁵² Nightlight Christian Adoptions, *Frequently Asked Questions*,

<http://www.embryoadooption.org/faqs/index.cfm>.

⁵³ *See In re Witten III*, 672 N.W.2d at 782 – 83.

⁵⁴ *See id.* at 783 (requiring signed authorization from both of the Wittens before any transfer, release, disposition, or use of the embryos could occur); Jill. R. Gorny, Note, *The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for Their Disposition?*, 37 SUFFOLK U.L. REV. 459, 461 (2004) (discussing the various controversies surrounding disposition of

Joneses situation would take the position as the court did in *In re Witten III*, and allow the Petersons to change their minds regarding the disposition of their embryos despite what the egg donor agreement stipulates.

However, as it stands now, the Petersons very likely have the legal right to the child Mrs. Jones is carrying. The egg donor agreement forbade them to donate the embryo, but did allow them to implant the embryo into a gestational surrogate who would work with the Petersons for the purpose of conception. Assuming this agreement is valid and the donation agreement with the Joneses is invalid, the Petersons could argue Mrs. Jones is their surrogate and could claim the child she is carrying is theirs.

c. The Anonymous Egg Donor

The anonymous donor does not appear to have many rights in this situation, or at least she appears to have no parental right over the child Mrs. Jones is carrying. While the contract she signed gave the Petersons the right to be joint tenants with rights of survivorship over the embryos and states the Petersons will be the owners of the ova and subsequent embryos, it does not specifically state she has given up all maternal rights. Nevertheless, there are a few states that have dealt with egg donor situations legislatively and judicially which may give direction.

Texas specifically spells out in its Family Code “[a] donor is not a parent of a child conceived by means of assisted reproduction.”⁵⁵ Florida also has a similar statute, as one of its

frozen embryos and summarizing alternatives for their disposition such as donation, adoption, scientific research, and simply throwing them away).

⁵⁵ TEX. FAM. CODE ANN. § 160.702 (Vernon 2002). The Uniform Parentage Act also advocates this position. UNIF. PARENTAGE ACT § 702, 7 U.L.A. 1 (2002).

courts discusses in *L.A.L. v. D.A.L.*⁵⁶ This court dealt with the rights of a sperm donor, but the statute makes it clear egg donors also “shall relinquish all maternal . . . rights and obligations with respect to the donation or the resulting children.”⁵⁷ Yet another court in Tennessee considered this issue and also concluded because the genetic “mother” donated her eggs and likewise waived her parental rights, she had therefore relinquished her position as the legal mother.⁵⁸ Taking these cases and statutes into consideration, the Petersons’ anonymous donor very likely has no maternal claim over the child Mrs. Jones is carrying. Her rights are limited to whatever may be determined as a remedy for the breach of contract, if indeed there was a breach. However, as discussed in Part III b, there may very well be no remedies available to her.

V. Liabilities

a. The Recipients of the Embryos (Joneses)

The Joneses biggest issue is they do not appear to have a legal right to the child Mrs. Jones is carrying. Mr. and Mrs. Peterson will most likely be the legal parents of the child. However, all is not lost for the Joneses if the Petersons are still willing to cooperate. In fact, a relatively easy solution exists if the Petersons are amiable. The Petersons and Joneses could

⁵⁶ *L.A.L. v. D.A.L.*, 714 So.2d 595, 596 (Fla. Dist. Ct. App. 1998) (per curiam).

⁵⁷ *Id. Compare* Hecht v. Superior Court, 20 Cal. Repr.2d 275 (Cal. Ct. App. 1993) (“[S]perm banks generally require those donors who are to be anonymous to sign a written waiver of any rights to the deposit and any paternity claims to children born from it.”) *with In re Sullivan*, 157 S.W.3d 911 (Tex. App.—Houston [14th Dist.] 2005, pet denied.) (finding a man who had donated his sperm to an acquaintance and signed a “Co-Parenting Agreement” which stated his intent to have an active role as a father had standing to bring a paternity suit).

⁵⁸ *In re C.K.G.*, 173 S.W.3d at 729.

arrange for the termination of the Petersons' parental rights and the adoption of the child by the Joneses.⁵⁹ If the Petersons are not amiable, the result for the Joneses is less certain. As mentioned in Part IV a, there is a good possibility the Joneses could lose a suit over parentage.

b. The Donors of the Embryos (Petersons)

The Petersons' liabilities are uncertain. As discussed earlier, in Part III a, there may or may not have been a breach of contract. Part III b illustrates that even if a valid contract is found and the Petersons breached it, they still may have no financial liability to the anonymous egg donor or the clinic that facilitated the egg donor agreement. If the Petersons agree to cooperate with the Joneses and terminate their parental rights, then the situation will come to a close with little or no liability attaching to them. However, if they change their minds and determine to keep the child Mrs. Jones is carrying, then they will probably face a battle. Although it is impossible to say, one can speculate the Joneses will fight to keep the child if the Petersons attempt to enforce their parental rights. As mentioned in Part IV a and b, the Petersons have the strongest claim over the child, and will probably win if they attempt to keep the child.

c. The ART Clinic

Unfortunately, since ART has been an option for infertile couples, many tragic mistakes have occurred. In most of these cases, the clinic is held liable for these mistakes. Recently in

⁵⁹ The procedures for terminating parental rights and adopting a child vary from state to state. In Texas, the procedures can be found in TEX. FAM. CODE ANN. §§ 160.001 -- 602 (Vernon 2002). In Texas, the parental termination order can be rendered at the same time as the adoption order and so long as the court finds all requirements have been met and it is in the best interest of the child, the court will grant the adoption. *Id.* § 162.016.

Am. Econ. Ins. Co. v. Schoolcraft a U.S. District Court in Colorado held a fertility doctor and clinic liable when donated eggs carrying the cystic fibrosis gene were used.⁶⁰ The woman implanted with the embryos gave birth to twins, one of which was diagnosed with cystic fibrosis.⁶¹ In another heartbreaking mistake case, a woman was implanted with another couple's embryos along with her own, resulting in twins—only one of which was her own biological child.⁶² The two couples involved in the mix-up, one Caucasian and the other African American, were able to work out an agreement among themselves concerning the children, but each individually sued the clinic.⁶³ When the court refused to dismiss the case in favor of the clinic, the parties ended up settling out of court nearly five years after the first lawsuit was filed.⁶⁴

Clinics have been sued for other reasons as well, perhaps less dramatic but equally devastating to the parties personally involved. In *Jeter v. Mayo Clinic*, the Jeters brought claims

⁶⁰ *Am. Econ. Ins. Co. v. Schoolcraft, M.D., P.C.*, No. 05-cv-01870-LTB-BNB, 2007 WL 2261649, at *1 (D. Colo. Aug. 6, 2007).

⁶¹ *Id.*

⁶² *Fasano v. Nash*, Nos. 107068/99, 601218/99, 200 WL 35534976 at *1 (N.Y. Sup. Mar. 2, 2000).

⁶³ *Id.* at *2 (agreeing that each couple should raise their own biological child, but that the two boys should be brought up as brothers and allowed to visit each other).

⁶⁴ *See Fasano v. Nash*, 282 A.D.2d 277 (N.Y. App. Div. 2001) (denying petitioners motion to dismiss for failure to state a cause of action); *Bender, supra*, at 448 (discussing the *Fasano* case). *Cf. Perry-Rogers v. Obasaju*, 282 A.D.2d 231 (N.Y. App. Div. 2001) (rejecting a doctor's malpractice claim for emotional harm damages caused after he mistakenly implanted the plaintiff's embryo into another woman).

of wrongful death, negligent loss of irreplaceable property, and breaches of fiduciary duty and bailment contract when their embryos were lost or destroyed.⁶⁵ The *Jeter* court allowed each cause of action against the clinic except wrongful death, because it found “absent legislative action expanding the wrongful death statutes, as a matter of law, a cryopreserved, three-day old fertilized human egg is not a ‘person’ for purposes of [the wrongful death] statute.”⁶⁶ In *York v. Jones*, a U.S. District Court in Virginia refused to dismiss a case against a clinic that had refused to consent to an inter-institution transfer of a couple’s pre-zygote.⁶⁷

Given the vast array of issues for which ART clinics have been found liable, there is a slight possibility liability could be assigned to the clinic Mr. and Mrs. Jones used. One could argue the clinic should have known the embryos were not eligible for donation and never should have implanted them in Mrs. Jones. While there is little, if any, case law discussing a situation the Joneses and Petersons find themselves facing, the cases discussing liability of ART clinics suggest a party attempting to assign the liability to the clinic may very well be successful.⁶⁸ Mr. and Mrs. Jones would be the most obvious party to bring suit against the clinic should any future litigation ensue against them, as the clinic certainly had a duty to them. Although there is no mention of a contract, one can reasonably assume the Joneses and their ART clinic had a contract, so perhaps a breach of contract claim may lie there as well.

⁶⁵ *Jeter v. Mayo Clinic Ariz.*, 131 P.3d 1256, 1259 (Ariz. Ct. App. 2005).

⁶⁶ *Id.*

⁶⁷ *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989).

⁶⁸ *See id.*; *Jeter*, 131 P.3d at 1259; *Fasano*, 282 A.D.2d at 277; *Am. Econ. Ins. Co.*, 2007 WL 2261649, at *1; *Bender*, *supra*, at 443 – 453.

VI. Policy Issues

While the egg donor agreement specifies the Petersons cannot donate, sell, or transfer the embryos, it does not specify what the Petersons may do with the embryos once they have decided not to utilize them for themselves. So the question is—what happens to the embryos now? Are they simply supposed to sit in a cryopreserved state forever? May they be used for scientific research such as stem cell development? Or should they simply be discarded as some form of biological waste? These questions have plagued many courts and there appears to be no uniform way to answer any of the above questions.

Typically these questions arise in divorce disputes between husbands and wives. *Davis v. Davis*, a Tennessee Supreme Court case, was one of the first courts to consider what happens to frozen embryos when the soon-to-be ex-husband and wife cannot agree upon their disposition.⁶⁹ The Davises had not signed an agreement specifying what was to be done with unused embryos, and there was neither legislation nor case law to guide the court in its decision.⁷⁰ Ultimately the court balanced the interests of the two parties and determined the party desiring to evade procreation should prevail as long as the other party had reasonable means of becoming a parent without use of the embryos in dispute.⁷¹

⁶⁹ *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

⁷⁰ *Id.* at 590.

⁷¹ *Id.* at 604. One other noteworthy finding in this case was that the court found the frozen embryos did not enjoy protection as “persons” under Tennessee or federal law. *Id.* at 594 – 595. *See also*. Roman, 193 S.W.3d at 54 – 55 (holding a “just and right” division of marital property awarding embryos to Mrs. Roman improper when the embryo agreement unambiguously provided the embryos be discarded in the event of divorce).

The Supreme Court of Massachusetts considered substantially the same situation in 2000 in *A.Z. v. B.Z.*⁷² However, this case differed from *Davis* in that the couple did have an agreement as to what would become of the embryos in the event of a separation—the wife was to retain the embryos for implantation.⁷³ The court found the agreement unenforceable and against the state’s public policy because “individuals shall not be compelled to enter into intimate family relationships, and [] the law shall not be used as a mechanism for forcing such relationships when they are not desired.”⁷⁴ Perhaps this case could be applied to the Jones and Peterson dilemma, but for different reasons. One can argue it would be against public policy to enforce the Petersons’ egg donor agreement. Mr. Peterson obviously does not object to the donation of the embryos, and the anonymous egg donor has no parental rights and cannot object. The better public policy to advocate is that of allowing the embryo an opportunity to be born to a couple that desperately desires to become parents, as opposed to the alternative of becoming biological waste or scientific research material.⁷⁵

⁷² *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000).

⁷³ *See id.* at 1054.

⁷⁴ *Id.* at 1059.

⁷⁵ Focus on the Family, *What Are Your Views on Embryo Adoption (Donation)?*,

[http://family.custhelp.com/cgi-](http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=1190&p_created=1044908302)

[bin/family.cfg/php/enduser/std_adp.php?p_faqid=1190&p_created=1044908302](http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=1190&p_created=1044908302) (providing Dr.

James Dobson’s view that embryos have an eternal soul which began the moment they were

fertilized and finding couples that adopt and implant these embryos have an opportunity to

“rescu[e] embryos that have no other possibility of life”).

The public policy argument can also be supported by *In re Witten III*.⁷⁶ This court found it was against public policy to enforce a contract regarding the disposition or use of embryos when one party later changes his or her mind about the earlier agreement.⁷⁷ Therefore, prior agreements *between couples* were unenforceable when one is no longer at ease with his or her former decision.⁷⁸ The court concluded the better practice is to follow a “contemporaneous mutual consent” model which allows no transfer, release, disposition, or other use of the embryos without a signed authorization of each donor.⁷⁹ The Petersons would obviously not be desirous of this result, because they wanted to donate their embryos to the Joneses. However, because the dispute is not between a couple, as the *In re Witten III* court limits its ruling, perhaps this case could be argued in favor of the Petersons.⁸⁰ Even though the Petersons did not read the portion of the egg donor agreement limiting their ability to donate the embryos, they obviously changed their minds and wished to do so. Because the *In re Witten III* court states such contracts are not enforceable if one party changes his or her mind, the Petersons can argue they had the right to change their minds and donate the embryos to the Joneses.⁸¹

⁷⁶ *In re Witten*, 672 N.W.2d at 780 (“[A]ny contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy”).

⁷⁷ *Id.* at 781.

⁷⁸ *Id.* at 780.

⁷⁹ *Id.* at 783.

⁸⁰ *See id.* at 782.

⁸¹ *See id.* at 781. *But see* Kass v. Kass, 235 A.D.2d 150 (N.Y. App. Div. 1997) (holding a party’s change of heart regarding disposition of embryos cannot be allowed to unilaterally change their mutual decision recorded in an earlier agreement), *aff’d*, Kass v. Kass, 91 N.Y.2d

While courts do have power to “determine public policy in the absence of any constitutional or statutory declaration” many are hesitant to do so on ART issues and prefer to leave such complex public policy issues to the legislation.⁸² While it is true legislators have a better opportunity to investigate these issues and debate the opposing values, a court still needs to make a determination when the issues are before it.⁸³ In that case it is important to remember:

It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.⁸⁴

Additionally it is important to remember children are not property and the interest a State has in protecting the welfare of a child is exceedingly superior to the State’s interest in managing embryos.⁸⁵ Taking these ideas into consideration, it appears a public policy argument may help in the Jones and Peterson dilemma. Not only does public policy support protecting the child, i.e. the child Mrs. Jones is carrying, but it also supports the use of ART in the absence of legislative mandates inhibiting the ART in some way. The Petersons can argue the portion of their egg donor agreement restricting their right to donate the embryos was void as against public policy;

554 (N.Y. 1998) (affirming the Appellate Division’s order that the parties’ agreement requiring donation to the IVF program must control the disposition of the embryos).

⁸² *In re C.K.G.*, 173 S.W.3d at 730 – 31.

⁸³ *Id.*

⁸⁴ Hecht, 20 Cal. Repr.2d at 290 – 91.

⁸⁵ *In re C.K.G.*, 173 S.W.3d at 726 – 27.

therefore the donation agreement with the Joneses will be valid and the Joneses will likely be the parents of the child Mrs. Jones is carrying.⁸⁶

Louisiana's legislature has gone the extra mile in affording protection to frozen embryos. One of its statutes maintains "[a]n 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 law."⁸⁷ In Louisiana, an embryo is recognized as a separate being distinct from the medical clinic or facility which stores it, and is not considered property.⁸⁸ Should the ART patients fail to express their identity, a doctor will be made temporary guardian of the embryo until an adoptive implantation can be arranged.⁸⁹

If the Petersons and Joneses lived in Louisiana, there would be no problem because it appears the egg donor agreement would run contrary to this law and therefore be void.⁹⁰ Because in Louisiana the embryo must be used, either by the genetic providers or an adoptive couple, the Petersons would certainly be allowed to donate their embryos to the Joneses.

⁸⁶ See *In re Witten*, 672 N.W.2d at 780 ("[A]ny contract which conflicts with the morals of the times or contravenes any established interest of society is contrary to public policy"); RESTATEMENT (SECOND) OF CONTRACTS § 178 (discussing situations when a contract or term of a contract is void as against public policy).

⁸⁷ LA. REV. STAT. ANN. § 9:123 (2000).

⁸⁸ *Id.* § 9.125 – 9.126.

⁸⁹ *Id.* § 9.126.

⁹⁰ See *Griffin*, 101 F.2d at 349 ("A void contract, one made in the face of absolute inhibition by statute, is ineffective for all purposes, and the court may find itself unable to grant relief to either party.").

Unfortunately, Louisiana is a minority in this respect, and only New Mexico has a similar law.⁹¹ Consequently, in most states, the Petersons and Joneses will need to rely on the public policy argument.

VII. Conclusion

The uncertain state of ART law makes it difficult to reach any concrete conclusions. More than likely, the agreement the Petersons made with their egg donor through the now-defunct clinic will be valid. Although there will be no remedy available to the clinic or the egg donor despite the breach in donating the embryos to the Joneses, the donation agreement with the Joneses will likely be invalid. In this case, the Joneses have a tenuous claim to the child Mrs. Jones is carrying and may very well lose a court battle if the Petersons attempt to enforce their rights to the child. At this point, the easiest and most likely way the Joneses can become parents of this child is if the Petersons relinquish their rights and the Joneses adopt the child. The other option is for the Petersons to claim the portion of their egg donor agreement that prohibited them from donating the embryos was against public policy. Unfortunately, Louisiana's statutes giving embryos recognition as a juridical person will not likely sweep the nation. And sadly, conservative views as those held by Dr. Dobson⁹² are not prevalent throughout our court systems either. Until federal and state legislatures determine the status of embryos, parties in the Petersons' and Joneses' position will need to rely upon the mercy of courts to make a public policy decision in their favor.

⁹¹ See Gorny, *supra*, at 471.

⁹² See Focus on the Family, at http://family.custhelp.com/cgi-bin/family.cfg/php/enduser/std_adp.php?p_faqid=1190&p_created=1044908302.