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A DIFFERENT KIND OF LIFE ESTATE: THE LAWS, RIGHTS, AND LIABILITIES ASSOCIATED WITH DONATED EMBRYOS

Sex was not working. Mr. and Mrs. Jones,[1] like many other couples, had difficulty getting pregnant. Their struggle to achieve pregnancy was a painful experience that occasionally was a strain on their otherwise blissful marriage. Mrs. Jones's cousin, Mr. Peterson, also had difficulty with his wife in achieving pregnancy. Sharing this struggle with each other brought courage and comfort to both couples. The Petersons eventually were successful in achieving pregnancy through *in vitro* fertilization[2] treatments. The embryos that the Petersons used for their pregnancy were created by using Mr. Peterson's sperm and eggs that were donated by an anonymous egg donor. At the time of their treatment, the Petersons signed an egg donor agreement as the Intended Mother and Intended Father. They did not use all of the embryos that resulted from their treatment, so the remaining embryos were cryopreserved.[3]

After much consideration and because of Mr. and Mrs. Jones's difficulty in getting pregnant, the Petersons donated five cryopreserved embryos to Mr. and Mrs. Jones to assist them in the pregnancy process. The Petersons and the Joneses executed a written donation document; no money was given for the embryos, making it a true donative transfer. After thawing the five embryos, Mr. and Mrs. Jones learned that three of the five embryos were viable, and all three viable embryos were transferred to Mrs. Jones by a licensed fertility clinic. Implantation was a success, and pregnancy was achieved. Mrs. Jones is now six months into the pregnancy.

Mrs. Peterson recently found a copy of the egg donor agreement that she and Mr. Peterson had signed when receiving *in vitro* fertilization treatments. The agreement had been

[1] The people and their stories in this Note are based on a hypothetical situation posed at http://www.embryolaw.org/.

[2] *In vitro* fertilization is the medical procedure by which egg cells are extracted from a woman's ovaries, and then the egg cells are fertilized with sperm cells. The fertilization takes place outside of the body, thus it is also known as test-tube conception. After fertilization, the zygote (or embryo, depending on whether the cell division process has advanced to that stage) is inserted into the woman's uterus. If cell division continues to proceed and the embryo implants into the uterine wall, then pregnancy is achieved. The New Encyclopedia Britannica 6 *in vitro fertilization* 276 (15th Ed., 2007).

arranged three and a half years earlier by an egg donation facility between the Petersons and the anonymous egg donor. Contact between the Petersons and the anonymous egg donor never occurred, and the egg donation facility subsequently went out of business. Two clauses in the agreement—which the Petersons do not remember noticing at the time of execution of the agreement—surprised them in light of their recent embryo donation to Mr. and Mrs. Jones and the resulting pregnancy.

> *Egg donor understands that as of the date of the ova retrieval, Intended Mother and Intended Father [Petersons] shall be the owners of the ova and any resulting embryos as joint tenants with rights of survivorship. They shall have complete control and authority over the disposition of the ova and resulting embryos.*
>
> *Notwithstanding the foregoing, the Intended Parents [Petersons] shall not donate, sell or otherwise transfer any donated ova, pre-embryos, or embryos that result from the Procedure to another person or couple (other than a gestational surrogate working with the Intended Parents) for the purpose of conception.*

The Petersons' donation of the five cryopreserved embryos to Mr. and Mrs. Jones for the purpose of conception is clearly a violation of the second clause. The second clause limits the Petersons' options in regard to their use of the embryos; they may (1) personally use the embryos at a later time for conception, (2) donate the embryos for research purposes, or (3) thaw the embryos and have them destroyed. The clause forbids the Petersons from transferring the embryos to any other person or couple for the purpose of conception. The first clause grants to the Petersons unfettered, complete control and authority over the disposition of the embryos as joint tenants with rights of survivorship.

This contradiction between Clause One and Clause Two establishes the foundation for this Note. With the number of cryopreserved embryos in the hundreds of thousands and continually

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[3] Cryopreservation is the "preservation (as of cells) by subjection to extremely low temperatures." *Merriam-Webster's*

increasing,[4] there is a need for germane guidance that the courts may follow in determining the rights and liabilities associated with embryo donation. Part I of this Note lays out the existing laws that pertain specifically to embryo donation. Part II focuses on existing laws that provide guidance to the courts in interpreting egg donor agreements as they relate to embryo donation. Part III discusses the rights, liabilities, and remedies associated with donated embryos as they relate to the parties under the egg donor agreement.

I. EXISTING EMBRYO DONATION LAWS

Regulations governing the issues involved specifically with embryo donation have arisen both statutorily and judicially. Twelve states have legislatively regulated the issues surrounding embryo donation,[5] and in seven states, questions in relation to assisted reproduction have been judicially addressed.[6]

A. Statutory Law

State legislatures in twelve states have specifically regulated aspects of embryo donation.[7] These states' statutory codes should serve as a model for other states that have not adopted such statutory provisions.

Of the twelve states that have specifically regulated embryo donation, six of them have nearly identical provisions.[8] These states have provided that "'[a]ssisted reproduction' means a

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Online Dictionary, http://www.merriam-webster.com/dictionary/cryopreservation.

[4] David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1068 (2003). *See also* Liza Mundy, *Souls on Ice*, 31 MOTHER JONES 38 (July/Aug. 2006).

[5] *See* DEL. CODE ANN. tit. 13, §§ 8-102, 702, 703 (2007); FLA. STAT. §§ 742.11, 742.13, 742.14, 742.17 (2007); LA. REV. STAT. ANN. §§ 9:121, 122, 124, 126, 127, 129, 130, 132 (2007); N.D. CENT. CODE §§ 14-20-02, 60, 61 (2007); N.H. REV. STAT. ANN. §§ 168-B:13, 15 (2007); OHIO REV. CODE ANN. § 3111.97 (2007); OKLA. STAT. tit. 10, § 556 (2007); TEX. FAM. CODE ANN. §§ 160.102, 702, 703, 7031 (2007); UTAH CODE ANN. §§ 78-45g-102, 702, 703 (2007); VA. CODE ANN. §§ 20-156, 158 (2007); WASH. REV. CODE §§ 26.26.011, 705, 710 (2007); WYO. STAT. ANN. §§ 14-2-402, 902, 903 (2007).

[6] *See* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Del Zio v. Presbyterian Hosp. in the City of N.Y., No. 74 Civ. 3588 (S.D.N.Y. Nov. 9, 1978); Jaycee B. v. Super. Ct. of Orange County, 49 Cal. Rptr. 2d 694 (Cal. Ct. App. 1996); A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000); J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

[7] *See supra* note 5.

[8] The six states with nearly identical provisions are Delaware, North Dakota, Texas, Utah, Washington, and Wyoming.

method of causing pregnancy other than through sexual intercourse. The term includes . . . [the] donation of eggs . . . [and the] donation of embryos . . . ."[9] In explicating the parental status—and thus also the parental rights and liabilities—of donors, these states have determined that "[a] donor is not a parent of a child conceived by means of assisted reproduction."[10] Thus, any donor of eggs or embryos in these states is restricted from asserting any parental rights, interests, or authority in connection with any child resulting from assisted reproduction. Conversely, any donor of eggs or embryos in these states is not liable to pay child support or assist in the upbringing of any child resulting from assisted reproduction.

These six states also provide regulation establishing the paternity of children resulting from assisted reproduction.[11] Washington's statutory language provides that "[i]f a husband provides sperm for, or consents to, assisted reproduction by his wife . . . he is the father of a resulting child born to his wife."[12] The words "husband" and "wife" are used in Washington, Texas, and Utah's statutes because of these states' public policy in favor of the traditional family and marriage being between a man and a woman. Delaware, North Dakota, and Wyoming statutorily establish paternity outside of the marriage context; "[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is the parent of the resulting child."[13] With paternity being statutorily established, the father in such a case is liable to assist in all parental responsibilities, and he is also granted all the parental rights, interests, and authority in conjunction with the resulting child.

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[9] UTAH CODE ANN. § 78-45g-102 (2007). For the five other states' similar statutory section that defines assisted reproduction, please see *supra* notes 5 & 8.

[10] DEL. CODE ANN. tit. 13, § 8-702 (2007). For the five other states' similar statutory section that restricts a donor's parental status, please see *supra* notes 5 & 8.

[11] *See* DEL. CODE ANN. tit. 13, § 8-703 (2007); N.D. CENT. CODE § 14-20-61 (2007); TEX. FAM. CODE ANN. § 160.703 (2007); UTAH CODE ANN. § 78-45g-703 (2007); WASH. REV. CODE § 26.26.710 (2007); WYO. STAT. ANN. § 14-2-903 (2007).

[12] WASH. REV. CODE § 26.26.710 (2007). *See also*, TEX. FAM. CODE ANN. § 160.703 (2007); UTAH CODE ANN. § 78-45g-703 (2007).

[13] WYO. STAT. ANN. § 14-2-903 (2007). *See also*, DEL. CODE ANN. tit. 13, § 8-703 (2007); N.D. CENT. CODE § 14-20-61 (2007). Texas also has a separate statute establishing paternity outside of the marriage context. TEX. FAM. CODE ANN. § 160.7031 (2007).

Maternity is established in all six of these states by the same method: "The mother-child relationship is established between a woman and a child by . . . the woman giving birth to the child."[14] Except as provided otherwise in surrogacy cases,[15] the woman who gives birth to the child is considered the mother of the child. She is granted all the parental rights, interests, and authority in connection with the child, and she is liable to assist in all parental responsibilities.

The other six states[16] that have statutorily regulated aspects of embryo donation have done so through statutory provisions that are substantially similar to the statutory provisions just discussed.[17] These states include the donation of embryos as a legitimate form of assisted reproduction.[18] They statutorily declare that donors in the context of assisted reproduction are not parents of the resulting child and thus have no parental rights or liabilities in connection with the resulting child.[19] These states also statutorily provide that the gestating mother and her consenting husband are granted parentage of the resulting child of the assisted reproduction, which granting of parentage is accompanied with the rights and liabilities of parentage.[20]

Of these six states, Louisiana grants to embryos the greatest status and protection. Louisiana's state code grants to the embryo (as a juridical person[21]) certain rights:[22] the embryo can only be used for the complete development of a human;[23] it cannot be sold;[24] it is entitled to

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[14] TEX. FAM. CODE ANN. § 160.201 (2007). *See also* DEL. CODE ANN. tit. 13, § 8-201 (2007); N.D. CENT. CODE § 14-20-07 (2007); UTAH CODE ANN. § 78-45g-201 (2007); WASH. REV. CODE § 26.26.101 (2007); WYO. STAT. ANN. § 14-2-501 (2007).

[15] Consideration of surrogacy cases is beyond the scope of this Note.

[16] These other six states which have substantially similar statutory provisions regulating aspects of embryo donation are Florida, Louisiana, New Hampshire, Ohio, Oklahoma, and Virginia.

[17] *See supra* notes 7–15.

[18] *See* FLA. STAT. §§ 742.11, 742.13, 742.14, 742.17 (2007); LA. REV. STAT. ANN. §§ 9:121, 122, 124, 126, 127, 129, 130, 132 (2007); N.H. REV. STAT. ANN. §§ 168-B:13, 15 (2007); OHIO REV. CODE ANN. § 3111.97 (2007); OKLA. STAT. tit. 10, § 556 (2007); VA. CODE ANN. §§ 20-156, 158 (2007).

[19] *Id.* New Hampshire does not statutorily address parentage of donors specifically in embryo donation cases. *See* N.H. REV. STAT. ANN. § 168-B:13 (2007).

[20] *See supra* note 18. New Hampshire provides for women who do not have a husband to participate in assisted reproduction. *See* N.H. REV. STAT. ANN. § 168-B:13 (2007).

[21] LA. REV. STAT. ANN. § 9:124 (2007). A juridical person is "a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being." BLACK'S LAW DICTIONARY 1178 (8th ed. 2004).

[22] LA. REV. STAT. ANN. § 9:121 (2007).

[23] *Id.* at § 9:122.

[24] *Id.*

identification and confidentiality;[25] it can sue or be sued;[26] if the intended parents are not identified, then the physician acting as an agent of fertilization will be its temporary guardian;[27] if viable, it may not be intentionally destroyed;[28] and it cannot be owned and is owed a high duty of care.[29] Such protections are far reaching for the embryo.

Resulting from the collection and corroboration of these existing statutes,[30] in these twelve states, the rights and liabilities of donors, men, women, fathers, and mothers are established in the context of embryo donation.

B. Case Law

Courts in seven states have addressed questions in relation to the disposition of embryos.[31] These courts' decisions explicate the policies of the states; but of these seven states, only two of them have statutorily regulated embryo donation.[32]

1. New York – *Del Zio v. Presbyterian Hospital in the City of New York*

The court in *Del Zio v. Presbyterian Hospital in the City of New York*[33] shed some light on considerations in relation to embryos. Mr. and Mrs. Del Zio had the desire to have a child together. Because of medical problems, Mrs. Del Zio could not achieve pregnancy; so she underwent three operations.[34] The operations did not cure the problem, and the Del Zios could not naturally become pregnant. Their physician, Dr. Sweeney, recommended an innovative,

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[25] *Id.* at § 9:124.
[26] *Id.*
[27] *Id.* at § 9:126.
[28] *Id.* at § 9:129.
[29] *Id.* at § 9:130.
[30] *See supra* notes 7–29.
[31] *See supra* note 6.
[32] Those two states are Virginia and Washington. *Compare supra* note 6 *with* note 5.
[33] Del Zio v. Presbyterian Hosp. in the City of N.Y., No. 74 Civ. 3588 (S.D.N.Y. Nov. 9, 1978).
[34] *Id.* at slip op. at 1–2.

unfamiliar procedure, *in vitro* fertilization.[35] After obtaining consent from the Del Zios and following much preparation, Dr. Sweeney undertook the procedure with the help of Dr. Shettles, a physician at the defendant hospital.[36] Mrs. Del Zio's egg was withdrawn, and Mr. Del Zio's semen was prepared; the two materials were prepared in a culture and placed in an incubator at the defendant hospital.[37] Dr. Shettles planned for the culture to incubate for four days.[38]

Dr. Vande Wiele, an employee of the hospital and supervisor of Dr. Shettles, discovered the culture and its purpose the day after the procedure was performed.[39] He felt it was his ethical duty to destroy the culture, and after consulting with hospital officials, he "effectively terminated the procedure and destroyed the culture."[40] Vande Wiele informed Dr. Shettles, and Dr. Shettles notified Dr. Sweeney that the procedure and culture had been destroyed by the hospital.[41]

Dr. Sweeney reported to the Del Zios that their culture had been destroyed by the hospital and that he believed that this procedure was their last chance to become pregnant.[42] As a result of the hospital's actions and the loss of opportunity to become pregnant, the Del Zios suffered severe emotional distress. They brought a tort action for intentional infliction of emotional distress and wrongful conversion against the hospital and Dr. Vande Wiele. The jury found for the Del Zios on the claim for intentional infliction of emotional distress, but they found for the defendants on the claim for wrongful conversion.[43]

The jury in the *Del Zio* case found for the Del Zios on the emotional distress claim presumably because they viewed the embryo as the potential opportunity for the Del Zios to become pregnant and hopefully give birth to a child. Such view of the embryo as the potential

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[35] *Id.* at slip op. at 2.
[36] *Id.* at slip op. at 3.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at slip op. at 4.

for human life is consistent with the jury's finding on the wrongful conversion claim also; the jury found for the defendants on the wrongful conversion claim, a claim in which "one who, without authority, intentionally exercises control over the *property* of another and thereby interferes with the other's right of possession."[44] If the embryo was considered human life or the potential for human life, the Del Zios could not win on a *property* claim of wrongful conversion, and such was the finding of the jury.[45]

2. New York – *Kass v. Kass*

Twenty years later, the Court of Appeals of New York, in the case of *Kass v. Kass*, determined that embryos are not considered "persons" for constitutional purposes and that they are controlled by the contractual agreements of parties.[46] In the *Kass* case, the appellant and the respondent were married in 1988 and immediately tried to become pregnant. They were unsuccessful at achieving a natural pregnancy, and they decided to attempt to have a child through *in vitro* fertilization procedures.[47]

After several unsuccessful attempts, the couple tried a final attempt, this time involving cryopreservation of any excess embryos that were not transferred for attempted pregnancy.[48] Prior to the procedure, the couple signed a number of consent forms determining the disposition of any embryos not transferred for attempted pregnancy. The signed consent forms determined that excess eggs would be inseminated and cryopreserved; if a divorce occurred, ownership of the embryos would be determined in a property settlement; and if the couple no longer desired pregnancy or could not decide on the disposition, the frozen embryos would be donated to

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[42] *Id.*
[43] *Id.* at slip op. at 11.
[44] *Id.* at slip op. at 10–11 (emphasis added).
[45] *Id.* at slip op. at 11.
[46] Kass v. Kass, 696 N.E.2d 174, 179 (N.Y. 1998).
[47] *Id.* at 175–76.

research.[49] The final attempted procedure was unsuccessful, frozen embryos remained, and the couple went through a divorce proceeding.[50]

The appellant wife drafted an uncontested divorce agreement that included a provision that the wife and husband would not claim custody of the embryos.[51] Shortly thereafter, the wife commenced an action to claim sole custody of the embryos in hopes of future implantation and birth of a child. The husband opposed and counterclaimed for specific performance of the parties' agreement found in the consent forms, donating the embryos to research.[52]

In determining the outcome of the case, the court stated that the relevant inquiry was who had dispositional authority over the embryos.[53] "Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the [embryos] are entitled to 'special respect.'"[54] The court determined that honoring the contract of the parties in settling the disposition of the embryos would assist in avoiding costly transactions and litigation in the future and most closely effectuate the bargained for intentions of the parties.[55] The contract between the wife and husband controlled the disposition of the embryos—they were donated to research.[56]

Because human life cannot be exchanged or disposed of through contractual agreements, the court, in effect, leaned away from a life or potential for life view of embryos toward a view of property status. The court did not attempt to discuss the possibility that embryos could be something other than property entitled to "special respect."[57]

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[48] *Id.*
[49] *Id.* at 176–77.
[50] *Id.* at 177.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 179.
[54] *Id.*
[55] *Id.* at 180.
[56] *Id.* at 182.
[57] *Id.* at 179.

3. Virginia – *York v. Jones*

Property interests in an embryo were considered in *York v. Jones*.[58] Mr. and Mrs. York were married in 1983 and soon thereafter attempted to become pregnant. Because of problems with Mrs. York's fallopian tubes, they were unable to achieve pregnancy.[59] They underwent the *in vitro* fertilization process after being advised by doctors at the Jones Institute in Virginia that such a procedure would be their best option for achieving pregnancy. They attempted the procedure with the Jones Institute on four separate occasions.[60] All four attempts failed to produce a pregnancy, but before the last attempt was endeavored, the Yorks consented that if more than five embryos were produced for immediate transfer, any excess embryos would be cryopreserved for future attempts at pregnancy.[61]

Six embryos resulted from the final procedure. Five of the embryos were immediately transferred to Mrs. York, but pregnancy was not achieved. The one extra embryo was cryopreserved for the Yorks to use later to attempt pregnancy.[62] In their contract with the Jones Institute, the Yorks agreed that,

> 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 3) thawed but not allowed to undergo further development.[63]

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[58] 717 F. Supp. 421 (E.D. Va. 1989).
[59] *Id.* at 423.
[60] *Id.*
[61] *Id.* at 423–24.
[62] *Id.* at 424.
[63] *Id.*

One year after the embryo was cryopreserved, the Yorks requested that their embryo be transferred from the Jones Institute to Los Angeles, California, where the Yorks now lived, where the embryo would be thawed and transferred to Mrs. York for another attempt at becoming pregnant.[64] Their request to transfer the embryo to the Los Angeles clinic was rejected by the Jones Institute, so their doctor requested the transfer a second time on their behalf. Again, the Jones Institute refused to transfer the embryo to a different clinic.[65]

Because of the Jones Institute's refusal to transfer the embryo to the Los Angeles clinic, the Yorks called upon the court to provide declaratory, injunctive, and compensatory relief.[66] The court focused on the contractual and bailor-bailee relationship that existed between the Yorks and the Jones Institute to determine the disposition of the embryo.[67] A bailment was created between the parties by their cryopreservation agreement.[68] The court described bailments this way:

> [A]ll that is needed "is the element of lawful possession . . . and duty to account for the thing as the property of another." . . . [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. . . . [O]bligation to return the property is implied from the fact of lawful possession of the personal property of another.[69]

Though not explicitly mentioning a bailment, the Jones Institute acknowledged the bailor-bailee relationship through its references in the agreement to the embryos as the property of the

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[64] *Id.*
[65] *Id.*
[66] *Id.* at 423.
[67] *Id.* at 425–27.
[68] *Id.* at 425.
[69] *Id.* (quoting Crandall v. Woodard, 143 S.E.2d 923, 927 (Va. 1965); citing 8 Am. Jur. 2d *Bailments* § 178 (1980)).

Yorks and its duty to account for the embryos. In such a relationship, the Yorks, not the Jones Institute, had the principal responsibility of deciding the disposition of the embryo.[70]

The Jones Institute argued that the Yorks were limited to the three fates described in the agreement, which did not include transferring the embryo to a different facility; but they ignored the limiting condition on the three fates: the three-fate limitation applied if the Yorks no longer desired pregnancy.[71] This limiting condition was not met; the Yorks wanted the embryo transferred to the Los Angeles clinic in order to attempt pregnancy.[72]

In light of the bailor-bailee relationship, the court easily determined that the Yorks, the bailor biological parents, should have dispositional authority that trumps the possessory interest of the Jones Institute, the bailee storage facility. The court denied all of the Jones Institute's motions to dismiss the Yorks's claims.[73]

Under such analysis of the relationship of the parties in connection with the embryo, the court essentially considered the embryo as property that could be subject to a simple property dispute with resolution coming from applying principles of property and contract law.

4. Tennessee – *Davis v. Davis*

The case of *Davis v. Davis* is similar to *Kass v. Kass* in that the parties were a husband and wife who had been divorced and could not agree on the disposition of their remaining cryopreserved embryos.[74] The important difference between the cases is that, unlike in *Kass*, no contract existed between Mr. and Mrs. Davis regarding the disposition of any excess cryopreserved embryos. Because no written agreement was executed between the parties, different considerations had to be deliberated in order for the court to determine the rights of the

[70] *Id.* at 425–26.
[71] *Id.* at 427.
[72] *Id.*
[73] *Id.* at 427, 429.

parties regarding their dispositional decisions. The court could not rely on contractual obligations and arguments to determine the outcome of the case like the court could in *Kass*.[75] Instead, the court considered principles of constitutional law, existing state public policy with regard to unborn life, scientific knowledge in relation to reproductive technology, and ethical considerations in response to such scientific knowledge.[76]

The Davises were married in 1980 and shortly thereafter became pregnant. Their pregnancy did not result in the birth of a child because the pregnancy was tubal,[77] thus resulting in the removal of Mrs. Davis's right fallopian tube.[78] She had four other tubal pregnancies and was eventually unable to naturally become pregnant. Mr. and Mrs. Davis attempted to adopt a child, but the birth mother withdrew her consent to the adoption. Other attempts at adoption were too expensive, so the Davises turned to *in vitro* fertilization as a last attempt to become parents.[79]

After six failed attempts at achieving pregnancy by means of *in vitro* fertilization, the Davises waited to go through the procedure again until the clinic was prepared to cryopreserve any excess embryos for future attempts at achieving pregnancy.[80]

Once the clinic was prepared to cryopreserve any excess embryos, the Davises moved forward with another *in vitro* fertilization cycle. They did not sign any consent forms, and there was no discussion or agreement concerning the disposition of the embryos in the event of a contingency such as divorce.[81] Nine embryos were produced from this cycle; some of them were immediately transferred to Mrs. Davis, while some were cryopreserved for future use. Again,

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[74] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
[75] *Id.* at 597–98.
[76] *Id.* at 591.
[77] A tubal pregnancy is an "ectopic pregnancy in a fallopian tube." *Merriam-Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/tubal%20pregnancy.
[78] Davis, 842 S.W.2d at 591.
[79] *Id.*
[80] *Id.* at 591–92.
[81] *Id.* at 592.

pregnancy was not achieved through this cycle.[82] Three months later, Mr. Davis filed for divorce.[83]

Throughout their separation and divorce, Mrs. Davis sought for the dispositional control of the couple's cryopreserved embryos. She initially wanted the embryos to personally attempt to become pregnant. Later, she sought the embryos so that she could donate them to another childless, infertile couple.[84] Mr. Davis was not sure that he wanted to become a parent outside the marriage relationship, nor did he want the embryos to be donated to another couple. His preference was to have the embryos discarded before having them donated to another couple.[85]

The trial court found that the embryos were considered persons, and thus, the only option was to permit the embryos to be implanted and potentially develop into children. So the trial court awarded custody to Mrs. Davis because she was the party seeking this outcome for the embryos.[86] The appellate court rejected the finding that embryos are considered persons. The appellate court found that embryos are property, and the Davises shared an interest in the property. They were given joint control over the disposition of their property, and Mr. Davis's constitutional right to not become a parent was recognized.[87] The Tennessee Supreme Court held that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[88]

In this interim category, the disposition of the embryos would be controlled by weighing the competing interests of the parties. The court cited many state statutes and cases to explain the state's policy that because of the lack of personhood, the embryos—as only a potential for

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[82] *Id.*
[83] *Id.*
[84] *Id.* at 589–90.
[85] *Id.*
[86] *Id.* at 594.
[87] *Id.* at 589, 594.
[88] *Id.* at 597.

human life—were not a state interest that could justify state control overriding the dispositional control of the Davises.[89] In great detail, the court explained the state and federal constitutional rights of privacy and individual, parental, and procreational autonomy.[90] While explaining the right of procreational autonomy, the court recognized "two rights of equal significance—the right to procreate and the right to avoid procreation."[91]

The court then analyzed the competing interests of Mr. and Mrs. Davis. Mr. Davis did not want to become a parent. If Mrs. Davis was allowed to donate the embryos to another couple to bear a child, Mr. Davis would have imposed on him unwanted genetic parenthood with its psychological and financial obligations.[92] Mrs. Davis wanted her efforts to produce the embryos to be of value. She wanted to donate the embryos to another couple to achieve pregnancy so that the difficulties of the *in vitro* fertilization procedures would not be futile. If Mr. Davis was permitted to destroy the embryos to avoid unwanted parenthood, a substantial emotional burden would be placed upon Mrs. Davis.[93] The court found that Mr. Davis's interest in avoiding unwanted parenthood outweighed the interest of Mrs. Davis in donating the embryos to help another infertile couple become pregnant.[94] Thus, Mr. Davis's desire to avoid parenthood was granted.

While introducing the facts and history of the dispute, the court made mention of important factors in relation to the disposition of cryopreserved embryos:

> [I]t is important to note the absence of two critical factors that might otherwise influence or control the result of this litigation: When the Davises signed up for the [*in*

[89] *Id.* at 594–604. "[Tennessee's] interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy." *Id.* at 602.
[90] *Id.* at 598–603.
[91] *Id.* at 601.
[92] *Id.* at 603.
[93] *Id.* at 604.
[94] *Id.*

> *vitro* fertilization] program . . . they did not execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process. Moreover, there was at that time no Tennessee statute governing such disposition, nor has one been enacted in the meantime.[95]

The court recognized the controlling influence that either state statutes or individuals' contractual agreements would have on the dispositional outcome of cryopreserved embryos, thus reducing the burden of litigation and the number of unanswered questions in such cases.

5. Other Cases

The Massachusetts case of *A.Z. v. B.Z.* was a dispute over the disposition of embryos between a husband and wife that were separated and then divorced.[96] After determining that the parties' written instruments were unenforceable, the court used constitutional and public policy rationale similar to that in the *Davis* case to determine the disposition of the embryos:[97] The issuance of a permanent injunction prohibiting the wife from using the embryos was deemed necessary to protect the husband's overriding procreative right to avoid parenthood.[98] In summary, the court stated, "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement."[99]

The case of *J.B. v. M.B.* in New Jersey is markedly similar to *A.Z. v. B.Z.* The dispute was between a divorced couple who could not agree on the disposition of their cryopreserved embryos.[100] The court resorted to constitutional and public policy grounds for determining the disposition of the embryos. After balancing the wife's right to avoid parenthood against the

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[95] *Id.* at 590.
[96] A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).
[97] *Id.* at 1056–59.
[98] *Id.* at 1058–59.
[99] *Id.* at 1057–58.
[100] J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001).

husband's right to father children, and in light of the fact that the husband was still fertile and capable of procreating, the court found that the wife's interest was more deserving of protection and granted her desire that the embryos be destroyed.[101] The court, while citing *Davis*, explained that the "scales '[o]rdinarily' would tip in favor of the right not to procreate if the opposing party could become a parent through other reasonable means."[102]

Washington's Supreme Court was called upon to determine the disposition of the cryopreserved embryos of a divorced couple who had a cryopreservation agreement in the case of *Litowitz v. Litowitz*.[103] The Litowitzes entered into a cryopreservation agreement with a storage clinic, which agreement provided in part that if their embryos had been maintained at the clinic for five years after the initial date of cryopreservation and the Litowitzes did not request a storage extension period, the embryos would be thawed and not undergo further development.[104] In other words, after five years of storage, absent a storage extension request, the embryos would be destroyed and discarded.

In their divorce action, the Litowitzes could not reach an agreement regarding the disposition of the embryos. Mr. Litowitz wanted to donate the embryos to another couple. Mrs. Litowitz wanted to implant the embryos in a surrogate mother so that she could personally raise any resulting child as her own.[105] The court based its decision solely on the contractual rights of the parties under the cryopreservation agreement.[106] The court determined that the five year storage period had expired and that if the embryos had not already been destroyed by the clinic, such thawing and discarding of the embryos was the proper remedy for this dispute under the

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[101] *Id.* at 715–20.
[102] *Id.* at 716. (citing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).
[103] 48 P.3d 261 (Wash. 2002).
[104] *Id.* at 263–64.
[105] *Id.* at 264.
[106] *Id.* at 271.

terms of the cryopreservation agreement.[107] In making this decision, the court gave the clinic dispositional authority over the embryos despite the contrary desires of the intended parents.

In the California case of *Jaycee B. v. Superior Court of Orange County*, the intended father under a gestational surrogacy contract tried to avoid paying child support to the intended mother of the resulting child.[108] In a usual surrogacy agreement, the intended parents provide the eggs and sperm and thus are also the genetic parents. Their resulting embryos are then implanted in a surrogate mother who carries and delivers the child. After birth, the child is turned over to the genetic, intended parents, and the surrogate mother has no rights or liabilities to the child.[109] In this case, the intended parents entered into a written contract with a surrogate mother and her husband. The surrogate mother had implanted within her an embryo that was a result from *in vitro* fertilization of an egg and sperm from anonymous donors, not from the intended parents. The procedure successfully resulted in the birth of a child, and the child was released from the hospital to the intended mother under the contract.[110]

Approximately one month prior to the birth of the child, the intended parents separated and a divorce proceeding commenced.[111] The wife sought temporary child support from the husband until a final adjudication of the divorce proceeding could be reached. The husband was willing to stipulate that he had signed the contract, but he claimed that the family law court lacked jurisdiction to award temporary child support. The court explained that "the most likely *legal* result based on the undisputed fact of [the husband's] signing the surrogacy agreement is that [the husband] will be held to be Jaycee's father."[112] Further, the court stated, "it is enough that [the husband] admits he signed the surrogacy agreement which, for all practical purposes, *caused*

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[107] *Id.* at 271.
[108] Jaycee B. v. Super. Ct. of Orange County, 49 Cal. Rptr. 2d 694 (Cal. Ct. App. 1996).
[109] *Id.* at 695.
[110] *Id.* at 696.
[111] *Id.*

Jaycee's conception every bit as much as if he had caused her birth the old fashioned way."[113] Because of the existence of the surrogacy contract and the husband's stipulation that he had signed it, the wife was able to make a sufficient showing that the husband would be found to be the father of the child. As a result, the court had jurisdiction to award temporary child support to the wife until final adjudication could be reached regarding the husband's parenthood.[114]

9. Summary of Case Law

Resulting from the case law in these seven states is a number of approaches in determining the rights and liabilities of the parties. These approaches fall generally within two categories: First, where no contract exists or an existing contract is unenforceable as repugnant to public policy, constitutional interests of the parties are balanced generally in favor of the party seeking to avoid parenthood; and second, written contracts between the parties that manifest the parties' previous intent will control the rights and liabilities of the parties.

II. Laws that Assist in Interpreting Agreements as They Relate to Embryo Donation

Where regulations have not been enacted, courts can look to these other states' statutory and case law or other areas of law to interpret egg donor agreements in relation to embryo donation. In the case of the Petersons,[115] principles from property, contract, and constitutional law can shed light on the rights and liabilities of the parties implicated in the egg donor agreement.

A. Property Law

Laws regarding bailment are germane to the Peterson's contract with the anonymous egg donor and the egg donation facility. The bailment relationship requires that the bailee exercise

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[112] *Id.* at 702 (emphasis in original).
[113] *Id.* (emphasis in original).
[114] *Id.* at 696–97.
[115] *See supra* note 1.

due care when in possession of the bailor's property; when the bailor requests that the property be returned, the bailee must return the property. The bailor, the true owner of the property, has dispositional control of the property. The Petersons, as the true and full owners of the embryos under the egg donor agreement, should have full dispositional authority over the embryos.

Secondly, the principle of free alienation of property can be of help in determining the parties' rights and liabilities. John Gray, in his treatise *Restraints on the Alienation of Property*, stated, "A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty, is as void as if attached to a fee simple in land."[116] More directly to the point, Gray stated, "[A]n absolute interest in personalty cannot have a condition against alienation attached to it."[117] Further, "the right of transfer is a right of property, and if another has the arbitrary power to forbid a transfer of property by the owner that amounts to annihilation of property."[118] Central, then, to the bundle of property rights is the right of alienation.

The Petersons' contract with the egg donor and the egg donor facility conveyed the eggs to the Petersons as "the owners of the ova and any resulting embryos," giving them "complete control and authority over the disposition of the ova and resulting embryos." But the second clause put a restraint on the alienation rights of the Petersons despite their "complete control and authority;" they were not to donate, sell, or otherwise transfer any donated ova or embryos to another person for the purpose of conception. Such a restraint is repugnant to the principle of free alienation of property, and thus should be held as invalid. The Petersons should be permitted to freely donate the resulting embryos to another couple for the purpose of conception.

B. Contract Law

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[116] JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 15 (1883).
[117] *Id.* at 16.
[118] Penthouse Properties, Inc. v. 1158 Fifth Ave., Inc., 11 N.Y.S.2d 417, 422 (N.Y. App. Div. 1939) (quoting Fisher v. Bush, 35 Hun 641).

Generally, contracts that are freely entered into will be enforceable between the parties to the contract. But courts will not enforce the agreements of private contracting individuals when those agreements are violative of public policy or constitutional rights.[119] Contracts to enter into or terminate familial relationships or that place unreasonable restraints on trade are often found to be violative of public policy or constitutional rights and thus are found to be unenforceable.[120]

The Supreme Judicial Court of Massachusetts declared, "[a]s a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy."[121] The Supreme Court of New Jersey added, "the laws of New Jersey also evince a policy against enforcing private contracts to enter into *or terminate familial relationships*."[122] The restrictive clause in the Petersons' egg donor agreement would effectively require Mrs. Jones to terminate her pregnancy that resulted from the Petersons' donation of embryos. Such a result is repugnant to public policy, and as such, the restrictive clause of the agreement should be unenforceable as violative of public policy.

"A bargain in restraint of trade is illegal if the restraint is unreasonable."[123] In effect, the egg donor agreement's restrictive clause is an unreasonable restraint of trade as an unreasonable non-competition clause benefiting the egg donation facility. The only party to benefit from the restrictive clause is the facility. The anonymous egg donor has been compensated for her services, and her rights and liabilities to the eggs and any resulting embryos or children have been terminated by the agreement. Reserving any rights, liabilities, or benefits for the anonymous egg donor would "burden her with 'responsibilities' she never contemplated and

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[119] *See A.Z. v. B.Z,* 725 N.E.2d 1051; *see also J.B. v. M.B.,* 783 A.2d 707.

[120] *Id. See also* Sherman Act, 15 U.S.C. §§ 1–7 (2007); Clayton Antitrust Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2007).

[121] *A.Z. v. B.Z,* 725 N.E.2d 1051, 1057–58.

[122] *J.B. v. M.B.,* 783 A.2d 707, 717 (emphasis added).

[would be] directly 'contrary to her expectations.'"[124] The restrictive clause does not benefit the Petersons because it places limitations on their ability to transfer any embryos.

In effect, the clause requires that services and the resulting payment for embryo transfer and conception must be solely performed and collected by the egg donation facility, similar to what the Jones Institute was forbidden to do in *York v. Jones*, *supra*. By limiting the restriction to the prohibition of transferring the embryos to another couple *for conception*, the facility's intent to deprive any other of receiving a benefit is made clear. By coupling this restriction against transferring for the purpose of conception with the restriction against *donating* the embryos, the restrictive clause becomes unreasonable. If the Petersons were prohibited only from *selling* the embryos for the purpose of conception, such a restriction might be found as reasonable and thus enforceable. But because the restriction includes a prohibition against donation, the restrictive clause is unreasonable and unenforceable.

Even if such a restraint of trade was found to be reasonable and enforceable, the purpose of the restraint no longer existed when the egg donation facility went out of business. At such time, the restrictive clause against transferability should have become void.

Additionally, because the egg donation facility has subsequently gone out of business since the time the agreement was executed, the Petersons should be discharged from performing the terms of the contract. The circumstances have changed dramatically, causing an unanticipated termination of the relationship between the Petersons and the egg donation facility, and because the egg donor was anonymous and already compensated, continued performance of the agreement should not be required of the Petersons.

C. Constitutional Law

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[123] RESTATEMENT (FIRST) OF CONTRACTS § 514 (1932).
[124] *Jaycee B.*, 49 Cal. Rptr. 2d 694, 701 (citing Johnson v. Calvert, 851 P.2d 776, 783).

While constitutional protections are not directly at issue in the Petersons' situation because an egg donation facility, not a governmental agency, is attempting to restrict them, some constitutional principles are helpful in understanding the relationship of the parties. The privacy rights of individuals, specifically procreational autonomy, were extensively discussed in *J.B. v. M.B.*[125] Individuals have the right to make personal, intimate decisions regarding whether to marry and have children. The choice of parenthood is reserved for the individual.

This privacy right is codified in New Hampshire in the context of surrogacy contracts: "There shall be no specific performance for a breach by the surrogate of a surrogacy contract term that: I. Requires her to become impregnated; II. Requires her to have an abortion; or III. Forbids her to have an abortion."[126]

Where the Petersons have already donated their embryos to Mr. and Mrs. Jones, and Mrs. Jones is now pregnant as a result of implanting the donated embryos, compelling the termination of the pregnancy against the will of Mrs. Jones is impermissible; requiring such would be an unconscionable violation of her privacy rights.

III. The Rights, Liabilities, and Remedies Associated with Donated Embryos

The parties involved in the egg donor agreement and subsequent transfer of embryos each have differing rights, liabilities, and remedies at the different stages of the interactions. Prior to receiving the embryos from the Petersons, Mr. and Mrs. Jones had no rights or liabilities relating to the embryos or eggs. After the embryos were transferred to Mrs. Jones and implantation occurred, full rights and liabilities vested in her and her husband. They enjoy the rights of ownership, possession, enjoyment, exclusive use, and bodily integrity. They also enjoy the right

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[125] *J.B. v. M.B.*, 783 A.2d 707, 715–17 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

[126] N.H. Rev. Stat. Ann. § 168-B:27 (2007).

of privacy. The only liability Mr. and Mrs. Jones should have is that of reasonable treatment of the implanted embryo. When the Petersons executed the agreement, they became the full owners of the eggs and resulting embryos. As such, they enjoyed the rights of ownership, possession, enjoyment, exclusive use, and transfer. They were liable to use reasonable care. Their rights and liabilities transferred to the Joneses when they made the donative transfer of the embryos.

The anonymous egg donor had privacy rights, ownership rights, and the right to bodily integrity in relation to her eggs prior to donating the eggs. In the agreement, the egg donor consented and intended to relinquish all her rights and liabilities as a genetic parent. Being anonymous, she had no intention of having any connection to the eggs or any resulting embryos or children. When she executed the contract, she gave up her rights and liabilities to the eggs in exchange for compensation for her services. In the unusual case that she brings a suit against the Joneses or the Petersons, no remedy will be available to her because specific performance and an injunction are impermissible after the pregnancy has occurred, and she has already been reasonably compensated for her services, so she cannot receive money damages.

The egg donation facility's only rights were monetary compensation for their services and the right of possession until the owner requested the eggs or embryos. It is liable to use reasonable care in storing, preserving, and transferring the eggs and embryos. Similar to the egg donor's remedies, specific performance and an injunction are not available. Because the facility has gone out of business and it was already paid for the services that it had previously provided, expectation, reliance, and restitution damages cannot be awarded.

In this unique situation, no remedy would be legally sound or equitable, which strengthens the argument that an unlimited restriction against donating the embryos to another couple for conception should be unenforceable.

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CONCLUSION

Difficult questions arise when disputes are brought that involve procreation, marriage, and family relationships. In the case of embryo donation, some states have attempted to settle the dispute by looking at the agreement between the parties and strictly adhering to the dispositional intent found therein. Some states solely consider constitutional and public policy grounds when determining the dispositional outcome of the dispute. Because of the weight of the decisions that control parenthood and embryo donation, parties in such disputes deserve clarity and uniformity so that they can fully understand their relationships, rights, and liabilities before proceeding with their decisions. Clarity and uniformity can be provided through the enactment of state statutory regulations that are similar to the few existing state statutes that control embryo donation.[127] The existing state statutes lack regulation concerning the status, rights, and liabilities of donation facilities. With the addition of legislation determining that facilities are only bailees with no dispositional control superseding the intended parents, clarity and uniformity through state statutes would be available to donors, donation facilities, and intended parents.

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[127] *See* discussion *supra* Part I.A.